



NAPD FORMAL ETHICS OPINION 19-1

Re: Ethics of Conflicts Imputation Between and Within Public Defender Offices

Question Presented: In light of the Sixth Amendment right to the effective assistance of counsel and the American Bar Association (ABA) Model Rules of Professional Conduct, under what circumstances is a conflict of interest on the part of one public defender imputed to another?

Short Answer

Conflicts of interest must be imputed among public defenders within the same firm.¹ If two public defender offices (or one public defender office and another organization) within a system of indigent defense are organized in a way that does not give rise to conflicts between them—they do not work together on cases, share access to files, or overlap in their work environment, and no one person or entity has hierarchical control over the office’s lawyers and litigation—they are not part of the same “firm” for purposes of conflict imputation under the ABA Model Rules of Professional Conduct. On the other hand, when any one of these factors is present, conflicts must be imputed between the offices.

There are a number of ways to structure indigent defense systems so as to avoid the need for imputation of conflicts of interest among their component public defender offices. But no method is always sufficient (or best) across all legal systems. Therefore, before any determination that public defender offices are separate firms—and thus imputation of conflicts of interest among lawyers in the

¹ The term “firm” is the relevant unit of analysis for legal organizations in the Rules of Professional Conduct. *See* MODEL RULES PROF’L CONDUCT R. 1.0(c) (Am. Bar Ass’n 2019) (“‘Firm’ or ‘law firm’ denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.”).

offices is unnecessary—there must be a fact-intensive inquiry, with careful focus on the relationship between the lawyers in different offices that could produce conflicts of interest.

Discussion

I. Overview

“The Sixth Amendment recognizes the right to the assistance of counsel” because the assistance of counsel is “necessary to ensure that the trial is fair.”² As a corollary, “the right to counsel is the right to the effective assistance of counsel.”³ The U.S. Supreme Court’s jurisprudence has long held that the Sixth Amendment right to counsel includes the right to conflict-free counsel.⁴ That is, wherever the “right to counsel exists,” the Sixth Amendment requires “a correlative right to representation that is free from conflicts of interest.”⁵ Because the ABA Model Rules of Professional Conduct and their state counterparts constitute a detailed body of law concerning the rights and obligations of lawyers and clients, the Supreme Court’s Sixth Amendment jurisprudence often turns to these sources to delineate the scope of the right to counsel.⁶ The Supreme Court has used the Model Rules of Professional Conduct and similar materials to evaluate ineffective assistance of counsel claims.⁷

The Model Rules of Professional Conduct and their state counterparts govern, *inter alia*, lawyers’ ability to take on two types of conflicts of interest: those between two current clients (concurrent conflicts) and those between a current and a former client. Model Rule 1.7 states that a concurrent conflict of interest exists where “the representation of one client will be directly adverse to another client” or “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”⁸ Concurrent conflicts of interest are only waivable if the lawyer can provide competent and diligent representation to each client, the representation is not otherwise prohibited by law, each client’s claims are not asserted against the other, *and* written informed consent is obtained from each client.⁹ However, “ordinarily a lawyer should decline to represent more than one co-defendant” even when clients might consent because “[t]he potential for conflict of interest in representing multiple defendants in a criminal case is so grave.”¹⁰ Model Rule 1.9 addresses duties owed to former clients, similarly requiring informed consent in writing from a former client before a lawyer represents someone whose material

² *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

³ *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970).

⁴ *See Von Moltke v. Gillies*, 332 U.S. 708, 725 (1948) (“The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client.”).

⁵ *Wood v. Georgia*, 450 U.S. 261, 271 (1981).

⁶ *See Strickland v. Washington*, 466 U.S. 668, 688 (1984) (“The Sixth Amendment refers simply to ‘counsel,’ not specifying particular requirements of effective assistance. It relies instead on the legal profession’s maintenance of standards sufficient to justify the law’s presumption that counsel will fulfill the role in the adversary process that the Amendment envisions. . . . Prevailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . .”).

⁷ *See, e.g., McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018) (citing MODEL RULES PROF’L CONDUCT R. 1.2(a)); *Wheat v. United States*, 486 U.S. 153, 160 (1988) (citing MODEL CODE PROF’L RESPONSIBILITY and MODEL RULES PROF’L CONDUCT); *Nix v. Whiteside*, 475 U.S. 157, 166-70 (1986) (citing CANONS PROF’L ETHICS, MODEL CODE PROF’L RESPONSIBILITY, and MODEL RULES PROF’L CONDUCT).

⁸ MODEL RULES PROF’L CONDUCT R. 1.7(a).

⁹ *Id.* R. 1.7(b).

¹⁰ *Id.* R. 1.7, cmt. 23.

interests in the same or substantially related matter are adverse to that former client.¹¹ Under Model Rule 1.10, lawyers in a firm cannot represent a client when another lawyer in the firm would be prohibited from doing so under Model Rule 1.7 or 1.9, subject to exceptions which are not relevant here.¹²

In analyzing conflicts of interest among public defenders, a few state courts have looked to Model Rule 1.11, which creates an exception to the Model Rule 1.10 requirement of imputed disqualification for current government lawyers.¹³ Model Rule 1.11 states that current government lawyers with an actual conflict must remove themselves from litigation.¹⁴ But “[b]ecause of the special problems raised by imputation within a government agency,” that Rule “does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees.”¹⁵

However, public defenders are not properly classified as “government lawyers” under the Rules: rather than representing the government, they represent private individuals who are being prosecuted by a government agency. Thus, as the annotation to the Model Rules notes, analyzing public defenders as government lawyers “makes for an awkward fit with Rule 1.11”—indeed, no fit at all.¹⁶ Further, conceiving of public defenders as government lawyers would imply that each public defender’s client is their employer, rather than the criminal defendants they represent.¹⁷ This cannot be squared with the Supreme Court’s admonition that “a public defender is not amenable to administrative direction in the same sense as other employees of the State. . . . A public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the [criminal defendant].”¹⁸ Thus, as soon as “a lawyer has undertaken the representation of an accused, the duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program.”¹⁹ While the purposes of imputing conflicts of interest among private counsel—ensuring loyalty, confidentiality, and client trust²⁰—do not apply neatly to government lawyers whose client is the government itself, they apply with equal or greater force to public defenders. Because public defenders represent individual citizens, and not the government or a governmental agency, public defenders who work within the same “firm” are subject to the rules of imputation of conflicts of interest, as stated in Model Rule 1.10.

Jurisdictions are split on the question of whether conflicts must at least be imputed among public defenders in the same office. Alaska,²¹ Arizona,²² Georgia,²³ Iowa,²⁴ Louisiana,²⁵ Maryland,²⁶ New

¹¹ See *id.* R. 1.9.

¹² See *id.* R. 1.10(a).

¹³ See, e.g., *People v. Shari*, 204 P.3d 453, 459 (Colo. 2009) (en banc); *Anderson v. Comm’r of Correction*, 64 A.3d 325, 326-28 (Conn. 2013); but see, e.g., *Nelson v. State*, 440 P.3d 240, 245 n.17 (Alaska 2019).

¹⁴ MODEL RULES PROF’L CONDUCT R. 1.11(d)(1).

¹⁵ *Id.* R. 1.11, cmt. 2. It does, however, recommend screening as a prudential matter. *Id.*

¹⁶ *Id.* R. 1.11 (Annotation) (section titled “Public Defenders”). While this specifically refers to successive-employment conflicts of interest, similar issues arise in concurrent-employment conflicts of interest. See *id.* (Annotation) (section titled “No Imputation, but Screening ‘Prudent’”).

¹⁷ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 97 cmt. c (Am. Law Inst. 2000); see also MODEL RULES PROF’L CONDUCT R. 1.13, cmt. 9.

¹⁸ *Polk County v. Dodson*, 454 U.S. 312, 321 (1981).

¹⁹ *Id.* at 318 (quoting ABA Standards for Criminal Justice 4-3.9 (2d ed.1980)); see also *Ferri v. Ackerman*, 444 U.S. 193, 202-04 (1979).

²⁰ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123, cmt. b.

²¹ See *Nelson v. State*, 440 P.3d 240, 245 n.17 (Alaska 2019).

Hampshire,²⁷ and Pennsylvania²⁸ require imputation. Connecticut,²⁹ Hawaii,³⁰ Idaho,³¹ Illinois,³² New Jersey,³³ New Mexico,³⁴ New York,³⁵ and Wyoming³⁶ do not. Nevertheless, for the reasons outlined below, the best view of the law requires imputation of conflicts among public defenders who work within the same “firm,” which at a minimum includes those who work within the same office. The usual presence of factors generating conflicting incentives among public defenders and risking breaches of confidentiality make imputation of conflicts of interest essential. Where such factors are effectively eliminated, however, the resulting relationship among public defender offices may not fit the definition of a single “firm.” Under those narrow circumstances, imputation is no longer required.

This opinion first addresses when two public defender offices are part of the same firm (Part II). It then rebuts common arguments for why conflicts should not be imputed between public defenders (Part III). Finally, it outlines three mechanisms for the provision of indigent defense services that attempt to avoid the need for imputation of conflicts of interests between lawyers, and briefly evaluates their merits (Part IV).

II. Defining the “Firm” in an Indigent Defense System

Neither the Model Rules nor any of their state equivalents expressly exempt public defenders within the same “firm” from conflicts imputation. And as already discussed, the exception to imputation for government lawyers does not apply, because the considerations that give rise to different rules for government lawyers cannot apply to public defenders.³⁷ The presence of one exception to imputation of conflicts of interest in the Rules implies the absence of any other exceptions: *expressio unius est exclusio alterius*.³⁸ Thus, conflicts must be imputed among public defenders within a “firm.” This is also the ABA’s informal opinion on the question³⁹ and is the definitive conclusion of the Restatement.⁴⁰

²² See *Rodriguez v. State*, 628 P.2d 950, 956-57 (Ariz. 1981).

²³ See *In re Formal Advisory Opinion 10-1*, 744 S.E.2d 798, 799-800 (Ga. 2013).

²⁴ See *State v. Ibarra*, 829 N.W.2d 190 (Iowa Ct. App. 2013).

²⁵ See *State v. Connolly*, 930 So. 2d 951, 955 n.1 (La. 2006).

²⁶ See *Duvall v. State*, 923 A.2d 81, 95 (Md. 2007).

²⁷ See *State v. Veale*, 919 A.2d 794, 797-98 (N.H. 2007).

²⁸ See *Com. v. Westbrook*, 400 A.2d 160, 162 (Pa. 1979).

²⁹ See *Anderson v. Comm’r of Correction*, 64 A.3d 325, 326-27 (Conn. 2013).

³⁰ See *State v. Mark*, 231 P.3d 478, 518 (Haw. 2010).

³¹ See *State v. Cook*, 171 P.3d 1282, 1292 (Idaho Ct. App. 2007).

³² See *People v. Cole*, 104 N.E.3d 325, 334-35 (Ill. 2017).

³³ See *State v. Bell*, 447 A.2d 525, 528-29 (N.J. 1982).

³⁴ See *Morales v. Bridgforth*, 100 P.3d 668, 669-70 (N.M. 2004).

³⁵ See *People v. Wilkins*, 268 N.E.2d 756, 757-58 (N.Y. 1971).

³⁶ See *Asch v. State*, 62 P.3d 945, 953-54 (Wyo. 2003).

³⁷ See *supra* notes 16-20 and accompanying text.

³⁸ “The expression of one thing implies the exclusion of others.” *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012)).

³⁹ ABA Comm’n on Ethics & Prof’l Responsibility, Informal Op. 1418 (1978) (“Representing Clients with Conflict of Interest by the Same Public Defender Department”).

⁴⁰ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123, cmt. d(iv).

Whether two lawyers work in the same “firm” is a fact-specific inquiry.⁴¹ Depending upon the structure of an indigent defense system, “the entire [system] or different components of it may constitute a firm or firms for the purposes of the[] Rules.”⁴² Facts such as shared access to client information and whether the lawyers hold themselves out to clients as being part of the firm are relevant.⁴³ In doubtful cases, the inquiry is guided by the purpose of the Rule at issue.⁴⁴ The requirement of imputation in Rule 1.10 is intended to safeguard the duties of loyalty and confidentiality.⁴⁵ In light of these purposes, two public defenders are part of the same firm for the purposes of conflict imputation if they work together on cases, overlap in a work environment, share access to client information—whether intentionally (including through working on trials together or electronic file sharing) or incidentally (such as through shared printers)—have a common supervisor who makes decisions regarding hiring, firing, promotion, discipline, and similar actions, or share a supervisor who reviews and directs litigation decisions. Conversely, if none of these factors is present, conflicts need not be imputed between the lawyers in question.

A. Safeguarding the Duty of Loyalty

1. Personal Incentives and Hierarchical Control of Personnel Decisions

“The rule of imputed disqualification . . . gives effect to the principle of loyalty to the client”⁴⁶ because “[w]here a lawyer’s relationship with a client creates an incentive to violate an obligation to another client, an affiliated lawyer will often have similar incentive to favor one client over the other.”⁴⁷ There are “real non-economic pressures present in private practice” that “are equally operative in a public defender service.”⁴⁸ In fact, “non-economic conflicts” like “friendship, loyalty, pride, fear of ostracism or retaliation”⁴⁹ are not only present in both contexts, but often more powerful motivational forces than pecuniary ones. The mere fact that a lawyer works in a public defender’s office will not immunize that lawyer from these biases and pressures. Further, in every public defender’s office there are issues of “hiring, firing, promotion and discipline of its personnel.”⁵⁰ Even with other safeguards in place, it will be difficult to ensure that the views of those in charge of such decisions do not exert improper pressure on public defenders, a problem far more likely to occur, and more severe in effect, where imputation of conflicts of interest is at issue.

2. Hierarchical Control of Litigation

Hierarchical control of litigation also implicates loyalty, and has long been at the core of disputes over imputation. A 1996 draft of the Restatement of the Law Governing Lawyers stated that conflicts

⁴¹ See MODEL RULES PROF’L CONDUCT R. 1.0 cmt. 2.

⁴² *Id.* at R. 1.0 cmt. 4.

⁴³ *Id.* at R. 1.0 cmt. 2.

⁴⁴ *Id.*

⁴⁵ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123, cmt. b.

⁴⁶ MODEL RULES OF PROF’L CONDUCT R. 1.10, cmt. 2.

⁴⁷ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123, cmt. b.

⁴⁸ *State v. Veale*, 919 A.2d 794, 797-98 (N.H. 2007) (quoting *State v. Lentz*, 639 N.E.2d 784, 788 (Ohio 1994) (Wright, J., dissenting)).

⁴⁹ *Id.*

⁵⁰ Catherine L. Schaefer, *Imputed Disqualification: Do Ethics Screens Adequately Shield Public Defenders from Conflicts of Interest?*, CHAMPION 29 (March 1997).

should not be imputed among public defenders in the same office.⁵¹ But the final draft of the Restatement differed sharply: “The rules on imputed conflicts . . . *apply to a public-defender organization as they do to a law firm in private practice* in a similar situation.”⁵² Part of the reason for the change in the final version was that the earlier draft came under sustained criticism for failing to accurately describe the supervisory structure of most public defender offices. “Contrary to the Restatement’s assumption, the public defender is involved in the substantive case work of the public defender office under his or her control. The public defender is not merely a labor contractor or dispatcher of cases.”⁵³ Thus, even where public defenders are in physically separate offices and do not share access to electronic files,⁵⁴ hierarchical control of litigation is another basis for imputation of conflicts of interest. Supervisors must make decisions about whether to appeal cases and on what grounds, what resources to devote to each case, and many other litigation decisions within constraints on personnel and funds. Those decisions will invariably create conflicts among public defender clients. And even if limited resources were no issue, public defenders converse with peers and supervisors to get advice and guidance on cases they are working on. Attempts to merely “insulate upper-management from cases involving conflicts of interest . . . would ultimately be complex, confusing, and largely unworkable”—in other words, ineffective.⁵⁵

B. Safeguarding the Duty of Confidentiality: Shared Space and Work Environment

Conflict imputation, in addition to safeguarding loyalty, serves as a prophylactic: it diminishes the probability that a client’s confidential information is shared with another lawyer whose client has conflicting interests.⁵⁶ The Restatement observes that “the restrictions upon a lawyer” regarding imputation of conflicts “also restrict other affiliated lawyers who . . . share office facilities without reasonably adequate measures to protect confidential client information so that it will not be available to other lawyers in the shared office.”⁵⁷ Jurisdictions vary in whether they require lawyers who share office space to impute conflicts between them,⁵⁸ but shared office space should always pose a concern. Even if public defenders had no personal incentive to violate an obligation to a client, it is virtually impossible to operate in a shared office space without overhearing phone calls, glancing at printed materials before they are picked up, seeing documents on another’s computer screen, or (in the case of shared virtual space)

⁵¹ “Where defenders in the same office discuss cases and have access to each other’s files, § 203(3) imputes their conflicts to each other. In the absence of such access, however, public defenders who are subject to a common supervisory structure within an organization ordinarily should be treated as independent for purposes of § 203(2). The lawyers provide legal services, not to the public defender office, but to individual defendants. Ordinarily, the office would have no reason to give one defendant more vigorous representation than other defendants whose interests are in conflict. Thus, while individual defendants should be represented by separate members of the defender’s office, *the representation of each defendant should not be imputed to other lawyers in an office* where effective measures prevent communication of confidential client information between lawyers employed on behalf of individual defendants.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS PFD NO. 1 § 203, cmt. d(iv) (1996) (emphasis added).

⁵² RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123, cmt. d(iv) (emphasis added).

⁵³ Jeff Brown, *Disqualification of the Public Defender: Toward A New Protocol for Resolving Conflicts of Interest*, 31 U.S.F. L. REV. 1, 14 (1996).

⁵⁴ See *infra* Section II.B.

⁵⁵ Brown, *supra* note 53, at 14.

⁵⁶ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123, cmt. b.

⁵⁷ *Id.*, at § 123.

⁵⁸ See, e.g., Or. State Bar, Formal Ethics Op. 2005-50 (2005) (imputation if lawyers share common employee with access to protected information); D.C. Bar, Ethics Op. 303 (2001) (whether sharing office space leads to imputed disqualification depends upon specific arrangements).

seeing electronic files on shared computer drives—all of which may include confidential client information.

* * *

An ethics opinion by the State Bar of North Dakota offers a helpful example of thoughtful reasoning about conflict imputation between public defender offices. The bar was asked to consider whether three regional public defender offices opened by a state commission could be treated as separate firms for purpose of conflict imputation. It concluded that, under the North Dakota Rules of Professional Conduct, conflicts should not be imputed across the public defender offices:

[T]he three public defender offices do not ‘present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm’ Rather, they maintain separate offices in different cities. And each office has its own filing system, its own separate computer drive which is not accessible by attorneys or employees from the other public defender offices, and its own letterhead. The three public defender offices also do not ‘have mutual access to confidential information concerning the clients they serve.’⁵⁹

Furthermore, each office had a separate supervisor, with “[a]ny supervision over the public defender offices” by the overarching Commission restricted to “purely administrative” matters.⁶⁰ Unlike many opinions that have grappled with this issue, this one thoroughly canvassed the relevant concerns—separation of cases, physical separation, separation of electronic files, separate chains of supervision and hierarchical control over management and litigation decisions—in analyzing the question of when public defenders are in different firms.⁶¹

III. Reasons for Rejecting Arguments for Non-Imputation

Several jurisdictions have failed to address the rationales discussed above, and instead have offered different reasons for why public defenders—even those working in the same office—are not subject to imputation of conflicts of interest. Those arguments generally fall into three categories: absence of economic incentives, responsibility to individual clients, and the importance of public defender expertise. Such arguments, however, are not only orthogonal to the question of imputation,⁶² but are also unpersuasive on their own merits.

A. No Private Economic Interests

Several state courts opinions argue that conflicts should not be imputed between public defenders in the same office because they lack economic incentives present among private lawyers. They reason that

⁵⁹ STATE BAR ASS’N OF N.D., Ethics Op. 06-07 (June 1, 2006) (citing N.D. R. PROF’L CONDUCT 1.10, Comment).

⁶⁰ *Id.* at 5-6.

⁶¹ Also relevant is the overarching question of whether “they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm.” MODEL RULES OF PROF’L CONDUCT R. 1.0, cmt. 2 (2019).

⁶² See *supra* notes 16-20, 38 and accompanying text.

lawyers in public defender offices do not seek to promote private economic interests;⁶³ unlike lawyers in private practice, “[p]ublic defenders . . . have no pecuniary interests in their attorney-client relationships or practice relationships.”⁶⁴ As a result, “when confronted with a situation where the interests of two clients become adverse, there would not be an economic incentive to favor one client over another . . . [and] the underlying economic rationale is absent for imputing disqualification to all attorneys in an office if one attorney has a conflict.”⁶⁵ In adhering to applicable ethics rules, the courts further reason, it is assumed each public defender will zealously advocate for his or her client’s interests.⁶⁶

There are two primary problems with this line of reasoning. First, the absence of pecuniary incentives does not imply the absence of other incentives to prioritize one client over another. As discussed in Section II.A.1, there are “real non-economic pressures present in private practice” that “are equally operative in a public defender service.”⁶⁷ In fact, “non-economic conflicts” like “friendship, loyalty, pride, fear of ostracism or retaliation”⁶⁸ are not only present in both contexts, but often more powerful motivational forces than pecuniary ones. Reflecting this, the Rules require imputation of conflicts of interests equally for both non-profit legal service providers and firms seeking economic returns.⁶⁹ Thus, the Rules make clear that imputation of conflicts within an organization does not turn on the existence of pecuniary interests. Second, as noted in Section II.A.1, in every public defender office there are issues of hierarchical control of personnel decisions: “hiring, firing, promotion and discipline of its personnel.” Thus, the premise that public defenders are fully insulated from “economic” interests is dubious.⁷⁰

B. Responsibility to Individual Clients

In addition to the absence of a collective economic interest, many state courts argue that “a public defender does not necessarily owe an allegiance to the reputation of his office such as to interfere with his undivided loyalty towards his client.”⁷¹ Although their salaries are provided by the state or local government, public defenders work for each indigent client, rather than for a group such as a law firm. As the Supreme Court of Wyoming argued, “The lawyers provide legal services, not to the public defender office, but to individual defendants. Ordinarily, the office would have no reason to give one defendant

⁶³ See, e.g., *State v. Mark*, 231 P.3d 478, 518 (Haw. 2010) (“[T]he same economic incentives that motivate private firms are not present at OPD.”); *Bolin v. State*, 137 P.3d 136, 145 (Wyo. 2006) (“[T]here is no financial incentive for attorneys in a public defender’s office to favor one client over another.”) (citing *People v. Christian*, 41 Cal. App. 4th 986 (Cal. Ct. App. 1996)); *State v. Bell*, 447 A.2d 525, 528 (N.J. 1982) (“Public interest firms have no financial incentive in retaining the cases of joint defendants who might thereby be prejudiced. As a consequence, the public does not lose confidence in a rule allowing attorneys in the same office to represent joint defendants, even though a single attorney from that office could not handle the cases.”).

⁶⁴ David H. Taylor, *Conflicts of Interest and the Indigent Client: Barring the Door to the Last Lawyer in Town*, 37 ARIZ. L. REV. 577, 594 (1995).

⁶⁵ *Id.* at 595.

⁶⁶ See, e.g., *Cook*, 171 P.3d at 1291 (“[T]he inbred adversary tendencies of [public defense] lawyers are sufficient protection.” (quoting *Bell*, 447 A.2d 525 at 528) (modifications in original)); *Cole*, 104 N.E.3d at 334-35 (“[T]he adversary tendency of lawyers within the public defender’s office [is] sufficient protection against a conflict of interest between assistant public defenders.”).

⁶⁷ *Veale*, 919 A.2d at 797-98 (quoting *State v. Lentz*, 639 N.E.2d 784, 788 (Ohio 1994) (Wright, J., dissenting)).

⁶⁸ *Id.*

⁶⁹ MODEL RULES OF PROF’L CONDUCT R 1.10, cmt. 1 (Am. Bar Ass’n 2019); see also Taylor, *supra* note 64, at 594.

⁷⁰ Schaefer, *supra* note 50, at 33.

⁷¹ *People v. Banks*, 520 N.E.2d 617, 620 (Ill. 1987).

more vigorous representation than other defendants whose interests are in conflict.”⁷² Under this reasoning, several state Supreme Courts have declined to impute conflicts among lawyers in public defender offices.⁷³

This argument is unpersuasive. First, all lawyers—whether at a law firm or a public defender office—owe their primary loyalty to their clients.⁷⁴ Second, public defenders, just as much as private lawyers, may be motivated to enhance the prestige of their office or help another’s client at the expense of one’s own client due to bonds of loyalty or friendship. Further, this argument in fact cuts *against* applying the government lawyers exception to public defenders: representation of individual clients runs against the assumption of the Rules that government lawyers merit special treatment because of the unique nature of having the government as one’s client.⁷⁵ The notion that public defenders’ responsibilities to individual clients justify an exception to imputation of conflicts of interests rules is therefore difficult to square with the text and structure of the Model Rules.

C. Value of Public Defender Expertise

Finally, some state courts have declined to impute conflicts among public defenders because of the value of public defender expertise for indigent defendants. As the Hawaii Supreme Court has noted, “a *per se* rule [of imputation] would result in many defendants having to go without the expert representation provided by public defenders.”⁷⁶ The Illinois Supreme Court has gone further, stating that “any such *per se* rule would needlessly disqualify competent and able members of the public defender office.”⁷⁷ Other state courts, including in California,⁷⁸ Idaho,⁷⁹ New Jersey,⁸⁰ New Mexico,⁸¹ and

⁷² *Bolin*, 137 P.3d at 145.

⁷³ *See, e.g., id.*; *Bell*, 447 A.2d at 528 (“Because ‘the primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State,’ . . . we can expect the public defenders to withdraw from the case whenever joint representation may prejudice their clients.”) (quoting *Branti v. Finkel*, 445 U.S. 507, 519 (1980)); *Banks*, 520 N.E.2d at 620 (rejecting “a *per se* conflicts rule precisely because . . . an assistant public defender’s loyalty towards his office is not great enough to impute to him the conflicts of other assistants”) (citing *People v. Robinson*, 79 Ill.2d 147 (1979)).

⁷⁴ *See* MODEL R. PROF’L CONDUCT R. 1.3 cmt. 1 (“A lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”).

⁷⁵ *See supra* notes 16-20 and accompanying text; *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1413, 1415 (1981).

⁷⁶ *Mark*, 231 P.3d at 518.

⁷⁷ *Banks*, 520 N.E.2d at 620.

⁷⁸ *See People v. Daniels*, 802 P.2d 906, 915 (Cal. 1991) (en banc) (“[A] rule of automatic disqualification is unnecessary, and would hamper the ability of public defenders’ offices to represent indigents in criminal cases.”).

⁷⁹ *See Cook*, 171 P.3d at 1292 (“We agree that automatically disqualifying a public defender where another attorney in the office has a conflict of interest would significantly hamper the ability to provide legal representation of indigent clients.”).

⁸⁰ *See Bell*, 447 A.2d at 528 (“A *per se* rule requiring counsel from separate offices would therefore needlessly deprive many defendants of competent local public defenders.”).

⁸¹ *See Morales*, 100 P.3d at 670 (“[R]equiring a *per se* disqualification would, in our view, ‘needlessly jeopardize the right of individual defendants to skilled and competent representation’ by the Department, especially in complex, costly and time-consuming cases like habeas corpus proceedings. . . . A public defender trained in post-conviction relief will offer a potentially higher level of service to the individual than even a member of the general criminal defense bar because of the unique issues that must be dealt with in a post-conviction claim.” (quotation omitted)).

Wyoming⁸² have also found the availability of competent representation an important consideration in deciding whether to impute conflicts between public defenders.

This logic is unpersuasive for three reasons. First, states overwhelmingly underfund public defender offices,⁸³ diminishing the importance of the relatively higher skill of public defenders as they have less time and other resources to apply to each case. Second, the failure of the state to provide competent alternative counsel to indigent defendants is a separate issue from whether a conflict exists; the state's failure to meet one ethical standard cannot absolve failure to meet another. Third, the value of public defender expertise cannot be relevant to the determination of whether a conflict of interest exists in any other context.⁸⁴ There is no principled justification for why such pragmatic considerations should be excluded from consideration in one case but not in the other: these concerns are both absent from the Rules and irrelevant to the purposes of imputation.

IV. Approaches to Mitigating the Need for Imputation

Imputation of conflicts of interest among public defenders is the rule. The sections below address structures of indigent representation that do not require imputation of conflicts between lawyers. Such analysis is meant to be suggestive and general rather than definitive and complete. It is important to underscore the need for a detailed and fact-intensive inquiry into all relevant features of the structure before any definitive determination can be made.⁸⁵

A. Special Conflict Offices

One way to avoid conflict imputation is to create an independent office outside the public defender office to handle cases which would otherwise result in an imputed conflict. For instance, the Washoe County Public Defender's Office in Nevada initially takes on all appointed counsel cases and then, following a conflicts screening, directs conflict cases to the Alternate Public Defender's office.⁸⁶ The Montana Bar Association has approved the efforts of one county's public defender to create such a conflict office.⁸⁷ There, the county's chief public defender transferred one of the two full-time lawyers to a new "office of conflict counsel for the public defender," which was separated through (i) a distinct computer system not linked to the main office, (ii) a separate filing system, (iii) separate letterheads and business cards, and (iv) separate rooms in the county courthouse.⁸⁸ Although the chief public defender continues to supervise the work of the conflict counsel on *non-conflict* cases and controls the conflict

⁸² See *Bolin*, 137 P.3d at 145 ("Another reason to adopt a case-by-case inquiry for conflicts of interest within the State Public Defender's Office is that to do otherwise would needlessly jeopardize the right of individual defendants to skilled and competent representation." (quotation omitted)).

⁸³ See, e.g., John P. Gross, *Rationing Justice: The Underfunding of Assigned Counsel Systems*, NAT'L ASS'N CRIMINAL DEF. LAWYERS 12, 14-15 (2013), <https://www.nacdl.org/getattachment/cf613fe0-8f46-4dc1-b747-82346328522e/gideon-at-50-rationing-justice-the-underfunding-of-assigned-counsel-systems-part-1-.pdf>.

⁸⁴ MODEL RULES OF PROF'L CONDUCT R. 1.10; 1.11(d)(1); 1.7; 1.9.

⁸⁵ "Whether two or more lawyers constitute a firm within [Rule 1.0(c)] can depend on the specific facts." MODEL RULES PROF'L CONDUCT R. 1.0 cmt. 2.

⁸⁶ *What is the Difference Between the Public Defender's Office and the Alternate Public Defender's Office?*, WASHOE COUNTY, NEVADA, <https://www.washoecounty.us/apd/faq/apdpublicdefender.php>.

⁸⁷ Montana Bar Association, *Ethics Opinion 960924: Is This Office Sharing Arrangement an Ethical No-No?*, 22 Mont. Law. 9 (Dec. 1996).

⁸⁸ *Id.*

office's budget, a Public Defender Advisory Board reviews any substantive decisions related to the administration and conflict issues.⁸⁹

This sort of division addresses most of the public policy concerns motivating the imputation of conflicts of interests. It creates an entirely separate staff of lawyers and supervisors, limiting the impact of any non-economic pressures on the “alternate” public defenders.⁹⁰ Both physical and virtual access and contact is closed off between public defenders and the “alternate” or “conflicts” public defenders. And hierarchical control of litigation is vested in two separate offices. However, aspects like Montana’s chief public defender’s control of the conflict office’s budget may pose a potential risk of hierarchical control of lawyers that gives rise to a need to impute conflicts, depending on how that control may be exercised. In addition, details in Montana such as supervision of non-conflict cases on one hand, or the separate letterheads and business cards on the other hand, also affect how separate the offices appear: the offices must be *perceived* as separate firms by the public.⁹¹ Thus, whether such public defenders might (or might not) fall within the definition of a “firm” under Rule 1.0(c) will depend on a more fact-intensive inquiry into each of these factors. But in general, constructing sufficiently separate conflict offices—if done with sufficient care and thoroughness—is one way to avoid imputation of conflicts of interest among public defenders.

B. Conflicts Panels Outside the Public Defender Office

A second potential solution is the creation of a conflicts panel, where private lawyers represent defendants who cannot be represented by the public defender office because of a conflict.⁹² Conflicts panels—if structured appropriately—should not face conflict of interest imputation problems among fellow panel members. In New York, for instance, a county established a legal aid conflicts panel through a contract with the local bar association.⁹³ Because the panel of lawyers worked in separate locations, did not share active files, lacked a common supervisor, and did not share confidential information with the county’s main legal aid office, the New York Bar Association found that such a panel did not operate as a law firm, thus obviating the need to impute conflicts among the panel members.⁹⁴ Generally, it is likely that such conflicts panels would not rise to the level of a *firm* at all. But even if a conflict panel were a firm for purposes of imputing conflicts of interest, the relevant public policy considerations guide the determination of whether it is a *separate* firm from a public defender office. Similar considerations—the separation of cases, physical workspace, electronic files, and supervision between a public defender office and a conflicts panel—would be key in this policy analysis. So long as the members of conflicts panels

⁸⁹ *Id.*

⁹⁰ *See supra* Section III.A.

⁹¹ *See supra* note 61.

⁹² *See, e.g., People v. Fryhaat*, 35 Cal. App. 5th 969, 979 (2019) (“[O]nce the public defender declared a conflict, the trial court should have appointed a conflict panel attorney to represent defendant in his absence.”); *Farrow v. Contra Costa County*, 12-CV-06495-JCS, 2019 WL 78839, at *8 (N.D. Cal. Jan. 2, 2019) (“The Public Defender’s Office has staffed the initial appearance or arranged for conflicts panel representation of all defendants at their first appearances at other courthouses, as well as all felony defendants and in-custody misdemeanor defendants in Richmond.” (internal quotations omitted)); *State v. Reeves*, 11 So. 3d 1031, 1061 (La. 2009) (“[T]he Capital Defense Project is now listed as a state-funded, regional capital conflict panel on the Louisiana Public Defender Board’s website.”)

⁹³ Committee on Professional Ethics, Opinion 914, N.Y. STATE BAR ASS’N (2012), <http://www.nysba.org/CustomTemplates/Content.aspx?id=4134>.

⁹⁴ *Id.*

are not hired onto the panel, fired from the panel, or disciplined while on the panel by a public defender office, and the trial court appoints each conflict panel lawyer, all relevant public policy considerations seem to point in favor of the conflicts panel being a separate firm (if it is a firm at all). Of course, each case of a conflicts panel must be examined separately, and in a fact-specific way, before such a determination can be certain.

C. Contracting Out or Mandated Representation

As a final alternative, the government may arrange for private counsel to defend an indigent client either through contract or mandate. Sometimes contracting out is motivated by fiscal concerns, as in Louisiana, where an unexpected decline in revenue led the 1st Judicial District Public Defender to propose eliminating the conflicts panel altogether and replacing it with a more ad hoc system in which a judge could require contracting with private lawyers.⁹⁵ And Missouri, for example, allows the chief public defender of the state to order any lawyer barred in the state to represent a defendant.⁹⁶

These approaches have at least two major risks. First, if private lawyers receive low compensation for such cases, there is significant risk that counsel may be ineffective.⁹⁷ Even if private counsel accepts an appointment, the appointment process is likely to give an indigent defendant a lawyer who is less experienced than a public defender or panel lawyer in working with indigent criminal defendants. The result may “rais[e], with justification, the question of competency of counsel.”⁹⁸ Second, in the cases where the public defender is obliged under its contract with the government to both identify conflicts and secure outside counsel for conflicted clients drawn from its own funds, the public defender may have a strong financial disincentive to certify conflicts.⁹⁹ As the California Supreme Court observed in such a case:

Pursuant to the contract, the fewer outside attorneys that were engaged, the more money was available for the operation of the public defender’s office. The direct consequence of this arrangement was a financial disincentive for the public defender either to investigate or declare the existence of actual or potential conflicts of interest requiring the employment of other counsel.¹⁰⁰

Thus, while such systems can in theory cure the problem of imputation of conflicts of interest, they pose severe risks of violating the duty to provide defendants with competent representation¹⁰¹ and may create perverse incentives to fail to recognize conflicts of interest. As a result, contracting or mandated

⁹⁵ See *State v. Garcia*, 108 So. 3d 1, 29 (La. 2012).

⁹⁶ MO. REV. STAT. § 600.042.5 (2013).

⁹⁷ See generally Bureau of Justice Assistance, *Contracting for Indigent Defense Services*, U.S. DEP’T OF JUSTICE (2000), <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf>.

⁹⁸ *People v. Robinson*, 402 N.E.2d 157, 162 (Ill. 1979).

⁹⁹ See *People v. Barboza*, 627 P.2d 188, 189 (Cal. 1981) (“Under the agreement . . . the Madera County Public Defender’s office was paid \$104,000 per year. From this amount, \$15,000 was deducted and deposited in a reserve account which was required to be maintained at all times to pay other defense counsel who were appointed when the public defender was disqualified because of a conflict of interest.”); *id.* (“At the end of each fiscal year, any unexpended balance on the reserve account was paid to the public defender.”).

¹⁰⁰ *Id.*

¹⁰¹ See MODEL RULES OF PROF’L CONDUCT R. 1.1.

representation systems are less desirable solutions to this problem than are the creation of conflict offices or the use of a conflicts panel.

Conclusion

Conflicts of interest must be imputed among public defenders within the same “firm.” The “firm” analysis in this context depends on the purposes motivating the rules on conflicts of interest—the duties of loyalty and confidentiality. As a result, public defender offices are only separate firms for purposes of imputation of conflicts of interest when they do not share information and do not have a common supervisor who makes determinations affecting allocation of resources, personnel issues and litigation decisions. Thus, physical separation of offices alone does not render public defender offices different firms. But constructing a sufficiently separate conflict office, so long as all relevant public policy concerns are accounted for, is one way to create separate firms. Another workable model, if structured appropriately, is the creation of a conflicts panel of private lawyers. Contracting out or mandated representation are still other alternatives, but ones that pose dangers with respect to both the provision of competent representation and the provision of representation free of conflicts of interests.

Respectfully submitted,

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