

**STATE BAR OF GEORGIA
ISSUED BY THE FORMAL ADVISORY OPINION BOARD
PURSUANT TO RULE 4-403 ON APRIL 23, 2010
FORMAL ADVISORY OPINION NO. 10-1**

QUESTION PRESENTED:

May different lawyers employed in the circuit public defender office in the same judicial circuit represent co-defendants when a single lawyer would have an impermissible conflict of interest in doing so?

SUMMARY ANSWER:

Lawyers employed in the circuit public defender office in the same judicial circuit may not represent co-defendants when a single lawyer would have an impermissible conflict of interest in doing so.

OPINION:

In Georgia, a substantial majority of criminal defendants are indigent. Many of these defendants receive representation through the offices of the circuit public defenders. More than 40 judicial circuit public defender offices operate across the State.

Issues concerning conflicts of interest often arise in the area of criminal defense. For example, a single lawyer may be asked to represent co-defendants who have antagonistic or otherwise conflicting interests. The lawyer's obligation to one such client would materially and adversely affect the lawyer's ability to represent the other co-defendant, and therefore there would be a conflict of interest under Georgia Rule of Professional Conduct 1.7(a). See also Comment [7] to Georgia Rule of Professional Conduct 1.7 ("...The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant"). Each such client would also be entitled to the protection of Rule 1.6, which requires a lawyer to maintain the confidentiality of information gained in the professional relationship with the client. One lawyer representing co-defendants with conflicting interests certainly could not effectively represent both while keeping one client's information confidential from the other. See Georgia Rule of Professional Conduct 1.4 ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation...").

Some conflicts of interest are imputed from one lawyer to another within an organization. Under Georgia Rule of Professional Conduct 1.10(a), "[w]hile lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so...." Therefore, the answer to the question presented depends in part upon whether a circuit public defender office constitutes a "firm" within the meaning of Rule 1.10.

Neither the text nor the comments of the Georgia Rules of Professional Conduct explicitly answers the question. The terminology section of the Georgia Rules of Professional Conduct defines “firm” as a “lawyer or lawyers in a private firm, lawyers employed in the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10: Imputed Disqualification.” Comment [1] to Rule 1.10 states that the term “firm” includes lawyers “in a legal services organization,” without defining a legal services organization. Comment [3], however, provides that:

Similar questions can also arise with respect to lawyers in legal aid. Lawyers employed in the same unit of a legal service organization constitute a firm, but not necessarily those employed in separate units. As in the case of independent practitioners, whether the lawyers should be treated as associated with each other can depend on the particular rule that is involved, and on the specific facts of the situation.

That is the extent of the guidance in the Georgia Rules of Professional Conduct and the comments thereto. In the terms used in this Comment, the answer to the question presented is determined by whether lawyers in a circuit public defender’s office are in the same “unit” of a legal services organization.

The Supreme Court of Georgia has not answered the question presented. The closest it has come to doing so was in the case of Burns v. State, 281 Ga. 338 (2006). In that case, two lawyers from the same circuit public defender’s office represented separate defendants who were tried together for burglary and other crimes. The Court held that such representation was permissible because there was no conflict between the two defendants. Presumably, therefore, the same assistant public defender could have represented both defendants. The Court recognized that its conclusion left open “the issue whether public defenders should be automatically disqualified or be treated differently from private law firm lawyers when actual or possible conflicts arise in multiple defendant representation cases.” Id. at 341.

Other states, in case law and ethics opinions, have decided the question presented in disparate ways. Some impute conflicts within particular local defender offices. See Commonwealth v. Westbrook, 400 A2d 160, 162 (Pa. 1979); Turner v. State, 340 So.2d 132, 133 (Fla. App. 2nd Dist. 1976); Tex. Ethics Op. 579 (November 2007); Va. Legal Ethics Op. No. 1776 (May 2003); Ct. Informal Op. 92-23 (July 1992); S.C. Bar Advisory Op. 92-21 (July 1992). Some courts and committees have allowed for the possibility that there can be sufficient separation of lawyers even within the same office that imputation should not be automatic. Graves v. State, 619 A.2d 123, 133-134 (Md. Ct. of Special Appeals 1993); Cal. Formal Op. No. 2002-158 (Sept. 2002); Montana Ethics Op. 960924. Others have decided more generally against a per se rule of imputation of conflicts. See Bolin v. State, 137 P.3d 136, 145 (Wyo. 2006); State v. Bell, 447 A.2d 525, 529 (N.J. 1982); People v. Robinson, 402 N.E.2d 157, 162 (Ill. 1979); State v. Cook, 171 P.3d 1282, 1292 (Idaho App. 2007).

The Eleventh Circuit Court of Appeals looked at an imputed conflict situation in a Georgia public defender office. The Court noted that “[t]he current disciplinary rules of the State

Bar in Georgia preclude an attorney from representing a client if one of his or her law partners cannot represent that client due to a conflict of interest.” Reynolds v. Chapman, 253 F.3d 1337, 1344 (2001). The Court further stated that “[w]hile public defender’s offices have certain characteristics that distinguish them from typical law firms, our cases have not drawn a distinction between the two.” Reynolds, supra, p. 1343.

The general rule on imputing conflicts within a law firm reflects two concerns. One is the common economic interest among lawyers in a firm. All lawyers in a firm might benefit if one lawyer sacrifices the interests of one client to serve the interests of a different, more lucrative client. The firm, as a unified economic entity, might be tempted to serve this common interest, just as a single lawyer representing both clients would be tempted. Second, it is routine for lawyers in a firm to have access to confidential information of clients. A lawyer could access the confidential information of one of the firm’s clients to benefit a different client. For at least these two reasons, a conflict of one lawyer in a private firm is routinely imputed to all the lawyers in the firm. See RESTATEMENT OF THE LAW GOVERNING LAWYERS Third, Sec. 123, Comment b.

The first of these concerns is not relevant to a circuit public defender office. “The salaried government employee does not have the financial interest in the success of departmental representation that is inherent in private practice.” Frazier v. State, 257 Ga. 690, 695 (1987) citing ABA Formal Opinion 342.

The concerns about confidentiality, however, are another matter. The chance that a lawyer for one defendant might learn the confidential information of another defendant, even inadvertently, is too great to overlook.

Other concerns include the independence of the assistant public defender and the allocation of office resources. If one supervisor oversees the representation by two assistants of two clients whose interests conflict, the potential exists for an assistant to feel pressured to represent his or her client in a particular way, one that might not be in the client’s best interest. Furthermore, conflicts could arise within the office over the allocation of investigatory or other resources between clients with conflicting interests.

The ethical rules of the State Bar of Georgia should not be relaxed because clients in criminal cases are indigent. Lawyers must maintain the same level of ethical responsibilities whether their clients are poor or rich.

Lawyers employed in the circuit public defender office are members of the same “unit” of a legal services organization and therefore constitute a “firm” within the meaning of Rule 1.10. Lawyers employed in the circuit public defender office in the same judicial circuit may not represent co-defendants when a single lawyer would have an impermissible conflict of interest in doing so. Conversely, lawyers employed in circuit public defender offices in different judicial circuits are not considered members of the same “unit” or “firm” within the meaning of Rule 1.10.