Wisconsin Ethics Opinion EF-22-01
Migration in Criminal Practice

March 16, 2022

***Synopsis**: Migration of lawyers from one law firm to another is a common part of contemporary practice and several ethics issues arise when a lawyer moves from one firm to another. This opinion focuses on criminal practice and addresses the issues that arise when a lawyer is migrating from defense to prosecution or prosecution to defense.*

When a defense lawyer agrees to an interview with a prosecutor's office or announces their candidacy for the office of district attorney, the lawyer has a personal conflict in the continued representation of criminal defense clients anywhere in the state. To continue representation of clients, the lawyer must reasonably conclude the conflict will not adversely affect the representation and obtain their informed consent in a signed writing.

The disciplinary rules prohibit a prosecutor from seeking employment with a firm involved in cases the prosecutor is litigating. When a prosecutor agrees to an interview with a defense firm with which the prosecutor has no cases, there is no automatic conflict. In some situations, specific facts may give rise to a conflict, a situation that should be reported to the prosecutor's supervisor to seek consent or arrange for transfer of cases to another prosecutor.

If, in either situation, the lawyer ultimately changes positions, additional responsibilities arise.

The former defense lawyer-current prosecutor may not appear adversely in the same or substantially related cases of former clients or in cases in which the lawyer possesses relevant information relating to the representation of the former client. Such conflicts are not imputed to others in the prosecutor's office and the office may continue involvement in the affected cases if the conflicted lawyer is timely screened.

The former prosecutor-current defense lawyer may not appear in any case in which they participated personally and substantially, whether as a lawyer or otherwise, regardless of adversity, absent written informed consent from their prior firm. Nor may they represent a client whose interests are adverse to a person about whom the lawyer obtained confidential government information while in government service. Other lawyers in the firm may represent the client if the lawyer is timely screened and receives no fee in the matter. Prior opinions E-80-12, E-86-18, E-86-15 and E-86-8 are withdrawn.

Circumstances triggering a migration conflict and responsibilities to current clients

A. Defense lawyer to prosecutor migration.

There are two ways criminal defense lawyers can become a prosecutor – through the normal hiring process or through the electoral process. Both situations raise conflict of interest issues – a personal conflict for the lawyer seeking employment with another firm [SCR 20:1.7(a)(2)], and, should the transition occur, responsibilities to former clients of the lawyer (SCR 20:1.9), and imputation issues for the lawyer's future colleagues [SCRs 20:1.10(d), 20:1.11(f)]. Although the ethical issues are similar, the triggering circumstances differ.[1]

A criminal defense lawyer seeking employment as a prosecutor has a personal interest in creating and maintaining a positive relationship with the prospective employer. This can create an incentive for the lawyer to be less vigorous in the representation of clients to avoid alienation of the prosecutor or, at a minimum, cause clients to question the lawyer's commitment to their cases.

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 supplied)

Paragraph [10] of the ABA Comment to the Rule explains:

> [10] . . . 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.[2]

Once the defense lawyer agrees to an interview with a prosecutor's office this information must be shared and discussed with every criminal defense client of the lawyer, including an explanation of how it could impact resolution of the case.[3] SCR 20:1.4(b). Continued representation would not be

[1] Wisconsin Formal Ethics Opinion EF-19-01 provides a comprehensive discussion of conflicts that can arise when a lawyer seeks employment with a new law firm. As discussed in that opinion, a personal interest conflict arises when the lawyer agrees to an interview for the new position or communicates their specific and concrete interest in a position with a firm. Id. at 5. If the lawyer is not offered a position following an interview or their expression of interest is declined there is no conflict.

[2] *See ALI Restatement (Third) of the Law Governing Lawyers, §125, comment d.*

[3] For purposes of the disciplinary rules, the district attorney's office is considered one statewide office, so all criminal defense clients must be notified, regardless of the county in which the case in venued. *See* Wisconsin Formal Ethics Opinion EF-11-02.

permitted unless the lawyer reasonably believes that competent and diligent representation is possible and the client gives informed consent in a writing signed by the client. SCR 20:1.7(b).

If the lawyer concludes competent representation is not possible, or if the client does not consent, the lawyer would be required to withdraw. SCR 20:1.16(a)(1).

A defense lawyer's decision to run for district attorney presents a personal conflict for the lawyer. Partisan elections are often contentious, and a common theme is which candidate would make the community safer, often by expanding prosecution and seeking harsher penalties for those convicted. Challengers often criticize the incumbent as being insufficiently punitive in their practices and policies.[4]

At the same time, the role of defense counsel is to seek the least punitive resolution of charges for the client, a resolution that a defense lawyer candidate may claim makes the incumbent unfit for office. Such a dynamic – seeking a lenient resolution for clients while simultaneously criticizing lenient dispositions while campaigning – is likely to materially limit a candidate's ability to effectively represent their clients.

The defense lawyer's conflict in the electoral context arises when they announce their candidacy.[5] At this point their personal interest in a successful campaign is directly at odds with their clients' interest in maintaining a positive relationship with the prosecutor and receiving a favorable case resolution. Further, by announcing their candidacy, the defense attorney is actively seeking employment with the client's opponent.[6] This conflict affects all of the defense lawyer's criminal defense clients, whether the cases are venued in the county in which the candidate is seeking office or elsewhere.[7]

The defense lawyer-candidate may only continue representation of criminal defense clients if they reasonably conclude their candidacy will not impair their representation and each client provides informed consent in a writing signed by the client.[8]

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[4] A growing number of progressive candidates for the position of district attorney claim that public safety is best achieved by alternatives to prosecution rather than punitive measures. Notwithstanding, a progressive candidate for district attorney is still seeking employment with the opposing law firm and the conflicts analysis is the same.

[5] Because the conflict involved is personal to the defense lawyer candidate, it would not be imputed to others in the defense lawyer's firm. SCR 20:1.10(a)(2).

[6] The conflict will be more acute if the defense lawyer candidate practices in the same county in which they are running for office. In a related situation the committee has opined that a conflict arises when the lawyer's interest in employment with a firm adverse to the client becomes "concrete". Wisconsin Formal Opinion EF-19-01 at 3-5.

[7] For purposes of analysis under the disciplinary conflict of interest rules, the committee considers the district attorney's office to be one state-wide office with multiple locations. *See* Wisconsin Ethics Formal Ethics Opinion EF-11-02.

[8] *See* SCR 20:1.0(f).

Under any circumstance, withdrawal would be required no later than when the lawyer began work as a prosecutor both to avoid violation of the disciplinary rules,[9] and because the applicable statutes prohibit a full-time prosecutor from simultaneously having another practice.[10]

B. Prosecutor to defense lawyer migration.

The disciplinary rules impose limits on migration of lawyers "serving as a public officer or employee" that do not apply to defense lawyers seeking to become prosecutors.

SCR 20:1.11 states:

> (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee …
> (2) shall not …
> (ii) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by SCR 20:1.12(b) and subject to the conditions stated in SCR 20:1.12(b).

To avoid the risk government authority might be used for personal gain the disciplinary rules impose an absolute bar to negotiate for employment with a firm involved in cases handled by the job-seeking prosecutor. SCR 20:1.11(d)(2)(ii).[11]

Responsibilities to Former Clients of the Lawyer and Firm

A. Defense lawyer to prosecutor migration.

At the point when the criminal defense lawyer either withdraws from representation or begins work as a prosecutor, their current clients become former clients. Responsibilities to the lawyer's former clients and those of other lawyers in the firm[12] are addressed by SCR 20:1.9, which provides:

[9] SCRs 20:1.7(a)(1), (b)(3) SCR 20:8.4(f).

[10] *See* Wis. Stat. §978.06(5)(a). A similar prohibition would apply to part-time prosecutors. Wisconsin Formal Opinion EF-11-02.

[11] A prosecutor remains subject to SCR 20:1.7 even when seeking employment with a defense firm not involved in any of their cases and should be mindful of circumstances that could give rise to a personal conflict.

[12] The Committee views both district attorney and public defender offices as "firm[s]" within the definition in SCR 20:1.0(d).

SCR 20:1.9 Duties to former clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter 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 gives informed consent, confirmed in a writing signed by the client.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
(1) whose interests are materially adverse to that person; and
(2) about whom the lawyer had acquired information protected by sub. (c) and SCR 20:1.6 that is material to the matter; unless the former client gives informed consent, confirmed in a writing signed by the client.

(c) 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.

The limits imposed by SCR 20:1.9 protect former clients in situations where they are adverse to the lawyer's current clients.

Subsection (a) cautions that the former criminal defense attorney may not represent the state in "the same or a substantially related matter" in which they represented the former client.[13] The latter typically would involve a different case with similar or overlapping factual issues, for example, if multiple charges arose from a single episode of criminal conduct. Similarly, if a former client's prior record were relevant, such as at sentencing, a prosecutor would have a conflict in prosecuting a former criminal defense client on a new criminal charge.

Subsection (b) extends the limits on the migrated lawyer to cases of others in their prior firm in which the lawyer obtained information protected by SCR 20:1.6, such as through a limited appearance or consultation with other firm lawyers.

Although the rule permits conflicted representation with the informed consent of the client, this seems unlikely to be a viable option in most cases. First, consent from the former client's current lawyer is necessary for the lawyer to even contact the former client to discuss continued representation. SCR 20:4.2(a), and it is unlikely the former client's current counsel would give

[13] Consent for continued representation of the client would not be permissible. SCR 20:1.7(b)(3).

such consent. Second, informed consent is also required from the prosecutor's current client,[14] and the prosecutor would have to seek such consent from the person legally authorized to give such consent on behalf of the State of Wisconsin.[15]

Subsection (c) protects the information relating to the representation of former clients from adverse use.[16]

Application of SCR 20:1.9 to the criminal defense firm context suggests three classes of former firm clients: (1) those previously represented by the migrated lawyer (2) those represented by others in the firm in which the migrated lawyer obtained client information and (3) those represented by others in the firm in which the migrated lawyer was not involved nor obtained any confidential client information. The first two categories are subject to the protections outlined in SCR 20:1.9, the latter is not.[17]

Restrictions on the migrated lawyer and their prior firm focus on the interests of clients. In cases not involving the migrated lawyer's former clients or firm clients for which the migrated lawyer was exposed to client information there would generally be no prohibition of the migrated lawyer's involvement in cases defended by their former colleagues.[18]

To ensure compliance with the disciplinary rules, the migrating lawyer should prepare a list of all former firm clients fitting into the first two categories and make the list available to the

[14] See Restatement (Third) of the Law Governing Lawyers §132.

[15] See Wisconsin Formal Ethics Opinion EF-11-02.

[16] Much has been written about the "substantially related" test found in the ABA Model Rules and the Wisconsin Rules of Professional Conduct for Lawyers. SCR 201.9. In general, most decisions and academic discussions see the rule as primarily protecting the former client's confidential information, and, to a lesser extent, loyalty interests. *See* Wolfram, *Former Client Conflicts*, 10 Geo. J. Legal Ethics 677 (1997).

[17] In *State v. Tkacz*, 2002 WI App 281, 258 Wis. 2d 611, 654 N.W. 2d 37 (2002) the court rejected the defendant's request to disqualify a prosecutor in a drug-related case where the prosecutor had previously represented the defendant in an earlier unrelated drug case. The court rejected the challenge, finding there was no "substantial relationship" between the cases. Not discussed was the risk that prior confidential information provided to the attorney could have been used to the former client's detriment in the subsequent prosecution. Given the different standards for review of a conviction and disciplinary rule violations, the committee believes *Tkacz* is best viewed as relevant to whether a conviction should be reversed rather than as a guide for compliance with the disciplinary rules.

[18] One possible exception would be a situation in which the departing lawyer has a continuing financial interest in their former firm, for example, due to continuing agreements regarding fee division or professional liability that might be affected by how cases are prosecuted and resolved. Depending on the specifics of the situation, this could constitute a conflict of interest to be raised with both firm clients and the migrated lawyer's new firm and could require the departing lawyer to divest their interest in the firm. SCR 20:1.7(a)(2). The migrated lawyer should also be mindful of statutory conflict of interest restrictions on "local public officials". Wis. Stat. §19.59(1).

prosecutor's office and their firm. As explained later in this opinion, this list is necessary to implement appropriate screens for the migrated lawyer.

As a current "public officer or employee", conflicts of interest for the new prosecutor are controlled by SCRs 20:1.11(d) and (f)[19], which provide:

> (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
> (1) is subject to SCR 20:1.7 and SCR 20:1.9; and
> (2) shall not:
> (i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or
> (ii) negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by SCR 20:1.12(b) and subject to the conditions stated in SCR 20:1.12(b) ....
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> …. (f) The conflicts of a lawyer currently serving as an officer or employee of the government are not imputed to the other lawyers in the agency. However, where such a lawyer has a conflict that would lead to imputation in a nongovernment setting, the lawyer shall be timely screened from any participation in the matter to which the conflict applies.

Subsection (d) makes clear the migrated lawyer remains subject to the limits imposed by SCR 20:1.9 as well as the requirements of SCR 20:1.11(d)(2)(i). The practical effect of these disciplinary rules is that the lawyer should not be involved either in the prosecution of former clients or a former firm client for which they obtained confidential client information.[20]

The impact of these prohibitions on others in the prosecutor's office is mitigated by SCR 20:1.11(f), which provides that the conflicts of the migrated lawyer "are not imputed to the other lawyers in the agency." And, as an additional safeguard for former clients, the migrated lawyer must be "timely screened from any participation in the matter[s] to which the conflict applies." This provision is unique to Wisconsin; it is not part of the ABA Model Rule. If adequate screening is timely implemented, other prosecutors may handle any cases their migrated colleague could not due to their personal conflict.

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[19] *See* SCR 20:1.10(d).

[20] As discussed in n. 15, *infra,* restrictions on the migrated lawyer's involvement in cases handled by his prior firm may also be affected by whether the lawyer has a continuing financial stake in the firm.

B. Prosecutor to defense migration.

Conflicts of former prosecutors who have migrated to defense work are addressed by SCR 20:1.11(a)-(c) which provides:

> (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:
> (1) is subject to SCR 20:1.9(c); and
> (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.
> (b) When a lawyer is disqualified from representation under par. (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
> (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
> (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.
> (c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom …

The rules indicate two areas of concern.

The first involves matters the lawyer was involved in as a prosecutor. SCR 20:1.11(a)(2) prohibits representation of a client in a "matter in which the lawyer participated personally and substantially as a public officer or employee" unless the lawyer's prior government client consents.[21] The prohibition applies whether the lawyer previously acted as a lawyer or in some other capacity and whether or not the interests of the potential new client are adverse to the former government client. The conflict is imputed to others in the lawyer's firm, but other

[21] *See* n. 12, *infra*. For a discussion of "personal and substantial" participation and "matter," see Wisconsin Formal Ethics Opinion E-09-03.

lawyers in the firm could represent the client provided the conflicted lawyer is screened, receives no portion of the fee, and the lawyer's prior firm is given notice. SCR 20:1.11(b). Note this prohibition is both narrower than that applicable to private lawyers, which prohibit involvement only in the "same or substantially related matters", SCR 20:1.9(a), and broader, in that it applies whether the lawyer acted as a lawyer or in some other capacity and whether or not it was adverse to the client. SCR 20:1.11(d)(2)(i).

The second prohibition concerns use of confidential government information about a person obtained while the lawyer was a prosecutor. In such a situation, the lawyer may not represent a client who interests are adverse to a person about whom the lawyer has confidential government information in a situation in which the information could be used to the "material disadvantage" of the person. Consent to conflicted representation in this situation is not permitted, although others in the firm could represent the client provided the conflicted lawyer is timely screened. SCR 20:1.11(c).

Screening

When a government lawyer has migrated to a new position the issue of screening comes into play both with the lawyer's prior and current firms. Although the specific requirements may vary,[22] review of screening in general terms may be instructive.

SCR 20:1.0(n) states:

> "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.

In any situation, adequate screening would seem to require several components:

(1) development of system – the firm should have a system in place, preferably reflected in a written policy.

(2) training – all lawyers and non-lawyers in the firm should be trained to ensure they understand the system and their individual responsibilities in its implementation.

(3) timeliness – the system should be in effect as soon as possible after the conflict is detected. Requiring the migrated lawyer to provide a list of former firm clients for conflicts screening will facilitate accurate and timely implementation of the necessary screens.[23]

[22] *Cf.* SCR 20:1.11(b) (former government lawyer) with SCR 20:1.11(f) (current government lawyer).

[23] For an example of a screen found to be ineffective due to lack of timeliness, see *Nelson v. Green Builders, Inc.,* 823 F.Supp. 1439 (E.D. Wis. 1993).

(4) isolation of the conflicted lawyer – the screen must prevent contact between the isolated lawyer and the lawyer(s) and support staff working on the matter.

(5) protection of confidential information – the system must include procedures to protect relevant information in whatever form from being improperly disclosed.

Issues may arise in smaller offices with few lawyers and support staff. It may be difficult or impossible to create adequate screening procedures in such situations. The committee notes this issue but takes no position on what circumstances may render screening unworkable.[24]

Conclusion

This opinion outlines the ethical responsibilities of lawyers in criminal practice who migrate from defense to prosecution or prosecution to defense. It should be read in conjunction with Formal Opinions EF-19-01 (Job Negotiations with Opposing Firm or Party) and EF-11-02 (Conflicts in Criminal Practice Arising From Concurrent Part-time Employment as an Assistant District Attorney and a Lawyer in a Private Law Firm). Prior opinions E-80-12, E-86-18, E-86-15 and E-86-8 are withdrawn.

[24] Minimal compliance with chapter 20 may not avoid disqualification issues in litigation – *See State v. Retzlaff*, 171 Wis. 2d 99, 104, 490 N.W. 2d 750 (1992); *Burkes v. Hales,* 165 Wis. 2d 585, 599, 478 N.W. 2d 37 (1991).