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THE SAN FRANCISCO DISTRICT ATTORNEY'S OFFICE
CONFLICTS OF INTEREST POLICY¹

Introduction

“A prosecutor is held to a higher standard from that imposed on other attorneys because of the unique function he or she performs in representing the interests, and exercising the sovereign power, of the State.” (*People v. Espinoza* (1992) 3 Cal.4th 806, 820.) To uphold our ethical obligations and the public’s trust, employees of a prosecutor’s office must work impartially, neutrally, and without interest. The existence of a conflict of interest impinges on those ideals and necessarily impugns that trust.

The procedures listed below are intended to help employees of the San Francisco District Attorney’s Office (SFDA) in promptly identifying potential conflicts of interest and to provide guidance on how to proceed once a potential conflict is identified. A summary of applicable laws for conflicts of interest follows the procedures outlined below.

Procedures

Identifying Conflicts of Interest

Broadly speaking, a conflict of interest exists when surrounding circumstances, including personal or professional relationships, create a real or apparent substantial motivation that might actually affect the exercise of prosecutorial discretion during any phase of the proceedings. That real or apparent substantial motivation may include factors that would suggest either a more lenient or harsher treatment of the defendant. (Professionalism: A Sourcebook of Ethics and Civil Liability Principles for Prosecutors, CDAA, 2019.)

A conflict of interest may arise in the following situations:²

- A victim, witness, or subject of a crime charged by SFDA or investigation conducted by SFDA is a parent, child, sibling, spouse, or other relative of an employee of SFDA;
- A victim, witness, or subject of a crime charged by SFDA or an investigation conducted by SFDA has a significant personal, familial, romantic, sexual, political, financial, professional, business, property, or other relationship with an employee of SFDA;
- An employee of SFDA is a victim, witness, or subject of a crime charged by SFDA or

¹ This policy supersedes the February 24, 2020 policy directive on conflicts of interest.

² This list is not exhaustive.

- an investigation conducted by SFDA;
- A prosecuting attorney who previously participated, personally and substantially, as a non-prosecutor in a criminal matter charged or investigated by SFDA;
 - A prosecuting attorney who previously served as an attorney for any subject charged with a crime by SFDA or investigated by SFDA;
 - A lawyer for a subject charged with a crime by SFDA or investigated by SFDA is a parent, child, sibling, spouse, or other relative of an employee of SFDA;
 - A lawyer for a subject charged with a crime by SFDA or investigated by SFDA has a significant personal, familial, romantic, sexual, political, financial, professional, business, property, or other relationship with an employee of SFDA; or
 - Any facts or interests that could reasonably be viewed as raising a potential conflict of interest.

Maintaining a Conflicts List

When any employee of SFDA identifies a potential conflict:

1. The employee shall immediately notify their direct supervisor to determine whether any conflict exists or whether the conflict warrants an ethical wall between the employee and the case. The employee shall provide their direct supervisor with their name, the name of the person who creates the basis of a potential conflict, the potential conflict's identifying information, including any incident report or court numbers, and a short summary of the potential conflict.
2. The employee and direct supervisor shall then consult with the Lead Attorney for the Trial Integrity Unit (TIU) providing the same information (the employee's name, the name of the person who creates the basis of a potential conflict, the potential conflict's identifying information, and short summary of the potential conflict) to confirm whether any conflict exists, whether the conflict warrants an ethical wall between the employee and the case, or whether other action is appropriate.
3. TIU will keep a list of conflicts and affected employees.
4. Direct supervisors must refer to the list kept by TIU to avoid assignments and improper communications where conflicts exist.
5. All prosecuting attorneys who previously served as an attorney for clients criminally charged by SFDA or were targets of an investigation conducted by SFDA shall, upon hire, provide TIU with a list of former clients and cases in which that former defense attorney received privileged and confidential information during that prior representation.

Ethical Wall

When a conflict is identified, an ethical wall may be imposed to prevent a conflict from disabling the prosecution by an attorney or an entire office. To be effective, an ethical wall must be imposed promptly and provide preventative measures to guarantee that information is not shared or conveyed. Ethical walls: establish physical, geographic, and departmental separation

of employees; prohibit and sanction any discussion of confidential matters; and establish rules and procedures to prevent access to confidential information and files.

To that end, once a conflict is identified for any SFDA employee, an ethical wall will be established by:

1. Physical, geographic, or departmental separation of the conflicted employee, if necessary;
2. Prohibited electronic and physical access to affected case file(s); and
3. Any other preventative measure to ensure that information is not shared or conveyed.

Rules and Procedures:

When a conflict is identified, TIU will provide SFDA's Information Technology (IT) Unit with the name of both the employee and the person that creates the basis for the conflict. IT will then follow procedures to ensure that an employee with a conflict of interest does not have access to the affected case(s) on any electronic system designed to store SFDA case files. For physical files, the supervising employee will ensure that an employee with a conflict of interest has no physical access to the affected case. In some instances, reassignment to a different unit within SFDA may be necessary to provide physical, geographic, or departmental separation and prevent any conflicts of interest in case work.

Supervising employees shall have access to a list of conflicts to comply with their obligation of avoiding assignments and improper communications where a conflict exists. This list is confidential work product; the list and any information contained in it cannot be duplicated or disseminated. Access to and use of this list is limited to the purposes of this conflicts of interest policy. Access and use of this list for any other purpose can result in discipline, including termination.

If the conflict involves the District Attorney or a supervising employee, the District Attorney or the supervising employee shall be walled off from the prosecution or investigation. For any conflict involving the District Attorney, the Chief Assistant District Attorney shall serve as the Acting District Attorney in that matter. For supervising employees, supervisorial responsibilities are elevated to the next level of supervision unaffected by the conflict.

An employee subject to an ethical wall shall not seek or solicit any information in any form about the matter(s) (e.g., a charged case or investigation) for which the employee has a conflict. Supervising employees shall not assign any matter(s) involving the subject of the conflict to the employee subject to an ethical wall. An attorney or employee assigned to a matter(s) where an ethical wall has been imposed shall not seek or solicit any information in any form from an employee subject to an ethical wall. Failure to comply with these rules and procedures can result in discipline, including termination.

Applicable Law

Special Conflicts of Interest for Former and Current Government Officials and Employees ([Cal. Rules Prof. Conduct, rule 1.11](#))

A lawyer currently serving as a public official or employee must not participate in a matter in which the lawyer personally and substantially participated while in private practice or

nongovernmental employment, unless the appropriate government agency gives its informed written consent. (Rule 1.11(d).)

A lawyer who formerly served as a public official or employee of the government cannot represent a client in connection with a matter in which the lawyer participated personally or substantially as a public official or employee, except upon informed, written consent from the governmental agency. (Rule 1.11(a).)

No attorney in the same firm may knowingly undertake or continue representation of that client, unless an ethical wall is erected for the former public official or government employee, and written notice is given to the governmental agency. (Rule 1.11(b).)

Nor can a former public official or government employee, having previously acquired confidential government information about a person, represent a private client whose interests are adverse to the person in a matter in which the information could be used to the material disadvantage of that person. The firm which currently employs the former public official or government employee may undertake or continue representation with that private client only if an ethical wall is erected for the former public official or government employee. (Rule 1.11(c).)

Personal participation includes both direct and supervisory participation. Substantial participation is more than mere official responsibility, knowledge, perfunctory involvement, or involvement on an administrative or peripheral issue. To be substantial, participation and involvement is significant, but it need not be determinative of the outcome of the matter. (Comment to Rule 1.11.)

Misdemeanor and Disbarment for Advising or Defending After Public Prosecution or Assistance Therein ([Bus. & Prof. Code, § 6131](#))

Former prosecutors that join defense practice are prohibited from appearing as defense attorneys on cases they have prosecuted on pain of disbarment and misdemeanor penalty. (See Bus. & Prof. Code, § 6131, subd. (b); see also *People v. Spencer* (1882) 61 Cal. 128, 130 [acting as district attorney drew up indictment, grand jury returned true bill; violation of duties to then appear as attorney for defendant].) But this provision also covers cases when the attorney “in any manner aided or promoted any action or proceeding in any court as district attorney or other public prosecutor” and so it is quite broad.

American Bar Association, Prosecution Function [Standard 3-1.7-Conflicts of Interest](#)

(a) The prosecutor should know and abide by the ethical rules regarding conflicts of interest that apply in the jurisdiction, and be sensitive to facts that may raise conflict issues. When a conflict requiring recusal exists and is non-waivable, or informed consent has not been obtained, the prosecutor should recuse from further participation in the matter. The office should not go forward until a non-conflicted prosecutor, or an adequate waiver, is in place.

(b) The prosecutor should not represent a defendant in criminal proceedings in the prosecutor's jurisdiction.

(c) The prosecutor should not participate in a matter in which the prosecutor previously participated, personally and substantially, as a non-prosecutor, unless the appropriate government office, and when necessary a former client, gives informed consent confirmed in writing.

(d) The prosecutor should not be involved in the prosecution of a former client. A prosecutor who has formerly represented a client should not use information obtained from that representation to the disadvantage of the former client.

(e) The prosecutor should not negotiate for private employment with an accused or the target of an investigation, in a matter in which the prosecutor is participating personally and substantially, or with an attorney or agent for such accused or target.

(f) The prosecutor should not permit the prosecutor's professional judgment or obligations to be affected by the prosecutor's personal, political, financial, professional, business, property, or other interests or relationships. A prosecutor should not allow interests in personal advancement or aggrandizement to affect judgments regarding what is in the best interests of justice in any case.

(g) The prosecutor should disclose to appropriate supervisory personnel any facts or interests that could reasonably be viewed as raising a potential conflict of interest. If it is determined that the prosecutor should nevertheless continue to act in the matter, the prosecutor and supervisors should consider whether any disclosure to a court or defense counsel should be made, and make such disclosure if appropriate. Close cases should be resolved in favor of disclosure to the court and the defense.

(h) The prosecutor whose current relationship to another lawyer is parent, child, sibling, spouse or sexual partner should not participate in the prosecution of a person who the prosecutor knows is represented by the other lawyer. A prosecutor who has a significant personal, political, financial, professional, business, property, or other relationship with another lawyer should not participate in the prosecution of a person who is represented by the other lawyer, unless the relationship is disclosed to the prosecutor's supervisor and supervisory approval is given, or unless there is no other prosecutor who can be authorized to act in the prosecutor's stead. In the latter rare case, full disclosure should be made to the defense and to the court.

(i) The prosecutor should not recommend the services of particular defense counsel to accused persons or witnesses in cases being handled by the prosecutor's office. If requested to make such a recommendation, the prosecutor should consider instead referring the person to the public defender, or to a panel of available criminal defense attorneys such as a bar association lawyer-referral service, or to the court. In the rare case where a specific recommendation is made by the prosecutor, the recommendation should be to an independent and competent attorney, and the prosecutor should not make a referral that embodies, creates or is likely to create a conflict of interest. A prosecutor should not comment negatively upon the reputation or abilities of a

defense counsel to an accused person or witness who is seeking counsel in a case being handled by the prosecutor's office.

Caselaw

A finding of a conflict of interest has been affirmed when:

- The victim of the crime is a prosecutor. (See *People v. Jenkins* (1987) 196 Cal.App.3d 394.)
- An employee of the district attorney's office has a familial relationship with the victim of the crime charged by that office. (*People v. Superior Court (Greer)* (1977) 19 Cal.3d 255.)
- Any familial relationship existed between the elected district attorney and the victim of the crime. (*People v. Dekraai* (2016) 5 Cal.App.5th 1110.)
- A deputy district attorney was a material witness to shooting and potentially a victim. (*People v. Conner* (1983) 34 Cal.3d 141.)
- A defendant's parents were employed by the district attorney's office. (*People v. Vasquez* (2006) 39 Cal.4th 47.)
- There was an attorney-client relationship between the prosecutor and the defendant. (*People v. Lepe* (1985) 164 Cal.App.3d 685.)
- Strong appearance of a conflict where the district attorney and staff was personally affected alleged conduct underlying the accusation to remove the auditor-controller from office. (*Lewis v. Superior Court* (1997) 53 Cal.App.4th 1277.)

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