

I. DEPARTMENT OF PUBLIC DEFENSE SEPARATION OF DIVISIONS AND CASE FILES IN ORDER TO MINIMIZE CONFLICTS – GENERAL POLICIES AND PROCEDURES

1.0 POLICY TITLE: Department of Public Defense (DPD) Division, Case File and Conflicts Case Management – General Policies and Procedures.

1.1 EFFECTIVE DATE: July 1, 2013

2.0 PURPOSE

To provide guidance in defining the case management and attorney management relationship between the DPD and its legal services divisions for the purpose of avoiding conflicts of interest which may disrupt or jeopardize the right to counsel and the validity of legal proceedings, maintain confidences and case information of clients and to provide for a separation between the divisions and the department of cases assigned and the legal work and supervision of attorneys and staff within the Public Defense (PD) Divisions.

3.0 REFERENCES

Washington State Supreme Court

Rules of Professional Conduct (RPC), RPC 1.6, 1.7, 1.9, 1.10, 1.11, 1.15(b), (2), (3), (5) and (d), 3.7, 5.1, 5.2, 5.3, 5.4, 6.2, 6.5

Washington Supreme Court Standards for Indigent Defense Services

American Bar Association *Ten Principles of a Public Defense Delivery System*

Washington State Bar Association Standards for Indigent Defense Services

Criminal Rule 3.1 and Criminal Rule of Local Jurisdictions 3.1

King County Office of Public Defense Conflicts of Interest Case Analysis Protocols (referred to as OPD Conflicts Protocols)

People v. Christian, 41 Cal.App.4th 986, 48 Cal.Rptr.2d 867, (1996)

People v. Robinson, 79 Ill.2d 147, 37 Ill. Dec. 267, 402 N.E.2d 157 (1979)

Castro v. Los Angeles County Bd. of Supervisors (1991), 232 Cal. App. 3d 1432 [284 Cal. Rptr. 154]

4.0 POLICY

4.1 It is the policy of the DPD that the majority of legal services provided to indigent persons will be provided by the public defender divisions within DPD. The OPD also recognizes the importance of a credentialed Assigned Counsel Panel that provides legal services independent of the divisions when necessary, consistent with the ABA *Ten Principles of a Public Defense Delivery System*, principle 2, RCW 10.101 and the *Washington State Bar Association Standards for Indigent Defense*. DPD will maintain client files and information for each division separate and apart from all other divisions.

4.2 Definitions

4.2.1 **DPD.** The Department of Public Defense is within the Executive Branch of King County government. The DPD central administrative staff screens defendants for indigency and refers cases to a PD Division, which in turn assigns an attorney to represent the defendant. The case assignment process includes: initial client screening; determination of indigency; checking for conflicts of interest, and assignment of cases. DPD administration provides department level management of legal services, policy setting, finance, IT, and system evaluation services in support of the department. DPD and its Divisions advocate for the defense system within King County.

4.2.2 **Public Defense Service Divisions.** Each Department of Public Defense division operates under DPD policy and procedure and administrative direction. Each division provides legal services independently from the others.

4.3 **The PD Divisions of DPD** receive administrative support from the Department Director and operate autonomously, with a separate Division Director who is responsible for the overall direction, coordination, and evaluation of the work of attorneys employed within the divisions. This Division Director, Deputy Division Director, or designee attorney supervisor is responsible for providing guidance to the litigation strategy of PD Division attorneys. Certain policies will be common to the different divisions, e.g. DPD Conflicts Policy, and County Human Resource policies, but will be directly administered within the separate divisions by the respective Division Director for each division. The DPD Director exercises no direct control or influence over the handling of cases by each PD Division, nor does the Director have access to the client files or other client confidences of the PD Division.

4.4 **Individual cases in each PD Division** are opened, litigated, and closed under separate PD Division file numbers. Each PD Division generates calendars listing appearances only for attorneys in the Division. Each PD Division has its own clerical support staff, paralegals, social workers, and investigators. Each PD Division office in each location is physically separate from those of other PD Divisions and OPD administration. Access devices for the offices of the PD Divisions do not permit access to other PD and OPD administrative offices, and PD Division access devices are not available to attorneys or support staff not employed by the Division. The DPD Director does not personally possess an access device to the PD Division offices nor do the PD Division Directors and Deputy Division Directors possess access devices to the OPD administrative or other PD Division offices. Decisions regarding the identification and resolution of potential conflicts of interest in an individual case are made within the respective divisions, consistent with the DPD Assigned Council Panel Policy and Procedure effective October 13, 2008 Decisions with respect to seeking expert services on an individual case are made within the respective division, prior to submission of the funding request.

4.5 **The files of PD Division clients** are physically and electronically housed and maintained separately from those of other PD Divisions and DPD administrative offices in a manner that ensures only PD Division attorneys and staff have

access to the confidential files of the Division in which they work. In turn, files of the DPD and other PD Divisions are protected, separate and likewise inaccessible to other PD Division attorneys or staff. Every employee of the DPD administration, other PD Divisions, and the PD Division shall be specifically advised to maintain the confidences of individual clients and to maintain the required degree of separation between the PD Division, the DPD administration and other PD Divisions.

- 4.6 **King County's DPD administration** is the referring authority for cases assigned to each Division. In turn, each Division Director and Deputy Division Director is governed by the same duties and responsibilities to provide conflict-free representation as is required of, and by, the DPD Director. The PD Divisions are considered to be treated as if each were a separate law firm located within the DPD.
- 4.7 **The DPD, the administrative office and the PD Divisions are independent entities within County government** separated by an ethical wall as defined in the RPCs. The policies and procedures of the Department of Public Defense are those generally applicable to any separate law firm and apply procedurally to both the administrative office and the divisions. After a case is transferred from DPD administration to a division, the Division Director or his or her designee will assign an attorney to represent the client.

4.6. **Attorney Serving as a Public Officer RPC 1.11(d)**

Multiple courts have taken the position that conflicts of interest in the public defender's office are governed by Rules of Professional Conduct 1.11(d) because these offices are governmental offices and as such must be examined in a different way. See, *Anderson v. Commissioner of Correction*, 127 Conn. App. 538, 15 A.3d 658 (2011), App. Granted, 301 Conn. 921, 22 A.3d 1280 (2011). In light of the *Dolan* decision which determined that the contractors were arms and agencies of the County, a strong argument can be made that the appropriate conflicts analysis should be done under RPC 1.11, which states in part: "except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee is subject to Rules 1.7 and 1.9; and shall not participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing." Other courts have come to the conclusion that if there is an administrative distinction between two offices, this separation is sufficient to avoid a per se conflict.

- 4.8 **General DPD policies** shall be prepared by Director of DPD, with input and consultation from the Division Directors. General policies are applicable to all divisions, but are administered independently within the respective divisions under the supervision of the Division Directors of each division.

5.0 **PROCEDURES**

5.1 PD Division review of conflicts

Each PD division shall separately administer policies and procedures for assessing and declaring a conflict and for division review of conflicts consistent

with the general PD Conflict of Interest Case Analysis Protocols policy effective July 1, 2013. The respective obligations of the attorneys and supervising attorneys within the separate divisions are set forth in the DPD Conflicts Policy Section 4.1.

5.2 Assignment and Review

5.2.1 The DPD will, during the interim period requested by the King County Council, allocate cases to the PD Divisions in the same percentage and case types as are found in the 2012-2013 Contracts for Legal Services. DPD will not assign a client to a PD Division if the Division represents a co-defendant or witness in the current case in another case or if the Division has advised DPD that it has an on-going conflict of interest that would prevent it from providing legal services to that client. DPD recognizes and agrees that conflicts may also arise because of prior representation of a client and, particularly in dependency proceedings, because of representation of a party who is a parent, guardian or other custodian, a child. These conflicts must be reviewed carefully when a criminal case may be related to a dependency proceeding.

5.2.2 When a PD Division is assigned a criminal case, it will promptly review the case for any conflict or other reason the Division may not be able to provide legal services to the person entitled to appointed counsel. The division shall assess whether it has a conflict arising from prior representation either due to representation of a co-defendant or complaining witnesses or for any other reason creating a conflict of interest. The Division will conduct this review before opening the case or assigning an attorney to represent the client.

If the division concludes it cannot provide legal services it will immediately return the case to DPD administration. The division will inform DPD administration of the reason it cannot provide legal services, to the extent permitted by attorney client privilege and the Rules of Professional Conduct.

If an attorney has entered an appearance in a case, he or she may not withdraw without first addressing the conflict with his or her supervisor and the case shall not be sent back to DPD for reassignment without the supervisor completing and signing an DPD conflicts withdrawal form, consistent with DPD Conflicts of Interest Case Analysis Protocols Section 4.1.

5.2.3 All decisions must be discussed with and approved by a supervisor. In atypical, sensitive or complex cases, the Division Director or Deputy Division Director of the PD Division will decide how the case is to be treated. Any declaration of a conflict resulting in the case being transferred from the Division back to the DPD administration office must be approved by the Division Director or Deputy Division Director or his or her designee.

- 5.2.4 For new dependency cases, the petition will be distributed to the PD Division for an initial conflict check. The division shall assess whether it has a conflict with any of the identified parties needing counsel pursuant to the petition and advise DPD administration which clients it can accept. DPD administration will then provisionally assign Divisions to provide representation at the initial shelter care hearing. If a party to a dependency case requests counsel after the initial shelter care hearings, conflicts will be reviewed pursuant to 5.2.3.
- 5.2.5 The DPD administration and its PD divisions shall meet at least quarterly to discuss their review of the returns and re-assignments to determine if there is a way to improve the certainty of assignments to the PD Divisions and to assigned counsel. This meeting can be conducted during regularly scheduled management meetings.