

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

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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.

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