
E-90-6 Conflicts, Office of State Public Defender

Facts

The State Public Defender Office (SPD) is considering establishing a special-conflicts office in Milwaukee. The office would:

- 1) handle the representation of one co-defendant when another co-defendant (or witness) is being represented by an attorney from the trial division of the SPD;
- 2) be organizationally separate from the SPD with its own budget;
- 3) include attorneys, support staff and supervisors who are entirely separate from the trial division;
- 4) keep all conflict files separate from trial division files, with access limited to conflicts-office employees; and
- 5) be housed separately from the trial division.

In addition, the SPD would obtain statutory authorization for the state public defender to delegate the authority to make final case decisions to the head of the conflicts office, and the state public defender would delegate that authority.

Question

May assistant SPD attorneys ethically represent co-defendants whose interests are in conflict if one attorney is a member of the regular trial division and the other attorney is a member of the special-conflicts office, as described above?

Opinion

Because the SPD is a “firm,” the Rules of Professional Conduct for Attorneys (RPC) prohibit the proposed representation unless the clients waive the disqualification in writing after consultation. SCR 20:1.10(a) and (d) and SCR 20:1.7(a)(2). See also *U.S. v. Tocco*, 575 F. Supp. 103 (N.D. Ill. 1983), *mot. den.* 581 F. Supp. 379 (N.D. Ill.), *late proceeding* 581 F. Supp. 384 (N.D. Ill.); and *Babb v. Edwards*, 412 So. 2d 859 (Fla. 1982). The state public defender may

wish to petition the Wisconsin Supreme Court for an amendment of the RPC to clarify its status as a “firm” under the proposed arrangement.

The role of the SPD appellate division raises another issue that also would be best addressed by the Wisconsin Supreme Court. Query: Would the establishment of two independent appellate divisions be necessary and sufficient to eliminate conflicts concerns? It has been held that public defender staff may not allege that another staff member was ineffective. *See, e.g., People v. Robinson*, 410 N.E.2d 121 (3d Dist. Ill. 1980).

We conclude that these issues should be addressed by the Wisconsin Supreme Court prior to the implementation of any SPD conflicts office. Generally, the concept appears workable provided that the issues that we have raised regarding appellate representation are resolved satisfactorily.