
**E-87-8 Communications by district attorney
with represented criminal defendants
and previously represented delinquent
child support payors**

Questions

Do the disciplinary standards of conduct for lawyers preclude a district attorney from:

1. Mailing or serving copies by other legal means of the state's motions, discovery demands and other formal notices to a defendant in a criminal case who is represented by counsel, where defense counsel is provided with a full and complete copy of all pleadings that are served or mailed to the defendant and the original copies of all pleadings are filed with the court having jurisdiction to hear the criminal case?
2. Sending correspondence in a delinquent child support case when:
 - a. Unrepresented delinquent payor has been represented by counsel at an earlier stage of the proceeding which has been concluded? or
 - b. Unrepresented delinquent payor has other matters pending with the district attorney's office that are unrelated to nonpayment of child support but in which the party is represented by counsel of record?

Opinion

Under both the Code of Professional Responsibility (SCR chapter 20, repealed effective Jan. 1, 1988) and the Rules of Professional Conduct for Attorneys (SCR chapter 20, re-created effective Jan. 1, 1988), lawyers may not communicate about the subject of the representation with a party the lawyer knows to be represented by counsel in that matter, unless the lawyer has the consent of opposing counsel or is authorized by law to do so. *See* SCR 20.38(1) and SCR 20:4.2.

SCR 20.38(1) has been held applicable to publicly employed Wisconsin attorneys and specifically to district attorneys. *See Disciplinary Proceedings*

Against Zapf, 126 Wis. 2d 123, 375 N.W.2d 654 (1985); *Disciplinary Proceedings Against Mauch*, 107 Wis. 2d 557, 219 N.W. 2d 877 (1982); and Committee on Professional Ethics Formal Opinions E-87-2 [reported at 60 Wis. Bar Bull. 66 (May 1987)] and E-82-4 [reported at 57 Wis. Bar Bull. 73 (June 1984)]. Therefore, without prior consent of counsel for a represented party or authorization by law, a district attorney may not communicate with a criminal defendant on the subject of the representation. SCR 20.38(1) and SCR 20:4.2.

Regarding correspondence or other direct communication with a previously represented delinquent payor in a child support enforcement proceeding, the committee finds no prohibition against such a district attorney's communication, provided that: a) the district attorney has no reasonable basis to believe that the delinquent payor is represented in the matter; and b) the district attorney otherwise complies with SCR 20.38(2) and SCR 20:4.3.

When the district attorney's office simultaneously is prosecuting a delinquent child support payor in an unrelated matter or matters in which defense counsel is of record, the committee believes that the district attorney's duties would be substantially the same as set forth in the preceding paragraph, whether or not the delinquent payor previously had been represented in the support proceedings.

However, particularly when simultaneously prosecuting a criminal charge under these circumstances, the district attorney may be well advised to give prior notification to criminal defense counsel of the district attorney's intent to communicate directly with the delinquent payor or the subject of the delinquency. Otherwise the protections afforded represented criminal defendants seriously could be undercut by disclosures made in unrelated proceedings in which the defendants are unrepresented. Prior notification of criminal defense counsel would be consistent with the spirit of SCR 20.38 and SCR 20:4.2 and 20:4.3, affording counsel timely opportunity to advise his or her client regarding the desirability or necessity of representation in the nonsupport proceeding.