
Wisconsin Memorandum Ethics Opinion 2/74 Part-time corporation counsel in private representation

Revised March 29, 2021

Question:

May a part-time county corporation counsel or firm associates defend persons charged with crimes if the part-time county corporation counsel is prevented by statute from prosecution of criminal cases in the county?

Opinion:

Neither a part-time corporation counsel nor associates in their firm may represent clients in criminal cases¹ in which a sheriff's deputy or another county employee has been involved in the investigation or may be a witness in the case. *See Wisconsin Formal Ethics Op. E-90-5.* If the criminal case involves police from a different governmental entity, such as a city or village, the part-time corporation counsel and associates in their firm may engage in a criminal defense practice.

A Wisconsin corporation counsel represents the county in civil cases. Wis. Stat. §59.42(1)(a). This often includes county departments and employees. The statutory responsibilities of a corporation counsel may overlap with the district attorney, but only in civil matters. Wis. Stat. §59.42(2)(b). In contrast, the district attorney represents the state rather than the county. *See Wisconsin Formal Ethics Op. EF-11-02.*

If a part-time corporation counsel or a lawyer associated in a firm with the part-time corporation counsel represented a criminal defendant where one or more county employees were adverse witnesses, the lawyer would face two problems. First, the lawyer owes a duty of confidentiality to the county that covers any information that relates to the representation of the governmental client. The part-time corporation counsel and others in the firm may also have access to information about the department or its officers that it is not available to the public at large. Disclosure of any information that relates to the representation of the county in defense of a criminal defense client would violate SCR 20:1.6(a) and possibly SCR 20:1.11(c) and adverse use of such information even absent disclosure would violate SCR 20:1.8(b). Use of this information in defense may also harm her standing with the county. Second, the firm owes a duty of loyalty to the county and attacking the credibility of a sheriff's deputy or other county employee, even

¹ The same analysis would apply to non-criminal matters such as ordinance or forfeiture proceedings.

without disclosure or use of information protected by SCR 20:1.6, would be directly adverse to the interests of the county. See SCR 20:1.7(a)(1).

On the other hand, the failure to aggressively challenge the adverse witnesses could deprive the criminal defense client of competent and diligent representation. See SCR 20:1.1, 20:1.3. Thus, simultaneous representation of the county and a criminal defendant when the county sheriff or other employees 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 county sheriff’s department or other county employees 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. All conflicts analysis is fact specific, but it is unlikely this is possible if competent representation of a defendant required vigorous cross examination of county employees. SCR 20:1.7(b)(1). If the lawyer reasonably believes that the lawyer can comply with SCR 20:1.7(b)(1), 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 county client, the informed consent would have to come from an officer or board of the county with lawful authority to make such decisions on behalf of the county. Memorandum Opinions 7/68 B and 6/70B are withdrawn.