Grand Jury Report
RESPONSE FORM

RE: Report Titled: ***Success Is a Plea Bargain, A Win Is a Lesser Charge***

Report Dated: June 7, 2011

Response Form Submitted By:

Kristen McMenomy
Director, Mendocino County General Services Department
501 Low Gap Road
Ukiah, CA 95482

Response MUST be submitted, per Penal Code §933.05, no later than: September 23, 2011

I have reviewed the report and submit my responses to the <u>FINDINGS</u> portion of the report as follows:

- ☐ I (we) agree with the Findings numbered:

  ____

- ☒ I (we) disagree wholly or partially with the Findings numbered below, and have ***attached, as required***, a statement specifying any portion of the Finding that are disputed with an explanation of the reasons therefore.

  ______ 18 ______

I have reviewed the report and submit my responses to the <u>RECOMMENDATIONS</u> portion of the report as follows:

- ☐ The following Recommendation(s) have been implemented and ***attached, as required***, is a summary describing the implemented actions:

  ____

- ☐ The following Recommendation(s) have not yet been implemented, but will be implemented in the future, ***attached, as required*** is a time frame for implementation:

  ____

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☐ The following Recommendation(s) require further analysis, and ***attached as required***, is an explanation and the scope and parameters of the planned analysis, and a time frame for the matter to be prepared, discussed and approved by the officer and/or director of the agency or department being investigated or reviewed: (This time frame shall not exceed six (6) months from the date of publication of the Grand Jury Report)

____

☒ The following Recommendations will NOT be implemented because they are not warranted and/or are not deemed reasonable, ***attached, as required*** is an explanation therefore:
18

I have completed the above responses, and have attached, as required the following number of pages to this response form:

Number of Pages attached: 5

I understand that responses to Grand Jury Reports are public records. They will be posted on the Grand Jury website: www.co.mendocino.ca.us/grandjury. The clerk of the responding agency is required to maintain a copy of the response.

I understand that I must submit this signed response form and any attachments as follows:

First Step: E-mail (word documents or scanned pdf file format) to:

- The Grand Jury Foreperson at: grandjury@co.mendocino.ca.us
- The Presiding Judge c/o Sally Nevarez: sally.nevarez@mendocino.courts.ca.gov
- The County's Executive Office: angeloc@co.mendocino.ca.us

Second Step: Mail all originals to:

Mendocino County Grand Jury
P.O. Box 939
Ukiah, CA 95482

Printed Name: Kristin McMenomey

Title: GSA Director

Signed: Kristin McMenomey Date: 10/31/11

Editor's Note:

State Bar Ethics Opinions cite the applicable California Rules of Professional Conduct in effect at the time of the writing of the opinion. Please refer to the California Rules of Professional Conduct Cross Reference Chart for a table indicating the corresponding current operative rule. There, you can also link to the text of the current rule.

THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2002-158

ISSUE:

Does the creation of a physically separate firm within a public office charged with indigent criminal defense avoid ethical issues arising out of the representation of multiple criminal defendants?

DIGEST:

The creation of a physically separate firm within a public office charged with indigent criminal defense, so that different firms represent different defendants, can avoid conflicts arising from the representation of multiple defendants, but only with adequate safeguards including maintaining the separateness of the two firms.

AUTHORITIES INTERPRETED:

Rules 3-110 and 3-310 of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code section 6068, subdivision (e).

INTRODUCTION

The use of internal screening procedures has become an accepted practice within public prosecutors offices as a means for avoiding disqualification because of what otherwise would constitute conflicts of interest within the offices. [1] (See *People v. Hernandez* (1991) 235 Cal.App.3d 674, 681 [286 Cal.Rptr. 652]; *People v. Lopez* (1984) 155 Cal.App.3d 813 [202 Cal.Rptr. 333]; *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108 [164 Cal.Rptr. 864].) Recently, the court of appeal held that the practices and procedures by which a Public Defender administered two separate offices were sufficient to avoid conflicts of interest between the two offices where each office represented a co-defendant in the same case. (*People v. Christian* (1996) 41 Cal.App.4th 986 [48 Cal.Rptr.2d 867]; see also *People v. Brown* (1993) 5 Cal.App.4th 950, 999-1000 [7 Cal.Rptr.2d 370].) In *People v. Christian, supra*, the Public Defender of Contra Costa County created a separate unit within the Public Defenders office (PD) which was designated the Alternate Defender Office (ADO). As stated by the court of appeal:

Although the ADO is formally a branch of the PD, it operates autonomously, with a separate supervising attorney who is responsible for directing, coordinating, and evaluating the work of attorneys employed by the ADO. This supervising attorney is solely responsible for providing guidance to and determining litigation strategy of ADO attorneys. The Public Defender exercises no control or influence over the handling of cases by the ADO. Nor does he have access to the client files or other client confidences of the ADO. Only upon the specific recommendation of the ADO supervising attorney may the Public Defender make changes in the salary or working conditions of persons working for the ADO.

Individual cases in the ADO are opened, litigated, and closed under separate ADO file numbers. The ADO generates calendars listing appearances only for attorneys in the ADO. The ADO has its own clerical support staff and investigators, independent of those employed by the PD. The ADO offices are physically separate from those of the Public Defender. The keys to the offices of the ADO are not available to attorneys or support staff not employed by the ADO. The Public Defender does not personally possess a key to the ADO offices, nor does the ADO supervisor possess keys to the PD offices. The ADO maintains a separate communications network, with its own telephone number, computer hookups to the Law & Justice computer system, facsimile machine, and computer equipment. The ADO also uses independent library facilities.

The files of ADO clients are housed separately from those of the PD to insure that only ADO attorneys have access to the confidential files of the ADO. In turn, files of the primary branches of the PD are protected as separate and likewise inaccessible to ADO attorneys or staff. Every employee of the PD and ADO has been specifically advised to maintain the confidences of individual clients and to be sensitive to the required degree of separation between the ADO and the PD. (*People v. Christian, supra*, 41 Cal.App.4th 986, 992-993.)

Given the elaborate effort described above to separate the two branches of the Public Defenders office, the court of appeal upheld the representation of the two co-defendants by these separate offices even without their consent and over the objection of one of the defendants. The court concluded that the PD and ADO are separate firms for purposes of conflict analysis. (*People v. Christian, supra*, 41 Cal.App.4th, 986, 1000.) [2] Thus, many of the ethical issues which may arise from the separation of a public defenders office into two branches or firms can be analyzed by resorting to traditional conflict analysis used when separate private law firms are involved.

While the separation of the PD and the ADO would resolve the type of conflict considered in *People v. Christian, supra*, 41 Cal.App.4th, 986, it might not resolve other types of conflicts of interest. For example, not only will the PD and ADO be confronted with representation of co-defendants jointly

charged in one case as was true in *People v. Christian, supra*, but they will be confronted with representing defendants who previously have been prosecuted in the same county on one or more occasions. While in some instances the same defendant will be assigned each time to the same branch of the Public Defenders office, this will not always occur. For example, if defendants A and B have been prosecuted in the past for separate and unrelated offenses and were each represented by the PD branch and subsequently are jointly charged in a new case, they must be provided with separate and independent counsel in the subsequent case. (*People v. Mroczko* (1983) 35 Cal.3d 86, 110, fn. 26 [197 Cal.Rptr. 52].) In this situation, defendant A could again be represented by the PD branch, but then co-defendant B could not be represented by the PD but could be represented by the ADO. Co-defendant B might assert that the PD branch has a conflict of interest because he had disclosed, during the course of his prior representation by the PD branch, confidential information material to the current criminal case. This is the type of conflict issue which can be resolved under the traditional analysis applicable to litigation involving a former client. (See, e.g., Cal. State Bar Formal Opn. No. 1998-152.)

Other types of conflict issues arising from the separation of the Public Defenders office into two branches may require analysis that is different from that utilized in litigation involving separate law firms because of factors unique to this separation. We believe this need for continued analysis exists even if the PD and ADO branches strictly adhere to the physical and functional separation required by *People v. Christian*. With the passage of time and as the use of such bifurcated offices under the auspices of the same public defender becomes more prevalent because of the need for fiscal economy, these conflict issues will need to be considered. The remainder of this opinion discusses five of these issues, but the opinion is not intended to be exhaustive.

I. Repeat Offenses

Assume A and B previously were prosecuted as co-defendants. A was represented by private counsel. B was represented by the PD branch, which successfully shifted blame for the crime to A, resulting in the conviction of A and the acquittal of B. Thereafter A is charged in a new and unrelated criminal case. Should the PD branch represent A over As objection? If this were a case involving the retention of counsel by a client, A could resolve the matter by simply not hiring the PD branch. However, if A has insufficient funds to hire an attorney, the selection of As counsel will be dependent on court appointment. Thus, whether the PD branch may be selected over the objection of A would be a matter for the court to decide. Nevertheless, the PD branch should consider whether it can maintain the confidence of A (cf. Bus. & Prof. Code section 6068, subdivision (e)) and whether, in light of this concern, it should suggest to the court that the ADO, rather than the PD, be appointed counsel for A. While a public defenders office which is not divided into branches would be faced with the same concerns regarding representation of a client who does not trust counsel (*People v. Berryman* (1993) 6 Cal.App.4th 1048 [25 Cal.Rptr.2d 867]), the existence of the ADO may make it more likely that the court will appoint public, rather than private counsel, to represent the indigent accused.

II. Representation of One of Two Co-Defendants by the Public Defender

If one co-defendant is represented by an attorney in the ADO while the other co-defendant is represented by the Public Defender himself or herself, a conflict of interest may be present. Under the arrangements noted in *People v. Christian, supra*, 41 Cal.App.4th 986, promotional opportunities for attorneys in the ADO are still subject to the decision of the Public Defender, although promotion and the resulting increase in salary are dependent initially upon recommendation of the ADO supervising attorney.

The Committee believes that this situation could create a conflict of interest that could adversely affect the representation of the defendant represented by the ADO. In previous opinions the Committee has noted that a conflict of interest can be defined generally as a situation that interferes with a lawyers ability to fulfill basic duties to a client. (See Cal. State Bar Formal Opn. No. 1995-141; see also L.A. Cty. Bar Assn. Formal Opn. 471.) These basic duties include the obligations to represent a client with undivided loyalty and to exercise independent judgment on a clients behalf. (*Ibid.*) These duties require a lawyer to render legal representation for the benefit of the client and to exercise judgment free of influences that are extraneous to the lawyer-client relationship. (*Anderson v. Eaton* (1930) 211 Cal. 113, 116 [293 P. 788].)

The situation presented here is the very type of conflict of interest that the foregoing principles seek to address. When the Public Defender is ultimately responsible for the employment condition of the ADO attorneys, a conflict of interest could result when the Public Defender represents a co-defendant. Such a conflict could arise if the ADO attorney is concerned that the outcome of the criminal proceedings might substantially affect his or her financial or promotional interests in the office. Such concerns, for example, could arise if the ADO could obtain an acquittal for the ADOs client while the Public Defenders client is convicted. (See, Cal. State Bar Formal Opn. 1983-72 [discussion of the obligation of the attorney to maintain undivided fidelity to the clients interests with regard to contingency fees].)

Consistent with these principles, rule 3-310(B)(4) of the Rules of Professional Conduct of the State Bar of California (hereinafter referred to as rule(s)) requires a member to make written disclosure to a client when the member has or had a legal, business, financial, or professional interest in the subject matter of the representation. Los Angeles County Bar Association Formal Opinion 477 explains that [t]he rule is intended to protect the [lawyer-client] relationship from activities or conduct that could produce divided loyalties by the lawyer, and the impairment of the lawyers competent and impartial representation of the client. Our Supreme Court has observed more specifically that rule 3-310(B)(4) . . . applies only to conflicts that arise over the subject matter of the representation that the attorney undertakes for the client, and not the conflicts that the attorney and the client may have outside this subject matter. The primary purpose of this prophylactic rule is to prevent situations in which an attorney might compromise his or her representation of the client in order to advance the attorneys *own* financial or personal interests. (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 546 [28 Cal.Rptr.2d 617].) [emphasis added]

While we cannot say that a possible conflict of interest under rule 3-310(B)(4) will exist in any particular situation, each ADO attorney should recognize the potential application of this rule before accepting or continuing any representation. If the particular facts and circumstances facing the ADO attorney do create a possible conflict of interest under rule 3-310(B)(4), then the ADO attorney will be required to make a written disclosure of . . . the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client. . . . as required by rule 3-310(A). [3]

III. Transfer of Personnel Between the PD and the ADO

As the needs of the two separate branches change, or as promotional opportunities arise in one branch which are not available in the other branch, deputies might be transferred from one branch to the other. This would produce another potential source of problems. If such a transfer were about to occur, there is the possibility that an attorney would have had access to confidential information in the first office which would benefit a client in the

second office. This risks a potential disclosure of the confidential information to others in the second office, as well as disqualification motions. *People v. Lopez, supra*, 155 Cal.App.3d 813; *Love v. Superior Court* (1980) 111 Cal.App.3d 367 [168 Cal.Rptr. 577]; *In re Charles L.* (1976) 63 Cal.App.3d 760 [132 Cal.Rptr. 840].) One solution would be for the second office not to accept or continue representation of a client whenever confidential information relevant to the representation of that client had been acquired by the transferring attorney while previously employed in the other office. (See *Castro v. Los Angeles County Board of Supervisors* (1991) 232 Cal.App.3d 1432, 1444-1445 [248 Cal.Rptr. 154].)

A second solution would be the establishment of ethical screens so that the transferring attorney has no contact with anyone else in the office with regard to those clients he or she had represented while in the other branch or about whom he or she has any confidential information. For example, in *Chadwick v. Superior Court, supra*, 106 Cal.App.3d 108, a district attorney hired one Jennings, who had handled juvenile cases while serving previously as a deputy public defender in the same county. Jennings was assigned to handle juvenile cases by the district attorney, but in a different city from where Jennings had earlier served as a deputy public defender. The trial court rejected motions to disqualify the district attorneys office in all cases which Jennings had handled as a deputy public defender. The court of appeal affirmed, based on three factual findings by the trial court: (1) the district attorneys office had isolated Jennings from any prosecutorial involvement in the cases he had handled as a deputy public defender; (2) Jennings was well regarded and trustworthy and had recognized his duty of confidentiality to his former clients; and (3) Jennings had no policy or personnel evaluation authority (unlike the situation in *Younger v. Superior Court*, (1978) 77 Cal.App.3d 892 [144 Cal.Rptr. 34] that led to the disqualification of the entire Los Angeles District Attorneys office).

On the other hand, in *Love v. Superior Court, supra*, 111 Cal.App.3d 367, the court held that the disqualification of the major crimes section of the district attorneys office was warranted where a former law student who had been assisting the defense in a capital case passed the bar, was hired by the district attorney, and was placed in the major crimes section of the office which was prosecuting the murder case. [4]

Just as with attorneys, the transfer of non-attorney support personnel from one office to the other involves the same potential ethical problems where the support staff had access to confidential information about the first offices clients. Such changes in employment are comparable to the movement of support staff from one law office to another. In such instances, support staff should be instructed by both the transferring and receiving offices that they are repositories of confidential information. Staff members who transfer from the PD office to the ADO office or vice versa should be the subject of an adequate ethics screen [5] by the office to which they transfer, as is discussed in *In re Complex Asbestos Litigation* (1991) 232 Cal.App.3d 572 [283 Cal.Rptr. 732].

IV. Supervision and Promotion of ADO Personnel

Although the day-to-day supervision of ADO personnel might not be the responsibility of the Public Defender, there may be circumstances under which the competence of a particular ADO deputy would be of concern to the Public Defender since he or she may have some responsibility to supervise the work of a subordinate attorney (see rule 3-110 Discussion section). For example, an issue relating to the imposition of office discipline could arise out of the representation of a client by an ADO deputy. In such circumstances the Public Defender may want to review the ADO office file relating to that representation. Limitations would have to be imposed upon such review in light of Business and Professions Code section 6068, subdivision (e), since client confidential information could not be disclosed to someone outside the ADO firm. There also would need to be similar limitations in the event the Public Defender wants to review an ADO file in connection with the promotion of an ADO attorney. In short, if the PD branch is deemed to be a separate firm from the ADO branch, the Public Defender, in carrying out his or her legal responsibilities, cannot have the same type of freedom of supervision over the ADO that is available for the PD office itself. Nevertheless, because the Public Defender is responsible for administering both the PD and ADO offices, the Public Defender has ethical obligations under rule 3-110 with respect to the competence of ADO attorneys. The Public Defender must meet this duty of competence in a manner that avoids violation of other ethical obligations, such as those set forth in Business and Professions Code section 6068, subdivision (e).

V. Financial Considerations

Where one person controls the finances of both offices ethical dilemmas could arise. For example, where the Public Defender is responsible for the budgets of both offices and the assignment of personnel to them, the Public Defender must take care not to discriminate for or against one client or class of clients in assigning work or providing investigation, testing, or other resources. Any such favoritism might violate the Public Defenders duty to provide a zealous representation to all clients (see, *People v. McKenzie* (1983) 34 Cal.3d 616, 631 [194 Cal.Rptr. 462] and rule 3-310) and to provide competent representation (rule 3-110). Moreover, avoiding this problem by not providing the services to either client might also violate the duty to provide competent representation to both clients.

CONCLUSION

The separation of a public defenders office into physically separate branches is legally permissible but raises ethical issues that can be resolved with adequate safeguards.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding on the courts, the State Bar of California, its Board of Governors, any persons or tribunals charged with regulatory responsibility or any member of the State Bar.

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[1] This opinion does not address whether internal screening procedures can be used in the private sector to avoid ethical conflicts of interest. Some cases have discussed ethical screens in civil situations. See, e.g., *People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1151-52 [86 Cal.Rptr.2d 816]; *In re County of Los Angeles* (9th Cir. 2000) 223 F.3d 990; *San Gabriel Basin v. Aerojet-General* (C.D. Cal. 2000) 105 F.Supp.2d 1095; *Henriksen v. Great American Savings and Loan* (1992) 11 Cal.App.4th 109 [14 Cal.Rptr.2d 184]; *Rosenfeld Construction Co. v. Superior Court* (1991) 235 Cal.App.3d 566, 577 [286 Cal.Rprt. 609]; *Dill v. Superior Court* (1984) 158 Cal.App.3d 301 [205 Cal.Rptr. 671]. See also *Cho v. Superior Court* (1995) 39 Cal.App.4th 113, 125-126 [45 Cal.Rptr.2d 863], and California State Bar Formal Opinion Number 1993-128 [discussing ethical screening of former government attorneys when in private practice].

[2] The screening procedures outlined in *People v. Christian, supra*, 41 Cal.App.4th 986 comport with those set forth in *Henriksen v. Great American*

Savings & Loan, supra, 11 Cal.App.4th at 116, fn. 6. The opinion in *Henriksen* observes in footnoted dicta: The typical elements of an ethical wall are: physical, geographic, and departmental separation of attorneys; prohibitions against and sanctions for discussing confidential matters; established rules and procedures preventing access to confidential information and files; procedures preventing a disqualified attorney from sharing in the profits from the representation; and continuing education in professional responsibility. [citations omitted]

[3] The situation considered above differs from one in which an attorney may be more likely to get a bonus from his or her firm if he or she prevails on behalf of a client seeking a substantial recovery. Under such circumstances the interests of the client and the attorney are not adverse to each other.

[4] Other cases that discuss disqualification in criminal cases include: *People v. Lopez, supra*, 155 Cal.App.3d 813, 827; *People v. Hamilton* (1988) 46 Cal.3d 123, 139 [249 Cal.Rptr. 320]; and *People v. Superior Court* (Greer) (1977) 19 Cal.3d 255, 270-271 [137 Cal.Rptr. 476]

[5] See footnote 2, above, concerning the requirements for an ethical screen.

SUCCESS IS A PLEA BARGAIN, A WIN IS A LESSER CHARGE
A Report on the Offices of the Public Defender and Alternate Defender

June 7, 2011

Findings

18. The PDO and the ADO are located in separate buildings to avoid any appearance of conflict of interest.
Response (General Services Agency Director):
The General Services Agency Director disagrees partially with this finding. The PDO and ADO are located in separate facilities due to the availability of leased space in the County. Attached is a Formal Opinion No. 2002-158 of the State Bar on this issue.

Recommendations

2. The County Executive Officer maintain the Office of the Public Defender and the Office of the Alternate Defender in separate buildings, (Finding 18)
Response (General Services Agency Director):
The recommendation will not be implemented because it is not warranted. According to the attached Opinion No. PDO and ADO can be physically located in the same facility so long as adequate safeguards are put into place wherein each office does not have access to the other.