

Dealing with Conflicts in Criminal Defense Representation

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Presented at Public Defender Conference, May 2002 and May 2007

Includes 2003 revisions to the North Carolina Revised Rules of Professional Conduct

I. Sources of Law

A. North Carolina Rules of Professional Responsibility

1. Rules

Rule 1.3 (Diligence)—Requires lawyer to act with reasonable diligence in representing a client, which according to comment 1 to rule includes acting with “zeal” on client’s behalf.

Rule 1.6 (Confidentiality of Information)—Describes confidential information and limits on disclosure.

Rule 1.7 (Conflict of Interest: Current Clients)—Regulates simultaneous representation and other conflicts.

Rule 1.9 (Duties to Former Clients)—Regulates successive representation of clients (for example, representing a defendant when a former client will be a witness against the defendant).

Rule 1.10 (Imputation of Conflicts of Interest: General Rule)—States general rule, with limited exceptions, that no lawyer in firm may knowingly represent client when any lawyer in firm would be prohibited from doing so by Rules 1.7 and 1.9.

Rule 1.16 (Declining or Terminating Representation)—Describes grounds for mandatory and permissive withdrawal.

2. Ethics Opinions

There are few ethics opinions about conflicts in criminal defense representation—under the 1973 Code of Professional Responsibility, 1985 Rules of Professional Conduct, or the Revised Rules of Professional Conduct (effective July 24, 1997, and amended Feb. 27, 2003). “CPR” signifies an opinion under the 1973 Code; “RPC” signifies an opinion under the 1985 Rules; “Formal Ethics Opinion” or “FEO” signifies an opinion under the current rules; and “Ethics Decision” refers to an unpublished opinion of the State Bar. Published opinions are available online at <http://www.ncbar.com>.

RPC 65 (July 14, 1989) (public defender office is treated as single law firm for purposes of joint representation).

98 Ethics Decision 9 (Oct. 14, 1998) (unpublished opinion states that criminal defense lawyer may not represent defendant when lawyer must cross-examine former client about prior conviction in which lawyer represented former client) (copy attached).

2003 FEO 14 (prosecutor has disqualifying conflict of interest in habitual felon case if, while a defense attorney, he or she represented defendant on prior felony conviction being used to establish habitual felon status and now must inquire into prior conviction; defense attorney has disqualifying conflict of interest in any phase of case if, while a prosecutor, he or she prosecuted defendant on one or more of prior felony convictions).

B. Sixth Amendment Right to Effective Assistance of Counsel

1. Principles

Automatic Reversal for Failure to Inquire. *Holloway v. Arkansas*, 435 U.S. 475 (1978), and cases interpreting it, held that if trial counsel brings a conflict to the trial court's attention, the trial court must hold a hearing on the issue; failure to do so is reversible error. Further, if the trial court holds a hearing, the court must allow counsel to withdraw unless the possibility of conflict is "too remote to warrant separate counsel." *Holloway*, 435 U.S. at 484. Regardless of whether trial counsel raises the issue, North Carolina case law requires the trial court to conduct an inquiry if it becomes aware of a potential conflict. See *State v. James*, 111 N.C. App. 785, 433 S.E.2d 755 (1993) (trial judge erred in not conducting inquiry into conflict of which it was aware; when potential conflict is raised, trial judge must "take control of the situation"; court orders new trial because record showed on face that counsel's multiple representation of defendant and prosecution witness adversely affected counsel's performance); *State v. Mims*, ___ N.C. App. ___, 637 N.C. App. 244 (2006) (trial judge erred in not conducting hearing regarding potential conflict of interest when prosecutor brought issue to judge's attention; another attorney in defense counsel's firm was representing a second defendant on charges arising out of same incident; court remands for hearing under actual conflict standard in *Cuyler* and *Mickens*).

Actual Conflict Standard. *Cuyler v. Sullivan*, 446 U.S. 335 (1980), and cases interpreting it, held that if the trial court neither knew nor should have known of a conflict, the defendant must show on appeal that an actual conflict adversely affected trial counsel's performance. This standard is obviously more difficult to meet than the *Holloway* standard, although it may be easier to satisfy than the standard for ineffective assistance of counsel in *Strickland v. Washington*, 466 U.S. 668 (1984).

Impact of *Mickens*. In a five-to-four decision, the Court in *Mickens v. Taylor*, 535 U.S. 162 (2002), held that the *Holloway* automatic-reversal rule applies only when trial counsel brings the conflict to the trial court's attention; if counsel does not do so, the less protective *Cuyler* rule applies even when the trial court knew or should have known of the potential conflict. *Mickens* states that trial counsel must "object" to continued representation for the *Holloway* rule to apply. However, it may not always be clear to counsel whether it is necessary to move to withdraw—for example, when counsel is not certain of the identity of the state's witnesses or the substance of their potential testimony. It should be sufficient in

those instances for counsel to bring the potential conflict to the court's attention and ask the court to take appropriate steps (*see* attached motion to determine whether counsel needs to withdraw; *see also* attached motion to require prosecution to reveal identity of witnesses so that it may be determined whether conflict exists). For a further discussion of *Mickens* and ineffective assistance claims based on a conflict of interest, *see* NC Defender Manual, Vol. 1, § 12.7D.

2. A Poor Guide to What Is Ethically Proper?

There appear to be only three reported decisions in North Carolina finding that an attorney's conflict of interest warranted reversal of a conviction under the Sixth Amendment. *See State v. Ballard*, ___ N.C. App. ___, 638 S.E.2d 474 (2006) (attorney represented defendant and potential defense witness, and attorney could not call defense witness because testimony could implicate that witness in unrelated criminal charges); *State v. James*, 111 N.C. App. 785, 433 S.E.2d 755 (1993) (attorney represented defendant and key prosecution witness); *State v. Loye*, 56 N.C. App. 501, 289 S.E.2d 860 (1982) (attorney was under investigation for own participation in criminal conduct involving defendant); *see also U.S. v. Nicholson*, 475 F.3d 241 (4th Cir. 2007) (finding actual conflict of interest).

As one commentator has observed, the courts' unwillingness to overturn a conviction on appeal because the defendant was unable to establish that a conflict adversely affected counsel's performance "says little about the ethical propriety of the lawyer's conduct." RODNEY J. UPHOFF, ED., *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER: PRACTICAL ANSWERS TO TOUGH QUESTIONS* 234 (Criminal Justice Section, ABA 1995).

C. Cases Involving Disqualification of Counsel by Trial Court

A trial court may override a client's waiver of a conflict and remove counsel if it finds that an actual or serious potential for conflict exists. *See Wheat v. United States*, 486 U.S. 153, 164 (1988) (trial court "must recognize a presumption in favor of petitioner's counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict"; evaluation of each case should be left primarily to informed judgment of court); *State v. Ballard*, ___ N.C. App. ___, 638 S.E.2d 474 (2006) (court rejected state's argument that defendant had waived his attorney's conflict of interest, finding that trial judge did not adequately question or advise defendant and that defendant's right to conflict-free representation was not knowingly, voluntarily, and intelligently waived); *State v. Yelton*, 87 N.C. App. 554, 361 S.E.2d 753 (1987) (potential conflict of interest was not sufficient to warrant interference with constitutionally guaranteed right of criminal defendant to retain and be represented by counsel of choice).

D. Malpractice Cases

See Belk v. Cheshire, 159 N.C. App. 325, 583 S.E.2d 700 (2003) (in apparently only reported decision in North Carolina on malpractice allegations in context of criminal proceeding, court holds that criminal defendant has greater burden than in civil legal

malpractice case and that he failed to meet burden); Harold H. Chen, Note, *Malpractice Immunity: An Illegitimate and Ineffective Response to the Indigent-Defense Crisis*, 45 DUKE L. J. 783 (1996) (discussing whether public defenders and other appointed counsel should have immunity from legal malpractice claims).

III. What Is a Conflict?

The authorities make the same basic point: *A client is entitled to the undivided loyalty of his or her attorney.* The critical question then, stated broadly, is: *Do you have competing loyalties or obligations that impair your obligation to your client?*

See, e.g., Comment 1 to Rule 1.7 of Revised Rules of Professional Conduct of the North Carolina State Bar (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client.”); Commentary to Standard 4-3.5 of ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993) (hereinafter “ABA Standards”) (“The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his or her client and free of any compromising influences and loyalties.”).

IV. Conflicts Involving Single Client

A. Personal Differences

Personal or strategic differences do not mandate withdrawal unless they affect your ability to represent your client effectively.

See Rule 1.16(b) of Revised Rules of Professional Conduct (permissive withdrawal rule states that “a lawyer may withdraw from representing a client if . . . (4) the client insists upon taking action that the lawyer considers repugnant, imprudent, or contrary to the advice and judgment of the lawyer, or with which the lawyer has a fundamental disagreement; or . . . (7) the representation . . . has been rendered unreasonably difficult by the client); Standard 4-1.6(d) of ABA Standards (“qualified lawyers should not seek to avoid appointment . . . except for good cause, such as: . . . the client or crime is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer’s ability to represent the client”); *McCoy v. Court of Appeals of Wisconsin*, 486 U.S. 429, 435 (1988) (“At the trial level, defense counsel’s view of the merits of his or her client’s case never gives rise to a duty to withdraw.”).

B. Taking Position Adverse to Client

The following examples are not always thought of as involving conflicts, but conflict concerns appear to be behind some of the rules.

1. Client Perjury

The proper course to take when dealing with client perjury (contemplated or completed) depends on rules and opinions beyond this paper. However, conflict concerns underlie in part the view that you should seek to withdraw when you believe your client will commit perjury. In that situation, you have a conflict between your obligation as an officer of the court not to present perjured testimony and your obligation to your client to advocate his or her cause and not reveal his or her confidences.

2. Physical Evidence

The proper course to take in dealing with physical evidence in your possession is beyond this paper. If, however, you determine that you have to turn over physical evidence, conflict concerns may bear on whether you stay in the case. The act of turning over physical evidence does not necessarily create a conflict requiring withdrawal. A conflict may arise, however, if you end up as a witness in regard to that evidence. Rule 3.7 of the Revised Rules of Professional Conduct prohibits a lawyer from acting as an advocate and witness in the same case except in certain circumstances. Underlying that rule, in part, are concerns about the potential conflict between representing and being a witness against a client.

C. Taking Position Adverse to Lawyer

The classic example of this type of conflict is challenging a conviction based on the attorney's own ineffectiveness. *See, e.g., United States v. Del Muro*, 87 F.3d 1078 (9th Cir. 1996) (reversible error for court to require trial counsel to represent defendant on motion for new trial alleging counsel's own ineffectiveness).

V. Conflicts Involving Representation of Multiple Clients

A. Representing Co-Defendants

1. Permissible but Rarely Advisable

See Standard 4-3.5(c) of ABA Standards (“The potential for conflict of interest in representing multiple defendants is so grave that ordinarily defense counsel should decline to act for more than one of several codefendants”); Comment 23 to Rule 1.7 of the Revised Rules of Professional Conduct (reaching same conclusion); FED. R. CRIM. PROC. 44(c) (in federal prosecutions, court must inquire when co-defendants are represented by same counsel and must take measures to protect each defendant's right to counsel unless there is good cause to believe no conflict is likely to arise); Gary T. Lowenthal, *Joint Representation in Criminal Cases: A Critical Appraisal*, 64 VA. L. REV. 939, 950 (1978) (hereinafter “Lowenthal I”) (survey of 136 public defender offices showed that 70% of offices strongly disfavored joint representation and 49% never represented more than one defendant in multiple defendant cases).

The above ABA Standard (and accompanying commentary) states, without explanation, that it is permissible to represent co-defendants at preliminary proceedings, such as bail hearings. Conflicts certainly could arise, however, at these and other pretrial proceedings.

2. North Carolina Standard

Under Rule 1.7(a) of the Revised Rules of Professional Conduct, you may not represent a client if the representation involves a “concurrent conflict of interest” unless otherwise permitted by the rule. A concurrent conflict exists if (1) the representation of one client is directly adverse to another client or (2) the representation of a client may be materially limited by the lawyer’s obligations to another client. Such representation is permissible only if the conditions in subsection (b) of Rule 1.7 are satisfied, including that:

1. you reasonably believe you can provide competent and diligent representation to each client, and
2. all of the clients give informed consent, confirmed in writing.

Client consent alone is insufficient. You must reasonably believe that the clients will not be prejudiced by joint representation.

3. Withdrawal after Undertaking Representation

If your office undertakes to represent co-defendants and subsequently determines that common representation adversely affects one of the clients in violation of Rule 1.7, the office may need to withdraw from both cases. Continued representation of one client may violate the office’s obligations to the client it no longer represents, who occupies the status of a “former client” under the rules. *See* Comment 4 to Rule 1.7 of Revised Rules of Professional Conduct (“Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer’s ability to comply with duties owed to the former client and by the lawyer’s ability to represent adequately the remaining client or clients, given the lawyer’s duties to the former client.”).

Rule 1.9, discussed in VI. below, sets forth an attorney’s duties to former clients and, except as permitted by the rule, prohibits a lawyer from:

1. representing a person in the same or substantially related matter if that person’s interests are materially adverse to the interests of a former client, or
2. using confidential information to the disadvantage of a former client or revealing confidential information of a former client.

Even if it is permissible for the office to keep one of the cases, it may be difficult to adopt a consistent policy on which case to keep. Do you keep the case you undertook first? The case that requires the most attorney time and skill? The case you’re most likely to win? *See* Lowenthal I at 954–56 (discussing possible policies and their deficiencies).

4. Release of Client Files

See RPC 153 (Jan. 15, 1993) (in cases of multiple representation a lawyer who has been discharged by one client may have to deliver to that client as part of that client's file information entrusted to the lawyer by the other client).

B. Representing Defendants and Client Witnesses

Problems similar to those arising with joint representation of co-defendants may arise when a current client in one case is a witness against another client in an unrelated case.

Under Rule 1.7(a)(2) of the Revised Rules of Professional Conduct, a lawyer may not represent a client if the representation may be materially limited by the lawyer's responsibilities to another client unless, as required under Rule 1.7(b), the lawyer reasonably believes that the representation will not be adversely affected and both clients consent. See also *State v. Ballard*, ___ N.C. App. ___, 638 S.E.2d 474 (2006) (trial court erred in denying defense counsel's motion to withdraw; counsel represented defendant and defense witness with potentially exculpatory information but witness's testimony could implicate him in an unrelated crime and counsel therefore could not call witness); *State v. James*, 111 N.C. App. 785, 433 S.E.2d 755 (1983) (defendant's Sixth Amendment right to counsel was violated by attorney's representation of defendant and key prosecution witness); Comment 6 to Rule 1.7 (discussing conflicts involved in cross-examining current client who is witness against another current client).

See generally Gary T. Lowenthal, *Successive Representation by Criminal Lawyers*, 93 YALE L. J. 1, 8–9 (1983) (hereinafter "Lowenthal II") (survey revealed that in only 2.8% of cases did particular public defender office represent defendant when witness against defendant was current client; low percentage reflected office's policy of withdrawing when current client is witness against another client).

C. Inconsistent Legal Positions in Unrelated Cases

In rare circumstances, a "positional conflict" may exist—that is, a situation in which clients have opposing interests in unrelated matters. See *Williams v. State*, 805 A.2d 880 (Del. 2002) (court holds that it would be unethical for lawyer to advocate conflicting legal positions in two capital murder appeals pending before same court; court therefore allows lawyer to withdraw from one of cases); Comment 24 to Rule 1.7 of Revised Rules of Professional Conduct (discussing possibility of positional conflict).

D. Excessive Caseload

The burden on an attorney of coping with an excessive caseload may be thought of as creating a conflict between clients. Courts may be unwilling to characterize such a situation as a conflict, however, which could trigger the *Holloway/Cuyler* rules on ineffective assistance rather than the *Strickland* standard. See generally 3 WAYNE R. LAFAYE ET AL., CRIMINAL PROCEDURE § 11.9(a), at 653 (2d ed. 1999) (hereinafter LAFAYE).

VI. Conflicts Involving Successive Clients

A. The Problem

Representing a current client in a case in which a former client is a witness may give rise to a conflict between an attorney's obligation to

- represent the current client diligently while
- maintaining the confidences of the former client.

B. Potential Conflict #1: Same or Substantially Related Matters

Grounds for Withdrawal. Rule 1.9(a) of the Revised Rules of Professional Conduct establishes a general protective rule regarding successive representation. It prohibits successive representation in the *same or substantially related matter* if the former and current client's interests are materially adverse unless the former client gives informed consent, confirmed in writing. Although the rule states that only the former client must consent, you may want to obtain the consent of both the former and current client since both are potentially affected.

Meaning of "Same or Substantially Related." When is a matter the "same or substantially related" for purposes of Rule 1.9(a)?

The rule clearly applies to situations in which an attorney represented the former client in an earlier stage of the case—for example, if an attorney represented two co-defendants initially and withdrew from representing one of them—because the representation would involve the "same" matter.

The rule likewise applies to situations involving the same events or transactions even though the cases are brought separately. A matter is "substantially related" if it involves "the same transaction or legal dispute." Comment 3 to Rule 1.9 of Revised Rules of Professional Conduct.

The rule also may apply to situations in which there is a substantial relationship between the earlier representation and the issues in the current case, even though the former and current cases involve unrelated transactions. Factors to consider may include: (1) Was the earlier representation brief or extended? (2) Did you acquire confidential information that could be useful in the current case? (3) How important is the former client to the prosecution's case against your current client? (4) How important is it for you to challenge the former client's credibility as a witness? These factors may warrant withdrawal from the current case under the "substantially related" rule even if you might be able to represent the current client without actually using or disclosing confidential information in violation of Rule 1.9(c) (discussed in more detail below). *See* Lowenthal II at 38; *see also* Comment 3 to Rule 1.9 of Revised Rules of Professional Conduct (a matter is "substantially related" if there is "a substantial risk that information as would normally have been obtained in the

prior representation would materially advance the client’s position in the subsequent matter”).

C. Potential Conflict #2: Use or Disclosure of Confidential Information

Grounds for Withdrawal. Rule 1.9(c) prohibits a lawyer from using information relating to the representation of a former client to the former client’s disadvantage or from disclosing information relating to the representation of a former client. Rule 1.6 elaborates on a lawyer’s duty to maintain confidentiality, protecting not only attorney-client communications but also other information gained in the course of the professional relationship with the former client. *See* Comment 3 to Rule 1.6 (defining duty of confidentiality); Comment 19 to Rule 1.6 (duty of confidentiality continues to apply after lawyer-client relationship ends).

Exceptions. There are two main exceptions to this prohibition:

1. Under Rule 1.6, if the former client consents to disclosure, an attorney may use or reveal the information.
2. Under Rule 1.9(c), if the information has become “generally known,” an attorney may use or reveal the information.

Cross-Examination about Prior Conviction. An unpublished opinion of the North Carolina State Bar, 98 Ethics Decision 9 (Oct. 14, 1998) (attached), states that an attorney has a conflict of interest, requiring withdrawal or client consent, if he or she would need to cross-examine a former client about a prior conviction resulting from a case in which the attorney represented the former client. The opinion states that although the conviction may be “generally known” within the meaning of Rule 1.9(c), cross-examination about the conviction would inevitably lead to inquiry into additional, confidential facts related to the conviction that are not a matter of public record. Under the imputed conflict principles in Rule 1.10, this opinion also may apply when another attorney in the office handled the previous case.

The concern about cross-examination seems both over- and under-inclusive. It may be over-inclusive because generally cross-examination about a prior conviction is limited to the fact of conviction (as required by Evidence Rule 609 on impeaching a witness by a prior conviction) and therefore would not involve confidential information. The opinion is also under-inclusive because the only question it addresses involves cross-examination. Rule 1.9(c) prohibits an attorney from using confidential information before as well as during trial. For example, in plea bargaining an attorney could not reveal confidential information of a former client in an effort to convince the prosecution that its case against the attorney’s current client is weak.

The unpublished Bar opinion, like an unpublished appellate court decision, provides guidance to attorneys, but it is not binding precedent. It is not clear why the Bar chose not

to publish the opinion, but it may be willing to consider other approaches in light of the demands and requirements of public defender work.

A published opinion in 2003 repeats the concern expressed in the unpublished opinion about cross-examination regarding a prior conviction. However, that opinion deals with a narrower set of facts—namely, the limitations in habitual felon cases on defense attorneys who become prosecutors and vice versa—and may be limited to that context. *See* 2003 FEO 14 (prosecutor has disqualifying conflict of interest in habitual felon case if, while a defense attorney, he or she represented defendant on prior felony conviction being used to establish habitual felon status and now must inquire into prior conviction; defense attorney has disqualifying conflict of interest in habitual felon phase of case if, while a prosecutor, he or she prosecuted defendant on one or more of prior felony convictions).

D. Potential Conflict #3: Diligence on Behalf of Current Client

Rule 1.3 provides that an attorney must act with reasonable diligence on behalf of a client. As indicated in the commentary, this rule includes the obligation to act with zeal on the client's behalf. In the context of successive representation, a conflict may arise if the attorney's obligations to a former client affect the attorney's zealous representation of the current client. For example, to avoid treading on confidential information, an attorney might be too restrained in cross-examining a former client.

E. Reviewing Former Client's Files

In my opinion, an attorney should review a former client's file before determining the appropriate steps to take. I see no ethical prohibition on reviewing a former client's file. If after reviewing the file the attorney believes that a conflict exists—for example, the attorney learns of confidential information that would be useful in representing the current client—the attorney should obtain the necessary client consent or withdraw if the client is unwilling to consent.

Not reviewing the former client's files seems problematic with respect to both the current and former client. An attorney's obligation to zealously represent the current client under Rule 1.3 includes conducting a full factual investigation, which would seem to include reviewing the office's files. Further, without looking at the former client's file, an attorney might continue to represent the current client even though a conflict exists. Information in the former client's file may be imputed to the attorney under Rule 1.10 regardless of whether the attorney actually knows of it. *See* RPC 65 (July 14, 1989) (imputing conflict in public defender's office in joint representation situation); *but see generally* 3 LAFAVE § 11.9(a), at 657 (although some courts impute conflicts in successive representation situation, others allow successive representation if public defender office utilizes firewall that keeps information of former client from current attorney).

Not everyone may agree with this position. For example, in *Lowenthal II* at 13–16, the public defender offices surveyed had varying policies on access to a former client's files:

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| Office will not represent current defendant regardless of what is in former clients' files | 21% |
| No access permitted to former clients' files | 15% |
| Access to and use of former clients' files with supervisor's permission | 3% |
| Access only by lawyer who represented former client | 3% |
| Access and use permitted for all trial lawyers | 58% |

The surveys revealed additional policies on use of information from former clients' files. Some offices disallowed use of attorney-client communications but allowed use of other information obtained during the course of representing the former client; this approach, however, may conflict with North Carolina's ethics rules, which define confidential information as including information obtained in the course of representation. Other offices allowed the use of information if it could be obtained from other sources—a kind of "independent discovery" rule for conflict situations. Several offices left the matter to the individual attorney's judgment. *See* Lowenthal II at 16–17.

VII. Procedural Matters

1. **If I am an assistant public defender, when do I have to get the court's permission to withdraw?**

Under the Public Defender plans governing appointment of counsel in Public Defender districts, the court is supposed to assign all of the indigent criminal cases to the Public Defender (although in some districts the court may assign a case to a private attorney on the approved list if the court discovers a conflict before sending the case to the Public Defender). If the Public Defender discovers a conflict before an attorney in the office undertakes representation, the Public Defender need not move to withdraw. Instead, depending on the local Public Defender appointment plan, the Public Defender either makes the assignment to a private attorney or returns it to the court for assignment from the approved list. Once an attorney in the Public Defender's office has undertaken representation (for example, the attorney has appeared), the attorney should formally move to withdraw if withdrawal of the office becomes necessary. Under the local plan, the court or the Public Defender then assigns the case to a private attorney on the approved list.

2. **Do I need to withdraw if I am an assistant public defender and the case is being reassigned to another assistant public defender in my office?**

Probably not. While an ethics opinion, RPC 58 (July 14, 1989), states that the court and client must consent when an appointed private attorney wishes to give a case to another attorney in his or her firm, the opinion does not appear to apply to appointments of the Public Defender, who appears through assistant public defenders from his or her office. Further, the opinion apparently was intended to prevent attorneys who are not on the appointed list from handling cases without permission. This rationale would not seem to

apply to reassignments within a full-time Public Defender's office, in which all of the attorneys do criminal defense work.

3. Do I have to disclose confidential information to support a motion to withdraw?

In most instances, no. Ordinarily, you need only indicate to the court that you have a conflict and perhaps the general basis for the conflict—for example, a former client is a witness in the current case. In some instances, a trial court might hold an *in camera* hearing to inquire further. *See State v. Yelton*, 87 N.C. App. 554, 557, 361 S.E.2d 753, 756 (1978). The Supreme Court has cautioned, however, that trial courts should be wary of infringing on privileged attorney-client communications. *See Holloway v. Arkansas*, 435 U.S. 475, 487 & n.11 (1978).

4. What sort of showing should be made of client consent?

Rules 1.7 and 1.9 require that the client give his or her informed consent, confirmed in writing. "Informed consent" means the agreement of the client after the lawyer has communicated adequate information and explanation to the client. *See* Rule 1.0(f) of Revised Rules of Professional Conduct. "Confirmed in writing" means a writing by the affected client or a writing by the lawyer to the client confirming an oral consent by the client. *See* Rule 1.0(c) of Revised Rules of Professional Conduct. You should obtain consent from all affected clients even if not explicitly required by the rules. In addition, although apparently not required, you may want to put consents or waivers of conflicts on the record. Advice of separate counsel is generally not required. *See generally* 3 LAFAVE §11.9(c), at 680 (noting, however, that some courts have encouraged co-defendants to consult with independent counsel before waiving conflict in joint representation situation).

5. May a prosecutor move to disqualify a defense attorney on the basis of a conflict?

Yes, but the court should scrutinize more carefully motions brought by an adversary in the proceeding. *See Yelton, supra* (opposing party may not use motion to disqualify as technique to harass). If the prosecutor brings such a motion, you may ask the court to require the prosecutor to show the basis for the conflict. For example, if the disqualification motion is based on the prosecutor's claim that a former client will be a witness against the defendant you represent, ask that the prosecutor identify the witness and the evidence to be offered by the witness so that an assessment of any conflict can be made.

October 14, 1998

Cross-examination of Former Client

Proposed opinion rules that a lawyer has a conflict of interest if effective representation of a current client at trial requires the use confidential information of a former client relative to a criminal conviction to cross-examine the former client even though the conviction itself is a part of the public record.

Inquiry #1:

Attorney A, a federal public defender, was appointed to represent Client on federal drug conspiracy charges. At trial, the government is expected to call numerous convicted drug dealers to testify against Client, including Witness X.

Seven or eight years ago, Witness X was charged with the sale of drugs. Attorney A, who was then a member of the local state public defender's office, represented him. Attorney A has no recollection of any communications he had with Witness X, but he does remember that Witness X went to trial and was convicted on the strength of the state's videotape evidence. The assistant district attorney who prosecuted that case is now also a member of the federal public defender's office.

At Client's trial, Attorney A wants to cross-examine Witness X about the fact that he was previously convicted for selling drugs. The conviction is a matter of public record. Witness X and Client were members of an organized group that sold drugs. Because Witness X's conviction falls within the time period of Client's alleged conspiracy, it is considered part of Client's conspiratorial conduct. Thus, the conduct that lead to Witness X's conviction will be "relevant conduct" at any sentencing of Client.

Does Attorney A have a conflict of interest with respect to representing Client during a trial at which Witness X will testify?

Opinion #1:

Yes.

When cross-examining a former client, conflicts of interest arise most frequently when the attorney either misuses confidential information previously obtained from the witness/former client or fails to cross-examine the witness effectively for fear of misusing confidential information. See Rule 1.9(c) and Rule 1.7, cmt. [4] of the Revised Rules of Professional Conduct. In the current situation, Attorney A may not use confidential information of Witness X in cross-examination for the benefit of Client without Witness X's consent. In addition, Attorney A must be careful that he does not forego relevant and material lines of questioning to avoid inappropriate use of confidential information. See

generally Delaware State Bar Association, Professional Ethics Opinion #1981-4 (June 4, 1981).

Attorney A indicates that his cross-examination of Witness X will be limited to the fact that Witness X was previously convicted. Ordinarily, the more relevant the prior representation is to the current matter, the more likely confidential information could be used effectively to cross-examine the witness/former client. Here, Attorney A should ask himself whether his representation of Client would be different were it not for his duty of confidentiality to Witness X. If a limited cross-examination is appropriate, there remains the question of whether cross-examination about Witness X's prior conviction is an improper use of confidential information.

Rule 1.6(a) of the Revised Rules of Professional Conduct defines "confidential information" as "information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." The term "client" as used in the rule includes former clients as well as present clients. Witness X's prior conviction is confidential information pursuant to this rule because it is information Attorney A gained in the professional relationship that may, at a minimum, be embarrassing to Witness X if revealed.

Generally, an attorney is prohibited from using confidential information to the disadvantage of a client or to the advantage of another. Rule 1.6(c). Rule 1.9(c) of the Revised Rules, nevertheless, provides that an attorney may use confidential information of a former client "when the information has become generally known." Arguably, a criminal conviction, as a part of the public record, is "generally known" and a lawyer might try to limit cross-examination of a former client to only the fact of the conviction pursuant to the exception in Rule 1.9(c). In practice, however, it is rare that cross-examination about prior criminal record can be limited to the fact of the convictions alone. Given the high probability that the lawyer will delve into facts relative to the conviction that are not public record and are, therefore, subject to the confidentiality rule or, in foregoing such questions, fail adequately to represent the lawyer's current client, it must be concluded that the lawyer is prohibited from representing the current client due to a conflict of interest.

Inquiry #2:

Does Attorney A have a conflict of interest because a member of Attorney A's present office prosecuted Witness X in the state case?

Opinion #2:

No. There is no conflict between the former prosecutor's role in the prosecution of Witness X and the current representation of Client by Attorney A except to the extent that confidential government information about Witness X may be used in the defense of

Client. See Rule 1.11(b) (prohibiting the use by a former government lawyer of confidential government information about a person against that person). “Confidential government information” is defined in Rule 1.11(e) as information which was obtained under governmental authority and which, at the time that the rule is applied, the government is prohibited by law from disclosing and which is not otherwise available to the public. The facts presented do not indicate that the former prosecutor in Attorney A’s office possesses any “confidential government information” about Witness X which could be used to the material disadvantage of Witness X in violation of Rule 1.11(b).

Inquiry #3:

While Attorney A was with the state public defender’s office, other attorneys in the office represented almost all of the remaining witnesses the government is expected to call at Client’s trial. Attorney wants to cross examine each of these witnesses about their prior convictions. Attorney does not have any information about these witnesses gained from confidential communications. Attorney A does know some of these witnesses were represented on drug charges that fall within the charged federal conspiracy.

Does Attorney A have a conflict of interest because of his former associates’ representation of the other government witnesses?

Opinion #3:

No. Attorney A’s prior association with the state assistant public defenders who represented the other witnesses did not lead to the acquisition of confidential information from the witnesses that is material to the current matter. See Rule 1.9(b).

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
TRS

STATE OF NORTH CAROLINA)
)
 V.)
)
)
)
 Defendant,)

MOTION TO DETERMINE
COUNSEL'S DUTY TO
WITHDRAW

NOW COMES Susan J. Weigand an attorney for the defendant and moves the Court to determine whether she needs to withdraw as defense counsel in the above-captioned cases. In support of her motion, defendant's counsel shows the following:

1. That on March 16, 1996, the defendant was arrested and charged with first degree murder and felony breaking or entering. These offenses allegedly occurred on February 27, 1996.

2. That on March 19, 1996, the defendant made his first appearance in Courtroom 1101A before the Honorable Philip Howerton, Jr. That on March 19, 1996 defendant was appointed counsel. The case was assigned to the undersigned attorney.

3. That on March 25, 1996, Attorney Jean B. Lawson was appointed co-counsel.

4. That on March 28, 1996 and again on April 15, 1996, counsel for the defendant served a request for voluntary discovery on Assistant District Attorney Libby Miller.

5. That on December 2, 1996, defense counsel received a letter from Ms. Miller. In her letter, Miller indicates that the defendant, while in custody allegedly made several inculpatory statements about the murder and breaking or entering. Ms. Miller did not provide defense counsel with the witness' name.

6. That on December 6, 1996, defense counsel wrote a letter to Assistant District Attorney Bob Bell. In her letter counsel told Mr. Bell that she had not been given the name of the informant and the informant's identity could be the source of potential conflict problems.


7. That on March 8, 1997, Assistant District Attorney Bob Bell told defense counsel that the informant is A record check indicates that on July 5, 1994, pled guilty to two counts of possession with intent to sell and deliver a controlled substance (CRS) and two counts of sale and delivery of controlled substance (CRS) was represented by Assistant Public Defender, Kevin P. Tully.

8. That a serious conflict of interest may exist which needs to be addressed prior to trial.

WHEREFORE, defendant respectfully prays the Court:

- (1) To determine prior to trial whether Assistant Public Defender Susan J. Weigand must withdraw in the above-captioned cases.
- (2) For such other and further relief as the court deems just and appropriate.

Respectfully submitted this the 19 day of May, 1997.



Susan J. Weigand
Assistant Public Defender
Attorney for

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CRS

STATE OF NORTH CAROLINA)
)
 V.)
)
 Defendant.)

MOTION TO DETERMINE
ADMISSIBILITY OF EVIDENCE

NOW COMES the defendant, by and through counsel, and pursuant to North Carolina General Statute 8C-Rule 104, and moves the Court to determine prior to trial whether statements defendant allegedly made to persons in his cell on or about February 22, 1994 and days thereafter are admissible into evidence. In support of this motion, defendant states the following:

1. That on February 1, 1994, the defendant was arrested and charged with one count of first degree kidnapping, one count of attempted first degree rape, and one count of indecent liberties with a minor. Said offenses allegedly occurred on January 28, 1994.

2. That the defendant has been incarcerated in the Mecklenburg County jail since February 1, 1994, the date of his arrest.

3. That Assistant District Attorney [REDACTED] has been involved in the prosecution of defendant [REDACTED] cases since the time of defendant's arrest.

4. That on April 5, 1994, the defendant pled not guilty to these charges.

5. That on May 9, 1994, after the case had been put on a trial calendar for the three (3) week term beginning May 16, 1994, Assistant District Attorney [REDACTED] sent defense counsel written notice of statements made by the defendant to someone other than a law enforcement officer.

6. In his notice, [REDACTED] indicated that these statements were allegedly made by the defendant to persons in his cell.

7. That Assistant District Attorney [REDACTED] has not provided defense counsel with the witness' name.

8. That counsel for the defendant is aware that Assistant District Attorney [REDACTED] advised Assistant Public Defender Joe Vonkallist to withdraw from a case so Mr. Vonkallist's former client could be a witness for the prosecution.

9. That [REDACTED] did not tell Mr. Vonkallist the name of the defendant.

10. That based on counsel's conversation with Mr. Vonkallist she has reason to believe that Mr. Vonkallist's former client will be testifying against her client.

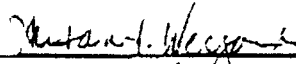
11. That if the State's witness is in fact Mr. Vonkallist's former client or any other client of the Public Defender's Office, a serious conflict of interest exists which needs to be addressed prior to trial.

WHEREFORE, defendant respectfully prays the Court:

1. To make Assistant District Attorney [REDACTED] reveal prior to trial the name or names of the witnesses who allegedly heard defendant [REDACTED] make statements while incarcerated in the Mecklenburg County Jail;

2. For such other and further relief as the Court deems just and appropriate.

Respectfully submitted, this the _____ day of _____, 1994.

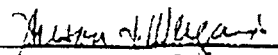


Susan J. Weigand
Assistant Public Defender
720 E. Fourth St., Suite 308
Charlotte, N.C. 28202
Phone: (704) 347-7870

ATTORNEY FOR

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion on [REDACTED] Assistant District Attorney, Twenty-Sixth Judicial District, by hand delivery, this the _____ day of _____, 1994.



Susan J. Weigand
Assistant Public Defender