

PUBLIC DEFENDER SERVICE CORPORATION
Board of Trustees' Video Conferencing Meeting
Tuesday, July 28, 2020 – 12:30 p.m.
Via Video Conferencing - Zoom
Public Defender Service Corporation
A G E N D A

- I. Call to Order**
- II. Roll Call**
- III. Proof of Due Notice of Meeting:**
 - A. **Notice:** 5 Working Days, Guam Daily Post Tuesday, July 21, 2020
 - B. **Notice:** 48 Hours, Guam Daily Post Friday, July 24, 2020
- IV. Determination of Quorum**
 - Approval of Minutes:** Regular Scheduled Meeting of June 23, 2020
- V. Old Business:**
 - A. Financial Status Update (PDSC, APD and DVP) Allotment Releases
 - B. Report from PDSC Executive Director – Update on Remote Hearings
 - C. Report from APD Managing Attorney – Update on Remote Hearings
 - D. Performance Evaluations (Executive Director and Managing Attorney)
 - E. Public Health Legal Assistance Services for Seniors Program
- VI. New Business:**
 - A. Civil Moratorium Memo from PDSC Deputy Director & Resolution No. 05-20 and Resolution No. 06-20 – **EXHIBIT A**
 - B. Car Purchase for Rental Cars – **EXHIBIT B**
- VII. Executive Session:**
 - A. Performance Evaluations (Executive Director and Managing Attorney) – **Material Hand Delivered to the BOT**
 - B. MA Gayle's Performance Evaluation Period– **EXHIBIT C**
- VIII. Public Discussion**
- IX. Adjournment and Next Meeting Date:** Tuesday, August 25, 2020 at 12:30 p.m. in the PDSC Conference Room.

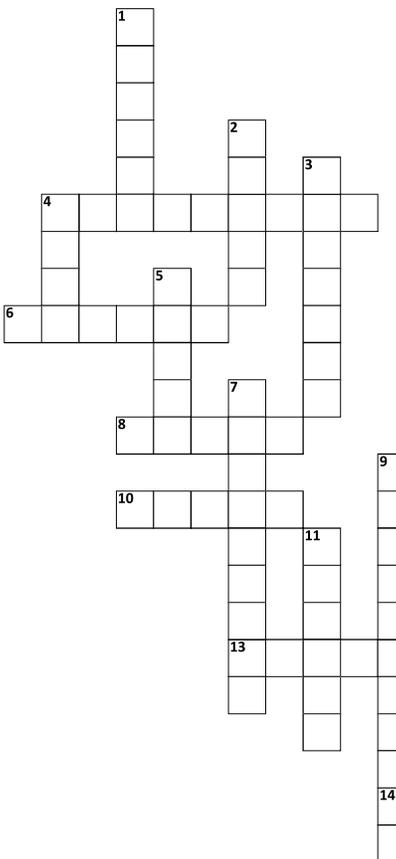


Presents
Chamorro Activity

A great way to learn and increase your Chamorro Vocabulary is by doing Crossword Puzzles. Crossword puzzles provide hours of enjoyment and challenge. With practice and patience you'll be done in no time!



- AFA'FA** armpits
- ATADOK** eyes
- ATTOMOBET** automobile
- BENTE** twenty
- BIRENGHENAS** eggplant
- CHALAN** road
- CHATGE** laugh at someone
- DADALAK** tail of an animal
- DOSSE** twelve
- ESTAGUE'** here is
- FANOMAKAN** shower room, swimming place
- FINA'** that which is
- ILEK** said
- MANNOK** chicken
- MELON** cantelope



Down

- 1. road
- 2. armpits
- 3. tail of an animal
- 4. that which is
- 5. twelve
- 7. automobile
- 9. eggplant
- 11. laugh at someone
- 12. said

Across

- 4. shower room, swimming place
- 6. chicken
- 8. twenty
- 10. cantelope
- 13. here is
- 14. eyes

Across: 4. fanomakan 6. mannok 8. dosse 10. melon 13. estague 14. atadok
Down: 1. chalan 2. afa'fa 3. dadalak 4. fina 5. bente 7. attomobet 9. birenghenas 11. chatge 12. ilek

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|---|--|---|

PO Box 1306 Hagatna, Guam 96932
ffc_agana@yahoo.com

NOTICE OF PUBLIC MEETING

The Public Defender Service Corporation Board of Trustees will hold a regular meeting on **Tuesday, July 28, 2020 at 12:30 P.M.** in the PDSC Conference Room of the Public Defender Service Corporation, located at MVP Sinajana Commercial Building, Unit B, 779 Route 4, Sinajaña, Guam 96910. The meeting will be held via video conferencing and a link to the meeting is available through the PDSC website.

Copies of the agenda will be available prior to the meeting at the Public Defender Service Corporation.

Individuals requiring special accommodations are asked to contact Ms. Cathy Gogue at 475-3100.

/s/ F. Philip Carbullido
Chairman

GUAM ENVIRONMENTAL PROTECTION AGENCY
AHENSIAN PROTEKSION LINA'LA GUAHAN

PUBLIC NOTICE

PROPOSED ISSUANCE OF SOLID WASTE STORAGE & PROCESSING PERMIT

The Guam Environmental Protection Agency (Guam EPA) wishes to notify the general public and other interested parties of Guam EPA's intent to issue a Solid Waste Permit to the following company:

JL Waste Management
Storage & Processing - Medical Waste
Lot No. 5103-2, Harmon, GU

The Permits and their conditions are proposed and open for public comment, in accordance with 10 GCA §51104. A copy of the proposed permit and permit applications for the applicant listed above, and all other supporting documents are available for public inspection, Monday through Friday (excluding holidays), 9:00 a.m. to 5:00 p.m. at the agency's administration building located at 17-3404 Mariner Avenue, Tiyan Barrigada. A public hearing will be held in the event a reasonable request is made.

PUBLIC REVIEW AND COMMENT PERIOD:
TUESDAY • JULY 21, 2020 - FRIDAY • SEPTEMBER 4, 2020

Written comments are welcomed and must be received by the agency via hand delivery, or mail and should be addressed to: Solid Waste Management Program, c/o Guam EPA:
17-3304 Mariner Avenue Tiyan Barrigada, Guam 96913-1617.

Written comments must be received, or postmarked no later than 5:00 p.m. on September 4, 2020.

Facsimile submittals will not be accepted.

The final decision to set conditions and issue the final permit or deny application for the permit will be decided after all comments have been considered. Please bring this information to the attention of all persons who may be interested in this matter.

For more information, please contact Glenn San Nicolas at 671.300.4751 or glenn.sannicolas@epa.guam.gv
/s/ WALTER S. LEON GUERRERO, Administrator

(THIS AD PAID FOR BY JL Waste Management)

GUAM EPA | 17-3304 Mariner Avenue Tiyan Barrigada, Guam 96913-1617 | Tel: (671) 300.4751/2 | Fax: (671) 300.4531 | epa.guam.gov
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GUILTY VERDICT continued from page 1

Judge Perez thanked jurors for their service through the "tremendous challenges" and said it was the longest trial he has ever presided over in his 12 years on the bench.

The trial was paused for four months due to the pandemic.

The jury listened to 18 hours of the audio captured from the first part of the trial when it resumed earlier this month.

Acosta decided not to testify.

During the trial earlier this year,

photos from the crime scene were shown in the courtroom of the blood splatter on the walls, the bedsheets and the mattress of Nauta's room.

DNA evidence taken from her body and sent to the FBI's DNA lab revealed it belonged to Acosta, FBI forensic examiner Brandon McCollum testified.

Acosta was being held at the Department of Corrections in 2018 in connection with multiple burglaries reported along Chalan Koda, Dededo, when he allegedly disclosed to another inmate

details about Nauta's death, court documents state.

He pleaded guilty last December to the Dededo burglaries.

Guam police detective Angel Santos IV testified during the trial in March about the moment Acosta opened up to investigators.

"He said he burglarized the residence and that he was high that night, under the influence of methamphetamine. He said he went next door. I asked, 'Timicca's house?' He nodded his head up and down. He said he went inside Timicca's

room," Santos said. "He said he went in to burglarize another residence. It was dark and he was startled by an unknown individual and couldn't see. What happened inside, he said it wasn't his intent and that it was a mistake."

The defense argued that Acosta's statements, however, were not a confession that he raped and killed Nauta.

"We cannot bring Ms. Nauta back to her family, but we hope that the close of this case and upcoming sentencing will aid in the road to peace and recovery for the family," Rapadas said.

RAID continued from page 1

possession of a Schedule II controlled substance. He is being held on \$3,000 cash bail.

"We have the defendants who will likely testify against each other and a lot of police evidence.... We believe it is a very strong case," said prosecuting attorney Steven Haderlie.

The four were ordered by the court to have no contact with each other.

According to court documents, Chandler was the target of the search warrant when officers spotted the four defendants inside his bedroom along with drug paraphernalia, meth and a container with residue of an unknown white powdery substance.

Investigators also found a small-caliber handgun with ammunition, assorted pills, cash, and an unknown powder substance that was sent to a lab for testing, documents state.

Chandler allegedly admitted to smoking meth and consuming a "quarter bar of Alprazolam." He denied owning the illicit drugs in his room, documents state.

Cruz, Kuper and Rosal also admitted to police that they smoked meth, the prosecution alleged in documents.

Kuper also allegedly admitted, according to court documents, that he brought eight pills of Alprazolam, which he crushed and snorted.

Rosal also told police he saw Chandler with a gun earlier that day and claimed they were going to become rich as soon as a package of meth arrived, documents state.

Authorities also found a fifth adult and three children in the apartment, documents state.

Criminal history

Chandler was arrested on illegal drug possession charges in February 2019, according to prison records. He was among a group of men accused of having drugs after police responded to a report of a suspicious person wearing a gas mask at a Tamuning game room, Post files state. He took a deferred plea for possession of Schedule IV controlled substance

last December and received a three-year suspended prison sentence.

Rosal was arrested for alleged illegal drug and firearm possession in April of this year. He was released from prison less than a week ago. In June 2019, he was acquitted in the Superior Court of Guam on allegations of beating and raping a woman known to him. Rosal was released on parole in February 2017 after serving his time in prison for assaulting an 18-year-old man in 2012, Post files state.

In April 2015, Pierson was arrested on charges of illegal possession of a controlled substance, illegal possession of marijuana, and possession with intent to deliver or distribute, prison records state.

TOURISM continued from page 1

GVB's revised proposed budget for 2021 could drastically drop to \$9.1 million in fiscal 2021, from about \$22 million annually in past years, GVB Vice President Gerry Perez told board members.

"It's worse to create false expectations than to live with reality," Perez said, as some board members shared what other agencies were projecting for 2021 tourist arrivals, reaching as high as 1 million.

If GVB goes with a \$9.1 million revised proposed budget for 2021, there was no mention at the board

meeting what that would mean for bureau personnel and programs.

"It's not very pretty," Perez told board members, led by Chairman Sonny Ada.

But at the GVB board meeting, members did not make a final decision on a revised 2021 budget that would be presented to senators next week. Perez will meet with certain board members today.

Guam's visitor arrivals grew steadily over the past years, from 1.3 million in fiscal 2015 to 1.4 million in 2016, and then to 1.5 million in 2017 and 2018 before reaching a record 1.6 million in 2019.

Fiscal 2020 numbers were earlier projected to remain at 1.6 million, but the COVID-19 pandemic threw that figure out the door. The current fiscal year's budget was slashed from \$22 million to \$12 million.

Perez at the board meeting said projected arrivals for fiscal 2021 total 251,437 with seat capacity at 70%, to 1.39 million-plus.

Guam 'never really closed'

Perez said Guam "never really closed the island to tourists."

Rather, Guam's source tourism markets "were afraid to let their residents travel for fear of infection" or be stuck in quarantine someplace

else, he said.

"The notion that we shut down tourists is not technically a correct notion," Perez said.

Board members at the meeting did not float any proposed new date for reopening Guam's tourism, after Gov. Lou Leon Guerrero scrapped the initial target of July 1.

However, the board approved \$21,000 in funding to hire entertainers that will greet arriving passengers from Aug. 1 to Sept. 30.

The board also approved \$1.25 million from rainy day funds to be used for basic marketing recovery plans for Japan, South Korea and Taiwan.

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/s/ F. Philip Carbullido
Chairman

PUBLICATION NOTICE

In accordance with the provisions of Guam Code Annotated, Title XI, Chapter III, Section 3315, notice is hereby given that:

Ada, Lizabeth M.

DBA: Ada, Lizabeth M.

has applied for a Class: Five (5) General Off-Sale Alcoholic Beverage License said premises being marked as Lot: 90-C-3-3 #470 Aguilar Rd. Windward Hills Yona.

PUBLICATION NOTICE

In accordance with the provisions of Guam Code Annotated, Title XI, Chapter III, Section 3315, notice is hereby given that:

HWANG, SANGCHUL

DBA: S&A Market

has applied for a Class: Five (5) General OFF Sale Alcoholic Beverage License said premises being marked as Lot: Guam Korean Trade Center Unit 6 L5162-3-1 R1, L5162-3-2 and L5162-3R3.

PUBLIC DEFENDER SERVICE CORPORATION

Board of Trustees' Video Conferencing Meeting

Tuesday, June 23, 2020 – 12:30 PM

Via Video Conferencing - Zoom

Public Defender Service Corporation

Conference Room

MINUTES

CALL TO ORDER:

The meeting was called to order at 12:31 p.m. on June 23, 2020 by the Chairman, Chief Justice F. Philip Carbullido.

I. ROLL CALL:

Present:

Chief Justice F. Philip Carbullido, Chairman, calling in from Guam
Judicial Center

Presiding Judge Alberto C. Lamorena, III, Vice Chairman, calling
in from Guam Judicial Center

Attorney Cynthia Ecube, Member, calling in from Hågatña

Trustee Donna M. Quinata, Member, calling in from Hågatña

Attorney Jacque T. Terlaje, GBA President, calling in from
Hågatña

Others Present:

Stephen P. Hattori, PDSC Executive Director

John P. Morrison, PDSC Deputy Director

AnaMaria Gayle, APD Managing Attorney

Cathy Gogue, Administrative Director

Michael Moreno, Chief Fiscal Officer

Cathleen LG Moylan, Program Coordinator

Julito Tingson, MIS Administrator

Katherine Sablan, Personnel Specialist IV

Audre Hattori, APD Management Officer

Speaker Tina Muña-Barnes

Arthur San Agustin, DPHSS Division of Senior Citizens

II. PROOF OF DUE NOTICE OF MEETINGS:

“Notice of Public Meeting” was published in the Guam Post on Tuesday, June 16, 2020 and Friday, June 19, 2020.

III. DETERMINATION OF QUORUM:

With the presence of four (4) out of the five (5) board members, a quorum was determined for the meeting to proceed.

GBA President Terlaje joined the meeting after rollcall was conducted. Consequently, all members were present for the meeting.

IV. **APPROVAL OF MINUTES:**

Chief Justice Carbullido stated the meeting will start with the approval of the minutes of the regular board meeting of December 17, 2019 and the reconvened meeting of January 14, 2020. A motion to adopt the minutes subject to correction was made by Presiding Judge Lamorena. Trustee Ecube stated she was reluctant acting on the meeting minutes of January 14th because she was not yet a board member. Chief Justice Carbullido indicated that Presiding Judge Lamorena and Trustee Terlaje are the only current board members who were present for those meetings.

Presiding Judge Lamorena amended the motion for members who were not present at said meetings to rely on the transcripts prepared by PDSC, seconded by Trustee Ecube. Approved by acclamation.

Chief Justice Carbullido moved on to the minutes of the regular board meeting of May 26, 2020, in which all current members were present.

Motion to adopt the meeting minutes of May 26, 2020 was made by Trustee Quinata, seconded by Presiding Judge Lamorena. Approved by acclamation.

V. **PUBLIC DISCUSSION**

Chief Justice Carbullido asked that the meeting move into Public Discussion so that Speaker Tina Muña-Barnes be allowed to comment on the Legal Assistance Services for Seniors Program, and then they will revert back to Old Business. No objections were made by the trustees.

Speaker Muña-Barnes thanked the board for the opportunity to speak in support of the Legal Assistance Services Program before attending a budget hearing for the Mayors' Council. Madam Speaker reminded the board that while working at PDSC, she remembers elderly clients bringing in homemade goods to express their appreciation to the PDSC staff for their invaluable help regarding what may have been really small legal assistance the office provided. She remembered that PDSC staff worked hard to give their clients the best service possible and it was with a heavy heart that she signed a moratorium that limited its services when she served on the board. She believes that this senior's program will right-size the PDSC and is in line with its enabling legislation to render legal aid in civil matters. Speaker Muña-Barnes e reminded the board that the *Manâmkô* only ask for help when they truly need it. Usually the assistance they are seeking is for simple, non-fee-generating matters such as deeds or to appoint agents to assist them as they reach their end stage. They come to PDSC to settle their matters to help their families avoid getting held up in probate or being torn apart because they did not have the opportunity to settle their affairs – which is something that happens far too often in our community. Speaker Muña-Barnes continued that 20% of Guam's population is people 55 years of age or older, many of whom are still working and are ready to begin end-of-life planning, but are held back by their limited pension. This program would provide a one-stop legal service center for our senior citizens. She noted that the PDSC

was established to assist vulnerable indigent persons who need representation in civil matters per 12 GCA §11105. The Speaker continued by stating that if it is the will for PDSC to not provide services to senior citizens in civil matters, she is proposing that the Corporation prepare a resolution so that the Legislature can work on legislation that is still pending. Speaker Muña-Barnes referred to Bill No. 146-35 that was introduced back in May of last year that allows PDSC to enter into inter-government/intra-government relations with Public Health. The intent to to work closely with the PDSC board as she is passionate about bringing services back to the Corporation. Speaker Muña-Barnes has asked the Legislative Secretary and others to help her in this effort.

Speaker Muña-Barnes further requested that the Board reconsider this matter given that our *Manãmko* ' are vulnerable and cannot afford legal services for simple matters that she knows can be handled through the Public Defender's Office. She would like to see these services, relative to civil matters, return back to the PDSC.

Chief Justice Carbullido thanked Madam Speaker for her support and passion on the Legal Assistance Services Program for seniors. He added that her comments are all part of the record and will be taken into consideration when we discuss this item on the agenda.

The Chief Justice then advised the members that the board meeting will proceed based on the agenda provided.

VI. **OLD BUSINESS:**

A. **FINANCIAL STATUS UPDATE (PDSC, APD, and DVP) Allotment Releases**

CFO Moreno stated that PDSC is at 97.5% of allotment releases. The office just received Amendment #3 for DVP STOP 2017 which adds on funding and will last until August 31st. Reimbursement requests have been submitted for January to May and should be up to date soon. We are working on STOP 2018 which will provide funds up until December 31st. It is a work in progress that has not yet been finalized.

Regarding APD, 3rd quarter allotments were received on June 12th. They are at 100% for this quarter. Next month Fiscal will issue an invoice for the last quarter of this fiscal year.

Chief Justice Carbullido asked CFO Moreno to clarify that PDSC remains current with allotment releases, which CFO Moreno confirmed. CFO Moreno noted that the at the beginning of the pandemic, the Governor's office identified \$179,000.00 from PD's approved appropriations and we are now awaiting confirmation that that amount will go back to PDSC through the CARES Act. Chief Justice Carbullido suggested that ED Hattori and AD Gogue put into writing a request for reimbursement, as that is what the Judiciary had done and they have already had this set-aside restored. ED Hattori stated that they did

communicate with BBMR who sent them an email stating that no allotments were withheld in regards to the pandemic. He mentioned the irony that PDSC was assisting residents who were being quarantined at hotels and we did not received any CARES money. He then assured Chief Justice Carbullido that they will put this request in writing by the next board meeting.

B. PDSC - UPDATE ON REMOTE HEARINGS

ED Hattori stated that the office just obtained fifteen (15) webcams and are now Zoom capable. At least three or four courtrooms have been having hearings using Zoom while the others are via teleconference. All documents are being e-filed, which is allowing both the court and PDSC to be more efficient. The issue they have yet to resolve is allowing clients to participate in hearings. He stated that change of plea hearings have taken place via Zoom. Judge Sukola is wavering between having in-person hearings or to set-up a site at the Judicial Education Center. PDSC is working with trial courts to determine how they will hold hearings while still maintaining social distancing protocols.

Presiding Judge Lamorena stated that to help expedite matters and reduce exposure to COVID-19, he has spoken with some of the other judges who, for misdemeanor cases, are amenable to having defendants waive their appearance and the court will accept their plea agreements if their attorneys-of-record submit a written consent from the defendant. Presiding Judge Lamorena asked that ED Hattori and MA Gayle submit a draft waiver form for PD and APD clients before we start using them. ED Hattori responded that they will work on the draft and submit it to the court before they start filing the waiver. Presiding Judge Lamorena asked if they can submit the form by the end of the week and stated again that this will only apply to misdemeanor cases, not felony to a misdemeanor. For example, a defendant charged with a misdemeanor DWI can plead to a lesser misdemeanor such as reckless driving. Whereas a defendant charged with a DWI as a 3rd degree felony who pleads to a misdemeanor DWI would have to go through the normal judicial process. Presiding Judge Lamorena added that the waiver would eliminate a lot of people walking into the courthouse.

ED Hattori confirmed that they will submit the form to the court within the next few days. Presiding Judge Lamorena asked that it be emailed to him so that he can share it with the other judges to which ED Hattori confirmed.

Chief Justice Carbullido asked ED Hattori if the fifteen new webcams that PDSC received is for the attorneys. He asked if he can present PD's Zoom capabilities at the Robes meeting, sharing that PD can now handle remote hearings. Chief Justice Carbullido asked that in the event PDSC needs to bring in a client for a hearing, where the client would be placed so that he/she can participate in the hearing. ED Hattori stated that they are still trying to resolve that issue and mentioned that the three work stations that have been set up in their front office will be used for attorney-client meetings and since only three stations have been set up, it will be difficult to accommodate court hearings. ED Hattori continued

by stating that the office is working on obtaining a wireless router that will enable clients to participate in hearings in the comfort of their vehicles in the PDSC parking lot. We are currently in the process of procuring a broadband wireless network that will expand Wi-Fi capabilities for our clients to use.

Chief Justice Carbullido asked if there is a conference room or if a plan is in place for clients to participate in court hearings via Zoom. ED Hattori stated that the office only has three stations set up for clients to use for meetings with their attorneys. Chief Justice Carbullido asked if a schedule was in place to hold hearings because the feedback he is getting is that PDSC is resisting to appear for hearings via Zoom. According to the Chief Justice, the preference PD is for in-person hearings which goes against the Supreme Court's Administrative Order as to how they are conducting business at this time. ED Hattori stated that they have successfully been meeting with clients via numerous virtual platforms meaning the clients would be able to participate in Zoom hearings from their locations, or from the PDSC parking lot once the network is established. It is difficult to have clients in the office for hearings when there are five courtrooms having hearings at one time. He continued that APD may only be able to accommodate one client per hour and mentioned that Judge Sukola had fifteen hearings on one morning and that alone would be hard for the office to manage. Chief Justice Carbullido stated that the Judiciary is continuing to build its resources in order to be virtual-capable and would like for PDSC to also extend its virtual capabilities and facilities, including a temporary facility, if necessary. He would like PDSC to research the cost for these measures so they can determine affordability. Chief Justice Carbullido mentioned that this will be the direction they are striving for at this point in time and would like to see that PDSC and APD do all they can to ensure participation in virtual hearings.

C. APD – UPDATE ON REMOTE HEARINGS

MA Gayle reported that APD is able to accommodate telephonic hearings for the most part. They are able to accommodate Zoom hearings at a very limited basis. The issue they are faced with is having court interpreters present for their clients. They have one room available for clients to use for appointments via Skype, but as far as having clients come into the office for Zoom hearings, they are not ready. They are awaiting more direction to come from the Judiciary as to how they can proceed.

MA Gayle also mentioned that she has been communicating with Lt. Governor Tenorio and Mr. H. Hyunh, the Governor's legal counsel, regarding reaching out to the mayors' council so that they can accommodate clients at mayors' offices. Chief Justice Carbullido asked that APD continue to work on this process which MA Gayle confirmed.

D. PERFORMANCE EVALUATIONS – EXECUTIVE DIRECTOR AND MANAGING ATTORNEY

Chief Justice Carbullido reminded the Board that a meeting took place on January 14th where a decision was made during Executive Session, but a legal opinion cited that such decisions were not in conformance with Open Government Law. Thus, the decision was deemed null and void. He asked the Board if they want to revote on the matter or consider other options. Presiding Judge Lamorena did not object to allowing the new Board members to review the evaluations of the prior Board so they can discuss the matter privately and are comfortable in making any decisions, amendments or conclusions. Chief Justice Carbullido agreed with this recommendation, but would like for the members to have reviewed the evaluations by the next Board meeting. Trustee Ecube agreed with Chief Justice Carbullido and Presiding Judge Lamorena that they have additional time to review the evaluations so that the final decision is fair to the parties, and that a time limit should be set for them to decide. Trustee Quinata shared that she would also like some additional time because she does have some questions regarding the minutes of that Executive Session. Chief Justice Carbullido asked AD Gogue to provide any written evaluations to the Board members, if any. He stated this matter needs to be brought to an end and is hoping to settle this by the next Board meeting.

Presiding Judge Lamorena motioned for the decision regarding the performance evaluations of ED Hattori and MA Gayle be postponed to the next Board meeting and that AD Gogue provide documents necessary to make a decision, seconded by Trustee Ecube. Approved by acclamation.

E. PUBLIC HEALTH LEGAL ASSISTANCE SERVICES FOR SENIORS

Chief Justice Carbullido agrees that there is a need for this program and that PDSC is, first and foremost, set up for indigent criminal defense which should not be compromised. This will be a pilot program so that PDSC can continue service to indigent persons and that a conflict wall should be properly set up so that PDSC attorneys are not conflicted with any services this program will provide to senior citizens. He continued that PDSC resources are not to be tapped on to support this program because of challenging times that are ahead for the government. Given these terms, a pilot program will allow PDSC to test their undertaking of additional tasks without compromising its primary responsibilities.

GBA President Terlaje shared that she is concerned that since PDSC is unable to secure clients' participation at virtual criminal proceedings, this is not the best time to enter into a pilot project. She is concerned that PDSC funds and resources will be tapped on and exhausted in the criminal side in attempting to establish this program. Though GBA President Terlaje agrees that there is a need for this service, she is concerned that it may result in reduced resources for PDSC's criminal obligations.

Presiding Judge Lamorena recognized the presence of Mr. Arthur San Agustin of DPHSS' Division of Senior Citizens and asked that he respond to Trustee Terlaje's comments.

Mr. San Agustin stated that office space will be made available to PDSC at Public Health in anticipation of this project and that funding was received from the Aging Disability Resource Center. Their office is working with the University of Guam and they are looking into building their capacity to allow technology to be part of their service continuum. They also provide Medicare counselling and have some funding available under the CARES Act to obtain the technology needed for Zoom or teleconferences should the attorney who is placed there need it. Mr. San Agustin also shared that his office has existing case management systems because of the referral and assistance component of their division. They have earmarked funding for this program, and have made funds available in preparation for how business may be run.

ED Hattori stated that they have a presentation that will further address any concerns. He reiterated that PDSC is capable of Zoom hearings and that his staff have been reporting to work daily, but he is not comfortable exposing them to any clients that would have to come into the office to participate in virtual hearings. He stated that if there is an order from the Court to hold hearings in the office, then they will comply; however, he wants to protect his employees by reducing social contact. He believes that court hearings should take place in a court setting and suggested that the court hold hearings in the attorney meeting rooms and upgrade their internet speed because PDSC does not have the personnel support for that, but if ordered to do so, then they will comply.

Chief Justice Carbullido agreed that it is mutual they want to protect their staff and the general public, and that the Judiciary is working to provide a space for virtual hearings that would allow for social distancing. He continued that he wants to ensure that everyone is making additional efforts to comply as opposed to saying they are not capable. ED Hattori stated that all PDSC attorneys have been trained on Zoom and are 100% supportive of this venture.

Chief Justice Carbullido asked if PDSC would like to proceed with their presentation given that they only have 30 minutes. Trustee Quinata asked how long it would be so that she be allowed to make a comment afterwards. AD Gogue stated that the presentation should be quick, and confirmed that Trustee Quinata will have time afterwards to speak.

AD Gogue began with a recap that the moratorium was in place in November 1999, June 2003, and August 2012. Attorney caseload statistics from 1999 were not available so we used stats from FY2000 when they implemented Abacus case management system; which showed the caseload for nine attorneys at 1,911. In June 2003, still with nine attorneys, the caseload was 1,991. Then in August 2012, with fifteen attorneys, the caseload was at 2,091. With that, there was an average of 212 cases per attorney in 1999; 221 cases in 2003; and 139 cases in 2012.

Among the other reasons for the moratorium are ethical responsibility to clients, budgetary constraints, malpractice, and conflicts. Between the years 2016 to 2019, attorney's caseloads decreased and were rightsized. Regarding ethical responsibility, for FY2020, caseloads were reduced to an average of 80-85 per attorney. PDSC has identified two retired attorneys who specialize in civil matters; therefore, allowing PDSC to satisfy their ethical responsibilities in providing services to Guam's senior citizens.

In regards to budget constraints, AD Gogue reminded the Board that funding for this will come from federal funds. For FY2020, \$192,144.00 is reserved for the next three months of the fiscal year and any unexpended funds will carry onto FY2021, per DPHSS' grantors. This would be for this fiscal year, plus three additional fiscal years as provided by the contract. Any conflicts that arise based on this contract, we have set some of the funds from this grants so that cases can be forwarded to Guam Legal Services. A commitment letter from Attorney Dan Sommerfleck has been received. The funds would also cover any associated office expenses. Regarding malpractice, the two proposed attorneys for this program have over 60 years combined service in civil matters and PDSC will ensure they comply with Guam's Rules of Professional Conduct, as well as SOPs that include a Representation Agreement. As for a conflict wall, a dedicated office space at DPHSS, that is rent-free, will be used for the program. Similar arrangements made between PDSC and APD will be used for this office to avoid conflicts between civil and criminal matters. ED Hattori mentioned that this will prevent PDSC from having to withdraw or be disqualified from Protective Order cases because they represent a party in a criminal matter, and vice versa. Additionally, it would shift civil cases away from the criminal matters and lower attorney caseloads. He added that stats from February 2019 showed that 16 attorneys were each handling an average of 92 criminal and civil cases. Whereas with this program, 15 attorneys would only handle about 85 criminal cases.

AD Gogue continued with her presentation and stated that since she and ED Hattori started at PDSC, conflict cases have decreased; APD can attest to this fact. Presiding Judge Lamorena asked how conflicts would be reduced if ED Hattori still has hiring powers for that program. ED Hattori responded that it would be similar to how APD is handled. Presiding Judge Lamorena reminded ED Hattori that MA Gayle does the hiring for that office, not ED Hattori. ED Hattori responded that it would be similar to the OAG who has a conflict wall between its Family and Prosecution Divisions. He further stated that it would not be necessary to have daily management control over the civil division.

Presiding Judge Lamorena inquired about a conflict between a *Manâmkô* whose property was stolen by the person appointed in that POA, if the criminal side would be able to represent that defendant. ED Hattori responded yes, and that the conflict wall that exists between APD and PDSC puts both offices under one umbrella, yet is sufficient. He continued that the Managing Attorney for this program will be answerable to the Board, not him. AD Gogue stated they have not

identified anyone for that position yet because they are still pending the Board's approval to proceed with this program.

GBA President Terlaje asked that the Board be allowed to review information regarding potential conflicts, as well as the memorandum between PDSC and Guam Legal Services that was mentioned earlier in the meeting. She inquired as to why ED Hattori stated he would not manage day to day operations of this office given his title of Executive Director and questioned why PDSC is entering into a partnership with GLS. She anticipates that more questions will arise as they spend more time on this matter.

Trustee Quinata stated that now would be a good time to start this program, despite COVID-19. She continued that the *Manâmkô* ' have nowhere to turn to in cases of abuse and believes that since PDSC was able to establish a conflict wall between themselves and APD, then she is confident they can do so for this program.

Chief Justice Carbullido informed the Board that the meeting will soon end and that this matter will be voted on at the next meeting. He instructed Deputy Director Morrison draft one resolution to modify the moratorium to allow for this program, as well as a second resolution with conditions that outline concerns expressed by the Board members for this pilot program. There should be a mechanism in place, and that this pilot program will not tap into PDSC's general fund. Chief Justice Carbullido asked that these resolutions be distributed to the Board members five (5) days prior to the next meeting so that they may make any amendments to the resolutions. Presiding Judge Lamorena asked that ED Hattori prepare a memo regarding the conflicts. Chief Justice Carbullido agreed with this recommendation and asked that ED Hattori provide authorities and samples of this program in other areas. He continued on by stating that possibly, at the end of a six month trial period of this program, they can re-evaluate the conflicts as a result of the PD providing such services.

Motion to table this vote to the next Board meeting made by Trustee Terlaje, seconded by Presiding Judge Lamorena. Approved by acclamation.

VII. **NEW BUSINESS:**

None.

VIII. **EXECUTIVE SESSION**

None.

XI. **PUBLIC DISCUSSION**

None.

X. **ADJOURNMENT AND NEXT MEETING DATE:**

With no further matters to discuss, **motion was made by Presiding Judge Lamorena and seconded by Trustee Quinata to adjourn the meeting. Approved by acclamation.**

The next BOT meeting is scheduled for Tuesday, July 28, 2020, at 12:30 p.m. in the PDSC conference room.

Respectfully submitted,



CATHY GOGUE
Board Secretary

VI. New Business

A. Civil Moratorium Memo from PDSC Deputy Director & Resolutions No. 05-20 and No. 06-20

MEMORANDUM

TO: PDSC BOARD OF TRUSTEES

FROM: JOHN P. MORRISON, PDSC DEPUTY DIRECTOR

DATE: JULY 20, 2020

RE: CIVIL MORATORIUM, Resolution No. 05-20

In January of this year I came on as the Deputy Director of the Public Defender Service Corporation (PDSC) upon the retirement of Mr. Richard Dirx. I am aware that over the last few years, management of the PDSC has expressed a desire to once again accept certain civil cases for representation. Our office is statutorily mandated to accept qualified civil cases, which historically it has done.

My first official involvement with this issue arose at our last Board meeting, on June 23, 2020, wherein Chief Justice Carbullido included my name in a list of employees tasked with preparing certain draft resolutions. I have done this and I am taking the time to write this memo in an effort to provide the Board with as much useful information as I can concerning the current moratorium, and how I have tried to structure the resolutions to best address concerns that individual members of the Board of Trustees voiced during our previous meetings. To educate myself, I have reviewed the law on areas of concern as well as every PDSC Board Resolution dating back to June 13, 1995.

BACKGROUND ON PDSC CIVIL MORATORIUMS

As mentioned above, the PDSC is somewhat unique in that we are not only tasked with providing representation in criminal cases as the U.S. Constitution and Organic Act require, but we are also required by statute to provide representation to qualified individuals in civil matters.¹ Over the years, the PDSC has requested that the Board limit the intake of certain civil cases on a number of occasions.

On June 13, 1995, the Board limited civil representation² to reflect an increase in caseload and a shortage of attorneys due to resignations and a shortage of funds.³ Vacancies were filled and

¹ See 12 GUAM CODE ANN. § 11105.

² The Board resolved to limit civil and domestic cases to those involving violence, the threat of violence, or uncontested guardianships.

³ *Relative to Limiting the Caseload of the Public Defender Service Corporation Temporarily*, Resolution No. PDSC 95-01 (June 13, 1995).

the Board resolved to lift the 1995 moratorium on March 15, 1996.⁴ The Board again resolved to limit civil cases on March 31, 1997, citing a backlog due to a dramatic increase in caseload, a lack of adequate support staff, and an inability to hire support staff due to budgetary restraints.⁵ This resolution allowed for the restriction to persist only as long as necessary to fill vacant positions.

A temporary moratorium on civil cases was requested on November 9, 1999.⁶ This particular restriction was unique and the Resolution speaks to the actual situation the PDSC Board of Trustees was addressing. Ms. Kathleen Maher left employment with the PDSC in July 1999⁷, and there were two attorney vacancies that management could simply not fill at the level approved. This drafting of the moratorium permitted it to expire upon the filling of the vacancies.

A similar moratorium was requested on June 23, 2003, citing an increase in cases and budget cuts across the entire government of Guam.⁸ The drafting of this moratorium caused it to naturally expire on October 31, 2003, giving the PDSC adequate time to attend to its financial situation.

I bring up these prior moratoriums because they are an important part of our history as an organization. The government of Guam as a whole has gone through financial ups and downs over the last thirty years and the PDSC has had to limit the scope of representation at times to reflect this fact. However, no moratorium before 2012 has persisted more than twelve months, with most of them expiring when staffing vacancies were filled. This must be because the Board of Trustees has always recognized that civil cases are an important part of what we do as an agency and is work we are in fact required to do by statute. No written Resolution has ever placed a moratorium on case types due to an increase in conflicts. That is simply not in the written record; all moratoriums were imposed due to financial concerns and corresponding staffing limitations. Similarly, no Resolution suggests that PDSC attorneys were inadequate in the civil services they provided.

The current limitation on civil work was imposed on August 28, 2012.⁹ This moratorium was requested, citing “serious budgetary constraints” and an increase in caseload. This moratorium

⁴ *Relative to Lifting the Temporary Limitation of Caseload in Civil and Domestic Cases of the Public Defender Service Corporation*, Resolution No. PDSC 96-01 (Mar. 15, 1996).

⁵ *Relative to Limiting the Caseload of the Public Defender Service Corporation Temporarily*, Resolution No. PDSC 97-01 (Mar. 31, 1997).

⁶ *Relative to Limiting the Caseload of the Public Defender Service Corporation Temporarily*, Resolution No. PDSC 99-06 (Nov. 9, 1999).

⁷ The Board later appointed Ms. Maher as the PDSC Executive Director on November 21, 2003. *See Relative to the Appointment of Kathleen E. Maher as Director of the Public Defender Service Corporation*, Resolution No. 08-03 (November 21, 2003).

⁸ *Relative to a Moratorium Involving Civil and Domestic Case Due to Budgetary Constraints*, Resolution No. 02-03 (June 3, 2003).

⁹ *Relative to the Continuation of a Moratorium Involving Civil and Domestic Cases*, Resolution No. 13-12 (Aug. 28, 2012).

does permit for the representation of certain civil cases, as previous Resolutions permitted, but is unique in that it has persisted for nearly ten years.¹⁰ The drafting of this particular Resolution did anticipate the matter being reviewed for further action after December 31, 2012, but no action was requested or taken by management or the Board of Trustees.

THE SCOPE OF THE CURRENT PROPOSAL

I want to be clear that the proposal for consideration is to modify the current moratorium to allow the PDSC to represent qualified individuals pursuant to the Legal Assistance Services (LAS) program administered by the Department of Public Health and Social Services (DPHSS), Division of Senior Citizens. The PDSC would create a division, the Elder Justice Center (EJC), which would address the legal work required by the LAS program. The EJC would exist as a six-month pilot program only. The Executive Director would be required to periodically present efficiency data to the Board of Trustees so that the Board could properly determine whether the program should be extended. After six months, the Board could elect to take further action.

CONFLICTS OF INTEREST

The primary concern raised by the individual Trustees has been the possibility of an increase in conflicts of interest resulting from the added EJC caseload. This is a concern that we are prepared to address. At prior meetings, the Alternate Public Defender (APD) was used as a model for addressing conflicts. I do not agree with the use of the APD as a model as it is not legally necessary and would result in an inability to properly oversee an entirely new program that is of limited duration.

Our office prepared a memorandum on how to properly structure a conflict wall. See **ATTACHMENT A**. It is our position that an imputed conflict of interest can be overcome by limiting the Executive Director and PDSC employees' access to confidential EJC files, having a separate case management system in place, and having a managing attorney who will be responsible for the day-to-day operations of the EJC. Cases that present a known conflict would be identified, marked, and stored in a separate filing cabinet. The Board heard from DPHSS Senior Citizens Administrator Arthur San Agustin at the June 23, 2020, Board meeting and ultimately he proposes to have the EJC staff operate out of the office space his agency would provide.

This structure would allow current PDSC management to properly staff the EJC and ensure that the program is working. Hard case statistics would be provided to the Executive Director so that he could inform the Board of Trustees regarding the type of cases accepted by the EJC,

¹⁰ The Board resolved to limit civil and domestic cases to uncontested guardianships, cases involving the burial of expired bodies, and domestic cases involving violence or the threat of violence.

how quickly they are closed, and other non-sensitive case information the Board could use to judge the efficiency of the EJC.

The PDSC has a long history of implementing ethical walls and no Resolution suggests that prior walls weren't effective. On February 24, 2004¹¹, the Board approved an ethical wall when Tricia R.S. Ada left employment as the Chief Prosecutor at the Attorney General's Office and took a position with the PDSC. This caused the Board to adopt standard operating procedure 002-FY2004 which required that Ms. Ada be walled off from files and confidential information. The SOP notes that it is relatively commonplace for attorneys to change employment from the Attorney General's Office to the PDSC and had occurred at least four times previously. On April 5, 2005¹², the Board resolved to implement an ethical wall and standard operating procedure for addressing conflicts when attorney Jocelyn Roden changed employment from prosecutions at the Attorney General's Office to a staff attorney at the PDSC.

If the EJC becomes a success and the Board wishes to further expand civil representation in the future, a structure similar to the APD may be a more a useful model. Absent a legal requirement and given the other ways in which the concerns of the Board can be addressed, I would advise against the use of the APD as a model at this point. I do not want to see a situation where the EJC fails because we are not nimble enough to make modifications to the program in real time.

ATTACHMENTS

Attached to this memo are two draft resolutions. Draft Resolution No. 05-20 (**ATTACHMENT B**) would allow the current moratorium to be modified to accept the work under the LAS program. Draft Resolution No. 06-20 (**ATTACHMENT C**) would create the EJC as a division of the PDSC and allow us to staff the office and begin the proposed work

I hope this memo has helped each of you understand the background of the current situation, the scope of the proposal, and efforts we will take to manage potential conflicts of interest.

¹¹ *Relative to the Approval of Standard Operating Procedure No. 002-FY2—2004 (General Administration) Addressing Conflicts, Case-Screening and Case-Assignment in Adult Criminal Cases (PDSC Employment of Former Prosecutor, Resolution 06-04 (February 24, 2004).*

¹² *Relative to the Approval of Standard Operating Procedure No. 001-FY2—2005 (General Administration) Addressing Conflicts, Case-Screening and Case-Assignment in Adult Criminal Cases (PDSC Employment of Former Prosecutor, Resolution 05-05 (April 5, 2005).*

MEMORANDUM

TO: PDSC BOARD OF TRUSTEES

FROM: JOHN P. MORRISON¹

DATE: JULY 20, 2020

RE: ETHICAL WALLS, PDSC ELDER JUSTICE CENTER

Question Presented

What are the structural recommendations for an inter-office ethical wall between the Criminal and Civil Divisions that would rebut the presumption of imputation of conflict within the Public Defender Service Corporation (PDSC)? What are the limitations on the executive director's supervisory role over both divisions?

Short Answer

PDSC can operate both Criminal and Civil Divisions without triggering vicarious disqualification through the implementation of policies and procedures that ensure both physical and operational separation between divisions. The ethical safeguards must include mutually exclusive access to client files and other confidences, independent case supervision, and specific advisory to staff regarding the ethical screen.

The executive director may retain his supervisory role over both divisions as long as his control or influence over the handling of cases and his access to client files and confidences are restricted to the Criminal Division. He may retain administrative authority over both divisions as long as he is not involved in the day-to-day operation of the Civil Division. He may be precluded from initiating any promotional and disciplinary actions regarding personnel under the Civil Division, limiting his role to reviewing and acting upon the recommendations of the division supervising attorney.

Facts

The Legal Assistance Services (LAS) Program is administered by the Department of Public Health and Social Services, Division of Senior Citizens (DPHSS, DSC). The purpose of the LAS Program is to provide legal advice and representation by an attorney to older individuals 60 years of age or older with greatest economic or social needs. The LAS Program is funded through federal grant funds and local Government of Guam matching and over-match funds.

¹ The following memorandum is work of PDSC summer intern, Tessa Mae Borja. Her work was reviewed and modified by the above supervising attorney and approved by him for disclosure to the PDSC Board of Trustees.

DPHSS, DSC proposes to sub-grant the LAS Program to Public Defender Service Corporation (PDSC). If approved by the Board of Trustees, PDSC will operate the LAS Program as the Guam Elder Justice Center. The Center will serve as a hub for legal services, training/outreach activities, and collaborative activities that aim to address the legal needs of Guam's senior citizens.

PDSC proposes to establish a Civil Division to encompass the Guam Elder Justice Center, the STOP Program and other civil legal services. The Civil Division will operate independent of the Criminal Division; its personnel will not be permitted to handle criminal cases. PDSC's proposal includes the implementation of a conflict wall to separate the Civil Division from the Criminal Division, similar to the manner in which the Alternate Public Defender operates independent of PDSC.

On May 26, 2020 and June 23, 2020, PDSC presented to the Board of Trustees a request to pursue the LAS Program. The Board deferred the matter until its July meeting to allow PDSC to address in writing its concerns, including the implementation of a conflict wall.

Discussion

“The Sixth Amendment recognizes the right to the assistance of counsel” because the assistance of counsel is “necessary to ensure that the trial is fair.” *Strickland v. Washington*, 466 U.S. 668, 685 (1984). As a corollary, “the right to counsel is the right to the effective assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970). The U.S. Supreme Court's jurisprudence has long held that the Sixth Amendment right to counsel includes the right to conflict-free counsel. *See Von Moltke v. Gillies*, 332 U.S. 708, 725 (1948) (“The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client.”). That is, wherever the “right to counsel exists,” the Sixth Amendment requires “a correlative right to representation that is free from conflicts of interest.” *Wood v. Georgia*, 450 U.S. 261, 271 (1981). Because the American Bar Association's (ABA) Model Rules of Professional Conduct and their state counterparts constitute a detailed body of law concerning the rights and obligations of lawyers and clients, the Supreme Court's Sixth Amendment jurisprudence often turns to these sources to delineate the scope of the right to counsel. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984) (“The Sixth Amendment refers simply to ‘counsel,’ not specifying particular requirements of effective assistance. It relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions Prevailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable”). The Supreme Court has used the Model Rules of Professional Conduct and similar materials to evaluate assistance of counsel claims. *See, e.g., McCoy v. Louisiana*, 138 S. Ct. 1500, 1509 (2018) (citing MODEL RULES PROF'L CONDUCT r. 1.2(a)); *Wheat v. United States*, 486 U.S. 153, 160 (1988) (citing MODEL CODE PROF'L RESPONSIBILITY and MODEL RULES PROF'L CONDUCT); *Nix v. Whiteside*, 475 U.S. 157, 166-70 (1986) (citing CANONS PROF'L ETHICS, MODEL CODE PROF'L RESPONSIBILITY, and MODEL RULES PROF'L CONDUCT).

a. General principles regarding attorney disqualification

A conflict of interest arises when there is a “substantial risk that the lawyer’s representation of the client would be materially and adversely affected by the lawyer’s own interest or by the lawyer’s duties to another client, a former client, or a third person.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 121 (2000). Thus, a conflict may arise when a lawyer simultaneously or successively represents two or more clients with adverse interests. *See id.*

A successive conflict of interest, as defined by the 2002 Model Rules of Professional Conduct which was adopted by Guam in 2003, occurs when “[a] lawyer who has formerly represented a client in a matter [] represent[s] another person in the same or a substantially related matter in which that person's interest are materially adverse to the interests of the former client.” MODEL RULES OF PROF’L CONDUCT R. 1.9(a) (AM. BAR ASS’N 2002). *See Re: Amendments to the Guam Rules of Professional Conduct*, PRM04-002 (Promulgation Order No. 04-002, Feb. 11, 2004). *Compare* GUAM RULES OF PROF’L CONDUCT (2003) with MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 2002). Rule 1.7 provides that a simultaneous or “concurrent” conflict occurs when “[t]he representation of one client will be directly adverse to another client; or there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” MODEL RULES OF PROF’L CONDUCT r. 1.7(a)(1)–(2) (AM. BAR ASS’N 2002).

In cases of successive representation where the attorney’s representation of the current conflict may conflict with the interests of a former client, “courts have recognized that the chief fiduciary value jeopardized is that of client confidentiality.” *Flatt v. Superior Court*, 885 P.2d 950, 954 (Cal. 1994) (*Flatt*). “Thus, where a former client seeks to have a previous attorney disqualified from serving as counsel to a successive client in litigation adverse to the interests of the first client, the governing test requires that the client demonstrate a ‘substantial relationship’ between the subjects of the antecedent and current representations.” *Id.*

In cases of simultaneous or concurrent representation of clients, “[t]he primary value at stake ... is the attorney’s duty—and the client’s legitimate expectation—of loyalty, rather than confidentiality.” *Id.* at 284. “In evaluating conflict claims in dual representation cases, the courts have accordingly imposed a test that is more stringent than that of demonstrating a substantial relationship between the subject matter of successive representations. Even though the simultaneous representations may have nothing in common, and there is no risk that confidences to which counsel is a party in the one case have any relation to the other matter, disqualification may nevertheless be required.” *Id.*

“[D]isqualification is a drastic course of action that should not be taken simply out of hypersensitivity to ethical nuances or the appearance of impropriety.” *Barrett-Anderson v. Camacho*, 2018 Guam 20, ¶ 4 (*Barrett-Anderson*) (quoting *Roush v. Seagate Tech., LLC*, 58 Cal. Rptr. 3d 275, 281 (Cal. Ct. App. 2007)). When considering disqualification, the Guam Supreme Court expressed that it “must be solicitous of a client’s right freely to choose his counsel[,] a

right which of course must be balanced against the need to maintain the highest standards of the profession.” *Id.* (quoting *Gov’t of India v. Cook Indus., Inc.*, 569 F.2d 737, 739 (2d Cir. 1978)).

b. Vicarious disqualification

Model Rules of Professional Conduct Rule 1.10(a) states that “[w]hile 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.” MODEL RULES OF PROF’L CONDUCT r. 1.10(a) (AM. BAR ASS’N 2002).

With a few exceptions, state and federal courts apply the same or essentially equivalent rules of imputation, which impute a new lawyer’s knowledge of the confidences of a former client to a new firm, thereby prohibiting representation by the firm of an interest adverse to the former client by one of its lawyers. *See, e.g., SLC Ltd. V. v. Bradford Group W., Inc.*, 999 F.2d 464, 467-68 (10th Cir. 1993); *Smith v. Whatcott*, 757 F.2d 1098, 1101 (10th Cir. 1985); *Paul E. Iacono Structural Eng’r, Inc. v. Humphrey*, 722 F.2d 435, 440-41 (8th Cir. 1983); *Armstrong v. McAlpin*, 625 F.2d 433, 444-45 (2d Cir. 1980); *Chrispens v. Coastal Ref. & Mktg., Inc.*, 897 P.2d 104, 116 (Kan. 1995); *Kala v. Aluminum Smelting & Ref., Co.*, 688 N.E.2d 258 (Ohio 1998).

Through the rule of “vicarious disqualification,” the courts have generally extended this rule to require disqualification of a disqualified attorney’s entire law firm. *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.*, 980 P.2d 371, 383 (Cal. 1999) (*SpeeDee Oil*). Thus, “[w]hen a conflict of interest requires an attorney’s disqualification from a matter, the disqualification normally extends vicariously to the attorney’s entire law firm.” *Id.* at p. 1139. “The rule of vicarious disqualification is based upon the doctrine of imputed knowledge,” which posits that the knowledge of one attorney in a law firm is the knowledge of all attorneys in the firm. *Adams v. Aerojet-General Corp.*, 86 Cal.App.4th 1324, 1333, 104 Cal. Rptr. 2d 116 (Cal. Ct. App. 2001). By “recogniz[ing] the everyday reality that attorneys, working together and practicing law in a professional association, share each other’s, and their clients’, confidential information,” *SpeeDee Oil*, supra, at 383, the vicarious disqualification rule “safeguards clients’ legitimate expectations that their attorneys will protect client confidences.” *Id.* at 374.

In reviewing the trial court’s decision not to disqualify the entire Attorney General’s Office, the Guam Supreme Court in *People v. Tennesen* determined that the disqualification standard for prosecuting attorneys is whether prosecution by the conflicted attorney would result in the “appearance of impropriety.” 2009 Guam 3, ¶ 29 (*Tennesen*) (citing *People v. Garcia*, 698 P.2d 801, 806 (Colo. 1985)). Overruling *Tennesen*, the Court in *Barrett-Anderson* found that this “now-abrogated” “appearance of impropriety” standard, which previously appeared in the ABA Code of Professional Responsibility, was eliminated with the introduction of the Model Rules of

Professional Conduct. 2018 Guam 20, ¶ 17 (citing *Waters v. Kemp*, 845 F.2d 260, 265 & n.12 (11th Cir. 1988)). Under the Model Rules, attorney disqualification is warranted only when his or her representation violates or significantly risks violating the Rules of Professional Conduct. 2018 Guam 20, ¶ 17 (citing *Bottoms v. Stapleton*, 706 N.W.2d 411, 416 (Iowa 2005)). The rules-based approach has been adopted in a litany of other jurisdictions. *Id.* (citing *Klein v. Bristol Hosp.*, 915 A.2d 942, 953 n.22 (Conn. Super. Ct. 2006); *Ex parte Terminix Int'l Co.*, 736 So. 2d 1092, 1095–96 (Ala. 1998); *Schwartz v. Cortelloni*, 685 N.E.2d 871, 878 (Ill. 1997); *Barragree v. Tri-County Elec. Coop., Inc.*, 950 P.2d 1351, 1362–63 (Kan. 1997); *Adoption of Erica*, 686 N.E.2d 967, 973 & n.10 (Mass. 1997); *In re Marriage of Carter*, 862 S.W.2d 461, 465 (Mo. Ct. App. 1993); *Emerald Partners v. Berlin*, 564 A.2d 670, 677 (Del. Ch. 1989)).

Even in certain jurisdictions that discussed the “appearance of impropriety” language after the adoption of the Model Rules, appearances alone were insufficient to warrant disqualification. *Id.* (citing *Bergeron v. Mackler*, 623 A.2d 489, 494 (Conn. 1993) (“Although considering the appearance of impropriety may be part of the inherent power of the court to regulate the conduct of attorneys, it will not stand alone to disqualify an attorney in the absence of any indication that the attorney’s representation risks violating the Rules of Professional Conduct.”)). Standing alone, the “appearance of impropriety” standard is open to widespread abuse and exploitation for tactical advantage. *Id.* (citing *Adam v. Macdonald Page & Co.*, 644 A.2d 461, 464 (Me. 1994) (“If a former client need merely allege that she made relevant confidential communications to her former attorney, then the rule will be an obvious vehicle for abuse.”)). The “significantly risk” portion of the test does not allow disqualification for potential conflict, but for inevitable and material conflicts. *Id.* (citing *Bottoms*, *supra*, at 417 (“[W]e first note that the concept of a potential conflict of interest is foreign to the new ethical rule.”)).

Finding that the application of the “appearance of impropriety” standard was warranted in *Tennessen* because the defendant was indicted prior to the 2003 adoption of the current rules, the Court in *Barrett-Anderson* nevertheless held that “the current standard for attorney disqualification is whether an attorney’s continued representation of a party or participation in an action violates or significantly risks violating the Guam Rules of Professional Conduct.” *Id.* at ¶ 18, 20.

c. Vicarious disqualification of government offices

A government office is ordinarily considered a firm for purposes of the ethics rules. *See* MODEL RULES OF PROF’L CONDUCT r. 1.0, cmt. 3 (AM. BAR ASS’N 2002) (“With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct.”). However, Rule 1.10 does not apply to the imputation of conflicts in government law offices. Amendments made to Rule 1.10 in 2002 declare that when a lawyer leaves government employment (or changes government jobs), Rule 1.11 rather than Rule 1.10 regulates the imputation of her disqualification to her new colleagues. Likewise, the imputation of one government lawyer’s disqualification to others in the same government law office is governed exclusively by Rule 1.11(d) and not by Rule 1.10. *See* MODEL RULES OF PROF’L CONDUCT r. 1.10, cmt. 7 (AM. BAR ASS’N 2002) (“Under Rule 1.11(d), where a lawyer represents the

government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer.”).

California courts have generally declined to apply an automatic and inflexible rule of vicarious disqualification in the context of public law offices. *In re Charlisse C.*, 45 Cal. 4th 145, 162, 84 Cal. Rptr. 3d 597, 609, 194 P.3d 330, 340 (Cal. 2008) (*Charlisse*) (citing *City of Santa Barbara v. Superior Court*, 122 Cal.App.4th 17, 27, 18 Cal. Rptr. 3d 403 (Cal. Ct. App. 2004) (*Santa Barbara*) (holding that attorney’s disqualifying conflict of interest did not warrant recusal of entire city attorney’s office in light of “screening measures established by the city attorney” that were “both timely and effective in protecting the [homeowners’] confidences); *Chadwick v. Superior Court*, 106 Cal.App.3d 108, 119, 164 Cal. Rptr. 864 (Cal. Ct. App. 1980) (*Chadwick*) (declining disqualifying the entire district attorney’s office because screening measures had “sufficiently isolated” the conflicted attorney from the prosecution of his former clients); *Love v. Superior Court*, 111 Cal.App.3d 367, 374, 168 Cal. Rptr. 577 (Cal. Ct. App. 1980) (where a public defender’s legal research assistant became an attorney and joined the major crimes section of the local district attorney’s office, holding that only the conflicted attorney and other lawyers in his section were disqualified from prosecuting a defendant for whom the attorney had worked while at the public defender’s office; the other attorneys who had “no working relationship” with the attorney in question were not)).

Instead, in this context, courts have looked to whether the public law office has adequately protected, and will continue to adequately protect, the former client’s confidences through timely, appropriate, and effective screening measures and/or structural safeguards. *Id.* (citing *In re Charles L.*, 63 Cal.App.3d 760, 765, 132 Cal. Rptr. 840 (Cal. Ct. App. 1976) (declining to impute confidential knowledge of one attorney in county district attorney’s office to entire staff, given “the size and structure of the organization” and “no evidence that information concerning [defendants] flows freely within the district attorney’s office”); *People v. Pineda*, 30 Cal.App.3d 860, 865, 106 Cal. Rptr. 743 (Cal. Ct. App. 1973) (“absen[t] some affirmative showing that a particular deputy public defender has acquired confidential adverse information about a defendant from the files or other employees of the office, any claim of conflict of interest would be groundless”); *cf. Chambers v. Superior Court*, 121 Cal.App.3d 893, 903, 175 Cal. Rptr. 575 (Cal. Ct. App. 1981) (reversing disqualification order in part because private law firm representing plaintiffs had “undertaken sufficient protective measures to screen” former government attorney “from any participation” in action against the state)).

Summarizing the consideration in declining to apply an automatic rule of vicarious disqualification to a public law office, the court in *Santa Barbara* explained:

“Unlike their private sector counterparts, public sector lawyers do not have a financial interest in the matters on which they work. As a result, they may have less, if any, incentive to breach client confidences. Public sector lawyers also do not recruit clients or accept fees. As a result, they have no financial incentive to favor one client over another [V]icarious disqualification in the public sector context imposes different burdens on the affected public entities, lawyers and clients. Most frequently cited is the difficulty

public law offices would have in recruiting competent lawyers. Private sector law firms may hesitate to hire a lawyer from a public law office, to avoid being disqualified in future matters involving that office. Individual lawyers may hesitate to accept public sector jobs, to avoid limiting their future opportunities in the private sector. Clients whose interests are adverse to a public entity could be deprived of their chosen counsel, or find it difficult to retain counsel at all, particularly in highly specialized areas of the law. Public entities may face the same difficulty and be forced to avoid hiring lawyers with relevant private sector experience. Disqualification increases costs for public entities just as it does for private sector litigants. When a public entity is involved, these higher costs raise the possibility that litigation decisions will be driven by financial considerations rather than by the public interest.

Id. at 163 (quoting *Santa Barbara*, supra, at 24–25 (citations omitted)). “In light of these considerations, courts have more readily accepted the use of screening procedures or ethical walls as an alternative to vicarious disqualification in cases involving public law offices.” *Id.* (quoting *Santa Barbara*, supra, at 25); see, e.g., *People v. Clark*, 5 Cal. 4th 950, 999-1000, 22 Cal. Rptr. 2d 689, 857 P.2d 1099 (Cal. 1993); *People v. Hernandez*, 235 Cal. App. 3d 674, 681, 286 Cal. Rptr. 652 (Cal. Ct. App. 1991) (*Hernandez*); *People v. Lopez*, 155 Cal. App. 3d 813, 827, 202 Cal. Rptr. 333 (Cal. Ct. App. 1984) (*Lopez*).

d. Public defender exempted from automatic imputation

In determining whether to automatically impute the conflict of one public defender to the entire public defender’s office, the Iowa Supreme Court required two findings: (1) that the public defender’s office is a “firm” under Model Rule 1.10, and (2) a public defender is not “a lawyer serving as a public officer or employee” under Rule 1.11. *State v. McKinley*, 860 N.W.2d 874, 888 (Iowa 2015) (*McKinley*).

The *McKinley* court found that “better-reasoned decisions” have rejected the automatic imputation of the conflicts of one public defender to the entire office. *Id.* (citing *United States v. Reynoso*, 6 F. Supp. 2d 269, 271—72 (S.D.N.Y. 1998) (“[I]t does not make sense to apply to the Federal Defender Division[] the same standards for disqualification that would apply to a private law firm” and noting “[t]he American Law Institute has also recognized that imputed disqualification . . . should not automatically apply to public defender offices”); *People v. Shari*, 204 P.3d 453, 459 & nn. 5–6 (Colo. 2009) (*Shari*) (holding that a public defender’s office is not a firm under the imputation rule and that public defenders are government attorneys); *Anderson v. Comm’r of Corr.*, 15 A.3d 658, 664 (Conn. App. Ct. 2011) (*Anderson*) (holding that a public defender’s office is not a firm and that “the plain language of Rules 1.10 and 1.11 supports the respondent’s contention that [public defenders are government attorneys]”); *State v. Severson*, 147 Idaho 694, 215 P.3d 414, 426–27 (Idaho 2009) (*Severson*) (holding that a public defender’s office is not a firm for purposes of imputation and adopting a case-by-case approach); *People v. Miller*, 404 N.E.2d 199, 202 (Ill. 1980) (rejecting “the notion that a public defender’s office is to be treated as a law firm or ‘entity’ in considering a conflict of interest claim”); *Bartley v. Commonwealth*, 400 S.W.3d 714, 719–20 (Ky. 2013) (utilizing a case-by-case approach to determine whether a conflict should be imputed within the public defender’s office); *State v. St.*

Dennis, 244 P.3d 292, 298 (Mont. 2010) (*St. Dennis*) (holding that a public defender’s office is not equivalent to a firm and adopting case-by-case approach); *State v. Bell*, 447 A.2d 525, 528–29 (N.J. 1982) (noting the differences between firms and public defender’s offices); *Asch v. State*, 62 P.3d 945, 953 (Wyo. 2003) (*Asch*) (rejecting “automatic disqualification of assistant public defenders” because the public defender’s office is not equivalent to a firm)).

1. Public defender’s office is not like a private law firm

The comments to ABA Model Rule 1.10 provide that:

For purposes of the Rules of Professional Conduct, the term “firm” denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

MODEL RULES OF PROF’L CONDUCT r. 1.10, cmt. 1 (AM. BAR ASS’N 2002). The commentators omitted public defender offices or any government office or agency from the enumerated organizations falling under the definition of “firm.” *Id.* The same comment, with the same omission, accompanies the Guam rule. *See* GUAM RULES OF PROF’L CONDUCT r. 1.10, cmt. 1 (AM. BAR ASS’N 2002). The ABA annotations also explain that a government law office is also ordinarily considered a firm for purposes of the ethics rules, but the imputation of conflicts in government law offices is regulated by Rule 1.11 rather than Rule 1.10. *See* MODEL RULES OF PROF’L CONDUCT r. 1.0, cmt. 3 (AM. BAR ASS’N 2002). These comments indicate the drafters of the Model Rules and Guam rules never intended for public defenders to be subject to the automatic imputation of conflicts of interest.

The Montana Supreme Court distinguished public defender’s offices from private law firms as follows:

In deciding upon the approach to be taken in [Office of Public Defender] conflict of interest cases, we consider among other factors the unique nature of public defender offices as opposed to private law firms. Unlike private law firms, the OPD is a not-for-profit public entity with a single source of clients engaged in a single type of legal proceeding. The OPD does not solicit clients or accept referrals from the public. Moreover, the attorneys are salaried employees rather than participants in the profits and revenue generated by a law firm. *People v. Christian*, 41 Cal. App. 4th 986, 995, 48 Cal. Rptr. 2d 867 (Cal. Ct. App. 1996) (*Christian*). As such, their compensation is not driven by their success or failure.

St. Dennis, *supra*, at 297-98.

The Wyoming Supreme Court elaborated on the differences between public defenders and lawyers in private law firms:

Public defenders who are subject to a common supervisory structure within an organization ordinarily should be treated as independent for purposes of [imputing conflicts of interest]. The lawyers provide legal services, not to the public defender

office, but to individual defendants. Ordinarily, the office would have no reason to give one defendant more vigorous representation than other defendants whose interests are in conflict. Thus, while individual defendants should be represented by separate members of the defender's office, the representation of each defendant should not be imputed to other lawyers in an office where effective measures prevent communications of confidential client information between lawyers employed on behalf of individual defendants.

Asch, supra, at 953 (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 203(2) (2000)). The Idaho Supreme Court reached the same conclusion:

[A]utomatically disqualifying a public defender where another attorney in the office has a conflict of interest would significantly hamper the ability to provide legal representation of indigent clients. This, together with the fact that such concurrent representation by public defenders generally will create no incentive (economic or otherwise) for diminished advocacy in such cases, convinces us that a per se rule imputing conflicts of interest to affiliated public defenders is inappropriate where there is no indication the conflict would hamper an attorney's ability to effectively represent a client.

Severson, supra, at 426 (quoting *State v. Cook*, 171 P.3d 1282, 1292 (Idaho Ct. App. 2007)). As noted above, the cases imposing an automatic-imputation rule by treating public defender offices like private law firms did so without analysis.

The automatic-imputation rule also increases the burden on taxpayers. *McKinley*, supra, at 891. "When an entire public defender's office is disqualified, private contract attorneys must be paid at hourly rates or a distant public defender must be brought in with attendant travel time and expense." *Id.* The *Asch* court observed:

[I]t goes without saying that an experienced public defender who specializes in criminal defense is a valuable asset within the criminal justice system, especially to the indigent defendant. Furthermore, given Wyoming's many small communities, with a limited number of lawyers, it could be difficult in many cases even to find local counsel for a defendant.

[Another] reason to avoid an automatic disqualification rule for imputed conflicts of interest among assistant public defenders is fiscal. Paying outside counsel every time there are multiple defendants in a case would, no doubt, be quite an expense for the taxpayers of the state. Where there has been no showing of an actual conflict of interest, and thus no showing of prejudice to the defendants, the minimal benefit of a per se rule would not justify the additional expense. While we cannot and should not "put a price on" the legal representation we provide to indigent defendants, the judicial branch of government still has an obligation to be fiscally responsible.

Asch, supra, at 953–54. The same court also addressed the concern that substitute counsel may be less experienced and less competent:

Another reason to adopt a case-by-case inquiry for conflicts of interest within the State Public Defender's Office is that to do otherwise would needlessly jeopardize the right of individual defendants to skilled and competent representation. As noted by the Illinois Supreme Court, "[i]n many instances the application of such a per se rule would require the appointment of counsel with virtually no experience in the trial of criminal matters, thus raising, with justification, the question of competency of counsel."

Id. at 953 (quoting *People v. Robinson*, 402 N.E.2d 157, 162 (Ill. 1979)).

2. Public defenders are government attorneys

In addition to finding that excluding public defender offices from the definition of firm under the Iowa Rules of Professional Conduct is sufficient to avoid automatic imputation, the *McKinley* court also found that the classification of public defenders as "lawyer[s] currently serving as . . . public officer[s] or employee[s]" within the meaning of Rule 1.11 warrants their exemption from automatic imputation. *McKinley*, supra, at 892 (citing *Shari*, supra, at 459; *Anderson*, supra, at 664). As the *Shari* court explained:

Conflicts particular to individual lawyers within a firm can, in certain circumstances, be imputed to the entire firm. However, Rule 1.10 specifically states that [t]he disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11. Rule 1.11, in turn, subjects government lawyers to Rules 1.7 and 1.9. The comments to Rule 1.11 make clear that a government attorney's individual conflicts are not imputed to the entire government agency for which he works. In accordance with Rule 1.11, we have recognized that a distinction must be drawn between an attorney in private practice with a traditional law firm and an attorney associated with a large public or governmental agency.

Shari, supra, at 459 (footnotes and citations omitted).

In considering whether three regional public defender offices opened by a state commission could be treated as separate firms for purpose of conflict imputation, the State Bar of North Dakota offered a helpful example of thoughtful reasoning about conflict imputation between public defender offices:

[T]he three public defender offices do not "present themselves to the public in a way suggesting that they are a firm or conduct themselves as a firm . . ." Rather, they maintain separate offices in different cities. And each office has its own filing system, its own separate computer drive which is not accessible by attorneys or employees from the other public defender offices, and its own letterhead. The three public defender offices also do not "have mutual access to confidential information concerning the clients they serve."

STATE BAR ASS'N OF N.D., Ethics Op. 06-07 (June 1, 2006) (citing MODEL RULES OF PROF'L CONDUCT r. 1.10, cmt.).

Furthermore, each office had a separate supervisor, with “[a]ny supervision over the public defender offices” by the overarching Commission restricted to “purely administrative” matters. *Id.* at 5–6. The opinion canvassed the relevant concerns—separation of cases, physical separation, separation of electronic files, separate chains of supervision and hierarchical control over management and litigation decisions—in analyzing the question of when public defenders are in different firms.²

e. Screening

A screen is a method by which a lawyer is isolated from any participation in a matter “through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under [the Model Rules] or other law.” MODEL RULES OF PROF’L CONDUCT r. 1.0(k) (AM. BAR ASS’N 2002); *see also* MODEL RULES OF PROF’L CONDUCT r. 1.0, cmt. 9 (AM. BAR ASS’N 2002) (“The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected.”). “Law reformers borrowed the concept of the ‘Chinese Wall,’ an institutional mechanism long used in banks, securities, and investment banking firms to segregate functions among separate departments and to insure that confidential information in one did not find its way into another.” *Bushwhacking the Ethical High Road: Conflict of Interest in the Practice of Law and Real Life*, 28 LAW & SOC. INQUIRY 87, 156.

Comment 9 to Rule 1.0 sets forth the following examples of reasonably adequate screening procedures:

The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

MODEL RULES OF PROF’L CONDUCT r. 1.0, cmt. 9 (AM. BAR ASS’N 2002). Additionally, notice must be given and screening procedures must be implemented in a timely fashion. MODEL RULES OF PROF’L CONDUCT r. 1.0, cmt. 10 (AM. BAR ASS’N 2002).

² Also relevant is the overarching question of whether “they present themselves to the public in a way that suggests that they are a firm or conduct themselves as a firm.” MODEL RULES OF PROF’L CONDUCT R. 1.0, cmt. 2 (AM. BAR ASS’N 2002).

Under Rule 1.10, screening is generally ineffective to prevent imputation. Imputation generally cannot be avoided by screening the individually disqualified lawyer; only if the disqualification is based upon a lawyer's activities before becoming a lawyer will screening be an option. *See* MODEL RULES OF PROF'L CONDUCT r. 1.10, cmt. 4 (AM. BAR ASS'N 2002). Screening in situations involving governmental or judicial employment is authorized under Rules 1.11 and 1.12.

The National Association for Public Defense opined that one way to avoid conflict imputation is to create an independent office outside the public defender office to handle cases which would otherwise result in an imputed conflict:

For instance, the Washoe County Public Defender's Office in Nevada initially takes on all appointed counsel cases and then, following a conflicts screening, directs conflict cases to the Alternate Public Defender's office.³ The Montana Bar Association has approved the efforts of one county's public defender to create such a conflict office.⁴ There, the county's chief public defender transferred one of the two full-time lawyers to a new "office of conflict counsel for the public defender," which was separated through (1) a distinct computer system not linked to the main office, (2) a separate filing system, (3) separate letterheads and business cards, and (4) separate rooms in the county courthouse.⁵ Although the chief public defender continues to supervise the work of the conflict counsel on non-conflict cases and controls the conflict office's budget, a Public Defender Advisory Board reviews any substantive decisions related to the administration and conflict issues.⁶

This sort of division addresses most of the public policy concerns motivating the imputation of conflicts of interests. It creates an entirely separate staff of lawyers and supervisors, limiting the impact of any non-economic pressures on the "alternate" public defenders. Both physical and virtual access and contact is closed off between public defenders and the "alternate" or "conflicts" public defenders. And hierarchical control of litigation is vested in two separate offices. However, aspects like Montana's chief public defender's control of the conflict office's budget may pose a potential risk of hierarchical control of lawyers that gives rise to a need to impute conflicts, depending on how that control may be exercised. In addition, details in Montana such as supervision of non-conflict cases on one hand, or the separate letterheads and business cards on the other hand, also affect how separate the offices appear: the offices must be perceived as separate firms by the public. Thus, whether such public defenders might (or might not) fall within the definition of a "firm" under Rule 1.0(c) will depend on a more fact-intensive inquiry into each of these factors. But in general, constructing sufficiently

³ *What is the Difference Between the Public Defender's Office and the Alternate Public Defender's Office?*, WASHOE COUNTY, NEVADA, <https://www.washoecounty.us/apd/faq/apdpublicdefender.php>.

⁴ MONT. BAR ASS'N, *Is This Office Sharing Arrangement an Ethical No-No?*, Ethics Op. 960924, 22 MONT. LAW. 9 (Dec. 1996).

⁵ *Id.*

⁶ *Id.*

separate conflict offices—if done with sufficient care and thoroughness—is one way to avoid imputation of conflicts of interest among public defenders.

NAT'L ASS'N FOR PUB. DEF., *Re: Ethics of Conflicts Imputation Between and Within Public Defender Offices*, Ethics Op. 19-1 (May 2020).

Tennessee remains Guam Supreme Court's sole decision to have considered whether a conflict wall may be used in place of disqualification of an entire government office. 2009 Guam 3, at ¶ 35–36 (citing *State v. Gonzalez*, 2005 NMSC 25, 163, 138 N.M. 271, 119 P.3d 151 (N.M. 2005) (suggesting that ethical screens commonly used in public and private law offices may be effective to dispel the appearance of unfairness); *In re Grand Jury Proceedings*, 700 F. Supp. 626, 629–30 (D.P.R. 1988) (declining to disqualify the entire U.S. Attorney's Office because conflict walls were effectively implemented)).

In *Tennessee*, the Court found that the Attorney General's communication with a news reporter about the defendant's case was in direct violation of specific orders for a conflict wall that forbade the Attorney General from participating in the defendant's prosecution,⁷ and that the government failed to meet its burden of proving that the conflict wall provided an effective screen. *Id.* at ¶ 22, 26, 28. Finding that disqualification of an entire office “would only be necessary if the particular conflicted attorney were not properly screened from the case,” the Court held that once the conflict wall has been shown to be ineffective, the trial court abuses its discretion in not recusing the entire AG's office. *Id.* at ¶ 37, 43.

The use of internal screening procedure has become an accepted practice within public prosecutors offices as a means for avoiding disqualification because of what otherwise would constitute conflicts of interest within the offices. STATE BAR OF CALIF. STANDING COMM. ON PROF'L RESPONSIBILITY AND CONDUCT, Formal Op. 2002-158 (2002) (Formal Op. 2002-158) (citing *Hernandez*, supra, at 681; *Lopez*, supra, at 813; *Chadwick*, supra, at 108).

In a successive conflict case, the California Supreme Court affirmed a lower court's judgment reversing on remand the juvenile court order that disqualified the Children's Law Center of Los Angeles (CLC), a publicly funded non-profit legal services organization, from representing a minor, Charlisse, in a dependency action. *Charlisse*, supra, at 150, 168. Previously comprised of three independent offices, CLC was restructured into three litigation units: a core unit, known as Unit 1, and two “conflict” units, known as Units 2 and 3. *Id.* at 151. The juvenile court appointed a CLC attorney in Unit 3 to represent Charlisse. *Id.* Represented by a non-CLC attorney, the minor's mother objected to the appointment, asserting that she was a CLC client of Unit 1 when she was a child and a conflict existed because, in light of CLC's structural changes, CLC's three units operated as one firm. *Id.*

⁷ The order erecting the conflict wall states: “The [c]ourt hereby ORDERS that a conflict wall be in place to shield [the Attorney General] from any further participation in the prosecution of this case. [The Attorney General] shall not discuss this case with anyone, shall not review files concerning this case, shall not have access to any files or information concerning this case, and shall not obtain or share confidential information concerning this case with anyone.” *Tennessee*, supra, at ¶ 44 (quoting ER at 42 (Dec. & Order)).

Although finding no actual conflict of interest and no improper disclosure of confidential information, the juvenile court in *Charlisse* found that an erosion of the ethical screens separating CLC's units created a structural conflict of interest warranting CLC's disqualification, citing cases wherein separate law units under a single governmental umbrella operated as separate law firms independent of parallel units also sheltered under that umbrella. *Id.* (citing *Castro v. Los Angeles County Bd. of Supervisors*, 232 Cal.App.3d 1432, 284 Cal. Rptr. 154 (Cal. Ct. App. 1991) (*Castro*) and *Christian*, *supra*).

In *Christian*, the appellate court held there was no actual conflict when two attorneys, both supervised by the Contra Costa County Public Defender, in a joint trial represented two criminal codefendants who had potentially conflicting interests. *Christian*, *supra*, at 1001. The public defender oversaw as independent government law offices both the public defender's office (PD) and a separate alternate defender's office (ADO). *Id.* at 992. The Court of Appeal described the elaborate effort to separate the two branches of the public defender's office:

Although the ADO is formally a branch of the PD, it operates autonomously, with a separate supervising attorney who is responsible for directing, coordinating, and evaluating the work of attorneys employed by the ADO. This supervising attorney is solely responsible for providing guidance to and determining litigation strategy of ADO attorneys. The public defender exercises no control or influence over the handling of cases by the ADO. Nor does he have access to the client files or other client confidences of the ADO. Only upon the specific recommendation of the ADO supervising attorney may the public defender make changes in the salary or working conditions of persons working for the ADO.

Individual cases in the ADO are opened, litigated, and closed under separate ADO file numbers. The ADO generates calendars listing appearances only for attorneys in the ADO. The ADO has its own clerical support staff and investigators, independent of those employed by the PD. The ADO offices are physically separate from those of the public defender. The keys to the offices of the ADO are different from the keys to the PD offices, and ADO keys are not available to attorneys or support staff not employed by the ADO. The public defender does not personally possess a key to the ADO offices, nor does the ADO supervisor possess keys to the PD offices. The ADO maintains a separate communications network, with its own telephone number, computer hookups to the Law & Justice computer system, facsimile machine, and computer equipment. The ADO also uses independent library facilities.

The files of ADO clients are housed separately from those of the PD to insure that only ADO attorneys have access to the confidential files of the ADO. In turn, files of the primary branches of the PD are protected as separate and likewise inaccessible to ADO attorneys or staff. Every employee of the PD and ADO has been specifically advised to maintain the confidences of individual clients and to be sensitive to the required degree of separation between the ADO and the PD.

Christian, supra, at 992–93. Concluding that the organization and operation of the two offices made them, in effect, separate law firms, the court in *Christian* rejected the view that the simultaneous representation of codefendants by the public defender and the alternate defender created a conflict, because the county public defender was also the titular head of the alternate defender’s office. *Id.* at 1000.

In *Castro*, a single executive director headed the Dependency Court Legal Services (DCLS)—subsequently restructured as CLC in *Charlisse*—with three separate public law units providing service to parents and children in dependency proceedings. *Castro*, supra, at 1436–37. The Court of Appeal in *Castro* concluded that there would be no conflict if attorneys from each unit were to simultaneously represent clients from a single family whose interests were divergent. *Id.* at 1439, 1441–44. The autonomy of each law unit was ensured because the chief attorney in each unit initiated hiring, firing, and salary changes for that unit’s attorneys. *Id.* at 1438.

The appellate court in *Charlisse* found that the structural safeguards discussed in *Castro* and *Christian* were not dispositive because those cases involved simultaneous representation, whereas *Charlisse* involved successive representation. *Charlisse*, supra, at 160–61. “Whether CLC’s disqualification is warranted turns on the likelihood that the [] attorney the juvenile court appointed to represent [the minor] has obtained or will acquire, either intentionally or inadvertently, confidential information CLC acquired through [another unit’s] prior representation of [the minor’s mother].” *Id.* at 166.

Because *Castro* and *Christian* involved simultaneous representation, the disqualification standards they applied were different from—and more stringent than—the standards that govern the successive representation in *Charlisse*. *Id.* at 160–61. Accordingly, the Court of Appeal observed that the factors emphasized in *Castro* and *Christian* are not necessarily dispositive in this case, and the juvenile court’s finding that CLC did not observe some of the safeguards *Castro* and *Christian* discussed does not automatically warrant disqualification. *Id.*

The *Charlisse* court found that the burden was on the organization to show that through timely, appropriate and effective screening measures and/or structural safeguards, the confidential information acquired during the prior representation of the minor’s mother had been and would be adequately protected during the current representation of the minor. *Id.* at 166.

f. Elements of an ethical wall

In *In re Complex Asbestos Litigation*, the court held that an effective screening system should have at least three safeguards:

Screening must take place at the outset to prevent any confidences being disclosed. Second, the tainted individual should be precluded from any involvement in or communication about the challenged representation. To avoid inadvertent disclosures and to establish an evidentiary record, a memorandum should be circulated warning the legal staff to isolate the individual from communications on the matter and to prevent access to the relevant files.

232 Cal. App. 3d 572, 594, 283 Cal. Rptr. 732 (Cal. Ct. App. 1991) (citing 1 Mallen & Smith, LEGAL MALPRACTICE § 13.19 (3d ed. 1989)).

“The typical elements of an ethical wall are: [(1)] physical, geographic, and departmental separation of attorneys; [(2)] prohibitions against and sanctions for discussing confidential matters; [(3)] established rules and procedures preventing access to confidential information and files; [(4)] procedures preventing a disqualified attorney from sharing in the profits from the representation; and [(5)] continuing education in professional responsibility.” *Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 810-11, 108 Cal. Rptr. 3d 620, 646 (Cal. Ct. App. 2010) (*Kirk*) (quoting *Henriksen v. Great American Savings & Loan*, 11 Cal.App.4th 109, 116, fn. 6, 14 Cal.Rptr.2d 184 (Cal. Ct. App. 1992) (*Henriksen*)). Another element “favorably acknowledged in case law” is the absence of supervisory power between the disqualified attorney and the attorneys involved in the litigation. *Id.* at 813 (citing *Santa Barbara*, supra, at 27).

Potentially relevant to the construction of ethical walls are suggested procedures for due process walls both in public law offices and private law firms that include (1) the identification of staff or officials who will provide support or points of contact for each screened attorney and (2) the communication of the elements of the due process wall to the staff. Amy Greyson, Constructing Due Process Walls Following *Morongo* and *Sabey*, Presentation Before the City Attorneys’ Department Annual Conference (Sep. 18, 2013), in LEAGUE OF CALIF. CITIES, <https://www.cacities.org>.

However, the analysis of the efficacy of a particular ethical wall “is *not* to determine whether all of a prescribed list of elements (beyond timeliness and the imposition of prophylactic measures) have been established; it is, instead, a case-by-case inquiry focusing 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.” *Kirk*, supra, at 811. This determination must be based on the sufficiency of the ethical wall to meet its purpose: “satisfying the trial court that the tainted attorney has not had and will not have any involvement with, or communication concerning, the litigation that would support a reasonable inference that confidential information was or will be disclosed.” *Id.* at 814.

A. A COURT WOULD LIKELY DISQUALIFY THE ENTIRE PUBLIC DEFENDER SERVICE CORPORATION IN A SUCCESSIVE REPRESENTATION CASE UNLESS THE CORPORATION IMPLEMENTS AN ETHICAL WALL THAT REBUTS THE PRESUMPTION OF IMPUTATION OF CONFLICT.

In the instant case, PDSC proposes to operate the LAS Program as the Guam Elder Justice Center. Among the Board of Trustees’ concerns is the potential vicarious disqualification of PDSC due to imputation of conflict of interest. To address the issue of conflict, PDSC has proposed to create a separate Civil Division to encompass the Guam Elder Justice Center, the STOP Program and other civil legal services. PDSC’s proposal for the Civil Division includes the implementation of a conflict wall to separate the Civil Division from the Criminal Division, similar to the manner in which the Alternate Public Defender operates independent of PDSC

Charlisse is notably relevant because the structure of the legal organization in that case is similar to the arrangement that PDSC aims to implement with the separation between the Criminal and Civil Divisions. The unified organization of CLC in *Charlisse* with the executive director heading a core firm set adjacent to conflict units is comparable to the proposed divisions and the administration and leadership structure of the PDSC.

In *Charlisse*, CLC adopted the following revised operating procedures that were implemented as a shift toward a more unified organization structure with a “core firm” and “conflict units”:

- “1. CLC[’s] staff will continue to be assigned by CLC’s executive leadership to a core unit or such other conflict unit or units as CLC may choose to maintain over time (currently denoted as CLC [Units] 1, 2, and 3). The conflict unit or units will handle cases with siblings where conflicts of interest are present (‘conflict cases’)—to be denoted on CLC’s file and records as conflict cases—as well as any other nonconflict cases that may previously or in the future be assigned to that unit. ... Any determination that a conflict exists in a given case will be made only after consultation with, and approval by, a supervisor, as set forth in CLC’s conflict policy.
2. Each of CLC’s units will operate pursuant to the procedures set forth herein to ensure that ethical walls for handling conflict cases within CLC remain in place and are honored at all times. Any questions or concerns that these procedures do not adequately preserve the separateness of conflict cases or that these procedures are not being complied with shall be directed to CLC’s Executive Director or the appropriate unit head.
3. Each CLC unit shall have a unit head. The conflict unit head(s) shall ensure that conflict case files and all confidential case information relating to conflict cases assigned to a given unit are maintained by that unit, remain separate from the case files and confidential case information of the core firm and any other conflict unit(s), and cannot be accessed by any staff outside the conflict unit. The conflict unit(s) head(s) and any other conflict unit supervisors shall supervise, direct and coordinate the day-to-day representation and case-related decision making in regard to conflict cases and conflict clients assigned to that unit and will be the final decision-maker in regard to those case-specific issues.
4. [CLC’s] practice for promoting, terminating or disciplining CLC lawyers or staff members is unchanged. The CLC Executive Director or his or her designee will remain the final decision-maker after considering a recommendation from the unit head or supervisor of that staff member, along with the basis for that recommendation. In evaluating that recommendation, the CLC Executive Director will not have access to conflict unit case files, or any conflict unit client confidential information.
5. No attorney shall have access to the case files or confidential client information relating to any clients of other units in conflict with that attorney’s clients.
6. Where no conflict of interest or ethical concerns exist, cases may be reassigned within CLC, and in particular from the conflict unit(s) to the core firm.

7. CLC’s executive leadership shall be responsible for hiring and training staff attorneys and for assigning them, as appropriate and consistent with the Board’s restructuring plan, to the core firm or conflict unit(s). All attorneys and staff shall receive training regarding the necessity of maintaining client confidences.

8. CLC will continue to remain counsel for all clients assigned to CLC. To ensure that the appropriate staff member receives notices, pleadings, and other information relating to clients, individual attorneys within CLC will serve as the responsible attorney—the attorney of record—for cases assigned to that attorney. If those individual attorneys leave CLC’s employ or change courtrooms or caseloads, a notice will be filed with the court and sent to all critical persons and entities, designating the new responsible attorney of record within CLC. As noted above, the conflict unit head(s) will maintain ultimate and final responsibility for the supervision, direction and coordination of case-related decision making in regard to conflict cases and conflict clients assigned to that unit and will be the final decision-maker in regard to those case-specific issues.

Charlisse, supra, at 154–55.

Given the dearth of Guam case law addressing vicarious disqualification, a court could find California decisions persuasive and find that PDSC’s adoption or implementation of an organizational structure and operating procedures that closely comply with the standards set forth in *Charlisse* would be adequate to rebut the presumption of imputation of conflict in a successive representation case. See *Charlisse*, supra, at 154–55.

Should PDSC adopt an organizational structure and operating procedures as prescribed in *Charlisse*, a court would likely use the rules-based attorney disqualification standard in *Barrett-Anderson* and find unwarranted the disqualification of PDSC attorneys of one division where the conflict is from a former client of an attorney from the other division. See *Barrett-Anderson*, supra, at ¶ 20; *Charlisse*, supra, at 154–55.

In deciding whether to disqualify PDSC in a successive conflict case, a court could find California case law persuasive and make the determination based on whether PDSC has adequately protected and will continue to protect a former client’s confidences through timely, appropriate, and effective screening measures and/or structural safeguards. See *Charlisse*, supra, at 165. This approach is appropriate with respect to PDSC because not unlike the case with DCLS and CLC in *Castro* and *Charlisse*, (1) PDSC is “unlike a private law firm” in that “[it] is nonprofit corporation” and a “creation of a public entity, the Board,” (2) PDSC “represents clients who cannot and do not pay for services rendered on their behalf,” and (3) “[a] third party, the [B]oard, funds” PDSC and “clients do not pay for the services the law firm renders. Hence no client becomes ‘more important’ than some other client, and no lawyer has any ‘obvious financial incentive’ to favor one client over another. Quite the opposite is true; because a third party pays, the attorney has every incentive to devote his or her entire efforts on behalf of the client.” *Id.* at 165–66 (quoting *Castro*, supra, at 1441).

B. WHERE THE CONFLICTED ATTORNEY IS THE EXECUTIVE DIRECTOR OF PDSC, A COURT WOULD LIKELY VICARIOUSLY DISQUALIFY PDSC IN A SUCCESSIVE REPRESENTATION CASE UNLESS THE EXECUTIVE DIRECTOR TIMELY AND ADEQUATELY LIMITS HIS CONTROL OVER THE CIVIL DIVISION.

California courts have held that “where the attorney with the actual conflict has managerial, supervisory, and/or policymaking responsibilities in a public law office, screening may not be sufficient to avoid vicarious disqualification of the entire office.” *Charlisse*, supra, at 163–64 (citing *Younger v. Superior Court*, 77 Cal.App.3d 892, 894–897, 144 Cal. Rptr. 34 (Cal. Ct. App. 1978) (decision to disqualify entire district attorney’s office was “reasonable” because of conflicted attorney’s “attendance at weekly meetings of the office’s executive staff, which meant he could [] participate in formulating prosecutorial policies that might affect the office’s prosecution of his former clients; and his membership on the office’s promotions committee, which might impact how attorneys in the office handled cases against his former clients”); *People v. Lepe*, 164 Cal.App.3d 685, 689, 211 Cal. Rptr. 432 (Cal. Ct. App. 1985) (trial court did not abuse discretion in disqualifying entire district attorney’s office because conflicted attorney’s supervisory powers over the recruitment, evaluation, promotion, and termination of deputies)).

In holding that ethical screening was insufficient to prevent disqualification of an entire public law office, the California Supreme Court stated:

Individuals who head a government law office occupy a unique position because they are ultimately responsible for making policy decisions that determine how the agency’s resources and efforts will be used. Moreover, the attorneys who serve directly under them cannot be entirely insulated from those policy decisions, nor can they be freed from real or perceived concerns as to what their boss wants. The power to review, hire, and fire is a potent one. Thus, a former client may legitimately question whether a government law office, now headed by the client’s former counsel, has the unfair advantage of knowing the former client’s confidential information when it litigates against the client in a matter substantially related to the attorney’s prior representation of that client.

City & Cty. of S.F. v. Cobra Sols., Inc., 38 Cal. 4th 839, 853-54, 43 Cal. Rptr. 3d 771, 782, 135 P.3d 20, 29-30 (Cal. 2006) (*Cobra*).

Nonetheless, “ethical screening might suffice to shield a senior supervisory attorney with a personal conflict and thus avoid vicarious disqualification of the entire government legal unit under that attorney’s supervision.” *Id.* at 850, fn. 2. The *Cobra* court explained that, in ruling on a disqualification motion involving this situation, a trial court should make “a factual inquiry” into the supervisor’s “actual duties ... with respect to those attorneys who will be ethically

screened” and “responsibility for setting policies that might bear on the subordinate attorneys’ handling of the litigation. In addition, the trial court should consider whether public awareness of the case, or the conflicted attorney’s role in the litigation, or another circumstance is likely to cast doubt on the integrity of the governmental law office’s continued participation in the matter.” *Id.*

The State Bar of California identified two supervisor-level ethical dilemmas arising from the separation of a public defender’s office into two branches: supervision and promotion of personnel of the second unit and financial considerations. Formal Op. 2002-158, *supra*.

Although the day-to-day supervision of ADO personnel might not be the responsibility of the Public Defender, there may be circumstances under which the competence of a particular ADO deputy would be of concern to the Public Defender since he or she may have some responsibility to supervise the work of a subordinate attorney. For example, an issue relating to the imposition of office discipline could arise out of the representation of a client by an ADO deputy. In such circumstances the Public Defender may want to review the ADO office file relating to that representation. Limitations would have to be imposed upon such review ... since client confidential information could not be disclosed to someone outside the ADO firm. There also would need to be similar limitations in the event the Public Defender wants to review an ADO file in connection with the promotion of an ADO attorney. In short, if the PD branch is deemed to be a separate firm from the ADO branch, the Public Defender, in carrying out his or her legal responsibilities, cannot have the same type of freedom of supervision over the ADO that is available for the PD office itself. Nevertheless, because the Public Defender is responsible for administering both the PD and ADO offices, the Public Defender has ethical obligations ... with respect to the competence of ADO attorneys. The Public Defender must meet this duty of competence in a manner that avoids violation of other ethical obligations

Where one person controls the finances of both offices ethical dilemmas could arise. For example, where the Public Defender is responsible for the budgets of both offices and the assignment of personnel to them, the Public Defender must take care not to discriminate for or against one client or class of clients in assigning work or providing investigation, testing, or other resources. Any such favoritism might violate the Public Defender[’]s duty to provide [] zealous representation to all clients and to provide competent representation. Moreover, avoiding this problem by not providing the services to either client might also violate the duty to provide competent representation to both clients.

Id.

In affirming the reversal of the disqualification order against the non-profit legal organization CLC, the court in *Charlisse* considered the organization’s operating procedures regarding employment practices which provide that the CLC executive director has (1) “final authority, upon the recommendation of the CLC Unit Heads, with regard to promoting, terminating, or disciplining CLC[’s] lawyers or staff members,” (2) “authority over CLC[’s] budget and how

funds get allocated in relation to CLC[’s] operating costs,” and (3) “authority over hiring decisions, and assignment of lawyers to particular CLC units.” *Charlisse*, supra, at 156.

Regarding the situation at bar, a court would likely find dispositive the breadth of the managerial powers of the executive director in determining whether the Civil Division is adequately screened. *See Kirk*, supra, at 813; *Henriksen*, supra, at 116; *Santa Barbara*, supra, at 27. PDSC can effectively prevent the imputation of conflict to the Civil Division by adopting operating procedures that insulate the division from undue influence of the executive director.

**BEFORE THE BOARD OF TRUSTEES
OF THE PUBLIC DEFENDER SERVICE CORPORATION
RELATIVE TO LIFTING A MORATORIUM INVOLVING
CIVIL AND DOMESTIC CASES**

RESOLUTION NO. 05-20

- WHEREAS,** on August 28, 2012, this body adopted Resolution No. 13-12 wherein the Executive Director of the Public Defender Service Corporation (“PDSC”) was directed to limit the caseload of the PDSC with regard to certain civil and domestic cases;
- WHEREAS,** concerning civil and domestic matters, the PDSC was directed to limit its representation to cases involving violence, the threat of violence, uncontested guardianships, and the release of a body for purposes of burial;
- WHEREAS,** pursuant to Resolution No. 13-12, the decrease in the scope of representation in civil and domestic matters was necessary due to an increase in caseload and “serious budgetary constraints” that affected the PDSC at the time;
- WHEREAS,** since the adoption of Resolution No. 13-12, the PDSC has been able to resolve the budgetary and staffing issues that previously compelled the reduction in services;
- WHEREAS,** the Department of Public Health and Social Services (“DPHSS”), Division of Senior Citizens (“DSC”) has proposed to sub-grant to the PDSC the Legal Assistance Services (“LAS”) program it administers for the purpose of providing legal assistance and representation to individuals aged 60 or older;
- WHEREAS,** the Executive Director of the PDSC has represented to the Board of Trustees a willingness to accept the work proposed and the ability to complete the work without compromising the scope of criminal defense work the PDSC provides, and has presented a plan for limiting conflicts of interest. These matters are addressed separately in Resolution No. 06-20. Now, therefore, be it

RESOLVED that the moratorium involving civil and domestic cases, imposed by Resolution No. 13-12, is hereby modified to enable the PDSC to accept qualified clients in civil matters limited to the terms of the LAS program administered by the DPHSS, DSC;

RESOLVED that the PDSC shall engage in these additional services pursuant to a pilot program that shall be six months in duration from the adoption of this resolution and reviewed by the Board of Trustees upon its expiration.

DULY AND REGULARLY ADOPTED this 28th day of July, 2020.

Chief Justice F. PHILIP CARBULLIDO
Chairman

CATHY GOGUE
Secretary

**BEFORE THE BOARD OF TRUSTEES
OF THE PUBLIC DEFENDER SERVICE CORPORATION
RELATIVE TO THE CREATION OF
THE ELDER JUSTICE CENTER PILOT PROGRAM**

RESOLUTION NO. 06-20

- WHEREAS,** the Public Defender Service Corporation (“PDSC”) was created by Public Law 13-051 to provide effective legal aid and assistance to those persons in Guam unable to afford counsel;
- WHEREAS,** section 60004 of P.L. 13-051 specifically directs the PDSC to render legal aid and assistance to qualified individuals in civil cases;
- WHEREAS,** adopted by this body on August 28, 2012, Resolution No. 13-12 imposed a temporary restriction on the types of civil cases the PDSC could accept for representation. This resolution was necessary due to the staffing and financial circumstances affecting the PDSC at the time. The modification of the moratorium imposed by Resolution No. 13-12 is addressed separately in Resolution No. 05-20;
- WHEREAS,** the Department of Public Health and Social Services (“DPHSS”), Division of Senior Citizens (“DSC”) has proposed to sub-grant to the PDSC the Legal Assistance Services (“LAS”) program it administers for the purpose of providing legal assistance and representation to individuals aged 60 or older;
- WHEREAS,** the Executive Director of the PDSC has represented to the Board of Trustees a willingness to accept the work proposed and the ability to complete the work without compromising the scope of criminal defense work the PDSC provides, and has presented a plan for limiting conflicts of interest;
- WHEREAS,** this body recognizes that there is a tremendous need for the services described. Members of the population at issue have both sacrificed mightily and contributed selflessly to the betterment of our community and country. We all gratefully stand on their shoulders;

WHEREAS, while there is a need for the services at issue, this body must ensure that the PDSC is financially fit for purpose, that the increase in scope of work does not result in an increase in conflicts of interest, and that a conflict wall and screening mechanisms are in place and supported by existing law. Now, therefore, be it

RESOLVED that the PDSC is hereby authorized to begin a pilot program to provide legal services covered by the LAS program administered by the DPHSS, DSC. The pilot program will be known as the Elder Justice Center (“EJC”), a division of the PDSC, and will be a pilot program that is six months in duration from the adoption of this Resolution;

RESOLVED that the government of Guam has only begun to realize the financial effects of the COVID-19 pandemic. The PDSC must continue to satisfy its primary function of representing indigent clients in criminal cases without becoming financially burdened with new responsibilities or unfunded mandates. The Board of Trustees was advised that the EJC will be partially funded by a matching grant between the federal government and the government of Guam. The PDSC is directed to make use of this funding and to use its discretion in allocating staff and resources to make the EJC successful, but it may not create additional permanent positions or financial obligations for the EJC outside of the current PDSC budget that would burden the general fund of the government of Guam;

RESOLVED that the EJC shall only accept clients who financially qualify for services, using the same intake tools that exist for all PDSC cases. The EJC shall not compete with the private bar for clients who would otherwise be able to afford an attorney at their own expense;

RESOLVED that avoiding conflicts of interest is of paramount importance. The PDSC is directed to implement a conflict wall that will eliminate conflicts arising in criminal cases as a result of the additional work under the LAS program. To avoid conflicts, the Executive Director of the PDSC will have neither access to confidential EJC files nor control of the day-to-day operations of the EJC. A separate case management system will be used for the EJC. Any EJC file that represents a known conflict with any PDSC case or client will be clearly marked and kept in a separate filing cabinet so these matters are clearly identified and controlled;

RESOLVED that the EJC will not engage in adversarial litigation, further eliminating potential conflicts. The work described by the DPHSS, DSC includes wills, powers of attorney, guardianships, and various forms of deeds. While EJC attorneys may periodically file documents in court, they will focus their energies on transactional matters;

RESOLVED that day-to-day operations of the EJC will be supervised by a managing attorney. The Executive Director of the PDSC will maintain nominal control of the EJC for purposes of staffing, administration, and budgeting. The Executive Director will have access to non-confidential case statistics so that he may properly advise the Board of Trustees on the effectiveness of the LAS program as the Board sees fit;

RESOLVED that the Executive Director of the PDSC shall be prepared at each monthly Board of Trustees meeting to present an update concerning the effectiveness of the EJC, conflicts of interest, expenses, the adequacy of representation, and other issues that may arise. The Board of Trustees will review the six-month pilot program upon its expiration for further action.

DULY AND REGULARLY ADOPTED this 28th day of July, 2020.

Chief Justice F. PHILIP CARBULLIDO
Chairman

CATHY GOGUE
Secretary

VI. New Business

B. Car Purchase for Rental Cars



647 Route 8
 Maite, Guam 96910
 Cell: (671) 888-1739
 Telephone: (671) 477-7807
 Facsimile: (671) 477-7752
 E-mail: eugener@carsplusguam.com

Hyundai Quotation

Date: July 24, 2020

Attention: Public Defender Service Corporation **Email:** cgogue@guampdsc.org
 c/o: Mrs. Cathy Gogue

From: Eugene “Dunge” Rios **Cc:** Joey C. Vince M.

Re: LEASE QUOTATION

Number of Pages (Including Cover Sheet): 1

Hafa Adai Cathy,
 Please review the following quotations on our 2017 Hyundai Tucson. I appreciate the opportunity to submit our quote.

New 2017 Hyundai Tucson SUV

- **2.0L DOHC 16-Valve 4-Cylinder Engine**
- 6 speed Automatic with Shiftronic Transmission
- Cloth Interior
- Power Windows/Locks/Mirrors
- Remote Keyless Entry
- Electronic Stability Control Program
- Anti-Lock 4 Wheel Disc Brakes
- Traction Control
- Air-conditioning
- Colored Door Handles
- **AM/FM/CD w/ Blue Tooth Capability**
- **Audio Control on Steering Wheel**
- Aluminum Wheels
- Child Safety Door Locks
- 60/40 Split Folding Rear Seat
- Dual Front Air Bags
- Privacy Glass
- Roof Rack
- **MPG: 28/37**
- **Colors: 02 each Silver**

- **24 Month Lease: \$570.00**
- **Government Agency provides Insurance**
- Maximum mileage: 1,250 miles per month
- Maintenance: 2 times a year not including wear and tear items
- Wash & Vacuum once a week at dealership
- License, Registration Fees
- Loaner Vehicle
- **\$12,000.00 buyout at end of term**

Should you have any questions or require additional information, please contact me at the numbers listed above or on my cell @ 888-1739.
 Regards,

Eugene Rios
 Fleet Sales Manager

VII. Executive Session

B. MA Gayles' Performance Eval. Period

EXECUTIVE DIRECTOR
Stephen P. Hattori



ACTING DEPUTY DIRECTOR
Jocelyn M. Roden
ADMINISTRATIVE DIRECTOR
Cathlyann C. Gogue

PUBLIC DEFENDER SERVICE CORPORATION
(Kotperasion Setbision Defensot Pubbleku)

GOVERNMENT OF GUAM
779 Route 4
Sinajaña, Guam 96910
Tel: (671) 475-3100 ♦ Fax: (671) 477-5844

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Rocky P. Kingree
Zachary C. Taimanglo
Earl Anthony V. Espiritu
Theresa G. Rojas
Kathleen A. Aguon
David J. Highsmith

July 20, 2020

The Honorable F. Philip Carbullido

Chief Justice
Judiciary of Guam
120 West O'Brien Drive
Hagåtña, Guam 96910

Subject: Performance Evaluation Period – Ana Maria Gayle (Annie)

Hafa Adai Chief Justice Carbullido,

Annie had reached out to me to explain the correlation of her performance evaluation and the grade/step in which she would be placed at once the Board has conducted their final evaluation of her performance.

Performance Evaluation Period 9/27/2017 to 3/27/2019 – 18 months waiting period. This performance evaluation period, had it been rated by Board of Trustees and approved by Board Chairman before 09/30/2019, would have kept Annie at ***the salary of Attorney Level 5 (Managing Attorney), AL5-7 \$112,997 P/A and shall be used as the appropriate compensation*** due to ***PL 34-116*** which placed a freeze on all salary increments, promotions, reclassifications, merit bonuses and any other upward pay adjustments which took effect 10/02/2018 and remained in effect through 09/30/2019.

Upon the lifting of such salary increment and merit bonus freeze, the payment of increments or merit bonuses ***shall not*** be retroactively applied and shall only be prospectively paid. This Non-Compensable Increment is for record keeping purpose and is not to be used for compensable determination.

However, on October 1, 2019, ***PL 35-36*** lifted the freeze on all salary increments and based on the Board's evaluation and your concurrence and approval, the performance evaluation period from 9/27/2017 to 3/27/2019 would prospectively compensate Annie at ***the salary of Attorney Level 5 (Managing Attorney), AL5-8 \$119,515 P/A as the appropriate compensation with no retroactive pay to 3/27/2019, only to October 1, 2019.***

Annie's next performance evaluation period of 18 months is from 3/27/2019 to 9/27/2020.

Senseramente,

Katherine LR Sablan
Personnel Specialist IV