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## Wisconsin Formal Ethics Opinion EF-20-02: Lawyer Examining a Current or Former Client as Adverse Witness

June 25, 2020

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**Synopsis:** *A lawyer faced with cross examining<sup>1</sup> a current client will have a conflict of interest that would prevent the lawyer from continuing both representations unless the conflict is subject to the written and signed informed consent of both clients. A lawyer faced with cross examining a former client will have a conflict if the subject matter of the prior representation is the same or substantially related to the examination or there is a substantial risk the lawyer will use information relating to the representation of the former client to the disadvantage of the former client. In both situations the conflict of interest would be imputed to other members of the lawyer's firm.*

### Scenario One

Lawyer A represents a party in a contested divorce. At the same time, Lawyer B, a lawyer in the same firm, represents the sibling of the opposing party in an unrelated debt collection matter. It is likely that the sibling will be a witness in the divorce trial as to issues related to custody and placement. May Attorney A depose, pursue discovery, and cross examine Attorney B's client at the divorce trial?

### Scenario Two

A public defender represents a client in a robbery case. Upon receipt of the prosecution's witness list, the public defender discovers a key state witness is her former client who she represented a year ago in connection with drug charges. Based on her prior representation, the public defender knows the former client has three prior felony convictions and has struggled with substance abuse problems. May the public defender cross examine the former client at trial?

### Introduction

This opinion addresses situations where a lawyer is faced with conducting an adverse examination of a current or former client of the lawyer or the lawyer's firm. Whether a conflict

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<sup>1</sup> In this opinion, the terms cross examination and adverse examination are used interchangeably. In addition, the discussion would apply to pretrial depositions and discovery requests as well as adverse examinations at trial.

that arises from cross-examining a current client is subject to informed consent depends on the specific facts and circumstances.<sup>2</sup> Former client conflicts are generally subject to informed consent.<sup>3</sup> In both situations the conflict would be imputed to other members of the attorney's firm.<sup>4</sup> This opinion reviews the relevant Wisconsin Supreme Court Rules ("SCRs") and then applies them to the scenarios presented.

## Opinion

The Rules of Professional Conduct for Attorneys (the "rules") that govern conflicts of interest set forth different standards for current and former client conflicts. For this reason, a threshold determination is whether the situation involves a current or former client.<sup>5</sup>

## Current Clients

A lawyer faced with an adverse examination of a current client must consider several rules: SCR 20:1.7 (Conflicts of interest for current clients), SCR 20:1.8(b) (use of confidential information to detriment of client); SCR 20:1.6 (Confidentiality), and SCR 20:1.4 (Communication).

The situation presents the lawyer with two choices, both problematic. The first is to aggressively examine the client, and use or disclose protected information that could harm or embarrass the client in service to the other client, while betraying the duties of loyalty and confidentiality owed to the client who is a witness. The second is to conduct either no examination or a limited

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<sup>2</sup> The committee's conclusions are consistent with ethics opinions from other jurisdictions. Current clients – *Conn. Op. 99-14* (1999); *Md. Op. 81-73* (1981); *Mich. Op. RI-239* (1995); *Mich. Op. RI-218* (1994); *Nassau County Op. 86-46* (1986); *Ore. Op. 1991-110* (1991); *Pa. Op. 2002-71* (2002); *Tenn. Op. 85-F-92* (1985), and *West Virginia State Bar Comm. on Legal Ethics v. Frame*, 433 S.E. 2d 579 (W. Va. 1993). Former clients – *A.B.A. Formal Opinion 92-367*, *Phil. Bar Assoc. Professional Guidance Committee Opinion 2014-1* (2014); *Ala. Op. 90-25* (1990); *Ariz. Op. 91-05* (1991); and *Va. Op. 1407* (1991). *But see Ohio Op. 2013-4* (Oct. 11, 2013). (A public defender may cross examine a former client whom the attorney previously represented. This opinion appears to be an outlier and assumes a minority view of what information is "generally known").

<sup>3</sup> See SCR 20:1.9(a).

<sup>4</sup> In the former client situation screening of the conflicted lawyer is permitted only if the attorney performed "minor and isolated services in the disqualifying representation" at a prior firm. See SCR 20:1.10(a)(2)(i).

<sup>5</sup> If the representation was for a specific matter, it will generally be assumed to end when the matter is resolved. In transactional or open-ended situations, the status of the relationship may be more ambiguous. It is the responsibility of the lawyer to clarify when the representation ends. Comment [4] to SCR 20:1.3 states:

If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

See also Wolfram, *Former Client Conflicts*, 10 *Geo. J. Legal Ethics* 677, 702-709 (1997).

examination to protect the witness-client, and by so doing, failing to provide the other client with competent<sup>6</sup> and diligent<sup>7</sup> representation.

In order to determine whether a conflict between current clients exists, the lawyer must look to SCR 20:1.7(a), which states in relevant part:

(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.

Conflicts under both subsections exist when a lawyer is faced with cross examination of a current client.

Although central to application of the rule, the term “directly adverse” is not expressly defined in the rule or its’ accompanying ABA Comment. However, paragraph [6] of the Comment states:

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client’s informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client–lawyer relationship is likely to impair the lawyer’s ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client’s case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer’s interest in retaining the current client. *Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit.*

(emphasis added)

By design, examination of an adverse witness seeks to advance the interests of a represented client by discrediting the witness, either by demonstrating they are untruthful or mistaken.

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<sup>6</sup> See SCR 20:1.1.

<sup>7</sup> See SCR 20:1.3.

Common strategies include presenting proof of the witness' prior bad conduct, their criminal record, inconsistent prior statements, bias, a history of alcohol or substance abuse, or a faulty memory.<sup>8</sup> Hostile treatment of a current client in a public forum is inevitably harmful to the lawyer-client relationship, undercuts the loyalty owed to the client, may be humiliating to the client, and, if based on information previously obtained from the client, violates the duty of confidentiality.<sup>9</sup> Cross examination of a current client, whether a party or only a witness, will always be "directly adverse" to that client.<sup>10</sup>

As noted, the situation also creates a "significant risk" that the lawyer's representation will be "materially limited" in one or more ways. SCR 20:1.7(a)(2). A vigorous adverse examination of the client poses risks to the duties of loyalty and confidentiality. Alternatively, a "soft" examination to protect the client-witness will improperly limit the level of competent and diligent representation owed the other client. Cross examination of a current client will always present a conflict of interest within the meaning of SCR 20:1.7.<sup>11</sup> Such conflicts are imputed to other members of the firm and screening of the conflicted lawyer will not defeat the imputation of the conflict. SCR 20:1.10(a).

Consequently, continued representation is permissible only if all the requirements of SCR 20:1.7(b), regarding informed consent, can be satisfied. These requirements are discussed later in this opinion.

### **Former Clients<sup>12</sup>**

After the termination of a lawyer-client relationship, the lawyer has a continuing duty to protect former clients' information and a duty to avoid former client conflicts. Thus, a lawyer may not

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<sup>8</sup> See Wis. Stat. §§904.04, 906.09. Regardless of the case, a significant part of any cross examination involves attempting to show why the witness is unworthy of belief, focusing on personal characteristics of the witness that are unrelated to the issues in the case. For this reason, a risk of harm to the client-witness or former-client witness will exist even when the cases are neither the same nor substantially related.

<sup>9</sup> See SCR 20:1.6. Information relating to the representation of a client may be used or disclosed without client consent in only a few circumstances; generally informed client consent is necessary. See also SCR 20:1.8(b) (prohibition against use of confidential information to the "disadvantage" of the client absent informed consent).

<sup>10</sup> Comment c(i) to §121 of the *Restatement (Third) of the Law Governing Lawyers* (2000) further explains, "[a]dverse' effect relates to the quality of the representation, not necessarily the quality of the result obtained in a given case. The standard refers to the incentives faced by the lawyer before or during the representation because it often cannot be foretold what the actual result would have been if the representation had been conflict-free." See also *A.B.A. Formal Opinion* 92-367 at 5-7 (conducting cross examination of client sufficiently adverse to trigger application of Rule 1.7); California Opinion 2011-182 at 2 ("adverse" includes actions that are "unfavorable" or "detrimental" even absent significant harm).

<sup>11</sup> The same analysis applies to other forms of adverse discovery against current clients, such as depositions, subpoenas, and interrogatories.

<sup>12</sup> SCR 20:1.18 provides protections to conflicts with prospective clients that parallel those for former clients.

“knowingly represent another person in the same or a substantially related matter in which that person’s interests are materially adverse to the interests of the former client. . .” unless the former client provides “informed consent confirmed in a writing signed by the client.” SCR 20:1.9(a).

The scope of the prohibition against representing an adverse client in the “same” matter is self-evident. Less clear is when the cases are “substantially related”.<sup>13</sup> Guidance is found in the ABA Comments to SCR 20:1.9:

[3] Matters are “substantially related” for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client’s position in the subsequent matter.

Put another way, matters are “substantially related” when it is reasonable to assume that the lawyer in the prior representation would have access to information that would be relevant and useful in the new matter. The former client is not required to assert that specific factual information was provided to the lawyer.<sup>14</sup> Whether or not the lawyer actually received such information is irrelevant to the analysis.<sup>15</sup>

In considering the propriety of cross examining, or conducting any form of adverse discovery against a former client, the lawyer must consider whether it is reasonable to *assume* that a lawyer in the prior representation would have had access to information useful in cross examining the former client. For example, a lawyer who previously represented a client in connection with a drunk driving offense would face a conflict in cross examining that former client as an adverse witness in a contract case because it would be reasonable to assume that issues that may have arisen in the drunk driving matter, such as possible substance abuse and illegal conduct, that would be relevant in attacking the credibility of the witness. On the other hand, a lawyer who

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<sup>13</sup> The “substantial relationship” test first appeared in case law and was subsequently codified into A.B.A. Model Rule 1.9. See *T.C. Theater Corp. v. Warner Bros. Pictures Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953); 51 *Law. Man. Prof. Conduct* 201, 222-224. See also, *Restatement (Third) of the Law Governing Lawyers* §132 (2000), Wolfram, *Former Client Conflicts*, 10 *Geo. J. Legal Ethics* 677 (1997).

<sup>14</sup> See SCR 20:1.9, ABA Comment [3]; “A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.”

<sup>15</sup> See *Burkes v Hales*, 165 Wis. 2d 585, 478 N.W. 2d 37 (Ct. App. 1991) “The general rule is that once a substantial relationship between the two representations is shown, the inquiry ends. “If the ‘substantial relationship’ test applies ..., ‘it is not appropriate for the court to inquire into whether actual confidences were disclosed.’ ” *Analytica Inc. v. N.D.P. Research*, 708 F.2d 1263, 1267 (7th Cir.1983) (citation omitted.) The test is whether the lawyer “could have obtained” confidential information in the first representation that would have been relevant in the second; whether such information actually was obtained and, if so, whether it actually was used against the former client is irrelevant. *Id.* at 1266” (citations omitted).

previously represented a client in a simple real estate matter would not face a conflict in cross examining the former client who witnessed a traffic accident because it would be unreasonable to assume that information learned in the real estate matter would be relevant in cross examining the former client.

As noted, analysis of former client conflicts under SCR 20:1.9(a) does not depend on whether relevant information was actually disclosed to the lawyer in the prior representation. If, however, relevant information is actually in the lawyer's possession, additional considerations arise. SCR 20:1.9 (c) provides:

... A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

This provision prohibits the *use*, even without disclosure, of information relating to the representation of former clients that might disadvantage the former client even if the cases are not the "same", "substantially related" or involve material adversity. It also prohibits *revealing* such information without the informed consent of the former client.<sup>16</sup>

The rule provides an exception to the prohibition on adverse use of information when the information is "generally known". SCR 20:1.9(c)(1). This provision has been interpreted narrowly. In ABA Formal Opinion 479, the ABA Standing Committee on Professional Ethics concluded that information is "generally known" only if widely recognized by members of the public in the relevant geographic area or within the former client's industry, profession, or trade.

The ABA Standing Committee rejected the notion that information is "generally known" if the information had previously been disclosed or is available in a public record, such as a court file or CCAP.<sup>17</sup> Thus, a lawyer faced with the prospect of cross examining a former client would be prohibited from making use of information relating to the representation of the former client unless that information fits the narrow definition of "generally known," meaning the information

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<sup>16</sup> Comment a to §132 of the *Restatement (Third) of the Law Governing Lawyers* (2000) notes, "In light of the confidentiality requirements . . . a lawyer representing a client in a matter may not use confidential client information if doing so will adversely affect a material interest of the former client, even though that matter is not substantially related to a former representation . . ."

<sup>17</sup> The Wisconsin Supreme Court rejected a request to expand the exception to include information available to the public or that has been previously revealed and declined to modify the language of the rule and ABA Comment. *In the Matter of the Petition to Modify SCR 20:1.9(c)* (July 21, 2016).

is not just available from a public source, such as a court file or a public data base, but rather widely disseminated and recognized. If such information does not fit that definition, and the information would be useful in cross examining the former client, the lawyer is materially limited in representing the current client because the lawyer is in possession of useful information that the lawyer cannot use in representing the client. SCR 20:1.7(a)(2).

Thus, although the conflict analyses differ, a lawyer faced with an adverse examination of either a current or former client will often face a conflict of interest that would prevent representation in either case.

### **Imputation of Conflict and Screening**

In general, the disqualification of one lawyer is imputed to her entire firm without the option of screening. SCR 20:1.10(a). In certain circumstances, screening may be possible in cases involving former clients, but only in cases where the “disqualified lawyer performed no more than minor and isolated services” in the disqualifying representation and the services were performed at a prior firm. SCR 20:1.10(a)(2).<sup>18</sup>

### **Informed Consent**

When faced with a conflict of interest, an affected current or former client may be able to give informed consent to continued representation.

SCR 20:1.0(f) provides:<sup>19</sup>

“Informed consent” denotes 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.

The requirements for informed consent are outlined in SCR 20:1.7(b)(1)-(4).

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<sup>18</sup> If the former client was represented by an attorney no longer with the firm, representation of a client with interests adverse to the former client would be prohibited, absent consent by the former client, if the remaining firm lawyers have access to information relating to the representation of the former client, such as a closed file. SCR 20:1.10(b), (c) and comment (c)(i) to §124 of the *Restatement (Third) of the Law Governing Lawyers* (2000). If the former attorney is now a government attorney, the conflict analysis would be controlled by SCR 20:1.11(f); see also SCR 20:1.10(d). In the government lawyer context, the conflicts of one lawyer are not imputed to others in the firm and screening of the affected lawyer is required.

<sup>19</sup> Consent to a conflict must be confirmed in a writing signed by the affected current or former client. SCR 20:1.0(q) defines “writing”: “[w]riting” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and electronic communications. A ‘signed’ writing includes an electronic sound, symbol, or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.”

In the case of currently represented clients, the lawyer must determine if it is reasonable to believe that the lawyer can competently and diligently represent each client notwithstanding the conflict. The “reasonableness” standard of SCR 20:1.7(b)(1) is objective – neither the lawyer’s nor the client’s subjective beliefs are dispositive. In the case of cross examination of former client the lawyer may conclude the conflict is non-consentable if the risk of harm to one or both clients appears unavoidable or the lawyer’s duty of confidentiality prevents making a disclosure necessary to obtain the client’s informed consent.<sup>20</sup> Former clients may consent to conflicts, but the lawyer must determine whether the current client conflict is consentable under SCR 20:1.7(b), and consent must be obtained from both the current and former client.<sup>21</sup> Finally, each affected client must provide informed consent in writing. SCR 20:1.7(b)(4) and 20:1.9(a).

Obtaining valid informed consent requires that the lawyer discuss with each affected client or former client the facts and circumstances that give rise to the conflict<sup>22</sup> Direct communication with the client or former client is at the core of obtaining valid informed consent.<sup>23</sup> The dialogue must be grounded in the facts of the particular case, the varied interests of the lawyer and affected clients or former clients, how these interests might align or conflict, a presentation of the options available to the client or former client, the likely consequences of pursuing each option, both positive and negative, and emphasis that consent will squarely place the attorney in an posture adverse to his client or former client. It may be the case that the lawyer cannot make the necessary disclosures to obtain informed consent if either of the affected clients or former clients do not consent.<sup>24</sup> It is also important that the client or former client know they can refuse to consent or withdraw consent previously given.

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<sup>20</sup> See A.B.A. Rule 1.7 cmt. ¶¶14-17; see also *Phil. Bar Assoc. Professional Guidance Committee Opinion 2014-1* (2014) (finding non-consentable conflict when attorney faced with cross examination of former firm client); *State v. Loyal*, 753 A. 2d 1073 (N.J. 2000)(defense counsel’s prior representation of key prosecution witness justified mistrial); *FMC Techs Inc. v. Edwards*, 420 F. Supp. 1153 (W.D. Wash. 2006)(violation of Rule 1.9 for attorney to represent client in case in which former client important adverse witness); but compare, *Daniels v. State*, 17 P. 3d 75 (Alaska Ct. App. 2001)(attorney may remain on case in which former client government witness where attorney claims no knowledge of confidences that could be used against witness); *People v. Frisco*, 119 P. 3d 1093 (Colo. 2005)(absent showing of confidences obtained from former client and current state witness that would be useful to current client the attorney need not be disqualified in present case); *Banner v. Flint*, 136 F. Supp. 678 (E.D. Mich. 2000)(cross examination of former client permissible with informed consent from former client).

<sup>21</sup> See §§ 122(1) and 132 of the *Restatement (Third) of the Law Governing Lawyers* (2000).

<sup>22</sup> SCR 20:1.6(c)(6) provides for discretionary disclosure of confidential information, “to detect and resolve conflicts of interest, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client”.

<sup>23</sup> See SCR 20:1.4.

<sup>24</sup> See *Restatement (Third) of the Law Governing Lawyers* (2000) §122 cmt. c(i). provides:

“...[d]isclosing information about one client or prospective client to another is precluded if information necessary to be conveyed is confidential . . . The affected clients may consent to disclosure . . . but it also might be possible for the lawyer to explain the nature of undisclosed information in a manner that nonetheless provides an adequate basis for informed consent. If means of adequate disclosure are unavailable, consent to the conflict may not be obtained.”



Finally, the lawyer must remember that consent to a conflict of interest is not consent to adverse use or disclosure of information relating to the representation of the current or former client. Adverse use or disclosure of such information requires separate informed consent. SCR 20:1.6(a) and SCR 20:1.9(c). If the lawyer believes that effective cross examination requires the adverse use or disclosure of such information, and the affected current or former client will not give informed consent, the conflict is non-consentable.

### **Withdrawal from Representation**

Comment ¶4 to SCR 20:1.7 provides:

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9.

If the lawyer learns sufficiently in advance that she may need to conduct an adverse examination of a current or former client, the most prudent course of action may be to decline representation.<sup>25</sup> Resolving the issues are invariably more difficult when the issue arises during trial, particularly when the identity of adverse witnesses is not known until the matter is well underway. If the conflict is unavoidable, the lawyer may be required to seek to withdraw from both cases and be obliged to follow whatever ruling the trial court makes.<sup>26</sup>

There is a substantial body of case law that addresses withdrawal, continuation, and related issues in both civil and criminal cases.<sup>27</sup> Although the issues are similar to those discussed in this opinion, the standards and procedures involved are distinct and beyond the scope of this opinion.

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<sup>25</sup> Lawyers should be mindful that the conflict arises when a lawyer learns that a current or former client may be an adverse witness in the matter, not when the witness is examined. Similarly, the lawyer who finds out through discovery that a current or former client may be an adverse witness at trial of the matter has a conflict upon discovery, even if the lawyer does not believe that the matter will proceed to trial.

<sup>26</sup> A possible alternative to withdrawal is to arrange for substitute counsel to conduct the adverse examination. *United States v. Britton*, 289 F. 3d 976 (7<sup>th</sup> Cir. 2002) (permitted when former client examined on minor point). *But see United States v. Cheshire*, 707 F. Supp. 235 (M.D. La. 1989) (substitute counsel not allowed when the former client is an important witness).

<sup>27</sup> See generally 51 Law. Man. Prof. Conduct 122. Additional considerations apply in criminal cases involving a constitutional right to conflict-free representation, *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Cuyler v. Sullivan*, 446 U.S. 335 (1980), where cross examination is protected by the confrontation clause and viewed as critical to effective representation, *Davis v. Alaska*, 415 U.S. 308 (1974). Compliance with ethics requirements will generally satisfy constitutional requirements although the failure to follow ethics requirements may not be a basis for post-conviction relief. See *State v. Tkacz*, 2002 WI App. 281, 258 N.W. 2d 611, 654 N.W. 2d 37 (2002) (prosecutor's prior

## **Review of Scenario One**

This scenario involves two current firm clients represented by two firm attorneys. One is represented by Attorney A in a divorce case; the other is a sibling of the opponent in the divorce case and is represented by Attorney B in an unrelated collection matter.

A conflict exists under SCR 20:1.7(a)(1) because the client represented by firm Attorney B is an adverse witness in the divorce case involving Attorney A. There is also a conflict under SCR 20:1.7(a)(2) because of a “significant risk” representation of both clients would be “materially limited” by the attorneys’ responsibilities to each client. Faced with examining the sibling, either at trial or in a deposition, Attorney A must choose between an aggressive examination and possible use of protected information the sibling shared with Attorney B or a ‘soft’ examination which would deprive Attorney A’s divorce client of competent and diligent representation. The Michigan State Bar Professional Ethics Committee in a similar case noted:

Generally, a lawyer may not undertake a representation in which the lawyer will be called upon to cross-examine a client/witness who is testifying against another client, because of the risk that the lawyer would conduct "a soft deferential, cross-examination rather than a diligent and vigorous one." See RI-128; ABA Op 92-367.

Mich. Op. RI-239 (1995). The conflict would be imputed to every lawyer in the firm and screening is not available. SCR 20:1.10(a). The fact that the subject matters of the representations are unrelated is immaterial to the analysis of whether a conflict of interest exists but may be relevant to the analysis of whether the conflict is subject to the informed consent of both clients. If the subject matters of the respective representations are unrelated and information relating to the representation of the witness client would not be useful in cross examining the witness, the lawyer may seek the informed consent of both clients to continue the representations. If either client refuses to consent, the lawyer must withdraw.

## **Review of Scenario Two**

As a scenario involving a former client, the public defender’s options are controlled by SCR 20:1.9, which prohibits representation adverse to the former client in the “same” or a “substantially related” matter, SCR 20:1.9(a), or the use of confidential information not generally known “to the disadvantage of the former client.” SCR 20:1.9(c). Because the matters in which the lawyer represented the former client were drug related offenses, it is reasonable to assume both that the lawyer would have had access to information that would be useful in attacking the credibility of the former client, such as substance abuse issues, and that the matters are substantially related, resulting in a conflict under SCR 20:1.9(a). Moreover, the adverse use or disclosure of

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representation of defendant insufficient to demonstrate conflict of interest to disqualify prosecutor from prosecuting former client in new criminal matter).

information relating to the lawyer's representation of the former client, such as the client's substance abuse problems, would be useful in attacking the former client's credibility.<sup>28</sup>

Like the first scenario, continued representation is theoretically possible given that the rules provide for informed consent from the former client. However, while the former client may give consent to the conflict, it is unreasonable to conclude that the former client would consent to disclosure of information relating to the representation to attack her credibility. If so, this limitation would prevent competent and diligent representation of the current client. In a similar case the Philadelphia Bar Association Professional Guidance Committee concluded,

As for the question concerning the conflict of interest, the Committee believes that there is a non-waivable conflict of interest that precludes Inquirer from continuing to represent his Client in the criminal matter. . . Accordingly, there is no question that Inquirer cannot continue to represent his client going forward, and Inquirer must withdraw from that representation so that new counsel may be appointed . . .

Phil. Bar Assoc. Professional Guidance Committee Opinion 2014-1 (2014) at 3-4. Of note, as a criminal matter, this scenario involves the constitutional right to the effective assistance of counsel.<sup>29</sup> The public defender should seek to withdraw from representation in such a case.

## **Conclusion**

A lawyer faced with conducting an adverse examination of a current client will face a conflict of interest. A lawyer faced with cross examination of a former client may face a similar problem and must carefully analyze whether her duty to avoid former client conflicts and the impermissible use or disclosure of information relating to the representation of the former client prevent continued representation. In both situations, the conflict may subject to the informed consent of the affected current and former client if the conditions set forth in SCR 20:1.7(b) are met.

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<sup>28</sup> None of the information learned from the former client and relevant to their subsequent cross examination fits within the "generally known" exception in SCR 20:1.9(c). See *infra* at 8-9.

<sup>29</sup> See n. 27 *infra*. See also *United States v. Johnson*, 131 F. Supp. 1088 (N.D. Iowa 2001).