FILED
February 22 2010
Ed Smith
CLERK OF THE SUPREME COURT
STATE OF MONTANA

IN THE SUPREME COURT OF THE STATE OF MONTANA

ORIGINAL

No. DA 09-0556 and DA 09-0605

STATE OF MONTANA,

Plaintiff and Appellee,

v.

DONNIE MACK SELLERS,

Defendant and Appellant.

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**RESPONSE BRIEF TO APPELLANT'S PETITION TO REMOVE OFFICE OF THE STATE PUBLIC DEFENDER**

The Office of the Appellate Defender (OAD) respectfully responds to Donnie Mack Sellers's petition to have the office removed from his case. Because this Court has ordered OAD to respond, OAD believes such an Order acts as a *Gillham* order in that OAD will not be held responsible for acting in a manner that may be inconsistent with any duty of loyalty seen to Sellers, nor will OAD be subject to disciplinary proceedings. *See Petition of Gillham*, 216 Mont. 279, 282, 704 P.2d 1019, 1021 (1985).

## BACKGROUND

From the outset, this Court should note that this issue was addressed prior to the creation of the Office of the State Public Defender (OSPD), as well as discussed at Public Defender Commission meetings held on July 23-24, 2009, October 14, 2009, December 17-18, 2009, and February 5, 2010.

## ARGUMENT

Sellers argues that OAD is not a separate firm for purposes of client representation and that OAD's assertion that it is a separate firm is a fallacy. (Petition at 3.) He further contends that OSPD and OAD have concurrent conflicts of interest when an OAD attorney handles an appeal raising an IAC claim against an OSPD attorney. (Petition at 3-4.) Each contention is addressed in turn below.

### I. BACKGROUND ON APPLICABLE LAW AND RULES OF PROFESSIONAL CONDUCT

The legal profession has "core values" of professional independent judgment; protection of confidential information; and loyalty to the client through the avoidance of conflicts of interest. *See* Op. 000111.

Rule 1.7 (Conflict of Interest) of the Montana Rules of Professional Conduct provide:

> (a) [A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Comment 8 to Rule 1.7 of the Model Rules (which is the same as the current Rule 1.7) concludes that 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." That is, the duty of loyalty remains to the client. And, the duty of loyalty is "perhaps the most basic of counsel's duties." *State v. Jones*, 278 Mont. 121, 125, 923 P.2d 560, 562 (1996) (*quoting Strickland v. Washington*, 466 U.S. 668, 692 (1984)).

Rule 1.10(a) (Imputation of Conflicts of Interest) of the Montana Rules of Professional Conduct provides:

> While 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 by Rules 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.

The imputed disqualification may be waived by a client in the same manner as described in Rule 1.7. *See* Rule 1.10(d).

Rule 1.10(a) applies the duty of loyalty found in Rule 1.7. Consequently, "each . . . lawyer is vicariously bound by the obligation of loyalty owed by all lawyers with whom that lawyer is associated." *In re Marra*, 2004 MT 8, ¶ 8, 319 Mont. 213, 87 P.3d 384. The imputed disqualification rule is absolute. *In re Marra*, ¶ 10.

Hence, the first step is to determine whether a particular lawyer, considered alone, would be barred from taking on a case or continuing representation in a case. If the lawyer is barred, the second step automatically extends the bar to the all of the lawyers in that firm. *In re Marra*, ¶ 10. *See also*, *In re Rules of Professional Conduct and Insurer Imposed*, 2000 MT 110, ¶ 51, 299 Mont. 321, 2 P.3d 806 (the Montana Supreme Court concluded defense counsel who submit to the requirement that an insurer give prior approval of defense expenses "violate their duties under the Rules of Professional Conduct to exercise their independent judgment and to give their undivided loyalty to the insureds [their clients]").

The imputed disqualification rule applies the duty of loyalty, which is the conflict of interest rule. A lawyer shall have loyalty to his/her client, and where there is a significant risk that the lawyer's representation of his/her clients is materially limited by the lawyer's responsibilities to a third person--here the Chief Public Defender under the current structure of OSPD--the question becomes whether the duty of loyalty--and thereby the rule against conflicts of interest--is violated. Part and parcel to the imputed disqualification rule is whether an appearance of impropriety exists. That is, whether it appears that a lawyer's duty of loyalty may be suspect. If there is an appearance of impropriety, that lawyer is violating his/her duty of loyalty and thereby violating the ethical rule against conflicts of interest. If one lawyer is disqualified because of this appearance, then the imputation is absolute. All lawyers within an office are likewise disqualified, in part because of the financial incentive.

## II. OAD AND OSPD ARE SEPARATE FIRMS.

To assist in answering the imputed disqualification question, the State Bar of Montana (the Bar) issued a formal, but not binding, ethics opinion targeting the general conflict of interest rule (Rule 1.7) and the general imputation of conflicts of interest rule (Rule 1.10) across public defenders. The facts presented were as follows:

> A county hired its first full time public defender to begin the "office of the chief public defender." This office quickly added two full-time attorney positions. Previously, these positions had been held by contract attorneys.
>
> In an effort to respond to challenges presented by conflicts of interest, the office transferred one full-time attorney to an office on the opposite side of the building. This new "office of conflict counsel for the public defender" includes a separate computer system not linked to the office of the chief public defender; a separate filing system for open and closed case files; separate letterhead and business cards and separate rooms in the county courthouse. There is no supervision by the chief public defender on client cases assigned as conflict cases, although general supervision is present over non-conflict cases. Budgetary authority for the conflict counsel office is maintained by the chief public defender for administrative purposes only. Administrative control and hiring authority over conflict counsel also resides with the chief public defender. A Public Defender Advisory Board exists to review substantive decisions as to administration and conflict issues made by the chief public defender.

Op. 960924.

On these facts, the Bar addressed whether the steps taken by the county were sufficient to satisfy the requirement of conflict-free counsel under Rule 1.7, and whether additional safeguards were advisable to ensure conflict-free counsel. Op. 960924.

The Bar noted that some jurisdictions treat public defender offices like a private law firm for conflict of interest purposes. In doing so, if one public defender is disqualified, such disqualification is imputed to the entire office. Op. 960924.

However, the Bar also noted that other jurisdictions do not apply the same per se conflict rule to public defender offices. And, the Bar agreed it was "inappropriate to apply the per se conflict rule to public defender offices." In so agreeing, the Bar relied on *State v. Pitt*, 884 P.2d 1150, 1156 (Hawaii Ct Appeals 1994) and *Graves v. State*, 619 A.2d 123, 131-32 (Md App. 1993) for the following:

> [A] conflict on the part of one member of the public defender's office does not extend per se to others in the office unless, after a case-by-case inquiry, it is determined that facts peculiar to a case preclude representation of competing interests by members of the office.
>
> [U]nder the case-by-case approach, if attorneys employed by a public defender are required to 'practice their profession side by side, literally and figuratively,' they are considered members of a "firm" for purposes of conflict of interest analysis regarding representation of multiple defendants, but where the practice of the attorneys in the office is so separated that the interchange of confidential information can be avoided or where it is possible to create such separation, the office is not equated with a firm an no inherent ethical bar would be present to the office's representation of antagonistic interests.

Op. 960924.

The Bar explained that a case-by-case analysis should be made in order to determine whether a public defender's office is equated to the same law firm for conflict purposes. In particular,

> Rules that forbid lawyers to accept matters because of a 'conflict,' and rules that impute a lawyer's conflict to his or her associates, have one paramount object - to prevent lawyers from entering into situations in which they will be seriously tempted to violate a client's right to

> loyalty and secrecy. Conflict rules try to strike an appropriate balance between protecting against risk to loyalty and confidentiality, on the one hand, and fostering the availability of counsel on the other. . . . The question, therefore, is not whether a lawyer in a particular circumstance 'may' or 'might' or 'could' be tempted to do something improper, but whether the likelihood of such a transgression, in the eye of the reasonable observer, is of sufficient magnitude that the arrangement or representation ought to be forbidden categorically.

Op. 960924 (quoting *Castro v. Los Angeles County Bd. of Supervisors*, 284 Cal. Rptr. 154, 162 (1991)). Based on this analysis, the Bar determined the focus should be (1) "whether, as a consequence of having access to confidential information, a public defender refrains from effectively representing a defendant;" (2) "whether the attorneys employed by the same public defender's office can be considered the same as private attorneys associated in the same firm;" and (3) "whether confidential information is protected by an effective 'wall' separating offices, facilities and personnel." Op. 960924.

The Bar concluded the office of conflict counsel was "sufficiently separated from the office of the chief public defender so as not to be considered the same as private attorneys associated with the same firm." Op. 960924.

Rule 1.0(e) defines firm as "a lawyer or lawyers in a law partnership, professional corporation, 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." This Court has explained that

"Lawyers in a firm, or in a close association like a firm, in fact normally function more or less as a single unit. They consult each other, have access to each other's files, overhear conversations with clients, and have a mutual financial interest in their client's cases." *In re Marra*, ¶ 9 (citation omitted).

OAD is a separate office for purposes of application of the State Bar Opinion 960924, as well as Rule 1.0(e). OAD and OSPD have no mutual financial interest in their clients' cases. Their interest is in advocating for the rights of each client's case. The information OAD has about a case is not accessible by the regional OSPD attorneys. OAD has separate support staff, separate files, and operates on a separate floor from the Helena regional office and the Major Crimes Unit. OAD has a separate manager--the Chief Appellate Defender. Management of the office rests with the Chief Appellate Defender. She handles the hiring, firing, and transferring of the lawyers. The Chief Public Defender does not involve herself in the case decisions made for any appellate attorney's case. In addition, the Chief Appellate Defender has control over the budget with the Chief Public Defender providing general oversight.

## III. A PER SE CONFLICT OF INTEREST DOES NOT EXIST.

Given that OAD is a separate firm, the next question to be answered in addressing the conflict issue presented by Sellers becomes whether such an appearance of impropriety exists so as to equate to a per se conflict of interest that

is imputed to the appellate office when OAD takes cases from the regional OSPD offices. Stated another way, because the Chief Appellate Defender reports directly to the Chief Public Defender, is OAD sufficiently autonomous in its decisions to raise ineffective assistance counsel claims against the OSPD regional attorneys? The answer to this question boils down to a state's approach to the duty of loyalty and the appearance of impropriety.

The phrase "appearance of impropriety" is not contained within the Rules of Professional Conduct. However, the former code stated lawyers should avoid an appearance of impropriety. *See In re Rules*, ¶ 9. The Bar's Opinion 960924 suggests the same by quoting *Castro*, 284 Cal. Rptr. at 162 ("The question, therefore, is not whether a lawyer in a particular circumstance 'may' or 'might' or 'could' be tempted to do something improper, but whether the likelihood of such a transgression, in the eye of the reasonable observer, is of sufficient magnitude that the arrangement or representation ought to be forbidden categorically.").

The American Bar Association Standards for Criminal Justice provide, in part:

> If the defender attorney on appeal believes that an issue of ineffective assistance of counsel should be presented, the defender program should be excused and private counsel appointed to the case. Unless this is done, the appellate lawyer from the defender office will be faced with a conflict of interest in complaining about the conduct of a colleague who represented the client in the trial court. The problem is

avoided in jurisdictions that have established wholly independent statewide appellate defender programs.[1]

Montana has not adopted the ABA standard for criminal justice. *Hendricks v. State*, 2006 MT 22, ¶ 14, 331 Mont. 47, 128 P.3d 1017.

The National Association of Criminal Defense Lawyers' "Standards and Evaluation Design for Appellate Defender Offices" do not require separate appellate and trial offices, but conclude that a conflict of interest appears whenever "the defendant was represented by the trial division of that same defender agency and it is asserted by the client or appears arguable to the appellate attorney that trial counsel provided ineffective representation."[2]

Some States have adopted a per se conflict of interest rule with regard to appellate defenders raising ineffective assistance of counsel claims against fellow public defenders. *See Hill v. State*, 566 S.W.2d 127 (Ark. 1978) (appointing one public defender to represent a defendant on appeal who asserts another public defender provided ineffective assistance of counsel at trial involves an inevitable conflict of interest); *State v. Bell*, 447 A.2d 525, 528 n.2 (N.J. 1982) (adopting a

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[1] ABA Standards for Criminal Justice, Providing Defense Services, (3rd ed. 1992). Standard 5-6.2, Commentary at page 84, available at http://www.abanet.org/crimjust/standards/providingdefense.pdf.

[2] NACDL Standards and Evaluation Design for Appellate Defender Offices, Standard E.1.b., available at http://www.nlada.org/Defender/Defender_Standards/Standards_For_Appellate_Defender_Offices#twoe. See also NACDL Standard J.4.

per se disqualification rule in cases where a public defender is required to attack the trial competence of another public defender); and *Commonwealth v. Fox*, 383 A.2d 199, 200 (Penn. 1978) (disqualifying a public defender's office in all cases that require the public defender representing the defendant on appeal to argue that ineffective assistance of counsel was provided by another public defender at trial).

However, other States have rejected the per se conflict of interest rule and instead analyze the issue on a case-by-case basis. *See Cannon v. Mullin*, 383 F.3d 1152, 1173 (10th Cir. 2004) ("whether trial and appellate attorneys from the same 'office' should be deemed 'separate' counsel will turn on the specific circumstances"); *People v. Banks*, 520 N.E.2d 617, 621 (Ill. 1987) (where an assistant public defender claims another assistant public defender from the same office rendered ineffective assistance of counsel, "a case-by-case inquiry should be conducted to determine whether any circumstances peculiar to the case indicate the presence of an actual conflict of interest"); and *Asch v. State*, 62 P.3d 945, 952-53 (Wyo. 2003) (case-by-case analysis for potential conflicts of interest where a public defender on appeal alleges a public defender at trial provided ineffective assistance of counsel).

Some of the States that have adopted a case-by-case analysis with regard to this issue note that public defenders do not have a financial stake in the outcome of their clients' cases nor in the reputations of their public defender colleagues. *See*

*e.g.*, *State v. Lentz*, 639 N.E.2d 784, 787-86 (Ohio 1994); *Banks*, 520 N.E.2d at 619-20. This approach presumes public defenders have a dedication to their clients that alleviates any concern about institutional loyalties that might inhibit their advocacy. Finally, practical considerations, such as the specialization that criminal appellate lawyers posses justify those lawyers taking regional cases, as greater expense and less expertise may result in contracting out the case.

States in favor of a per se rule contend that public defenders have a financial interest in, as well as a strong loyalty to, each other's reputation and the institution itself. The Montana Supreme Court's decision in *State v. Thompson*, 1999 MT 108, ¶¶ 12-15, 294 Mont. 321, 981 P.2d 778 and the Bar Opinion 960924 are instructive on this point.

In *Thompson*, this Court addressed whether the appellant was entitled to the appointment of new counsel because his present counsel filed a motion to withdraw in which he asserted that he was unable to find any non-frivolous issues to raise on appeal. Appellate counsel asserted by claiming he could not find any non-frivolous issue and then being asked to brief a specific issue, his ability to do so effectively might reasonably be questioned again because he initially argued no non-frivolous issues existed. *Thompson*, ¶ 13. The Court reviewed the arguments appellate counsel raised and concluded that Thompson was represented effectively. Hence, it was not necessary for the Court to appoint new counsel. *Thompson*,

¶¶ 14-15. Again, "The question, therefore, is not whether a lawyer in a particular circumstance 'may' or 'might' or 'could' be tempted to do something improper, but whether the likelihood of such a transgression, in the eye of the reasonable observer, is of sufficient magnitude that the arrangement or representation ought to be forbidden categorically." *Castro*, 284 Cal. Rptr. at 162 (1991).

Sellers asserts that "because the OAD's attorney's personal feelings of collegiality, desire to maintain the agency's reputation with the Legislature and the public, or fear of reprisal from his supervisor or ultimately the chief public defender, Randi Hood, all create a significant risk that the OAD attorney's handling of the IAC claim would be restricted and the representation of the client compromised." (*See* Petition at 4-5.)

Sellers makes these blanket assertions without any support that attorneys within OAD have, in fact, failed to raise IAC claims for those reasons. In reality, OAD attorneys have raised IAC claims on direct appeal and will continue to do so because their loyalty is with their individual clients. Sellers's argument begs the question whether the likelihood of an appellate attorney doing something improper (like not raising an ineffective assistance of counsel claim)--in the eyes of a reasonable observer--is of sufficient magnitude that the representation be forbidden. That answer is a resounding no.

OAD does not have a financial stake in its clients' cases. OAD does not have a financial stake in or a strong loyalty to the reputation of its colleagues. OAD's duty remains with its clients. Colorable ineffective assistance of counsel (IAC) claims are raised, but the likelihood of success on appeal is limited due to the burden of proof required. In particular, colorable IAC claims on direct appeal require that the lawyer's deficient performance be detailed on the record and that the lawyer's deficient performance also prejudice the client. OAD is comprised of criminal appellate experts dedicated to defense of the indigent. Stated another way, all lawyers who work for OPD--trial and appellate lawyers alike--already know that they are helping people whom others are unlikely or unwilling to help.

Contracting out any case where the regional lawyer thought he/she was ineffective would not alter the potential for an appearance of impropriety in the eye of a reasonable observer. That is, the contract attorneys have a greater quantifiable financial and loyalty stake in shying away from IAC claims against regional attorneys because OAD contract work provides a significant part of some contract attorneys' livelihood. It is true, that we, as OAD lawyers, have some level of loyalty to our colleagues and the OSPD agency. The issue is whether a reasonable observer would conclude that institutional loyalty would override our core values of duty to the client, first and foremost.

Sellers advocates for adoption of a per se rule given the "unique and highly centralized structure of OSPD," and given that the "stakes are too high for the Court not to adopt a *per se* rule." (Petition at 9.) However, Rules 1.7(a)(2) and 1.10(a) contemplate whether there is a significant risk that an attorney's representation "will be materially limited." Adoption of a per se rule would find a conflict where a conflict does not exist, because whether a significant risk exists that materially limits the attorney's representation is a factual question--one that can only be answered by looking at that attorney's conduct. In effect, by adopting a per se rule, the assumption is that an attorney's representation was materially limited. But again, OAD's representation has not been limited because where applicable that appellate attorney raises IAC issues regardless of any of other "pressures" because that is the attorney's duty and that is what is followed.

If Montana adopts the per se stance, the OAD should be an entirely separate agency--not under the Public Defender Commission, not under another person, but under the Department of Administration or some other agency without connection to the Public Defender Commission. That type of separation, of course, requires a legislative change and a substantial financial change as well. And, even if OAD operates as an entirely separate agency, it would still be part of the public defense team. Individual appellate lawyers would still feel some degree of loyalty to

colleagues in this small Montana Bar, regardless of whether they were public defenders, contract attorneys, or members of a private firm.

Again, such loyalty does not override OAD's loyalty to its clients, which is the primary duty of every lawyer. No conflict of interest exists, and this Court should deny Sellers's petition.

Respectfully submitted this 22nd day of February, 2010.

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## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Response Brief to Appellant's Petition to Remove Office of the State Public Defender to be mailed to:

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