

SM-45 INQUIRY IN CONFLICT OF INTEREST CASES

This Special Material is intended to implement decisions of the Wisconsin Supreme Court requiring that the trial court make an inquiry when facts indicate a potential conflict of interest on the part of defense counsel. The obligation first applied to cases where codefendants were represented by the same lawyer, State v. Kaye, 106 Wis.2d 1, 14, 315 N.W.2d 337 (1982),¹ and was later expanded to all cases where a conflict of interest may arise, State v. Miller, 160 Wis.2d 646, 467 N.W.2d 118 (1991).²

Where an inquiry is required, it has two purposes: to elicit sufficient facts to determine whether an actual conflict or a serious potential conflict exists; and if a conflict exists, to determine whether the defendant may waive the right to conflict-free representation.

I. Cases in Which an Inquiry is Required**A. Multiple representation**

State v. Kaye held that an inquiry is required: ". . . whenever the same attorney or law firm represents more than one defendant in the same criminal case." The rule was reaffirmed in State v. Miller, *supra*, and in State v. Dadas, 190 Wis.2d 340, 526 N.W.2d 818 (Ct. App. 1994).³

1. Federal Rule 44(c), after which the Kaye requirement was modeled, requires an inquiry when defendants are represented by attorneys "associated in the practice of law."
2. An inquiry should be made whether counsel is retained or appointed.⁴
3. Inquiry is required in both felonies and misdemeanors.
4. The inquiry is not limited to cases expected to go to trial⁵ but is required to assure effective assistance of counsel in regard to all matters beyond the initial appearance and setting of pretrial release.

B. Other conflict of interest situations

The primary cases reaching the appellate courts have involved multiple representation, but conflict of interest concerns can also arise where defense counsel has previously participated in the prosecution of the defendant⁶ or represents or has represented a witness for the state.⁷ In either situation, the trial court should conduct an inquiry into the existence of an actual conflict.⁸

II. Inquiry Whether a Conflict Exists

A. Standard

The court must first determine whether an actual or serious potential conflict exists.

Cases have elaborated upon the standard in multiple representation cases, concluding that there is an actual conflict of interest where incriminating information voluntarily supplied by one client is used to provide evidence of another client's criminal activities, expose another client to potential criminal prosecution, or provide justification for a sentencing recommendation or a sentence.⁹ Counsel could face a conflict of interest in several different situations: in pursuing plea negotiations for one client; cross-examining one of the clients at trial; or pursuing a line of defense for one client that might implicate another.¹⁰

In conflict situations not involving multiple representation, similar concerns are involved, all relating to the central question: is counsel able to give undivided loyalty to the client.

B. Timing

Inquiry regarding the existence of an actual conflict of interest or of a serious potential conflict should be made at the arraignment in misdemeanors and as early as possible in felonies. In felonies, waiting until the arraignment is too late. The inquiry should be conducted:

1. In open court (generally, but see below).
2. On the record.
3. With the participation of the prosecutor.

Evidence of possible conflict of interest could arise at any time during the case; if so, an inquiry should be conducted then.

C. In chambers inquiry

If the initial inquiry indicates a possibility of conflict of interest, a more detailed inquiry is required. If the detailed inquiry would result in disclosures to the prosecutor that would be unfairly prejudicial to the defendant, inquiry should be in chambers, on the record, with defendant and defense counsel. The prosecutor may be excluded. If a detailed inquiry would result in information coming to the trial judge's attention that would be unfairly prejudicial to the defendant, the inquiry may be conducted before a different judge.

III. Inquiry of Defense Counsel

Adequately investigating the conflict of interest issue may require making inquiry of defense counsel.

A. Standards relating to conflict of interest

The Wisconsin Rules of Professional Conduct for Attorneys address conflict of interest in two sections. See SCR 20:1.7, Conflict of interest: general rule, and SCR 20:1.8, Conflict of interest: prohibited transactions.

Specific duties of defense counsel are elaborated upon by Sec. 4-3.5(b) of the ABA Standards. This standard was adopted in State v. Kaye, 106 Wis.2d 1, 15:¹¹

(b) Except for preliminary matters such as initial hearings or applications for bail, a lawyer or lawyers who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear that:

(i) no conflict is likely to develop;

(ii) the several defendants give an informed consent to such multiple representation; and

(iii) the consent of the defendants is made a matter of judicial record. In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that an attorney sometimes encounters in defending multiple clients. In some instances, accepting or continuing employment by more than one defendant in the same criminal case is unprofessional conduct.

B. Questions to ask defense counsel

1. Has counsel considered the possibility of conflict?
2. What investigation has counsel undertaken to see whether conflict exists?
3. What discussion or explanation of conflict has there been with the client?

C. The court should strongly advise against multiple representation

IV. Inquiry of Defendants

If a conflict is found to exist, it may be waived by the defendant after a proper inquiry is made by the court. This requires addressing the defendant personally, in the same manner as a guilty plea.

An inquiry like the following is suggested:

COURT: "Your right to a fair trial guarantees that you have the right to be represented by counsel. In the circumstances of this case, one part of that right to counsel may be in conflict with another part of that right.

"You do have the right to counsel of your own choice. That is, you have the right to select your own lawyer and to be represented by that lawyer. At the same time, you have the right to be represented by a lawyer who has undivided loyalty to you; that is, your lawyer should have only your interests at heart with no conflicting reason for not representing your interests as vigorously as possible.

[THE FOLLOWING TWO PARAGRAPHS APPLY ONLY TO THE MULTIPLE REPRESENTATION CASE.]¹²

"It is the right to counsel with no conflict of interest that is at stake here. Because your lawyer is undertaking to represent both you and your codefendant,

there is the potential for a conflict of interest. A lawyer seeking to represent two defendants in the same case unavoidably faces the possibility that the duty to one client may conflict with the duty to the other. A conflict can arise in many different situations: plea negotiations; deciding what witnesses to call and how to question them; deciding whether either defendant should testify; making opening and closing arguments in court; and in other situations. And if both you and your codefendant are convicted, it will be especially difficult for the lawyer to represent both of you effectively at sentencing without arguing that one of you deserves more blame than the other.

"Conflict of interest arises in many different ways and is difficult to detect or foresee. As a result, the law strongly prefers that a lawyer represent only one person. However, the law also recognizes that a person accused of crime has the right to be represented by the lawyer of his choice and therefore allows you to give up the right to counsel who represents only you.

"You should discuss these problems with your lawyer, and you should feel free to discuss them with another lawyer if you want to. If, after carefully considering possible problems which may arise, you wish to continue to be represented by your present lawyer, the court will consider your request. The court will be in recess until you have had a full opportunity to consider this with your lawyer and decide this important matter."

AFTER ALLOWING A REASONABLE PERIOD OF TIME FOR THE DEFENDANT(S) TO CONSIDER THE CONFLICT OF INTEREST PROBLEM, MAKE THE FOLLOWING INQUIRY ON THE RECORD.

"Do you wish to continue with your present lawyer?"

[IF THE ANSWER IS "NO," NO FURTHER INQUIRY IS NECESSARY.]

"Have you had enough time to consider the possible conflict of interest problem?"

"Have you discussed possible conflicts in your case with your lawyer?"

"Do you have any questions about the conflict of interest problem?"

"Please explain what the term "conflict of interest" means to you."

[CONTINUE ASKING ABOUT THE DEFENDANT'S PERCEPTION OF THE CONFLICTS PROBLEM UNTIL SATISFIED THAT THE DEFENDANT IS AWARE OF AND UNDERSTANDS THE VARIOUS RISKS INVOLVED.]

"In spite of these possible problems, do you wish to continue to be represented by (name of lawyer)?"

V. Waiver of the Right to Separate Counsel

A. The waiver must be free, voluntary, and understanding

1. It is like a guilty plea or a waiver of jury trial.
2. Inquiry into educational background, etc., may be necessary.¹³

B. If there is a valid waiver, the defendant may continue with joint representation subject to review by the court. See section VI, below.

VI. Rejecting the Waiver; Disqualifying Counsel

A trial court has the authority to disqualify counsel, even over the defendant's objection and proffered waiver of the right to conflict-free representation, when an actual or serious potential conflict of interest exists.¹⁴

The court must first have determined that an actual or serious potential conflict exists after conducting the inquiry outlined above. The court should be alert to any possibility that the state is seeking to manufacture the conflict to eliminate a particular lawyer as an adversary. When there is any evidence of this, it should be carefully explored in the record.¹⁵

Once an actual or serious potential conflict is established, the decision to disqualify counsel resides in the sound discretion of the trial court. Factors to consider include:¹⁶

- (1) whether client and counsel have a close relationship or one of long duration;
- (2) whether counsel has performed substantial work in the case;
- (3) whether an alternative lawyer of like ability could be obtained; and,

- (4) whether disqualification would cause unacceptable delay.

COMMENT

SM-45 was originally published in 1982 and revised in 1989, 1991, and 1995. This revision, which involved a general updating and expanded SM-45 to apply to conflict of interest generally, was approved by the Committee in August 1999.

1. In State v. Kaye, the Wisconsin Supreme Court held:

. . . we will require trial courts to conduct an inquiry whenever the same attorney or law firm represents more than one defendant in the same criminal case. The court should inquire of the defendants and their attorney at the arraignment as to the possibility for actual conflicts of interest. The judge should ensure that the defendants understand the potential conflicts and determine whether they want separate counsel. If the defendants insist on being represented by the same counsel, after being fully advised of the potential problems, the trial judge should permit such multiple representation. However, this determination should not be made unless it is clear the defendants have made a voluntary and knowing waiver of their right to separate counsel.

106 Wis.2d 1, 14.

Kaye arose in connection with a defendant's postconviction claim that he was denied effective assistance of counsel at sentencing because his lawyer also represented a codefendant. Though Kaye had not objected to the multiple representation in the trial court, he argued at the postconviction stage that his lawyer was precluded from arguing that Kaye was less culpable than the codefendant because the lawyer also represented the codefendant. The Wisconsin Supreme Court denied relief on the ground that Kaye failed to show "that an actual conflict of interest adversely affected his lawyer's performance," citing Cuyler v. Sullivan, 446 U.S. 335, 348 (1980), in which the United States Supreme Court established the standard for evaluating claims of ineffectiveness of counsel based on conflict of interest. However, the court in Kaye established the requirement for an inquiry by the trial court in order to avoid having problems like this arise in the future.

[Note that a different standard applies to evaluating claims of ineffective assistance of counsel in multiple representation cases. The test is whether "an actual conflict of interest adversely affected performance." This is in contrast to the test in all other situations, which involves two questions: (1) was performance of counsel deficient; and (2) if so, was there prejudice. Strickland v. Washington, 466 U.S. 668 (1984). In the multiple representation situation, prejudice is presumed "if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." Burger v. Kemp, 483 U.S. 776, 107 S.Ct. 3114, 3120 (1987), citing Strickland, *supra*, 466 U.S. at 692, and Cuyler, *supra*, 446 U.S. at 348, 350.]

The rule announced in Kaye is modelled after Rule 44(c) of the Federal Rules of Criminal Procedure. Rule 44(c) provides:

- (c) Joint Representation. Whenever two or more defendants have been jointly charged

pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

The commentary to the federal rule offers a helpful discussion of the scope and nature of the multiple representation problem.

2. In Miller, the court reaffirmed the rule in State v. Kaye, *supra*, as to multiple representation cases, but stated the obligation to conduct an inquiry more broadly: ". . . a circuit court should make an inquiry . . . when counsel represents codefendants in the same criminal case or when a question of conflict of interest is raised in any criminal case about an accused's counsel of choice." 160 Wis.2d 646, 660-61.

3. In State v. Dadas, 190 Wis.2d 340, 526 N.W.2d 818 (Ct. App. 1994), the court of appeals reaffirmed the need for a trial court to conduct a colloquy with the defendant(s) in all cases where one lawyer represents more than one defendant. Noting that State v. Kaye, *supra*, did not identify the remedy to be applied where a required colloquy is not conducted, the court of appeals decided it should "independently review the record to ascertain from the facts and circumstances if there was an actual conflict of interest." 190 Wis.2d 340, 346.

4. Multiple representation concerns should rarely come up in cases involving appointed counsel, since the State Public Defender is under a statutory obligation to enact rules relating to conflict of interest. See § 977.02(6).

5. See, for example, § 968.45(1), relating to witnesses before a grand jury, which reads in part as follows:

. . . . If the prosecuting officer, attorney for a witness or a grand juror believes that a conflict of interest exists for an attorney or attorneys to represent more than one witness before a grand jury, the person so believing may make a motion before the presiding judge to disqualify the attorney from representing more than one witness before the grand jury. A hearing shall be held upon notice with the burden upon the moving party to establish the conflict.

6. State v. Love, 227 Wis.2d 60, 594 N.W.2d 806 (1999), reversing 218 Wis.2d 1, 579 N.W.2d 277 (Ct. App. 1998): defense counsel was a former prosecutor who had represented the state at Love's original sentencing two years earlier. The court of appeals held that the appearance of a conflict was so strong that nothing more is required to warrant a remand for resentencing with different counsel. The supreme court reversed, holding that an inquiry into the presence of an actual conflict of interest is required in the serial representation case. Also see State v. Cobbs, 221 Wis.2d 101, 548 N.W.2d 709 (Ct. App. 1998): defense counsel had previously worked as a prosecutor in a case involving the defendant five years earlier; there was no actual conflict or a serious potential conflict of interest.

7. State v. Street, 202 Wis.2d 534, 551 N.W.2d 830 (Ct. App. 1996): defense counsel had an actual conflict of interest because counsel was also representing a detective – who was the lead

investigator in the criminal prosecution of Street – in the detective's divorce.

8. In State v. Love, note 6, supra, the Wisconsin Supreme Court held that the same inquiry should be conducted in the serial representation case that Kaye requires for the multiple representation case. The court emphasized that the key to addressing these potential problems is early disclosure to the trial court:

In extending Cuyler-Kaye standards to serial representation, we are bound to extend also the requirement that all potential conflicts of interest that result from an attorney switching sides be made known to the court as soon as feasible before trial so that the court can inform the affected parties and conduct an appropriate inquiry.

227 Wis.2d 60, 79.

9. State v. Dadas, 190 Wis.2d 340, 347-48, 526 N.W.2d 818 (Ct. App. 1994).

10. These were examples recognized in State v. Miller, supra, 160 Wis.2d 646, 659.

11. The ABA standard cited in the text and adopted in Kaye recognizes that an attorney who undertakes multiple representation may be engaging in unprofessional conduct. For a case where multiple representation was the basis for discipline of an attorney, see Disciplinary Proceedings Against Eisenberg, 117 Wis.2d 332, 344 N.W.2d 169 (1984).

12. The two paragraphs that follow in the text are intended to describe the conflict of interest that exists where one lawyer represents more than one defendant. In other conflict cases, a similar description of the nature of the conflict should be provided.

13. SM-30, **WAIVER OF COUNSEL**, suggests general questions that relate to the defendant's ability to make an understanding and voluntary waiver of counsel. The same questions may be useful in connection with the waiver of conflict-free counsel. Also see SM-32, **ACCEPTING A PLEA OF GUILTY**, for similar questions about educational background, drug use, etc.

14. In Wheat v. United States, 486 U.S. 153 (1988), the United States Supreme Court dealt with the question whether a federal district court could decline a defendant's waiver of the right to conflict-free representation. Wheat was charged with crimes relating to a drug distribution enterprise. He sought to substitute for his lawyer by bringing in a different lawyer who also represented two others charged with crimes related to the same drug enterprise. The trial judge refused to allow the substitution, finding that there was an irreconcilable conflict of interest that could not be waived, despite the defendant's willingness to do so. Wheat appealed on the ground that the refusal to accept his waiver deprived him of his right to be represented by counsel of his choice. The Supreme Court upheld the action of the trial court, holding that "where a court finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver, and insist that defendants be separately represented." This applies to cases involving potential as well as actual conflicts. The trial court "must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of serious potential for conflict. The evaluation of the facts and circumstances of each case under this standard must be left primarily to the informed judgment of the trial court."

In State v. Miller, 160 Wis.2d 646, 467 N.W.2d 118 (1991), the Wisconsin Supreme Court adopted

the Wheat rule:

We conclude that the circuit court may, in its discretion, disqualify counsel of a criminal accused, even over the accused's objection and proffered waiver of the right to conflict-free representation, when an actual or a serious potential for conflict of interest exists.

160 Wis.2d 646, 650.

The court overruled any language in State v. Kaye, supra, that could be interpreted as prohibiting a circuit court from exercising this authority.

15. In State v. Miller, supra, the court repeated the caution set forth in Wheat that trial courts be alert to the possibility that the government may seek to create a conflict of interest to eliminate a defense lawyer who may be a formidable adversary. The Wisconsin Supreme Court "repeat[ed] these admonitions so that circuit courts will be sensitive to the motives of the prosecutors and carefully explore this issue on the record in the exercise of its discretion to disqualify counsel." 160 Wis.2d 646, 654.

16. These factors were acknowledged in State v. Miller, supra, 160 Wis.2d 646, 659.