
Wisconsin Formal Ethics Opinion EF-18-03: Form Contract Drafting and Conflicts

August 27, 2018

Synopsis

A lawyer who prepares a form contract for a client does not have a direct conflict of interest by reason of the fact that it may be used by that client in the future to negotiate a contract relationship with another party that may be a client of the lawyer. The lawyer, however, may not, in drafting the form contract, use or disclose confidential information of other clients of the lawyer. The lawyer may not then represent another party in negotiating against the client who is using the form contract without the informed consent of both. A lawyer may not provide representation for a client that involves the analysis or review of a contract form/template that was prepared by the lawyer or the lawyer's law firm for another client.

Introduction

Lawyers are often asked to draft model contract forms (“form contracts”) that will be used by a client to enter into contractual relationships with other parties. The lawyer is expected to draft a form contract that is consistent with the wishes of the client requesting the form. In some instances, the lawyer may assume that, in the future, the form contract being drafted will be presented by the client to other companies or persons who are also clients of the law firm.

Analysis

A determination whether a lawyer has a conflict of interest that prevents the lawyer from drafting the form contract for a client when it is possible that the form contract will be presented to other clients of the law firm requires an analysis of Supreme Court Rule (“SCR”) 20:1.7 of the Wisconsin Rules of Professional Conduct for Attorneys (the “Rules”).

SCR 20:1.7(a) provides, in relevant part, as follows:

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.

In the situation under consideration, the lawyer is not being asked to draft the form contract for a specific matter and would not be directly involved in explaining or negotiating the terms of a contract with another client of the lawyer. Consequently, there would be no "direct adversity" that is recognized under SCR 20:1.7(a)(1). The drafting of a form contract that may or may not be used in business transactions with others who may be a client of the lawyer's law firm would also not be a "direct adversity" conflict.

The principal focus of the analysis changes to whether there is a "significant risk" that the lawyer providing legal services to one client in the drafting of a form contract will, in some way, be materially limited by the lawyer's responsibilities to another client or a former client if the lawyer reasonably assumes that the form contract will be used by the client (who requested the form contract) when engaging in future dealings with other companies or persons who may be represented by the lawyer or law firm on other unrelated matters.

ABA Comment [8] provides guidance with respect to material limitation conflicts:

Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

The Committee does not believe that the mere fact that a form contract may be used by one client in possible future transactions with another client of the lawyer poses a significant risk of materially impairing the lawyer's ability to competently represent the first client. Not only is it uncertain whether the form contract will be presented as the basis for a contractual relationship by the client that requested the form contract, but the other client is free to negotiate its terms or reject them altogether. Given the hypothetical nature of such a future transaction, it is hard to see how the lawyer would be impaired in using her skills and expertise to develop a form

contract that provides the greatest protection for the client requesting the form contract. The risk here is less than even the “mere possibility” of harm discussed in Comment [8].

The analysis may be different, however, if the lawyer believes that there is a significant risk that the form contract will be used in specific transactions with another specific client of the lawyer. If the lawyer determines that her ability to prepare a form contract for the requesting client is materially limited by, for example, the lawyer’s desire to protect or advocate for the interests of another client, or her possession of material confidences of another client to whom the first client may present the form contract, the lawyer may conclude that her representation of the requesting client is materially limited. In such a case the lawyer would have a conflict between the duty of competent representation to one client and the duty of confidentiality to another.

A direct conflict would arise within the meaning of SCR 20:1.7(a)(1) if the client for which the lawyer drafted the form contract asked the lawyer to help it negotiate or draft a specific contract with another current client of the lawyer or their firm.

A direct conflict also would arise if, having helped one client prepare a form contract, the lawyer is subsequently asked by another client to negotiate a contract based on the form contract, with the first client. If the first client is still a current client of the lawyer, that would constitute a direct conflict within the meaning of SCR 20:1.7(a)(1). If the party for whom the lawyer had prepared the form was no longer a current client, the proposed representation of the second client would still be directly adverse to a former client in a substantially related matter and therefore be a conflict under SCR 20:1.9(a). In either case, the lawyer could not provide the requested representation without the informed consent of both clients. Whether requesting informed consent for a concurrent conflict of interest is appropriate depends upon the circumstances, given that some such conflicts are non-consentable.¹ If the conflict is with a former client, SCR 20:1.9(a) controls and the lawyer may seek informed consent for the representation.

Conclusion

A lawyer may normally draft a form contract on behalf of a client even if the lawyer knows that the form contract may be used by the requesting client to engage in a contractual relationship with another client of the law firm in the future. That fact alone does not rise to the level of a “direct conflict” or a “significant risk” of a material limitation of the lawyer’s ability to represent the requesting client. If the lawyer, however, is aware of a specific matter in which the form contract will be used in a negotiation with another client of the firm and the lawyer desires to protect the other client or has material confidential information about the other client, the lawyer may have a conflict. The lawyer would normally have a conflict in future representation that involves the form contract where the lawyer is representing a party other than the original client.

¹ See SCR 20:1.7(b).

