

Missouri Supreme Court Advisory Committee
Formal Opinion No. 120

Re: Conflict of Interest re: Missouri Supreme Court Rules 24.035 and 29.15

Question

Is a conflict of interest, requiring non-representation, present when an attorney employed by the State Public Defender System is asked to represent a client seeking postconviction relief based upon ineffective assistance of counsel, where the postconviction claim is based upon the ineffective assistance of another attorney employed by the state Public Defender System in handling the appeal following conviction?

Hypothetical Situation: Attorneys A and B work in the Central Appellate Office for the Appellate/PCR Division of the State Public Defender. Attorney A specializes in appellate representation and represents the client in the Missouri Court of Appeals. Attorney B specializes in postconviction representation. After the direct appeal is affirmed, the client files a pro se motion for postconviction relief pursuant to Rule 29.15 and the trial court assigns Attorney B to the case pursuant to section (c) of the Rule. Both Attorneys A and B are supervised by Attorney C, the District Defender for the Central/Appellate Office for the State Public Defender. There are two other offices in the Appellate/PCR Division, housed in St. Louis and Kansas City. Each office of the Appellate/PCR Division has a separate District Defender responsible for daily operations of the respective offices. All three District Defenders for the Appellate/PCR Division offices are supervised by a Division Director, Attorney D, housed in the Operations Division for the State Public Defender in Columbia.

- 1.) Does Attorney B have a conflict of interest in providing representation to a client who, in the pro se motion for postconviction relief, complains of the representation rendered by Attorney A on direct appeal?
- 2.) If Attorney B has a conflict in the above situation 1., may another attorney from the Western or Eastern Appellate/PCR office handle the postconviction case in which the client complains of Attorney A's representation on direct appeal?
- 3.) Would Attorney B have a conflict of interest in providing representation where the client, in the pro se motion for postconviction relief, complains only of trial counsel's assistance and does not complain of Attorney A's appellate assistance? Assume trial counsel is not employed by the state Public Defender System.

- 4.) If Attorney B has a conflict in the above situation 3., may another attorney from the Western or Eastern Appellate/PCR office handle the postconviction case in which the client's pro se motion for postconviction relief only complains of his trial counsel's assistance?

Answer:

- 1.) There is no per se conflict in Attorney B's representation of a client who, in the pro se motion for postconviction relief, complains of the appellate representation of Attorney A, who is a public defender in the same office as Attorney B. The presence or absence of a conflict in this scenario would be determined on a case-by-case basis and would only exist where Attorney B had an ACTUAL conflict of interest.
- 2.) Where Attorney B has an ACTUAL conflict of interest in the above situation 1., another public defender in any office may handle the postconviction case in which the client complains of Attorney A's representation on direct appeal.
- 3.) No. There is no conflict of interest under this scenario and, in fact, Attorney B has an ethical duty to raise a claim of ineffective assistance of counsel on behalf of client should such a valid claim exist.
- 4.) Attorney B does not have a conflict under the above situation 3.

Discussion

The analysis to any question concerning conflicts of interest must begin with Rule 1.7, Conflict of Interest: General Rule. In regard to the questions before the Committee, the Rule in paragraph (b), that

- “(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or a third person, or by the lawyer's own interests, unless
- (1) the lawyer reasonably believes the representation will not be adversely affected;
 - (2) the client consents after consultation....”

The justification for this directive is provided in the Comment to the Rule, and is basically

one premised on loyalty to the client. Thus,

“loyalty to the client is...impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer’s other responsibilities or interests.

“[Accordingly,] the critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.” See Comments to Rule 1.7.

In the fact setting provided in the hypothetical and within the context of the questions posed to this Committee, it may be that the lawyer may feel loyalty to a colleague employed by his or her office or to his or her own interests in career advancement. Such loyalty would require withdrawal when it would materially limit his or her representation of the client unless the lawyer reasonably believes that the representation will not be adversely affected and the client consents after consultation. There is, no per se rule against any such representation posed and a case-by-case determination must be made by the lawyer(s) involved.

This Committee has been asked, however, whether it is *ever* permissible for a public defender to represent a client under the aforementioned hypotheticals. Even if the client consents and the public defender reasonably believes that representation will not be adversely affected, is it ethical for a public defender to represent a client on a postconviction motion on ineffective assistance of counsel against appellate counsel who is postconviction counsel’s colleague within the public defender system? Due to the acute risk of the appearance of impropriety in such a situation, this question requires additional analysis beyond Rule 1.7.

Although there are no formal Missouri ethics opinions which specifically address the various questions asked in this opinion, one informal opinion is helpful and is consistent with there being no per se rule against representation. This Missouri Informal Opinion asks

“Attorney is an assistant public defender. Attorney represents a defendant on one criminal charge. Another charge was brought against the same defendant before the defendant went to trial on the first charge. Attorney represented the defendant in both cases. One case went to trial first and the defendant was convicted. The defendant has now filed a 29.15 Motion alleging ineffective assistance of counsel. Must Attorney withdraw from representation of the defendant in the second case? If Attorney must withdraw, may the defendant be represented out of another office of the public defender system?” Mo. Inf. Op. 940089 (hereinafter “Opinion 940089”).

The answer to the first question in Opinion 940089 was that the attorney clearly had a conflict of interest in continuing to represent someone who contended he rendered ineffective assistance and “must seek to withdraw unless the client consents after full disclosure and advice from an independent attorney”. *Id.* Notwithstanding, and more pertinent to the questions now posed, the answer to the second question in Opinion 940089 was that the client could continue to be represented by another public defender should his colleague be forced to withdraw. This answer is based upon the Comments to Rule 1.7 and require that any conflict which may develop will not “materially interfere with the lawyer’s independent judgment in considering alternatives or foreclosing courses of action that reasonably should be pursued on behalf of the client.”

The bulk of Opinion 940089, while applicable to all public defenders, is only remotely relevant where defendant’s motion alleging ineffective assistance of counsel is filed against a *colleague* of the public defender defending the Motion. Interestingly, however, the second part of the question in Opinion 940089 draws an answer which parallels the pending hypotheticals more closely. Opinion 940089 states that a second public defender from the public defender system may represent the defendant should Attorney be forced to withdraw. The opinion provides this direction despite any inherent relationship between two public defenders creating a possible conflict. “A possible conflict does not in itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent judgment in considering alternatives or foreclosing courses of action that reasonably should be pursued on behalf of client.” Comments to Rule 1.7. In Opinion 940089 as well as the posed hypotheticals, the potential conflict arising out of the relationship between two public defenders “does not in itself preclude representation.” *Id.* If the public defenders in each case are able to maintain independent judgment absent any interference resulting from the conflict, representation may continue.

This theme is echoed by the Missouri Supreme Court in *State ex ret. Public Defender Commission v. Bonacker*, 706 S.W.2d 449 (Mo. banc 1986). In *Bonacker*, the Public Defender Commission sought to prohibit Circuit Courts from appointing attorneys employed by the Commission to represent prisoners in postconviction proceedings. The Court held that not only did the Circuit Court have jurisdiction to appoint members of the System to represent indigent prisoners in custody who seek such relief, they would also not be exceeding their jurisdiction by appointing public defenders to represent those who alleged ineffective assistance of counsel against other public defenders who originally represented them, notwithstanding the claim that such appointments would result in conflicts of interests and do violence to rules of ethics governing attorneys. On this issue, the Court wrote that no absolute disqualification exists, notwithstanding arguments concerning the centralized nature of the public defender system and the inherent conflict said to exist because the interests of the client in the postconviction setting conflict with the interests of the attorney’s employer, the Public Defender System. Rather, the Court wrote, the issue of conflicts of interest should be handled on a case-by-case basis, and when conflicts arise, they may be addressed and resolved by the Commission through the employment of private counsel under contract.

Courts in other states have addressed similar issues and determined that no inherent conflict exists where colleagues in the Public Defender's Office defend the same client in subsequent actions. The Illinois Supreme Court in *People v. Banks*, 1212 Ill.2d 36 (1987) refused to apply a per-se approach to this question and employed a case-by-case review for the presence or absence of an *actual* conflict of interest. Similarly, where public defenders *in the same office* represent codefendants with antagonistic defenses, that same court found there is no per se conflict of interest.

In fact, Attorney B in the posed hypothetical may actually have an ethical duty to assist the client where that client has a valid claim for ineffective assistance of counsel against an attorney in the same office as Attorney B. See Webster, *The Public Defender, The Sixth Amendment and the Code of Professional Responsibility: The Resolution of a Conflict of Interest*, 12 CRIM.L.REV. 739 (1975). This Committee, however, will not go so far as to support a premise all public defenders must continue representation of any defendant with a valid claim for ineffective assistance of counsel regardless of conflict status. Instead, Attorneys A, B, C and D in the posed hypotheticals must determine whether they may reasonably believe that their representation will not be adversely affected under the circumstances. See Comments Rule 1.7. If it is likely that a conflict will eventuate and, if it does, the conflict will materially interfere with the public defender's independent judgment, then the public defender must withdraw. *Id.* If, on the other hand, the public defender is able to maintain independent judgment absent any interference resulting from the conflict *and* the client consents, the public defender then has an ethical obligation to continue his or her representation of the client. Thus, the determination of whether or not Attorney B may continue representing the client in the posed hypotheticals does not rest exclusively on the circumstances surrounding the conflict or the claim of the defendant. Rather, it rests on the public defenders in question and whether or not the criteria set out above can be successfully met. An actual conflict exists only where the criteria set out above requires the public defender to withdraw from representation.

A final note - the Public Defender's Office must not make the assumption that no inherent conflict means that there is no *actual* conflict. In fact, Attorneys A, B, C and D should take affirmative action to *ensure* that no actual conflict eventuates. Late in 1996, the Missouri Supreme Court directed the Public Defender's Office "to take steps to resolve this conflict situation and to assure the courts before which it pursues its client's objectives that it has taken the necessary steps to avoid the appearance of impropriety." *Moore v. State*, ___ S.W.2d ___ (Mo. banc 1996) and *Carr v. State*, ___ S.W.2d ___ (Mo. banc 1996). In these consolidated cases the Missouri Supreme Court cites *Bonacker* and includes two specific methods through which the public defender's office can follow the Court's direction. "[T]he public defender commission has by statutory authority and practice employed conflict counsel where *actual conflicts* arose. In addition, the public defender commission has granted general authority to erect so-called 'Chinese walls' within its office, assuring that an attorney whose responsibilities are in conflict with another member of the staff will not be influenced by that association." *State ex rel Public Defender Commission v. Bonacker*, 706 S.W.2d 449 (Mo. banc 1986) (emphasis added).

While a public defender faced with this conflict need not automatically withdraw from representation, he or she would be well advised to employ the Court's suggestions and ensure that no *actual* conflict exists. It is this Committee's opinion that it is permissible for a public defender under the posed hypotheticals to maintain representation of the client *as long as* 1.) the client consents after consultation, including informing the client of additional options for representation, 2.) the public defender and his or her supervisor are able to maintain independent judgment absent any interference resulting from the conflict, and 3.) affirmative steps have been taken to ensure that no actual conflict eventuates, including the use of "Chinese Walls" where appropriate. Further, it is this Committee's opinion that should the public defender be required to withdraw, another public defender may represent the client assuming that individual passes the three part test set out above.

MISSOURI SUPREME COURT
ADVISORY COMMITTEE

Sandra L. Schermerhorn, Chair

Dated: March 26, 1997