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Policy Directive
San Francisco District Attorney's Office
Conflicts of Interest

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I. INTRODUCTION

Prosecutors must perform official duties with absolute impartiality and fairness. A variety of circumstances may present conflicts of interest for prosecutors. Conflicts of interest affect the appearance of neutrality and may improperly expose prosecutors to privileged information. To ensure the public confidence and the highest ethical standards, all employees of the District Attorney's Office shall abide by the policies and procedures set forth here to recuse prosecutors with a conflict of interest, establish an ethical wall, provide notice of the conflict of interest, and create an alternative chain of command when a supervisor is affected by the conflict of interest.

II. LEGAL STANDARD

The California Rules of Professional Conduct has left the conflict imputation and screening rules for lawyers moving from private practice into government service to case law and its development. (See California Rules of Professional Conduct, Rule 1.11, Special Conflicts of Interest for Former and Current Government Officials and Employees, Comment [10].)

Penal Code Section 1424(a)(1) defines the legal standard for a conflict of interest to disqualify a district attorney from performing an authorized duty. The motion to disqualify may not be granted unless the evidence shows that a conflict of interest exists that would render it unlikely that the defendant would receive a fair trial. The statute articulates a two-part test: "(i) is there a conflict of interest?; and (ii) is the conflict so severe as to disqualify the district attorney from acting?" (*People v. Eubanks* (1996) 14 Cal. 4th 580, 594.) Thus, while a conflict exists whenever there is a reasonable possibility that a district attorney's office may not exercise its discretionary function in an evenhanded manner, the conflict is disabling only if it is so grave as to render it unlikely that defendant will receive fair treatment. (*People v. Conner* (1983) 34 Cal. 3d 141, 148.)

Represented defendants informed of the considerations that influence a waiver decision may validly waive a conflict of interest. (*People v. Mai* (2013) 57 Cal. 4th 986, 1010-1011.) Courts have acknowledged that the California Rules of Professional Conduct allow attorneys to accept employment adverse to a former client with informed written consent. (See California Rules of Professional Conduct, Rule 1.7, Conflict of Interest: Current Clients.) Therefore, a district attorney may prosecute a former client for a crime relating to a matter to which he has obtained confidential information in the course of his former employment, with that client's consent. (*People v. Lepe*

(1985) 164 Cal. App. 3d 685, 688.) The consent and waiver must be a knowing and intelligent act done with sufficient awareness of the relevant circumstances and likely consequences, and it must be informed, written consent. (CA RPC 1.7.) The court must assure itself that the defendant understands the potential drawbacks, dangers, adverse consequences, and disadvantages of waiving the conflict, after having thoroughly discussed it with counsel sufficient for consent, and voluntarily wishes to waive. If the court finds the waiver inadequate, it may reject the waiver. (*People v. Baylis* (2006) 139 Cal. App. 4th 1054, 1067-1068.) Considerations for an informed waiver shall include the District Attorney's commitment that recusal, ethical walls, and the protection of confidential information (See *infra*) pursuant to this policy shall apply to all prosecutions where a defendant waives the conflict of interest.

Even in the absence of a waiver, courts have long considered the recusal of an entire prosecutorial office a disfavored remedy that should not be applied unless justified by a substantial reason related to the proper administration of justice. (*People v. Hernandez* (1991) 235 Cal. App. 3d 674, 679; *Millsap v. Superior Court* (1999) 70 Cal. App. 4th 196, 201.) Recusal of the entire district attorney's office was error and an abuse of discretion when less drastic alternatives such as walling off the conflicted employee would suffice under the circumstances to prevent any actual conflict of interest that would rise to the level of being so grave as to render it unlikely that defendant would receive fair treatment. (*People v. Cannedy* (2009) 176 Cal. App. 4th 1474, 1491.)

In most circumstances, the fact that one or two employees of a large district attorney's office have a personal interest in a case would not warrant disqualifying the entire office. (*People v. Vasquez* (2006) 39 Cal. 4th 47, 57.) In denying the recusal of the office where an assistant district attorney was the victim and witness to assault and escape charges, the court recognized that the San Francisco District Attorney's Office was a large office that had minimal communications about the event. (*Trujillo v. Superior Court* (1983) 148 Cal. App. 3d 368, 373.)

Where the conflict of interest exists because a prosecutor learned confidential information during the representation of former clients, recusal of the individual prosecutor is required. (*People v. Lopez* (1984) 155 Cal. App. 3d 813, 819-828.) It is undisputed that the presumption of imputed knowledge is uniformly rebuttable and may be overcome by a proper ethical screen when the issue arises in the context of government attorneys. (*Kirk v. First American Title Insurance Company* (2010) 183 Cal. App. 4th 776, 805-806.) The specific elements of an effective screen or ethical wall will vary from case to case, but two elements are necessary: first, the screen must be timely imposed when the conflict first arises or is discovered; and second, an effective wall involves imposition of preventive measures to guarantee that information will not be conveyed. Other relevant elements of an ethical wall include physical, geographic, and departmental separation of attorneys; prohibitions against and sanctions for discussing confidential matters; established rules and procedures preventing access to confidential information and files; and continuing education in professional responsibility. (*Id.* at 810-811.) The case-by-case inquiry focuses not on whether all the prescribed elements have been established but on whether the court is satisfied that the tainted attorney has not had and will not have any improper communication with others at the firm concerning the litigation. (*Id.* at 811.) Isolation of a prosecutor from the prosecution of his former clients was sufficient protection for the defendants and the imputed knowledge theory did not

apply to government practice. (*Chadwick v. Superior Court* (1980) 106 Cal. App. 3d 108, 116-118.) But when the ethical wall failed, the court recused the San Francisco District Attorney's Office. (*People v. Choi* (2000) 80 Cal. App. 4th 476, 483-484.)

While it recognized that California courts have upheld the ethical screening of attorneys within government offices to protect confidences the attorney obtained from prior representation, the Supreme Court affirmed the vicarious disqualification of an entire government office when the opposing party sought disqualification based on a conflict of interest affecting the head of that office. (*City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal. 4th 839, 853-854.) Because Penal Code Section 1424 was inapplicable to a civil action, the Court applied the considerations from *Younger v. Superior Court* (1978) 77 Cal. App 3d 892, to disqualify the office despite the city attorney's efforts to screen himself from the case. The court reasoned that the head of a government law office sets policy, has the power to review, hire, and fire employees, and elevates the public perception on a case. (*Id.* at 853-854.) The opinion noted that the 1980 enactment of Penal Code Section 1424 abrogated the *Younger* disqualification standard in criminal prosecutions. (*Id.* at 850.) Following the same logic, the Court of Appeal denied the recusal of a district attorney's office for the alleged conflict affecting the head of that office, holding that the *Cobra Solutions* standard for vicarious disqualification did not apply to a prosecuting agency in a criminal matter. (*Spaccia v. Superior Court* (2012) 209 Cal. App. 4th 93, 102-106.) Even when the head of a prosecutorial office had a conflict of interest because her spouse was the victim in an assault prosecution, recusal and an ethical wall was sufficient to insulate the conflict of interest and denial of the defendant's motion to recuse the district attorney's office was proper. (*Melcher v. Superior Court* (2017) 10 Cal. App. 5th 160, 166-171.)

III. PROCEDURE

A. Identification of Conflicts

All employees shall be responsible for identifying cases and situations that present a potential conflict of interest for themselves and the Office. Potential conflicts of interest include but are not limited to:

- 1) Assistant District Attorneys (ADAs) who previously represented the subject of an Office investigation or prosecution. The duty to preserve confidences and secrets learned while representing former clients is a continuing obligation that cannot, except in very specific circumstances, be breached by a prosecutor or any lawyer (Business and Professions Code Section 6068(e)(1). See also California Rules of Professional Conduct, Rule 1.9, Duties to Former Clients, and ABA Standards Relating to the Prosecution Function, Standard 3-1.7(d), Conflicts of Interest.)
- 2) Employees who are closely related to or have a close relationship with the subject of an Office investigation or prosecution.
- 3) Employees who are victims or witnesses in an Office investigation or prosecution.

- 4) Employees who are closely related to or have a close relationship with a victim or witness in an Office investigation or prosecution.
- 5) ADAs who are closely related to a lawyer who represents the subject of an Office investigation or prosecution. This close relationship includes familial and financial relationships. (See California Rules of Professional Conduct, Rule 1.7, Conflict of Interest: Current Clients, and ABA Standards Relating to the Prosecution Function, Standard 3-1.7(h), Conflicts of Interest.)
- 6) Any circumstance where an ADA feels that a personal interest in the outcome of a case conflicts with or calls into question the ADA's neutrality or judgment about the case. (See ABA Standards Relating to the Prosecution Function, Standard 3-1.7(f), Conflicts of Interest.)

B. Maintaining a Conflicts List

Upon learning that any potential conflict exists:

- 1) The employee affected by the conflict shall immediately notify the employee's Unit Managing Attorney to determine whether the conflict warrants an ethical wall between the employee and the case and whether other action is appropriate.
- 2) When the Managing Attorney determines that an ethical wall is appropriate, the employee shall notify the Trial Integrity Unit (TIU) of the conflict with the subject's name, other identifying information as applicable (incident report number, court number, SF Number), and a short summary of the conflict.
- 3) ADAs shall also provide TIU with a list of former clients and cases in which the ADA received privileged and confidential information in the course of prior representation.
- 4) TIU will maintain a list of conflicts and affected employees. Employees and managers shall refer to this list to avoid assignments and improper communications where conflicts exist.

C. Ethical Wall

An employee with a conflict of interest shall be walled off from the case. An "ethical wall" between the employee and a case shall mean:

- 1) The employee with the conflict of interest is barred from having any official role in the case.
- 2) The employee shall not divulge or reveal any confidential information learned from a prior representation.
- 3) The employee shall not use any channel afforded by his or her employment:
 - a. To access information about the case;

- b. To affect or influence the handling or outcome of the case; or
 - c. To communicate about the case in an official capacity.
- 4) Managers shall not assign any responsibility for a subject on the list to an employee with a conflict of interest for that subject.
 - 5) ADAs and employees assigned to the investigation or prosecution shall not seek or solicit any information from the ADA with a conflict of interest about matters that may be privileged.

The Office's Information Technology (IT) Unit shall establish a system for preventing an employee with a conflict of interest from accessing case materials on Office systems with Office issued login credentials. The Office case management system will be configured to provide notifications about which employee is walled off from a case due to a conflict of interest.

D. Notification

The Office shall disclose all conflicts of interest to the court and affected defendant(s) in order to provide the defendant and counsel with the opportunity to determine whether to pursue any motion based on the conflict of interest. (See ABA Standards Relating to the Prosecution Function, Standard 3-1.7(g), Conflicts of Interest.) The Office shall also inform the defense that it will recuse and wall off the affected employee pursuant to this policy.

If a defendant moves to recuse the Office, Penal Code Section 1424(a)(1) requires 10 court day notice to the District Attorney and Attorney General.

Alternatively, upon full disclosure, the assistance of counsel, and informed written consent a defendant may waive the conflict of interest.

E. Chain of Command

Where a conflict of interest affects the District Attorney or a supervisor in the chain of command for an investigation or prosecution and the defense has waived the conflict of interest in writing, the District Attorney or affected supervisor shall be walled off from the investigation or prosecution. If the conflict of interest applies to the District Attorney, all supervisory responsibilities shall pass to the Chief of Staff. For other supervisors, supervisory responsibilities shall pass to a Division Chief unaffected by the conflict of interest.