
Wisconsin Ethics Opinion E-90-05: Lawyer who represents Municipality as Defense Counsel in State Prosecutions

Revised April 13, 2020

Question:

May a part-time lawyer for a municipality or a member of the lawyer's law firm represent defendants in state prosecutions in which the municipality's law enforcement personnel are potential witnesses?

Opinion:

For purposes of this opinion, it is assumed that a private law firm represents a municipality. It is also assumed that criminal cases are prosecuted by the district attorney who represents the state but works with the municipality's police department on cases arising in the municipality.

When a lawyer from the firm represents a criminal defendant where one or more police officers from the municipality are adverse witnesses, the lawyer faces two problems. First, the lawyer owes a duty of confidentiality to the municipality that covers any information that relates to the representation of the municipal client. Lawyers from the firm may have access to information about the department or its officers that may be useful in cross examining a police officer. Disclosure of any information that relates to the representation of the municipality in defense of a criminal defense client would violate SCR 20:1.6(a) and adverse use of such information even absent disclosure would violate SCR 20:1.8(b). Second the firm owes a duty of loyalty to the municipality, and attacking the credibility of the municipality's police officers, even without disclosure or use of information protected by SCR 20:1.6, is directly adverse to the interests of the municipality. See SCR 20:1.7(a)(1).

On the other hand, the failure to aggressively challenge the police involved in the case could deprive the criminal defense client of competent and diligent representation. See SCR 20:1.1, 20:1.3. Thus, simultaneous representation of the municipality and a criminal defendant when the municipality's police officers are involved would create a "significant risk that the representation of one or more clients [would] be materially limited by the lawyer's responsibilities to another client. . ." SCR 20:1.7(a)(2). This conflict is imputed to all members of the lawyer's firm and may not be screened. See SCR 20:1.10(a). No lawyers in the firm could

defend criminal cases involving the municipality's police department absent compliance with SCR 20:1.7(b).

In order to comply with SCR 20:1.7(b), the lawyer would have to reasonably conclude they could competently and diligently represent both clients notwithstanding the conflict of interest. It seems unlikely this is possible if competent representation of a defendant required vigorous cross examination of the municipality's police officers. SCR 20:1.7(b)(1). If so, the lawyer would have to obtain the informed consent of both clients, confirmed in separate writings signed by each client. In the case of the municipal client, the informed consent would have to come from a constituent of the municipal client who has the lawful authority to make such decisions on behalf of the municipal client. Ordinarily, this would not be the police officers involved in the matter.