

2001 DRAFTING REQUEST

Bill

Received: 09/26/2001

Received By: mdsida

Wanted: Soon

Identical to LRB:

For: Gwendolynne Moore (608) 266-5810

By/Representing: Jessica

This file may be shown to any legislator: NO

Drafter: mdsida

May Contact:

Addl. Drafters: rryan

Subject: Public Defender

Extra Copies:

Submit via email: YES

Requester's email: Sen.Moore@legis.state.wi.us

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Provide the public defender office with funding and positions for a conflicts office

Instructions:

Companion to LRB-3735

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	mdsida 09/27/2001	wjackson 09/28/2001					State
/1			jfrantze 10/01/2001		lrb_docadmin 10/01/2001 lrb_docadmin 10/05/2001	lrb_docadmin 10/05/2001	

Vers. Drafted Reviewed Typed Proofed Submitted Jacketed Required

FE Sent For:

LAB intro

<END>

2001 DRAFTING REQUEST

Bill

Received: 09/26/2001

Received By: mdsida

Wanted: Soon

Identical to LRB:

For: Gwendolynne Moore (608) 266-5810

By/Representing: Jessica

This file may be shown to any legislator: NO

Drafter: mdsida

May Contact:

Addl. Drafters: rryan

Subject: Public Defender

Extra Copies:

Submit via email: YES

Requester's email: Sen.Moore@legis.state.wi.us

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Provide the public defender office with funding and positions for a conflicts office

Instructions:

Companion to LRB-3735

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?	mdsida 09/27/2001	wjackson 09/28/2001		_____			State
/1			jfrantze 10/01/2001	_____	lrb_docadmin 10/01/2001		

FE Sent For:

<END>

2001 DRAFTING REQUEST

Bill

Received: 09/26/2001

Received By: mdsida

Wanted: Soon

Identical to LRB:

For: Gwendolynne Moore (608) 266-5810

By/Representing: Jessica

This file may be shown to any legislator: NO

Drafter: mdsida

May Contact:

Addl. Drafters: rryan

Subject: Public Defender

Extra Copies:

Submit via email: YES

Requester's email: Sen.Moore@legis.state.wi.us

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

Provide the public defender office with funding and positions for a conflicts office

Instructions:

Companion to LRB-3735

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
1?	mdsida	11 WLj 9/28	Jb10/11	Self 10/11			

FE Sent For:

<END>

D-Note

2001 BILL

Soon

Regen

1 AN ACT relating to: positions for the office of the state public defender, requiring
2 quarterly reports, and making an appropriation.

Analysis by the Legislative Reference Bureau

Under current law, the office of the state public defender (SPD) is responsible for providing legal representation to various indigent persons. If a person qualifies for legal representation by the SPD, the SPD either assigns an attorney employed by the office to represent the person or contracts with a private attorney to represent the person. If two potential SPD clients have conflicting or potentially conflicting interests, the SPD cannot represent both clients and, instead, must contract with private attorneys to represent at least one of the potential clients.

In budget determinations under 2001 Wisconsin Act 16 (the biennial budget bill), the joint committee on finance (JCF) authorized and funded 43.3 new positions for the SPD for trial representation (30.0 attorneys, 7.5 legal secretaries, 4.3 investigators, and 1.5 client services specialists). JCF also authorized and funded 16.0 new positions for the creation of a conflicts office within the SPD to represent persons whose interests are in conflict or potentially in conflict with those of persons represented by the SPD's general trial representation unit. The 16.0 positions approved by JCF for a conflicts office consisted of: 1.0 supervising attorney, 10.0 attorneys, 3.0 legal secretaries, 1.5 investigators, and 0.5 client services specialists. The biennial budget bill also included a provision directing the public defender board to submit quarterly reports on budget savings to JCF, and to seek additional funding from JCF, if the appropriations for the public defender board are not sufficient. The governor vetoed the funding for the 59.3 positions and the requirement that the public defender board submit quarterly savings reports.

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3735/1dn

MGD:jld.pg

~~September 19, 2001~~

Jessica

Scott:

~~As you know,~~ Supreme Court Rule 20:1.10 (a) prohibits a lawyer in a firm from representing a person whose interests conflict with the interests of another person who is already represented by another member of the firm. But it is unclear whether, for the purposes of that rule, the Office of the State Public Defender (SPD) is a firm. Wisconsin courts have not addressed that issue; commentators and courts in other jurisdictions that have addressed it (either by looking at Rule 1.10 of the ABA Model Rules of Professional Conduct — the rule on which SCR 20:1.10 (a) is based — or another state's version of that rule) disagree. Compare *People v. Robinson*, 79 Ill. 2d 147 402 N.E.2d 157 (Ill. 1979) (individual lawyers with public defender office treated as separate firms) and G. Hazard and W. Hodes, *The Law of Lawyering: A Handbook on The Model Rules of Professional Conduct*, (2d ed. 1990), section 14.5 (public defender office should not automatically be considered a single firm) with American Law Institute, *Restatement of the Law Governing Lawyers* (2000) section 123 (rules regarding conflicts with affiliated lawyers apply to public defender offices in the same way as they do to private firms).

The State Bar of Wisconsin has also considered this issue. In 1990, in Ethics Opinion E-90-6, the State Bar considered a proposal under which the SPD would have established a conflicts office in Milwaukee. The office would have been similar, but not identical, to the conflicts office that would be established under this bill. The most important difference relates to s. 977.05 (4) (b), stats., which requires that the SPD “[b]e the chief legal officer of the office of the state public defender and make all final decisions regarding the disposition of any case handled by the office.” This bill does not affect that provision, so the public defender would be responsible under the statutes for the work of the conflicts office. By contrast, under the proposal considered by the State Bar in its ethics opinion, the statute would have been revised so that the public defender could — and would — have delegated the authority to make final case decisions to the head of the conflicts office.

Even with that statutory change, the State Bar was unwilling to give the proposal its unqualified blessing. Although it indicated that the proposal “appeared workable,” it suggested that the SPD “petition the Wisconsin Supreme Court for an amendment of the [Rules of Professional Conduct] to clarify its status as a ‘firm’ under the proposed arrangement.” It concluded that the application of SCR 20:1.10 (a) “should be

addressed by the Wisconsin Supreme Court prior to the implementation of any SPD conflicts office." At the same time, the State Bar stated that the SPD is a "firm," suggesting that, without any change in s. 977.05 (4) (b), stats., SCR 20:1.10 (a) may well apply.

A Wisconsin court considering this issue would not be bound by Ethics Opinion E-90-6. Thus, it might ultimately conclude that SCR 20:1.10 (a) is inapplicable if the conflicts office were separated from other units of the SPD in a way that protects client confidences and promotes client loyalty — regardless of whether the public defender himself or herself retains ultimate responsibility for the office under the statutes. On the other hand, a court could conclude that, without any statutory changes, the SPD is a firm to which that rule applies. If it did, that might effectively end the conflicts office's ability to handle conflicts cases. *See Wheat v. United States*, 486 U.S. 153 (1988). (Such a determination may not necessarily require reversing convictions in cases in which the conflicts office had been involved, since the defendant would have to show that the conflict adversely affected his or her defense. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).)

There are at least two options that would make it the fate of the conflicts office more secure. First, you could amend s. 977.05 (4) (b) stats., to require the public defender to delegate the authority to make final case decisions to the head of the conflicts office. Second, you could establish the conflicts office as a subunit of the public defender board but prohibit it from being set up as a subunit of the SPD.

Michael Dsida
Legislative Attorney
Phone: (608) 266-9867

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-3893/1dn
MCD:jld:jf

October 1, 2001

Jessica:

Supreme Court Rule 20:1.10 (a) prohibits a lawyer in a firm from representing a person whose interests conflict with the interests of another person who is already represented by another member of the firm. But it is unclear whether, for the purposes of that rule, the Office of the State Public Defender (SPD) is a firm. Wisconsin courts have not addressed that issue; commentators and courts in other jurisdictions that have addressed it (either by looking at Rule 1.10 of the ABA Model Rules of Professional Conduct — the rule on which SCR 20:1.10 (a) is based — or another state's version of that rule) disagree. *Compare People v. Robinson*, 79 Ill. 2d 147 402 N.E.2d 157 (Ill. 1979) (individual lawyers with public defender office treated as separate firms) and G. Hazard and W. Hodes, *The Law of Lawyering: A Handbook on The Model Rules of Professional Conduct*, (2d ed. 1990), section 14.5 (public defender office should not automatically be considered a single firm) with American Law Institute, *Restatement of the Law Governing Lawyers* (2000) section 123 (rules regarding conflicts with affiliated lawyers apply to public defender offices in the same way as they do to private firms).

The State Bar of Wisconsin has also considered this issue. In 1990, in Ethics Opinion E-90-6, the State Bar considered a proposal under which the SPD would have established a conflicts office in Milwaukee. The office would have been similar, but not identical, to the conflicts office that would be established under this bill. The most important difference relates to s. 977.05 (4) (b), stats., which requires that the SPD “[b]e the chief legal officer of the office of the state public defender and make all final decisions regarding the disposition of any case handled by the office.” This bill does not affect that provision, so the public defender would be responsible under the statutes for the work of the conflicts office. By contrast, under the proposal considered by the State Bar in its ethics opinion, the statute would have been revised so that the public defender could — and would — have delegated the authority to make final case decisions to the head of the conflicts office.

Even with that statutory change, the State Bar was unwilling to give the proposal its unqualified blessing. Although it indicated that the proposal “appeared workable,” it suggested that the SPD “petition the Wisconsin Supreme Court for an amendment of the [Rules of Professional Conduct] to clarify its status as a ‘firm’ under the proposed arrangement.” It concluded that the application of SCR 20:1.10 (a) “should be

addressed by the Wisconsin Supreme Court prior to the implementation of any SPD conflicts office.” At the same time, the State Bar stated that the SPD is a “firm,” suggesting that, without any change in s. 977.05 (4) (b), stats., SCR 20:1.10 (a) may well apply.

A Wisconsin court considering this issue would not be bound by Ethics Opinion E-90-6. Thus, it might ultimately conclude that SCR 20:1.10 (a) is inapplicable if the conflicts office were separated from other units of the SPD in a way that protects client confidences and promotes client loyalty — regardless of whether the public defender himself or herself retains ultimate responsibility for the office under the statutes. On the other hand, a court could conclude that, without any statutory changes, the SPD is a firm to which that rule applies. If it did, that might effectively end the conflicts office’s ability to handle conflicts cases. *See Wheat v. United States*, 486 U.S. 153 (1988). (Such a determination may not necessarily require reversing convictions in cases in which the conflicts office had been involved, since the defendant would have to show that the conflict adversely affected his or her defense. *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980).)

There are at least two options that would make it the fate of the conflicts office more secure. First, you could amend s. 977.05 (4) (b) stats., to require the public defender to delegate the authority to make final case decisions to the head of the conflicts office. Second, you could establish the conflicts office as a subunit of the public defender board but prohibit it from being set up as a subunit of the SPD.

Michael Dsida
Legislative Attorney
Phone: (608) 266-9867

Basford, Sarah

From: Clark, Jessica
Sent: Friday, October 05, 2001 10:59 AM
To: LRB.Legal
Subject: Draft review: LRB-3893/1 Topic: Provide the public defender office with funding and positions for a conflicts office

It has been requested by <Clark, Jessica> that the following draft be jacketed for the SENATE:

Draft review: LRB-3893/1 Topic: Provide the public defender office with funding and positions for a conflicts office