
Wisconsin Formal Ethics Opinion 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

July 5, 2011

Synopsis: An individual lawyer who works part-time as an Assistant District Attorney prosecuting defendants on behalf of the State of Wisconsin and part-time for a private law firm has a conflict of interest which would bar the lawyer from representing defendants in state criminal cases. That lawyer could still represent clients in opposition to the State of Wisconsin in non-criminal matters. The lawyer's conflicts would be imputed to lawyers in his private firm and could not be waived so that firm would be disqualified from representing defendants in state criminal cases. The lawyer's conflicts would not be imputed to lawyers in the District Attorney's Office at which the lawyer works provided the lawyer is timely screened from any participation in the matter, in which case that office could continue to prosecute any case against any party as to whom the lawyer had a conflict.

While a relatively rare situation, unusual difficulties may be encountered regarding conflicts of interest arising for lawyers and their law firms when the lawyer is employed part-time as a criminal prosecutor in a District Attorney's Office and part-time as a lawyer in a private law firm which might represent criminal defendants. Such a situation clearly raises conflict issues for the attorney and each of the firms for which the attorney works.¹

Conflicts for the Lawyer

SCR 20:1.7(a) prohibits a lawyer from undertaking representation adverse to a current client. So, in this situation, it is necessary to determine the lawyer's client when working as an Assistant District Attorney.

Determining the client represented by an Assistant District Attorney is not necessarily simple. Authorities considering the question most often approach it as a fact-based inquiry, taking into account such considerations as the authority of the District Attorney's Office and its relationship to other aspects of the government, the reasonable expectations of relevant government authorities, and the specific function that the lawyer is performing on behalf of the District Attorney's Office.² The Wisconsin Supreme Court has indicated that the client of the

¹In Wisconsin, a District Attorney's Office is included in the definition of "firm" for purposes of the disciplinary rules. SCR 20:1.0(d).

²See, e.g., ABA Formal Opinion 97-405, Restatement (3rd) of the Law Governing Lawyers, Section 97, Comment (c).

District Attorney is the State.³ However, there does not appear to be any Wisconsin statutes or case law defining the client relationship or examining its contours. Therefore, to address the potential for conflicts, it is necessary to look to the purpose and function of a District Attorney's Office.

Previous Wisconsin ethics opinions⁴ have implied, without explicitly stating, that District Attorney's Offices act on behalf of individual counties rather than the state as a whole. In the opinion of the Committee, this implication is now incorrect, as a series of factors support the conclusion that the State of Wisconsin is properly regarded as the District Attorney's client. District Attorneys were county employees at the time the older Wisconsin ethics opinions were drafted; they are now state employees. Criminal prosecutions are carried out on behalf of the State of Wisconsin, which is always named as the plaintiff in criminal prosecutions. The authority of District Attorney's Offices is defined by a state statute, section 978.05, Wis. Stats. While District Attorney's Offices operate to a certain extent independently, they do share information and cooperate on matters and, therefore, cannot be viewed as a series of wholly separate, county-based offices. If a District Attorney's Office is unwilling or unable to pursue a particular prosecution, responsibility for that prosecution is taken over by the state Attorney General's Office. District Attorney's Offices often work with investigative agencies which have broad jurisdiction throughout the state. Finally, ethics committees of other states and the ABA consistently view prosecutors as representing their respective states.⁵

The idea that a prosecutor represents the state is consistent with the common understanding that a part-time prosecutor may not represent criminal defendants in neighboring jurisdictions. The concerns behind this prohibition were well-stated by the ABA in Ethics Opinion 30 (1931):

It is a well-known fact that prosecutors are granted courtesies by the police departments, as well as the prosecuting authorities, of other cities and counties throughout the country. This practice is a great benefit to the administration of criminal justice. If prosecutors indulged in the practice of defending criminals in states [or counties] other than their own, this helpful cooperation might easily and quickly be withdrawn. Other evils, detrimental to the proper enforcement of criminal laws, are not difficult to conceive, were prosecutors also acting as defenders of those accused of crime. Subjectively, the effect of such a practice upon the prosecutor himself must, in our opinion, be harmful to the interest of the public, whose service is the prosecutor's first and foremost duty.

³See, e.g., *In re Penn*, 201 Wis. 2d 405, 407 (Wis. 1996) (per curiam).

⁴Wisconsin Ethics Opinions E-81-5, E-83-19, E-86-15.

⁵See, e.g., New Hampshire Ethics Advisory Opinion No. 1996-97/6, Indiana Ethics Opinion No. 1 of 1996, Kentucky Ethics Opinion E-291, ABA Formal Opinion 142 (1935).

Since the State of Wisconsin is the part-time prosecutor's present client,⁶ SCR 20:1.7(a)(1) clearly bars that lawyer's representation of criminal defendants anywhere in the state. Under that Rule, the representation of a criminal defendant would certainly be "directly adverse" to another current client, the state.

While the part-time prosecutor would be barred from representing criminal defendants against the state, that disqualification would not necessarily apply to the representation of private clients against the state in matters that are wholly unrelated to state criminal prosecutions. Indeed, ethics opinions⁷ and case law from other states⁸ support using a narrow definition of a government attorney's client for conflict purposes. Here, the District Attorney's representation of the state is expressly limited by Wis. Stat. 978.05. This statute authorizes District Attorneys to provide specialized legal services to the state; because the scope of their representation is defined narrowly, District Attorneys cannot be regarded as lawyers for the state in all matters. Thus, the scope of an Assistant District Attorney's conflict does not extend to every possible matter in which the state may have an interest.

Although it is clear that the scope of the conflict is limited, the contours of possible conflict are not as clear. At a minimum, an Assistant District Attorney and his firm would be

⁶The Wisconsin District Attorney's Association reports that some county boards attempt to set priorities for their county's District Attorney. The legal basis for such attempts is not clear and the Committee does not believe that changes the analysis in this opinion.

⁷ See, e.g., Arkansas Ethics Op. 96-1 (1997) (lawyer representing water commission may represent clients in proceedings against other branches of city government if lawyer concludes that commission is entity distinct from city, and that his responsibilities to commission would not limit representation of other clients); California Ethics Op. 2001-156 (if city charter does not give constituent parts of city government any authority to act independently of city, city attorney does not represent them as "separate clients" and is therefore free to advise both mayor and city council on same matter, even though they are taking opposing positions); District of Columbia Ethics Op. 268 (1996) (concluding that a lawyer representing private clients against one city agency may under certain circumstances perform services for another city agency); In re Supreme Court Advisory Comm. on Prof'l Ethics Op. No. 697 911 A.2d 51, 22 Law. Man. Prof. Conduct 623 (N.J. 2006) (lawyers retained to represent municipal entity in particular matter are not automatically prohibited from representing private clients in other matters before boards or agencies of same municipality) (N.J. 2006); New York City Ethics Op. 99-06 (1999) (law firm not per se prohibited from representing clients adverse to state even though one of firm's lawyers is representing state pro bono in unrelated matters as special counsel to Manhattan district attorney's office; representations involve "entirely separate agencies of New York State"); Oregon Formal Ethics Op. 2005-122 (2005) (private practitioner who sometimes serves as special prosecutor representing state in misdemeanor cases may represent private parties in unrelated civil matters against city or county).

⁸ See, e.g., *Brown & Williamson Tobacco Corp. v. Pataki*, 152 F. Supp.2d 276, 17 Law. Man. Prof. Conduct 151 (S.D.N.Y. 2001) (rejecting contention that law firm retained to represent state on public assistance matters thereby represented all of executive branch for conflict purposes); *Aerojet Props. Inc. v. State*, 530 N.Y.S.2d 624 (N.Y. App. Div. 1988) (refusing to disqualify law firm from continuing to represent claimant in court of claims action against state for unpaid rent even though insurance carrier for state's indemnitor eventually retained same firm to defend personal injury claim involving same state office; "Given the multitudinous nature of the State's activities, even the appearance of impropriety seems de minimis here").

conflicted from representing a client in any matter that falls within the statutory authority of the District Attorney, under Wis. Stat. 978.05. As the traditional work of District Attorney's Offices is the prosecution of criminal cases, it is clear that a firm that employs a part-time Assistant District Attorney could not represent criminal clients being prosecuted by the state.

However, while Wis. Stat. 978.05 is a good starting point for the conflict analysis, it is not the ending point. Instead, a conflicts analysis must also take into account the full range of ethical duties that a lawyer owes a client, including protection of client confidences under SCR 20:1.7 and avoiding situations where an attorney's representation of one client will be materially limited by his duties to another client, or his own personal interests, under SCR 20:1.7(a)(2). Because a District Attorney's office may be involved in relationships with a wide range of government officials and agencies that implicate these ethical obligations, a nuanced conflicts analysis is necessary before any undertaking representation that involves a government interest.⁹

This analysis is likely to be highly fact-specific, so it is not possible to provide clear answers regarding the scope of the conflict. At a minimum, however, this additional conflict analysis must take into account the nature of the Assistant District Attorney's work on behalf of the State, as well as the nature of that office's relationship with county government.¹⁰ Some District Attorney's Offices have a close relationship with county or local officials that could give rise to ethical duties or limitations that would restrict a firm's ability to represent a client in non-criminal matters that involve these officials. Likewise, the risk of conflicts is high where an Assistant District Attorney handles cases on behalf of a government agency that has both criminal and civil jurisdiction. For example, a part-time Assistant District Attorney may work with the Department of Natural Resources in matters where a civil land use dispute has developed into a criminal matter. In such cases, the Assistant District Attorney would likely face conflicts under SCR 20:1.7 and/or 20:1.9 that would preclude him from undertaking civil or criminal representations that involve the DNR as an adverse party. In contrast, if a part-time Assistant District Attorney is hired for a limited purpose, such as prosecuting misdemeanor traffic offenses, he would likely not face any conflicts in representing clients before the DNR or other state agencies.

⁹ This type of analysis arises frequently in the context of state attorneys general, who may face conflicts among state agencies. See, e.g., *Granholm v. Michigan Pub. Serv. Comm'n*, 625 N.W.2d 16 (Mich. Ct. App. 2000) (holding that Michigan's Attorney General is 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); *Env'tl. Prot. Agency v. Pollution Control Bd.*, 372 N.E.2d 50 (Ill. 1977) (attorney general may represent opposing state agencies in dispute in which he is not himself a party; attorney general's responsibility to serve or represent state's broader interests "will occasionally, if not frequently, include instances where State agencies are the opposing parties); cf. *Duekmejian v. Brown*, 624 P.2d 1206 (Cal. 1981) (while attorney general cannot be compelled to represent state officers or agencies if he believes they are acting contrary to law, "he may not take a position adverse to those same clients").

¹⁰ Cf. District of Columbia Ethics Op. 268 (1996) ("The identity of the government client for all ethical purposes is established in the first instance between the lawyer and responsible public officials in accordance with the general precepts of client autonomy embodied in Rule 1.2").

Is the Conflict Waivable?

Under SCR 20: 1.7(b), a firm may be able to represent a client despite a conflict if certain criteria can be satisfied:

Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in a writing signed by the client.

However, SCR 1.7(b) seems an unlikely solution to this problem. SCR 1.7(b)(4) requires each affected client to give written and informed consent. The Committee is not aware of any official or agency having authority to give informed consent on behalf of the State of Wisconsin and, at least for directly adverse criminal defense work, it is difficult to imagine circumstances where it would be in the State's interest to provide the necessary consent. Likewise, it seems unlikely that a private client -- and particularly a criminal defendant -- would be willing to have his lawyer provide the government with the disclosures necessary to obtain the State's informed consent under Rule 20:1.0(f). Therefore, in circumstances where a conflict has been identified, such a conflict cannot appropriately be regarded as waivable.

Conflicts for the Firms

Questions remain as to what conflicts, if any, are imputed to the lawyer's public and private employers in this situation and whether those conflicts necessarily result in disqualifications. Imputation of disqualifications for non-governmental law offices are covered by SCR 20:1.10. Under subsection (a) of that rule:

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by SCR20:1.7 or SCR 20:1.9 unless:

- (1) the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or

(2) the prohibition arises under SCR20:1.9, . . .

Here, the part-time prosecutor's disqualification from representing criminal defendants arises under SCR 20:1.7(a)(1). In the lawyer's private firm, SCR 20:1.10 generally prohibits other lawyers in that firm from representing clients the lawyer personally could not. If the lawyer would be prohibited from accepting a criminal defendant's case because of a conflict arising from the lawyer's work as a prosecutor, other lawyers in the firm would also be prohibited from undertaking that representation.

The exceptions arising under Rule 1.10(a)(1) and (2) do not apply in this situation. Subsection (a)(1) makes an exception for disqualification based on a personal interest of the prohibited lawyer but the disqualification in this situation is based on an adverse client, not the lawyer's personal interest. Subsection (a)(2) creates an exception for conflicts with former clients, but in situations where the firm is employing a lawyer who also serves as a part-time Assistant District Attorney, the conflict is with a current client. Therefore, subsection (a)(2) would not apply.

SCR 20:1.10(c) allows waiver of the conflict by the affected client under the conditions stated in SCR 20:1.7. However, as discussed above, the waiver provisions in SCR 20:1.7(b) are not available in this situation.

Thus, the private firm employing a part-time prosecutor would be disqualified from representing state court criminal defendants in Wisconsin, regardless of whether that representation arises in the same county in which the individual lawyer prosecutes.

In the case of a conflict for the individual lawyer, a different set of considerations arises regarding imputation of that conflict to the District Attorney's Office in which the lawyer is employed part-time. A simple example would be that the lawyer, on behalf of the private firm, represents an individual in a civil matter and that individual is prosecuted by the District Attorney's Office which employs the lawyer. It is obvious under Rule 1.7(a)(1) that the lawyer cannot prosecute his civil client. Is that conflict and disqualification imputed to the entire District Attorney's Office?

Rule 1.11(f) tells us it is not:

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 non-government setting, the lawyer shall be timely screened from any participation in the matter to which the conflict applies.

So, with screening, any conflicts disqualifying a part-time Assistant District Attorney from a criminal prosecution would not require disqualification of the entire District Attorney's Office from the matter.