The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2010-5
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SYLLABUS: The assistant state public defenders in the state public defender's central appellate office located in the state's capital city and the assistant state public defenders in the state public defender's trial branch offices located in four different counties are not automatically considered lawyers associated in a firm for purposes of imputing conflicts of interest under Prof. Cond. Rule 1.10(a). If an appellate state public defender *does not* provide assistance to a trial branch state public defender in a trial matter, there is no ethical reason to impute a conflict of interest when an appellate attorney is asked to conduct a merit review, prosecute an appeal, or pursue a postconviction remedy asserting ineffectiveness of trial counsel in that matter. The appellate state public defenders *are not* associated with the trial branch state public defenders in that matter. But, if an appellate state public defender *does* provide assistance to a trial branch state public defender in a trial matter, it would be appropriate under the ethical rules to impute a conflict of interest when an appellate attorney is asked to conduct a merit review, prosecute an appeal, or pursue a postconviction remedy asserting ineffectiveness of trial counsel in that matter. The appellate state public defenders *are* associated with the trial branch state public defenders in that matter.

There is not a per se conflict of interest when an appellate assistant state public defender in the central appellate office conducts a merit review, asserts an appeal, or pursues a postconviction remedy asserting that another assistant state public defender in a branch office rendered ineffective assistance at trial. Under Prof. Cond. Rule 1.7(a)(2), whether an appellate state public defender in the central office has a conflict of interest in asserting ineffectiveness of an assistant state public defender in a trial branch office will depend upon whether there is a substantial risk that the appellate lawyer's ability to consider, recommend, or carry out an appropriate course of action for the defendant is limited by the appellate lawyer's responsibilities to another client, a former client, or a third person, or by the lawyer's own personal interests. This will always be a factual determination in each matter. If an appellate assistant state public defender in the central office has a significant close personal relationship or unyielding institutional loyalty to the trial assistant state public defender, it is likely there is a substantial risk of a material limitation on the appellate representation in that matter. Or, if an appellate assistant state public defender in the central office has provided assistance to an assistant state public

defender in a trial matter, it is likely that there is a substantial risk that the appellate lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the appellate lawyer's own personal interest arising from involvement in the trial matter, when asked to conduct a merit review, prosecute an appeal, or pursue a postconviction remedy asserting ineffectiveness of trial counsel in that matter.

OPINION: This opinion addresses conflicts of interest, and the imputation of conflicts of interest, as to the lawyers in the state public defender's office.

> Are the assistant state public defenders in the state public defender's central appellate office located in the state's capital city and the assistant state public defenders in the state public defender's trial branch offices located in four different counties considered lawyers associated in a firm for purposes of imputing conflicts of interest under Prof. Cond. Rule 1.10(a)?
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> Is there a conflict of interest when an appellate assistant state public defender in the central appellate office conducts a merit review, prosecutes an appeal, or pursues a postconviction remedy asserting that another assistant state public defender in a trial branch office rendered ineffective assistance at trial?

Introduction

The State Public Defender of Ohio provides indigent representation pursuant to the statutory powers set forth in R.C. 120.06. The State Public Defender is appointed by the Ohio Public Defender Commission. R.C. 120.03(A). The State Public Defender appoints assistant state public defenders. R.C. 120.04(A)(2).

The State Public Defender is required to maintain a central office in Columbus and to establish an office to handle appeal and postconviction matters. R.C. 120.04(B)(1), R.C. 120.04(B)(12). In addition to maintaining a central office, the State Public Defender has established branch offices in four different counties. The branch offices provide only trial representation. The central office provides appellate representation and also has a trial division.

This opinion addresses two questions that arise from the State Public Defender having a central office and branch offices. The first issue is whether, under the Ohio Rules of Professional Conduct, the assistant state public defenders in the central office and in the branch trial offices are considered lawyers associated in a firm for purposes of imputation of conflicts of interest. The second issue is whether there is a conflict of interest when an assistant state public defender in the central appellate office conducts a merit review, prosecutes an appeal, or pursues a postconviction remedy asserting ineffectiveness of an assistant state public defender from a trial branch office of the state public defender.

This opinion does not address conflicts of interest among the appellate assistant state public defenders in the central office and the assistant state public defenders in the trial division at the central office. According to the requester, the appellate assistant state public defenders in the central office would not conduct a merit review, prosecute an appeal, or pursue a postconviction remedy asserting that an assistant state public defender in the trial division at the central office rendered ineffective assistance at trial.

Although not dispositive of the issues in this opinion, the Board notes that indigent representation is also provided by some Ohio counties. Under Ohio's statutory scheme for indigent representation, any county may establish a county public defender's or a joint county defender's office; or may adopt a resolution to pay counsel who is either personally selected by the indigent person or appointed by the court; or in lieu of establishing these offices or adopting a resolution to pay court appointed or selected counsel, the county may contract with the State Public Defender for the State Public Defender's representation of indigent persons. R.C. 120.13-120.17, 120.23-120.27, 120.33(A), 120.33(B), 120.04(C)(7). The State Public Defender supervises the compliance of county and joint county public defender offices, and the county appointed counsel system with the Ohio Public Defender Commission's rules. R.C. 120.04(B)(3). The State Public Defender provides technical aid and assistance including representation and assistance on appeals. R.C. 120.04(B)(13).

Imputation of conflicts of interest when State Public Defender has a central appellate office and branch trial offices

Under the Ohio Rules of Professional Conduct, conflicts of interest are imputed among lawyers associated in a law firm, unless an exception within the rule applies. Prof. Cond. Rule 1.10(a) states: "While lawyers are associated in a *firm*, none of them shall represent a client when the lawyer *knows* or *reasonably should know* that any one of them practicing alone would be prohibited from doing so by Rule 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the *firm*."

As explained in Comment [2] to Prof. Cond. Rule 1.10, the rule of imputed disqualification "gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated."

A public defender organization is, by terminology, a law firm for purposes of the Ohio Rules of Professional Conduct. Prof. Cond. Rule 1.0(c) states: "'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

private or public legal aid or public defender organization, a legal services organization, or the legal department of a corporation or other organization."

Although the ethical rules define a public defender organization as a law firm, that definition alone is not dispositive as to whether all of the state public defender's lawyers are considered lawyers associated in a firm for purposes of imputation of conflicts of interest. As explained in Comment [2] to Prof. Cond. Rule 1.0(c), "[w]hether two or more lawyers constitute a firm within division (c) can depend on the specific facts."

The structure of the state public defender organization is pivotal in determining whether all lawyers within the organization are considered lawyers associated in a firm for purposes of imputation of conflicts of interest. Comment [4] to Prof. Cond. Rule 1.0(c), addressing legal aid and legal services organizations, explains that "[d]epending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these rules."

A North Dakota ethics committee considered whether three public defender offices opened by the Commission on Legal Counsel for Indigents can be treated as separate law firm for purposes of imputing conflicts of interest. The committee noted that the three offices do not present themselves to the public or conduct themselves as a firm, and they maintain separate office in different cities. Each office has its own filing system and separate computer drive. Each office has its own letterhead. There is no mutual access to confidential information regarding the clients. Each office has its own supervising attorney and its own administrative staff. Any supervision by the Commission over the office is purely administrative. The committee advised that under the facts presented the three public defender offices are not a "firm" for purposes of North Dakota's Prof. Cond. Rule 1.10(a). See State Bar Assn. of North Dakota, Op. 06-07 (2006).

Under the organizational structure of the State Public Defender of Ohio, the central appellate office is separate from the trial branch offices located in four different counties. The four trial branch offices are described as "essentially independent entities that have limited contact with the appellate attorneys" in the central office. The database of the central appellate office is separate from a trial branch office's database. The central office and the trial branch offices share Internet Technology support, but appellate attorneys do not have access to a trial branch office database. Each trial branch office has a branch office attorney director.

Nevertheless, one must acknowledge that there is a connection between the central appellate office and the trial branch offices. The State Public Defender is responsible for appointing all of the assistant state public defenders, including the trial branch attorneys. The central appellate office is available to provide support to the trial branch offices; for example, a trial branch office might on occasion need to call the appellate office for advice on a trial matter. But, for the most part, the trial branch offices function separately from the central appellate office.

The Board's view is that given the structure of having a central appellate office in the capital city and separate trial branch offices located in different counties, imputation of conflicts of interest, between the state assistant public defenders in the trial branch offices and the state assistant public defenders, is not automatically required under Prof. Cond. Rule 1.10(a). As noted in Comment [3] to Prof. Cond. Rule 1.10, division (a) of the ethical rule "does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented." Under the facts presented, the separate databases provide protection of confidential information. In the absence of facts establishing otherwise, the loyalty of the appellate state public defenders' to the defendants is not doubted.

Thus, in answer to Question One, the Board advises as follows. The assistant state public defenders in the state public defender's central appellate office located in the state's capital city and the assistant state public defenders in the state public defender's trial branch offices located in four different counties are not automatically considered lawyers associated in a firm for purposes of imputing conflicts of interest under Prof. Cond. Rule 1.10(a). If an appellate state public defender *does not* provide assistance to a trial branch state public defender in a trial matter, there is no ethical reason to impute a conflict of interest when an appellate attorney is asked to conduct a merit review, prosecute an appeal, or pursue a postconviction remedy asserting ineffectiveness of trial counsel in that matter. The appellate state public defenders *are not* associated with the trial branch state public defenders in that matter. But, if an appellate state public defender *does* provide assistance to a trial branch state public defender in a trial matter, it would be appropriate under the ethical rules to impute a conflict of interest when an appellate attorney is asked to conduct a merit review, prosecute an appeal, or pursue a postconviction remedy asserting ineffectiveness of trial counsel in that matter. The appellate state public defenders *are* associated with the trial branch state public defenders in that matter.

Appellate assistant state public defender review of representation by trial assistant public defender

Having addressed imputation of conflicts of interest, consideration is given to determining whether there is a conflict of interest when an appellate assistant state public defender is conducting a merit review, asserting an appeal, or pursuing a postconviction remedy asserting ineffectiveness of a trial assistant public defender.

Under the Ohio Rules of Professional Conduct, the conflicts of interest of current clients are addressed in several rules. Prof. Cond. Rule 1.7 is the general rule where the analysis of all conflicts begins. Prof. Cond. Rule 1.8 contains specific rules not applicable to this opinion.

Prof. Cond. Rule 1.7(a) states: "A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies: (1) the representation of that client will be directly adverse to another current client; (2) there is a

substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer' s own personal interests."

The "material limitation" conflict of interest identified in Prof. Cond. Rule 1.7(a)(2) is at issue when an appellate assistant state public defender conducts a merit review, prosecutes an appeal, or pursues a postconviction remedy asserting that another assistant state public defender rendered ineffective assistance at trial. The "directly adverse" conflict of interest identified in Prof. Cond. Rule 1.7(a)(1) is not at issue and is not addressed further herein.

In analyzing the "material limitation" conflict of interest, the question is whether there is a *substantial* risk that an appellate assistant state public defender's ability to consider, recommend, or carry out an appropriate course of action for a defendant when conducting a merit review, prosecuting an appeal, or pursuing a postconviction remedy asserting ineffective assistance at trial by an assistant state public defender will be materially limited. If so, there is a conflict of interest under Prof. Cond. Rule 1.7(a)(2).

As defined by Prof. Cond. Rule 1.0(m). "'[s]ubstantial' when used in reference to degree or extent denotes a matter of real importance or great consequence." Given the serious nature of public defender representation, if a risk exists, it likely will be a substantial risk.

It appears settled that a conflict of interest exists for a defendant's trial lawyer to argue that the trial lawyer's own representation was ineffective. For example, in Ohio, there is a notion that "counsel cannot realistically be expected to argue his own incompetence." *State v. Lentz* (1994), 70 Ohio St.3d 527, 529. As the *Lentz* court mentioned, this notion is approvingly attributed to *State v. Carter* (1973), 36 Ohio Misc. 170 by the court in *State v. Cole* (1982), 2 Ohio St.3d 112, 114 f.n. 1: As the *Cole* court, referring to *Carter*, noted, since "counsel cannot realistically be expected to argue his own incompetence, *res judicata* does not act to bar a defendant represented by the same counsel at trial and upon direct appeal from raising a claim of ineffective assistance of counsel in a petition for postconviction relief." *Cole* at 114, fn. 1.

These cases precede the adoption of Prof. Cond. Rule 1.7(a)(2). Under Prof. Cond. Rule 1.7(a)(2) the ethical analysis is whether there is a conflict of interest arising from a substantial risk that the lawyer's interest in not being found ineffective that would materially limit the lawyer's ability to consider, recommend, or carry out an appropriate course of action for the defendant.

Debatable issues surround whether there is a conflict of interest when one public defender prosecutes an appeal or pursues a postconviction remedy, asserting claims that another public defender's representation was ineffective. For discussion, see Christopher M. Johnson, *Not for Love or Money: Appointing a Public Defender to Litigate a Claim of Ineffective Assistance Involving Another Public Defender*, 78 Miss. L.J. 69 (2008). As Johnson notes, the debate about a per se rule barring public defenders from litigating

ineffectiveness of other public defenders versus a case by case analysis arises from disagreements as to basic premises. Id. at 87. For example, is it significant that public defenders, unlike private practitioners, have no financial interest in the outcome of a case? Can it be concluded that public defender ethos will preclude a public defender from concerns for the professional reputation of colleagues as might prevent zealous litigation of ineffectiveness claims involving a colleague? Does office loyalty exist, and if it so does it influence individual public defenders? Are there practical reasons supporting the appointment of public defenders to litigate ineffective assistance claims? Id. at 82-100.

In Ohio, the *Lentz* court rejected a per se rule that a conflict of interest exists when another public defender at the postconviction stage asserts a claim of ineffective assistance of a public defender, in favor of a case by case analysis. *Lentz* at 531. The *Lentz* court held that "when a criminal defendant is represented by two different attorneys from the same public defender's office at trial and on direct appeal, *res judicata* bars a claim of ineffective assistance of trial counsel raised for the first time in a petition for postconviction relief when such claim could have been made on direct appeal without resort to evidence beyond the record, unless the defendant proves that an actual conflict of interest enjoined appellate counsel from raising a claim of ineffective assistance of trial counsel on direct appeal." Id. at 529.

In adopting a case-by-case analysis, the court considered the question of whether a private law firm and a county public defender's office are analogous. The *Lentz* court noted the importance of this question since the ethical rule [then DR 5-105(D), now Prof. Cond. Rule 1.10(a)] imputes a lawyer's conflicts to a law firm. Id. at 530.

The court found "[a]t the threshold level, the lack of a financial stake in the case's outcome sets the public defender apart from the private firm. A lawyer in private practice who is still being paid by a defendant would be less willing to admit that his firm's representation in an earlier stage of the proceedings was substandard. Also, unlike the public defender, the private attorney is in competition with other law firms for clients' business, so diminished reputation more directly affects the finances of private sector attorneys." Id. at 530.

On the other hand, "[w]hile a public defender's office may not have the financial conflicts of a private law firm, conflicts driven by loyalty, reputation and *esprit de corps* may be just as likely to arise in a public defender's office as in a private law firm." Id. at 530. "Still, the doubts or awkwardness such feelings engender does not give rise to the same level of conflict of interest that would occur were a lawyer representing competing parties or co-defendants with differing interest, and certainly does not create a level of *conflict* serious enough for this court to find a *per se* conflict of interest. A lawyer's supreme duty of loyalty is to his client (EC 5-1), and that is a duty that we should not assume will be ignored due to the possibility of embarrassing a co-worker." Id. at 530.

Under Prof. Cond. Rule 1.7(a)(2), whether an appellate state public defender in the central office has a conflict of interest in asserting the ineffectiveness of another assistant

state public defender in the trial branch office will depend upon whether there is a substantial risk that the appellate lawyer's ability to consider, recommend, or carry out an appropriate course of action for the defendant is limited by the appellate lawyer's responsibilities to another client, a former client, or a third person, or by the lawyer's own personal interests.

Based upon the ethical rule and in keeping with applicable Ohio case law, the Board's view is that there is not a per se conflict of interest under the ethical rules for an appellate assistant state public defender in the central office to conduct a merit review, prosecute an appeal, or pursue a postconviction remedy asserting the ineffectiveness of another assistant state public defender in a trial branch office. This will always be a factual determination in each matter.

In each case, an appellate state public defender must consider whether there is a conflict of interest under Prof. Cond. Rule 1.7(a)(2). The question must be asked: Is there a substantial risk that the appellate lawyer's ability to consider, recommend, or carry out an appropriate course of action for the defendant is limited by the appellate lawyer's responsibilities to another client, a former client, or a third person, or by the lawyer's own personal interests, such as a close personal relationship or an unyielding institutional loyalty to the trial assistant public defender?

If the appellate assistant state public defender in the central office has a significant close personal or unyielding institutional loyalty to the trial assistant state public defender, it is likely there is a substantial risk of a material limitation on the appellate representation. Or, if an appellate assistant state public defender in the central office has provided assistance to an assistant state public defender in a trial matter, it is likely, that there is a substantial risk that the appellate lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the appellate lawyer's own personal interest arising from involvement in the trial matter, when asked to conduct a merit review, prosecute an appeal, or pursue a postconviction remedy asserting ineffectiveness of trial counsel.

In conclusion, the Board's advice is as follows. There is not a per se conflict of interest when an appellate assistant state public defender in the central appellate office conducts a merit review, asserts an appeal, or pursues a postconviction remedy asserting that another assistant state public defender in a branch office rendered ineffective assistance at trial. Under Prof. Cond. Rule 1.7(a)(2), whether an appellate state public defender in the central office has a conflict of interest in asserting ineffectiveness of an assistant state public defender in a trial branch office will depend upon whether there is a substantial risk that the appellate lawyer's ability to consider, recommend, or carry out an appropriate course of action for the defendant is limited by the appellate lawyer's responsibilities to another client, a former client, or a third person, or by the lawyer's own personal interests. This will always be a factual determination in each matter. If an appellate assistant state public defender in the central office has a significant close personal relationship or unyielding institutional loyalty to the trial assistant state public defender, it is likely there is a substantial risk of a material limitation on the appellate

representation in that matter. Or, if an appellate assistant state public defender in the central office has provided assistance to an assistant state public defender in a trial matter, it is likely, that there is a substantial risk that the appellate lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the appellate lawyer's own personal interest arising from involvement in the trial matter, when asked to conduct a merit review, prosecute an appeal, or pursue a postconviction remedy asserting ineffectiveness of trial counsel in that matter.

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.