

Navigating Limited Representation at an Initial Hearing

DISCIPLINARY COMMISSION

OPINION #1-24

Question

How may a public defender provide meaningful and efficient representation to multiple public defender clients at initial hearing while maintaining compliance with Indiana's Rules of Professional Conduct?

Short Answer

If a county or court system adopts a model in which a single public defender represents all defendants who qualify for indigent legal services in a day's initial hearings, care must be taken by the public defender to explicitly limit the scope of representation and to advise clients of the limited scope of that representation.¹ However, when necessary to best protect the interests of clients, the public defender must be able to pivot by requesting additional attorneys or expanding the scope of representation.

Recommended Rules for Review

[Indiana Rules of Professional Conduct: 1.1, 1.2, 1.4, 1.6, 1.7, 1.9, and 1.18](#)

Summary

Public defender offices or appointed attorneys who seek to limit representation of clients at initial hearing must balance the need to avoid conflicts of interest with the responsibility to provide indigent clients with effective representation. Depending on the circumstances, a public defender may need to request that additional counsel be appointed or to expand the limited scope of representation, so a client's interests are protected and competent representation is provided.

¹ Indigent criminal defense in Indiana is provided under three models: 1) public defender programs; 2) contracts under [I.C. 33-40-7-8](#) between courts and attorneys or law firms; and 3) assigned counsel systems in which private attorneys are appointed by judges on a case-by-case basis. See [Standards for Indigent Defense Services in Non-Capital Cases, Public Defender Commission \(June 14, 2023\)](#). This opinion expresses no advice on which model is preferred and merely focuses on the rules governing the attorney-client relationship during the limited time of an initial hearing. For a more thorough analysis of a lawyer's obligations concerning conflicts of interest, please review [Advisory Opinion #2-22](#).

The following general rules should be considered:

1. An attorney is permitted to engage in representation that is limited in scope, but the attorney must explicitly communicate the limited nature of the representation to the client(s). Indiana Professional Conduct Rules [1.2](#), [1.4](#).
2. An attorney must consult with a client about any relevant limitations on the lawyer's representation. Indiana Professional Conduct Rule [1.4](#).
3. An attorney should not reveal information relating to the representation of a client unless the client gives consent, and the information is not being used to the benefit or detriment of another client. Indiana Professional Conduct Rules [1.6](#), [1.9](#), [1.18](#).
4. An attorney should not represent a client in instances when the attorney's ability to advocate on behalf of that client is materially limited by a duty owed to another. Indiana Professional Conduct Rules [1.7](#), [1.9](#).
5. If a public defender is assigned to represent two or more clients with conflicting interests, the representation may only continue if the public defender obtains informed consent in writing from each affected party. Indiana Professional Conduct Rule [1.7\(b\)](#).

Ethical Minefields and Application of the Rules

Ethical Minefield #1 – Limitations on the Scope of Representation

Hypothetical #1: Public Defender A is assigned to represent Defendant B at an initial hearing and communicates to Defendant B that the scope of representation is limited to making sure Defendant B is aware of his or her legal rights and the charges faced and to advocating on Defendant B's behalf for pretrial release conditions. Public Defender A further explains that Defendant B should not discuss in any detail the underlying facts of the criminal charge(s) with Public Defender A. Prosecutor C communicates to Public Defender A a plea offer (or an offer to resolve the criminal matter with a diversion agreement) available to Defendant B. Public Defender A is concerned about communicating this offer to Defendant B because Public Defender A does not have sufficient information, nor has Public Defender A had time to conduct an investigation regarding the facts of the case and potential defenses.

If a plea or diversion agreement is offered to Defendant B at the initial hearing, Public Defender A's duties of competency, representation, and communication under Indiana Professional

Conduct Rules [1.1](#), [1.2](#), and [1.4](#) should outweigh maintaining a limited scope of representation. Any defense attorney whose client is offered a plea or diversion agreement at an initial hearing will be faced with the same challenge regarding lack of a full investigation into the facts and law of the case. This lack of ability to make a full investigation does not obviate the public defender's duty to communicate the offer.

Rather than leaving Defendant B unrepresented or uninformed, Public Defender A should expand the scope of representation to gather sufficient facts from the client to provide competent advice regarding the agreement offered by Prosecutor C. Rule [1.4\(b\)](#) requires that Public Defender A advise Defendant B on the terms of the agreement, the possibility that additional investigation and discovery could uncover weaknesses in the State's case, and any potential consequences the agreement could likely have on Defendant B so that Defendant B is able to make an informed decision.² Moreover, Rule [1.2](#) requires Public Defender A to abide by Defendant B's decision to accept a plea or diversion agreement at the initial hearing stage.

If the facts are changed so that Public Defender A would be handling the initial hearing of Defendant B along with Co-Defendant D, and an agreement is offered by Prosecutor C that would require Defendant B to offer evidence against Co-Defendant D, then Public Defender A would need to request additional counsel to represent Co-Defendant D. It would be a conflict of interest under Rule [1.7](#) for Public Defender A to represent both Defendant B and Co-Defendant D at the initial hearing under these circumstances.

Ethical Minefield #2 – Advising Clients of Rights

Hypothetical #2: Public Defender A is appointed to represent Defendant B at an initial hearing. Public Defender A communicates the limited nature of the representation and advises Defendant B about legal rights, charges filed, and that Defendant B will be represented by a different public defender after the initial hearing. Public Defender A advises Defendant B that (1) Defendant B has an attorney and (2) Defendant B has the right to refuse to answer any questions by law enforcement about the case. Public Defender A has received criticism for advising defendants, including Defendant B, that they can refuse to speak to law enforcement, under the guise that this advice is outside of Public Defender A's

² See also Comment 5 to Indiana Professional Conduct Rule [1.4](#), which explicitly states that a client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued.

limited scope of representation. Should Public Defender A be concerned that this advice is outside the limited scope?

In this scenario, Public Defender A correctly advised Defendant B of his or her legal rights, including the right to not speak to law enforcement. Regardless of the limited scope of representation, an attorney must properly advise any client of his or her legal rights. While Indiana Professional Conduct Rule [1.2](#) permits a lawyer and client to enter into an agreement for limited representation, Comment 7 states that the limitations of the representation do not exempt a lawyer from the duty to provide competent representation.³ Advising a defendant or client about the constitutional protection against self-incrimination is fundamental and should be part of any initial advisement made to a client who has criminal charges pending.

Ethical Minefield #3 – Conflicts of Interest

Hypothetical #3: At an initial hearing, Public Defender A is assigned to represent Defendant B and Defendant C, who are in a domestic relationship. Defendant B is accused of domestic battery on Defendant C, and Defendant C is charged with possession of marijuana. The State has requested a no-contact order and a stay-away order for Defendant B from the home where Defendant B and Defendant C reside. Under these circumstances, may Public Defender A ethically represent both Defendant B and Defendant C at the initial hearing, advise them of the charges and potential penalties, and advocate for their pretrial release?

In the scenario above, Indiana Professional Conduct Rule [1.7](#) is implicated because of the potential of a no-contact order or stay-away order, and Public Defender A should engage in a material limitation analysis to evaluate whether a conflict of interest precludes limited scope representation of both individuals. Specifically, Public Defender A must determine whether “there is a significant risk that [his or her] ability to consider, recommend, or carry out an appropriate course of action for [one of] the client[s] will be materially limited” by Public Defender A’s duty owed to the other client.

If Defendant/Witness C does not want the no-contact order and/or the stay-away order and each client provides informed consent in writing to the limited representation, then Public Defender A may continue to represent both parties at initial hearing because Public Defender A’s representation of Defendant B would not be materially limited by Public Defender A’s

³ See also Comment 6 to Rule [1.2](#).

responsibilities to Defendant/Witness C or vice versa. However, if Defendant/Witness C wants the no-contact order and/or the stay-away order, then Public Defender A cannot represent both clients, and another attorney should be appointed to represent Defendant B.

Even if Defendant B and Defendant C in this scenario agree on a course of action (e.g. not pursuing a no-contact order or stay-away order), Public Defender A must evaluate the underlying facts for other potential conflicts of interest. For instance, if the facts are changed to include that a minor in the household witnessed the domestic battery, which may necessitate child protection service involvement, Public Defender A would need to advise Defendant C as to why seeking a no-contact order/stay-away order might be beneficial and the potential legal ramifications in other proceedings of not seeking such protection orders. As this advice would potentially be adverse to Defendant B, additional counsel should be appointed to advise Defendant B.

Ethical Minefield #4 – Duties to Former Clients

Hypothetical #4: Public Defender A is appointed to represent Defendants B, C, and D at their initial hearings for criminal charges arising from the same incident. Public Defender A did not gather any information regarding the underlying matter from Defendants B, C, or D. Following the initial hearing, Public Defender A is appointed to represent Defendant B for the criminal matter. However, Public Defender A has just been informed that Defendant C is a witness against Defendant B in the matter. May Public Defender A continue to represent Defendants B?

If Public Defender A did not gather any specific information from Defendants A, B, or C during the initial hearing stage, then Public Defender A is free to represent Defendant B in the criminal matter due to the limited nature of the representation at the initial hearing stage. While Defendants B, C, and D are all technically former clients, the limited scope of representation, which involved only the advisement of rights and charges and advocacy for pretrial release, does not implicate the same or substantially related analysis of Indiana Professional Conduct Rule [1.9](#).

If the facts are changed so that Public Defender A received confidential information from Defendant C during the initial hearing stage, Indiana Professional Conduct Rule [1.9\(c\)](#) and [1.18\(b\)](#) would be implicated, to the extent that Defendant B's case could be affected by the confidential information. In that instance, Public Defender A would owe a continuing duty to Defendant C to not use that information to the disadvantage of Defendant C. Therefore, absent

informed consent from affected parties, Public Defender A should not represent any party in the matter who has interests that are adverse to Defendant C.

Conclusion

As counties and court systems seek to provide competent representation for indigent criminal defendants in an efficient manner, consideration should be given to the ethical responsibilities of public defenders, even with limited scope representation. A lawyer is obligated to provide competent representation and keep a client properly informed, regardless of the limited scope of the representation.

This nonbinding advisory opinion is issued by the Indiana Supreme Court Disciplinary Commission in response to a prospective or hypothetical question regarding the application of the ethics rules applicable to Indiana judges and lawyers. The Indiana Supreme Court Disciplinary Commission is solely responsible for the content of this advisory opinion, and the advice contained in this opinion is not attributable to the Indiana Supreme Court.