

Ethical Issues in Representing Governmental Clients

Aviva Meridian Kaiser, Ethics Counsel
State Bar of Wisconsin

I. Representing Governmental Clients: An Introduction

A. Same Obligations Apply to Lawyers Representing Government Clients that Apply to Lawyers Representing Private Clients, But

1. The traditional rules of professional conduct governing the conduct lawyers are not easily applied to government lawyers. They assume an attorney-client relationship typical to private lawyering and rely on responsibility to a single client.
2. When a lawyer is employed by the government, however, the picture becomes murkier. Representing the government often involves undelineated clients with conflicting interests. Government attorneys must exercise greater discretion with respect to policy questions and apply often abstract, transsubstantive values. By comparison, lawyers who represent private clients, represent a distinct client who ordinarily forms objectives and goals prior to retaining counsel. The rules of professional conduct are premised on this type of representation, and require a lawyer to adhere to the paramount values of loyalty, zeal, and confidentiality with respect to his or her jurisdiction's rules of professional conduct. These rules prohibit a lawyer from imposing personal goals or agendas in the course of litigation or counseling. Rather, an attorney should act as a conduit of the client's own goals. Jane Datillo, *Representing the Public's Interest: Ethical Issues Confronting State Attorneys General Generally, and Multistate Litigators Specifically*, <http://web.law.columbia.edu> (2008).
3. The rules require that an attorney know exactly who her clients are and the specific content of their goals. Both of these elements can be unclear in agency representation. An agency lawyer may define his or her client narrowly or broadly. The government lawyer may have similar latitude in defining the agency's goals. *Id.*
4. The rules are even more difficult to adapt to the practice of state attorneys general than to other government or agency lawyers. Although a large portion of the work done by state attorney general offices is agency representation, state attorneys general have another role to play. In addition to the reactive work done in representing the state and state agencies in a more traditional attorney-client relationship, a state attorney general often serves as a self-initiating plaintiff's attorney. *Id.*
5. In either role, the attorney general may be required to prioritize the rights or interests of certain groups of constituents over those of other groups. In addition to these groups of clients with conflicting interests, the state attorney general must aim to serve the interests of the state as a whole – interests which themselves compete and may be defined in numerous formulations. A state attorney general may weigh the state's overall economic welfare, for example, against the economic welfare of a certain class of citizens or certain citizens. Economic interests must at times be weighed against issues of human dignity, health, and

fundamental fairness. A state attorney general may exercise extraordinary discretion, and the more discretion he or she exercises, however, the further he or she departs from the reach of the rules. *Id.*

6. Although courts and commentators traditionally invoke the “special” role of the government lawyer, the rules of ethics for government lawyers “are, for the most part, the same as those governing lawyers generally.” Hazard, *Conflicts of Interest in Representation of Public Agencies in Civil Matters*, 9 Widener J. Pub. L. 211, 212 (2000).
7. According to the ABA Formal Ethics Op. 97-405 (1997), “[w]hile lawyers who serve as public officers or employees are singled out for special treatment under a few rules, e.g., Rule 1.11 (‘Successive Government and Private Employment’) and 3.8 (‘Special Responsibilities of a Prosecutor’), it has generally been assumed—correctly in our view—that such lawyers are in most other respects subject to the same obligations in representing their government client that apply to lawyers representing private clients.”

B. Statutory Responsibilities

1. The “special” problems of lawyers who represent governmental clients arise out of the overlapping and sometimes contradictory responsibilities they owe their various clients.
2. Typically, the clients include entities, elected officials, appointed officials, supervisory employees, and “line” employees. The authority of each governmental client—as well as that of each lawyer who is a public officer or employee—must be derived from constitutions, charters, statutes, ordinances, rules, and regulations, including the professional conduct standards that apply to lawyers generally. See Green, *Must Government Lawyers “Seek Justice” in Civil Litigation?*, 9 Widener J. Pub. L. 235, 269-70 (2000) (“Whether one views the client as the government, a government agency, or a government official, the client is distinctive in at least this respect: the client owes fiduciary duties to the public. It may then be suggested that the government lawyer owes some derivative duties to the public.”); Moliterno, *The Federal Government Lawyer’s Duty to Breach Confidentiality*, 14 Temp. Pol. & Civ. Rts. L. Rev. 633, 637 (2005) (“The government lawyer functions in a direct line from some legitimate articulator of the public interest.”).

II. Background: Rules of Professional Conduct Specifically Relating to Government Lawyers

A. SCR 20 Preamble: A Lawyer’s Responsibilities [18]

Paragraph [18] recognizes that “the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships.” For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment.

B. SCR 20:1.0(d)

The definition of “firm” or “law firm” includes the legal department of a government entity.

C. SCR 20:1.11

This Rule addresses conflicts created when a lawyer moves between public and private employment, in either direction, or from one public-sector job to another. It also governs the imputation of conflicts.

D. SCR 20:1.10 ABA Comment [7]

Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.

A 2002 amendment to this comment made clear that Model Rule 1.10 is not applicable to former or current government lawyers, and explained that Rule 1.11(d) displaces Rule 1.10 not only when a lawyer is representing the government “after having served private clients,” as the comment had stated, but also when a lawyer is representing the government “after having served in private practice, nongovernmental employment, or in another government agency.”

E. SCR 20:1.13 ABA Comment [9]

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. See Scope [18]. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority. See Scope.

F. SCR 20:4.2 ABA Comment [4]

[4] This Rule does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not

prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule through the acts of another. See Rule 8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

G. SCR 20:3.8

This Rule specifies the professional responsibilities of prosecutors.

III. Who Is the Client?

Defining whom the government lawyer represents is an essential first step since traditional concepts of professional responsibility are based on the relationship with a represented client.

A. Differing Views for Identifying the Client

1. Four possible clients have been identified for the government lawyer: 1. the agency official; 2. the agency itself; 3. the government; and 4. 'the people,' sometimes termed 'the public interest'. Catherine Lanctot, *The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: the Three Hardest Questions*, 64 S. CAL. L. REV. 951, 1004.
2. One commentator on this subject analyzed three models for determining the identity of the client or clients of a publicly employed attorney: the public at large, the government as a whole, or a specific agency or supervisor. The author's recommendation was that the ABA should amend the official Comment to Model Rule 1.13 to specify that "the government lawyer's client is the agency that employs her.... [T]he fact that the lawyer may be subject to miscellaneous federal regulations or policies (i) does not change the identity of the client, and (ii) cannot be used to justify decisions in the course of representation that are based on policy considerations that extend beyond the best interests of the agency." Panas, *The Miguel Estrada Confirmation Hearings and the Client of a Government Lawyer*, 17 Geo. J. Legal Ethics 541, 562 (2004).
3. In many cases, one or two of the four will emerge as the dominant client. However, the government lawyer ought not to lose sight of the rest while advocating for one particular idea of client. Often, identifying the dominant client depends on an ad hoc determination of how the relationship "seems." In a criminal prosecution, the government lawyer represents the sovereign and wields enormous power. When an agency or agency official is a party in a civil case that's not specific to the government's role as sovereign or representative of the people, "the government seems more like a private party." Bruce A. Green, *Legal Ethics for Government Lawyers: Straight Talk for Tough Times: Must Government Lawyers "Seek Justice" in Civil Litigation?*, 9 WIDENER J. PUB. L. 235, 236.

4. “Where the Attorney General represents the State as an entity and not its officers or agencies, for example, ...or when the State sues or is sued and no agency or officer is a named party, the Attorney General has discretion that normally reposes in the client in other circumstances, and again he is both the client and the attorney for all practical purposes.” See generally Gilmore, *Who Is the Public Attorney's Client? How Do the Public Attorney's Rules for Conflict of Interest Differ From the Private Attorney's*, 45-FEB Advocate (Idaho) 10, 10 (2002).
5. For a thorough review of how the role of the publicly employed government lawyer varies with different models of client identity, see Note, *Government Counsel and Their Obligations*, 121 Harv. L. Rev. 1409, 1411 & n. 17 (2008) (government lawyers should be charged with gatekeeping responsibilities similar to those imposed on corporate lawyers).

B. Clients Whose Interests Conflict

1. The publicly employed government lawyer may be statutory counsel to clients who are at odds with each other or whose interests or positions are in conflict in a particular matter. See Simon, *Propter Honoris Respectum: The Professional Responsibilities of the Public Official's Lawyer: A Case Study From the Clinton Era*, 77 Notre Dame L. Rev. 999, 999-1000 (2002) (public-official client “occupies institutional role entailing public duties that potentially conflict with her individual interests,” and “sometimes has a selfish interest in avoiding responsibility for her decisions and sometimes finds lawyers distinctly useful for this purpose”).
2. ABA Comment [9] to SCR 20:1.13 states that “in a matter involving the conduct of government officials, a government lawyer *may have authority under applicable law* to question such conduct more extensively than [would] a lawyer for a private organization in similar circumstances.”
3. The majority view is that a publicly employed lawyer has more latitude than a private practitioner in representing clients with conflicting interests. Rationales include the need for uniform legal policy area-wide (e.g., nationwide, statewide, countywide, citywide, etc.); the salaried government lawyer's nonsusceptibility to many of the private practitioner's economic incentives; the lawyer/public servant's responsibility to serve the public interest; a broader view of the client interests involved; a different view of the confidentiality obligation involved; and the need to avoid spending public funds to retain separate counsel. See, e.g., *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003); *Env'tl. Prot. Agency v. Pollution Control Bd.*, 372 N.E.2d 50 (Ill. 1977); *Superintendent of Ins. v. Attorney General*, 558 A.2d 1197 (Me. 1989); *Humphrey v. McLaren*, 402 N.W.2d 535 (Minn. 1987); *State ex rel. Comm'r of Transp. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734 (Tenn. Ct. App. 2001); see generally Berenson, *The Duty Defined: Specific Obligations That Follow From Civil Government Lawyers' General Duty to Serve the Public Interest*, 42 Brandeis L.J. 13, 47-53 (2003).
4. In *Granholm v. Michigan Pub. Serv. Comm'n*, 625 N.W.2d 16 (Mich. Ct. App. 2000), the court declared Michigan's attorney general free to represent opposing state agencies in litigation. Only if the attorney general “chooses to stand in opposition to a state agency or department as an actual party litigant and yet simultaneously attempts to represent that state agency in the litigation” is a conflict of interest created. Because the court found such a conflict in the case before it, it ordered the attorney general to file either a client consent to the dual

representation or a stipulation of substitution of counsel for the state's public service commission.

5. Civil rights suits against public officers or employees can create intractable conflicts problems for publicly employed lawyers. The typical claim seeks punitive as well as compensatory damages against a municipality, a municipal entity, and several municipal officers and employees in their individual as well as official capacities. The lawyer defending one of these actions may find that defending the client in his official capacity would be at the expense of protecting the client in his individual capacity. An employee's defense may also be at odds with that of the entity or the officers, for example if the employee's defense is that he was obeying his supervisor's instructions, or doing his best in the face of inadequate training and supervision by his supervisors, or hampered by the municipality's inadequate staffing or budget allocations. Furthermore, the same government law office may be representing the municipal employer's interest in a disciplinary action against one of the individual defendants.

III. Duty to Give “Corporate Miranda Warnings” to Organization’s Officers and Employees

An analysis of the lawyer’s ethical obligations starts with the question, “Who is the lawyer’s client?” The lawyer for an organization represents the organization, not its officers, employees, or shareholders. SCR 20:1.13(a) states: “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” “Constituents” (as defined in ABA Comment [1] to SCR 20:1.13) means the corporation’s officers, directors, employees and shareholders.

A. Organization’s Officers and Employees

Although the in-house lawyer’s client is the organization, the organization’s officers and employees that the lawyer deals with every day are something more than “third parties.” As the duly authorized agents of the organization, they speak for the organization: they direct its affairs. They may also determine the in-house lawyer’s salary and prospects for promotion. On a more personal level, in-house counsel will often develop informal working relations with the organization’s “constituents” and develop close friendships. Thus the role and the loyalties of in-house counsel are clear in concept but potentially ambiguous in real-life terms. While it is usually clear who the organization’s lawyer represents and where the lawyer’s loyalties should lie, there are some complicated situations.

- B. The situation becomes more complicated, however, when an organization’s employee with whom the attorney is dealing has interests that may be in conflict with those of the organization. SCR 20:1.13(f) provides guidance in such situations. “In dealing with an organization’s directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”
 1. To whom should the conflict be apparent?

In 2002, the ABA answered the question by deleting “it is apparent” and substituting “the lawyer knows or reasonably should know.” ABA Model Rule 1.13(f). The adversity of interests

must be apparent to a lawyer of reasonable prudence and competence. Wisconsin has not adopted the 2002 ABA formulation.

2. On its face, SCR 20:1.13(f) uses the phrase “shall explain” and thus appears to require the attorney to remind the organization’s employee that the attorney represents the organization in every case where there is an adversity of interests. ABA Comment [10] advise that the lawyer should advise the constituent “that such person may wish to obtain independent representation” and that “discussions between the lawyer for the organization and the individual may not be privileged.” Comment [11] muddies the water, however, by adding: “Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.”
3. Corporate counsel may find additional guidance in SCR 20:4.3, “Dealing with Unrepresented Persons.” SCR 20:4.3 provides:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall inform such person of the lawyer’s role in the matter. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.
4. Read together, SCR 20:4.3 and 1.13(f) stand for the proposition that when a lawyer, acting on behalf of a client, deals with an unrepresented person, the burden is on the lawyer to clear up any misunderstandings about whom the lawyer represents and where the lawyer’s loyalties lie. In the organizational context, Rule 1.13(f) requires in-house counsel to clarify his loyalties whenever he is dealing with an officer, employee, or other constituent whose interests are adverse to the organization’s. Whenever counsel knows or reasonably should know of such adversity, he or she must at a minimum remind the officer or employee that he or she represents the organization. In addition, to avoid misunderstanding about counsel’s role, it will in many cases be prudent for counsel to suggest that the individual obtain independent representation and to make it clear that the individual may not claim the protections of the attorney-client privilege for communications with counsel.
5. The consequences of failure to provide the required warnings can be severe. The lawyer may be subject to professional discipline. Moreover, an attorney-client relationship can result if the organization’s officer or employee reasonably relies on the lawyer to protect his or her interests, and the lawyer knew or should have known of the reliance but did nothing to discourage it. Thus, the in-house counsel who fails to give the required warnings may find himself with an unanticipated and unwanted attorney-client relationship with an organization’s officer or employee. That inadvertent client relationship may in turn lead to the lawyer’s disqualification in any subsequent legal proceedings involving the officer or employee, and perhaps even the disqualification of the entire organization’s law department.

Effective Screening for Public Officers or Employees

Aviva Meridian Kaiser, Assistant Ethics Counsel
State Bar of Wisconsin

The Wisconsin Rules of Professional Conduct for Attorneys permit law firms to screen an “infected lawyer” in seven specific circumstances. In these circumstances, a law firm, without client consent, may use a screen to prevent the disqualifying conflict of interest of one lawyer from being imputed to the entire law firm. These circumstances arise from work that a lawyer did at a prior firm, from prior work that a lawyer did while working for the government, from discussions with prospective clients, and from work performed by a nonlawyer at a prior firm. The primary concern in these circumstances is the protection of the former client’s information that is subject to the duty of confidentiality from either its disclosure or from its use to the disadvantage of the former client.

This outline first identifies the requirements of an effective screen. It then identifies the circumstances in which screening is permitted, and it also provides practice pointers for erecting an effective screen. Following this outline is a checklist for erecting an effective screen and a sample screening memorandum.

A. The Definition of “Screened” and Its Requirements

SCR 20:1.0(n) defines “screened” and establishes the requirements for an effective screen.

(n) “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.

ABA Comments [9] and [10] to SCR 20:1.0 provide further guidance.

[9] The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

[10] In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

Based on the definition of “screened” and the Comments, an effective screen has three requirements: 1. the timely imposition of procedures within the firm, 2. the isolation of the disqualified lawyer from any participation in the matter, and 3. the protection of information subject to the duty of confidentiality.

1. The Timely Imposition of Procedures within the Firm

One factor that courts consider in determining the adequacy of a screen is whether the screening arrangement was set up at the time the potentially disqualifying event occurred, either when the lawyer first joined the firm or when the firm accepted a case presenting an ethical problem. *Silicon Graphics, Inc. v. ATI Techs. Inc.*, 741 F. Supp. 2d 970, 982 (W.D. Wis. 2010) (citing *LaSalle National Bank v. Lake County*, 703 F.2d 252, 259 (7th Cir. 1983)).

The better practice is to identify the conflict and erect the screen before the conflict arises, i.e., before the personally disqualified lawyer or nonlawyer arrives at the firm. For example, in *Silicon Graphics*, the law firm notified all the members of the litigation team three weeks before the personally disqualified lawyer joined the firm that a screen was being erected. *Id.* at 983.

In contrast, in *LaSalle National Bank*, the screening arrangements were not established until the disqualification motion was filed. Even though the personally disqualified lawyer stated in his affidavit that he did not disclose to any person associated with the firm any information relevant to the litigation, the court upheld the disqualification of the entire firm because “no specific institutional mechanisms were in place to insure that information was not shared, even if inadvertently, between the months of February and August.” *LaSalle National Bank* at 259.

Moreover, an informal understanding as to nonparticipation, even when accompanied by uncontradicted affidavits denying past or future sharing of confidences, did not constitute an effective screen. *Nelson v. Green Builders, Inc.*, 823 F. Supp. 1439, 1448 (E.D. Wis. 1993).

2. The Isolation of the Disqualified Lawyer from any Participation in the Matter

In determining the adequacy of the isolation, the courts consider two related factors: the likelihood of contact between the personally disqualified lawyer and the specific lawyers responsible for the present representation; and the size of the law firm and its structural divisions. *Schiessle v. Stephens*, 717 F.2d 417, 421 (7th Cir. 1983).

These related factors address one particular concern: the risk that the personally disqualified lawyer will inadvertently disclose information because he or she is part of the same practice group or in the same office as the lawyers responsible for the case. See *Silicon Graphics* at 983. In response to this concern, the personally disqualified lawyer in *Silicon Graphics* was prohibited from working on any case with any lawyer who was working the matter at issue, and the personally disqualified lawyer was prohibited from attending any meetings on any

subject with any lawyer who had worked on the matter at issue, including department meetings or quarterly partners meetings. *Id.* at 984.

Physically isolating the disqualified lawyer, such as placing the disqualified lawyer in an office away from the offices of the lawyers working on the matter, substantially reduces the chances of inadvertent disclosure. Using separate support staff for the disqualified lawyer and the lawyers working on the matter further reduces the chances of inadvertent disclosure.

The risk of inappropriate contact between the personally disqualified lawyer and the specific lawyers working on the matter at issue is much greater in smaller firms with little or no structural divisions. While no case has categorically rejected the efficacy of isolation in small firms, some cases have concluded that the isolation was not sufficient.

For example, in *Cheng v. GAF Corp.*, 631 F.2d 1052 (2d Cir. 1980), the court concluded that the screen was ineffective because there still existed a continuing danger that the personally disqualified lawyer might unintentionally transmit information to the specific lawyers in the matter at issue. Even though the personally disqualified lawyer was in a different division of the 35-lawyer firm and had submitted affidavits that he had not worked on the matter at issue, that he had not disclosed any confidences nor discussed the merits of the case, and that the firm did not permit him to have any substantive involvement in the case, the court “harbored doubts as to the sufficiency of these preventative measures.” *Id.* at 1058. While the court offered no reasoning for its conclusion, the description of the screen seems to indicate that it was not as robust as other screens. Noticeably absent from the description was the physical isolation of the files and the specific instructions to all lawyers and nonlawyers not to discuss the matter with the screened lawyer.

On the other hand, in *People v. Davenport*, 779 N.W.2d 257 (Mich. App. 2009), the court held that the prosecutor implemented an effective screen even though the office employed only two attorneys.

3. The Protection of Information Subject to the Duty of Confidentiality

In determining the adequacy of the screen, the courts also consider preventative measures that insulate against future disclosure of protected information by the screened lawyer to the firm. These measures are designed to prohibit the flow of information from both sides of the screen.

Establishing physical segregation or barriers to implement the screen reduces the chance of disclosure of protected information. For paper files, restrict access to them by keeping them in locked file cabinets and restrict access to the keys. For digital files, protect them with a password and withhold the password from the screened lawyer or nonlawyer.

In addition to these three requirements established by the definition of “screened,” each specific circumstance in which screening is permitted has additional requirements established by the particular rule.

B. When Screening Is Permitted

The Wisconsin Rules permit screening in seven specific circumstances. This outline discusses four of the circumstances, three of which are contained in SCR 20:1.11 and one which applies to nonlawyers.

1. SCR 20:1.11(b) provides for screening when the conflict arises from work on a specific matter in which the lawyer participated personally and substantially while serving as a public officer or employee of the government.

SCR 20:1.11 governs special conflicts of interest for former and current government officers and employees. Subsection (b) states:

(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.

Consequently, when the conflict arises from work on a specific matter in which the lawyer participated personally and substantially while serving as a public officer or employee of the government, the requirements for screening are:

- timely imposition of procedures with the firm,
- isolation of the disqualified lawyer from any participation in the matter,
- protection of information subject to the duty of confidentiality,
- prevention of any part of the fee from the matter being apportioned to the disqualified lawyer, and
- prompt written notice of the screen to the appropriate government agency.

2. SCR 20:1.11(c) provides for screening when the conflict arises from a lawyer having confidential government information about a person that was acquired when the lawyer was a public officer or employee.

SCR 20:1.11 governs special conflicts of interest for former and current government officers and employees. Subsection (c) states:

(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.

Consequently, when the conflict arises from a lawyer having confidential government information about a person that was acquired when the lawyer was a public officer or employee, the requirements for screening are:

- timely imposition of procedures with the firm,
- isolation of the disqualified lawyer from any participation in the matter,
- protection of information subject to the duty of confidentiality, and
- prevention of any part of the fee from the matter being apportioned to the disqualified lawyer.

3. SCR 20:1.11(f) provides for screening of a government employee when a conflict arises from work on a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment.

SCR 20:1.11 governs special conflicts of interest for former and current government officers and employees. Subsection (f) states:

(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.

Consequently, when the conflict arises from work on a matter in which the lawyer participated personally and substantially while in private practice or in nongovernment employment, the requirements for screening are:

- timely imposition of procedures within the government agency,
- isolation of the disqualified lawyer from any participation in the matter, and
- protection of information subject to the duty of confidentiality.

4. SCR 20:1.10 ABA Comment [4] provides for screening when the conflict arises from work performed by a nonlawyer while that nonlawyer was at a prior firm.

ABA Comment [4] to SCR 20:1.10, the general rule for imputed disqualification, states:

[4] The Rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a nonlawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before

the person became a lawyer, for example, work that the person did while a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the nonlawyers and the firm have a legal duty to protect. See Rules 1.0(k) and 5.3.

Consequently, when the conflict arises from work performed by a nonlawyer while that nonlawyer was at a prior firm, the requirements for screening are:

- timely imposition of procedures with the firm,
- isolation of the disqualified lawyer from any participation in the matter, and
- protection of information subject to the duty of confidentiality.

Comment [4] does not, however, permit screening in circumstances that do not arise from the nonlawyer moving from one firm to another. For example, a screen cannot be used to insulate a lawyer from information that could be “significantly harmful” when that information is obtained by a nonlawyer assistant who conducts the initial interview with the prospective client. Wisconsin Formal Ethics Opinion EF-11-03 (2011).

In addition to the seven circumstances permitted under the Wisconsin Rules of Professional Conduct, federal law governing imputed disqualification permits screening in circumstances not permitted by Wisconsin law. *Silicon Graphics, Inc. v. ATI Techs. Inc.*, 741 F. Supp. 2d 970, 982 (W.D. Wis. 2010). Under federal law, a law firm can avoid imputation through screening regardless of the scope of the work that the individually disqualified lawyer performed for the former client. Under Wisconsin law, however, screening is allowed only if the individually disqualified lawyer performed “no more than minor and isolated services in the disqualifying representation.” SCR 20:1.10(a)(2).

C. Practice Pointers for Erecting an Effective Screen

The effectiveness of a screen is “based on objective and verifiable evidence presented to the trial court and must be made on a case-by-case basis.” *Schiessle v. Stephens*, 717 F.2d 417, 421 (7th Cir. 1983). See also *Nelson v. Green Builders, Inc.*, 823 F. Supp. 1439, 1447 (E.D. Wis. 1993). The burden of proof is on the party seeking to cure the imputed disqualification with screening to demonstrate that the use of screening is appropriate for the situation and that the disqualified lawyer is timely and properly screened.

In making its determination, the court may consider factors such as “the size and structural divisions of the law firm involved, the likelihood of contact between the tainted lawyer and the specific lawyers responsible for the present representation, and the existence of rules which prevent the tainted lawyer from gaining access to relevant files or other information pertaining to the present representation or which prevent the tainted lawyer from sharing in the fees derived from the representation.” *Id.*; *Schiessle* at 421.

Checklist for Erecting an Effective Screen

The following practice pointers, in the form of a checklist, are derived from the Rules and the factors that the courts have considered when assessing the adequacy of a screen. Because the effectiveness of a screen is dependent on the particular facts of the case, not every item in the checklist may be necessary or possible in all instances.

- Develop and implement policies and procedures that set out why a screen is needed, when and how a screen will be put into effect, and what will happen if a screen is violated. The effectiveness of a screen depends on the development of routine internal policies and procedures. Review these policies and procedures on a periodic basis to make sure they reflect any changes in law firm management.

Note: SCR 20:5.1(a) and 5.3(a) require that a law firm has in effect policies and procedures giving reasonable assurance that all lawyers and nonlawyers in the firm conform to the Rules. Policies and procedures that set out why a screen is needed, when and how a screen will be put into effect, and what will happen if a screen is violated are necessary to erecting an effective screen.

- Make sure that all lawyers and nonlawyers are familiar with these policies and procedures. SCR 20:5.1 and 5.3 require a law firm to take appropriate steps to educate all lawyers and nonlawyers.
- Impose consequences when the screening policies and procedures are ignored or violated.
- Undertake due diligence to ascertain whether the new lawyer's or nonlawyer's employment at the firm will give rise to any conflicts of interest with former clients. Search the law firm's records to identify all cases on which the former law firm of the new lawyer or nonlawyer is opposing counsel. To be timely, screens must be in place when the potentially disqualifying event occurs: effective screening begins during the hiring process.
- Draft a Screening Memorandum that fully and accurately describes the screen.
- Require the Screening Memorandum to be signed by the screened lawyer or screened nonlawyer and any lawyers or nonlawyers who have been, or are anticipated to be, working on the screened matter.
- Require outside vendors, experts and other personnel working on the screened matter to sign an acknowledgment that they have read and will comply with the terms of the Screening Memorandum.
- Provide prompt written notice of the screen to the affected former client, the appropriate government agency, or to the prospective client.
- Provide prompt written notice of the screen to all lawyers and nonlawyers within the firm.
- Prohibit the screened lawyer or nonlawyer from maintaining any material concerning the

former client and from sharing any material concerning the former client with the lawyers and nonlawyers within the firm.

- Prohibit the screened lawyer or nonlawyer from working on any case with any lawyer who is working on the screened matter.
- Prohibit the screened lawyer from attending any meetings on any subject with any lawyer who is working on the screened matter, such as department meetings or quarterly partners meetings.
- Instruct the screened lawyer or nonlawyer in writing not to discuss the prior matter with the new firm.
- Instruct all lawyers and nonlawyers in writing to isolate the screened lawyer or nonlawyer from communications about the matter.
- Prevent the screened lawyer or nonlawyer from having access to the relevant files. For paper files, restrict access by keeping them in locked file cabinets and by restricting access to the keys. The files should be marked so that they are easily identified. For digital files, protect them with a password and withhold the password from the screened lawyer or nonlawyer.
- Develop and implement physical barriers that physically isolate the screened lawyer or screened nonlawyer from lawyers and nonlawyers working on the screened matter.
- Use different support staff for the screened lawyer or screened nonlawyer and for the other lawyers and nonlawyers working on the screened matter.
- Monitor and document the continued existence and impermeability of the screen by sending periodic electronic or written reminders to all lawyers and nonlawyers.
- Monitor and document the continued existence and impermeability of the screen by requiring periodic acknowledgment or affidavits by the screened lawyer or nonlawyer that he or she has not breached the screen.
- Prohibit fee sharing on the screened matter. A screened lawyer or nonlawyer may receive compensation or a bonus based on the profitability or revenue of the entire firm, which includes the screened matter, but may not receive compensation or a bonus directly from the fees or revenue of the screened matter.
- Keep records documenting that the screen has been complied with by the law firm.

Screening Memorandum [Sample]

To: [Names] or [Attached Distribution List] or [All Lawyers and Staff]
From: [Lawyer in the Firm Responsible for Maintaining the Screen]
Date: [Current Date]
Re: Screening Procedures Adopted with Respect to [Name of Matter or Name of Client]

This Screening Memorandum confirms the Screening Procedures that have been adopted and implemented by _____ [Name of Firm] in connection with the current representation of _____ [Name of Client] in _____ [Name of Matter].

or

This Screening Memorandum confirms the Screening Procedures that have been adopted and implemented by _____ [Name of Firm] in connection with the current and future representation of _____ [Name of Client].

The "Screened Lawyer" or "Screened Nonlawyer" is _____ [Name].

The Screening Procedures

The Screened Lawyer (or Screened Nonlawyer) is prohibited from participating in any matter related to _____ [Name of Former Client].

The Screened Lawyer (or Screened Nonlawyer) is prohibited from discussing any aspect of any matter related to _____ [Name of Former Client].

The Screened Lawyer (or Screened Nonlawyer) is prohibited from working on any case with any lawyer who is working on the screened matter.

The Screened Lawyer (or Screened Nonlawyer) is prohibited from attending any meetings on any subject with any lawyer who is working on the screened matter, such as department meetings or quarterly partners meetings.

All lawyers and nonlawyers in _____ [Name of Firm] are prohibited from discussing any matters concerning _____ [Name of Former Client] in the presence of the Screened Lawyer (or Screened Nonlawyer).

All lawyers and nonlawyers in _____ [Name of Firm] are prohibited from receiving any information from the Screened Lawyer (or Screened Nonlawyer) relating to any matters concerning _____ [Name of Former Client].

All lawyers and nonlawyers in _____ [Name of Firm] are prohibited from permitting the Screened Lawyer (or Nonlawyer) to review any documents or any other materials relating to any matters concerning _____ [Name of Former Client].

The Screened Lawyer (or Screened Nonlawyer) is prohibited from having access to the files relating to any matters concerning _____ [Name of Former Client]. Access to paper files is restricted by keeping

the files in locked file cabinets located _____. Keys to the file cabinets are controlled by _____ and issued to others only _____. Access to electronic files is restricted by protecting the files with a password and withholding the password from the Screened Lawyer (or Screened Nonlawyer).

The Screened Lawyer (or Screened Nonlawyer) will be assigned different support staff from the lawyers and nonlawyers working on the screened matter.

The Screened Lawyer's (or Screened Nonlawyer's) office is _____ (physically separated) from the offices of the lawyers and nonlawyers working on the screened matter.

All lawyers, nonlawyers, and outside vendors, experts, or other personnel working on the screened matter must sign an acknowledgment (or affidavit) that they have read and will comply with the terms of this Screening Memorandum.

The Screened Lawyer (or Screened Nonlawyer) must sign an affidavit that he/she has read and will comply with the terms of this Screening Memorandum.

A copy of this Screening Memorandum will be promptly sent to _____ (former client, government agency, prospective client).

A copy of this Screening Memorandum will be promptly given to all lawyers and nonlawyers in the firm.

Any lawyer, nonlawyer, outside vendor, expert, or other personnel working on the screened matter who violates these Screening Procedures will be subject to discipline.

[Name of Firm] will monitor and document the continued existence and impermeability of the screen by sending periodic electronic or written reminders to all lawyers and nonlawyers.

[Name of Firm] will monitor and document the continued existence and impermeability of the screen by requiring periodic acknowledgment or affidavits by the Screened Lawyer (or Screened Nonlawyer) that he or she has not breached the screen.

The Screened Lawyer is prohibited from receiving any part of the fee from the screened matter.

All records establishing and documenting these Screening Procedures will be retained consistent with [Name of Firm]'s document retention policy.

To confirm your acknowledgment of these procedures, please sign and date the **Acknowledgement of Screening Procedures Adopted with Respect to [Name of Matter or Name of Client]**, which is attached to this Screening Memorandum, and return it to _____ as soon as possible.

Acknowledgement of Screening Procedures Adopted with Respect to

[Name of Matter or Name of Client]

This acknowledgment confirms that:

I have received the memorandum entitled "Screening Procedures Adopted with Respect to [Name of Matter or Name of Client]" dated [...]; and

I have complied with and will continue to comply with the terms of the Screening Procedures Adopted with Respect to [Name of Matter or Name of Client]" dated [...].

Date: _____

Name: _____
(Please print)

Signature: _____