

Ethics Opinion

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FACTS: A county hired its first full time public defender to begin the "office of the chief public defender". This office quickly added two full-time attorney positions. Previously, these positions had been held by contract attorneys.

In an effort to respond to challenges presented by conflicts of interest, the office transferred one full-time attorney to an office on the opposite side of the building. This new "office of conflict counsel for the public defender" includes a separate computer system not linked to the office of the chief public defender; a separate filing system for open and closed case files; separate letterhead and business cards and separate rooms in the county courthouse. There is no supervision by the chief public defender on client cases assigned as conflict cases, although general supervision is present over non-conflict cases. Budgetary authority for the conflict counsel office is maintained by the chief public defender for administrative purposes only. Administrative control and hiring authority over conflict counsel also resides with the chief public defender. A Public Defender Advisory Board exists to review substantive decisions as to administration and conflict issues made by the chief public defender.

QUESTION PRESENTED:

1. Are the steps taken by the county sufficient to satisfy the requirement of conflict-free counsel under Rule 1.7¹ et seq.?
2. Are additional safe-guards advisable to ensure conflict free counsel?

SHORT ANSWER:

1. Yes, subject to the provisions in the answer to question 2.
2. Yes, the office should retain the ability to hire counsel outside the system described to respond to the potential of having multiple co-defendants beyond that system's capacity. In addition, oversight of sensitive administrative decisions between conflict counsel and the chief public defender should be maintained by the Public Defender Advisory Board.

DISCUSSION: Criminal defendants are guaranteed the right to counsel under the Sixth Amendment of the United States Constitution. The right to counsel includes the right to be represented by counsel who is free from conflicts of interest. *Wood v. Georgia*, 450 U.S. 261, 271 (1981). It is the Ethics Committee's opinion that the facts presented in this inquiry generally satisfy the guarantee of conflict free counsel.

In some jurisdictions a public defender's office is treated, per se, like a private law firm for conflict of interest purposes, so that disqualification of one public defender is imputed to the entire office under Rule 1.10 of the Rules of Professional Conduct². Yet, while courts generally hold that it is an improper conflict for private attorneys to represent a criminal defendant if a

partner or associate of the same firm represents a co-defendant (see *State v. Bellucci*, 410 A.2d 666 (1980)), many courts do not apply the same per se conflict rule to public defender offices. The Ethics Committee agrees that it is inappropriate to apply the per se conflict rule to public defender offices.

The Ethics Committee's reluctance to apply the per se conflict rule to public defenders is best explained in *State v. Pitt*, 884 P.2d 1150, 1156 (1994), a Hawaii ruling which cites *Graves v. State*, 619 A.2d 123 (1993) for the following:

[A] conflict on the part of one member of the public defender's office does not extend per se to others in the office unless, after a case-by-case inquiry, it is determined that facts peculiar to a case preclude representation of competing interests by members of the office. (Citation omitted.)

[U]nder the case-by-case approach, if attorneys employed by a public defender are required to 'practice their profession side by side, literally and figuratively,' they are considered members of a "firm" for purposes of conflict of interest analysis regarding representation of multiple defendants, but where the practice of the attorneys in the office is so separated that the interchange of confidential information can be avoided or where it is possible to create such separation, the office is not equated with a firm and no inherent ethical bar would be present to the office's representation of antagonistic interests. (Citation omitted.)

The Ethics Committee's reluctance does not mean, however, that a public defender office may not be found to be the same as a firm for conflict purposes. A case-by-case analysis should be made. As explained in *Castro v. Los Angeles County Board of Supervisors*, 284 Cal. Rptr. 154, 162 (1991):

Rules that forbid lawyers to accept matters because of a 'conflict,' and rules that impute a lawyer's conflict to his or her associates, have one paramount object - to prevent lawyers from entering into situations in which they will be seriously tempted to violate a client's right to loyalty and secrecy. Conflict rules try to strike an appropriate balance between protecting against risks to loyalty and confidentiality, on the one hand, and fostering the availability of counsel on the other....The question, therefore, is not whether a lawyer in a particular circumstance 'may' or 'might' or 'could' be tempted to do something improper, but whether the likelihood of such a transgression, in the eye of the reasonable observer, is of sufficient magnitude that the arrangement or representation ought to be forbidden categorically.

In the case by case analysis, the focus should be on whether, as a consequence of having access to confidential information, a public defender refrains from effectively representing a defendant; whether the attorneys employed by the same public defender's office can be considered the same as private attorneys associated in the same firm (i.e., the "side by side" practice described in *Pitt* and *Graves*); and whether confidential information is protected by an effective "wall" separating offices, facilities and personnel.

The county system proposed in this request has much in common with that applied in *People v. Christian*, 48 Cal. Rptr. 867 (Cal. App. 1 Dist. 1996). There the county established an alternate defender office (ADO) to serve indigent clients who would otherwise be represented by private

attorneys appointed by the conflicts panel of the county bar association. Although the ADO is formally a branch of the public defender office, it operates autonomously, with a separate supervising attorney. The public defender has no influence over the handling of cases by the ADO, nor does he have access to the client files or other client confidences of the ADO. The ADO has its own clerical support staff, investigators and physically separates the offices and files from the public defender. Finally, although the public defender is in charge of both his office and the ADO, that responsibility is restricted to administrative issues only. Supervision of the ADO attorneys is the responsibility of the ADO supervising attorney, not the public defender. The California court held the county's system satisfied the requirements of the Rules of Professional Conduct, finding that the ADO and public defender offices were separate offices with a strict ethical "wall" for the purpose of imputation of conflict.

CONCLUSION: Given the facts presented in this request, the Ethics Committee reaches the same conclusion as that reached in Christian. The Committee believes that the office of conflict counsel at issue is sufficiently separated from the office of the chief public defender so as not to be considered the same as private attorneys associated with the same firm. Moreover, the offices are sufficiently separated to protect confidential information in conflict situations. As the facts indicate, access to confidential information in conflict situations is restricted. The two offices are located in different areas of a building, computers and files are not shared, each office is held out as its own entity and development of litigation strategy is autonomous. Finally, although administrative control and hiring authority over conflict counsel rests with the chief public defender, sensitive decisions in these areas should be subject to Public Defender Advisory Board oversight. The Committee notes that this system does not assure that no conflict will ever arise, as there is potential for assignment of three or more co-defendants to the public defender office. For this reason the Committee recommends that the county retain its option of hiring lawyers outside of both offices. However, on the whole, the Committee believes that the system proposed presents no inherent ethical bar to the offices' representation of antagonistic interests.

THIS OPINION IS ADVISORY ONLY

ENDNOTES

1. Rule 1.7 Conflict of Interest: General Rule

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

- (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
- (2) each client consents after consultation.

(b) a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibility to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consent after consultation. When representation of multiple clients in a single matter is undertaken, the

consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

2. Rule 1.10 Imputed Disqualification: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8(c), 1.9 or 2.2.