

# KING COUNTY PROSECUTING ATTORNEY'S OFFICE

## CIVIL DIVISION CONFLICT SCREENING POLICY

### I. INTRODUCTION

The purpose of this memo is two-fold. First, this memo identifies various “dual representation” scenarios that may arise for Civil DPAs in their practice which warrant review for actual or apparent conflicts. “Dual representation” refers to situations where our Office, either through a single or multiple DPAs, represents two different clients in the same matter. In addition to current client scenarios, this memo considers DPA representation of the County adverse to a former individual County client.<sup>1</sup> Second, this memo formalizes policies and procedures that the KCPAO will implement to consider and address actual or potential conflicts, and appearance of conflicts concerns.

Pursuant to RPC 1.13, our Office subscribes to the entity theory of representation under which in the ordinary course of our work DPAs represent King County as a single entity. We do not ordinarily treat subordinate parts of the County, such as the Council, the Executive, or a specific Executive branch department, as separate “clients.”<sup>2</sup> As a result, we do not typically have to deal with situations in which there is a conflict of interest between our clients in the manner addressed by the RPCs. There are, however, a few situations in which our Office is faced with representing more than one client in the same matter. Additionally, there are situations where, as a prudential matter, we have determined that the Office will treat the representation as if more than one client is involved.

This memo first describes situations where review for potential conflicts is warranted and then explains what procedures should be used for potential conflict review. The memo then moves on to look at scenarios where the Office has determined that conflict screening will be required, and what that process will entail. This memo should be applied by DPAs to ensure conflicts are avoided or appropriately addressed when dual representation situations arise.

### II. SCENARIOS WHERE POTENTIAL CONFLICT REVIEW IS WARRANTED

In the following scenarios, DPAs are expected to notify their section head, who will notify the Chief Civil DPA, of potential or existing dual representation. The section head and

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<sup>1</sup> This memo does not address conflicts arising from a DPA's representation of former clients prior to joining the Office, nor conflicts that arise due to reasons such as financial or other personal interest in a matter. For these scenarios, DPAs should review the RPCs, the County Ethics Code (Ch. 3.04 K.C.C.), and speak to their supervisor.

<sup>2</sup> For prudential reasons, our office does treat certain different constituent parts of the County as separate clients for purposes of attorney client communications and preservation of client confidences. The precise scope of these considerations is beyond the scope of this memo.

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Chief Civil DPA will determine whether screening is necessary or what other cautionary steps may be appropriate.

1. One DPA represents a county department or employee who is being investigated by another county entity with authority to impose a penalty and another DPA represents the investigating entity. Examples are investigations by the Office of Civil Rights or the County Ombudsman.
2. One DPA represents a county department that is applying for a permit or resolving a permit enforcement issue with another county department and another DPA represents the permitting entity. An example is the Roads Division seeking a construction permit from the Permitting Division, or dealing with an enforcement issue relating to such a permit.
3. One DPA seeks to represent multiple defendants in a single lawsuit. This may occur when a lawsuit names King County and/or multiple individual County employees as defendants in the same case.

There may be other circumstances not mentioned here where dual representation concerns arise and warrant supervisor notification and review for potential screening. If a DPA identifies such a situation, the DPA should consult the RPCs, Ch. 3.04 KCC, and notify their section head that they believe there may be a potential conflict. The section head and Chief Civil DPA will determine whether any further steps are necessary.

### **III. GENERAL PROCEDURES FOR REVIEW OF A POTENTIAL CONFLICT**

*Dual Representation:* In dual representation scenarios that warrant potential conflict review, the Office will take steps to determine whether screening or other preventative measures should be taken. If a DPA or staff become aware of a potential conflict they shall promptly inform their section head. The affected section head(s) shall evaluate whether a conflict exists based on review of available information regarding the matter, the clients, and the anticipated DPA involvement in the matter, and shall make a recommendation to the Chief Civil Deputy, who shall make the decision as to whether a conflict screen is needed.

The ability of a single DPA to represent multiple defendants in a lawsuit will be determined by the Chief Civil Deputy in consultation with the affected section heads. If the Chief Civil Deputy determines that one DPA may not represent all the defendants, and chooses to use multiple DPAs to represent the various defendants, a conflict screen will be required.

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*Individual County Employees Represented:*<sup>3</sup> For matters involving representation of individual employees, before deciding to represent an individual employee in any litigation matter or to advise in a manner potentially adverse to a particular employee, DPAs shall take steps to identify whether a potential conflict of interest may exist, including

1. Identifying the employee to be represented or the employee with respect to whom advice is sought.
2. Enquiring with section heads whether any current or former advice or litigation matter that has been handled by the PAO involving the individual employee.
3. Having an assigned staff person conduct a search in Legal Files for any current or former litigation or advice matters involving the individual employee, if one has not been done.

If the search indicates that another DPA (a) has previously or is currently advising with respect to the employee on the same or a substantially related matter, or (b) has previously or is currently representing the employee on any matter, follow-up with the affected section heads is required. The section heads, in consultation with the Chief Civil Deputy, will determine whether screening is required or what further steps are required to ensure fair and effective representation.

#### **IV. SCENARIOS WHERE DPA SCREENING IS REQUIRED**

The Office requires conflict screening in the following situations:

1. One DPA represents a decision maker and another DPA represents or advises a party that appears before that decision maker in the same matter. Typical examples include one DPA advising the King County Hearing Examiner, while another appears on behalf of a party before the Hearing Examiner, such as the Permitting Division or Animal Control.
2. One DPA represents a party in a lawsuit or administrative proceeding and another DPA represents or advises a party on the other side of the same lawsuit or proceeding. This situation occurs infrequently and the Chief Civil Deputy should be notified before filing or joining a lawsuit on behalf of part of the County in opposition to another part of the County. In the past, such situations have included the King County Landmarks Commission intervening in litigation brought by the King County Assessor against the State Department of Revenue. It has

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<sup>3</sup> As mentioned above, because our client is the County, ordinarily individual County employees are not our clients for conflict purposes. That is not the case when individual County employees are named as defendants in lawsuits. In that case, the individual employee is a client.

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also included situations where a County agency appealed the decision of a County decision maker, such as the Hearing Examiner or the Personnel Board, and our office provided at least pro forma representation of the decision maker.

3. One DPA is asked to represent a county employee who is a named defendant in an active lawsuit, and another DPA is asked to represent the County adverse to that employee (e.g. to provide advice to the County about potential disciplinary action adverse to the employee).

4. One DPA formerly represented a county employee and another DPA is later asked to represent the County (1) in the same or a substantially related matter, (2) in which the County's interests are materially adverse to the interests of the employee.

**V. GENERAL CONFLICT SCREENING PROCEDURES**

If a dual representation scenario warrants screening to avoid a conflict of interest, the following procedures shall be promptly implemented:

1. The affected section head(s) shall identify the employees who need to be screened. Where multiple clients or multiple constituent parts of the County are involved, all DPAs and staff representing one client or part of the County, including supervisors with whom they discuss the matter, must be screened from all DPAs and staff representing the other client or part of the County. If groups of employees within the same section are screened from each other, one group will be assigned to report to a different section head or the Chief Civil Deputy for the screened matter.

2. Screened attorneys and staff who are working on the screened matter will be informed that the screening is in place and that they may not (1) communicate with the other screened attorneys or staff with respect to the screened matter or (2) access files or documents related to the screened matter.

3. If the screened matter involves litigation or other proceeding where DPAs are representing parties and must communicate with each other with regard to the screened matter, the DPAs should communicate only in writing unless a third party is present.

4. When assigning attorneys and staff to a screened matter, the section head must communicate the screen and affirm that the attorney or staff have not previously had any involvement with the screened matter.

5. Limitations on document access to any matter involving a conflict screen:  
a. Hard copy files must be clearly identified as "Restricted Files." Such identification should include, but is not limited to, affixing a label (in substantially the form of

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the attached) on the outside of the file. Restricted Files should be housed in a manner that reduces the likelihood of access by any conflicted individuals.

b. Legal Files: Have the Restricted File be labeled in the notes field as one that is restricted, and access is limited to those designated. Those that may access such a legal file are limited to the assigned attorney(s), the attorney's staff, the section head to whom the screened employees will report for that matter and/or the Chief Civil Deputy if he or she is also in the reporting chain for the matter, and the Chief Administrative Supervisor.

6. Section heads and all other PAO staff should avoid discussing screened matters during staff meetings where screened staff are present or in weekly, monthly, or other reports, except for providing information that is publicly available.