
E-81-5 District attorney pro tempore conflict of interest

Question 1

May a lawyer appointed by the court to act as district attorney pro tempore in accordance with the provisions of Section 59.44(1), Wisconsin Statutes, while acting under such appointment, also act as defense counsel in criminal matters in that county?

Opinion

The above statute authorizes the appointment of an “acting district attorney” stating that any judge of a court of record may “appoint some suitable person to perform, for the time being or for the trial of such accused person, the duties of such district attorney, and the persons so appointed shall have all the powers of district attorney while so acting.”

Your request does not state whether the appointment involved would be for the trial of “an accused person” or “for the time being.” Therefore, we must necessarily consider both types of appointment.

(a) A district attorney pro tempore appointed for the trial of an accused person (being in effect a “special prosecutor”) has, with respect to the trial involved, all of the powers of the district attorney while so acting. Therefore, he may not at the same time appear against the state of Wisconsin in representing anyone charged with a crime in that county.

(b) A district attorney pro tempore appointed “for the time being” is likewise charged with all the powers and duties of the district attorney with all respect to all criminal matters arising in the county in which appointed (unless a county board has created the office of corporation counsel, he would likewise be charged with representing the county in civil matters). Therefore, during the period of said appointment, the appointee may not represent any person charged with a crime. Neither may he nor she, after the expiration of the appointment, represent or appear on behalf of anyone against whom he or she had issued a criminal complaint, or had conducted any stage of criminal proceedings.

The conflict of interest in each instance is obvious. Therefore, our answer to Question 1 is: “no.”

Question 2

If the answer to Question 1 is “no,” may any other members of the same law firm as that of the district attorney pro tempore be precluded from providing criminal defense representation in the court under which the district attorney pro tempore is acting?

Opinion

Again, we shall consider both types of appointment.

(a) If the lawyer has been appointed for a single trial and thus, in effect, is acting as what is generally referred to as “a special prosecutor” our answer is “no,” other members of the firm are not precluded. (It being obvious, however, that no member of the same law firm may represent the accused party.)

(b) However, if the appointment is “for the time being,” each member of the law firm would be precluded from providing criminal defense representation in the county in which the appointment had been made, since, for that time, the appointee would have all of the duties and responsibilities of the district attorney, and would be “an acting district attorney.”

In E-79-1 this committee quoted with approval a footnote from ABA Formal Opinion Number 342 which states:

“It has long been recognized that the disqualification of one lawyer in an organization generally constituted disqualification of all affiliated lawyers. The rule is based upon the close, informal relationship among law partners and associates and upon the incentives, financial and otherwise, for partners to exchange information freely among themselves when the information relates to existing employment.”

Consequently, since the district attorney pro tempore “for the time being” is precluded from acting as defense counsel for persons charged with a crime during the period of appointment, the other members of the law firm are likewise precluded.

Your attention is invited to SCR 20.48 which requires: “A lawyer should avoid even the appearance of professional impropriety.” Should the same law firm include both the district attorney pro tempore and his or her partners or associates acting as defense counsel in the same county, the appearance of professional impropriety is evident. (*See also* SCR 20.49(2).)

In view of Ethical Consideration SCR 20.48(6), it is the committee’s opinion that a member should accept an appointment as district attorney pro tempore only under the following conditions:

1. The proposed appointee promptly informs the appointment judge whether he or she and members of the firm are currently engaged in criminal defense work in order to permit the judge to make further inquiry if deemed advisable; and
2. No pending case in which the proposed appointee, or any member of his or her law firm, appears as defense counsel is venued in the county in which he or she is to be appointed.