

Report of the Conflicts Work Group and Addendum

Management of Conflicts of Interest and Substitutions of Counsel in Public Defense Cases Conflicts Work Group Recommendations

Brief Background

At the November 18, 2004 meeting of the Public Defense Services Commission (PDSC), Chair Barnes Ellis requested that Ann Christian convene a Conflicts Work Group to explore and propose more effective methods to manage conflicts of interest, withdrawals and substitutions of appointed counsel. The primary purpose of the work group was to identify implementation ideas to:

- reduce the number of “avoidable” withdrawals and generally, substitutions of appointed counsel;
- reduce the number of instances where counsel seeks to withdraw from representation relatively late in a case; and
- reduce the number of instances where public defense clients request to fire their appointed counsel.

Creation of such a work group was one of 13 recommendations made by Ann Christian in her November 12, 2004 report to the PDSC. That report is referenced hereafter as “Preliminary Review” and is attached for reference.

No one who was asked to serve on the work group declined or even hesitated to serve. Paul Levy agreed to co-chair the work group. Among many things, Paul is one of the state’s experts on the issue of former client conflicts and other ethical issues related to criminal and public defense, a member of the State Bar’s (OSB) Legal Ethics Committee, and the Attorney Trainer for Metropolitan Public Defender (MPD). In addition to Paul and Ann Christian, the following individuals volunteered their time, expertise, real life experiences, and insight to the work group effort.

Kathryn Aylward, Director, Contract and Business Services Division, Office of Public Defense Services
Downing Bethune, Attorney, Multnomah County Indigent Defense Consortium

Deb Burdzik, Private Bar Attorney, Multnomah and Washington Counties, former MPD attorney

Alex Hamalian, Administrator/Attorney, Rose City Defense Consortium and Private Bar Attorney
(Multnomah and Tillamook Counties)

Greg Hazarabedian, Executive Director, Public Defender Services of Lane County, Inc.

Bruce Liebowitz, Administrator/Attorney, Portland Defense Consortium and L & L, Inc.

Angel Lopez, President/Attorney, Portland Defense Consortium and Attorney, L & L, Inc.

Julie McFarlane, Supervising Attorney, Juvenile Rights Project, Inc.

Caroline Meyer, Analyst, Contract and Business Services, Office of Public Defense Services

Garrett Richardson, Senior Staff Attorney, Multnomah Defenders, Inc.

The Conflicts Work Group met monthly beginning in January 2005 and ending in May 2005.

Work group members understood the importance of and historical reasons for addressing issues revolving around conflicts and substitutions, both real and perceived. Members worked to best determine at least for Multnomah County and likely statewide the following:

- What potential issues are real, most significant, capable of improvement with minimal resources and change for public defense and the courts, and within the ability of the PDSC to effect or at least seriously influence? For example and discussed later in this report, education and training for public defense providers regarding conflicts, best practices for contractors including keeping data and monitoring individual attorneys' withdrawals, ensuring early and regular contact with clients, and early review of discovery and to a certain degree early provision of discovery.
- What potential issues are real, but not of greatest significance, at least at this time or within the work group members' collective experience? For example, additional provider resources to immediately check discovery upon receipt.
- What potential issues are real and of great significance, but not within the PDSC's ability to effect or seriously influence -- at least in the relative near future? For example, the mental health and substance abuse specter of many public defense clients in a criminal justice versus mental health system and the ease of physical access to in-custody clients.

The work group's recommendations are set forth at the conclusion of this report and are structured in two phases.

The first phase identifies and recommends those measures and best practices that we believe are most likely to most effectively and efficiently result in the greatest reductions in the number of withdrawals/substitutions and the lengths of time between appointment and withdrawal. That is, they are the best recommendations the work group can provide to the PDSC and Office of Public Defense Services (OPDS) for implementation of improvements and changes in the *near future* that will be most effective and least extreme or financially or resource expensive to PDSC or providers.

Next, the work group's second phase recommendations include additional measures for possible consideration in the future, if determined necessary after assessing the impact and effectiveness of more easily implemented and effective measures and practices recommended as Phase 1.

This report was prepared by Ann Christian. A draft of the report was reviewed and improved by the co-chair and other members of the work group. That draft report was submitted to and reviewed by the OPDS' Contractor Advisory Group and was provided to the PDSC for preliminary discussion at its June 16, 2005 meeting. A short addendum is attached to the report which provides additional information concerning the relatively recent Court of Appeals decision in *State v. Estacio*, 199 Or. App. ___ (2005-134) and two matters raised at the June 16th PDSC meeting.

New Information, Improvements and Corrections Since the November 12, 2004 Preliminary Report

1. *New Oregon Rules of Professional Conduct (RPC) Relevant to Conflicts, Withdrawals and Substitutions of Counsel*

Note: The full text of the RPCs listed below is provided in Appendix A to this report.

- a. Rule 1.9 (Duties to Former Clients) and Rule 1.10 (Imputation of Conflicts of Interest to Firm) and Revisions to OSB Formal Opinion No. 2003-174

As discussed in Paul Levy's article in the September/October 2004 issue of *The Oregon Defense Attorney* (Appendix B) and the Preliminary Review at pages 8-12, former client conflicts are likely the most prevalent reason for attorneys filing motions for substitution of

counsel. And they likely are the most fertile ground for improvement with respect to the number of cases in which counsel withdraws. We recommend at the conclusion of this report that attention and resources be devoted within contract offices and on a statewide basis to educating and assisting attorneys in determining former client and other ethical issues.

There is important and very promising information to report on the former client front within the following context – common for many Multnomah County and other public defense contractors: the attorney who represented a firm’s former client is no longer with the firm, but the former client’s file remains with the firm (frequently, housed off-site).

OSB Formal Opinion 2003-174 (interpreting DR 5-105 and this fact situation) and the November 12, 2003 Written Advisory Ethics Opinion issued to MPD require the newly appointed attorney to pull the former client’s old file and review the file to determine whether there is a “matter specific” or an “information specific” conflict. Not only is this time-consuming, but upon review, the attorney possibly (or possibly not) learns adverse information that neither she nor any other attorney in the office would likely ever be aware of had the file not been pulled and reviewed.

As Paul Levy first suggested, new Rule 1.10 appears to change the imputation of information contained in an old, closed file where the attorney who represented the former client is no longer associated with the firm. (See the comparison of the provisions of former DR 5-105(J) and new Rule 1.10 at page 10 of the Preliminary Report.) As a member of the OSB Legal Ethics Committee, Paul has been instrumental in the final form of the revision of Formal Opinion No. 174.

It now appears likely the committee, at its June 11th meeting, will adopt a revised Formal Opinion No. 2005-174 and forward it and other revised opinions to the Board of Governors (BOG) for final adoption. BOG meetings are next scheduled for June 24 and August 19.

The revised opinion Paul anticipates will be adopted by the committee and the BOG provides there is no former client conflict where the attorney who represented the former client is no longer with the firm, so long as no lawyer remaining at the firm has protected confidential information and provided the files of the former client are in storage and appropriate safeguards are in place to prevent access to those files by any lawyer of the firm during the pendency of the new client’s case.

The anticipated revised opinion No. 2005-174 also will specifically address the albeit rare but not previously adequately addressed issue of a potential former client “matter-specific” conflict where a former client remains on probation and the new representation of the new client may adversely affect the former client’s probation. See Paul’s article, page 7. The present draft concludes, after discussion, that the former client on probation scenario does not involve a matter-specific former client conflict.

b. Other New RPCs Relevant to Conflicts and Withdrawals/Substitutions

In addition to recommending education and training to public defense providers on the topic of former client conflicts, the work group notes the following new RPCs that more explicitly address issues such as communication with clients and attorneys’ ethical responsibilities with respect to clients with diminished capacity. Both of these issues are common in defendants’ requests for substitution of counsel. Future education and

training should include these topics and may also serve as an opportunity to refresh providers' knowledge of the OSB's "Principles and Standards for Counsel in Criminal, Delinquency, Dependency and Civil Commitment Cases" which already have provisions regarding client communication and accommodation of special circumstances of a client, such as youth, mental or physical disability, or foreign language barrier.

Rule 1.4 – Communication – see full text in Appendix A and see "Keeping in the Loop Communication is the key", OSB Bulletin, May 2005.

Rule 1.14 – Client with Diminished Capacity – see full text in Appendix A.

Rule 1.16 – Declining or Terminating Representation. The portion of this new rule with respect to withdrawing from representation appears to be effectively the equivalent of DR 2-110 Withdrawal from Employment (mandatory and permissive). The new rule does however explicitly provide the following in the case of a *permissive withdrawal* for good cause which was not provided in the text of DR 2-110: "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."

Rule 5.2 – Responsibilities of a Subordinate Lawyer. Of particular interest is (b) "A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."

Encouraging and adopting as a "best practice" regular consultation with supervisors or fellow attorneys on issues of conflicts of interest and withdrawals/substitutions is one of the work group's recommendations. Rule 5.2 supports this recommendation and should be actively used to provide protection at least for the subordinate attorney in determining to remain on a case.

2. Recent Relevant Cases

- a. *In re Complaint of Knappenberger*, 338 Or. ___ (2005-015), Oregon Supreme Court decision, filed March 24, 2005.

Issue #1 When an attorney conducts only an initial consultation with an individual (i.e., the attorney is not formally retained), is that individual a "former client" for purposes of DR 5-110 or merely a "prospective client"? The Supreme Court noted the following facts about the initial consultation to support a factual determination that the individual was a former "client" for purposes of DR 5-110:

- the consultation was approximately two hours;
- counsel provided substantive and legal advice on various aspects of the matters discussed;
- both counsel and the individual believed the consultation was confidential;
- both counsel and the individual expected payment to be made for the consultation;
- counsel never told the individual he was not the attorney's client, that the individual should avoid disclosing confidential information to him, or that the creation of a lawyer-client relationship would be deferred until some later date.

Although of likely limited application to most public defense providers, the new rules have a provision, Rule 1.18, regarding duties to prospective clients. This rule, included in

Appendix A, permits an attorney to have substantive discussions with a prospective client and then be screened if the firm is not hired and later becomes adverse to the prospective client. The rule obviously does not help a solo practitioner.

Issue #2 Does the fact that an attorney (in this case, a busy, solo practitioner) does not recall someone as a former client relieve the attorney of the duty to conduct a conflicts check prior to accepting employment from a prospective new client? Although the answer to most is evident, it is worth noting how the Court described a lawyer's responsibility to perform conflicts checks.

"... he had no real procedure for checking for conflicts. The accused did not conduct routine 'conflicts checks' to determine whether the representation of a potential new client might present a conflict. He kept a client address list, to which he added the names of potential clients if he thought that they might become clients. However, the accused checked his list or other files only when his memory alerted him to a potential problem. In our view, a lawyer in the accused's situation may not rely solely on his or her memory to avoid prohibited conflicts of interest."

- b. *State v. Estacio*, 199 Or. App. ___ (2005-134), Court of Appeals decision filed April 13, 2005, petition for review filed May 18, 2005 (S52440). Opinion attached as Appendix C.

The work group was able to review and at least begin discussing this recent Court of Appeals opinion at its final meeting in May. Although one could read the opinion to suggest there will be more frequent substitutions of counsel (at the defendant's request) granted, as well as more frequent attorney motions to withdraw once a client files a complaint against the attorney with the OSB, we believe the court's opinion should not so necessarily result.

There are however issues that require additional research, thought and discussion. Consideration of the following also need to be incorporated into discussions and review of the *Estacio* opinion. A client who files a bar complaint reportedly waives attorney/client privilege, at least to the extent the attorney determines necessary to defend against the complaint. Attorney disciplinary files generally are available to the public. Any colloquies between counsel and the court on the issue of the allegations contained in a bar complaint (necessary for the court to make a "full inquiry" in order to determine whether to allow a defendant's request for substitution of new counsel) need to be on the record for purposes of appeal, but covered by "protective orders" in instances where information disclosed may be adverse to the client in terms of the present prosecution or potential re-trial following a successful appeal or post-conviction relief matter. Work group member Alex Hamalian has a current case on remand from the Court of Appeals that involves many of these issues.

The co-chairs of the work group will consult with others and further review and research the issues raised by the *Estacio* opinion. An addendum on this topic will be provided for consideration at the PDSC's August meeting.

3. *Centralized Data and How Big is the Conflicts/Withdrawals “Problem”?*

a. Background

The Preliminary Review noted the need for better data on withdrawals/substitutions of counsel; i.e., data on the number of cases in which counsel withdraws, the length of time between appointment and withdrawal, the number of successive substitutions in a single case and the reasons for withdrawals. Better data is necessary to factually assess the extent to which there is what has been termed the conflicts/withdrawals “problem.” Good data is necessary to address the concerns raised during the course of the recent review of Multnomah County completed by PDSC Executive Director Peter Ozanne/OPDS and concerns raised by some prosecutors and others in other counties. Such concerns generally include that there is a “gray market” in conflicts cases, that some attorneys use withdrawals to help manage their caseloads, and that last-minute withdrawals and substitutions cause delays in court proceedings.

The Preliminary Review recommended a survey be distributed for completion by public defense contractors to collect benchmark data. At its first meeting, the work group discussed the need for such data and reviewed the draft survey that was included in the Preliminary Review. The Portland Defense Consortium agreed to complete both parts of the survey to determine the amount of time required to answer the questions and provide the detailed case data. The survey questions generally addressed contractors’ practices and procedures surrounding conflicts checking and issues such as receipt of discovery.

At the work group’s February meeting, PDC reported that completion of the survey questions by the administrative office alone (not the individual consortium law offices) took one and one-half hours. The data compiled by PDC was extensive and clearly supported one of the advantages of a consortium in general -- the fact conflicts cases can be managed and reassigned within the consortium at no additional cost – and showed that substitutions outside of PDC indeed were minimal (three in a two-month period). There was discussion about what the survey’s data requirements did not provide (for example, information on multiple, successive substitutions) and other concerns.

In lieu of going forward with sending the survey out to all contractors statewide, the work group decided to conduct a survey of all OCDLA members regarding the time frames within which discovery is provided (see Appendix D), address the survey questions as a group (roundtable style), and work with existing data at the Contract and Business Services Division (CBS).

Because CBS now receives monthly appointment reports electronically from essentially all contractors and after brainstorming a methodology, CBS Director Kathryn Aylward was able to produce data for the:

- percentage of cases in which there is a substitution of counsel;
- number of cases in which there are multiple, successive substitutions of counsel (other than those within a contract consortium where no additional payment/case credit occurs); and

- times within which withdrawals/substitutions occur.

This data does not provide information on the “reasons” for withdrawals/substitutions. In our recommendations, we suggest that information on “reasons” is best compiled and maintained internally by contract providers. That information then would be available to CBS, upon request, under current contract provisions.

b. Number of Substitutions of Appointed Counsel (other than within a consortium) and Number of Cases with Multiple Sequential Substitutions

Data from CBS appointment records and methodology. Case appointment information was compiled in a data base for all contractors and private bar for criminal, contempt, extradition, post-conviction relief, and habeas corpus cases (i.e., juvenile and probation violation excluded) for the “core” time period January 1, 2004 through June 30, 2004. Of these appointments, appointment data for the previous six months (July 1, 2003 through December 31, 2003) and the subsequent six months (July 1, 2004 through December 31, 2004) was reviewed to determine the number of cases during the original six-month period that had an appointment of counsel (outside of substitutions within consortia) during the entire 18-month time period.

Of the case appointments during the core six-month appointment time period:

- 4.6% had one or more previous or subsequent appointments within the 18-month period *statewide*; and
- 6.3% had one or more previous or subsequent appointments within the 18-month period in *Multnomah County*.

Statewide, of the 40,457 case appointments during the core six-month appointment time period (again, not including internal consortium substitutions):

- five cases had a total of four attorneys appointed – that is, three substitutions of counsel;
- 100 cases had a total of three attorneys appointed – that is, two substitutions of counsel; and
- 1,771 cases had a total of two attorneys appointed – one substitution of counsel.

Of the five cases in which there were a total of four attorneys appointed to represent a defendant (three substitutions of counsel), two were in Multnomah County, two were in Washington County, and one was in Douglas County. The following summaries of three of these cases illustrate the nature of these types of cases. Although such cases are rare

in the context of the over 160,000 public defense cases per year, they are resource intensive and consumptive -- not only to the public defense providers involved and the Public Defense Services Account, but frequently to the jails/community corrections, courts, and prosecutors.

One case involved multiple victims, over 80 Measure 11 (M11) sex offense charges, and a concurrent federal prosecution. The state case was filed at a time when the Portland Defense Consortium was completely overwhelmed with M11 cases and private bar counsel was appointed after MPD and PDC were allowed to withdraw. OJIN indicates mental health issues, a number of letters written by the defendant to the court, and that the court denied substitution of a fourth attorney only to allow the request by the defendant approximately one month later. The case has been concluded at the trial level.

One case involved charges of Manufacturing/Delivery of a Controlled Substance and Possession of a Controlled Substance against a defendant who previously had been represented by counsel in juvenile dependency and delinquency matters and was involved in an Abuse Prevention Act matter. A confidential informant and body wire evidence appear to have been involved in the case. OJIN reflects the defendant requested her original attorney be withdrawn, which the court allowed. That attorney was a member of a consortium, but the court substituted a new contractor rather than other consortium counsel on the case. The defendant's next two attorneys filed motions to withdraw soon after their respective appointments, which would tend to indicate a conflict related to possible former representation of a witness or co-defendant. Although not included on the list maintained by CBS to log contacts by courts under the PDSC's substitution policy, it appears very likely this is a case where the court indeed contacted CBS and the final appointment of counsel from out-of-county "stuck"; i.e., the case was disposed.

One case with a total of four attorneys involved an individual charged in February 2004 with Offensive Littering, Drinking in Public and False Information to Police for issuance of a citation. Counsel was appointed at defendant's first appearance in March and requested the case be scheduled for "early disposition". That motion was denied. That same day and the subsequent day, the defendant filed motions to "set aside indictments" and to disqualify a particular judge. A few days later, defendant filed a request with the court that counsel be removed and that he be allowed to continue *pro se*. In the next few weeks, defendant was arrested and held in jail on a probation violation on a prior DUII case. By the end of April, the court allowed defendant's motion to proceed *pro se*, but left appointed counsel on the case as a legal advisor. By the second week of May, a different judge allowed substitution of counsel and subsequently in July and August, two private bar attorneys were substituted to represent this defendant. At trial in October, defendant was convicted only of the False Information charge. He was sentenced to 30 days jail, with credit for time already served and all fines, fees and assessments were waived. This case was next appealed by the defendant. That appeal is pending along with two other appeals by the defendant.

OJIN records show 66 trial level cases filed since 1989 against this individual just in the one county in which the case in which four attorneys were substituted occurred. Typical charges include Interference with Public Transportation, Drinking Alcohol in a Public Place, DUII, Theft III, Criminal Trespass II, Criminal Mischief and Possession of Controlled Substance. The majority of cases were misdemeanors and not infrequently

some cases proceeded at the prosecution’s request as violations and/or the accusatory instrument was dismissed. Three misdemeanor cases remain pending with two different defense attorneys appointed. The defendant also has had numerous probation violation cases where counsel was appointed, which are not included within the 66 cases referenced in OJIN.

c. Times Within Which Withdrawals/Substitutions Occur

One of the concerns regarding withdrawals/substitutions of counsel is the length of time that lapses prior to the request being filed. If appointed counsel has a conflict, it is in the best interests of the client, both defense attorneys and the system in general that original counsel identify the conflict and request substitution of new counsel as soon as reasonably possible.

With the data compiled to determine conflict percentage rates discussed immediately above, CBS determined the percentage of substitutions that occurred within weekly increments, as follows. While almost one-third of substitutions occur within two weeks of appointment, it takes a little more than four weeks for even one-half of substitutions to occur, almost three months for three-quarters of substitutions to occur and almost seven months for 95% of all substitutions on cases to have occurred.

Time frame for substitution	%-age of substitutions within time frame
1 week	15%
2 weeks	30%
3 weeks	40%
4 weeks	48%
5 weeks	55%
6 weeks	60%
7 weeks	64%
8 weeks	68%
9 weeks	70%
10 weeks	72%
11 weeks	74%
12 weeks	76%
13 weeks	78%
14 weeks	79%
15 weeks	80%
16 weeks	81%
30 weeks	95%

Generally, work group members were surprised with these figures; i.e., that the data does not reflect substitutions occurring more quickly. One must take into consideration that

police reports with state witness information, for example, often are not made available to defense counsel for one to two weeks after first appearance in court and the appointment of counsel. Other factors that influence the length of time include, for example, motions for substitution of counsel being heard in some courts on other than daily dockets. Or in Lane County, one attorney indicates motions for substitution frequently are filed at 35-day call court appearances. Even considering the potential that the data may be overstated to a certain degree as described in the “caveat” below, there is room for improvement in the area of length of time within which counsel seeks to withdraw.

CBS also compiled the following data by county showing the average and the median (50% lower, 50% higher) number of days between appointment and substitution of counsel. The median figures appear to be better indicators, because a very late substitution or substitutions will have a significant impact on the average. For example, for a county with only three cases where there was a substitution of counsel and where one substitution occurred in 10 days, one in 30 days and one in 240 days, the average is figured as 93 days or approximately 13 weeks. The median in the same example is 30 days.

County	Average # of days before substitution	Median # of days to substitution
Baker	114	115
Clatsop	81	59
Coos	19	9
Crook	41	15
Deschutes	37	11
Douglas	70	41
Hood River	62	20
Jackson	83	70
Jefferson	111	58
Josephine	43	18
Lane	61	36
Malheur	45	18
Multnomah	60	34
Polk	32	15
Umatilla	73	40
Wasco	26	13
Washington	74	41
Statewide	59	31

Although perhaps overly simplistic, the county with the smallest average and median lengths of time for substitution of counsel – Coos County – is a county where:

- the public defender contractor generally is appointed to all cases unless there is an apparent conflict (for example, co-defendants) at first appearance;

- discovery generally is available immediately for misdemeanor cases and within a day of a felony indictment;
- the defender's office actually has a discovery clerk who physically accesses the prosecution's file and makes copies of police reports and other discovery on a regular and routinely quick basis;
- the director of the public defender's office personally reviews staff attorneys' conflicts/requests for substitution prior to their submission to the court;
- a motion for substitution can be filed the next day a conflict of interest is determined to exist – there is no delay in scheduling a court appearance for this matter;
- a consortium of attorneys generally is appointed to cases in which the public defender has a conflict (limiting the number of subsequent substitutions); and
- the court is noted for its efficiency and rule compliance/enforcement.

Deschutes County, with the second shortest median number of days for substitution (11 days), has a number of factors similar to those noted for Coos, including a conflicts checking mechanism between the public defender, private law firm and consortium contractors and relatively early provision of discovery by the District Attorney's office.

- d. A caveat regarding the data used for and discussed in b. and c. above. Consider the example set out above of a county with what appear in the data to be three substitutions of counsel – one in 10 days, one in 30 days and one in 240 days. It is possible and in some counties, even likely, that the new appointment of a provider other than the original attorney appointed 240 days ago is, at least to some degree, the result of a bench warrant or multiple bench warrants being issued for a defendant during that time period – not that there was a motion and order substituting counsel. Rather, the court's appointment of a second attorney (240 days later) may have occurred because of two possible assumptions made by the court. To the extent this has occurred, the data presented in b. and c. above is overstated.
- If 180 or fewer days have passed since a bench warrant was issued when a defendant fails to appear in court and the defendant is arrested or otherwise appears again in court, the contractor originally appointed receives *no* additional contract case credit for reappointment to represent the individual on the case. *However*, if more than 180 days have passed, any contractor (even the one originally appointed) will receive a new case credit for the appointment.

The number of courts or number of instances where courts appoint new counsel when a defendant has had a bench warrant issued and is back before the court is not readily known, but one would assume minimal. However in some courts, particularly those where two different contractors pick up cases on different days of the week,

there may be instances where, particularly if more than 180 days have passed, whichever contractor is in court that day will receive the new appointment (regardless of whether that contractor previously represented the defendant before the bench warrant was issued). This appears to be particularly true if the following occurs.

- In some counties, the District Attorney's office may file a new criminal charge of Failure to Appear (FTA) against the defendant for failure to appear in court when the bench warrant originally was issued. Some courts and some attorneys apparently continue to assume that when a FTA crime is charged, that the defendant's original defense attorney will have a conflict of interest in continuing to represent the defendant on the underlying charge and the new FTA. The assumption, which should generally be incorrect (see ORS 162.193 which is discussed in the Phase 1 Recommendations below), is that the attorney will be called as a witness to testify against the defendant/client; e.g., that the attorney (or staff) will be called to testify that the attorney (or staff) personally or by letter notified the defendant of the court appearance at which the defendant failed to appear.

Two comments to summarize the concern about courts appointing new counsel other than when a motion for substitution is filed, affecting the data now established as "withdrawals/substitutions of counsel benchmark data" and future runs of that data for comparison purposes:

- inclusion of appointments of contractors or attorneys other than the contractor/attorney appointed prior to the defendant's failure to appear in court may result in the "benchmark data" now available being overstated with respect to both the percentage of cases in which there is a withdrawal/substitution of counsel and the length of time for substitutions to occur; and
- courts' assumptions that appointment of a new contractor or attorney is best or does not matter at least fiscally results in inefficiencies; e.g., former counsel having to provide case information to the new attorney and the new attorney starting relatively from scratch with the client and case.

We later recommend CBS continue to work with courts and providers to best ensure the re-appointment of the attorney/contractor who was representing a defendant when a bench warrant was issued (even if a FTA charge is filed or likely to be filed).

4. *Other Improvements*

- a. The information faxed by the Multnomah County DA's office to MPD for "appropriate case assignment" review the same day of felony first court appearances (described at page 4 of the Preliminary Review):

- increasingly has been more complete than during a computer transition in the DA's office; and
 - generally is received by MPD more quickly than previously and is now transmitted electronically by email rather than by fax.
- b. During the course of the preliminary review of conflict/withdrawal issues in Multnomah County, it was learned there was an issue with respect to how appointments initially were being entered in OJIN for the consortium (PDC) which generally is first to receive MPD conflicts. The manner in which the entries were made created a situation where an attorney within the consortium would be assumed by the court to have represented the person, for purposes of former client conflicts checking, when in fact that generally would not be the case. The attorney's OSB number simply was entered until the bar number for the specific attorney who actually was assigned by the consortium to the case could be provided to the court and entered in OJIN. Multnomah County court staff now initially enter "PDC" generically, rather than a specific OSB number, as the assigned attorney for every PDC appointment. The individual PDC attorney who is assigned each case then must return a letter of representation to the court within 48 hours, in order that that attorney's bar number is timely entered in OJIN.

5. *Corrections to November 12, 2004 Preliminary Report*

The Preliminary Report, at pages 4 and 16, references implementation of MPD's "appropriate case assignment" for felony cases as beginning in November 2000. In fact, this process was the second in a two-phase felony arraignment improvement project initiated by the Indigent Defense Services Division and MPD. The appropriate case assignment process began July 15, 2002.

Two tables on pages 14 and 15 of the report regarding Private Bar appointments in Multnomah and Lane Counties: Felony information for Multnomah County was inadvertently deleted by the author during finalization of the report and intentional murder cases were not included in the felony case counts in the Lane County table. Revised tables are included below with corrected information noted in **bold**. In addition, projected Private Bar appointment information has been added to the tables for Fiscal Year Ending 2005.

Multnomah County Private Bar (PB) Cases

(The vast majority of PB cases are conflicts cases from contractors. But PB cases are not the same as *all* conflicts cases, since conflict cases are substituted from one contractor to another contractor, as well as to PB.)

Case Type	FYE 2002		FYE 2003		FYE 2004		FYE 2005 (projected)	
	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type
Felony	403	4.4%	195	2.6%	80	1.0%	156	2.2%
Misdemeanor	402	3.4%	380	3.6%	206	1.6%	271	2.1%
Probation Violation	54	0.8%	29	0.6%	7	0.2%	14	0.3%
Juvenile	303	2.1%	263	1.9%	357	2.7%	481	3.3%
Other *	108	4.6%	42	2.0%	30	1.7%	22	1.2%
Total	1,270	2.9%	909	2.4%	680	1.7%	944	2.3%

Lane County Private Bar (PB) Cases

(not *all* PB cases are conflicts cases)

Case Type	FYE 2002		FYE 2003		FYE 2004		FYE 2005 (projected)	
	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type
Felony	1,697 [1,691]	38.9%	1,457 [1,451]	40.4%	1,141 [1,139]	26.0%	790	19.9%
Misdemeanor	925	31.3%	657	22.6%	435	14.8%	164	9.3%
Probation Violation	3	0.2%	4	0.3%	114	5.6%	48	3.3%
Juvenile	39	0.7%	53	0.9%	41	0.7%	30	0.5%
Other *	189	42.2%	197	41.2%	138	30.8%	130	22.2%
Total	2,853	18.4%	2,366	16.6%	1,869	11.9%	1,162	8.4%

Work Group Recommendations – Phase 1 for Consideration/Implementation Now

(Listed in order of priority and assumed significance in reducing the number and lengths of time of withdrawals/substitutions)

What is the goal? One must assume there will never be zero substitutions and there will always be some late substitutions that could not have been discovered more timely. An example of the latter recently occurred. The day before trial a client called his lawyer with good news. The person who the defendant had long maintained was a key defense witness, but for whom the defendant had no name or information other than a rather generic description, was just brought into jail. The defendant just talked to the witness and indeed that person has very favorable information. Unfortunately, counsel represented this new witness in the recent past and clearly recalls confidences that require the lawyer to withdraw from representing the defendant scheduled for trial the next day.

As stated at the beginning of this report, the goals for public defense providers and the PDSC are to:

- reduce the number of “avoidable” withdrawals and generally, substitutions of appointed counsel;
- reduce the number of instances where counsel seeks to withdraw from representation relatively late in a case; and
- reduce the number of instances where public defense clients request to fire their appointed counsel.

The work group reviewed various methods likely to reduce the number and time frames of withdrawals that were included in the Preliminary Review, as well as others identified during the course of work group meetings. The various methods were reviewed within the context of what methods are (or should be) the least difficult to accomplish in terms of resource/financial needs, and which methods will likely get the biggest bang for the effort. Or, as set out at the beginning of this report, what potential issues surrounding withdrawals/substitutions are real, most significant, capable of improvement with minimal resources and change for public defense providers and administrators and for the court, and within the ability of the PDSC to effect or at least seriously influence? Appendix E contains the working draft used by the work group of issues, factors/problems, improvements and what is needed to realize the improvements for the two primary reasons for substitutions: current/former client conflicts; and breakdown in attorney/client relationship.

The work group recommends the following first be considered for implementation by the PDSC and public defense providers. To the extent a recommendation is dependent on the courts or prosecutors changing something they do, the work group encourages education and outreach be initiated by PDSC/OPDS and local public defense providers to accomplish the change.

1. Education, Training, Tools and Ongoing Assistance

- For Attorneys Re: Conflicts of Interests, Substitutions, Best Practices and the RPCs

To the extent an attorney does not realize that simply knowing her firm previously represented a state's witness in her new client's case is not a sufficient basis to request new counsel be substituted, unnecessary substitutions will continue. We reasonably cannot expect public defense lawyers in the "trenches" to be expert in conflicts analysis (which is not particularly intuitive). Attorneys and their supervisors need to be provided educational opportunities and perhaps more importantly, "tools" to use when needed and a resource, in addition to the OSB, for assistance or brainstorming when needed.

Paul Levy's article in the September/October 2004 issue of *The Oregon Defense Attorney* was and remains an excellent "first step" toward providing public defense providers the education, training, tools and ongoing assistance they need. Paul has agreed to compile a checklist to assist attorneys in resolving former client conflict issues. Paul should be asked, along with his boss Jim Hennings, about compiling and providing training materials and trainings for new attorneys and about being available to consult with other public defense providers.

David Elkanich is scheduled on June 16, 2005 to present "The Ins and Outs of the New Ethics Code" at OCDLA's annual conference and will be asked to spend some time on former client conflicts and the other new rules addressed above that affect public defense providers. In addition, the work group recommends OCDLA and PDSC incorporate in the October 2005 Public Defense Management Conference time for a presentation and discussion regarding the new RPCs and other matters relating to conflicts and conflicts management for contract administrators and others attending that conference.

Finally, if there is no existing document that contains a compilation of summaries of appellate cases relevant to public defense related conflicts of interest and substitutions of counsel (e.g., similar to the summary provided above with respect to the *In re Complaint of Knappenberger* case), we recommend one be compiled and made available to public defense providers and others, perhaps on OCDLA's or PDSC's website.

- For Contractors/Attorneys Re: Communication and Contact with Clients

The OSB Bulletin article, referenced above, on the new RPC that explicitly addresses communication with clients is again a very good "first step" for attorneys recognizing they may be able to improve their communication skills and contacts with clients. Setting clear expectations with a client, as is suggested in the article, in many instances should reduce the number of "needy" calls placed by clients. To the extent public defense providers do not have legal assistants available to help with effective and efficient communication, consideration should be given to such use.

Providers should work together to identify those factors that interfere with their ability to effectively communicate with their clients and at least make those barriers known to the CBS and local courts - if for no other reason, to support the need for additional resources. For example, in Multnomah County there are persistent barriers presented by the jails to effective communication for clients who are in-custody. Video links between offices and jails or correctional institutions are available more and more, but are not a substitute for in-person attorney/client visits.

Best practices, preferably internally within contractor offices, should be established regarding communication and contact with clients. Attorneys and legal assistants should be made aware of the public defense contract provisions regarding client contact (24 hours in-custody and 72 hours out-of-custody; section 7.1.4 of the model contract) and the importance of complying therewith.

7.1.4 Client Contact

7.1.4.1 In-Custody Initial Interviews

Contractor shall, whenever possible, speak to and conduct initial interviews in person with in-custody clients:

- (a) within 24 hours of appointment; or
- (b) by the next working day if the court appoints Contractor on a Friday, weekend, or holiday.

7.1.4.2 Out-of-Custody Interviews

Within 72 hours of the appointment, Contractor shall arrange for contact with out-of-custody clients, including notification of a scheduled interview time or what client must do to schedule an interview time.

Similarly, in Multnomah County, attorneys should be informed of the court's substitution policy which requires attorneys who are substituted onto a case to make contact with the new client within 24 hours of verbal notice of appointment.

The work group heard credible evidence of instances where prior counsel failed to effectively communicate with a client for months; e.g., failed to visit an in-custody client for a number of months.

In instances of attorneys who are employees of or members of a public defense contractor where such an allegation or belief exists, the attorney, judge, client or other person who has good reason to believe it may be true can and should report the matter to the attorney's supervisor or contract administrator. If it's not true, that needs to be known. If it is true, that needs to be known.

In instances of attorneys who are individual, private bar attorneys, the attorney, judge or other person who has good reason to believe there has been such a lapse can and should report the matter to CBS, in accordance with the PDSC's complaint policy. Again, this is important not only to ensure the quality of representation, but also to provide attorneys facing such an accusation an opportunity to correct the record or rumor in the matter. Additionally, information and conclusions resulting from CBS investigations into complaints will be available to CBS when it initiates direct involvement in establishing private bar panels of attorneys. Further, information currently contained within CBS's accounts payable system will allow review of private bar attorneys' withdrawal rates and lengths of time between appointment and withdrawal which may be helpful (but of course not necessarily determinative) in considering applicants for private bar panels.

Finally, a tool that ought to be considered, both by public defense attorneys and CBS, in instances where a defendant is requesting substitution of counsel based upon the fact that he feels his attorney has not given enough of her time to properly advise him or is dissatisfied with the advice he has been given, is use of another attorney to review the case and provide a second opinion to the defendant. Although this may result in additional expense to the case, it might avoid the greater expense then or later of the court substituting new counsel onto the case.

- For Courts and Public Defense Providers – Failure to Appear (FTA)

To the extent CBS analysts identify counties where courts appear to automatically allow new counsel to be substituted onto cases when a defendant is charged with FTA, the courts (and if necessary, District Attorneys) should be encouraged to review ORS 162.193, set out below. This statute was purposefully enacted in 1989, as a product of the Bauman/Burton Indigent Defense Work Group to contain indigent defense costs.

“In no prosecution under ORS 162.195 or 162.205 shall counsel representing the defendant on the underlying charge for which the defendant is alleged to have failed to appear be called to testify by the state as a witness against the defendant at any stage of the proceedings including, but not limited to, grand jury, preliminary hearing and trial. However, upon written motion by the state, and upon hearing the matter, if the court determines that no other reasonably adequate means exists to present evidence establishing the material elements of the charge, the counsel representing the defendant may be called to testify.”

- For Courts Regarding Appointments of Same Counsel in Cases with Bench Warrants More Than 180 Days

As previously discussed, to the extent CBS analysts identify counties where courts are not appointing the same contractor/attorney to represent a defendant who is returning to court on a bench warrant issued more than 180 days ago, the courts should be encouraged to do so, unless there is a particular reason in the specific case to do otherwise. Reducing the number of these types of cases within CBS’ future “conflicts” data runs will provide an improved and truer picture of conflict rates and lengths of time between appointment and substitution of counsel.

2. Assistance, Supervision, Data and Monitoring **Within** Contractor Groups

The consensus of the work group is that contract providers need to accept and assume direct responsibility for ensuring:

- their attorneys and staff have the assistance and tools necessary to ensure motions to withdraw are properly supported in law and fact – i.e., are not used for purposes of case management;

- supervisors (or contract administrators) review or at least be available to review individual attorneys' motions for substitution of counsel;
- meaningful and complete data is collected by providers to obtain an accurate assessment of substitutions both to and from a contract office;
- the conflicts data is monitored for trends; and
- attorney supervisors or administrators monitor and provide feedback when determined helpful and necessary to individual attorneys with respect to their withdrawal from cases.

Throughout the course of the work group, the above, as opposed to PDSC dictating certain practices and data collection/provision to CBS requirements, was the clear consensus of the members. Contractors should be encouraged by PDSC to ensure the above responsibilities are met and provide support to contractors, if and when needed, in exercising these responsibilities.

3. Provision of Information that will Better Assist Courts in Determining Whether to Allow Substitution of Counsel and Whom to Substitute

The work group recommends the PDSC adopt a "best practice" or policy for public defense providers that in filing a motion with the court for substitution of counsel, the attorney provide at least the following:

- as much information about the nature of the conflict as is possible without revealing confidences or secrets or otherwise harming the client; and
- the number of attorneys previously appointed on the case.

The work group recommends the PDSC adopt a "best practice" or policy that provides, as does the current Multnomah County Substitution Policy:

"Attorneys shall provide the court with available information regarding other individual attorneys or firms who either currently or previously represented any of the alleged victims or witnesses, co-defendants or other potential adverse parties, to avoid creating a subsequent actual conflict."

And the work group recommends attorneys who are substituted off a case provide to new counsel, in addition to discovery and other case file materials, any listings of the name and DOB of victims, state witnesses, co-defendants, and possible defense witnesses previously compiled for purposes of conducting a conflicts check.

4. Improvements in Timely Receipt and Review of Co-defendant, State Witness, and Other DA Discovery Information

With no close second, the most crucial and most frequently cited barrier to the early identification of conflicts which require substitutions of counsel was delay in defense counsel receiving prosecution information/discovery. Delay in the provision of discovery to defense counsel also can hurt the establishment and maintenance of a favorable attorney/client relationship. Imagine if you were abruptly taken into custody, appointed counsel, denied release and heard from your attorney for more than a few days that she was still waiting for the police reports in the matter.

Appendix D to this report is a chart that records the responses to a survey conducted by the work group of retained and public defense counsel regarding attorneys' receipt of initial police reports from the prosecution. Other than the extent to which various attorneys' experiences differ even within a county (which may be a function of how quickly the attorney actually recognizes his office has received discovery as opposed to when it actually is received), it is significant that public defenders and private bar alike in Lane County generally report receipt of at least initial police reports the same day as their clients' first appearances. In most other counties and focusing on felonies, most attorneys report receipt of initial police reports within one to seven days of grand jury indictment. Grand jury indictment generally is close to a week after a person's arrest.

A small group from the conflicts work group met with Multnomah County District Attorney Mike Schrunk and members of his senior staff on March 3, 2005 to discuss various aspects of earlier provision of discovery to defense counsel. We felt comfortable doing so for many reasons including the fact that Mike Schrunk testified before the PDSC on September 9, 2004 as follows:

"I think we need to pay attention to this ['legitimate' conflicts versus client-requested substitutions] and we need to work hard. Now we don't as prosecutors come with completely clean hands, when I talk about conflicts. It is incumbent on us to make sure that we get early and complete police reports or investigative reports with a list of witnesses out. So we have to do that. But it is also incumbent upon appointed counsel to screen those things, to read them as expeditiously as possible, and to notify the court if they have a conflict."

Definite improvements have been made to ensure that MPD, for appropriate case assignment screening purposes, receives as much prosecution information as is possible and early on the day of defendants' first court appearances regarding co-defendants, victim and known state witness names. We are hopeful that when Multnomah County finishes its budget process, Mr. Schrunk will be able to consider our request that the information currently being provided to MPD be allowed to be passed on to PDC (with of course the same constraints as agreed to between Jim Hennings and Mike Schrunk). Otherwise, no changes in the provision of discovery in Multnomah County have been accomplished.

Perhaps the PDSC should consider requesting that the issue of provision of discovery at some point be a topic for discussion and review by the Chief Justice's State Criminal Justice Advisory

Committee (CJAC). One has to assume there will be a time when discovery is provided electronically throughout the state and efforts in some counties (such as Multnomah) to plan for this are ongoing. That too commends the topic to the Chief Justice's State CJAC. Lastly, the provision of discovery is an issue that frequently is raised by prosecutors when discussions about earlier provision of discovery to defense counsel occur and it was raised by Mike Schrunk at our March 3rd meeting. The concern expressed is that some, not all, attorneys fail to timely provide defense discovery to the prosecution.

Finally, the work group acknowledges that an absolutely critical corollary of receiving discovery early on in a case is the responsibility of defense counsel to ensure their staff or they timely review initial and ongoing discovery and potential defense witnesses for conflicts. To the extent contract offices currently do not ensure this occurs, changes should be made.

5. Preference for One or a Limited Number of Judges to Hear Motions for Substitution of Counsel

The work group acknowledges the fact that having one or a limited number of judges hearing motions for substitution of counsel is most effective in ensuring both that client-requested substitutions are carefully and consistently reviewed and that attorney-requested substitutions are properly supported by fact. The work group commends that practice to courts.

6. Public Defense Contractor Resources

Work group members concluded that the conflicts databases currently utilized by the contractors represented on the work group were sufficient to meet the need for timely and accurate conflicts checking to occur. Similarly, work group members did not view staff or attorney resources currently to be a problem or barrier to identifying conflicts early on (e.g., early review of discovery) or timely filing motions for substitution of counsel, when needed.

With added emphasis on withdrawals and substitutions data and practices, these assessments may change. The work group recommends that CBS take into account individual contractors' efforts to effectively and efficiently manage withdrawals and take into account any changes in contractor staff/attorney resources that will better assist with such efforts in the course of contract negotiations.

7. PDSC's Substitution Policy

As recommended in the Preliminary Review, the work group reviewed and discussed the PDSC's Substitution Policy, as well as the reasons for the 2003 legislation requiring courts to comply with the PDSC's policy.

The work group determined that no changes are necessary to that policy. The work group does recommend that CBS consider touching base with some courts for the purposes of best ensuring the courts understand:

- the underlying reasons for the policy;
- the fact that CBS can be a significant resource in helping the courts address client-based substitution requests; and
- the fact that CBS can be a significant resource in locating counsel for a client who needs special counsel appointed.

The work group finally recommends that CBS ensure court contacts are documented in the database CBS has established, provided CBS continues to find doing so worthwhile.

8. One Client/One Attorney Presumption – Exceptions

During the course of the work group’s meetings, the following situation was raised with respect to what should be the presumed best course of action for counsel and the court faced with the following situation:

If Attorney A who is appointed to represent a client on three cases, determines the attorney has a former client conflict in only one of the three cases, should new counsel be substituted only onto the one case or on all three cases? To the extent all three cases, versus only one, are transferred to new counsel, there is an additional cost to public defense for the two additional cases. However, to the extent the defendant winds up with two or even three lawyers representing him on multiple pending cases, there is assumed to be a greater potential for “harm” to the client. Even if no harm occurs, having multiple lawyers for one client is inefficient.

After much discussion and consideration of the pros and cons, the work group recommends that PDSC endorse a presumption that a conflict in one case should result in substitution of counsel in all pending cases, unless there are factors supporting the contrary. Although such a presumption will result in, at least for the short-term, additional substitutions of counsel, the work group concludes that the benefit of a client having one attorney with all of the client’s cases be the responsibility of that attorney as a legal matter in most instances outweighs the additional cost. The attorney seeking withdrawal and substitution of new counsel on all of the pending cases would be responsible for assessing and providing the court information, if requested, on the following factors.

General Policy: One Attorney for One Client

Factors to be Considered by a Judge in Deciding Whether to Substitute Counsel on All Pending Cases

- Nature of conflict – reason for substitution
- Types of cases involved

- Length of time counsel on cases
- Status of cases – next scheduled court appearance
(time and type of appearance)
- Client’s wishes

Potential Changes for Future Consideration (Phase 2) If Determined Necessary, After an Opportunity to Assess the Impact of the Improvements Recommended Above

The conflicts work group discussed and reviewed the subjects listed below for purposes of determining whether to recommend their immediate consideration, adoption or implementation. Topics 1 through 4 below were ones recommended for review in the November 2004 Preliminary Review.

The work group recommends that the following be reviewed in the future only after consideration and implementation of the work group’s Phase 1 recommendations, and an opportunity (e.g., at least one year) to assess the actual positive impact of those recommended improvements on the number of withdrawals/substitutions and timeliness of requested withdrawals/substitutions.

1. Amend Case Credit Provisions in Public Defense Contracts

The work group considered recommending to the PDSC that changes be made in the model public defense contract so that contractors, for example, lose credit if a motion for substitution is not filed in a timely manner. See pages 12 through 14 of the Preliminary Review for the history of model contract provisions regarding withdrawal of counsel in relation to case credit; i.e., financial impact of withdrawals.

In addition to the record keeping, logistical and administrative impact on contractors and CBS of instituting changes, such as those considered and set out below, there would be negative (as well as at least perceived positive) results of making such changes. Under current provisions, there is no financial disincentive to withdrawing from a case at any point in time, unless the case is a “complex case” and even in that instance, some limited case credit is maintained for the case from which counsel withdraws. The work group concludes this is as it should be so that counsel is not presented with the potential conflict of financial loss as a result of properly complying with the attorney’s ethical responsibility.

Further, contractor withdrawal rates were factored into the case credit amounts negotiated when the change in total loss of credit for withdrawals occurred in 1990. To the extent changes were made to reduce case credits for withdrawals, one should anticipate contractors seeking an adjustment to contract rates that at least keep them financially at status quo. Re-institution of loss of total case credit for withdrawals would result in a decrease in the total caseload

statewide and most likely, an increase in the per case cost statewide – even though the workload and total cost of representation would remain unchanged.

Other changes considered, such as differential or additional payments or credits to contract attorneys who are substituted onto cases for example more than 40 days after the first appointment of counsel, would not be justified in some instances. Similar to a recent instance in Multnomah County, what if a lawyer were required to withdraw from representation the day his client is scheduled to enter a guilty plea? The reason for the late withdrawal? The attorney recognizes the victim in the case who appears in court that day as a former client. The police report and charging instrument in the case incorrectly stated the victim's name. Newly appointed counsel inherits a case that was fully investigated and scheduled for entry of a negotiated plea. After new counsel's review and consultation with his new client, the negotiated plea in fact occurs.

The following are potential contract changes reviewed by the work group:

- contractor can choose: 1) pull closed file to determine whether there is an actual former client conflict and keep credit for appointment to case even if substitution is necessary; or 2) substitute off case without pulling former client file, but no case credit for appointment;
- differential payments for contract offices where the attorney is substituted onto an in-custody felony case more than 40 (or some other period of time) days after first appointment of counsel;
- contractors lose case credit if a motion for substitution of counsel is filed more than five court days after receipt by attorney's office of discovery that discloses the conflict; i.e., contractor keeps case credit if motion is filed timely; and
- contractors lose case credit if counsel seeks to withdraw more than 30 days after appointment, unless counsel includes in the motion information supporting the fact the conflict could not reasonably have been identified sooner.

The work group, including the Director of CBS, concluded not to recommend changes be made in the model contract terms. More straight-forward, management-based and less disruptive and extreme recommendations set forth above ought first to be implemented and tested.

2. Firm Unit Rule

As discussed previously, new RPC 1.10 and the anticipated revision to OSB Formal Opinion 2003-174 will result in fewer "former client" motions to withdraw; i.e., in those instances where the conflict for an attorney who is no longer with the firm historically has been imputed to the newly appointed attorney only because a file exists in storage.

Work group members who have been involved in making prior recommendations that the "firm

unit rule” be examined for public defense providers in particular do not anticipate much more can reasonably be accomplished in this area. However, the work group leaves this on the list of potential improvements for the future. For example, could the rule be “relaxed” in instances where the attorney who represented the former client:

- remains employed at the firm;
- is not the attorney appointed to represent the new client;
- remembers nothing about the former client or is effectively screened from discussions regarding the new client’s case;
- the former client file has been closed for greater than 10 or some other number of years; and
- the file is secured against access?

3. Appropriate Case Review in Misdemeanor Cases

Although recommended for consideration in the Preliminary Review, the resource demand to accomplish for misdemeanors what MPD currently does for felonies with respect to appropriate case assignment would be huge. This is due primarily to the sheer number of misdemeanors scheduled for arraignment each day. MDI and MPD already have established what appears to be a very effective process to pre-screen misdemeanor cases that need substitution of counsel for conflicts with the other public defender. For example, prior to an MPD attorney submitting a motion for substitution of counsel in a misdemeanor case, MPD’s staff will have consulted MDI’s staff to determine whether MDI has a conflict of interest in representing the defendant.

4. Central Substitution Review Attorney for Multnomah County

Although recommended for consideration in the Preliminary Review, the work group expressed no interest in the idea of contracting with an attorney to serve as the centralized substitution review attorney, as described at page 18 of the Preliminary Review. This is in large measure because Janet Frazier, the Multnomah County Circuit Court staff person who handles all withdrawals/substitutions for the court, is incredibly effective and efficient in her position. Also, it simply is the better practice, at this point in time at least, to place the responsibility on the contractors and their attorneys to ensure withdrawals/substitutions are kept to a minimum and to monitor the same internally.

5. 60-day Rule

With exceptions only for the most serious of felonies (e.g., aggravated murder), current law generally provides a defendant who is in custody must be released if not tried within 60 days of arrest. (ORS 136.290) There are limited exceptions to this “60-day rule” and of course, the

defendant can always consent to the trial being held greater than 60 days after arrest. In fact and particularly for Measure 11 offenses, most defendants understand it is in their best interest to waive his 60-day right to trial and do so.

The 60-day rule is most relevant to substitutions of counsel requested by a defendant, because the defendant is dissatisfied with counsel. Early, regular and meaningful communication between counsel and client is critical to establishing and maintaining an effective attorney/client relationship.

Members of the work group considered the fact that having to discuss and in most instances, advise a client to waive the “60-day right” relatively early on can sometimes adversely impact the relationship. This is particularly so in Measure 11 cases, where the charge(s) is so serious and where the defendant will not likely be released from custody pending trial.

The work group floated the idea of amending statute to provide a 120-day release rule for Measure 11 offenses past some members of OCDLA’s legislative committee. Ultimately, the work group decided against recommending a statutory change this legislative session, primarily due to the likely opposition of courts and prosecutors and the fact it would be a relatively extreme measure that likely would have very minimal impact on the actual number of substitutions of counsel.

6. File Retention

Even post-Rule 1.10 and the anticipated revision of OSB Formal Opinion 2003-174, former client conflicts likely will continue to be a primary reason for substitutions of counsel. This is because there are so many contractors, not only in Multnomah County but statewide, that have been public defense providers for decades. And their closed case files reflect that fact. Many contractors are paying not insignificant amounts to warehouse client files in perpetuity. When can a criminal, juvenile, probation violation case file “safely” be destroyed?

Appendix F is a “File Retention and Destruction” document prepared by the Professional Liability Fund which provides, in part:

“Most client files should be kept for a minimum of 10 years to ensure the file will be available to defend you against malpractice claims. Files that should be kept for *more* than 10 years include:

1. Cases involving a minor who is still a minor at the end of 10 years [e.g., dependency cases].

* * * * *

6. Criminal law – most of these files should be kept indefinitely.

* * * * *

9. Files of problem clients.”

Discussion of obtaining client permission to destroy the file at a certain time or ensuring the client has a complete copy of the file as alternatives to the necessity of keeping files for at least an extended period of time simply are not options for public defense cases.

In an effort to best ensure that public defense attorneys keep files for at least ten years and after consulting with the Federal Public Defender with respect to likely time frames for federal habeas corpus matters, the following provision was adopted many years ago for the model public defense legal services contract:

7.5.3 Retention Period

For purposes of this contract only, Contractor agrees to preserve all case files a minimum of ten (10) years from the date the case is closed for all cases except aggravated murder and Measure 11 cases. Case files in aggravated murder and Measure 11 cases shall be preserved a minimum of twenty (20) years from the date the case is closed.

As long as there is firm unit rule, post-conviction relief, federal habeas corpus and aggravated murder cases, the best practice for criminal and likely civil commitment, juvenile delinquency and dependency cases is, as the PLF suggests, "most of these files should be kept indefinitely."

The primary issue for possible future review is whether off-site storage or electronic storage of files can somehow be arranged (location-wise and security-wise) so that files may be maintained forever, but at some point not be subject to former client ethical determinations.

New Oregon Rules of Professional Conduct
of Interest to Public Defense Conflicts Issues
Communication, Former Client Conflicts of Interest and Imputation, Withdrawal,
Clients with Diminished Capacity and Subordinate/Supervisory Lawyers
(most relevant sections of RPC 1.9 and 1.10 emphasized in **bold**)

RULE 1.4 COMMUNICATION

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.¹

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) 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 in which that person's interests are materially adverse to the interests of the former client unless each affected client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter, unless each affected client gives informed consent, confirmed in writing.

(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:

(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; or

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

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST; SCREENING

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9, unless the personally disqualified lawyer is screened from any form of participation or representation in the matter. For purposes of this rule, screening requires that:

(1) the personally disqualified lawyer shall serve on the lawyer's former law firm an affidavit attesting that during the period of the lawyer's disqualification the personally disqualified lawyer will not participate in any manner in the matter or the representation and will not discuss the matter or the representation with any other firm member; and the personally disqualified lawyer shall serve, if requested by the former law firm, a further affidavit describing the lawyer's actual compliance with these undertakings promptly upon final disposition of the matter or representation;

(2) at least one firm member shall serve on the former law firm an affidavit attesting that all firm members are aware of the requirement that the personally disqualified lawyer be screened from participating in or discussing the matter or the representation and describing the procedures being followed to screen the personally disqualified lawyer; and at least one firm member shall serve, if requested by the former law firm, a further affidavit describing the actual compliance by the firm members with the procedures for screening the personally disqualified lawyer promptly upon final disposition of the matter or representation; and

(3) no violation of this Rule shall be deemed to have occurred if the personally disqualified lawyer does not know that the lawyer's firm members have accepted employment with respect to a matter which would require the making and service of such affidavits and if all firm members having knowledge of the accepted employment do not know of the disqualification.

(d) A disqualification prescribed by this rule may be waived by the affected clients under the conditions stated in Rule 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

RULE 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in

the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

RULE 1.16 DECLINING OR TERMINATING REPRESENTATION

[similar to former DR 2-110, with one perhaps notable addition emphasized below in **bold**]

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- (1) the representation will result in violation of the Rules of Professional Conduct or other law;
- (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- (3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- (3) the client has used the lawyer's services to perpetrate a crime or fraud;
- (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. **When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation. (Emphasis added)**

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers, personal property and money of the client to the extent permitted by other law.

RULE 1.18 DUTIES TO PROSPECTIVE CLIENT

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or:

- (1) the disqualified lawyer is timely screened from any participation in the matter; and
- (2) written notice is promptly given to the prospective client.

RULE 5.2 RESPONSIBILITIES OF A SUBORDINATE LAWYER

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

The Changing Landscape of Former Client Conflict of Interest Analysis

by Paul Levy

Without a doubt, sorting out conflicts of interest is the most frequently encountered ethical inquiry criminal defense lawyers make.¹ But it's an inquiry that we very often get wrong, at tremendous cost to our firms, the state's public defense system, local courts and jails, and especially our clients. And we get it wrong, I submit, because we're afraid to do the right thing.

Our reticence is a product of awkward rules, written without regard to a modern criminal defense practice, interpreted and applied by people who don't do or understand our work. But some recent developments give reason for hope. First, by the end of the year Oregon is likely to finalize adoption of the American Bar Association's Model Rules of Professional Conduct, replacing our current Code of Professional Responsibility.² And with these new rules may come a movement away from an archaic and crippling application of our existing "firm unit rule" and its concomitant requirement of vicarious disqualification.

Consider how often you have heard criminal defense attorneys tell a judge they must withdraw from representation because "our firm previously represented a witness," and that request is allowed without further inquiry or explanation. Indeed, we have often answered the conflict question at the very point where our analysis should really begin, thereby avoiding a difficult duty under the rules and too easily abandoning our clients.

After all, "an attorney is not required to decline employment or withdraw from a case merely because a former client will testify as an adverse witness." OSB Formal Ethics Opinion No. 1991-110.³ In fact, the first question we need to answer in a thoughtful conflicts analysis is whether our current and former clients' interests are in

fact adverse. DR 5-105(A). If they aren't adverse (and there are plenty of instances when a former client may be named in a police report but have nothing adverse to say about our client), then there is probably no need for further analysis and we should continue with our current representation.

If the interests of our current and former clients are adverse, then we're required to withdraw from representation only if the two matters are "the same or significantly related." DR 5-105(C). Figuring out whether matters are "significantly related," which has a specific meaning under the conflicts rules, is the heart of former client conflict analysis, and also an endeavor fraught with difficulty. Understanding why this is so difficult is key to appreciating why we're wrong so often on conflicts questions and how we might be able to do better.

Matters are "significantly related" if the representation of the current client might harm the former client in connection with the matter in which we represented the former client, commonly called a "matter-specific" conflict, DR5-105(C)(1); or, if representation of the former client provided the lawyer with confidences or secrets that are capable of adverse use on behalf of the current client, commonly called an "information-specific" conflict, DR 5-105(C)(1).⁴

The existing formulation of the matter-specific rule derives from *In re Brandness*, 299 Or 420 (1985), a case where a husband and wife consult a lawyer about purchasing a business. Not long after that, husband seeks same lawyer's assistance in getting a divorce, in the course of which the lawyer seeks to restrain wife from interfering with the business. Because the divorce representation "would, or would likely, inflict injury or damage" to wife in

connection with the prior representation concerning acquisition of the business, the attorney had a prohibited matter-specific conflict.

This type of conflict turns out to be rare in our line of work, with one frequently encountered area of difficulty. Since our representation is, by definition, concluded when we encounter a former client in a new case, it would be the exceptional instance where we might harm the former client in connection with his or her closed case. But what if that former client is still on probation or post-prison supervision from our former case, and an allegation of violation may result from our current representation? Is that the same matter or a new one? This is one of the areas where the Oregon State Bar's guidance on these rules for defense practitioners is particularly frustrating.

Until recently, the Bar's discussion of matter-specific conflicts has largely concerned civil cases. OSB Formal Ethics Opinion No. 1991-11, which is devoted to this topic, gives four examples, each one a civil matter. Last year, though, the Bar issued OSB Formal Ethics Opinion No. 2003-174, which purports to give guidance to public defender organizations on a variety of conflicts issues. And, indeed, among the scenarios, a lawyer encounters a former client who is said to be on probation arising from the former representation. No one at the Bar, though, recognized this as the one persistent problem in this area, as the opinion blithely concludes that a mat-

Continued on next page.

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ter-specific conflict would not exist when the two matters “involve different events and charges.” So the probation question remains unresolved.

Invariably, though, our conflicts questions involve the information-specific prong of the inquiry: did the former representation yield confidential information that is capable of adverse use on behalf of the current client? Our task, then, is not simply to ask whether we gained confidential information in the course of the former representation, but to answer whether that information is relevant in any way to our current client’s case. And, in fact, in providing guidance on this question, the Bar has talked in terms of “relevance,” OSB Formal Ethics Opinion 1991-17, although not making clear whether that means admissible in court or simply helpful in some way. It would seem to be the latter, since other opinions have talked in terms

of whether the information “may be useful” (OSB Formal Ethics Opinion 1991-110) or “helpful” (OSB Formal Ethics Opinion No. 1991-120) to the defense.

Again, the recent OSB Formal Ethics Opinion 2003-174 tries to be helpful on this issue, suggesting that a conflict would exist if information could be used to discredit the former client’s testimony (suggesting that admissibility might be required) or in “trying to argue” that the former client was culpable. The only actual example offered is an odd one for an opinion about public defender organizations: suppose lawyer learns, they say, about environmental problems at a site belonging to client, then another client retains lawyer to negotiate the purchase of the site. At least this tells us that we should be thinking about information useful in negotiations. The opinion concludes with the keen observation that whether an information-

specific conflict exists “depends upon the facts of the specific case involved.”

And therein, really, lies the greatest difficulty for practitioners. In resolving our professional responsibilities, we are asked to make very difficult judgments based “upon the facts of the specific case involved.” But recent experience has shown that Bar disciplinarians are neither willing to defer to good-faith efforts to perform this duty⁵ nor equipped to understand the real-life issues that might guide our analysis. As a result, many defense attorneys continue to take the apparently safe—but ultimately wrong—approach of simply withdrawing whenever they learn that a former client of their firm is involved in any way in a current client case.

But there is a better, and in fact easier, way to resolve many former client conflict questions. Especially for medium-size and larger public defender organizations,

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a substantial number of our potential conflicts are with former clients who were represented by attorneys no longer with the firm. In fact, for firms that have been around for a while—and we have quite a few in Oregon—most of the former clients were represented by lawyers no longer with those firms. Suppose for a moment that the closed files in these cases are in storage, either off site or at least under carefully controlled and monitored conditions that prohibit access by firm attorneys. Under these circumstances, might a firm attorney now be able to say that he or she is not in possession of confidential information from a former client?⁶

There is, in fact, ample support for such a position. The challenge, of course, is the firm unit rule, DR 5-105(C), which in the Bar's view imputes to current firm lawyers knowledge about every case ever handled by a firm, and vicariously requires disqualification of any attorney still with a firm. DR 5-105(G).⁷ Aside from begging common sense, disqualifying a firm today for work done years ago by a departed lawyer on a file that's inaccessible to the remaining lawyers seems to run counter to the intent of DR 5-105(J), which specifically allows lawyers to take adverse positions to former clients, when confidential information was obtained by a departed lawyer, so long as the closed file no longer "remains at the firm." See also OSB Formal Ethics Opinion No. 1991-128.

One would think that for a file to "remain at the firm," if that fact is to have any operative meaning, would entail some ability to access the file. Naturally, there was no discussion of this point in OSB Formal Ethics Opinion No. 2003-174, which posits a case where the former client's lawyer has left the firm and the file is in storage. The opinion simply observes that DR 5-105 does not provide for "screening" files, without asking what it should mean for a file to remain with a firm, noting that "screening" is only available under DR 5-105(I), the ruling governing lateral moves.

In fact, it's this latter rule that provides the best argument for accepting, as a reasonable resolution of potential information-specific conflicts, the promises of lawyers and law firms to observe safeguards so firm lawyers will not access closed files handled by attorneys no longer with the firm. For over twenty years, in the context of lateral moves, the Bar has accepted the promise of new hires and their new firms that confidential information known to

that lawyer about clients adverse to the new firm will not be shared or used. DR 5-105(I)(1) & (2). Having accepted the efficacy of such promises, in a circumstance far more tempting than that posed by files locked safely away in storage, it is hard to envision good faith objections to the notion that such files no longer remain available to firm lawyers.

Fortunately, we don't need to wait much longer for a new approach by the Bar, since the proposed new Rule of Professional Conduct 1.10(b), governing conflict analysis when the lawyer who represented the former client has left the firm, appears to make the change. The new rule no longer speaks of the closed file remaining at the firm and, instead, provides that "the firm" is not disqualified unless "any lawyer remaining in the firm" has protected information. According to Peter Jarvis, an editor of the Bar's *The Ethical Oregon Lawyer* and a leading expert on conflicts analysis, "the shift from the 'firm' to 'any lawyer' makes no sense if a firm can be knocked out by dead files that no one still there has ever seen."

There is every reason to adopt a new approach to this persistent problem. Rather than require lawyers to look at the confidences in former client files, thereby tainting the reader with the information and exposing their evaluation of the potential uses of it to second-guessing by the Bar, simply locking away the files can neatly resolve many information-specific former client conflicts. As a result, we would see far fewer substitutions, notably reduced public defense expenditures, less delay in handling our difficult cases, and better representation for our clients. And, we'd be sensibly and reasonably resolving our ethical responsibilities.

ENDNOTES

¹ It's an inquiry we should make at the beginning of every case, and then often during a case as we learn of new potential witnesses.

² Having been reviewed by the Oregon Supreme Court and revised according to their wishes, the Oregon State Bar's House of Delegates will vote (and adopt) the new rules at its meeting on October 16, 2004, after which they will return to the Supreme Court for final approval. The new rules, in place in roughly the same form in 45 other states, replace our Code of Professional Responsibility. They can be viewed at http://www.osbar.org/_docs/discipline/disciplinechanges/proposedorpc.pdf.

³ Some attorneys still hold to a totally unfounded view that we owe a duty of perpetual

loyalty to our former clients. Not only may we confront them and, indeed, harm them as adverse witnesses in the appropriate circumstances, we can even go so far as to prosecute them if we like. See OSB Formal Ethics Opinion No. 1991-120. This and other Formal Ethics Opinions can be viewed at <http://www.osbar.org/ethics/ethicsops.html>.

⁴ The proposed Rule 1.9 under the Rules of Professional Conduct replaces DR 5-105(C) and substitutes "substantially related" for "significantly related," and would not appear to change the analysis under current rules.

⁵ One of the most intriguing features of the proposed Rules of Professional Conduct is in the section governing Law Firms and Associations which, for the first time in Oregon, creates a defense for *some* lawyers who make a good faith effort to abide by the rules. First, Rule 5.1 requires that managerial and supervisory attorneys have measures in place to assure compliance with the rules by all firm attorneys. Then, Rule 5.2(b) provides that a "subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's *reasonable resolution of an arguable question of professional duty*" [emphasis added]. It remains a mystery why all attorneys, including supervisors and sole practitioners, aren't granted some deference for reasonable resolutions of arguable questions of professional duty.

⁶ One other obvious way to resolve former client conflicts, which I won't dwell on, is to obtain informed consent to continue with the current representation from both the current and former clients, under DR 5-105(F), which will be replaced by Rule 1.7. Aside from the practical difficulties of locating the former client and making meaningful the required advice that both current and former client seek independent legal advice, it would be expected that most former clients would refuse to give consent. Another approach, of course, would simply be to destroy many closed files. But there are good reasons to preserve even our oldest files, among them the possibility that a client may need them years later in the defense of an aggravated murder prosecution.

⁷ It's not immediately apparent why the firm unit rule has anything to do with the closed files of attorneys no longer with the firm, but the Bar seems to think otherwise. According to an Informal Written Advisory Ethics Opinion, dated November 12, 2003, from George Riemer, OSB General Counsel to John Connors, the Director of the Multnomah County office of the Metropolitan Public Defender, even when the former client's lawyer is no longer in the office, "it is important for you to understand that 'sealing' the file and putting it in storage does not alter the fact that any information in your office is imputed to everyone, hence the vicarious disqualification ('firm unit rule') of DR 5-105(G)."

199 Or. App. ____ (2005-134); State v. Estacio; ____ P.3d ____

STATE OF OREGON, Respondent, v. FEDERICO DEJESUS ESTACIO, JR., Appellant.

Filed: April 13, 2005

IN THE COURT OF APPEALS OF THE STATE OF OREGON

0108-36054; A118666

Appeal from Circuit Court, Multnomah County.

Julie Frantz, Judge. (Hearing)

Jerome LaBarre, Judge. (Judgment)

Submitted on record and briefs August 4, 2004.

James N. Varner filed the brief for appellant. Federico Dejesus Estacio, Jr. filed the supplement brief pro se.

Timothy A. Sylwester, Assistant Attorney General, filed the brief for respondent. With him on the brief were Hardy Myers, Attorney General, and Mary H. Williams, Solicitor General.

Before Edmonds, Presiding Judge, and Wollheim and Schuman, Judges.

EDMONDS, P. J.

Convictions vacated and remanded with instructions to inquire into the reasons for counsel's request to withdraw as defendant's attorney. If the trial court determines that defendant was entitled to substitute counsel or that counsel should have been permitted to withdraw, it shall order a new trial; otherwise it shall reinstate the previous judgment.

EDMONDS, P. J.

Defendant appeals from multiple convictions for robbery, ORS 164.405; and ORS 164.395, and makes numerous assignments of error. We reject defendant's assignments without discussion except for what follows in this opinion. We review for errors of law, ORS 138.220, and remand for a hearing on whether different counsel should have been appointed to represent defendant at trial. *State v. Smith*, [190 Or App 576](#), 80 P3d 145 (2003), *rev allowed*, [337 Or 160](#) (2004).

The incidents resulting in defendant's arrest and trial occurred on August 29, 2001. After appointment of counsel and arraignment on October 18, 2001, in late February 2002, defendant's trial counsel requested a hearing to determine defendant's ability to aid and

assist counsel, and in early March defendant requested an order for substitution of attorney.(fn1) The trial court ultimately found that defendant was able to aid and assist his counsel and denied his motion for substitution of counsel, finding no basis for his request.(fn2)

At the hearing on the motion for substitution of counsel, defendant explained that he believed that "[counsel's] not really looking for my best interest and she's not helping me as far as any legal work[.]" In response, the trial court pointed out that, because the evaluation had just been made about whether he was able to aid and assist in his own defense, it "would not judge [counsel's] attention to your case on the fact that up until last week she hadn't done much. Because, as I said, everything is kind of in limbo until a determination is made if you're able to aid and assist." After hearing from counsel, the trial court made its decision: "Mr. Estacio, your attorney has done everything and more than the court would expect at this point. She has been working very hard on your behalf. The motion is denied. No basis." Defendant responded:

"Can I say something? It's just the fact that, you know, I've had her since August. I just feel like she ain't--you know, I just feel like she got a heavy case load. I know she's doing a lot of work. That's what I'm trying to say is maybe she's too busy."

After a further exchange between the trial court and defendant, defendant explained, "I just feel she ain't looking for my best interest." The court responded that "there is absolutely no basis and no reason you would lead me to believe that."

On March 29, 2002, the trial court heard pretrial motions before selecting a jury and beginning trial. Both the prosecutor and defendant's counsel stated that they were ready for trial. Defense counsel then told the court that defendant wished to address the court before the beginning of argument on the pretrial motions. Defendant stated to the court:

"First of all, I do not want to proceed--go along with my attorney * * * and I also do not want to negotiate a plea for a crime that I didn't commit. Over the past seven months she has been deceiving me to taking a plea bargain and she has not submitted any motion or legal help to me. Every time I would ask her to do something, I'm being ignored or denied, or I'm not, you know, and I don't know if she's prejudiced against my case or if she's doing it intentionally. It seems that she's more interested in my personal life rather than trying to help me with my case, or focusing on what's important. * * * With all due respect, Your Honor, I could fix a lot of time because I didn't know what was happening here and there, and I should be able to know at least what I'm dealing with and what I'm going up against, and I really think that [counsel] is not looking out for my best interests. I think her caseload is too [heavy], too much stuff in her hands, but not enough time, and it seems like she's doing everything at the last minute, and I feel like I'm being forced to go to trial today *and instead I file complaint to the Bar section, but I'm still waiting for their response.* Right now, I'm going to trial today, and so there's some time limit. *I just wish to be appointed to another counsel so that my*

constitutional rights will be protected. * * * [S]ometimes there was trouble in communicating with her, whether my attorney's lying to me about everything we discussed, or what she puts in front of me."

(Emphasis added.)

The trial court asked if counsel had any statement that she wanted to make. She replied, "I guess, for the record, this is the first I knew that Mr. Estacio had filed a Bar complaint. He did ask for a substitution of counsel, and we had a hearing on that matter." The trial court reviewed the order from that hearing and asked defendant if "anything happened that's different between March 13 and today." Defendant asserted that he was given everything at the last minute and did not have time to consider matters before having to make a decision. Counsel then made an additional statement to the court:

"I wonder if Mr. Estacio's maintaining a Bar complaint against me puts me in actual conflict with his interests. Having not seen any correspondence from the Bar, nor yet been in a position to respond to it, I don't know to what extent I would need to divulge client confidences or secrets in order to defend myself in a Bar complaint. I know that that could become an issue, but as yet, I've got no notice yet from the Bar. * * * [H]is statements that he doesn't understand what's going on and he doesn't understand what he's up against baffle me because we've been discussing * * * all the evidence that the state can bring against Mr. Estacio. We've been discussing that for months. And, Your Honor, I think that's sort of part and parcel of my concerns that Mr. Estacio can't assist and cooperate. I think it's clear that he distrusts me and I'm not really sure why that is."

(Emphasis added.)

After some discussion about other matters, the trial court returned to the issue of the Bar complaint:

"JUDGE: Now, [counsel], getting back to your comments about the Bar complaint, you indicated that you were concerned that, because of what you've just learned today, * * * for you to defend yourself from the Bar complaint, you would need to divulge client confidences. I'm interested in the time frame. This has been estimated as a two-day trial and, if you had not even known of a Bar complaint, there would not be any defense or any divulging any client confidences that would occur during the course of this trial, would there?"

"DEFENSE [COUNSEL]: Right. I don't think so. I don't think so, Your Honor. I mean, I know--I'm aware--I've never been in this situation before. This will be my first Bar complaint. But, I know that a lawyer may, if necessary, divulge confidences to the extent necessary to defend against such a thing, so I don't know what the allegations are so I don't know what I would or could divulge, and maybe it might come around in a month or more. It might happen before a certain thing. It might not. I just don't know if that might change--"

"JUDGE: Well, if it would happen, say, a month from now, let's say, in connection with sentencing, then a motion for substitution may be appropriate at that time if a conflict comes up. Right?"

"* * * * *

"JUDGE: But nothing has been put in front of me right now to indicate a real conflict right now, unless I'm missing something, based on what you've said. [Referring to counsel.]"

The trial court then inquired of defendant further and ultimately ruled

"that the defendant has not made a sufficient showing of any specific reason why a substitution of counsel should occur and I don't find any reason for criticism of [defense counsel] at this time based on what has been presented to me, and therefore, I do not believe it would be appropriate under Oregon law for me to grant this motion and therefore, I am denying--respectfully denying Mr. Estacio's motion for substitution of counsel."

Based on counsel's prior request, the court then conducted a competency hearing under ORS 161.360 and found that defendant was able to understand the nature of the proceedings, aid and assist counsel, and participate in his own defense. After a recess, the court made its rulings on other pretrial matters and prepared for *voir dire*. Counsel then spoke up: "I think that I need to move to withdraw * * * *based upon Mr. Estacio's Bar complaint. I think that puts us in conflict.* That is a conflict of interest." (Emphasis added.) The trial court asked for any authorities and for evidence of what specifically the Bar complaint entailed. Counsel referred the court generally to the Oregon State Bar Disciplinary Rules regarding when representation of the client is in conflict with a lawyer's personal interests. She returned to the possibility that she might be required to disclose confidences or otherwise privileged material in response to the complaint and observed that "[t]his may have a chilling effect on his communication with me throughout the duration of the trial." She concluded, "I certainly, Your Honor, it's not going to affect my performance, that I am ready, willing, and able to try this case, and it won't affect me at all, the fact that he filed a Bar complaint."

The trial court denied the motion to withdraw, incorporating the statements made in its ruling on the substitution of counsel, and adding:

"[W]hat I see is before the court in this question is an unspecified Bar complaint. There's no detail at all regarding it except the two words, Bar complaint, so there's no indication at all that any betrayal or revealing of client confidences or secrets would occur or could occur, the Oregon Code of Professional Responsibility is filled with many, many provisions, and with this unspecified 'Bar complaint,' it's impossible to know what we're talking about here. Counsel has indicated that she's ready, willing, and able to proceed with this case and that this will not affect her ability to try the case, and so, it would require a lot of

speculation for me to say that, because something might or might not occur way down the line that that [sic] today could have a chilling effect or during the course of this trial could have a chilling effect, and I don't really see that anything new has been presented, nor has any further detail been given[.]"

Defendant argues on appeal that "under [Code of Professional Responsibility Disciplinary Rule (DR)] DR 5-101 * * * an actual conflict of interest existed due to the bar complaint disclosed by defendant, and, absent 'the consent of the lawyer's client', defendant's trial counsel was required to withdraw and the trial court was required to allow trial counsel's withdrawal."(fn3) DR 5-101 provides, in part:

"(A) Except with the consent of the lawyer's client after full disclosure,

"(1) a lawyer shall not accept or continue employment if the exercise of the lawyer's professional judgment on behalf of the lawyer's client will be or reasonably may be affected by the lawyer's own financial business, property, or personal interests. As used in this rule, 'a lawyer's own financial, business, property, or personal interests' does not include serving in a pro tem capacity on any court, board or other administrative body where such service is occasional or for a limited period of time and compensation therefor is incidental to the lawyer's other sources of income[.]"

The Supreme Court explained in *In re Knappenberger*, [337 Or 15](#), 27, 90 P3d 614 (2004):

"As with the other conflicts-of-interests rules, DR 5-101(A) is 'based upon the concern that, when a lawyer undertakes the representation of a client with interests differing from the interests of the lawyer * * *, the lawyer's judgment might become impaired or the lawyer's loyalty might become divided.' *In re Kluge*, [335 Or 326](#), 335, 66 P3d 492 (2003). To vindicate that concern and to prevent compromised representation, DR 5-101(A) requires a lawyer to look forward and to determine whether, in accepting or continuing representation, the lawyer's and the client's interests will conflict, in terms of DR 5 101(A), whether the lawyer's professional judgment 'will be or reasonably may be affected' by his or her own interests. That operative text expresses two degrees of certainty with respect to that determination. * * * That is DR 5-101(A) requires consent after full disclosure if, based on the facts in an individual case, (1) the exercise of the lawyer's professional judgment 'will be' affected by his or her * * * personal interests, regardless of whether the determination of an effect on the lawyer's professional judgment is reasonable; or (2) the exercise of the lawyer's professional judgment 'reasonably may be affected' by his or her * * * personal interests."

In some circumstances "it is possible for a lawyer to continue to exercise his or her professional judgment on behalf of the client without placing the quality of representation at risk." *Id.* at 28. However, this appeal is not about whether counsel violated DR 5-101(A), and our role as an error-correcting court in a criminal case is

fundamentally different from an ethics adjudication.

State v. Edwards, [132 Or App 590](#), 890 P2d 423 (1995), provides the framework for our analysis. In *Edwards*, we said:

"The right to substitute court appointed counsel is not absolute, and we review the trial court's decision for abuse of discretion. *State v. Langley*, [314 Or 247](#), 258, 839 P2d 692 (1992) [*adh'd to on recons*, [318 Or 28](#), 861 P2d 1012 (1993)]; *State v. Heaps*, [87 Or App 489](#), 742 P2d 1188 (1987). The exercise of that discretion requires a balancing of a defendant's right to effective counsel and the need for an orderly and efficient judicial process, *State v. Wilson*, [69 Or App 569](#), 572, 687 P2d 800 [1984], *rev den*, [298 Or 553](#) (1985), but

"a defendant has "no right to have another court-appointed lawyer in the absence of a legitimate complaint concerning the one already appointed for him." *State v. Langley*, *supra* 314 Or at 257, (quoting *State v. Davidson*, [252 Or 617](#), 620, 451 P2d 481 (1969))."

"A request for substitution of counsel, therefore, requires a factual determination of whether a defendant has presented a 'legitimate complaint.' A 'legitimate complaint' is one 'based on an abridgement of a criminal defendant's constitutional right to counsel.' *State v. Langley*, *supra*, 314 Or at 258."

132 Or App at 593.

Applying the above principles, we conclude that it was an abuse of discretion to deny defendant's requests without making a full inquiry once the trial court was informed that defendant alleged that counsel had deceived and lied to him and that, as a result, defendant had filed an ethics complaint against counsel. At a minimum, the trial court should have made an affirmative inquiry of defendant concerning those allegations and the factual basis for them in order to ensure that defendant could be provided assistance of counsel in the upcoming trial that met the requirements of Article I, section 11, of the Oregon Constitution and the Sixth Amendment to the United States Constitution. To fulfill its obligation, the trial court was required to determine if defendant's complaints were legitimate and, if legitimate, whether they would interfere with effective assistance of counsel.^(fn4) The trial court's failure to make such an inquiry was error. *Cf. Edwards*, 132 Or App at 593 (holding that an intimate relationship between a defense investigator and a state witness did not constitute an ethical violation as to defense counsel).

The next step of the analysis is to determine if the court's error requires reversal. On that issue, our decision in *Smith* is also instructive. In that case, the trial court failed to inquire into the defendant's complaints concerning appointed counsel after he requested new counsel. 190 Or App at 578. We originally rejected the state's arguments that we should remand to the trial court for it to determine whether the defendant's attorney had adequately represented him. *State v. Smith*, [187 Or App 562](#), 564, 69 P3d 787 (2003). However, on reconsideration, we held that Article VII (Amended), section 3, of the

Oregon Constitution(fn5) requires a showing of prejudice. *Smith*, 190 Or at 579-80. We explained:

"Because the trial court had an affirmative duty to inquire of defendant, the lack of an adequate record is its responsibility, not defendant's; defendant did all that he could do under the circumstances to make a record. The result of those considerations is that we cannot simply affirm the judgment.

"That we cannot affirm the judgment, however, does not mean that defendant is automatically entitled to a new trial. If the trial court, after inquiring, could properly have refused to provide defendant a new attorney, defendant has not been prejudiced. If, on the other hand, the trial court should have agreed to defendant's request for a different attorney, defendant has been prejudiced because he did not receive counsel provided in accordance with the applicable requirements. To remand for a new trial without a showing of prejudice is, in effect, to presume prejudice in substance from proof of error in the procedures designed to protect the substantive right. In *State v. Parker*, [317 Or 225](#), 233, 855 P2d 636 (1993), the Supreme Court expressly rejected a similar conclusion by this court. We conclude that the state is correct to the extent that defendant is not automatically entitled to a new trial as the result of the trial court's error. Rather, we vacate defendant's conviction and remand for the trial court to make the inquiry that it failed to make previously. If it determines that defendant should have received different counsel, it shall order a new trial; otherwise it shall reinstate defendant's conviction. This procedure is, admittedly, cumbersome, but it carries out the intention of the voters when they adopted section 3 by initiative in 1910. To the extent that our previous cases are inconsistent with this ruling, they are disavowed."

Id. at 580-81 (footnote omitted).(fn6) The same principles are applicable here.

Convictions vacated and remanded with instructions to inquire into the reasons for counsel's request to withdraw as defendant's attorney. If the trial court determines that defendant was entitled to substitute counsel or that counsel should have been permitted to withdraw, it shall order a new trial; otherwise it shall reinstate the previous judgment.

Footnotes:

1. A different judge than the judge presiding at defendant's trial considered both of those matters at separate hearings.
2. The trial court had already scheduled defendant's trial to begin at the end of March.
3. We refer to the rules in the Oregon Code of Professional Responsibility, not the Oregon Rules of Professional Conduct, which became effective on January 1, 2005.
4. As we recently noted in *State v. Crain*, [192 Or App 328](#), 333, 84 P3d 1092, *rev den*,

[337 Or 565](#) (2004), an attorney's motion to withdraw in a criminal case may involve "potentially overlapping, but analytically distinct, considerations from those implicated by a defendant's motion for substitute counsel." Here, as the discussion in the text makes clear, the two motions were significantly interrelated. We note, however, that under other circumstances it may be that consideration of counsel's motion to withdraw may require a different inquiry and analysis from the consideration of a defendant's motion for substitute counsel.

5. Section 3 provides, in pertinent part:

"If the supreme court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, not withstanding any error committed during the trial[.]"

6. Consistent with *Smith* is the Supreme Court's recent discussion in *Ryan v. Palmateer*, [338 Or 278](#), 297, ____ P3d ____ (2005), where the court rejected the application to Oregon law of the structural error doctrine and reiterated the requirement that in direct criminal appeals we consider whether errors at trial require reversal under "harmless error" analysis.

Responses to DA Provision of Discovery (Police Reports) Survey
of OCDLA Members *
(March 2005)

Appendix D

County	Measure 11 (M11)	Other Felony	Traffic Misdemeanor	Non-Traffic Misdemeanor	Comments
Clackamas	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	W/in 2 days 1st appearance	W/in 2 days 1st appearance	M11/Felonies: Retained - sometimes advantage, get Police Reports (PR) before grand jury. PR occasionally available day of arraignment. Misdemeanors: Often available same day as 1 st appearance, if accusatory instrument is filed (except DUII generally) All: When prior counsel withdraws, provision of PR takes about a week in most cases.
	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	W/in 2 days 1st appearance	W/in 2 days 1st appearance	M11: Lots of variation between DDAs and cases - sometimes can get PR before indictment/arraignment, sometimes not but w/in 1-2 days. Homicide or otherwise "complicated" cases, may be more than 2 weeks. Generally, w/in 1-2 days indictment/arraignment.
	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	Same day as 1 st appearance	Same day as 1 st appearance	Misdemeanor Domestic Violence: generally, within 2 days of first appearance. ** See additional notes re: DA discovery process in Coos County on final page.
Deschutes	After indict, > 7 days arraignment	After indict, w/in 1 day arraignment	Same day as 1 st appearance	Same day as 1 st appearance	
	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	Same day as 1 st appearance	Same day as 1 st appearance	
	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	Same day as 1 st appearance	Same day as 1 st appearance	
Douglas	After indict, > 7 days arraignment	After indict, > 7 days arraignment	More than 2 weeks	More than 2 weeks	M11: Motion to release client pending, since > 30 days since arrest and only PC affidavit provided so far. Not the 1 st time. Non-M11 Fel: 1 of main reasons cases are set over at CSC, waiting for PR. Practicing 15 years, this is worst it's been. No Pattern. Some get report w/in few days - others it literally takes months.
	After indict, > 7 days arraignment	After indict, > 7 days arraignment	no response	no response	Douglas can be very slow. Coos may have PR by arraignment, but peculiar procedure - attempt to place burden on defense to continually check DA file for any new/updated discovery.

County	M11	Other Felony	Traffic Misdemeanor	Non-Traffic Misdemeanor	Comments
Harney	After indict, > 7 days arraignment	After indict, > 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	
Jackson	After indict, > 7 days arraignment	After indict, > 7 days arraignment	More than 2 weeks	More than 2 weeks	
	After 1 st appearance, but before GJ convened	After indict, w/in 7 days arraignment (see comments)	> than 5 days, but < 2 weeks 1 st appearance	Between 3 and 5 days 1 st appearance	Non-M11 Fel: if in-custody , generally PR provided before indictment. If out-of-custody , generally PR provided within a few days of arraignment on indictment.
Josephine	See comment	See comment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	All felonies: in-custody and out-of-custody: always after the 1 st appearance; usually takes a week or week-and-a-half.
	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	
	After indict, > 7 days arraignment	After indict, w/in 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	M11: Generally, greater than 7 days after arraignment on indictment, and although sometimes sooner, it is NEVER before the indictment arraignment.
Lane	Same day 1 st appearance	Same day 1 st appearance	Same day 1 st appearance	Same day 1 st appearance	Non-M11 Fel: sometimes FTA disc not available day of arraignment. But DA has been making great efforts to streamline the discovery process, which ends up saving both offices time and work.
	Same day 1 st appearance	Same day 1 st appearance	Same day 1 st appearance	Same day 1 st appearance	M11 and Non-M11 Fel: We are also proceeding by information on many felony cases, except for M11. On M11 indictments , may be some delay in disc.
	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	W/in very few days of written request to citing officer	After indict, w/in 1 day arraignment	

County	M11	Other Felony	Traffic Misdemeanor	Non-Traffic Misdemeanor	Comments
Lane (continued)	After 1 st appearance, but before GJ convened	After 1 st appearance, but before GJ convened	> than 5 days, but < 2 weeks 1 st appearance	No response	
	After indict, w/in 7 days arraignment	Same day 1 st appearance	Same day 1 st appearance	Same day 1 st appearance	
Lincoln	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	All: one jurisdiction (LE) notoriously slow getting PR filed with DA's office.
	After indict, > 7 days arraignment	After indict, > 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	
Linn	After 1 st appearance, but before GJ convened	After 1 st appearance, but before GJ convened	Between 3 and 5 days 1 st appearance	Between 3 and 5 days 1 st appearance	
	After 1 st appearance, but before GJ convened	After 1 st appearance, but before GJ convened	Between 3 and 5 days 1 st appearance	Between 3 and 5 days 1 st appearance	All Misd: Sometimes w/in a day or two from first appearance.
	After 1 st appearance, but before GJ convened	After 1 st appearance, but before GJ convened	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	Extensive description of process. The DA gives us what they have when they get it. The hold up is when they do not receive reports in a timely manner from the police agencies.
Malheur	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	Between 3 and 5 days 1 st appearance	Between 3 and 5 days 1 st appearance	

County	M11	Other Felony	Traffic Misdemeanor	Non-Traffic Misdemeanor	Comments
Marion	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	More than 2 weeks	don't handle enough to fairly comment	All Fel: Discovery is a real problem, we often do not get it even before offers expire. Other times we get it the day before plea and continuances are troublesome even when there is nothing more we could have done short of a motion to compel. Timing is faster for in-custody, but disc is never complete which is just as problematic. Response from some ADAs that 'your client knows what he did, you don't need everything to make your decision' is inappropriate. Traffic Misd: In a recent DUI, disc took 6 weeks.
	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	W/in 2 days 1st appearance	W/in 2 days 1st appearance	All: DA policy - no PR until indictment (or arraignment on charges if misd) and appointment or appearance with client. Generally, PR start being available with 24 hours of arraignment on indictment/misd. All too frequently (about 1/4 cases), PR don't start arriving until 3-4 days of arraignment.
	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	W/in 2 days 1st appearance	W/in 2 days 1st appearance	
	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	Between 3 and 5 days 1 st appearance	Between 3 and 5 days 1 st appearance	All Fel: DA policy re: no PR before indictment. Thinks ORS require upon filing of information or indictment. More discussion. All Misd: May be quicker if client is in-custody. Thanks for taking on this topic!
	After indict, w/in 7 days arraignment	After indict, w/in 1 day arraignment	W/in 2 days 1st appearance	W/in 2 days 1st appearance	

County	M11	Other Felony	Traffic Misdemeanor	Non-Traffic Misdemeanor	Comments
Multnomah	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	Unknown	Unknown	Initial police reports are often incomplete, subsequent discovery - additional reports, forensics, jail calls and the like vary significantly by DA. Detectives often have reports which DA claims to have never received. Yesterday for an anecdotal example I sent out a good felon in possession case for trial. My client had been in custody for 4 months, in part based on my advice that the state had a weak case. Yesterday afternoon I was provided a copy of a jail phone call made by my client in October or November after her initial arrest. In that call was a clear admission to possession of the weapon. This is becoming typical and I believe it is in part due to cuts in the DA's office.
	No response	No response	W/in 2 weeks, sometimes longer	Approx. 40% at arraignment; 40% w/in 3-5 days; 20% > 5 days but < 2 weeks	MPD's reported experience/estimates for misdemeanors
	No response	After indict, > 7 days arraignment	More than 2 weeks	More than 2 weeks	Non-M11 Fel: 2 or more weeks after arraignment. ** See additional comments at conclusion of Table.
	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	W/in 2 days 1st appearance	W/in 2 days 1st appearance	Response from retained counsel.
	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	More than 2 weeks	More than 2 weeks	Traffic Misd: It varies, but mostly not at 1 st appearance except for DU/Is. If it is a DWS, the traffic record often doesn't come before Pre-trial Conference. Non-traffic Misd: It varies. Most PR comes with 1 st appearance. Notable exceptions are BW where disc goes to prior attorney and DV cases a bit slow.

County	M11	Other Felony	Traffic Misdemeanor	Non-Traffic Misdemeanor	Comments
Tillamook	After indict, w/in 1 day arraignment	After indict, w/in 1 day arraignment	Same day 1 st appearance	W/in 2 days 1 st appearance	
	After indict, > 7 days arraignment	After indict, w/in 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	
Umatilla	No response	After indict, w/in 1 day arraignment	Same day 1 st appearance	Same day 1 st appearance	All: The only way to get disc is to pick it up. Occasionally, they will mail it, but usually not.
	After indict, > 7 days arraignment	After indict, > 7 days arraignment	More than 2 weeks	More than 2 weeks	All Fel: Most cases, PR provided w/in one month. M11 in-custody PR generally arrive in 1-2 weeks. Comments re: other disc requiring 2-3 court appearances/requests. All Misd: Generally, more than 2 weeks but within one month.
	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	Between 3 and 5 days 1 st appearance	Between 3 and 5 days 1 st appearance	M11: Sometimes longer if arrested at time of crime.
	After indict, > 7 days arraignment	After indict, > 7 days arraignment	No response	No response	
Wasco	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	
	After indict, > 7 days arraignment	After indict, > 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	All Fel: Depends on if client was indicted before or after being taken into custody, and if we were appointed before or after indictment. In general, takes 7-10 days after app'tment to get reports. M11 cases, it can be longer.
	After 1 st appearance, but before GJ convened	After indict, w/in 1 day arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	

County	M11	Other Felony	Traffic Misdemeanor	Non-Traffic Misdemeanor	Comments
Washington	No response	No response	More than 2 weeks	More than 2 weeks	
	After indict, > 7 days arraignment	After indict, > 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	All Fel: The timing of disc is somewhat inconsistent, but averages 11 days from request. The greater the volume, the slower the speed.
	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	Between 3 and 5 days 1 st appearance	Between 3 and 5 days 1 st appearance	
	No response	See comment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	Non-M11 Fel: Generally, receive PR w/in 7 days of request for disc, which office mails out when get appointed. So, if client is in-custody, generally don't get PR until after indictment or preliminary hearing. Since WACO does prelims in several types of cases, often we have to do the prelim without having received PR. I always thought that was unfair.
	After indict, w/in 7 days arraignment	See Comment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	Non-M11 Fel: If prelim hearing, get PR before hearing – in-custody in one week and out-of-custody in one to two weeks. If case goes to GJ, get PR approx one week after GJ. All Misd: Receive PR at about two weeks.
	After indict, w/in 7 days arraignment	Gen, 7 days after arraignment	Gen, 7 days after arraignment	Gen, 7 days after arraignment	
Yamhill	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	
	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	
	After indict, w/in 7 days arraignment	After indict, w/in 7 days arraignment	> than 5 days, but < 2 weeks 1 st appearance	> than 5 days, but < 2 weeks 1 st appearance	

* The email survey to all OCDLA members is attached on the final two pages of this document.

** Additional Comments/Notes:

Coos County – All Cases:

Our DA's office has an "open file" policy, which means that we pick up and copy DA's files. Our office has one discovery clerk. On the day of arraignment (except for Mondays, when arraignments are at 3 p.m.), our discovery clerk copies the discovery. For in-custodies, she gives the discovery directly to the attorney. The attorney is responsible for asking her or his secretary to do a conflict check. For out-of-custodies, the discovery clerk sends the discovery to the secretaries who do conflict checks. I [contract administrator] then decide all conflict questions.

This system works fairly well. There are a couple of problems: First, if the DA receives additional discovery, there is no notification process. We are expected to periodically check the DA files for new discovery. The attorneys, not discovery clerk, do this. Second, in the past, there were [instances when discovery apparently was hidden]. The issue was eventually resolved, but we are still a little wary of this.

Multnomah – Misdemeanors:

We get discovery 2 or more weeks later and also get additional discovery after 1 to 2 pretrial settings have gone by and sometimes even on day of trial.

We go through phases where we complain and it gets a little better. Then it gets worse and we start filing motions to compel. The most frustrating part is when we have a DUI case with a diversion entry deadline and we get no discovery prior to the hearing date or only partial discovery where we are missing a lab report and find ourselves in a situation where the client has to make an election but we have incomplete information from the district attorney's office for the client to make an informed choice. Usually in those situations we take a setover in diversion court. But the delay in getting discovery when we have filing deadlines is frustrating.

There has been local discussion about shortening the time frame between arraignment and the first pretrial setting to less than a month. If this occurs, then the current 2-3 week time frame that we have been getting discovery will be a disaster. In short, we need discovery provided to us at time of arraignment or within 3 business days, in my opinion.

NOTE: Two survey responses for Juvenile-type cases were not included in the above table.

To: OCDLA Members
From: annchristian@comcast.net
Date: Wed, 23 Feb 2005

Paul Levy and Ann Christian, co-chairs of a Conflict Work Group established by the Public Defense Services Commission, request your help. One significant aspect of public defense conflicts/substitutions of counsel is the time frame within which discovery is provided to defense counsel. We are asking BOTH attorneys who do public defense work and those who do not to give us information on how quickly POLICE REPORTS generally are provided to defense counsel in different counties.

Please respond to the four questions below directly to Ann. Please do not reply to OCDLA. You can send your response to Ann at annchristian@comcast.net by either:

1. hitting "reply" to this email, delete the ocdla address and paste ann's email address into the "to:" box, enter your responses, and hit "send"; or
2. hitting "forward" on this email, paste ann's email address into the "to:" box -- and prior to actually "sending" the email to Ann, be sure to include your responses below.

SURVEY

In state court cases in the county in which your office is located, Police Reports are provided (made available) to defense counsel in the vast majority of cases (over 90%) within which of the following time frames. (If there are differences, for example for misdemeanors, based upon whether a client is in-custody or out-of-custody, please briefly describe the difference in the comments section.)

1. For Measure 11 cases
 - The same day as my client's first court appearance
 - After first appearance, but before grand jury is convened
 - Not until after a client is indicted, but within a day of the arraignment on the indictment
 - Not until after indictment, but within 7 days of the arraignment on the indictment
 - Not until after indictment and greater than 7 days after the arraignment on the indictment

Comments:

2. For other Felony cases

- The same day as my client's first court appearance
- After first appearance, but before grand jury is convened
- Not until after a client is indicted, but within a day of the arraignment on the indictment
- Not until after indictment, but within 7 days of the arraignment on the indictment
- Not until after indictment and greater than 7 days after the arraignment on the indictment

Comments:

3. For Misdemeanor TRAFFIC cases

- The same day as my client's first court appearance
- After first appearance, but within 2 days of first court appearance
- Between 3 to 5 days of first court appearance
- More than 5 days after first court appearance, but less than two weeks
- More than two weeks

Comments

4. For Misdemeanor NON-Traffic cases

- The same day as my client's first court appearance
- After first appearance, but within 2 days of first court appearance
- Between 3 to 5 days of first court appearance
- More than 5 days after first court appearance, but less than two weeks
- More than two weeks

Comments:

Ethical Conflicts – Issues and Improvements

Appendix E

Current/Former Client Conflicts Chart #1

Issue	Factor/Problem	Improvement	What's Needed?
Early Discovery	<p>Felonies – 1. Complainant, co-defendant and known civilian witness information not consistently provided to MPD prior to first appearance.</p> <p>2. Discovery generally not provided until after grand jury indictment.</p> <p>Traffic (non-DUI) Misdemeanors – police reports not available at first appearance or soon thereafter.</p> <p>Non-Traffic Misdemeanors – generally, reports available at first appearance</p>	<p>1. DA provides complainant, co-defendant, known civilian state witness information to MPD no later than early morning of 1st appearance (just as is done with aggravated murder and murder case info to court pre-1st appearance).</p> <p>2. For all felonies (or as first step all property/drug felonies – as pilot), provision of discovery pre-grand jury.</p> <p>Just as with non-traffic misdemeanors, defense copy of PR should be in DDA file and provided at first appearance</p>	<p>1. a. Additional or redirected resources in DA's office and maybe MPD? b. Can information provided to MPD be provided to PDC?</p> <p>2. Change in DA policy and possible resource issue?</p> <p>Additional or redirected resources in DA's office? Or simply moving DUI/traffic discovery from DA office in courthouse to Justice Center?</p> <p>All: Electronic provision of police reports; e.g., Scan and Email versus Copying</p>
Ability of Contractors to Immediately Check for Conflicts	<p>Is there delay in reviewing discovery once it is received by Contractor? By staff? By attorney?</p> <p>Time/staffing?</p> <p>Office conflicts database and/or OJIN improvements?</p>	<p>Additional resources?</p> <p>Office database and/or OJIN improvements?</p> <p>Internal policy/direction re: importance of immediate and continuing review?</p>	<p>Additional resources?</p> <p>Office database and/or OJIN improvements?</p> <p>Internal policy/direction re: importance of immediate and continuing review?</p>

Issue	Factor/Problem	Improvement	What's Needed?
<p>Review/Assistance to Attorneys re: Determining if Actual Conflict</p>	<p>If prior representation by office, pulling and reviewing file – delay and potentially learn of a conflict not otherwise known to present attorney</p> <p>Potential for attorneys using possible conflict/withdrawal as caseload management tool</p>	<p>New Rule and Interpretation re: imputation of former client conflict if attorney no longer at firm</p> <p>Better training and resources (e.g., # of staff/attorneys and assistance of another attorney?)</p> <p>Improvements in Kor conflicts data bases?</p> <p>Internal monitoring of attorney withdrawals?</p>	<p>Additional training for staff/attorneys?</p> <p>Review of potential conflict by supervisor/other attorney?</p> <p>Development of written guidelines or a model “things to consider” checklist?</p>
<p>Prior Representation -- Closed Files</p>	<p>OSB Formal Opinion No. 2003-174 Pulling closed file for review</p> <p>Retention of files (PLF, K provisions, where to store old files – Salem?)</p>	<p>New Rules and Interpretation</p> <p>PDF files</p> <p>Send files to Salem?</p> <p>Informed waivers – former and current clients – but further delay and right to independent counsel?</p>	<p>PLF and OSB Guidance</p>
<p>Appointment of New Counsel</p>	<p>How to best and expeditiously determine new attorney who most likely has no conflict</p>	<p>Attorney seeking substitution submits (to court or PDC or other Kor) list of known witnesses, co-defendants, potential defense witnesses?</p> <p>Attorney seeking substitution contact potential new attorneys prior to substitution hearing?</p> <p>Delay briefly official substitution to allow better conflicts checking?</p>	<p>Group endorses this, just need direction.</p> <p>Group does not endorse.</p> <p>Is done in limited instances now.</p>

Issue	Factor/Problem	Improvement	What's Needed?
<p>One Client/ One Attorney</p>	<p>If Attorney A is appointed to represent client on three cases, determines former client conflict on one of three cases, should new counsel be substituted onto only the one case or on all three cases?</p> <p>To the extent all three cases, versus only one, are transferred to new counsel, there is an additional cost to public defense for the two additional cases.</p> <p>To the extent the defendant winds up with two or even three lawyers representing him on multiple pending cases, there is assumed to be a greater potential for "harm" to the client. Even if no harm occurs, having multiple lawyers for one client is inefficient resource-wise.</p>	<p>In Multnomah for example, a client may have the Portland Defense Consortium appointed on a felony and later, but while the felony is pending, MDI is appointed to represent the defendant on two misdemeanors. If the MDI attorney determines she has a conflict requiring withdrawal/substitution on one misdemeanor case only, both cases should be transferred to new counsel, unless there is reason to believe it is not in the client's best interest to have one attorney handling all three cases. There are circumstances, however, where counsel should retain the non-conflict cases; e.g., non-conflict case scheduled for trial in one week.</p>	<p>If assume that generally (not always) it is better for a client to have one attorney on pending matters, need direction to attorneys and courts that new counsel should be substituted on all 3 cases in the example, provided withdrawing counsel assesses that transfer of all cases is in the best interest of the client and will not result in delay in resolution of pending cases that is not supportable.</p>
OTHERS?			

Breakdown in Attorney/Client Relationship Chart #2

Issue	Factor/Problem	Improvement	What's Needed?
Sufficient Communication Early and Regular Contact	<ol style="list-style-type: none"> 1. No "Immediate" Contact with Client 2. Failure or Inability to regularly communicate/consult with client – e.g., custody clients at Inverness (evening/weekend visits) 	<ol style="list-style-type: none"> 1. Legal Assistant, at minimum, immediate contact 2. Video? Transport to JC? 3. Someone to review particular attorney contacts, if pattern of such withdrawals? 	Increase and/or redirection of Kor resources
Early Discovery	See topic Chart #1	See topic Chart #1	See topic Chart #1
Dissatisfaction with Advice	Even with early discovery, sufficient communication, excellent representation/advice, client may be "unhappy"	2d opinion availability?	Policy decision Occurs to a limited extent currently - formally (request NRE) and informally between some contractors or consortia members
Known "problem" defendants	Some defendants historically are "dissatisfied" clients	Initially or after first motion to withdraw, appoint experienced private bar attorneys or attorney contractors and compensate accordingly	Policy decision and court discretion to do so (i.e., skip other contractors)
60-day rule	One of relative early matters counsel must address with client – waive 60 days statutory "right" (aka right to be convicted within 60 days)	For Measure 11, amend ORS 136.290 to provide a 120-day rule	Legislation
OTHERS?			

FILE RETENTION AND DESTRUCTION

Most client files should be kept for a minimum of 10 years to ensure the file will be available to defend you against malpractice claims. Files that should be kept for *more* than 10 years include:

1. Cases involving a minor who is still a minor at the end of 10 years.
2. Estate plans for a client who is still alive 10 years after the work is performed.
3. Contracts or other agreements that are still being paid off at the end of 10 years.
4. Cases in which a judgment should be renewed.
5. Files establishing a tax basis in property.
6. Criminal law – most of these files should be kept indefinitely.
7. Support and custody files in which the children are minors or the support obligation continues.
8. Corporate books and records.
9. Files of problem clients.
10. Adoption files.

Whenever possible, do not keep original papers (including estate plans or wills) of clients. When closing the file, return original documents to clients or transfer them to their new attorneys. Be sure to get a receipt for the property and keep the receipt in your file.

The first step in the file retention process begins **when you are retained by the client**. Your **fee agreement** should notify the client that you will be destroying the file and should specify when that will occur. The client's signature on the fee agreement will provide consent to destroy the file. In addition, your **engagement letter** should remind clients that you will be destroying the file after certain conditions are met.

The second step in the file retention process is **when the file is closed**. When closing the file, establish a destruction date and diary that date. If you have not already obtained the client's permission to destroy the file (in the fee agreement and engagement letter), you can get written permission when you close the file. Or you can make sure that the client has a complete copy of the file. This includes all pleadings, correspondence, and other papers and documents necessary for the client to construct a file for personal use. If you choose the latter alternative, be sure to document that the client has a complete file. This means that the file you have in your office is *yours* (and can be destroyed without permission) and the one the client has is the *client's* copy.

The final step in the file retention process involves reviewing the firm's electronic files for client-related material. This data may be on servers, hard drives, laptops, home computers, zip drives, disks, or other media. Examples include email communications, electronic faxes, digitized evidence, word processing or other documents generated during the course of the case. Review these sources¹ to ensure that the client file is complete. If there are documents that exist only in electronic form, they should be printed and placed in the appropriate location in the client's file. You may then elect to permanently purge the electronic version of the client's file², or move it onto appropriate storage media. The retention policy for electronic data should be consistent with the retention policy for paper files, to the extent possible. Unfortunately, rapid obsolescence of computer hardware and software may make it difficult, if not impossible, to retrieve electronic data that is five or more years old.

¹ Intranets, Extranets, the Internet, or web-based servers may also contain client data.

² With proper technique, deleted documents can be retrieved and restored. Consult with a computer expert to determine what steps must be taken to ensure that client documents have been *completely* purged from your system, including back-ups, if applicable. For recommendations on how to store data for long-term archival needs, contact the Association for Records Management Professionals, www.arma.org

Closed files should be organized by years or organized into two groups: files that are ten years and older and files that are less than 10 years old. If possible, however, separate closed client files into groups according to the year the work was completed so that each year you know which files to review for destruction.

Keep a permanent inventory of files you destroy and the destruction dates. Before destroying any client file, review it carefully. Some files need to be kept longer than 10 years, as noted above. Others may contain conflict information that needs to be added to your conflict database or original documents of the client which should never be destroyed. Always retain proof of the client's consent to destroy the file. This is easily done by including the client's consent in your fee agreement or engagement letter, and retaining the letters with your inventory of destroyed files.

Shredding is generally the best method for file destruction. (See OSB Legal Ethics Op.1995-141.) Permanent destruction of electronic data requires special expertise .²

Preliminary Review of Conflicts of Interests in Public Defense Cases
Ethical, Resource and Client Issues
Recommendations
Ann Christian
November 12, 2004

Overview of Primary Issues Relating to Public Defense Attorneys and Conflicts of Interest and the Scope of This Preliminary Review

On an annual basis, public defense attorneys are appointed by Oregon's trial courts to represent persons determined financially unable to retain counsel in over 160,000 cases. The nature of these cases range from non-payment of a court imposed financial obligation (e.g., non-payment of child support or a criminal fine) to aggravated murder. Public defense cases also include those where a child has been removed from her parent's custody by the State due to alleged abuse and neglect and cases in which the person has been taken into State custody based on an allegation the person is psychologically a danger to oneself or others.

Of the more than 160,000 cases annually, some number have more than one attorney appointed to represent the client during the course of the case. In what appears in the total scheme of public defense representation to be a relatively few cases, a client entitled to public defense counsel may have, as was the case in one recent case in Multnomah County, six attorneys appointed to represent the individual prior to the court allowing the person to represent himself.

This preliminary review of public defense conflicts of interest is not intended to be a treatise on the case law, disciplinary rules and Bar opinions governing attorney conflicts. And it is not a legal review of the courts' authority to allow withdrawal and substitution of appointed counsel; i.e., how many attorneys is an individual entitled to in order to ensure the person receives "adequate" or "effective" representation required by the federal and state constitutions? At what point, after how many attorneys, can or should a court deny a person's request for new counsel? Or, legally and practically, at what point should a judge deny a request for new counsel, allow a person to proceed with his case with no representation or with the assistance only of a "legal advisor."

Rather, this preliminary review of public defense conflicts of interest is intended to:

- identify the *practical issues* and *adverse impacts* that result from attorneys' ethical obligations to current and former clients and ethical issues that arise in representing some individuals who have significant mental health or social issues;
- identify the *practical issues* and *adverse impacts* that arise and result from legal representation provided by multiple attorneys;
- assess the extent and nature of the multiple representation "problem" – to the extent current information allows such an assessment; and
- provide recommendations to public defense administrators and providers for what steps should next be taken to improve the practical issues and adverse impacts of multiple representation of public defense clients.

The primary issues relating to public defense attorneys' conflicts of interest and multiple public defense attorneys appointed to represent an individual appear to be:

1. the financial cost to the state;
2. the adverse impact on public defense attorneys (both the former and future appointed attorneys);
3. the adverse impact on the court, prosecutors, and others (e.g., victims) involved primarily in the criminal and juvenile justice systems; and
4. the adverse impact on clients of public defense services.

An Illustration of the Conflicts “Problem”

To illustrate the above primary issues related to “conflicts,” consider the following example.

Tom Smith is 40 years old and in custody at the Multnomah County Detention Center. Mr. Smith is charged with a Ballot Measure 11 offense and violating his probations on multiple drug, theft and firearms convictions.

Mr. Smith's OJIN court records in Multnomah County alone date to 1985 (the year to which the Court back loaded records into OJIN). *Excluding* numerous infraction and violation cases, Mr. Smith has 56 closed felony, misdemeanor, domestic restraining order, and other domestic relations-related cases, including contempt for non-payment of child support. Multiple violations of the many probations that Mr. Smith has served are not counted in the court's OJIN records. Mr. Smith also is listed as a party in his son's Minor in Possession of Alcohol case and his parental rights were recently terminated by the court. Finally, Mr. Smith is known to be a “difficult” client to represent.

The former Mrs. Smith has a similar OJIN record and is the named victim in Mr. Smith's new Attempted Murder/Assault I case. Both Smiths have been appointed counsel by the court on their criminal and juvenile court cases over the years.

Although this example is not the norm with respect to clients of public defense services, it is this type of scenario that does occur (seemingly, more and more frequently) and brings to everyone's attention within the system the difficulties presented in appointing an attorney to represent the “Mr. Smiths” and appointing an attorney that will be able to stay on the case from start to finish. In Oregon, there is an emphasis on appointing counsel at the defendant's first appearance. This is good for Mr. Smith and for the court and prosecution. In a county with multiple felony contractors and contract offices which handle juvenile cases, as well as criminal cases, the challenge has been and continues to be how best to determine which attorney should be appointed to represent Mr. Smith – today, at 1:00 p.m.

The example of Mr. Smith is primarily based on a real case for which counsel recently was appointed. In this example, Multnomah County public defense contractors whose attorneys previously have been appointed to represent Mrs. Smith in her criminal and juvenile court matters and those whose attorneys have been previously appointed to represent the Smith children in juvenile court all have an actual conflict of interest in representing Mr. Smith on his new felony case. The victim of the alleged assault is Mrs. Smith.

Prior to November 2000, what likely would have occurred with respect to the appointment of counsel for Mr. Smith?

Prior to November 2000, it is most likely Metropolitan Public Defender Services (MPD) would have been appointed to represent Mr. Smith at his first court appearance. This is because MPD is the county's primary major felony contractor and because no review occurred prior to Mr. Smith first court appearance, with respect to "conflicts" that may readily be identified by a review of OJIN case records.

Because MPD had represented Mrs. Smith previously, MPD would identify that conflict after having been appointed and would then file a motion for substitution and appointment of another public defense attorney. The court's staff, at this point and assuming time and resources are available that day, may be able to identify that Contractor X previously represented the Smith children and as a result, avoids the court appointing that contractor to represent Mr. Smith. But the court's staff does not and cannot know that Contractor Y, which is "next in line" for consideration of appointment, currently represents the state's primary witness to the alleged assault. Contractor Y is appointed, discovers the conflict after interviewing Mr. Smith, and requests the court substitute new counsel.

Attorney Homan with Contractor Z is substituted by the court. Mr. Homan reviews the discovery that became available today; e.g., two to three weeks after Mr. Smith's first court appearance. A check for conflicts based upon information included in the discovery results in no conflicts being identified. Mr. Homan interviews Mr. Smith and returns to his office with the name of a witness not listed in the discovery. This witness is identified by Mr. Smith as his self-defense witness.

That witness is a former client of Contractor Z's office eight years ago, well before Mr. Homan was employed by Contractor Z. The attorney who represented the defense witness is no longer employed by Contractor Z. Attorney Homan has the file on the former client retrieved from the office's storage unit. He reviews the file and determines the former representation creates an actual conflict, under DR 5-105(C)(2) and the OSB's Formal Opinion NO. 2003-174. Historically, the most difficult of ethical conflict issues for public defense counsel have been related to this "former client representation" type of scenario.

But DR 5-105(D) does allow the attorney to continue his representation of Mr. Smith if both Mr. Smith and the former client consent to the representation after full disclosure. Even if Attorney Homan were to seek such consent, assume that Mr. Smith would not consent, not because of the disclosed conflict, but because Mr. Smith was not impressed with Attorney Homan, in part because he looks so young and has a 2001 bar number.

By now, four weeks have passed since Mr. Smith's grand jury indictment and there is a concern Mr. Smith may not consent to waiving "the 60-day rule." The court considers the third motion for substitution of counsel in this case. Mr. Smith now informs the court that he wishes to represent himself, as he knows well from experience that his court-appointed attorneys are "not real attorneys." He knows what happened that horrible evening and he simply wants to present his case to a jury. The court does not allow Mr. Smith to represent himself and appoints an attorney from the court's private bar list. That attorney files a motion for substitution two weeks later, based upon a "breakdown" in the attorney/client relationship.

This illustration, based on fact in again a relatively few but notable cases, could continue with even more attorneys being appointed or Mr. Smith eventually representing himself, with the assistance of a "legal advisor."

What actually occurred recently in Multnomah County with respect to the appointment of counsel for “Mr. Smith”?

Beginning in November 2000, MPD and the former Indigent Defense Services Division implemented an “appropriate case assignment” process within the MPD office. MPD staff reviews *felony* first appearance dockets the morning prior to the scheduled court appearances. Staff check OJIN to determine whether a defendant currently is represented by an appointed attorney. If that is the case, that attorney will be appointed on the new case, provided the contractor/attorney also takes felony appointments. One client, one attorney.

If a defendant is not currently represented by appointed counsel, MPD performs a conflicts check to determine whether (without benefit of formal discovery) MPD has an apparent conflict in being appointed to the case; e.g., OJIN and MPD records. In our example, this review would show that MPD previously has represented Mrs. Smith. To the extent the District Attorney’s office is able, information on co-defendants, victim names and prosecution witnesses may also be provided to MPD staff.

The goal of the “appropriate case assignment” process is to identify as many potential conflicts for MPD and other felony contractors as is humanly possible within a very limited time prior to defendants’ first court appearances.

In the recent *real* case on which the Mr. Smith illustration is fashioned, it appears MPD staff’s review of the defendant’s OJIN history (56 closed cases) also disclosed the fact that the vast majority of other contractors’ attorneys previously had represented the defendant. At the defendant’s first appearance in court later that day, the court appointed a non-contract, Private Bar attorney.

Of course, it remains to be seen whether the Private Bar attorney will remain on the case through its conclusion. But, the fact of having the “appropriate case assignment” process in place avoided the delay and disruptions resulting from many of the multiple substitutions that would have occurred prior to the implementation of MPD’s “appropriate case assignment” process four years ago.

The purpose of the Mr. Smith illustration and discussion is three-fold:

- to provide a sense of the nature of conflicts in public defense cases;
- to provide a broad sense of how conflict issues adversely impact public defense resources and providers, public defense clients, and the court system overall; and
- to explain one of a number of improvements already in place in Multnomah County that decreases the likelihood a client will have multiple attorneys appointed during the course of the client’s case.

Examples of How Competing Goals and Demands Affect Appointment and Substitution of Counsel

Contract and Private Bar Representation

In the Mr. Smith illustration, Private Bar counsel was first appointed to represent “Mr. Smith,”

based upon the appearance from OJIN records that all other contractors in Multnomah County likely would have a conflict of interest. Is that the answer? When in doubt about contractors' ethical ability to represent a client at the outset of appointing counsel, appoint Private Bar in every case? But even in Mr. Smith's case, if given the time (prior to actual appointment of counsel) and resources (e.g., available staff, state witness/co-defendant names), there likely may have been one of the ten law firms that are members of the two Multnomah County contract consortia that may have been able to accept Mr. Smith's case, without conflict.

Particularly in this time period when public defense caseloads are not those of the 1990s where there were more than sufficient numbers of cases available for all contractors and private bar, public defense administrators and contract providers want contractors to get as many cases as they possibly can. The two Multnomah County consortia were established for the very purpose of being able to accept appointment to cases in which MPD has a conflict. Consortia contracts are intended to decrease the need for Private Bar, hourly-paid attorneys.

But then, State Bar Task Forces and others have long advocated for the maintenance of a strong (well-trained and experienced) Private Bar component of public defense as a matter of good policy. If having a strong Private Bar is not given priority, who will handle the cases that continue to have substantial multiple conflicts?

The answer by some may be that contract attorneys from neighboring counties be appointed to such, again relatively rare, cases. But with the workload demands of most existing contractors and court docket issues in many courts, appointing out-of-county contract attorneys may not be the best solution, unless there is no other solution.

The goals of immediate appointment of counsel and continuous representation by appointed counsel (no periods of time where a client is unrepresented) and the goal of avoiding multiple appointments due to conflicts

If a person who is determined financially eligible for appointed counsel at that person's first court appearance could wait to learn who his specific attorney will be until the prosecution provides discovery, conflict appointments would decrease. However, the competing goals of best ensuring a public defense client actually has early contact with his attorney and makes his future court appearances is better attained if the client leaves his first court appearance having met his appointed attorney. At the first court appearance, at least preliminary legal advice and contact information can be exchanged. But by appointing a specific contractor or attorney at the first appearance, the potential for a conflict withdrawal of that public defense provider is greater than if counsel could be appointed after for example, preliminary discovery is available.

By raising these competing demands, I wish to make it clear that I am not suggesting or recommending the initial appointment of counsel, particularly for clients in custody, be delayed to sometime after first appearance. My point is simply that it is important to identify what are often different and competing demands and goals within the system that impact the potential for conflict substitutions of appointed counsel.

With respect to the appointment of counsel at the *outset* of a case, ORS 135.045 and 135.050 and constitutional mandates support appointment of a specific contractor or attorney immediately. In addition, the practical side effects of delaying appointment of counsel, such as the possible loss of a critical defense witness, support appointment at the first court appearance. However, for cases in which counsel has been appointed and there is a need to substitute new counsel, one may consider delaying the new appointment of counsel for what likely would be no more than 24 hours in order that other contractors or Private Bar being

considered by the court for substitution could review discovery and conduct a conflicts check prior to the court actually ordering appointment of new counsel. A trade off with this approach is that there may be out-of-custody clients who do not re-contact the court or who will be required to make yet another court appearance to learn who their new attorney is.

The Need to Retain Experienced, Quality Public Defense Attorneys and Firms

Another set of competing goals is minimizing the number of instances where multiple public defense attorneys are appointed to a case and retaining experienced public defense providers. More time and experience means more conflicts for individual attorneys and firms. Particularly with the issue of “former client” conflicts, public defender and law firm offices that have existed for decades are “ripe” for conflicts and withdrawals, particularly under existing Disciplinary Rules. Rather than recommend consideration be given to “shutting down” such offices and seeking out new attorneys and firms, I am pleased to discuss below that the historical issue and impact of “former client” conflicts will likely be mitigated with the adoption of new disciplinary rules, effective January 1, 2005.

Retention of Client Files

A final example of competing goals or demands that impact the number of instances where substitution of appointed counsel is necessary involves retention of public defense files. Clients, the Oregon State Bar, the Office of Public Defense Services under the contract terms, and subsequent lawyers for the client all want clients’ files to be preserved – for probation violation proceedings, and state and federal postconviction relief proceedings. But keeping files for extended periods of time creates often significant ethical issues. As is the case with the experienced attorneys and offices discussed above, the new disciplinary rules will likely lessen the adverse impact of retaining client files.

It also needs to be noted that lack of adequate resources within public defense providers’ offices, prosecution offices, and the courts impact the number of cases in which appointed counsel will need to be substituted and the time within which conflicts can be determined. Both result in delays in the resolution of a case and generally adversely impact the client and all others within the justice system. If the District Attorney’s office cannot provide discovery to defense counsel in a timely manner, there is a greater likelihood for a greater number of and more delay in substitutions of counsel. If a public defense office has insufficient resources to timely check for conflicts or to maintain regular contact with clients, there is a greater likelihood for a greater number of and more delay in substitutions of counsel. If a court’s docket is such that cases are repeatedly set over, attorney/client relationships can deteriorate or clients are more likely to eventually fail to appear in court, resulting in issuance of a bench warrant and beginning the appointment of counsel process anew months or years later.

Primary Reasons for Withdrawal by Appointed Counsel Due to a Conflict of Interest

- Current representation of two clients in any matters when such representation would result in an actual or likely conflict
- Prior representation by attorney or office of state’s witness under certain circumstances

- Prior representation by attorney or office of a defense witness under certain circumstances
- Prior representation by attorney or office of co-defendant or other party (e.g., juvenile case) under certain circumstances
- Breakdown of the attorney/client relationship

Representation of Multiple Current Clients

The first listed reason for withdrawal by appointed counsel due to a conflict of interest is best illustrated by a situation where two co-defendants are indicted and separate counsel is appointed to represent each of the co-defendants. The county's primary felony contractor is appointed to represent one of the co-defendants. Two months later and perhaps as a result of information provided to the prosecution by one of the co-defendants with the advice of counsel, a third co-defendant is indicted. Unless co-defendant #3's charging instrument or OJIN for the brand new case number indicates the "tie" between the earlier two cases and the new case, it is likely the county's primary felony contractor will be appointed to represent co-defendant #3. In reality, these conflict situations are rare.

The more frequent situation where one encounters the "current clients" representation conflict issue is in juvenile dependency cases. It may appear tempting, at least fiscally, for a court to appoint one attorney to represent both the mother and the father in a dependency proceeding. Even if there appears, at least at the outset of the case, to be no "actual conflict," there often will be a "likely conflict of interest" under DR 5-105(A)(2) of the Oregon Code of Professional Responsibility (ORCP).

Under DR 5-105(F), an attorney may represent multiple current clients in instances where there is no actual conflict, but there is a likely conflict, if each client consents to the multiple representation after full disclosure. Should there be independent counsel appointed to represent mother and father to ensure full disclosure and knowing and voluntary consent? What if a likely conflict later becomes an actual conflict, the court then will be requested to appoint two new attorneys, one each for the mother and father. In an effort to save the cost of appointing individual counsel for mother and for father in a proceeding that ultimately may result in their parental rights being terminated, a court may wind up appointing a total of three attorneys to represent the parents versus having appointed two separate attorneys at the outset of the case.

I believe the "best practice" with respect to cases in which there is a potential for current client conflicts (co-defendants, multiple parties) is for the court to appoint separate counsel at the beginning of the case. Every effort should be made to identify such multiple party cases at their outset.

The following is an excellent example of "the system" talking to and working together to avoid public defense conflicts. In one Racketeering case involving, I believe, 18 reportedly gang-affiliated co-defendants (almost all of whom had previously been represented by appointed counsel), the Multnomah County District Attorney's office contacted both the court and the Indigent Defense Services Division well in advance of serving the arrest warrants. This allowed all possible conflicts checks (which were very time consuming) to be made by court and IDSD staff to best ensure "appropriate assignment" of attorneys originally appointed to represent the co-defendants.

Former Client Conflicts, With Emphasis on Instances Where the Former Client Was Represented by Counsel No Longer With a Firm (Contractor) and the Closed Case File is in Storage

With respect to the next three reasons listed above for withdrawal of appointed counsel, Paul Levy, Attorney Trainer for MPD, recently wrote:

“Without a doubt, sorting out conflicts of interest is the most frequently encountered ethical inquiry criminal defense lawyers make. But it’s an inquiry that we very often get wrong, at tremendous cost to our firms, the state’s public defense system, local courts and jails, and especially our clients. And we get it wrong, I submit, because we’re afraid to do the right thing.

* * * * *

Consider how often you have heard criminal defense attorneys tell a judge they must withdraw from representation because ‘our firm previously represented a witness,’ and that request is allowed without further inquiry or explanation.”

The Oregon Defense Attorney, September/October 2004.

Paul, whom I view as one of the state’s experts on the issue of former client conflicts, is of course correct. During a visit of Multnomah County’s Criminal Procedure Court (CPC) to observe the handling of substitution of counsel motions in misdemeanor cases, I overheard an attorney inform his client he needed the court to appoint new counsel, because his office previously represented a witness in the client’s case. The attorney later informed me no review of the former client’s file had been done. His motion to withdraw was simply based upon a check of state’s witnesses against the office’s database of former clients. Of course, if the attorney had reviewed the former client’s file, there may have been a clear factual basis to request substitution of counsel. Or, there may not have been a basis to support the motion.

One of the recommendations included in the January 12, 2001 addendum to the OSB’s Indigent Defense Task Force #3’s report, included at my and others’ requests that the OSB consider a modification of DR 5-105 in regard to the “firm unit rule” for former client conflicts. The Legal Ethics Committee considered the recommendation and decided in 2001 to include the discussion and consideration of a change in the “firm unit rule” as a part of its then-new Model Rules of Professional Conduct review.

As stated at the beginning of this paper, a detailed review and discussion of the relevant Oregon Code of Professional Responsibility provisions with respect to conflicts of interest is outside the scope of this paper. This is due in significant part to the fine work done on the issues by individuals like Paul Levy. In addition to the article previously referenced, Paul’s written materials, “Ethical Minefields: The Changing Landscape of Client Conflict of Interest Analysis,” prepared for the May 1, 2004 OCDLA Trial Preparation and Investigation Conference are an excellent resource.

Based upon my review, I agree with Paul that at least some of the ethical “minefields” appear to have been destroyed with respect to former client conflicts by the adoption of Rule 1.10(b) of the Oregon Rules of Professional Conduct (ORPC).

Under current, soon to be replaced, DR 5-105(C) and DR 5-105(J), an attorney appointed to represent a client must pull a former client’s file to determine whether the attorney has a conflict

of interest in representing the new client. The question the attorney then must answer is: did the former representation provide the attorney confidential information about the former client that is capable of adverse use on behalf of the current client? If the attorney is the same attorney who represented the former client, he may know the answer to the question from memory or from reviewing the former client's file. Or if the attorney who represented the former client is another attorney in the office, the attorney with the new case can consult with that attorney and review the former client's file.

But what if the attorney who represented the former client is no longer employed with the office? Or what if the attorney who represented the former client is still employed at the office and has no memory of the former client's case? And with respect to the latter question, does it matter at all whether the former client's file remains on-site at the law firm's office or the file has been stored (often years ago) at an off-site storage facility? Under DR 5-105(C), DR 5-105(J) and OSB Formal Opinion NO. 2003-174, the newly appointed attorney must pull the closed file, unless the file "is no longer at the firm."

The question of whether a file is "no longer at the firm" if the file long ago has been archived for example, in the basement of the law office's building or at an off-site storage location is not addressed in the formal opinion. An email reply to a public defender director who directly asked this question of the OSB's General Counsel staff upon receiving a copy of the formal opinion in late 2003 suggests storing a file off-site does not mean the file is no longer at the firm. Similarly, OSB General Counsel George Riemer, in an Informal Written Advisory Ethics Opinion (November 12, 2003) to Metropolitan Public Defender Services states that even when the former client's lawyer is no longer in the office, "...it is important for you to understand that 'sealing' the file and putting it in storage does not alter the fact that any information in your office is imputed to everyone, hence the vicarious disqualification ('firm unit rule') of DR 5-105(G)."

Given the opinion and the above responses from the Bar, the attorney with the new case is required to retrieve and review the file (wherever the file may be or for how long) and even if the attorney who represented the former client is no longer employed at the law firm, the attorney must withdraw from the case if the file review discloses a conflict of interest.

All Oregon lawyers will be governed by the newly adopted ORPC, including public defense counsel, effective January 1, 2005.

A comparison of Rule 1.10 (ORPC) and DR 5-105(C) and (J) is provided on the following page.

**Current DR 5-105 Conflicts of Interest:
Former and Current Clients**

* * * * *

(C) Former Client Conflicts - Prohibition. Except as permitted by DR 5-105(D), a lawyer who has represented a client in a matter shall not subsequently represent another client in the same or a significantly related matter when the interests of the current and former clients are in actual or likely conflict. Matters are significantly related if either:

(1) Representation of the present client in the subsequent matter would, or would likely, inflict injury or damage upon the former client in connection with any proceeding, claim, controversy, transaction, investigation, charge, accusation, arrest or other particular matter in which the lawyer previously represented the former client; or

(2) Representation of the former client provided the lawyer with confidences or secrets as defined in DR 4-101(A), the use of which would, or would likely, inflict injury or damage upon the former client in the course of the subsequent matter.

* * * * *

(J) Effect of a Lawyer's Departure. When a lawyer has terminated an association with a firm, **the firm** is not prohibited by reason of the formerly associated lawyer's work from thereafter representing a person in a matter adverse to a client that was represented by the formerly associated lawyer unless **one or more of the lawyers [any lawyer]** remaining at the firm would be disqualified pursuant to DR 5-105(C) **or unless the closed file or other confidential information remains at the firm** and consent is not obtained pursuant to DR 5-105(D).

(Emphasis added)

**Rule 1.9 Duties to Former Clients
(effective January 1, 2005)**

* * * * *

(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:

(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.

Rule 1.10 Imputation of Conflicts of Interest; Screening (effective January 1, 2005)

* * * * *

(B) When a lawyer has terminated an association with a firm, **the firm** is not prohibited from thereafter representing a person with interests **materially** adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) **any lawyer remaining in the firm has information protected** by Rules 1.6 and 1.9(c) that is material to the matter.

(Emphasis added)

Of greatest significance, in my opinion, is the fact that new Rule 1.10 no longer references “closed files” as does DR 5-105(J). In addition, the new rule applies only to “any lawyer remaining in the firm” as opposed to DR 5-105(J) which applies to the firm as a whole. The focus appears to shift from lawyers and files with protected information to simply lawyers who remain employed at the firm who have protected information.

In response to an email from Paul Levy, Peter Jarvis, an editor of the OSB’s *The Ethical Oregon Lawyer* and expert on conflicts analysis, Mr. Jarvis submits that “the shift from the ‘firm’ to ‘any lawyer’ makes no sense if a firm can be knocked out by dead files that no one still there [at the office] has ever seen.” He goes on to say “but even if ... I am reading too much into the language of the new rule, the worst that could be said is that the new rule is arguable ambiguous.”

Further review and consultation with OSB General Counsel is warranted. But it appears that the new rule may no longer require that archived files be pulled and reviewed. It also appears that any attorney at a law firm, even the attorney who represented the former client, may continue representation in the new case in which the former client is a witness, if the attorney or another attorney in the office does not remember any protected information obtained from the former representation.

Cases in Which an Attorney/Client Relationship “Fails to Succeed” – Sometimes Despite Multiple Attorney Appointments

It is my belief that the most significant issue with respect to public defense conflicts of interests and substitution of appointed counsel is not with the cases where a contractor discovers a conflict, for example when discovery is received. But rather the most significant issue and challenge for courts and public defense administrators and providers involves cases where there are multiple, sequential appointments. These cases range from the most serious to the least serious of cases; e.g., from Measure 11 or Termination of Parental Rights cases to Criminal Trespass II cases involving homeless individuals.

Although relatively rare in comparison to the total public defense caseload, cases in which multiple, sequential attorneys are appointed tend to involve clients who have mental health or other social issues (e.g., distrust of government including “government attorneys”). They may also occur in instances where counsel is unable to (e.g., due to workload) or fails to establish a good, working attorney/client relationship early on and maintain that relationship.

The underlying impetus for the 2003 legislation that the PDSC adopt substitution of counsel policies and the amendment of relevant statutes that courts “...may not substitute one appointed counsel for another except pursuant to the PDSC’s policy” was based upon concerns raised about cases in which multiple attorneys are appointed, not the case where one counsel is substituted because a conflict is identified when discovery is received.

One recent misdemeanor case in Multnomah County in which a total of four public defense attorneys were appointed involved the son of an individual who has been before the court numerous times since the early 1980s and has been represented by numerous attorneys. Part of the attorneys’ difficulties in establishing and maintaining an attorney/client relationship with their client involved the client’s father.

Courts, correctly, wish to have counsel available to every defendant who is financially eligible and does not waive that constitutional right. This is so because it is the court’s responsibility, but also because a *pro se* individual is at substantial risk without counsel and frequently

demands more of the court's resources. However, at what point does a court refuse to appoint new counsel? After two attorneys have been appointed and the court is assured that the breakdown of the attorney/client relationships is not attributable to counsel? After four attorneys? And what about appointment of a "legal advisor" versus an attorney, which has been done in cases as serious as intentional murder?

Whenever contacted by a court in the past with a case in which multiple attorneys already had been withdrawn due to a "breakdown" in the attorney/client privilege, I would suggest the court allow one last substitution, making it clear to the client that this attorney would be his last. In addition, we would attempt to locate and appoint an attorney who without question is well qualified and who has the time to devote to the case, to be compensated on an hourly rate basis. This seems to be the best approach given all the circumstances, but is not something that can be accomplished in very many cases.

Historical and Present Public Defense Model Contract Provisions Re: Withdrawal of Counsel in Relation to Case Credit (Financial Impact of Withdrawals)

In addition to the disruption in representation of a public defense client and the added delay that generally occurs with substitution of counsel, substitutions (to the extent they might otherwise be avoided) are costly in public defense resources, both human and financial. The following chart provides a history of public defense contract provisions governing the financial impact on a public defense contractor, if contract counsel withdraws from a case.

Time Period	Public Defense Contract Provisions Regarding Withdrawal and Case Credit
7/1/83-6/30/85	If motion to withdraw is granted within one judicial day, contractor will accept on that day a case of equal value. If motion is granted within ten judicial days on a traffic or misdemeanor case, no case credit. If motion is granted within five judicial days in another other case type, no case credit
7/1/85-6/30/87	No credit for case if withdrawal occurs within two weeks of appointment; however, court may, in its discretion, approve credit up to the full unit value of the case if the court finds the degree of services already rendered in the case should merit credit. Full credit for case for withdrawals approved by court more than two weeks after appointment, except in murder cases where the court will determine the appropriate number of units earned based on services rendered, up to the total murder unit value.
8/1/87-6/30/88	No credit or other payment for a case where a request for withdrawal is filed within 14 calendar days of appointment, unless, upon request, the court otherwise expressly orders. For cases where a request is filed more than 14 days after appointment, the contractor who withdrew and the contractor (or private bar attorneys) who was substituted onto the case submits hourly fee certifications to the court. At the conclusion of the case, the court determines each contractors' pro-rata share of credit for one case based on the number of hours each contractor expended on the case; e.g., if each contractor expended 3 hours, each contractor receives one-half case credit.

7/1/88-6/30/89	If contractor withdraws and reassignment to other appointed counsel outside contractor's group is necessary, no case credit, but such cases will be reported as assigned. Murder cases are counted on a "credited" basis, so if withdraw, no credit. All other case obligations are on an "assigned" basis, so if withdraw on a non-murder case that case "counts" as a case under the contractor's caseload obligation. No withdrawal within 180 days of loss of contact or issuance of bench warrant. Contractor keeps credit for these cases.
7/1/89-6/30/90	Except for cases in which contractor withdraws due to loss of contact or issuance of a bench warrant after 180 days have passed, contractor receives no case credit (i.e., loses case credit) for all cases in which contractor withdraws where reassignment to another appointed counsel outside the contractor's group is necessary.
7/1/90-12/31/91	No loss of credit for cases in which contractor withdraws. Contracts were negotiated to factor in historical withdrawal rates. For example, if a contractor during the previous contract period was compensated \$300,000 per year for 1,000 credited cases (\$300 per case) and if contractor's withdrawal rate during the previous contract (where cases with withdrawals except for loss of contact/bench warrants were subtracted out of previously reported appointed cases) was 10% (100 cases), then contractor's base caseload was adjusted to 1,100 cases and compensation for those 1,100 cases remained at \$300,000.
1/1/92-12/31/93	Loss of case credit for cases in which counsel is withdrawn due to determination by court the client is not financially eligible for appointed counsel or client withdraws request for appointed counsel prior to completion of financial eligibility verification. Addition of "payback cases." If contractor withdraws from a "payback case" (generally, murder cases), contractor does not receive a payback case credit for that appointment. For Consortium contractors only, only one contract case credit for cases where another consortium attorney is substituted for another consortium attorney.
1/1/94-present	No significant changes with respect to withdrawals/case credits, except the following: 1. Loss of credit for an appointed case if contractor's attorney is subsequently retained on that case; and 2. "Payback cases" became "complex cases" and a complex case was defined as a case where the case value is \$1,000 or more. Withdrawal from a complex case changes the original case credit to "other."

For much of the 1980s, contract provisions ranged from loss of credit for cases in which contract counsel withdrew within certain periods of time (one, two, five judicial days, two weeks, 14 calendar days) to sharing of credit with other contractors or Private Bar attorneys. In 1988, contractors were allowed to keep credit for cases in which counsel withdrew, except murder cases. And in 1989 contracts, cases in which counsel withdrew resulted in loss of that case credit, with an exception only for loss of contact/bench warrant withdrawals.

The record keeping and reconciliation efforts necessitated by the provisions that based the "credit" or "no credit" (more properly, subtraction of credit previously reported to the court or IDSD) determination on the timing of a motion to withdraw were significant. In addition, such provisions at least created the perception that an attorney had a financial incentive to **not** check for conflicts in a timely manner. The era of sharing credits between counsel appointed in a single case was extremely time consuming for courts and contractors, as well.

The general rule of loss of all credit if counsel withdrew (regardless of the reason) that was adopted in 1989 was viewed as unfair by contractors. At the same time, IDSD was too dependent at that time, in my view, on relying on contractors to report to the office "withdrawal" cases, to be subtracted from appointed cases reported to the office often in previous months.

Beginning in 1990 and continuing today, contractors retain case credit for cases in which no attorney within the contract is able to represent the client. Consortium contractors do not receive additional credit for cases substituted within consortium members. As stated in the chart, the conversion from “loss of credit” in 1989-90 in the vast majority of withdrawal cases to “keep the credit” in the vast majority of cases was accomplished by determining historical withdrawal rates and adding those cases to the contractor’s quota. No additional compensation was provided for what appeared on paper to be an increase in quota. Basically, the contractors were paid the same amount of money for the same workload and the bookkeeping and adjustments previously required were no longer necessary.

Under this approach however there is no financial disincentive for an attorney to withdraw from a case – which can be viewed as both good and bad. This is an area that I recommend be reviewed by the work group I recommend at the conclusion of this paper.

How Big is the Conflicts/Withdrawal “Problem”?

One of the largest public defense contractors’ conflict data for CY 2004 to date indicates a projected conflict/withdrawal rate of 6.9% of cases for the year. That conflict rate is higher than other contractors based upon the fact the office has been in existence for decades and is a public defender office.

For counties with consortia contracts, the conflicts rate – cases in which counsel outside the consortium must be appointed – is substantially less. For example, the number of private bar appointments in Clackamas, Linn, Union, Wallowa Counties for FYE 2003 was zero. Private bar appointments in Lincoln, Josephine, Klamath, Lake, Douglas, Coos, Curry, Umatilla and Morrow Counties was less than one percent.

If the new “former client conflict” rule is as suspected less likely to generate conflict withdraws, a decrease in the financial part of the conflicts problem will occur. As alluded to elsewhere, there also are “system-related” methods to reduce the number of conflict/substitution cases (e.g., early discovery and assurance of early conflicts checks performed by public defense providers). Collectively, the system needs to work toward decreasing the reasons why public defense counsel discovers an ethical reason to withdraw and seek substitution in public defense cases.

No Centralized, Good Data on Cases from Which Public Defense Counsel Withdraws

In Multnomah County, for example, one generally can assume that any case where private bar, non-contract counsel is appointed is a case from which a contractor or multiple contractors have withdrawn. The following chart displays private bar appointment data for Multnomah County for the past three years.

Multnomah County Private Bar (PB) Cases
(not the same as *all* conflict cases)

Case Type	FYE 2002		FYE 2003		FYE 2004	
	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type
Misdemeanor	402	3.4%	380	3.6%	206	1.6%
Probation Violation	54	0.8%	29	0.6%	7	0.2%

Juvenile	303	2.1%	263	1.9%	357	2.7%
Other *	108	4.6%	42	2.0%	30	1.7%
Total	1,270	2.9%	909	2.4%	680	1.7%

* Other case types include postconviction relief, habeas corpus, civil commitment, contempt, extradition

Total public defense caseloads for Multnomah County for FYE 2002, 2003 and 2004, respectively: 44,356; 38,008; and 40,824.

However, the Private Bar number of cases does not reflect ALL of the cases in which appointed counsel has withdrawn. For example, if MPD withdraws and the Portland Defense Consortium is substituted on the case, there is no current electronic or OJIN-query system that readily captures the number of conflict substitutions that occur between Multnomah County contractors or the nature of the conflicts.

Further complicating any analysis on a county-by-county or statewide basis, one need only look at Private Bar data from Lane County.

Lane County Private Bar (PB) Cases
(not all PB cases are conflict cases)

Case Type	FYE 2002		FYE 2003		FYE 2004	
	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type	# PB Cases	PB % of County's Total # of Cases for Case Type
Felony	1691	38.9%	1451	40.4%	1139	26.0%
Misdemeanor	925	31.3%	657	22.6%	435	14.8%
Probation Viol.	3	0.2%	4	0.3%	114	5.6%
Juvenile	39	0.7%	53	0.9%	41	0.7%
Other *	189	42.2%	197	41.2%	138	30.8%
Total	2853	18.4%	2366	16.6%	1869	11.9%

* Other case types include postconviction relief, habeas corpus, civil commitment, contempt, extradition

NOTES:

1. Lane PD is the only contractor that handles criminal cases and probation violations. Therefore, all cases in which Lane PD has a conflict are assigned to Private Bar (versus another contractor, as is the case in Multnomah County).
2. Until June 30, 2004, Lane PD did not necessarily accept case appointments every single court day. As a result, some of the Private Bar cases included above are **not** cases in which Lane PD had a conflict. This is different from Multnomah County Private Bar case numbers where close to 100% of private bar appointments are the result of contractors' conflicts.
3. A consortium of attorneys under contract also handle Juvenile cases. Private bar appointments are limited to those cases neither Lane PD nor the consortium can handle.

In Lane County, unlike Multnomah County, it is not a safe assumption that the vast majority of Private Bar appointments were conflicts cases from which the Lane Public Defender's office withdrew.

My recommendations include two that address the critical issue of the current lack of good data that is needed to monitor attorney and contractor withdrawals and compare withdrawal rates between contractors and between counties. The latter comparative analysis would allow better

assessments of obstacles (e.g., late discovery) and “best practices” with respect to handling the issue of conflicts and substitution of counsel.

Systems in Place in Multnomah County and Lane County to Identify Conflicts Early On and Efficiently Handle Substitution of Counsel

The Lane County public defender’s office has an effective early and ongoing conflicts review process in place. Prior to court first appearances, the public defender’s staff checks the court docket prior to the attorney attending court. Any apparent conflicts are identified prior to court. At first appearances, the attorney from Lane PD has a computer in the courtroom that is linked to the office computer. Checks for conflicts based upon new information provided in the charging instrument or otherwise can be made immediately in the court room.

In addition to the “appropriate case assignment” process performed by MPD in Multnomah County since 2000, the court has made, in my estimation, every effort to establish the best possible system for the handling of motions for substitution of counsel. Key aspects of the court’s policy include the following.

- All motions for substitution of counsel in felony cases where the defendant is in custody and the motion is scheduled more than 21 days after the date of arrest and there is no signed waiver by the defendant of the 60-day rule are scheduled to be heard by Chief Criminal Judge Julie Frantz. Particularly in cases involving an allegation the attorney/client relationship is irreparably damaged, the assignment of such motions to one judge allows observation of attorneys who more frequently than others are involved in such cases, and allows continuity with respect to multiple requests made by a client for new counsel.
- Attorneys requesting to be withdrawn from a case are required to provide the court with available information regarding other individual attorneys or firms which either currently or previously represented any of the alleged victims or witnesses, co-defendants or other potential adverse parties, to avoid creating a subsequent actual conflict.
- Attorneys requesting to be withdrawn must provide a copy of the attorney’s file materials to the court at the court appearance or no later than 9 a.m. the following day, allowing substituted counsel to immediately review the case file to determine any conflicts that attorney may have immediately.

One may conclude that there are more questions than answers or more problems than possible solutions in the area of better addressing conflicts of interests in public defense cases. However, I can attest to the fact that many improvements have occurred (e.g., current Multnomah and Lane County procedures adopted in the 1990s and 2000s and the addition of a five-office felony consortium in Portland in 2002). As a clear example of progress, the number of private bar appointments in Multnomah County has decreased almost 50% since FYE 2002.

Many more improvements are within reach, given proper study and resources.

Recommendations for Improvements in the Handling of Public Defense Conflicts of Interest

1. A detailed review of new Rules 1.9 and 1.10 (ORPC), regarding representation of clients in

cases that involve a former client of that office, should be undertaken, including further consultation with the OSB and a review of:

- a. case law from other jurisdictions that have the Model Rules of Professional Conduct – including state appellate and postconviction relief and federal Habeas Corpus cases addressing related effective representation of counsel issues;
 - b. other “Model Rule” jurisdictions’ Bar Opinions and any available information on disciplinary actions related to former client conflicts; and
 - c. Restatement of Law: The Law Governing Lawyers, Conflicts of Interest.
2. Although Paul Levy’s article in OCDLA’s publication has alerted public defense counsel of the likely change in former client conflicts requirements, the fruits of the detailed review provided above should be communicated to all public defense attorneys.
 3. Attachment #1 to this paper is a draft survey I recommend be distributed to public defense contractors for completion. The survey is intended to gather “benchmark” data on withdrawals of counsel, as well as information from contractors on their local practices and environments relating to conflicts. With the likelihood that conflicts should decrease under new Rule 1.10, baseline data is critical to measure whether that occurs and to what extent that occurs.
 4. Consider requiring contractors provide reports to the Contract and Business Services Division on cases from which contract counsel withdraws. The reports would be similar to the report included at the conclusion of the attached draft survey, except consortia contractors would report only cases in which counsel outside the consortium was required for substitution. For a number of contractors I have talked to about their databases, such a requirement may likely result in a *de minimis* increase in cost or time to the contractor, particularly if for example, information is reported on a periodic basis.
 5. Consider requiring Private Bar attorneys to provide additional information for cases in which they withdraw, including the date the withdrawal was granted and the reason for requesting counsel be withdrawn from the case. Private bar attorneys previously were required to provide this additional information on their fee statements.
 6. Establish a “conflicts” work group comprised of public defense contractor staff, one private bar attorney who routinely is appointed to conflict cases, and CBS staff (I have recommendations with respect to specific individuals).

Among the issues for the workgroup’s review and recommendations, I suggest the following.

- a. Technological and human resource improvements that likely will decrease the number of instances in which counsel is substituted
 - within contractors’ offices (e.g., more staff resources at MPD in order that the morning check for appropriate case assignment includes more than just pending cases where counsel already is appointed or one court reports an inability to reach a live person when trying to reach a contractor to best determine whether that contractor has a conflict in accepting a substituted case);
 - the courts (e.g., possible OJIN improvements); and

- prosecutors' offices (for example, potential for electronic provision of discovery speeding the identification of conflicts and possibly reducing current discovery costs of approximately \$950,000 per year).
- b. Other contractor staff issues that would better ensure:
- early and regular client contact (phone, video and in person)
 - early review of discovery as it is received by the office, as well as information provided by any defense investigator; and
 - early interview of the client and defense witnesses.
- c. Possible methods to obtain court dockets sooner, particularly in misdemeanor, out-of-custody cases for "appropriate case assignment" review similar to that currently done by MPD.
- d. The possibility and efficacy of contracting with an attorney to serve as the centralized substitution review attorney for Multnomah County. This person would review motions for substitution prior to submission to the court, maintain a database with respect to conflicts, evaluate data and trends based upon the central database, and coordinate substitutions in an effort to better determine which contractor/attorney ought to be substituted.
- e. The relative advantages and disadvantages of delaying (for no more than 24 hours and only when necessary) the appointment of substituted counsel in order that contractors or Private Bar attorneys being considered by the court for substitution are able to conduct a conflicts check prior to the court actually ordering appointment of new counsel.
- f. The effectiveness of the PDSC's substitution of counsel policy.
- g. Changes in public defense model contract terms, including but certainly not limited to:
- differential payments for contract offices where the attorney is substituted onto an in-custody felony case more than 40 (or some other period of time) days after first appearance;
 - contractors lose case credit if a motion for substitution of counsel is filed more than five (or three?) court days after discovery disclosing the conflict is received by the attorney's office; i.e, contractor keeps case credit if motion is filed timely; and
 - contractors lose case credit if counsel seeks to withdraw more than 30 (21?) days after appointment, unless counsel includes in the motion information supporting the fact the conflict could not reasonably have been identified sooner.

Second Draft (11/9/04)
Public Defense Contractor Survey
Conflict/Withdrawal Cases

The following survey is a component of the Office of Public Defense Services' (OPDS) review of service delivery in Multnomah County. Please complete and return the survey to _____ (_____) by _____, 2004.

Contractor: _____

Name of Person(s) Completing this Survey: _____

1. At first appearance, how are co-defendants (or multiple parties in juvenile cases) identified (for example, same charging instrument/petition or sequential case numbers)?
2. What, if any, changes would better help identify inherent, clear conflicts (such as co-defendants) at first appearances?
3. How frequently is a case appointed under your contract where the client already is represented by a different contractor in another pending case?
 - rarely (less than twice a month)
 - sometimes (2-5 times a month)
 - frequently (6 or more times a month)

Comments:

4. Prior to the appointment of a contractor/attorney, what (if any) methods are in place to identify whether a person requesting appointment of counsel:
 - a. already is represented by a contractor in another pending case?
 - b. previously has been represented by a contract attorney?

5. How important is it that one contractor/attorney represent a defendant or probationer on all pending cases?

6. How important is it that one contractor/attorney represent a child if the child is subject to both dependency and delinquency proceedings?

7. What advantages and disadvantages are there (to the client and to appointed counsel) of having the attorney who originally represented the client appointed to represent the client on a probation violation matter?

Advantages:

Disadvantages:

8. If a client is appointed to contractor/attorney and it is learned the client is already represented by another contractor/attorney, what is done?

a. One attorney contacts the other attorney and a motion for substitution is submitted so the client is represented by one attorney?

- Always
- Only if: _____
- Rarely

Comments:

b. Each attorney remains on each case?

- Always
- Only if: _____
- Rarely

Comments:

9. Describe the process by which the FIRST check for conflicts is made.

a. When is the first check made?

- Prior to first appearance
- Immediately upon appointment (within one day)
- More than one day after appointment

Comments:

b. Who makes the first conflicts check and based on what information?

- non-attorney staff with benefit only of the charging instrument (or petition), OJIN and contractor's records re: former/current clients;
- non-attorney staff with benefit **also** of police reports or some other at least preliminary discovery (e.g., witness names);
- the assigned attorney with benefit only of the charging instrument (or petition), OJIN and contractor's records re: former/current clients;
- the assigned attorney with benefit **also** of police reports or some other at least preliminary discovery (e.g., witness names);
- the assigned attorney only after review of discovery and an interview with the client; OR
- Other (please describe):

Comments:

10. After the initial conflicts screening, appointed counsel discovers contractor's office previously represented a state's witness in the present case.

Describe how the attorney/contractor determines whether the present attorney will withdraw from the present representation or not?

What if any difference does it make if:

a. the file(s) for the prior representation is no longer available at the immediate office location?

- b. the attorney who previously represented the witness is no longer employed by contractor/a consortium office?

11. Is contractor's former and present client information maintained in a database?

- Yes
- No

If yes,

- a. what data is maintained; e.g., client name, DOB, case number, case type, attorney's name, withdrawal?
- b. data is available back to _____ (year)

What improvements in the database would improve contractor's ability to screen for conflicts?

12. Discovery – when generally is (at least initial) discovery received by appointed counsel for the following types of cases?

Drug Felony cases:

Property Felony cases:

Person Felony cases:

Misdemeanor cases:

Juvenile Delinquency cases:

Juvenile Dependency cases:

13. Generally, closed case files are archived (moved to a storage area outside the attorney's immediate office) on the following schedule:

Felony cases:

Misdemeanor cases:

Probation Violation cases:

Delinquency cases:

Dependency/TPR cases:

14. Please complete the information requested on the following page.

Code	Description of Reason
PWD	Attorney or Contractor's other attorney withdrew from representation of client in the past (for whatever reason)
WTA	Attorney previously represented a witness in the present case
WTO	Other attorney within or previously within Contractor's (or consortium member's) office previously represented a witness in the present case
CDA	Attorney previously represented a co-defendant in the present case
CDO	Other attorney within or previously within Contractor's (or consortium member's) office previously represented a co-defendant in the present case
CON	Ethical conflict of interest – only if a conflict other than WTA, WTO, CDA or CDO; e.g., “breakdown” in attorney/client relationship
CLN	Client's request – no clear ethical conflict
ONE	Withdrew so client represented by one (or at least one less) attorney on pending cases
RET	Client retained counsel
INL	Court withdrew counsel based on determination client not financially eligible for appointed counsel
LOS	Loss of contact with client or client failed to appear
OTH	A reason other than those listed above – please describe the nature of conflict, without disclosing any confidences or secrets, in Column #8

Addendum to the Report of the Conflicts Work Group
Further Discussion of *State v. Estacio*
and
Two Matters Raised at the June 16, 2005 PDSC Meeting

This addendum to the Report of the Conflicts Work Group was prepared by work group co-chair Ann Christian. It primarily provides additional detail, discussion and concerns with respect to the relatively recent Court of Appeals decision in *State v. Estacio*, 199 Or. App. __ (2005-134). Appellant's petition for review is pending with the Supreme Court. The finding by the Court of Appeals that the trial court erred in not holding a "full inquiry" into Mr. Estacio's second request for substitution of counsel and counsel's concurrent motion to withdraw is not at issue in the petition for review. A copy of the *Estacio* opinion is included in the work group's report as Appendix C. Citations to the opinion are not included in the discussion below, for brevity's sake and because the opinion itself is relatively short. Indeed, much of the opinion, particularly with respect to the facts, is set forth below for three primary purposes:

- to help frame the issues and concerns discussed below;
- to provide the extent to which the trial court conducted an inquiry into Mr. Estacio's concerns and reasons for requesting the court appoint new counsel and his filing of a Bar complaint against counsel – that inquiry having been determined by the Court of Appeals to not be a "full inquiry" – in order to assist in understanding what more needs to be done in order that courts conduct the "full inquiry" held to be necessary by the court; and
- to provide readers who are not familiar with court hearings on requests for substitution of counsel a sampling of such hearings, particularly those where it is the client and not counsel requesting new counsel be appointed.

Unfortunately, there are many issues discussed below that are not easily resolved, at least not without further direction from the courts and further input by defense practitioners and administrators. We do, however, identify and attempt to analyze the issues. And we provide some suggestions for "best practices" by defense counsel who find themselves to be the subject of a Bar complaint and/or request for substitution of counsel in certain instances where the client's and/or the attorney's interests may at least appear to conflict and/or require protection.

Finally, this addendum includes brief discussions of two matters raised June 16, 2005, when the work group's then-draft report was initially presented to the commission.

***State v. Estacio* Facts.**

Mr. Estacio was charged with a number of felonies and appointed counsel in mid-October 2001. In late February 2002, his attorney requested a hearing to determine defendant's ability to aid and assist counsel. In early March, the defendant requested an order for substitution of attorney. At separate hearings on March 13, a judge other than the trial judge found that defendant was able to aid and assist and denied defendant's request for new counsel, finding there was no basis for his request. Defendant's case remained scheduled for trial in late March.

At this first hearing on defendant's request for new counsel, defendant explained to the judge that "[counsel's] not really looking for my best interest and she's not helping me as far as any legal work[.]" After hearing from the attorney, the judge denied the request for new counsel, stating "Mr. Estacio, your attorney has done everything and more than the court would expect at this point. She has been working very hard on your behalf. The motion is denied. No basis." The opinion does not indicate what the attorney conveyed to the court. The defendant continued to try to explain to the court his concerns about his attorney, among other things raising the attorney's "heavy case load" and that the attorney maybe was too busy. After a further exchange between the judge and defendant, Mr. Estacio concluded "I just feel she ain't looking for my best interest." The court responded that "there is absolutely no basis and no reason you would lead me to believe that."

Sixteen days later and just prior to the trial judge hearing pre-trial motions and commencing the trial, Mr. Estacio again requested the court provide him with new counsel. At this second substitution hearing, defendant indicated the following to the court, including the fact he had filed a complaint against counsel with the Oregon State Bar (OSB):

"First of all, I do not want to proceed--go along with my attorney * * * and I also do not want to negotiate a plea for a crime that I didn't commit. Over the past seven months she has been deceiving me to taking a plea bargain and she has not submitted any motion or legal help to me. Every time I would ask her to do something, I'm being ignored or denied, or I'm not, you know, and I don't know if she's prejudiced against my case or if she's doing it intentionally. It seems that she's more interested in my personal life rather than trying to help me with my case, or focusing on what's important. * * * With all due respect, Your Honor, I could fix a lot of time because I didn't know what was happening here and there, and I should be able to know at least what I'm dealing with and what I'm going up against, and I really think that [counsel] is not looking out for my best interests. I think her caseload is too [heavy], too much stuff in her hands, but not enough time, and it seems like she's doing everything at the last minute, and I feel like I'm being forced to go to trial today *and instead I file complaint to the Bar section, but I'm still waiting for their response.* Right now, I'm going to trial today, and so there's some time limit. *I just wish to be appointed to another counsel so that my constitutional rights will be protected.* * * * [S]ometimes there was trouble in communicating with her, whether my attorney's lying to me about everything we discussed, or what she puts in front of me." (Emphasis in opinion.)

The judge asked counsel whether counsel had any statement she wished to make and she replied as follows: "I guess, for the record, this is the first I knew that Mr. Estacio had filed a Bar complaint. He did ask for a substitution of counsel, and we had a hearing on that matter." After reviewing the order from the earlier substitution hearing, the judge asked defendant whether anything had happened since the previous hearing. The defendant replied that he was given everything at the last minute and did not have sufficient time to consider matters before facing a trial.

Counsel's statement and the court and counsel's colloquy follow.

"*I wonder if Mr. Estacio's maintaining a Bar complaint against me puts me in actual conflict with his interests.* Having not seen any correspondence from the Bar, nor yet been in a position to respond to it, I don't know to what extent I would need to divulge client confidences or secrets in order to defend myself in a Bar complaint. I know that that could become an issue, but as yet, I've got no notice yet from the Bar. * * * [H]is statements that he doesn't understand what's going on and he doesn't understand what

he's up against baffle me because we've been discussing * * * all the evidence that the state can bring against Mr. Estacio. We've been discussing that for months. And, Your Honor, I think that's sort of part and parcel of my concerns that Mr. Estacio can't assist and cooperate. I think it's clear that he distrusts me and I'm not really sure why that is." (Emphasis in opinion.)

"JUDGE: Now, [counsel], getting back to your comments about the Bar complaint, you indicated that you were concerned that, because of what you've just learned today, * * * for you to defend yourself from the Bar complaint, you would need to divulge client confidences. I'm interested in the time frame. This has been estimated as a two-day trial and, if you had not even known of a Bar complaint, there would not be any defense or any divulging any client confidences that would occur during the course of this trial, would there?

"DEFENSE [COUNSEL]: Right. I don't think so. I don't think so, Your Honor. I mean, I know--I'm aware--I've never been in this situation before. This will be my first Bar complaint. But, I know that a lawyer may, if necessary, divulge confidences to the extent necessary to defend against such a thing, so I don't know what the allegations are so I don't know what I would or could divulge, and maybe it might come around in a month or more. It might happen before a certain thing. It might not. I just don't know if that might change--

"JUDGE: Well, if it would happen, say, a month from now, let's say, in connection with sentencing, then a motion for substitution may be appropriate at that time if a conflict comes up. Right?

"* * * * *

"JUDGE: But nothing has been put in front of me right now to indicate a real conflict right now, unless I'm missing something, based on what you've said. [Referring to counsel.]"

The trial court reportedly inquired of defendant even further and ultimately ruled:

"... [T]he defendant has not made a sufficient showing of any specific reason why a substitution of counsel should occur and I don't find any reason for criticism of [defense counsel] at this time based on what has been presented to me, and therefore, I do not believe it would be appropriate under Oregon law for me to grant this motion and therefore, I am denying--respectfully denying Mr. Estacio's motion for substitution of counsel."

After the court ruled on a number of pre-trial matters, counsel informed the court she thought she needed to move to withdraw from the case "... based upon Mr. Estacio's Bar complaint. I think that puts us in conflict. That is a conflict of interest." (Emphasis in opinion.) The judge asked for authorities and evidence of what specifically the Bar complaint entailed. Counsel referred generally to disciplinary rules regarding conflicts involving representation of a client when a lawyer's personal interests may be in conflict and again, suggested she might be required to disclose confidences or otherwise privileged information in response to the complaint. She indicated the latter "... may have a chilling effect on his communication with me throughout the duration of the trial." She concluded, "I certainly, Your Honor, it's not going to

affect my performance, that I am ready, willing, and able to try this case, and it won't affect me at all, the fact that he filed a Bar complaint.”

The judge denied counsel’s motion to withdraw, incorporating the statements made in his ruling on defendant’s request for substitution of counsel, and added:

”[W]hat I see is before the court in this question is an unspecified Bar complaint. There’s no detail at all regarding it except the two words, Bar complaint, so there’s no indication at all that any betrayal or revealing of client confidences or secrets would occur or could occur, the Oregon Code of Professional Responsibility is filled with many, many provisions, and with this unspecified ‘Bar complaint,’ it’s impossible to know what we’re talking about here. Counsel has indicated that she’s ready, willing, and able to proceed with this case and that this will not affect her ability to try the case, and so, it would require a lot of speculation for me to say that, because something might or might not occur way down the line that that [*sic*] today could have a chilling effect or during the course of this trial could have a chilling effect, and I don’t really see that anything new has been presented, nor has any further detail been given[.]”

Estacio Opinion.

It appears from the *Estacio* opinion that the defendant argued on appeal only that trial counsel had an actual conflict of interest due to the Bar complaint that was filed against counsel and that as a result, counsel was required to withdraw and the court was required to allow counsel’s withdrawal. Defendant’s argument was based upon former DR 5-101(A) (conflict of interest where exercise of lawyer’s professional judgment on behalf of the client will be or reasonably may be affected by the lawyer’s own...personal interests).

The court reviewed cases involving DR 5-101(A) and a defendant’s right to substitute counsel. With respect to the latter, the court noted the right to substitute counsel is not absolute and that:

“A request for substitution of counsel ... requires a factual determination of whether a defendant has presented a ‘legitimate complaint.’ A ‘legitimate complaint’ is one ‘based on an abridgement of a criminal defendant’s constitutional right to counsel.’” (citing *State v. Langley*, 314 Or 247, 257 (1992) [*adh’d to on recons*, 318 Or 28 (1993)]).

The Court of Appeals held the trial court abused its discretion in *denying defendant’s requests* for new counsel “... without making a full inquiry once the trial court was informed that defendant alleged that counsel had deceived and lied to him and that, as a result, defendant had filed an ethics complaint against counsel.” The court’s holding does not specifically state or address whether the trial court abused its discretion in denying counsel’s motion to withdraw.

The court further provided that “[a]t a minimum, the trial court should have made *an affirmative inquiry of defendant concerning those allegations and the factual basis for them* in order to ensure that defendant could be provided [constitutionally effective assistance of counsel].” (Emphasis added.) The only other direction in the body of the court’s opinion is as follows: “To fulfill its obligation, the trial court was required to determine if defendant’s complaints were legitimate and, if legitimate, whether they would interfere with effective assistance of counsel.”

The court vacated Mr. Estacio’s convictions and remanded the case to the trial court with instructions “... *to inquire into the reasons for counsel’s request to withdraw as defendant’s*

attorney [not defendant's request for new counsel]." (Emphasis added.) Further, "[i]f the trial court determines that defendant was entitled to substitute counsel or that counsel should have been permitted to withdraw, it shall order a new trial; otherwise it shall reinstate the previous judgment." Although confusing, we assume the trial court will need to affirmatively and fully inquire into the specifics of the defendant's Bar complaint and request for new counsel -- and, if determined necessary, that the court then will also conduct a full inquiry into counsel's motion to withdraw.

When the trial court does conduct its full inquiry on remand, what role will the OSB's disposition of the Bar complaint play? In this case, the complaint was dismissed.

Issues Arising From Estacio and Substitution Hearings Generally.

It may be, as some have suggested, that the *Estacio* opinion will result in an increase in Bar complaints being filed against counsel in conjunction with defendants requesting new counsel be appointed; i.e., clients may believe more so than in the past that their chances of obtaining new counsel will be improved if they file a Bar complaint. And it may be that courts may grant such requests more frequently, based upon a full inquiry having been made or for other possible reasons. Or maybe not.

Some attorneys may feel that *Estacio* adds support to a notion that the filing of a Bar complaint *automatically* constitutes an actual conflict of interest or break-down in the attorney/client relationship, requiring that counsel file a motion to withdraw from the case. There likely are factual situations where the allegations made against counsel do not raise a substantial likelihood that counsel will need to, for example, disclose confidences to defend against the Bar complaint or that there is a "significant risk" that the representation of the client will be "materially limited by ... a personal interest of the lawyer." (Rule of Professional Conduct (RPC) 1.7(a)(2) which is similar to former DR 5-105(A)). At the same time and again, depending on the facts and circumstances in a given case, it may be immediately apparent to counsel that there is or likely will be an actual conflict of interest resulting from the allegations and counsel's position on the allegations.

The co-chairs of the Conflicts Work Group continue in our belief that the mere fact a client has filed a Bar complaint does not *ipso facto* create an actual conflict of interest, requiring the attorney to file a motion to withdraw from representation in the underlying case. With that said, we are not judges and not OSB disciplinary counsel.

We note in the work group report that in the scheme of the entire public defense caseload, substitutions of counsel are relatively rare. Requests for substitution of counsel by the defendant (versus on the attorney's motion) are but a small subset of all substitutions. These relatively small number of instances where courts must conduct a full inquiry frequently fit within a fact pattern similar to that in *Estacio*; e.g., possible mental health issues, a defendant who feels his attorney is not looking out for the defendant's best interests, who feels he is not receiving sufficient attention or information, and who faces a potential lengthy sentence. Finally, it is even more rare that a defendant's concerns reach the level of the filing of an ethics complaint with the OSB.

While the number of public defense cases impacted by the *Estacio* opinion is very small, the issues we believe to be unresolved at this time are significant and troubling for counsel, clients, and the trial and appellate courts in addressing requests for substitution of counsel, particularly when a Bar complaint has been filed.

What is a “Full Inquiry”.

The most critical question following *Estacio* is -- what is a “full inquiry”? Does a full inquiry simply require that the court make an affirmative and full inquiry **of the defendant** with respect to his concerns, the allegations in the Bar complaint and the factual basis that he believes supports his Bar complaint and request for new counsel? As stated above, the court provided that “[a]t a minimum, the trial court should have made an affirmative inquiry **of defendant** concerning those allegations and the factual basis for them in order to ensure that defendant could be provided [constitutionally effective assistance of counsel].” (Emphasis added.) If that is all that is absolutely or minimally required, the *Estacio* case is not troubling.

But the inquiry actually made by the trial court of Mr. Estacio’s concerns certainly was not cursory. If the court had specifically asked “why do you believe your attorney is lying and deceiving you?,” it is likely the defendant’s response would have been similar to, if not the same as, what he previously informed the court.

Does a full inquiry require the court to ask counsel for a response to the allegations? The trial-level judge did ask Estacio’s attorney whether she had any statement she wished to make. Although she did make a statement, it was not a response to the allegations made by her client and the court did not require that she specifically respond to the concerns expressed by the defendant. Would she now be required to do so? Does a full inquiry require the Bar complaint, any response to the complaint, and other correspondence or materials in OSB disciplinary counsel’s file to be provided to the court for inspection and consideration in ruling on defendant’s request for new counsel? To the extent counsel will be required to provide a response (which may require disclosure of confidences or secrets at worse or information that may be adverse to the client), the *Estacio* case is troubling.

How has the Court of Appeals addressed requests for substitution of appellate counsel where a Bar complaint has been filed against counsel?

Generally, the issue of requests for substitution of appointed counsel is discussed in the context of local trial-level cases. Appellate courts also must address client and attorney requests for the appointment of new counsel and the effect of a Bar complaint having been filed by the client against counsel. In an appeal still pending before the Court of Appeals (*State v. Gorst*, CA A111840), the court’s orders with respect to four requests for substitution of counsel may assist in determining what the “full inquiry” requirement in *Estacio* entails and what standards might be applied in addition to or supplemental to the “legitimate complaint” requirement of *Langley*.

In early 2004, the attorney appointed to represent the appellant submitted a motion for leave to withdraw, citing the fact the client had filed a Bar complaint and that as a result, counsel had a conflict of interest continuing his representation of client.

The Court of Appeals’ order denying counsel’s motion to withdraw provides as follows:

“ORS 138.500 requires the court to appoint ‘suitable’ counsel to represent the defendant on direct appeal in criminal cases. The act of the defendant in filing a complaint with the Oregon State Bar, without more, does not demonstrate that counsel is not suitable, *especially if the complaint is not arguably meritorious*. Counsel has not provided the court with information regarding the nature of the complaint; therefore, the court cannot determine whether the nature of the complaint truly creates a conflict of interest requiring appointment of other counsel.” (Emphasis added.)

“The motion is denied, with leave to renew based on a showing of the nature of the complaint that appellant has filed.”

Subsequently, counsel submitted to the Court of Appeals a copy of counsel’s response to the Bar complaint he filed with the OSB and renewed his motion to withdraw. The client also filed a *pro se* motion for appointment of new counsel on the same grounds as alleged in client’s complaint to the OSB.

In May 2004, the court denied both motions after determining that “... the grounds asserted by appellant for removing counsel either are not true or do not demonstrate that counsel is rendering inadequate representation.” The court granted defense counsel’s request that counsel’s response to appellant’s motion be sealed (including counsel’s response to the Bar complaint).

After denying a subsequent *pro se* request for reconsideration, the court denied a new motion to withdraw filed by counsel in November 2004. Counsel’s new motion was based upon the fact his client had filed a petition for review with the Supreme Court seeking review of the Court of Appeals’ denial of appellant’s motion to replace counsel.

The Court of Appeals’ order denying the motion provides:

“The court will consider allowing counsel to withdraw if the court is persuaded that counsel is unsuitable or is rendering ineffective assistance. It appears to the court that the demands that appellant has made of counsel are not reasonable. Counsel’s rejection of those demands do not demonstrate that he is unsuitable or rendering ineffective assistance of counsel. Therefore, counsel’s motion for leave to withdraw is denied.”

Appellate cases generally provide greater opportunity, at least with respect to time constraints, than cases at the trial-level for a court to directly review a client’s actual bar complaint, counsel’s response and any additional information relevant to the court making its determination whether:

- a client has a “legitimate complaint”;
- the complaint is “arguably meritorious”;
- that counsel is unsuitable or is providing ineffective assistance; and
- if counsel has or likely has an actual conflict as a result of the Bar complaint.

In addition, some might suggest that due to differences in the roles and responsibilities of counsel on appeal and counsel at the trial-level that, barring an actual conflict of interest, the standard for allowing substitution of counsel at the trial level ought to be more “lenient” than at the appellate level or that the inquiry should be less onerous at the trial level. By noting this, we are not suggesting the standards should differ. Again, we leave it to the courts to provide further guidance.

If in fact a court must or may feel the need to inquire of counsel, not simply of the defendant, in order for there to be a “full inquiry”, we would first have to assume that counsel and the court will ensure the hearing is held *ex parte*. In our view, the first problem created in the *Jenkins* case

(briefly described below) was that counsel disclosed information extremely adverse to the client in the presence of the prosecutor.

In instances involving disclosures of confidences or secrets and perhaps in other instances where adverse, but not privileged, information must be disclosed by counsel, we next have to assume that counsel will request and that the court will grant a request that the court seal the record of the hearing and issue a protective order, as was requested and done by the Court of Appeals in the *Gorst* example above.

Our next concern is how much information will counsel be required to provide the court? If, as in the *Estacio* case, the Bar complaint has only recently been filed and counsel has not seen the complaint, will counsel be required to effectively provide a verbal Bar complaint response on the “spot”?

Some may ask how this situation varies from a defendant’s request for substitution of counsel where there has been no Bar complaint filed – at least not yet. How does it matter or affect a substitution hearing that in addition to defendant complaining to the court and requesting new counsel, that a Bar complaint has been filed? As a practical matter the allegations and issues will be the same; i.e., the defendant is complaining about his attorney.

Generally, it matters not whether the complaint is made to the court or to the Bar or to both. For example, by alleging one’s attorney has breached a duty by the lawyer to the client, there is no attorney/client privilege for what otherwise would be confidential/privileged information if that information is “relevant” to the issue of breach of duty. OEC 503. It matters not whether the allegation that the attorney has breached a duty is made to the OSB or to the court.

The primary difference is that at a court hearing, the attorney’s reputation, credibility with the court and his client, and pride are at stake. When a Bar complaint has been filed, OSB disciplinary counsel is involved and the attorney faces the potential for disciplinary sanction. While counsel may feel comfortable proceeding with a substitution hearing where there is no Bar complaint component, counsel may determine it is absolutely necessary to at least request a continuance of the hearing where there is a Bar complaint component, particularly if counsel has not yet seen or responded to the Bar complaint.

But back to the issue of “full inquiry” and the extent to which counsel will be asked for a response to his client’s concerns/complaint. Is it sufficient for counsel to simply respond to what the client has stated to the court by saying “Your Honor, I can assure the court that I have done everything possible in this case and I am able to continue providing my client constitutionally effective assistance of counsel?” If counsel has prepared a response to the Bar complaint, does the response necessarily need to become part of the record?

Will the attorney be required to specifically address the allegations contained in the Bar complaint or what the defendant tells the court is in the Bar complaint? For example, an allegation that counsel refuses to contact or subpoena “all my witnesses” for trial. Does a full inquiry require counsel’s specific response? For example, “No, Your Honor, we contacted all defendant’s potential witnesses and I have indeed advised my client against calling any of these individuals at trial.” Where the client alleges counsel refuses to file motions on the client’s behalf, does a full inquiry require such specificity as “Your Honor, I have thoroughly reviewed the discovery, I am an expert in search and seizure law, and there are no motions I can ethically file with the court?” These specific responses could be shortened to “No, Your Honor, the allegations are false, my client’s lying.” Even if no confidences or secrets are disclosed, no quality defense attorney wishes to provide information to the court that is adverse to his client.

And, of course, if required to do so, the attorney/client relationship likely is made even worse, which could potentially result in a basis for the court to substitute counsel eventually.

Adding even further to our concerns is RPC Rule 3.3(d). "In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse." The Study Guide for the new RPCs that was prepared by the OSB General Counsel's Office notes: "[p]aragraph (d) has no equivalent in the former Oregon Code [of Professional Responsibility]." May one assume that confidences or secrets not otherwise required to be disclosed (e.g., future crime) are exempt from this requirement? Adverse to whom? Either the client or counsel? This concern is not directly related to the *Estacio* case; i.e., it would be of concern pre-*Estacio*. Again, we raise more concerns and issues than we can provide answers.

One final area of concern that does not necessarily result from the *Estacio* decision, but is related and of concern. Since the OSB disciplinary file is a public record, should counsel request the court issue a protective order prohibiting the OSB from disclosing matters in the OSB disciplinary file, particularly if confidences that are direct evidence related to the underlying prosecution need to be disclosed as a part of the "full inquiry" substitution hearing (see *Jenkins* discussion below). If yes, for how long? As long as there is a possibility the defendant is at risk for conviction; i.e., trial or possible retrial?

Although the *Jenkins* situation is very unusual if not unique, what if the complaint against counsel is that he did not contact any of the defendant's "witnesses"? Should counsel seek a protective order of his response to the OSB, if counsel decides to provide the names of all the individuals that counsel's investigator contacted and the fact that none of the witnesses' testimony would assist the client in his defense? This information would very likely be of interest to the prosecutor in the case to the extent the individuals really are State's witnesses. Indeed, the prosecutors in the *Jenkins* matter included the following in their March 2005 motion to the court, at page 15, in support of their argument that the defendant waived any attorney/client privilege as a result of his filing a Bar complaint and noted: "... in this case, there was no protective order protecting the privilege in front of the Oregon State Bar. Mr. Jenkins could have sought such a protection, but he did not."

Similarly, should individuals who file Bar complaints or seek substitution of counsel alleging a breach of duty by the attorney be warned that by so alleging, they may be waiving certain attorney/client confidences and secrets? If yes, who should provide the warning?

Brief Summary of *State v. Jenkins*.

Defendant was charged with multiple felonies in January 1999, including solicitation to commit murder. Counsel was appointed and in June, a defense psychologist evaluated the defendant. The psychologist reported to the attorney that defendant made a threat to commit a future crime involving the victim of the pending charges and his family. Counsel, in turn, reported the threats to the trial court, in the presence of the prosecutor, and moved to withdraw from the case. New counsel was appointed. Two days later the defendant was charged with solicitation to commit *aggravated* murder.

The prosecution subpoenaed the psychologist as a witness at trial. The trial court denied the defense's motion to quash the subpoena and ruled the psychologist's testimony as to the threats the defendant related were admissible. Defendant was convicted. On appeal, the Court

of Appeals held the trial court erred in finding the defendant's statement to be admissible and remanded the case for a new trial.

In June 2000, the defendant filed a Bar complaint against his original attorney. He alleged that the attorney "violated the attorney-client privilege (sic), gave information to the prosecution and was both inept and ineffectual during the 6 months she represented him (sic)." OSB disciplinary counsel sent a letter to the defendant indicating she needed specific information prior to determining whether to request a response from the attorney. Defendant then wrote a six-page letter. Additional correspondence occurred and in March 2001, the determination was made that the attorney did not violate the Code of Professional Responsibility.

In February of 2005, the defendant filed a Bar complaint against one of the prosecutors. It was only as a result of this complaint that the prosecutors became aware of the fact that the defendant previously filed a Bar complaint against his original attorney. The prosecutors requested and received the entire OSB file on the 2000 original attorney complaint. In their new motion to admit the testimony of the psychologist, the prosecutors argued, *inter alia*, that the defendant, by filing and litigating the bar complaint, waived any attorney/client privilege.

Last month, the trial court granted the state's motion to admit the testimony on grounds other than the defendant's filing of the bar complaint waived his attorney/client privilege.

As is mentioned elsewhere, the *Jenkins* case is extremely unusual. It does however illustrate how complex, intractable and "thorny" issues related to substitution of counsel, Bar complaints, ethics and the protection of a client's rights and interests can be.

How Likely Will Counsel Have an Actual Conflict of Interest Where Defendant Seeks Substitution of Counsel and/or Files a Bar Complaint?

Using everyday, real life, frequent Bar complaint-type or request for substitution of counsel-type scenarios, how likely is it that counsel will have an actual conflict of interest (requiring counsel to move to withdraw) where his client seeks new counsel and/or files a bar complaint? In both scenarios, we assume that a court will conduct a full inquiry requiring the attorney to specifically respond to the allegations. To the extent that is not required by the court, there is even less likelihood of an actual conflict of interest, except to the extent RPC Rule 3.3(d) affirmatively requires counsel to disclose material facts to the court *sua sponte* at an *ex parte* hearing.

Scenario #1. Lack of contact with the client.

If the allegations are **true and egregious** (for example, no contact for six months), the attorney is at risk with respect to at least OSB discipline and reputation. How would any confidences or secrets legitimately need to be disclosed to either try to defend or at least mitigate against the allegation? It is possible that the attorney's professional judgment (and zealotry) may or may not be affected by the fact the complaint has been filed and the attorney must defend or at least mitigate against it, if possible. A full inquiry by the trial court will result in possible evidence for use by OSB disciplinary counsel and perhaps, well it should. A full inquiry by the trial court may very well result in new counsel being appointed and well it should.

If the allegations are **totally false**, the attorney is not at risk for discipline or otherwise. How would any confidences or secrets need to be disclosed? It is possible in some instances that an attorney's professional judgment will or reasonably may be affected by the attorney's personal interest in defending against the Bar complaint, but is there a "significant risk" that counsel's

representation will be “materially limited” by the attorney’s personal interest? RPC Rule 1.7(a)(2). And clearly, this risk is not as great as it would be if the allegation were true and egregious. It would seem that at least for experienced, quality defense counsel, the mere fact a client has falsely accused the attorney of not having contact with the client would not result in an actual conflict of interest.

Scenario #2. Attorney lies and is deceitful (Estacio allegations)

If the allegations are **true and prejudicial** to the client, the attorney is at risk with respect to at least OSB discipline and reputation. How would any confidences or secrets legitimately need to be disclosed to either try to defend or at least mitigate against the allegation? It is possible that the attorney’s professional judgment (and zealotry) may or may not be affected by the fact the complaint has been filed and the attorney must defend or at least mitigate against it, if possible. A full inquiry by the trial court will result in possible evidence for use by OSB disciplinary counsel and perhaps, well it should. A full inquiry by the trial court may very well result in new counsel being appointed and well it should.

If the allegations are **totally false**, the attorney is not at risk for discipline or otherwise. How would any confidences or secrets need to be disclosed? Maybe there is a factual situation where that would be the case, but we believe it would be an extraordinary fact situation. It is possible in some instances that an attorney’s professional judgment will or reasonably may be affected by the attorney’s personal interest in defending against the Bar complaint, but again is there a “significant risk” counsel’s representation will be “materially limited” by the attorney’s personal interest? RPC Rule 1.7(a)(2). And clearly, this risk is not as great as it would be if the client’s allegation was true. As with Scenario #1, it would seem that at least for experienced, quality defense counsel, the mere fact a client has falsely accused the attorney of lying and deceiving the client would not result in an actual conflict of interest, requiring counsel to withdraw from representation.

The following conundrum is ironic. Quality defense attorneys would likely do their best not to provide the court with adverse information about their clients, if possible, and would prefer the court not require the attorney to respond specifically or at all. While at the same time, quality defense attorneys would likely not wish that attorneys who are incompetent or negligent at best to be shielded from having to defend a client’s claims on the record – either by admitting, for example, the attorney hasn’t visited or talked with his client for months on end or lying to the court in saying the attorney has maintained contact.

Suggested Best Practices for Counsel.

In instances where a court requires counsel to provide specific responses to allegations the attorney has breached his duty to the client (whether or not a Bar complaint has been filed), counsel first must assess, based upon the particular facts of the case, whether counsel has a conflict of interest requiring counsel to move to withdraw. In addition, counsel must assess – based upon the specific facts – whether it appears to counsel that information provided at a substitution of counsel hearing or provided in response to a Bar complaint may prejudice the client in the criminal case, reflect adversely on the client, or possibly provide evidence of perjury by the client if a court determines to illicit defendant’s specific concerns under oath.

If a client indicates to counsel that he wants to have new counsel appointed, counsel should inquire into the reasons the client wishes new counsel and address those issues with the client, where possible. That is, we do not believe that at the first mention of concern by a client or

request for new counsel, that counsel's only responsibility at that point merely is to schedule a substitution hearing. After discussion with the client, if the client continues to want new counsel appointed, we believe it then is counsel's responsibility to have a hearing scheduled. Depending upon the specific facts as counsel understands them to be, counsel may have an actual conflict of interest and must then file a motion to withdraw. In most instances, we believe there will be no clear conflict.

Counsel should next try to determine prior to the hearing whether the particular judge hearing defendant's request will likely require counsel to provide a response to defendant's reasons for requesting new counsel and if yes, how specific the court will require counsel to be in his response. Counsel should indicate his preference to the court that he not be required to provide specific responses. If the hearing will be a full inquiry where counsel will be required to provide specific responses and information and it appears to counsel that prejudicial, adverse or other negative information will HAVE to be provided to the court, counsel should ensure the hearing is:

- *ex parte*; and
- subject to a protective order sealing the record and precluding use of the information within the record for purposes of prosecuting or prejudicing the defendant.

The question arises, what if a judge denies counsel's requests for the hearing to be *ex parte* and for a protective order? Counsel should again assess whether he now has an actual conflict of interest. If yes, counsel requests the court appoint new counsel based upon an actual conflict. If no, counsel should assess, based upon the specific facts known to counsel, the risk to the client of proceeding with the hearing with the prosecution present and/or without a protective order. If determined necessary, counsel should request a continuance of the hearing, allowing counsel an opportunity to determine what if anything needs to be done, including the possibility of filing a petition for a writ of mandamus for a case for example, that is factually similar to the *Jenkins* case.

If a Bar complaint has been filed, counsel should assess whether it appears that information provided in the complaint, counsel's written response to the complaint, or other materials may prejudice the client in the underlying criminal case. If yes, counsel should seek a protective order from the trial court sealing the OSB disciplinary records and precluding use of attorney/client privileged information, if any, for any purpose other than the disciplinary matter and precluding use of any other information for purposes of the prosecution of the defendant.

We recommend further review of the issues and suggested best practices set out above by the Office of Public Defense Services' (OPDS) Contractor Advisory Group.

Two Issues Raised at the June 16th PDSC Meeting (not related to Estacio)

1. An Additional Contributor to Delay in the Identification of Conflicts.

County-by-county data on the average and median number of days between appointment of counsel and substitution of counsel is set forth at page 10 of the work group's report. For example, substitutions in Multnomah County average 60 days from original appointment to appointment of new counsel. The median number of days is 34 days. Members of the work group were a bit surprised the number of days was not less. We identify in the work group's report various matters that can significantly affect the time within which conflicts reasonably can

be identified by counsel; e.g., promptness of receipt of police reports and other discovery, adequacy of attorney and staff resources to check for conflicts, review discovery and maintain an effective attorney/client relationship, and delays in being able to schedule a court hearing.

Another significant contributor to the delay in substitution of counsel where the attorney determines a conflict of interest exists that was not directly mentioned in the work group's report is the fact that many public defense contractors have decades of closed files, many of which are housed off-site. As discussed in the report, in order to properly determine whether a lawyer's former representation of a state's witness, for example, presents a conflict of interest, the closed file for the former client must be reviewed. If the closed file is across town in a warehouse that contractor cannot directly access, there can be a relatively significant delay in being able to review the file; i.e., contractor's staff must request warehouse staff pull and forward the file on to the attorney.

2. Use of Contractors' Withdrawal Rates as Contractor Performance Measures.

The Conflicts Work Group's second recommendation for implementation by the PDSC and public defense providers, beginning on page 18 of the report, is that contract providers need to accept and assume direct responsibility for ensuring, *inter alia*:

- meaningful and complete data is collected by providers to obtain an accurate assessment of substitutions both to and from a contract office;
- the conflicts data is monitored for trends; and
- attorney supervisors or administrators monitor and provide feedback when determined helpful and necessary to individual attorneys with respect to their withdrawal from cases.

At the PDSC's June 16th meeting, Peter Ozanne asked whether withdrawal data might serve as a performance measure in evaluating public defense contractors.

Ann Christian responded that Peter's question certainly was a good question. She indicated her primary concern about using such data effectively as a formal performance measure is that there are a number of variables that "legitimately" influence conflicts rates for different contractors. For example, if one were to define a "contractor conflicts rate" as the number of cases in which a new *contractor* (versus new attorney) is substituted onto a case, we know consortia contractors will have a much smaller (if any) conflict rate than public defender contractors, because consortium contractors substitute another consortium attorney onto a case if there is such a need. If one were to define a "conflicts rate" as the number of cases in which contractors' *attorneys* are substituted off a case (including substitution of another consortium member), data would need to be maintained by consortia on intra-consortium conflicts – which is possible, but may not be an efficient use of limited resources in the total scheme of things.

Two other significant variables that affect individual contractors' conflicts rates are the length of time a contractor has been a public defense contractor and the breadth of cases accepted by the contractor. The conflict rate for Metropolitan Public Defender (MPD) necessarily and correctly will be higher than a public defender established last year that limits its cases to civil commitment and juvenile dependency cases in Medford. MPD is one of the oldest public defenders in the *country*, it accepts almost *all* trial-level public defense case types, and for years, it has had offices in two counties and at one time, had offices in all three Metro counties. Another local variable that could affect conflict rates, regardless of attorney performance, is the number of jail beds available for pre-trial detention. An in-custody client is more likely to

become dissatisfied with his attorney than a client who is only facing the possibility of future incarceration.

We continue to believe that it is absolutely critical that local contract administrators and supervisors actively bear responsibility for collecting meaningful conflict/substitution data and tracking and monitoring individual attorneys' withdrawal and substitution rates and the overall withdrawal rate for the contract entity. Using contractors' conflicts rates as *formal* performance measures may not be practical, at least at this point in time. We do believe though, that once the data for the data fields we recommend be collected by individual contractors is available, that it would be worthwhile to at least obtain and review conflict rate information as a part of regional and individual contractor peer reviews.

We recommend this suggestion be further reviewed by the OPDS' Contractor Advisory Group.