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**E-80-20 Conflict of interest: Representation for and against a county**

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**Question**

Does a prohibited conflict occur when an attorney representing a plaintiff in a suit against the county government attempts, in an independent suit, to represent the interest of the county against another defendant?

**Discussion**

The question of whether a conflict of interest exists merely by virtue of the representation in the two actions depends upon the status of the attorney involved. There are three categories of attorneys relevant to the conflict of interest analysis:

1. Lawyers who are public officials;
2. Lawyers who are regularly employed by the county; and
3. Private practitioners who represent the county in some matters.

With respect to all three categories, Supreme Court Rule 20.24 provides a three-part test. First, the attorney must be convinced that his professional judgment on behalf of his client will not be affected by the overlap of parties in the unrelated actions. Secondly, the attorney must make a complete disclosure of the conflict possibility to all affected clients. Finally, the attorney must gain the consent of each client to his continued representation of their interests.

An attorney need not refuse to take a client merely because he also represents a party with interests adverse to his early client. SCR 20.24(1) articulates that standard:

“Except with the consent of the client after full disclosure, a lawyer may not accept employment if the exercise of his or her professional judgment on behalf of the client will be or reasonably may be affected by his or her own financial, business, property or personal interests.”

*Public Officials*

Several Wisconsin ethics opinions make clear that an attorney who is a public official may not represent a party against the government of which he/she is an official. The opinions note that a public official has a conflict of interest between his continuing duty as a public official and his duty to a prospective private client. Representation of the public interest entails a continuing relationship, whereas a representation of a private citizen can be limited to the individual facts for which the lawyer was hired.

In Formal Opinion E-54-2, the committee held that a member of a city council or county board may not represent a party against the city or county respectively. In Formal Opinion E-65-1, the committee held that a part-time district attorney may not represent a party against the State Highway Commission because the attorney in the office of the district attorney represents the county and the state at all times.

Finally, a memorandum opinion issued March 15, 1967, held that it was improper for a lawyer who was a county board member to prosecute a claim against the county on behalf of a private citizen.

### *County Employees*

The propriety of representation by county employees in the situation described above is governed by SCR 20.24(1), SCR 20.28(3), and SCR 20.30(4).

SCR 20.28(3) provides:

[A] lawyer may represent multiple clients if it is obvious that the lawyer can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each.

The threshold requirement, therefore, is an obvious ability on the part of the lawyer to adequately represent both interests. While the representation takes place in separate and presumably unrelated actions, the requirement is fulfilled. SCR 20.28(3) also mandates full disclosure and consent in regard to both clients. SCR 20.30(4) strengthens the consent requirement for county lawyers. It reads:

“A lawyer who is regularly employed shall not accept professional employment if the professional employment will conflict with the interests of or the lawyer's loyalty to the lawyer's employer except in compliance with SCR 20.24(1) and with the prior consent of the employer.”

*Private Practitioners*

The propriety of representation by private practitioners in the situation described above is governed by SCR 20.24(1) and 20.28(3). A private practitioner can represent the county in one suit and be a plaintiff against the same county in a separate suit provided the disclosure and consent requirements are met, and the attorney complies with SCR 20.24(1).

A similar conclusion was reached in the Ethics Committee Memorandum Opinion 8-77A. That memorandum stated that a law firm may represent an insurance company in pending cases and at the same time represent third persons in unrelated matters against the same insurance company. Representation of both matters was ethically permitted with full disclosure and consent of all parties.

**Conclusion**

1. Lawyers who are county officials are categorically barred from representing private clients against the county.
2. Lawyers who are county employees may, with the county's prior consent, represent private clients against the same county provided said county employee complies with SCR 20.24(1), SCR 20.28(3), and SCR 20.30(4).
3. Private practitioners may represent the county in one suit and a plaintiff against the county in a separate suit provided said practitioners comply with SCR 20.24(1) and SCR 20.28(3).