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# Wisconsin Formal Ethics Opinion EF-10-03: Conflicts arising from consultations with prospective clients; significantly harmful information

December 17, 2010

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*Synopsis: When a lawyer has received information from a prospective client that could be significantly harmful to the prospective client, the lawyer may not thereafter represent a client whose interests are adverse to the prospective client in the same or a substantially related matter. Information may be “significantly harmful” if it is sensitive or privileged information that the lawyer would not have received in the ordinary course of due diligence; or if it is information that has long-term significance or continuing relevance to the matter, such as motives, litigation strategies, or potential weaknesses. “Significantly harmful” may also be the premature possession of information that could have a substantial impact on settlement proposals and trial strategy; the personal thoughts and impressions about the facts of the case; or information that is extensive, critical, or of significant use. Lawyers may avoid such conflicts by limiting the information received from prospective clients and, with appropriate waivers, seeking a prospective client’s agreement that consultations will not result in subsequent disqualification.*

## **Introduction**

The State Bar’s Standing Committee of Professional Ethics (the “Committee”) previously addressed the issue of conflicts arising from consultations with prospective clients in Ethics Opinion E-89-5. Since that opinion was issued, however, the Wisconsin supreme court adopted SCR 20:1.18, which imposes specific duties to prospective clients.<sup>1</sup> That Rule provides as follows:

### ***SCR 20:1.18 Duties to prospective client***

*(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.*

*(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as SCR 20:1.9 would permit with respect to information of a former client.*

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<sup>1</sup> SCR 20:1.18 became effective on July 1, 2007 and was part of the revision of Wisconsin’s Rules of Professional Conduct for Attorneys. See Supreme Court Rules Order 04-07.

*(c) A lawyer subject to par. (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in par. (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in par. (d).*

*(d) When the lawyer has received disqualifying information as defined in par. (c), representation is permissible if:*

- (1) both the affected client and the prospective client have given informed consent, confirmed in writing, or*
- (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and*
  - (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and*
  - (ii) written notice is promptly given to the prospective client.*

The Committee therefore takes this opportunity to revisit this topic in light of the new Rule.

SCR 20:1.18(a) defines a prospective client as “a person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter.” When a person is classified as a prospective client, certain ethical duties attach, even though the prospective client does not become a client.<sup>2</sup> SCR 20:1.18(b) treats a prospective client as a former client for confidentiality purposes. SCR 20:1.18(c), however, is not as demanding for conflicts of interest purposes. If a lawyer has discussions with a prospective client and has decided not to undertake the representation<sup>3</sup> or if the prospective client has decided not to hire the lawyer, the lawyer may represent a party who is adverse to the prospective client in the same or substantially related matter unless the lawyer received information from the prospective client that could be “significantly harmful” to that prospective client if used in that matter. Likewise, the *Restatement (Third) of the Law Governing Lawyers* §15(2) (2000) forbids a later representation adverse to a prospective client if the information disclosed by the prospective client would be “significantly harmful” to the prospective client in the matter.<sup>4</sup>

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<sup>2</sup> The ethical duties owed to a prospective client are competence, SCR 20:1.18 ABA Comment [1]; safekeeping and return of property, SCR 20:1.18 ABA Comment [1]; the duty to inform the prospective client if a fee is to be charged for the consultation, *Restatement (Third) of the Law Governing Lawyers*, § 15, Comment g; confidentiality, SCR 20:1.18(b); and loyalty, SCR 20:1.18(c).

<sup>3</sup> A lawyer may decline representation for a number of reasons, such as profitability, workload, expertise, or future direction of the lawyer’s practice.

<sup>4</sup> The *Restatement*, while not binding authority in Wisconsin, is relied upon by courts in professional responsibility cases from time to time. See e.g. *Disciplinary Proceedings against Duchemin*, 2003 WI 19, 658 N.W.2d 81 (2003).

Both SCR 20:1.18 and §15 of the *Restatement* provide a more lenient standard for potential conflicts arising from contact with a prospective client than for conflicts arising from representation of a former client. Under SCR 20:1.9(a), which governs former client conflicts, a lawyer who has formerly represented a client in a matter cannot later represent another person in the same or substantially related matter if the interests of the former client and the other person are materially adverse. With a former client, the receipt of information is presumed if the matters are the same or substantially related, and consequently later adverse representation is prohibited.<sup>5</sup> Thus, under SCR 20:1.9(a), the analysis ends once it is determined that the matters are substantially related and there is no further inquiry into the information disclosed by the former client. However, under SCR 20:1.18(c), a later representation adverse to a prospective client in the same or a substantially related matter is prohibited only when the information actually disclosed by the prospective client is “significantly harmful.” This more lenient standard reflects the attenuated relationship with prospective clients. It is the possession of the significantly harmful information that forms the basis for subsequent disqualification. In order, therefore, to understand conflicts arising under SCR 20:1.18(c) it is necessary to understand what is meant by the term “significantly harmful information.”

### **“Significantly Harmful” Information**

Neither SCR 20:1.18 and its Comments, nor the *Restatement* § 15 define “significantly harmful” information. The “significantly harmful” test was adopted from *ABA Formal Opinion 90-358*,<sup>6</sup> which discusses the measures a lawyer should take to avoid being disqualified from representing an existing client as a result of receiving information relating to the potential representation of a would-be client. The opinion states: “Only if the confidential information is so extensive and sensitive as to create a significant risk that the confidential information will be improperly used against the [would-be] client should the lawyer not be permitted to represent current clients on whose behalf the information might be used.”<sup>7</sup>

Even though “significantly harmful” is not defined by SCR 20:1.18, it is possible to identify types of information that may be “significantly harmful” by reviewing case law and ethics opinions:

- **Sensitive personal information:** A court disqualified a law firm from representing the wife in a child custody proceeding because the father had previously consulted with, but chose not to retain, a lawyer in the firm, even though the father later stated when testifying at a disqualification hearing that he did not believe the information he imparted could be “significantly harmful.” During the father’s consultation with the lawyer, the father gave the lawyer a copy of his journal, told the lawyer facts that were not in the journal, and

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<sup>5</sup> See *Burkes v. Hales*, 165 Wis.2d 585, 478 N.W.2d 37 (Ct. App 1993)

<sup>6</sup> *ABA/BNA Lawyers’ Manual on Professional Conduct: Practice Guides* 31:153.

<sup>7</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. No. 90-358, n. 12 (1990). The opinion relies on *Restatement (Third) of Law Governing Law*. § 213 (T.D. No. 3, 1990).

disclosed his concerns about the children and his former wife. He even acted on advice he received from the lawyer during the conference. The Arkansas Supreme Court concluded that a prospective client would not know whether the information disclosed during the consultation “could be significantly harmful,” and further concluded that disqualification was warranted based on finding that the information was “significantly harmful.” *Sturdivant v. Sturdivant*, 367 Ark. 514, 241 S.W.3<sup>rd</sup> 740 (2006).

- **Premature possession of the prospective client’s financial information:** Such information could have a substantial impact on settlement proposals and trial strategy and therefore be significantly harmful. *Artificial Nail Technologies, Inc. v. Flowering Scents, LLC*, 2006 WL 2252237(D., Utah) (unpublished opinion).
- **Settlement Position:** Likewise, the percentage of settlement that the prospective client is willing to accept and the concessions that the prospective client is willing to make could be significantly harmful. *ADP, Inc. v. PMJ Enterprises, LLC.*, 2007 WL 836658 (D.N.J.) (unpublished opinion).
- **Litigation Strategies:** Furthermore, a prospective client’s personal thoughts and impressions regarding the facts of the case and possible litigation strategies are significantly harmful, even though the lawyer claims that when he read and responded to the e-mail, he was not aware of and did not open the e-mail attachments that contained the information. *Chemcraft Holdings Corp. v. Shayban*, 2006 WL 2839255 (N.C. Super) (unpublished opinion).
- **Information that could be used to the detriment of the prospective client:** Any information that could be reasonably used to the detriment of the prospective client, such as information that would be useful in impeaching the testimony of the prospective client, is by definition, information that could be significantly harmful.

The examples listed above do not represent a complete recitation of the types of information that may be “significantly harmful” to a prospective client, but they are instructive. It is important to note that the fact that information may be discoverable at some point in current or future litigation, does not by itself mean that the information should not be considered significantly harmful. The fact that the information is discoverable, or of the type routinely required to be disclosed in a certain type of matter, may be a factor in the analysis, but is not, in the opinion of the Committee, determinative.

From a review of such sources, it is possible to fashion a loose definition of “significantly harmful information.” Information may be “significantly harmful” if it is sensitive or privileged information that the lawyer would not have received in the ordinary course of due diligence; or if it is information that has long-term significance or continuing relevance to the matter, such as motives, litigation strategies, or potential weaknesses. “Significantly harmful” may also be the premature possession of information that could have a substantial impact on settlement proposals

and trial strategy; the personal thoughts and impressions about the facts of the case; or information that is extensive, critical, or of significant use.

### **Avoiding Disqualification**

Under SCR 20:1.18, a lawyer who is careful in limiting the initial interview can avoid obtaining “significantly harmful” information and therefore avoid disqualification. To avoid receiving “significantly harmful” information, ABA Formal Opinion 90-358 advises:

*When obtaining the preliminary information before undertaking representation, the lawyer should obtain from the would-be client only information sufficient to determine whether a conflict or potential conflict of interest exists and whether the new matter is one within the lawyer’s capabilities and one in which the lawyer is willing to represent the would-be client. The would-be client should be cautioned at the outset of the initial conversation not to volunteer information pertaining to the matter until after the lawyer has had an opportunity to determine whether a conflict of interest exists and whether lawyer is capable and willing to undertake the representation if the client elects to use the lawyer’s services.<sup>8</sup>*

The same advice is provided by ABA Comment [4] to SCR 20:1.18, which provides in part: “In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial interview to only such information as reasonably appears necessary for that purpose.” Likewise, Comment (c) to § 15 of the *Restatement (Third) of the Law Governing Lawyers* provides in part: “In order to avoid acquiring disqualifying information, a lawyer considering whether or not to undertake a new matter may limit the initial interview to such confidential information as reasonably appears necessary for that purposes.”

This advice is also echoed in the case law concerning disqualification. For example, in a software copyright dispute, the plaintiff, during an initial consultation with the attorney, disclosed only that he had a dispute with the defendant, that software was involved, and that there was some type of prior settlement agreement. The plaintiff did not retain the attorney, and the attorney was subsequently retained by the defendant. The lawyer was not disqualified from representing the defendant because the lawyer had not learned any details of the case.<sup>9</sup> By taking such measures, lawyers may minimize the chances of future disqualification.

### **Advanced Informed Consent**

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<sup>8</sup> ABA Comm. on Ethics and Professional Responsibility, Formal Op. No. 90-358.

<sup>9</sup> *Poly Software Int’l v. Su*, 880 F. Supp. 1487, 1491 (D. Utah 1995). A Utah Ethics Advisory Opinion cites this case in advising lawyer to limit the initial interview to avoid disqualifying information, Utah State Bar Ethics Advisory Opinion Comm., UT Eth. Op. 04-05 (2005).

A lawyer can also avoid disqualification by an agreement with the prospective client made at the very outset of the initial consultation.

“A lawyer may condition conversations with a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter.”<sup>10</sup> Moreover, if the agreement between the lawyer and the prospective client expressly provides, “the prospective client may also consent to the lawyer’s subsequent use of information received from the prospective client.”<sup>11</sup> The effectiveness of an advanced informed consent is generally determined by whether the client understands the material risks and disadvantages that the advanced informed consent entails.

SCR 20:1.0(f) defines informed consent as “the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” Comment [22] to SCR 20:1.7 discusses consent to future conflicts as follows:

*[22] Whether a lawyer may properly request a client to waive conflicts that might arise in the future is subject to the test of paragraph (b). The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).*

Thus it is critical that such a waiver be as comprehensive as possible in identifying the anticipated future conflict and in disclosing the material risks of signing such a waiver to the prospective client. The lawyer must explain to the prospective client in plain language that the lawyer may in fact represent the opposing party in the same matter, and that the lawyer may have sensitive information learned from the prospective client in the representation of the opposing party. The lawyer must also explain to the prospective client in plain language that, as one of the reasonably available alternatives, the prospective client has the right to expect confidentiality

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<sup>10</sup> SCR 20:1.18 ABA Comment [5]

<sup>11</sup> SCR 20:1.18 ABA Comment [5]

and loyalty from the lawyer and thus there is no obligation to agree to the waiver. Such waivers must be confirmed in writing [see SCR 20:1.18(d)(1)].<sup>12</sup>

The Committee cautions that a prospective client's advanced informed consent to a conflict does not constitute consent to disclose confidential information or use confidential information to the disadvantage of the prospective client.

### **Imputed Disqualification, Conflict Waivers, and Screening**

Generally, under SCR 20:1.10, a conflict of interest of one lawyer will be imputed to all of the lawyers in the firm. SCR 20:1.18(d) provides two exceptions to the imputed disqualification.

First, the law firm can avoid imputed disqualification if “both the affected client and the prospective client have given informed consent, confirmed in writing.”<sup>13</sup> SCR 20:1.0(c) states that “confirmed in writing” when used in reference with informed consent, “denotes informed consent that is given in writing by the person or a writing that the lawyer promptly transmits to the person confirming an oral informed consent,” as defined by SCR 20:1.0(f). The writing does not excuse the lawyer from discussing with the prospective client the material risks as well as the reasonably available alternatives, and affording the prospective client a reasonable opportunity to raise questions and concerns. Instead, the writing is required to impress upon prospective clients the seriousness of the decision and to avoid disputes or ambiguities that may occur in the absence of a writing. This exception may be of limited use because parties may be unwilling to waive the disqualification of their opponents' lawyers.

Consequently, SCR 20:1.18(d)(2) permits a second exception, screening. Screening is permissible to avoid imputed disqualification if “the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client,” and the disqualifying lawyer is timely screened from any participation in the matter, is apportioned no fee from the matter, and written notice is promptly given to the prospective client. The requirement that notice be given to the prospective client allows the prospective client to assess, and if appropriate, challenge the sufficiency of the firm's screening procedures.

### **Conclusion**

When a lawyer has interviewed a prospective client and no lawyer-client relationship ensues, the lawyer may represent a party who is adverse to the prospective client in the same or substantially related matter unless the lawyer has acquired information from the prospective client that could be significantly harmful to that prospective client if used in that matter.

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<sup>12</sup> In Wisconsin, conflict waivers from prospective clients are an exception to the general rule that conflict waivers must be in writing and *signed* by the affected clients. Conflict waivers from prospective clients need only be confirmed in writing.

<sup>13</sup> SCR 20:1.18(d)(1)

Information may be significantly harmful if it is sensitive or privileged information that the lawyer would not have received in the ordinary course of due diligence; if it is information that has long-term significance or continuing relevance to the matter, such as motives, litigation strategies, or potential weaknesses; if it is the prospective client's personal thoughts and impressions about the facts of the case; if the premature possession of the information could have a substantial impact on settlement proposals and trial strategy; or if the information is extensive, critical, or of significant use.

To avoid acquiring significantly harmful information from a prospective client and therefore avoid being disqualified, a lawyer should limit the initial interview to only such information as reasonably appears necessary for that purpose. The lawyer also may avoid disqualification by obtaining, at the very outset of the initial consultation, the prospective client's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter.

When a lawyer is disqualified, the law firm can avoid imputed disqualification if both the affected client and the prospective client give informed consent, confirmed in writing. The law firm can also avoid imputed disqualification if the lawyer who received the significantly harmful information took reasonable measures to avoid the exposure, is timely screened from any participation in the matter, is apportioned no fee from the matter, and written notice is promptly given to the prospective client.

***E-89-5 is hereby withdrawn***