

LAWYER DISCIPLINARY BOARD REQUEST FOR COMMENTS

The Lawyer Disciplinary Board is soliciting public comments on the following Legal Ethics Opinion. You may email your comments to ahinerman@wvdc.org, or mail them to the following address:

Conflict of Interest Committee,
c/o Office of Disciplinary Counsel
4700 MacCorkle Avenue SE, Suite 1200C
Charleston, WV 25304

Deadline for submissions: September 20, 2018.

DRAFT

L.E.O. 2018-__

CONFLICTS IN A PUBLIC DEFENDER'S OFFICE

INTRODUCTION

The Lawyer Disciplinary Board (Board) received a request for a formal legal ethics opinion addressing whether screening was available in a public defender's office when a former prosecuting attorney¹ takes a position as a supervisory attorney (known as "the public defender" or "chief public defender") in a public defender corporation/office. The Board recognizes that a Board of Directors oversees a "public defender corporation" pursuant to W.Va. Code §§ 29-21-1 *et seq.* This opinion assumes that under this office/corporation structure, the supervisory attorney ("the public defender" or "chief public defender") does not have authority to hire or fire or otherwise make such employment related decisions and that those duties remain with the Board overseeing the

public defender corporation.² Provided that this assumption is correct, the Board advises that screening is available pursuant to Rule 1.11 [Special Conflicts of Interest for Former and Current Government Officers and Employees] of the West Virginia Rules of Professional Conduct, unless the former prosecuting attorney participated personally and substantially in the matter.

DISCUSSION

Rule 1.11(a) provides, in pertinent part, that “..., a lawyer who has formerly served as public officer or employee of the government: (1) is subject to Rule 1.9(c); and (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate agency gives its informed consent, confirmed in writing, to the representation.” However, the conflict is non-waivable because the State may not waive conflicts especially where the public interest is involved. *See also, State ex rel. Morgan Stanley v. MacQueen*, 187 W.Va. 97, 416 S.E.2d 55 (1992). Therefore, the Board advises that if the former prosecuting attorney participated personally and substantially in the matter, then the matter must be referred to an attorney who is not a public defender in the same public defender corporation.

For matters in which the former prosecuting attorney did not participate in personally and substantially, but were nonetheless active in the prosecuting attorney’s office at the time of the attorney’s employment in that office, the Board advises that

¹ In the request for a formal legal ethics opinion, the prosecuting attorney in question was an assistant prosecuting attorney.

² See, W.Va. Code § 29-21-15(c).

screening of the former prosecuting attorney from access to those cases is available pursuant to Rule 1.11(b). Rule 1.11(b) provides, in pertinent part, that when a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless: (1) the disqualified lawyer is timely screened from any participation in the matter; and (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule. Comment [2] to Rule 1.11 provides, in part, that “Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice.” *See also*, Rule 1.10(d), which states that “[t]he disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.”

In regard to screening, the Board advises that the public defender corporation/office must determine what measures need to be taken to effectively screen the former prosecuting attorney from the case, keeping in mind both paper and electronic files. For example, each public defender corporation should have a written policy on screening procedures. *See also*, Rule 1.0(k) and Comment [6] to Rule 1.11 which detail screening requirements under the West Virginia Rules of Professional Conduct, including an obligation to obtain written acknowledgment from all office employees concerning their knowledge of the screening. The Board also wants to make clear that consistent with its understanding of the supervisory attorney position (known as “the public defender” or

“chief public defender”), it is necessary that the supervisor be screened from all aspects of the screened cases. The Board advises that there can be no interference by the supervisory attorney with the internal decision making process and that assistant public defenders must be free to exercise his or her independent legal judgement in the representation of his or her clients with no expectation that there will be any employment consequences as a result of his or her handling of these screened cases.

Finally, the Board does not believe that the issue of whether a public defender corporation/office is or is not a law firm is dispositive to this specific conflict of interest issue because it involves the conflict of a former government employee which is governed by Rule 1.11 of the West Virginia Rules of Professional Conduct.³ Therefore, all other questions involving general conflicts of interest, *i.e.*, those not specific to the conflict of interest posed when a prosecuting attorney takes a position in a public defender corporation discussed above, would be determined pursuant to Rules 1.7 [Conflict of Interest; Current Clients], 1.9 [Duties to Former Clients] and 1.10 [Imputation of Conflicts of Interest: General Rule] of the West Virginia Rules of Professional Conduct.

CONCLUSION

³ The Board notes that a public defender corporation/office would likely be considered a law firm under the West Virginia Rules of Professional Conduct. Rule 1.0(c) of the Rules of Professional Conduct states that “[f]irm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional partnership, professional corporation, limited liability entity, 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.” In addition, Comment [3] to Rule 1.0 states that “[w]ith respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct.” See also, Comment [4] which provides that “[s]imilar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending on the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules.” But see, L.E.I. 85-2, “*Lawyers Serving Together in a Prosecuting Attorney’s Office are not Members of a ‘Law Firm’ for Purposes of Imputed Disqualification*” wherein the Board found that Prosecuting Attorney’s offices are not considered to be law firms for purposes of the West Virginia Rules of Professional Conduct.

The Board advises that when a prosecuting attorney takes a position in a public defender corporation, either as supervisory attorney (known as “the public defender” or “chief public defender”) or as an assistant public defender, screening is available for matters in which the former prosecuting attorney did not participate personally and substantially pursuant to Rule 1.11(b) of the West Virginia Rules of Professional Conduct. However, screening is not available if the former prosecuting attorney participated personally and substantially in the matter. In that case, the matter must be referred to an attorney who is not a public defender in the same public defender corporation. All other conflict of interest issues involving the attorneys in a public defender corporation can generally be analyzed pursuant to Rules 1.7, 1.9 and 1.10 of the West Virginia Rules of Professional Conduct.

APPROVED by the Lawyer Disciplinary Board on the ___ day of _____, 2018, and **ENTERED** this _____ day of _____, 2018.

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**James R. Akers, II, Esquire, Chairperson
Lawyer Disciplinary Board**