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# Wisconsin Formal Ethics Opinion EF-19-01: Job Negotiations with Opposing Firm or Party

*June 26, 2019*

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**Synopsis:** *When a lawyer has an active and material role in the representation of a client, the lawyer ordinarily will have a conflict of interest when the lawyer sends a targeted, specific expression of interest in employment to an opposing firm or party in the matter, or when the lawyer agrees to substantive discussions concerning possible employment with an opposing firm or party. The lawyer may normally address the conflict through disclosure and informed consent of the client or withdrawal from the representation if that can be accomplished without material adverse effect on the client. Because such personal interest conflicts are normally not imputed to other lawyers within a firm, a lawyer may also address such a conflict by seeking reassignment from the matter when feasible.*

## Introduction

Lawyers often change jobs, whether from one private law firm to another, from private to government employment or under some other circumstance. Most of the time, a lawyer's job search and negotiations with potential employers do not raise difficult issues with respect to the Rules of Professional Conduct for Attorneys (the "Rules"). Lawyers do need to be mindful, however, of circumstances that can raise concerns with respect to conflicts and confidentiality. When a lawyer joins a new firm, a conflicts check must be done and conflicts that the new lawyer brings to the firm must be addressed.<sup>1</sup> This opinion does not address those issues.

Conflicts may also arise from the lawyer's personal interest in the job search process prior to joining any new employer. In this opinion the State Bar's Standing Committee on Professional Ethics (the "Committee") addresses whether and when a conflict of interest arises in the job search process itself.<sup>2</sup>

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<sup>1</sup> See SCR 20:1.6(c)(6), which governs disclosures necessary to detect and resolve conflicts of interest, SCR 20:1.9, which governs former client conflicts, SCR 20:1.10, which governs imputation of conflicts within private law firms and SCR 20:1.11, which governs conflicts for current and former government lawyers.

<sup>2</sup> Lawyers who are employed in government law offices and seek employment with private employment with parties involved in matters in which the lawyer is participating are governed by SCR 20:1.11(d)(2)(ii) and job negotiations for lawyers employed as law clerks to judges are governed by SCR 20:1.12(b). These particular situations are beyond the scope of this opinion. Lawyers who are employed by the government are subject to SCR 20:1.7 and the

## Discussion

The Rules are clear that that personal interests of a lawyer, such as an interest in future employment, can create a conflict of interest for the lawyer. Supreme Court Rule (“SCR”) 20:1.7(a) states:

(a) Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person *or by a personal interest of the lawyer.*

(emphasis added)

The question then becomes whether a lawyer’s interest in prospective employment is a “personal interest” of the lawyer that could materially limit the lawyer’s ability to represent a client. Paragraph [10] of the ABA Comment to the Rule directly addresses this:

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. *Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client.*

(emphasis added)

Whether an interest in possible employment may give rise to a conflict is also addressed in The Restatement (Third) of the Law Governing Lawyers, §125, comment d., which states:

*d. A lawyer seeking employment with an opposing party or law firm.* This Section applies when a lawyer seeks to discuss the possibility of the lawyer's future employment with an adversary or an adversary's law firm. The conflict arises whether the discussions about future employment are initiated by the lawyer or by the other side. If discussion of employment has become concrete and the interest in such employment is mutual, the lawyer must promptly inform the

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responsibilities of lawyers employed by the government who seek employment with an opposing government law firm, such as a public defender who seeks employment in a prosecutor’s office, are addressed by this opinion.

client. Without effective client consent (see [§ 122](#)), the lawyer must terminate all further discussions concerning the employment, or withdraw from representing the client (see [§ 32\(2\) & \(3\)](#)). The same protocol is required with respect to a merger of law firms or similar change (see [§ 123](#)).

Thus it is clear that discussions regarding possible future employment with a an opposing party or a law firm representing an opposing party create a conflict under SCR 20:1.7(a)(2) because there is a significant risk that the lawyer’s personal interests will materially limit the representation.<sup>3</sup> The lawyer who is seeking employment from an opposing firm or party clearly has an incentive to please the opposing party or firm and this creates a significant risk of materially limiting the lawyer’s ability to represent the client.<sup>4</sup> The point at which the conflict arises depends on several factors, which are discussed below.

### **The lawyer’s involvement in the matter**

In order for the conflict to arise from a lawyer’s interest in employment with an opposing firm or party, the lawyer’s involvement in the matter must be material<sup>5</sup> and active. This degree of involvement does not require that the lawyer have primary responsibility for the matter, so an associate who is working on a matter under the supervision of a partner will have a conflict if the associate engages in employment discussions with an opposing firm. A lawyer who is no longer currently involved in the matter, however, will not have a conflict, so a lawyer who covered a hearing for another lawyer who was on vacation but has had no further involvement in a matter will not have a conflict if that lawyer then seeks employment with the opposing law firm. A lawyer, however, who has responsibility for a matter that is dormant, such as when the lawyer is awaiting the decision of a court of appeals, but expects further work in the future should be considered to be actively involved in the matter.

### **When does the conflict arise?**

There are a variety of ways to pursue a new job – sending out resumes, expressing interest through a contact, or perhaps being contacted by the prospective employer. The issue of when the conflict arises for a lawyer contemplating a move was addressed in ABA Formal Ethics Opinion

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<sup>3</sup> The analysis in this opinion applies equally to a lawyer’s interest in employment with an opposing party, such as a lawyer seeking employment as an in-house lawyer for a corporation, as with an opposing firm.

<sup>4</sup> This conflict exists irrespective of whether the lawyer subjectively believes that they will not act on the incentive – SCR 20:1.7(a)(2) clearly states that the conflict exists when the *risk* of a limitation exists. The Rule does not require that the lawyer *actually* be limited in the representation of the client for the conflict to arise.

<sup>5</sup> For purposes of this opinion, the Committee agrees with DC Bar Ethics Op. 367 with respect to “material” involvement: “Factors to consider in determining whether the lawyer has a “material” role in the matter include whether the lawyer has contact with the client regarding the matter, has contact with the adversary or the adversary’s lawyer in the course of representing the client in the matter, and/or is working on the substance of the matter. If none of these factors is present, the lawyer’s role in the matter would likely not be material, and his professional judgment on behalf of the client would likely not be adversely affected such that a personal interest conflict would arise.”

96-400, which concluded that the conflict arises when the lawyer's interest in a job was concrete, communicated to the prospective employer and the interest was mutual. While noting the difficulty in establishing a bright-line rule, the opinion states as follows:

The criteria of concreteness, communication and mutuality can be met early in any job search process. They are certainly met at the point that the lawyer agrees to participate in a substantive discussion of his experience, clients or business potential, or the terms of an association. While recognizing that the exact point at which a lawyer's own interests may materially limit his representation of a client may vary, the Committee believes that clients, lawyers and their firms are all best served by a rule which requires consultation and consent at the earliest point that a client's interest could be prejudiced. *We, therefore, conclude that a lawyer who has an active and material role in representing a client in litigation must consult with and obtain the consent of that client, ordinarily before he participates in a substantive discussion of his experience, clients or business potential or the terms of an association with an opposing firm.*

(emphasis added)

DC Bar Ethics Opinion 367 addresses the issue as follows:

In our view, a personal interest conflict may arise at various points during the employment process. Assuming a lawyer has a material and active role in a matter, a personal interest conflict may arise when the lawyer's interest in the prospective employer, both subjectively and objectively judged, is targeted and specific, and has been communicated to the prospective employer, such as when a lawyer sends a targeted resume directly to an entity or person adverse to his client or the adversary's lawyer. In another situation, where a lawyer sends blanket form letters and resumes to multiple potential employers, a personal interest may not arise until a potential employer expresses specific interest in the lawyer. If in response to such blanket form letters and resumes, the employer sends a non-targeted and general response (e.g., a notification that the application has been received and nothing more), a personal interest conflict may not arise at that time. Assuming a lawyer has a material and active role in a matter, a personal interest conflict arises if the lawyer participates in substantive discussion of his experience, clients, or business potential, or the terms of employment, with the prospective employer. A personal interest conflict is clearly present where there is an outstanding offer of employment that the lawyer is considering or has accepted.

(footnotes omitted)

Both opinions take the position that a conflict will arise when whenever a lawyer agrees to substantive discussions, such as an interview, with an opposing law firm when the lawyer has a

material and active role in the matter. Further, a lawyer who has material and active role in a matter, will have a conflict when the lawyer sends a targeted and specific expression of interest to an opposing firm or party. Both opinions also note the difficulty in establishing a bright line test and that some situations will depend on specific facts. The Committee agrees with this analysis.

As discussed below, most job-seeking conflicts will be consentable, and so it is useful to consider what would be the reasonable expectations of the client in knowing when their lawyer is seeking employment from the client's opposing firm or adversary. In the view of the Committee, most clients would consider this to be important information and material as to their choice of counsel. With that in mind, we offer the following guidelines as to when the conflict arises:

- 1) Generalized, non-specific job searches normally do not result in a conflict. For example, a lawyer who sends out the same resume to multiple potential employers, which may include an opposing firm, will not have a conflict.<sup>6</sup>
- 2) If a potential employer that is an opposing firm responds to a generalized job search with an offer of an interview (or other concrete offer to discuss possible employment), the lawyer will have a conflict if the lawyer agrees to the interview. If the lawyer declines the interview, or if the potential employer indicates that they are not interested, the lawyer does not have a conflict.
- 3) If a lawyer has an active and material role in a matter, and the lawyer sends a targeted, specific expression of interest to an opposing firm, the lawyer normally will have a conflict of interest when the expression of interest is communicated to the opposing firm.<sup>7</sup> For example, a partner who has primary responsibility for a matter and is the main client contact, ordinarily must disclose before specifically seeking employment with an opposing firm. Likewise, a criminal defense lawyer who sends a targeted and specific expression of interest to an opposing prosecutor's office has a conflict requiring disclosure and consent from the lawyer's criminal defense clients.<sup>8</sup>

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<sup>6</sup> Generalized job searches would also include the use of web based methods, such as lawyers who post their resumes on websites for job seekers to which opposing firms may have access.

<sup>7</sup> See ABA Formal Op. 96-400, footnote 9: "Thus, a lawyer who is the lead lawyer in a matter should not even contact the adverse party or firm about a possible association, without consultation and consent, because such contact may materially prejudice the client's interest."

<sup>8</sup> See DC Bar Ethics Op. 367. "The attorney who submitted the inquiry in Opinion 210 was a sole practitioner who primarily represented criminal defendants in the Superior Court of the District of Columbia against the USAO-DC and was applying to the USAO-DC for employment. As a sole practitioner she would have had primary responsibility for all of her cases and would have had direct personal interactions with the lawyers in the Office to which she was applying. Therefore, submitting a resume was sufficient to give rise to a personal interest conflict." Such a conflict would also arise if defense counsel is running for office as the elected District Attorney in a county.

- 4) A lawyer who receives a contact from a potential employer, or a head-hunter acting on behalf of a potential employer, offering to discuss potential employment has a conflict when the lawyer agrees to participate in such a discussion. If, however, the lawyer declines to participate, no conflict arises.

While these guidelines do not cover every possible situation, and are not meant to be exhaustive, it is hoped that they serve as useful examples of the principles set forth in the conflict rules.

### **Addressing the conflict**

Once a lawyer has determined that a conflict has arisen, it is the responsibility of the lawyer to address the conflict. Normally, this can be accomplished in one of three ways:

- 1) **Reassignment or withdrawal:** If the job-seeking lawyer works in a law firm with other lawyers, and it will not be harmful to the interests of the client, the lawyer may seek to be relieved of responsibility for the matter.<sup>9</sup> The Committee understands that for many lawyers, disclosing the fact that the lawyer is seeking employment elsewhere to the lawyer's supervisors will not be realistic because the lawyer fears either immediate termination or retaliation.<sup>10</sup> This fear does not, however, relieve the lawyer of the responsibility to appropriately address the conflict.<sup>11</sup> Alternatively, the lawyer may withdraw from the matter pursuant to SCR 20:1.16(b)(1) if the withdrawal could be accomplished without material adverse effect on the client.
- 2) **Disclosure and Consent:** Conflicts arising pursuant to SCR 20:1.7(a)(2) may be subject to consent by the affected client if the conditions set forth in SCR 20:1.7(b) are met. If the lawyer believes that the conflict is consentable, the lawyer must ensure that the conflict waiver meets the informed consent standard, is in writing and is signed by the affected client.
- 3) **Cessation of discussions about employment:** While putting the possibility of future employment with an opposing firm "on hold," may resolve the issue, the job seeking lawyer must still consider whether the prospect of future employment still creates need for disclosure and consent.

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<sup>9</sup> This is possible because, as discussed below, the conflict of the job seeking lawyer is normally not imputed to other lawyers in the firm.

<sup>10</sup> There are situations, however, where the firm is aware that the lawyer is seeking another job, such as when an associate has been told they are unlikely to make partner and the firm encourages the associate to seek a new job.

<sup>11</sup> The Rules do sometimes require lawyers to put the interests of clients ahead of their own interests and the lawyer may have to choose between notifying the client and the firm or forgoing the job search. If a lawyer does notify their firm of a conflict arising from a job search, supervisory lawyers within the firm should be mindful of their obligations to clients. See SCR 20:5.1.

## **Imputation of the Conflict**

Imputation of conflicts within private law firms is governed by SCR 20:1.10.<sup>12</sup> That rule holds that conflicts arising under SCR 20:1.7 and SCR 20:1.9 for one lawyer are imputed to other lawyers within the same firm, but provides an exception under SCR 20:1.10(a)(1) for conflicts based on a personal interest of the lawyer that do not pose a significant risk of materially limiting the ability of other lawyers in the firm to represent the client. Other jurisdictions have opined that the interest of an individual lawyer in seeking employment is just such a personal interest conflict that is not ordinarily imputed to other lawyers within the firm.<sup>13</sup> The Committee agrees with this conclusion. Other lawyers within a firm must remain alert, however, of the possibility of unusual circumstances, such as when a lawyer wishes to join a job seeking lawyer in migrating to a new firm, which may also give rise to a conflict.

## **Conclusion**

Many lawyers will change jobs in their careers and for the most part, the Rules do not pose an impediment to lawyer mobility. Lawyers, however, do owe duties of loyalty and communication, and most clients would expect to be informed if their lawyer were seeking employment with an opposing firm or party. Lawyers must remain aware of situations where the lawyer's duty of loyalty to the client may be impaired by the lawyer's interest in future employment and address such personal interest conflicts appropriately.

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<sup>12</sup> Imputation of conflict within government law firms is governed by SCR 20:1.11(f). For purposes of analysis of the question considered in this opinion, there is no difference in either remedies for or imputation of the conflict of a job seeking lawyer.

<sup>13</sup> See ABA Formal Ethics Opinion 96-400 and DC Bar Ethics Opinion 367.