
Wisconsin Memorandum Ethics Opinion 3/73
Conflict for former D.A. to represent private claimant
Revised March 29, 2021

Question:

May a former part-time prosecutor who successfully prosecuted an accused for the wrongful killing of a state patrolman represent the widow in a civil wrongful death claim against the accused?

Opinion:

A former prosecutor may not represent the widow of a crime victim in a wrongful death case involving a defendant the district attorney prosecuted. The question is controlled by two separate subsections of SCR 20:1.11.

Subsection (a) prohibits involvement in a matter in which the attorney participated “personally and substantially”¹ as a public officer or employee absent the informed consent of the government entity. Direct involvement in the prosecution of a defendant satisfies the requirement of personal and substantial participation.

Subsection (e) defines what constitutes a “matter” for purposes of the rule. The term has been interpreted to apply to situations involving the same incident, facts and persons even if not the same precise action.² This view is consistent with the ABA comment to the rule:

[10] For purposes of paragraph (e) of this Rule, a "matter" may continue in another form. In determining whether two particular matters are the same, the lawyer should consider

¹ The participation requirement of SCR 20:1.11 need not be adverse nor as an attorney unlike the conflict rules applicable to private lawyers. See *generally* SCR 20:1.10.

² *In re Sofaer*, 728 A.2d 625 (D.C. 1999) (former government lawyer involved in investigation of matter may not subsequently represent party in matter as private attorney); *State ex rel. Jefferson County Bd. of Zoning Appeals v. Wilkes*, 655 S.E.2d 178 (W. Va. 2007) (former county attorney may not represent private developer in connection with conditional use permit when lawyer was involved in related prior proceedings). *Utah Ethics Op. 15-01* (2015) (all proceedings before Board of Pardons and Parole involving particular inmate constitute the same matter). *But see Rhode Island Ethics Op. 2010-08* (2010) (no conflict when legal matter distinct even though it involved the same parties).

the extent to which the matters involve the same basic facts, the same or related parties, and the time elapsed.

The committee adopts this view of “matter”. A criminal action and subsequent wrongful death action based on the same incident and facts are the same “matter”.

Thus, under the requirements of SCR 20:1.11(a) representation of a crime victim’s widow in the circumstances presented would be prohibited absent the informed consent of the district attorney.³

Whether informed consent is possible under SCR 20:1.11(c) may be irrelevant given the requirements of SCR 20:1.11(c), which prohibits involvement in a matter when the lawyer has access to confidential government information not available to the public that is (1) adverse to the defendant (2) was obtained by governmental authority when the lawyer was acting as a prosecutor and (3) could be used against the person. If the lawyer tried the criminal case against the defendant, it seems certain they had access to all investigative materials, most or all of which constituted confidential government information. Informed consent is not permitted to avoid the prohibition stated in subsection (c) and thus it provides an additional reason why the former prosecutor could not represent the widow in a subsequent civil wrongful death action.

³ The question of whether district attorneys are authorized to consent in such situations is unresolved in Wisconsin. As a matter of substantive law, the question is beyond the scope of the committee’s authority. See *Wisconsin Formal Opinion EF-11-02*.