

2016

**State of Utah, Plaintiff/Appellee, vs. William Tirado, Defendant/  
Appellant**

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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STATE OF UTAH,

Plaintiff / Appellee,

vs.

WILLIAM TIRADO,

Defendant / Appellant.

Case No: 20140967-CA

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**REPLY BRIEF OF APPELLANT**

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APPEAL FROM THE SECOND DISTRICT COURT, WEBER COUNTY, STATE  
OF UTAH, FROM A CONVICTION OF ARRANGING THE DISTRIBUTION OF A  
CONTROLLED SUBSTANCE, A SECOND DEGREE FELONY, BEFORE THE  
HONORABLE ERNIE W. JONES

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Oral Argument Requested

23B Remand Requested

Tirado has now been released from the Utah State Prison

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**INTRODUCTORY NOTE**

The State's brief, and its criticism of Tirado's reliance upon "extra-record" evidence, demonstrates the difficulty criminal defendants face when they attempt to use Rule 23B of the Utah Rules of Appellate Procedure to establish an ineffective assistance of counsel (IAC) claim on direct appeal. As the State points out, Tirado's "sole claim on appeal is that he was denied his Sixth Amendment right to counsel because his attorney labored under an actual conflict of interest", which "depends in large part on the extra-record proffer made with his rule 23B motion." Appellee's Brief at 14. This is accurate. Much of Tirado's IAC claim requires reference to facts not currently on the record, but facts which he has good reason to believe will be shown if he is allowed to call witnesses at a hearing.

According to the Revised Order Pertaining to Rule 23B the “Appellate Court may elect to adjudicate the motion separately or in conjunction with its treatment of the merits of other issues presented on appeal.” That election, when and how the appellate court will adjudicate the 23B motion, is unknown to a defendant as he prepares and files his briefs on the merits of his IAC claims. In cases like this one, where the Court has elected not to rule upon the 23B motion or stayed the briefing schedule, a defendant’s briefs must by necessity refer to “extra-record” evidence in order to argue his IAC claim. These defendants are placed ‘between a rock and a hard place’ on direct appeal because they must fully brief their IAC claims even before actually knowing exactly what the record on those claims will look like. This is a very difficult place to be because, as the State points out “Affidavits submitted in support of Rule 23B motions are not part of the record on appeal and will be considered only to determine whether [to] grant or deny the motion.” Revised Order Pertaining to Rule 23B. So defendants whose IAC claims depend upon the facts contained within their 23B motions are forced to base their claims, which cannot be made on PCRA, upon facts which they are not allowed to refer.

The Supreme Court issued its Revised Order Pertaining to Rule 23B “in the interest of expediting the final disposition of criminal appeals”, but in so doing it may have created a ‘Catch-22’ for those whose genuine issues depend upon

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<sup>1</sup> See Utah Code §78B-9-106 (2010). According to the Post Conviction Remedies Act (PCRA) “A person is not eligible for relief under this chapter upon any ground

“extra-record” evidence. Tirado’s claims of IAC based on an actual conflict of interest, a conflict which is hinted at in the record, but patently clear from the extra-record evidence. Unless and until that evidence is added to the record, Tirado’s right to raise an IAC claim is severely restricted.

## **ARGUMENT**

### **I. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR OPERATING UNDER AN ACTUAL CONFLICT**

#### **A. A Conflict of Interest Existed**

The State’s brief ignores the Rules of Professional Conduct discussed in Tirado’s opening brief. For example, the State acts as though trial counsel would

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that... was raised or addressed at trial or on appeal” or “could have been but was not raised on appeal”. So if IAC is raised on appeal based upon ‘extra-record evidence’ attached to a 23B motion, and the 23B motion is denied, and then the IAC claim is rejected because there is no record evidence of ineffectiveness, the defendant cannot raise IAC in a PCRA action, because it “was raised or addressed... on appeal”. This IAC claim will never really have been heard on its merits, and the only argument he will have been allowed to make would have been without any factual support. But because it was raised on appeal, IAC cannot be raised in PCRA. On the other hand, if IAC is not raised on appeal, the PCRA statute bars a defendant from raising IAC where it “could have been but was not raised on appeal”. So if a defendant does not raise his IAC claims in his briefs on appeal, because the 23B motion has not been granted yet, he would be precluded from raising it on PCRA. The only exception to the PCRA eligibility bar is in instances of ineffective assistance of appellate counsel. In other words, if a defendant wants a court to hear the full merits of his IAC claim, including the facts that support that claim, his 23B motion must be granted, or appellate counsel must perform deficiently by not raising an IAC claim on appeal. And IAC of appellate counsel for failing to raise IAC of trial counsel will be subject to a conceivable tactical purpose review, thus making the attempt to preserve an IAC claim for PCRA by not raising it on direct appeal a fool’s errand. The only defendants who can raise IAC claims on PCRA for trial counsel’s performance would be those whose appellate counsel gave no thought to IAC at all, or perhaps those who were represented by the same attorney at trial and on appeal, a practice discouraged by the courts.



have been free to disclose anything and everything about Courtney at Tirado's trial because "Young's representation of Courtney for the charges that arose out of the same events ended five months before defendant's trial..." Appellee's Brief at 18. This is not how lawyer/client relationships work. Defense attorneys are not free to disclose the information they learn about their clients the moment the judge issues a sentence. The rule forbidding a lawyer from revealing "information relating to the representation of a client" does not have an expiration date.

UT.R.PROF.CON. RULE 1.6. Attorneys are essentially bound to take our client's secrets, information which could impeach them, and other information related to the representation, to the grave. Trial counsel would not have been free to reveal information about Courtney at Tirado's trial five years after Courtney was sentenced, let alone five months later.

The State's argument infers that it believes, at the time of Tirado's trial, Courtney was a former client, not a concurrent client. Given the fact that these two defendants were charged with the same crime arising from the same facts, this belief is a stretch at best. However, for the sake of argument a review of Rule 1.9 Duties to Former Clients, is helpful because it demonstrates that this distinction is meaningless on the question of confidentiality and privilege. Under that rule a "lawyer who has formerly represented a client in a matter... shall not thereafter:... (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client." UT.R.PROF.CON. RULE 1.9. The confidentiality in Rule 1.6 applies to current and former clients. See

Appellant's Brief at 10-11. So trial counsel would have been bound by the same duties of confidentiality and privilege to Courtney even if Courtney became a former client.

Most importantly the State attempts to argue there was no conflict of interest because there was nothing about Courtney's circumstance, at the time of Tirado's trial, that would have placed him in some danger of detriment if trial counsel would have revealed what he knew about Courtney to Tirado's advantage. It is as if the only way to create a conflict is if trial counsel has to throw one client under the bus, in order to save the other. That is too high of a bar, and it is inconsistent with the ethical rules that tell attorneys how they are obligated to relate to their clients.

Conflicts of interest arise when counsel owes duties to multiple clients and has to choose which duties he will fulfill or maintain, and which duties he will abandon. The State has not contested that trial counsel the duties of competence (Rule 1.1), of confidentiality (Rule 1.6), of conflict (Rules 1.7 and 1.8), and the duty to former clients (Rule 1.9) to both Tirado and Courtney. When Tirado was going to trial and trial counsel knew the State planned to prove Tirado's intent to distribute was tied to Courtney and his possession of methamphetamine<sup>2</sup> counsel

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<sup>2</sup> At the preliminary hearing it was clear the State intended use the evidence and statements collected from Courtney against Tirado. See R.216:26-27 (when Courtney was arrested at Tirado's house he had methamphetamine on his person), R.216:30-31 (in response to the fact that Tirado was not found to have any drugs Vanderwarf acknowledge "it's not unusual that Mr. Tirado wouldn't

would have known he could not violate his duty of confidentiality to Courtney in order to confront and impeach him to show his statements did not implicate Tirado. So instead, trial counsel decided to abandon his duty of competence to Tirado. He abandoned his duty to present Tirado's best defense by declining to do anything at odds with his duties of confidence and privilege to Courtney. Counsel may have opted for what he thought was a middle ground approach, trying to represent both clients without discussing the conflict or securing a waiver from either client. But that middle ground actually was a choice to maintain the duties to Courtney and abandon the duties to Tirado.

The State's argument that no conflict existed, because Courtney had nothing to gain, is inconsistent with the Rules of Professional Conduct and the obviously conflicting interest between Tirado and Courtney.<sup>3</sup> This Court should reject the

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have drugs on him but Carl Courtney would" because "Tirado has been know and had, on previous occasions, gotten narcotics from Carl Courtney.").

<sup>3</sup> Tirado has not been able to locate any Utah case on the question of whether the inability of trial counsel to confront a witness demonstrates an actual conflict of interest. However, a related question was posed to the Ohio Supreme Court's Advisory Board of Commissioners on Grievances and Discipline. They were asked to consider the question: "Does a lawyer's representation of a criminal defendant create a conflict of interest if the lawyer will be required to cross-examine a former client during the defendant's trial in a matter unrelated to the representation of the former client?" Tirado recognizes that the exact question at stake in this case would be 'in a matter *related* to the representation of the former client?', but suggests that the Ohio advisory opinion may still have some helpful analysis. Tirado has attached the opinion as an addendum for the Court to consider if it finds it appropriate. It should be noted that the Ohio Rules of Professional Conduct seem to be identical, or at least very similar, to the Utah Rules. Without discussing every line of the Ohio opinion, Tirado would direct the Court to the conclusion which states "If a current representation involves the same or a substantially related matter and the current client's interests in the

State's argument and simply read the rules in light of the facts presented at trial by the State. Tirado and Courtney were charged with the essentially the same crime, which was to be proved by overlapping the evidence and statements obtained separately from each of them. Their interests were materially at odds, and trial counsel's representation of them was limited by that conflict. He should never have continued as counsel for Tirado at trial. He had an ethical obligation to withdraw and he failed to do that, which led to representation materially impacted by the conflict.

### **B. The Conflict Impacted Counsel's Performance, Creating an Actual Conflict of Interest**

The cases explaining how an *actual* conflict of interest is demonstrated use several seemingly different tests. The State is fond of citing the language of *Lafferty v. State*, 2007 UT 73, ¶ 175 P.3d 530 which says "[t]o establish an actual conflict, [a defendant] must demonstrate that 'counsel was forced to make choices advancing other interests to the detriment of his client.'" (Citing *Taylor v. State*, 2007 UT 12, ¶123, 156 P.3d 739). In his opening brief Tirado cited *State v. Lovell*, 1999 UT 40, ¶24, 984 P.2d 382, which characterizes an actual conflict as "turn[ing] on whether (1) other counsel likely would have approached the case differently and (2) a tactical reason other than the alleged conflict existed for [counsel's] decisions. (Citing *State v. Webb*, 790 P.2d 65, 67 (Utah App. 1990)).

While the State's preferred test seems to require more evidence, and obviously

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matter are materially adverse to the former client, Prof.Cond.R. 1.9(a) dictates that the lawyer may not continue the current representation without the former client's informed consent, confirmed in writing." Addendum A.

Tirado would prefer the Court to apply the more generous analysis, under either analysis this case demonstrates an actual conflict of interest, from which prejudice must be presumed.

The State frames the argument as requiring Tirado to prove “both that (1) Young was in a position that would force him to make choices advancing Courtney’s interests to the detriment of [Tirado’s] interests, and (2) Young actually did so.” Appellee’s Brief at 15-16. The majority of the State’s argument focuses on the idea that because Courtney’s case was over, there was no way trial counsel could have advanced Courtney’s interests, so no matter how much it may have hurt Tirado, if it didn’t hurt Courtney it wasn’t an actual conflict. But the State’s argument assumes that there was no reason to keep Courtney’s confidential information confidential, or there was no reason not to betray the lawyer/client relationship because Courtney had already pled guilty. In other words, the State assumes Courtney could have no interest in the confidence of his attorney unless it was protecting him in the underlying case. This assumption is wrong.

This position would lead counsel to believe they could and should violate their ethical duties of confidentiality, ignore the Rule of Professional Conduct, and spill the beans as soon as the legal controversy with one client ends. It’s as if Johnny Cochran was free to disclose OJ Simpson’s confessions, to the benefit of any other client, the moment the trial ended because double jeopardy prevented Simpson from being retried. That is not how confidentiality works, that is not

how 'furthering the client's interests', in this sense, works. Clients' interest is to have the confidence of their attorney indefinitely into the future, regardless of how their case is resolved.

Trial counsel, even now, even long after both cases have ended, owes a duty to both Courtney and Tirado not to reveal any information related to the representation. Courtney's interests were furthered by the very fact that his counsel kept his confidential information confidential. Courtney's interests were furthered when his attorney did not reveal anything he learned in his representation of Courtney at Tirado's trial. Courtney need not avoid going to jail, a second time, in order to have his interests furthered. He gets to preserve his lawyer/client relationship, he gets to have his secrets kept secret, whatever they may be. The detriment that would have come to Courtney, had trial counsel used confidential and privileged information to benefit Tirado, is that Courtney would have lost his lawyer/client relationship, the very foundation of legal representation. This is a real detriment, regardless of whether it could or would result in additional criminal danger.

If the Court were considering the State's position as persuasive, that a client's interests are not advanced by maintaining confidentiality beyond the end of criminal liability, it should consider the broader negative implication such a rule could have upon limiting the ethical obligation of attorneys to their former clients. Exposure to criminal liability far from the only reason we want lawyers to keep their client's confidential information private. The State's position, that

Courtney had nothing to gain by trial counsel's loyalty, undermines the foundation of lawyer/client relationships in all areas of legal practice. This Court should reject the State's extremely narrow interpretation of the *Lafferty/Taylor* test.

Furthermore, the State's position would require Tirado on appeal to extract from trial counsel confidential and privileged information about Courtney, the very information trial counsel was ethically obligated not to share at trial. Trial counsel's duties to Courtney have not changed simply because Tirado has been convicted and now appeals. Trial counsel could not now reveal the private information about Courtney to help Tirado on appeal any more than he could have at trial. And Tirado could not be expected to know that information in order to meet his burdens on appeal.

It does not matter whether the confidential or privileged information could have hurt Courtney in his case, it only matters that trial counsel ethically cannot and did not reveal it to help Tirado. This is sufficient to prove trial counsel was forced to choose between his two clients. Proceeding to trial with Tirado in a case where Tirado was convicted upon the evidence obtained from Courtney, without objection, without betraying any of Courtney's confidences, is sufficient to prove trial counsel actually did choose to advance Courtney's interests at the expense of Tirado's.

## **II. TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO PROTECT TIRADO'S RIGHT OF CONFRONTATION DUE TO THE CONFLICT OF INTEREST**

The State's brief does not address Tirado's claim that trial counsel's dual representation prevented him from subjecting the statements provided by Courtney to cross-examination or confrontation. A search of the State's brief reveals no instance where the State discusses trial counsel's duty to "confront" or cross-examine Courtney, about the drugs found on his person, about his history of drug distribution, and most importantly about his admission to the police that sometimes he sells drugs and, if her were to sell, it would be from the drugs found on him. See R.217:138. As explained in Tirado's initial brief, trial counsel was prevented by ethical obligations to Courtney from asserting Tirado's right to confront Courtney when the State introduced this evidence. See Appellant's Brief at 20, 22, 23, 24. This evidence was crucial to the State's case and should not have been admitted as hearsay in violation of Tirado's right to confront.

The State's silence on this issue should be taken as an acknowledgement that counsel's performance was deficient. Any reasonable attorney would object to admission of an alleged confession of a codefendant that violated the hearsay rule and the right to confront. This is basic lawyering. But trial counsel could not object to hearsay or confrontation, because either of those objections would have required the State to call Courtney as a witness and would have required trial counsel to cross-examine and impeach his own client. Trial counsel could not have done those things and he should not have gone to trial when it was obvious



that the State would need Courtney as a witness.

The State's silence on this question is not surprising, however, given how obviously deficient it is for trial counsel to have allowed the State to admit such blatantly inadmissible and unconstitutional evidence. Again, it is patently deficient performance to fail to object to obvious hearsay and confrontation violations. These are the result of counsel laboring under a conflict of interest, counsel who could not adequately represent both Courtney and Tirado's interests. There can be no doubt that an attorney who owed no duty to Courtney would have been free to object, and would have objected, to the evidence offered about and from Courtney. This objections would have forced the State either to call Courtney, at which time he would be subject to confrontation (not to mention free to exculpate Tirado as he says he would have done), or the State would have declined to call Courtney and have been prevented from presenting the evidence related to his statements.

If Courtney had been called as a witness, his out of court statements, that "if he needed to sell it, he would sell from that specific amount" found on his person (R.217:138), would have been directed away from Tirado by his testimony that he did not "arrange to have [Tirado] act as a 'middleman' to arrange to sell methamphetamine..." Affidavit of Carl Courtney. All of the negative evidence presented about Courtney, and used by the State to infer Tirado's intent to distribute, could have been rebutted by Carl's testimony that he and Tirado were not selling drugs together. The State's case depended upon that inference, and it

would have evaporated.

The State's argument, that if Courtney had been called as a witness his "anticipated testimony [would have] added nothing material to the defense" because the two "were cousins, permitting the inference that they might lie for each other", or because Courtney had an extensive criminal record opening him up to impeachment, Appellee's Brief at 24, cannot be taken seriously under the circumstances. It was State's case that depended upon Courtney's statement impliedly implicating Tirado. It makes no sense to say that Courtney's proposed testimony denying he and Tirado were arranging to sell drugs with Lorenzo would have no material impact, when the State's evidence, with the opposite inference, is the only evidence which connected Tirado to any drugs that could have been sold. As it stands, it is the State's case that depends upon Courtney's credibility, and if he is impeached by his relationship to Tirado and his history, so too is the State's inference implicating Tirado. What is bad for the goose, is bad for the gander.

Courtney had the right to confront the witnesses against him, including Courtney, his codefendant. Because Courtney was represented by the very attorney who would have had to confront him, that attorney had a conflict of interest. Counsel was forced to choose between questioning, impeaching, and confronting one client, and adequately presenting another client's defense. Trial counsel elected not to object to the State's admission of hearsay evidence in violation of Tirado's right to confront. Counsel elected to allow the State to

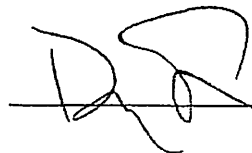
incorrectly infer that Courtney's intent to distribute could be attributed to Tirado. Counsel elected to allow the State to connect the drugs found in Courtney's pocket to Tirado. That election was a decision to affirm and maintain the duties counsel had to Courtney and deny Tirado the right to competent, diligent, effective assistance of counsel. This is an actual conflict of interest. It advanced Courtney's interests by maintaining the lawyer/client relationship and neglected Tirado's interests in a full and complete defense. This Court should presume prejudice.

#### **CONCLUSION AND PRECISE RELIEF SOUGHT**

Trial counsel operated under a conflict of interest, in that he represented two clients with materially adverse interests. That conflict became an *actual* conflict when trial counsel maintained his lawyer/client relationship, with all its confidences and privileges, with Courtney rather than presenting a complete defense for Tirado. This is ineffective assistance of counsel. Because trial counsel had an actual conflict of interest this Court should presume prejudice and reverse Tirado's conviction because he was denied effective assistance of counsel.

Because this case depends upon evidence not currently in the record, but which Tirado has provided by affidavit in his 23B motion for remand, his Court should temporarily remand this case to the district court for a hearing related to ineffective assistance of counsel.

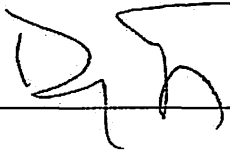
RESPECTFULLY SUBMITTED this 8th day of June, 2016.



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### **CERTIFICATE OF SERVICE**

I hereby certify that I mailed a copy of the foregoing Appellant's Reply Brief to the Utah Attorney General, Appeals Division, PO Box 140854, Salt Lake City, Utah 84114-0854 on this 8th day of June, 2016.



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**Certificate of Compliance With Rule 24(f)(1)**


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# The Supreme Court of Ohio

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## OPINION 2013-4

Issued October 11, 2013

### Cross-Examination of a Former Criminal Client in an Unrelated Matter

**SYLLABUS:** Under Prof.Cond.R. 1.7(a)(2), a conflict of interest is created if there is a substantial risk that a lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited by the lawyer's responsibilities to a former client. Prof.Cond.R. 1.9 details a lawyer's responsibilities to a former client, which include a prohibition against using information relating to the representation of a former client to the disadvantage of the former client. A lawyer may not cross-examine a former client who is an adverse witness in a current representation if it would violate Prof.Cond.R. 1.9. When a lawyer represented a former client in a criminal case that ended in a conviction, the use of the conviction in a subsequent unrelated case to impeach the former client is impermissible unless the lawyer can satisfy one of the exceptions in Prof.Cond.R. 1.9(c)(1). These exceptions allow the cross-examination if the former client's conviction has become generally known or the use of the conviction for impeachment of the former client is permitted or required by the Rules of Professional Conduct. The cross-examination may also proceed upon the informed consent of the former client. If the lawyer cannot satisfy one of the Prof.Cond.R. 1.9(c)(1) exceptions or obtain the former client's informed consent, the lawyer must withdraw from the current representation and request permission to withdraw if required.

**QUESTION PRESENTED:** Does a lawyer's representation of a criminal defendant create a conflict of interest if the lawyer will be required to cross-examine a former client during the defendant's trial in a matter unrelated to the representation of the former client?

**APPLICABLE RULES:** Rules 1.4, 1.6, 1.7, and 1.9 of the Ohio Rules of Professional Conduct

**OPINION:***The Hypothetical*

During the course of the representation of a criminal defendant, a public defender may discover that he or she previously represented a prosecution witness in a prior, unrelated criminal case. A public defender reports this scenario is not uncommon, and has requested guidance on whether a conflict of interest exists that would prevent the public defender from continuing the current criminal representation. For purposes of this opinion, the Board is asked to assume that the public defender no longer represents the prosecution witness, that the witness was convicted in the prior case, and that the underlying crime is an impeachable offense under Evid.R. 609. As part of the current representation, the public defender may have to cross-examine the prosecution witness / former client regarding the prior offense in an effort to attack their credibility. Because the requester of this opinion is a public defender, we will address the issue presented in that context, but our analysis is also applicable in both private criminal and civil representations where a lawyer must cross-examine a former client.

The Board briefly answered the requester's question in Advisory Opinion 2008-4, which addresses the imputation of conflicts in a public defender's office. A public defender's cross-examination of former clients was outside the scope of Opinion 2008-4, but the Board made the following independent statement: "If a *former* client in an unrelated matter is a witness in a defendant's criminal case, an assistant county public defender may represent the criminal defendant, but may not use or reveal information of the former client that is protected from disclosure under [Prof.Cond.R. 1.9(c)]." (Emphasis in original.) Ohio Sup. Ct., Bd. of Comm'rs on Grievances and Discipline, Op. 2008-4 (Aug. 15, 2008). This opinion will expand upon the Board's statement in Opinion 2008-4.

*Applicable Rules in Analysis of Conflicts of Interest Involving Former Clients*

The scenario presented to the Board involves the interplay of Prof.Cond.R. 1.7 and 1.9. When a public defender learns that a current client's case may involve the adverse testimony of a former client, the conflict analysis as to the current client begins with Prof.Cond.R. 1.7. As stated in Prof.Cond.R. 1.7, Comment [1], "[t]he principles of loyalty and independent judgment are fundamental to the attorney-client relationship and underlie the conflict of interest provisions of [the Rules of Professional Conduct]. Neither the lawyer's personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute the lawyer's loyalty to the client. All

potential conflicts of interest involving a new or current client must be analyzed under [Prof.Cond.R. 1.7].”

Prof.Cond.R. 1.7(a) states as follows:

(a) A lawyer’s acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

(1) the representation of that client will be directly adverse to another current client;

(2) there is a substantial risk that the lawyer’s ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer’s responsibilities to another client, a former client, or a third person or by the lawyer’s own personal interests.

Applying Prof.Cond.R. 1.7(a)(2) to the situation presented to the Board,<sup>1</sup> the public defender’s continued representation of the current client creates a conflict of interest if there is a “substantial risk” that the public defender’s ability to “consider, recommend, or carry out an appropriate course of action for that client will be materially limited” by the public defender’s responsibilities to the former client. Prof.Cond.R. 1.0(m) defines “substantial” as “a matter of real importance or great consequence.”

“A lawyer’s duties of loyalty and independence may be materially limited by responsibilities to former clients under [Prof.Cond.R. 1.9].” Prof.Cond.R. 1.7, Comment [18]. To ascertain a lawyer’s responsibilities to a former client, then, we must next consult Prof.Cond.R. 1.9. That rule states in pertinent part as follows:

(a) Unless the former client gives informed consent, confirmed in writing, a lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter

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<sup>1</sup> Prof.Cond.R. 1.7(a)(1) is inapplicable as the public defender in this hypothetical is not simultaneously representing clients with adverse interests.



in which that person's interests are materially adverse to the interests of the former client.

\* \* \*

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter do either of the following:

(1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known;

(2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Prof.Cond.R. 1.9. First considering Prof.Cond.R. 1.9(a), the interests of the public defender's current client are materially adverse to the former client, who will be testifying for the prosecution. The requester of this opinion, though, has asked the Board to assume that the cases involving the former and current clients are unrelated matters. This opinion makes such an assumption, but we note that under Prof.Cond.R. 1.9(a), the former client would have to provide informed consent, confirmed in writing, for the public defender to represent the current client if the matters were the same or substantially related.

#### *Evaluating Obligations to the Former Client / Adverse Witness*

Neither Prof.Cond.R. 1.7 nor Prof.Cond.R. 1.9 automatically ban a lawyer from representing a client when an adverse trial witness is a former client and the current matter is unrelated to the representation of the former client. *Accord* Ill. State Bar Assn., Op. 05-01 (Jan. 2006); Md. State Bar Assn., Comm. on Ethics, Op. 2004-24 (May 14, 2004); Utah State Bar, Ethics Advisory Op. Comm. Op. 02-06 (June 12, 2002). To the contrary, a lawyer representing a client in a matter in which another *current* client is an adverse witness likely faces a conflict of interest under Prof.Cond.R. 1.7. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-367 (1992). "When a lawyer is called upon to cross-examine her own client, the lawyer may well be torn between a 'soft,' or deferential, cross-examination, which compromises the representation of the litigation client, and a vigorous one, which breaches the duty of loyalty to the client-witness." *Id.*

at 3. Although the Board may not provide guidance on the legal question of a defendant's constitutional right to the effective assistance of counsel, we note that the courts view simultaneous representations (both the defendant and a co-defendant or witness are current clients) and successive representations (either a co-defendant or witness is a former client) differently in that context because in successive representations the lawyer "is no longer beholden to the former client." *Gillard v. Mitchell*, 445 F.3d 883, 891 (6th Cir. 2006). See also *Moss v. United States*, 323 F.3d 445 (6th Cir. 2003); *Smith v. Hofbauer*, 312 F.3d 809 (6th Cir. 2002). Nevertheless, even in completely unrelated matters, lawyers have specific obligations to former clients as set forth in Prof.Cond.R. 1.9(c).

Returning to Prof.Cond.R. 1.7, the starting point for any conflict of interest analysis, the public defender must determine whether his or her ability to carry out an appropriate course of action for the current client will be materially limited by the public defender's responsibilities to the former client. In other words, the public defender must be able to provide competent and diligent representation to the current client while also fulfilling his or her "continuing duties" to the former client "with respect to confidentiality and conflicts of interest." Prof.Cond.R. 1.9, Comment [1]. This determination will depend upon the public defender's ability to properly cross-examine the former client for the benefit of the current client while also complying with Prof.Cond.R. 1.9(c). If the public defender concludes that the cross-examination does not require him or her to use information relating to the representation of the former client to the disadvantage of the former client or to reveal such information, the public defender does not run afoul of Prof.Cond.R. 1.9(c) and the current representation may continue absent other conflict of interest issues.

The requester, though, indicates that the public defender may be required to use evidence of the former client's criminal conviction for impeachment purposes at trial. Because the public defender represented the former client in the criminal case providing the basis for impeachment, evidence of the conviction would be "information relating to the representation" under Prof.Cond.R. 1.9(c)(1). Unlike the "confidences and secrets" approach to confidentiality in the now-repealed Code of Professional Responsibility,<sup>2</sup> information relating to the representation of a client includes both "matters communicated in confidence by the client" and "all information relating to the representation, whatever its source." Prof.Cond.R. 1.6, Comment [3]. The public defender would present the conviction to attack the former client's credibility, so it would be used to the "disadvantage" of the former client. Accordingly, the public

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<sup>2</sup> See former DR 4-101.

defender's cross-examination of the former client on the prior conviction violates Prof.Cond.R. 1.9(c)(1) unless the public defender is able to satisfy one of the exceptions set forth in that provision.

Under Prof.Cond.R. 1.9(c)(1), the public defender would also be prohibited from using any other information learned in the representation of the former client during the cross-examination in the current criminal case. For example, if the former client indicated to the public defender a willingness to lie under oath within the prior representation, the public defender may not use that information against the former client in the cross-examination. *See* 2 Restatement of the Law 3d, The Law Governing Lawyers, Section 132, Comment f (2001).

*Exceptions to the Provisions that Protect Former Clients in Unrelated Matters*

Prof.Cond.R. 1.9(c)(1) contains two exceptions that allow a lawyer to use information relating to the representation of a former client to the disadvantage of the former client. The first exception applies when the information has become "generally known." The second exception allows a lawyer to use the information to the disadvantage of the former client if it is permitted or required by the Rules of Professional Conduct (Rules).

*a. "Generally Known" Exception*

As stated in the commentary to Prof.Cond.R. 1.9, "the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client." Prof.Cond.R. 1.9, Comment [8]. The term "known" denotes "actual knowledge of the fact in question" and "a person's knowledge may be inferred from circumstances." Prof.Cond.R. 1.0(g). The phrase "generally known," however, is not defined in the Rules, Model Rules, or any of the accompanying comments. As a result, the following Restatement definition has been referenced when determining whether information relating to a representation is generally known:

Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositories such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through

publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known.

1 Restatement of the Law 3d, The Law Governing Lawyers, Section 59, Comment d (2001). *See also In re Adelphia Communications Corp.*, S.D.N.Y. No. 02-41729REG, 2005 WL 425498 (Feb. 16, 2005), citing *Cohen v. Wolgin*, E.D.Pa. No. 87-2007, 1993 WL 232206 (June 24, 1993). “[T]he reason for the exception allowing use of information relating to the former representation when the information has become generally known is that at that point the rationale for requiring confidentiality no longer exists.” ABA Ctr. for Prof’l Responsibility, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct 1982-2005*, at 220 (2006) (reviewing the history of Model Rule 1.9).

i. *Existence of Criminal Conviction*

Upon review of motions for withdrawal or disqualification of counsel in criminal cases that are based upon former-client conflicts, courts have taken the view that a former client’s criminal conviction is generally known because it is a matter of public record. *See State v. Rogers*, 231 W.Va. 205, 744 S.E.2d 315 (2013); *United States v. Valdez*, 149 F.R.D. 223 (D.Utah 1993); *State v. Sustaita*, 183 Ariz. 240, 902 P.2d 1344 (Ariz.App. 1995); *State v. Mancilla*, Minn.App. No. A06-581, 2007 WL 2034241 (July 17, 2007). On the broader issue of lawyers facing former clients on the witness stand, Ohio courts evaluating allegations of the ineffective assistance of counsel have concluded that a lawyer’s prior representation of a witness is not a per se conflict. *See, e.g., State v. Lorraine*, 66 Ohio St.3d 414, 613 N.E.2d 212 (1993); *State v. McDonald*, 4th Dist. Lawrence No. 09CA4, 2009-Ohio-5132; *State v. Jones*, 5th Dist. Stark Nos. 2007-CA-00041 and 2007-CA-00077, 2008-Ohio-1068.

In general, criminal convictions are matters of public record and are usually accessible through public databases not requiring any particular expertise to obtain the conviction information. Standard practice for prosecutors would be to obtain the criminal records of their witnesses, possibly from the witnesses themselves, and this information must be supplied to the public defender during discovery. *See* Crim.R. 16(B)(2). The fact that the public defender receives the criminal record of the former

client from the prosecutor diminishes the “rationale for requiring confidentiality” referenced in the legislative history to Model Rule 1.9. Additionally, as a matter of trial strategy, prosecutors may even elicit testimony regarding the former client’s prior conviction on direct examination. These characteristics likely place the former client’s criminal conviction in the scenario presented to the Board within the realm of information that is generally known. Based upon the Restatement definition, the fact that criminal histories of witnesses are exchanged during discovery, and the case law on former-client conflict allegations, the Board’s view is that as long as the public defender’s cross-examination of the former client is limited to the existence of the prior conviction for impeachment, the public defender can satisfy the “generally known” exception in Prof.Cond.R. 1.9(c)(1).<sup>3</sup> If competent representation of the current client requires the public defender to use additional information relating to the representation of the former client to their disadvantage, the public defender must make an individual determination as to whether this additional information is also generally known.

ii. *Other Information in the Public Record*

Outside the context of the record of a criminal conviction in the scenario before the Board, lawyers are cautioned that the presence of information “in the public record does not necessarily mean that the information is generally known within the meaning of Rule 1.9(c).” See Bennett, Cohen & Whittaker, *Annotated Model Rules of Professional Conduct*, 175 (7<sup>th</sup> Ed. 2011), citing *Pallon v. Roggio*, D.N.J. Nos. 04-3625 (JAP) and 06-1068 (FLW), 2006 WL 2466854 (Aug. 24, 2006); *Steel v. Gen. Motors Corp.*, 912 F.Supp. 724 (D.N.J. 1995); *In re Anonymous*, 932 N.E.2d 671 (Ind. 2010). “[T]he fact that information has become known to some others does not deprive it of protection if it has not become generally known in the relevant sector of the public.” 1 Restatement, Section 59, Comment d. The following cases provide additional instruction on this issue: *Disciplinary Counsel v. Cicero*, 134 Ohio St.3d 311, 2012-Ohio-5457, 982 N.E.2d 650 (drug raid in which federal agents seized college football memorabilia was generally known, information learned during a meeting with a prospective client was not); *In re Gordon Properties, L.L.C.*, U.S. Bankr. Ct., E.D. Va., Nos. 09-18086-RGM and 12-1562-RGM, 2013 WL 681430, f.n. 6 (Feb. 25, 2013), quoting Va. State Bar, Legal Ethics Commt., Op. 1609 (Sept. 4, 1995) (“information regarding a judgment obtained by a law firm on behalf of a client, ‘even though available in the public record, is a secret, learned within the attorney-client relationship’”); *Emmanouil v. Roggio*, D.N.J. No. 06-1068, 2008 WL 1790449 (Apr. 18, 2008) (information regarding civil defendant’s testimony in a prior

<sup>3</sup> This statement assumes that the prior conviction has not been expunged. Under Evid.R. 609(C), evidence of a prior conviction is not admissible if the conviction “has been the subject of a pardon, annulment, expungement, certificate of rehabilitation, or other equivalent procedure \* \* \*.”

case was generally known when defendant disclosed the information to the plaintiff and the prior case was a matter of public record); *Sealed Party v. Sealed Party*, S.D.Tex. No. Civ.A. H-04-2229, 2006 WL 1207732 (May 4, 2006) (information in press release announcing a civil settlement that was in the public record was generally known, the fact that the case settled and the lawyer's impressions about the case were not); *In re Adelphia Communications, supra*, (list of properties owned by particular parties was not generally known information; information was publicly available, but would require substantial difficulty or expense to produce a list of the properties owned by the parties and related entities); *Cohen v. Wolgin*, E.D.Pa. No. 87-2007, 1993 WL 232206 (June 24, 1993) (magazine and newspaper articles, published court decisions, court pleadings, and public records in a government office are generally known; pleadings filed under seal and records of an international court are not). As evidenced by these cases, particularly in civil matters, whether information in a public record is generally known may require a review of the applicable facts and circumstances.

b. "Permitted or Required by the Rules" Exception

The second exception in Prof.Cond.R. 1.9(c)(1) that allows a lawyer to use information relating to the representation of a former client to the disadvantage of the former client applies when the use is permitted or required by the Rules. Stated another way, information about a former client may be used "in ways that would be permitted were the relationship still in effect." Bennett, Cohen & Whittaker at 174. An application of this exception would typically involve Prof.Cond.R. 1.6, which governs the lawyer's duty of confidentiality to the client. Prof.Cond.R. 1.6(b) sets forth circumstances under which a lawyer is permitted to reveal confidential client information, and Prof.Cond.R. 1.6(c) mandates the release of confidential client information in certain instances. In the scenario presented to the Board, the public defender could use information relating to the representation of a former client to the disadvantage of the former client if permitted or required under Prof.Cond.R. 1.6 or another provision of the Rules.

Although Prof.Cond.R. 1.9(c)(1) may permit the use of former-client information in certain circumstances, Prof.Cond.R. 1.9(c)(2) makes clear that the public defender still has a continuing duty of confidentiality to the former client. These provisions distinguish "using" former-client information from "revealing" such information. Prof.Cond.R. 1.9(c)(2), which is identical to Model Rule 1.9(c)(2), "prohibits any disclosure (as opposed to use) of former-client information that would not be permitted in connection with a current client, regardless of whether the information has become generally known." *Id.* at 175.

*Informed Consent or Withdrawal*

When faced with the cross-examination of a former client that requires the use of information relating to the prior representation to the detriment of the former client, a public defender may conclude that he or she cannot satisfy either of the exceptions in Prof.Cond.R. 1.9(c)(1). That is, the information is not generally known and the use of the information is not permitted or required by the Rules. In this situation, the public defender may either obtain the former client's informed consent or seek permission to withdraw from the current representation. "The provisions of [Prof.Cond.R. 1.9] are for the protection of former clients and can be waived if the client gives informed consent." Prof.Cond.R. 1.9, Comment [9]. "Informed consent" is an "agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." Prof.Cond.R. 1.0(f). With the informed consent of the former client as defined in Prof.Cond.R. 1.0(f), the public defender may use information relating to the representation of the former client to their disadvantage.

The public defender may not be able to obtain the former client's informed consent to the use of disadvantageous information about the former client's representation. Given that the former client is an adverse witness, competent and diligent representation of the current client probably requires the cross-examination and potential impeachment of the former client. If the public defender is unable to fulfill this obligation to the current client, cannot satisfy one of the exceptions in Prof.Cond.R. 1.9(c)(1), or secure the former client's informed consent, the public defender must withdraw from the current representation. Because the current matter is a criminal case, the public defender must move the court for permission to withdraw. As stated in Prof.Cond.R. 1.16, Comment [3], "[w]hen a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. \* \* \* Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation."

*The Lawyer's Individual View of Conflicts of Interest*

Even if the public defender is able to comply with Prof.Cond.R. 1.9 in a case where a former client is an adverse witness, there may be unique aspects of the representation of the former client that cause the public defender to conclude that a material limitation conflict still exists under Prof.Cond.R. 1.7(a)(2). See *United States v. Oberoi*, 331 F.3d 44 (2003) (a lawyer should not be required against his or her own judgment to continue a representation that involves the impeachment of a former

client). In this instance, to resolve the conflict, the public defender must take steps to ameliorate it as set forth in Prof.Cond.R. 1.7(b). These steps include evaluating whether the public defender can competently and diligently represent the client affected by the conflict of interest, consulting with the client affected by the conflict, and obtaining the client's informed consent, confirmed in writing. Prof.Cond.R. 1.7, Comment [2]. If the public defender cannot ameliorate the conflict, he or she may not accept or continue the representation. In situations where a public defender's representation of a client is prohibited by law, the conflict is nonconsentable under Prof.Cond.R. 1.7(c)(1).

### *Imputation of Conflicts*

Under the concept of imputed disqualification, "[w]hile lawyers are associated in a firm, none of them shall represent a client when the lawyer knows or reasonably should know that any one of them practicing alone would be prohibited from doing so by [Prof.Cond.R. 1.7 or 1.9]." Prof.Cond.R. 1.10(a). Similarly, Prof.Cond.R. 1.9(c) obligates all of the lawyers in a firm to the former clients of the firm. "[A] firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, [and] \* \* \* each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated." Prof.Cond.R. 1.10, Comment [2]. As defined in Prof.Cond.R. 1.0(c), a "firm" includes public defender organizations. Accordingly, even when a different public defender in the same office represented the former client / adverse witness, if that public defender would be prohibited by Prof.Cond.R. 1.7 or 1.9 from representing the current client, all of the public defenders in the office are disqualified under Prof.Cond.R. 1.10. *See also* Advisory Opinion 2008-4. For this reason, a former-client conflict cannot be cured by "handing off" the cross-examination to another public defender in the same office. All of the public defenders in that office are bound by the prohibitions against using and disclosing former-client information except as permitted by Prof.Cond.R. 1.9. Imputed disqualifications, though, "may be waived by the affected client under the conditions stated in [Prof.Cond.R. 1.7(b)]." Prof.Cond.R. 1.10(e).

### *Duty to Communicate with the Current Client*

Although the focus of this opinion is a lawyer's obligation to former clients, the public defender's primary responsibility in this hypothetical is to the current client. Under Prof.Cond.R. 1.4(b), the public defender is required to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Consistent with the public defender's duty to communicate with the current client, when the public defender learns that an adverse witness is a former



client, he or she is advised to disclose this information to the current client. This disclosure should occur whether or not the public defender concludes that the cross-examination of the former client is permissible under Prof.Cond.R. 1.7 and 1.9. The Board also recommends that the public defender notify the court of potential conflicts involving adverse witnesses as soon as practicable.

In closing, the Board recognizes that the Rules often do not provide a bright-line indication of whether a representation creates a material limitation conflict of interest under Prof.Cond.R. 1.7(b)(2). A lawyer's conflict analysis requires consideration of all of the relevant facts and circumstances and involves both objective and subjective elements of evaluation. As stated in the Preamble to the Rules, "The Ohio Rules of Professional Conduct often prescribe rules for a lawyer's conduct. Within the framework of these rules, however, many difficult issues of professional discretion can arise. These issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules." Rules, Preamble: A Lawyer's Responsibilities, at ¶ 9.

#### CONCLUSION:

When a lawyer learns that a current representation may require the cross-examination of an adverse witness who is a former client, the lawyer must analyze the potential conflict under Prof.Cond.R. 1.7 and 1.9. Prof.Cond.R. 1.7(a)(2) indicates that a conflict of interest is created in the current representation if there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for the client will be materially limited by the lawyer's responsibilities to the former client. The lawyer's responsibilities to the former client are articulated in Prof.Cond.R. 1.9. If a current representation involves the same or a substantially related matter and the current client's interests in the matter are materially adverse to the former client, Prof.Cond.R. 1.9(a) dictates that the lawyer may not continue the current representation without the former client's informed consent, confirmed in writing.

If the current matter and the matter involving the former client are unrelated, the former client does not have to consent to the current representation, but the lawyer must comply with Prof.Cond.R. 1.9(c). That provision prohibits the lawyer from using information relating to the representation of the former client to the disadvantage of the former client unless the information has become generally known or the Rules of Professional Conduct permit or require such use. Prof.Cond.R. 1.9(c) also prohibits the lawyer from revealing information relating to the representation of the former client except as permitted or required by the Rules.

In this opinion, the Board was asked whether a public defender may present evidence of a prior conviction to impeach a former client. The public defender represented the former client in the case that led to the conviction and did not learn of the former client's potential adverse testimony until the current representation was underway. Impeachment of the former client violates Prof.Cond.R. 1.9(c) because the public defender would be using information relating to the prior representation to attack the credibility of the former client, which would disadvantage the former client. However, the public defender may proceed with the current representation if the former client's criminal conviction is generally known, the use of former-client information is permitted or required by the Rules of Professional Conduct, or the former client provides informed consent. Absent these conditions, the public defender must seek permission from the court to withdraw from the current representation.

**Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney's Oath of Office.**