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Not For Love or Money: Appointing a Public Defender to Litigate a Claim of Ineffective Assistance Involving Another Public Defender

Christopher M Johnson, Franklin Pierce Law Center

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This article explores whether public defenders can litigate claims of ineffective assistance of counsel involving an affiliated public defender as the claim’s target. Courts in different states have reached different conclusions on that question. Some courts treat public defenders as sufficiently different from private practitioners as to justify a different conflict of interest rule, and allow such representation. Other courts disagree, and bar public defenders from litigating such a claim to the same extent that they would bar a private practitioner litigating a claim involving a partner. The dispute raises important questions about the nature of public defender practice. After examining the stated reasons and implicit premises of the two approaches, the article concludes that courts should not allow public defenders to litigate ineffective assistance claims involving affiliated public defenders.
# TABLE of CONTENTS

I. The Relevant Legal Rules..............................................................................6  
   (A) Ineffective Assistance of Counsel.....................................................6  
   (B) The Ethical Rules Governing Conflicts of Interest.............................9  
      1. Analysis of the First Account of the Conflict..............................11  
      2. Analysis of the Second Account of the Conflict............................15  
   (C) Conclusion.......................................................................................15  

II. The Caselaw? Per Se Rule or Case-by-Case Analysis..............................16  
   (A) The Case-by-Case Analysis............................................................17  
   (B) The Per Se Rule...............................................................................22  
   (C) A Procedural Approach....................................................................27  

III. An Analysis of the Premises.................................................................29  
   (A) For Love?: The Loyalty Interest.....................................................29  
      1. Policy Considerations.....................................................................32  
      2. Practicability Considerations..........................................................35  
         (a) A Practical Challenge to the Per Se Rule.................................36  
         (b) Practical Challenges to the Case-by-Case Rule......................39  
   1. The Search for Future Facts..............................................................40  

II. Limited Sources of Evidence…………………………….41
III. Ineffability of the Fact…………………………………….42
IV. Non-Adversarial Fact-Finding……………………….44

(c) Conclusion……………………………………………………………………………….45

(B) For Money?: The Financial Interest……………………………………………..46

IV. Conclusion…………………………………………………………………………………………………48
In June, 2003, a New Hampshire grand jury indicted Scott Veale for one count of timber trespass and one count of theft by unauthorized taking. At the request of his public defender, the court ordered a competency evaluation of Veale. As a result of that evaluation, the court found Veale not competent to stand trial, and not restorable to competence. As required by New Hampshire law, the trial court granted the public defender’s motion to dismiss the prosecution against Veale.

Acting pro se, Veale then filed a Notice of Appeal alleging, among other claims, that his public defender had rendered ineffective assistance of counsel. The Supreme Court appointed the New Hampshire Appellate Defender to represent Veale on that appeal. Upon receiving the notice of appeal and the


2Veale, 919 A.2d at 795.

3Id.


5Veale, 919 A.2d at 796.

6Id.
appointment order, the Appellate Defender moved to withdraw from the representation, citing a conflict of interest.\textsuperscript{7}

The conflict arose out of the connection between the Appellate Defender Program and the New Hampshire Public Defender. New Hampshire operates a state-wide public defender program.\textsuperscript{8} The program has nine trial offices spread through the state, each covering district and superior courts within a geographically-defined area. The program also includes an office specializing in the defense of persons facing post-sentence confinement as dangerous sexual offenders. Finally, it includes the Appellate Defender office, which represents indigent criminal defendants in the state Supreme Court.\textsuperscript{9}

The Appellate Defender constitutes a joint enterprise between the New Hampshire Public Defender and the Franklin Pierce Law Center, New Hampshire’s only law school.\textsuperscript{10} The assistant appellate defenders are salaried employees

\textsuperscript{7}Id.


\textsuperscript{9}\textsc{n.h. rev. stat. ann.} § 604-b:4 (2001) (authorizing the public defender to subcontract for attorney services, including appellate services).

\textsuperscript{10}Veale, 919 A.2d at 796-97; Johnson, supra note 8, at 825-26.
of the public defender, who serve as assistant appellate defenders on two-year rotations, before returning to a public defender trial office. During their rotations, assistant appellate defenders often actively represent clients at the trial level, and retain administrative duties within the public defender’s office. Public defenders and appellate defenders work closely together and share confidential information. Attorneys in the two offices are often trained and educated together using materials and services available only to employees of the public defender and lawyers who contract with the State to provide indigent representation.\textsuperscript{11}

In response to the motion to withdraw from the representation of Veale, the New Hampshire Supreme Court issued an order directing the Appellate Defender to address “whether the mere allegation of ineffectiveness of public defender trial counsel by a defendant requires the withdrawal of the appellate defender.”\textsuperscript{12} Upon reading that order, I thought I knew the answer: no public defender can litigate a claim of ineffective assistance involving another public defender employed by the same entity, at least where the claim relates to the lawyer’s performance. Upon researching the question, however, I discovered a split of authority on the matter. The question involved subtleties I had not previously appreciated.

The question of whether courts can appoint one public defender to

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\footnotesize\textsuperscript{11}Veale, 919 A.2d at 796-97; Johnson, supra note 8, at 825-27. \\
\footnotesize\textsuperscript{12}A copy of the Order is on file with the author.
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litigate a claim of ineffective assistance of counsel involving an affiliated public defender has received very little scholarly attention. A number of jurisdictions allow courts, under some circumstances, to appoint public defenders to litigate claims of ineffective assistance directed against an affiliated public defender. In those jurisdictions, courts undertake a case-by-case analysis to decide whether the affiliation creates a disqualifying conflict. In preferring a case-by-case analysis to a per se rule barring the appointment of an affiliated public defender in any such case, courts offer various justifications.

First, public defenders, unlike lawyers in private practice, have no financial interest in the results of their cases, nor in the reputations of their public defender colleagues. Second, public defenders have a distinguishing characteristic — a zealous dedication to their clients — that alleviates the concern that conflicting collegial or institutional loyalties might inhibit their advocacy. Third, practical considerations justify the appointment of public defenders in such cases. The appointment of a public defender costs less than the appointment of private counsel, and public defenders specialize in criminal practice, and so may bring greater expertise to the case than would a general practitioner.

I have found only one law review article that gives any sustained attention to the issue: David N. Webster, The Public Defender, the Sixth Amendment, and the Code of Professional Responsibility: The Resolution of a Conflict of Interest, 12 AM. CRIM. L. REV. 739 (1975).

See infra Part II (A) (citing cases).
Other jurisdictions apply a *per se* rule barring the appointment of a public defender to litigate an ineffectiveness claim involving an affiliated public defender.\textsuperscript{15} In preferring that rule, courts attribute significant influence on behavior to collegial or institutional loyalty. Some judges also have criticized the case-by-case approach as unworkable.

This article analyzes those two approaches to the issue. In Part I, the article describes the legal doctrines bearing on the question. Those doctrines, as presently articulated, do not compel any particular resolution of the dispute, but can accommodate either approach. In Part II, the article details the reasoning of the courts as they defend the adoption of one or the other of the two possible rules.

In Part III, the article weighs the advantages and disadvantages of the two approaches. It concludes that the *per se* rule best reconciles the considerations and interests at stake. That conclusion does not rely on generalizations about an essential public defender character. Assertions about the “typical public defender” or about an essential public defender character seem implausible, given the vast number of public defenders and the variety of public defender institutional structures. Moreover, such generalizations, because not susceptible to demonstration, will persuade only those already convinced. The article therefore relies, in preferring the *per se* rule, on concerns about the administrability of the case-by-case approach.

\textsuperscript{15}Id.
I. THE RELEVANT LEGAL RULES

The issue implicates two different sources of law, and two different sets of rules. A claim of ineffective assistance of counsel arises under the Sixth Amendment’s right to counsel. The question of whether a particular lawyer may represent a particular client implicates the professional conduct rules defining conflicts of interest. This article briefly describes each set of rules below.

(A) INEFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment provides that, “[i]n all criminal prosecutions, the accused shall ... have the Assistance of Counsel for his defence.”16 The Supreme Court has long recognized that the right to counsel encompasses the right to the effective assistance of counsel.17 Claims of ineffective assistance of counsel can differ in their essentials, and some such claims do not involve criticism of the performance of defense counsel.

For example, some claims of ineffective assistance of counsel focus upon obstacles to an effective defense created by the trial court18 or by

16U.S. CONST. amend. VI.


18See, e.g., Geders v. United States, 425 U.S. 80 (1976) (finding violation of right to counsel in trial court’s order barring counsel from consulting with defendant during overnight recess in
state law.\textsuperscript{19} Other claims focus on defense counsel, but do not necessarily require a critique of counsel’s performance. Such claims may focus instead on circumstances that “are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.”\textsuperscript{20} As an illustration of such circumstances, the Supreme Court has referred to the facts of the infamous Scottsboro Boys case, in which the trial court appointed “all the members of the bar” in Scottsboro for the purpose of advising the defendants.\textsuperscript{21} Another circumstantial claim of ineffective assistance that focuses on defense counsel without focusing on counsel’s competence may arise when defense counsel represents clients with adverse interests.\textsuperscript{22}

This article does not address the question of a conflict of interest trial); \textit{Herring v. New York}, 422 U.S. 853 (1975) (finding violation of right to counsel in trial court’s ruling barring counsel from giving closing argument).


\textsuperscript{21}\textit{Id.} at 660 (discussing \textit{Powell v. Alabama}, 287 U.S. 45 (1932)).

arising out of those circumstances. Instead, it focuses on the much more common, and much more difficult, question of whether a public defender may litigate a claim of ineffective assistance of counsel involving a fellow public defender, when that fellow defender’s performance and competence are at issue. The Supreme Court’s decision in \textit{Strickland v. Washington}\textsuperscript{23} sets out the elements of such claims.

In that much-cited case,\textsuperscript{24} the Supreme Court articulated two elements that comprise a performance-based claim of ineffective assistance. First, a defendant must show that counsel rendered deficient performance. Second, the defendant must show that counsel’s deficient performance prejudiced the defense.\textsuperscript{25} The deficient performance prong raises an issue for this article.

To satisfy that prong, a defendant must show “that counsel’s representation fell below an objective standard of reasonableness.”\textsuperscript{26}

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\textsuperscript{23}\textit{466 U.S. 668 (1984).}

\textsuperscript{24}Adam M. Steinman, \textit{The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy}, 63 \textit{Wash. & Lee L. Rev.} 81, 144 (2006) (including chart listing most-frequently cited cases; identifying \textit{Strickland} as the third-most cited case by all courts (and the most cited criminal case), and as the most-cited case, bar none, by State courts).

\textsuperscript{25}\textit{Strickland}, 466 U.S. at 687.

\textsuperscript{26}/d. at 688.
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defining objective reasonableness, the Court referred to “prevailing professional norms.” In explaining the meaning of the prong, the Court took pains to emphasize that “[j]udicial scrutiny of counsel’s performance must be highly deferential,” and that courts must “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” The effect of that interpretation of the standard has been, as commentators have noted, to accept as reasonable a very wide range of actions and choices. To win a claim of ineffective assistance, thus, a defendant must show that counsel’s performance was very poor indeed.

27Id. at 688.

28Id. at 689.

29Id. at 689.

THE ETHICAL RULES GOVERNING CONFLICTS OF INTEREST.

Many jurisdictions have adopted the American Bar Association’s Model Rules of Professional Conduct conflict-of-interest rules. This article therefore uses the relevant provisions of the Model Rules to explore the problem raised by claims of ineffective assistance involving affiliated public defenders. Similar conflicts of interest rules exist also in jurisdictions drawing upon other models, such as the ABA’s Model Code of Professional Responsibility.

One can describe the potential conflict arising out of the ineffectiveness claim in at least two ways. One account identifies the primary conflict as involving the allegedly ineffective lawyer. The conflict thus arises out of the fact that lawyers have a conflict precluding them from alleging themselves ineffective. Insofar as that conflict extends to other, affiliated public defenders, it does so by the imputation rules.

The second account of the conflict avoids recourse to the imputation rules.

31 MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 5 (3rd ed. 2004) (noting that “(a)lmost all jurisdictions have adopted the Model Rules, California and New York being the major exceptions”).

rules. Instead, it describes the lawyer appointed to litigate a colleague’s ineffectiveness as having a direct interest in that colleague’s reputation, and in the reputation of the organization to which both belong. This article next sets forth the ethical rules bearing on each of those descriptions of the conflict.

(1) Analysis of the First Account of the Conflict.

Rule 1.7(a) bars lawyers in general from representing a client where the lawyer has a concurrent conflict of interest. Rule 1.7(b) declares that such a conflict of interest exists, inter alia, where “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.” 33 That provision raises the question whether an individual public defender’s affiliation with the public defender entity or relationship with an allegedly ineffective public defender colleague implicates a “responsibility to a third person” or a “personal interest of the lawyer.” 34

Notwithstanding the existence of a conflict, Rule 1.7(b) allows the representation if

(i) the lawyer reasonably believes that the lawyer will

34 Id.
be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.\textsuperscript{15}

That rule declares a three-step process for the evaluation of possible conflicts.

First, the lawyer weighs the circumstances to determine whether the lawyer believes that the conflict will not adversely affect the representation. If the lawyer concludes that the conflict would adversely affect the representation, the lawyer should not undertake the representation or, if already appointed, should seek to withdraw. If the lawyer concludes that the conflict will not adversely affect the representation, the analysis proceeds to the second step, which focuses on the objective reasonableness of the lawyer’s conclusion that the conflict will not adversely affect the representation. If the representation survives that reasonableness analysis, the matter reaches the third step: client consent.

Courts have had no trouble in recognizing that lawyers have an interest in not being found ineffective, at least where the claim raises a question of competence.\textsuperscript{36} To raise such a claim would pit the lawyer’s duty of loyalty to

\textsuperscript{15} Id. R. 1.7(b)(1)-(4).

\textsuperscript{36} E.g., Murphy v. People, 863 P.2d 301, 304-05 (Colo. 1993); Shelton v. U.S., 323 A.2d 717.
the client against the lawyer’s own interest in maintaining a reputation for competence and, more fundamentally, the lawyer’s interest in maintaining a license to practice. A lawyer who renders ineffective assistance may thereby violate the rule of professional conduct mandating competence, and could on that account face professional disciplinary sanctions. Courts consistently hold that no lawyer may litigate such a claim when the claim raises a question about the lawyer’s own competence. Such a representation cannot survive the objective reasonableness step of the conflict analysis.

The next question inquires whether that conflict disqualifies other public defenders associated with the allegedly ineffective lawyer. The conflict rules do extend the scope of some disqualifications beyond the lawyer directly involved to other lawyers with whom that lawyer is associated. When the two lawyers are colleagues affiliated with a single firm, or in a public defender office, each may have an interest in the success and reputation of the other. Recognizing that possibility, the Rules enforce a principle of imputed disqualification.


38 See supra note 36; see also White v. Kelso, 401 S.E.2d 733, 734 (Ga. 1991) (“an attorney cannot reasonably be expected to assert or argue his or her own ineffectiveness”).

Rule 1.10 provides 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 Rule 1.7...”40 As does Rule 1.7, Rule 1.10 allows an exception to the general rule of disqualification. Paragraph (c) provides that a “disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.”41

Insofar as Rule 1.10 proposes to apply only to “lawyers ... associated in a firm,”42 the question arises as to whether a public defender office constitutes a “firm” within the meaning of the rule. The comments to Rule 1.10 address that question, declaring that “the term ‘firm’ denotes...lawyers employed in a legal services organization.”43 A number of courts, however, have found otherwise, and excluded public defenders from the definition of “firm,” and therefore from the application of the imputed disqualification rule.44 Other courts have found that public defender organizations are

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40 Model Rules of Prof’l Conduct R. 1.10(a) (2007).

41 Model Rules of Prof’l Conduct R. 1.10(c) (2007).

42 Model Rules of Prof’l Conduct R. 1.10(a) (2007).


44 See, e.g., State v. Lentz, 639 N.E.2d 784 (Ohio 1994); People v. Banks, 520 N.E.2d 617, 619 (Ill. 1987).
“firms,” and therefore covered by the imputed disqualification rule. The outcome of the analysis, on the first account of the conflict, thus depends on whether the organization for which the allegedly-ineffective public defender and the appointed public defender both work constitutes a “firm” within the meaning of the rules.

(2) Analysis of the Second Account of the Conflict.

As noted above, the second description of the conflict avoids recourse to the imputation rule by focusing in the first instance on the appointed lawyer’s situation, rather than on the allegedly-ineffective lawyer’s situation. On that account, the possible conflict arises out of the appointed lawyer’s own interest in the reputation of the allegedly-ineffective lawyer and of the public defender organization for which they both work.

The first step in the Rule 1.7(b) analysis focuses on the lawyer’s own belief as to whether the conflict may adversely affect the representation. The second step addresses that issue from an objective point of view. Insofar as the source of the possible conflict arises out of the affiliation of the appointed lawyer and the allegedly-ineffective lawyer together in a single public defender organization, the reasonableness analysis will turn on the nature and strength of the influence of that affiliation over the

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45See, e.g., Veale, 919 A.2d 794, 796; Ryan v. Thomas, 409 S.E.2d 507, 509 (Ga. 1991).
lawyer’s behavior. Although it takes a different route, the second
description of the conflict thus arrives at essentially the same destination
as the first. Both turn on the nature of the public defender entity.

(C) Conclusion.

The doctrine thus leads courts to inquire into, and characterize, the
nature of public defender organizations. Are they firms? Or are they, in
some essential respect, so different from private law firms as to justify
removing public defender entities from the scope of the conflict rules in
general, and from the imputed disqualification rule in particular? Because
the professional conduct rules raise, without answering, those questions,
courts have had to supply answers from other sources. This article
accordingly turns next to examine in detail the reasoning given by courts
that have confronted those questions.

II. THE CASELAW: PER SE RULE OR CASE-BY-CASE ANALYSIS?

Courts confronting the question of whether one public defender may
litigate an ineffectiveness claim involving an associated public defender
take one of two general approaches. Some courts have held that the rules of
professional conduct establish a per se bar against the public defender’s
representation in such circumstances.\textsuperscript{46} In effect, that approach declares unreasonable the belief that the shared public defender affiliation will not adversely affect the representation.

Other courts, applying a case-by-case analysis, have concluded that the law permits public defender representation in such cases, at least under some circumstances.\textsuperscript{47} The case-by-case approach seems more difficult to reconcile with the controlling ethical rules, at least when applied to deny an appointed public defender’s request to withdraw. It would seem that, in making such a motion, the appointed public defender declares a belief that the conflict would adversely affect the representation. Under Rule 1.7, as noted above, such a belief should generally preclude representation. The case-by-case approach, however, apparently avoids confronting the lawyer’s subjective belief by treating the issue wholly as a matter for objective assessment. That is, the case-by-case approach posits that it will sometimes be reasonable to believe that the shared affiliation would not adversely affect the representation.

(A) The Case-By-Case Analysis.

\textsuperscript{46}See infra Part II (B).

\textsuperscript{47}See infra Part II (A).
The United States Court of Appeals for the Tenth Circuit, and state courts in Illinois, New Mexico, Ohio, and Rhode Island, have all adopted a case-by-case analysis. In theory, given the continuing existence of the imputed disqualification rule in general, courts could adopt one of two lines of reasoning to support the conclusion that the ethics rules do not necessarily bar such representation. First, courts could find some distinctive feature in the ineffectiveness claim, such as to define that claim as not creating a conflict, or at least, not creating a conflict subject to the imputation rule. Second, courts could find the distinctive feature not in the nature of the ineffectiveness claim, but in the nature of public-defender practice.

Among the case-by-case courts, only the Tenth Circuit has even arguably pursued the first line of reasoning, which would permit lawyers in private

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48See Cannon v. Mullin, 383 F.3d 1152 (10th Cir. 2004); Banks, 520 N.E.2d 617 (Ill. 1987); Morales v. Bridgforth, 100 P.3d 668 (N.M. 2004); State v. Lentz, 639 N.E.2d 784 (Ohio 1994); Simpson v. State, 769 A.2d 1257 (R.I. 2001). It bears mentioning that the Rhode Island decision differs from all the others, in that it involved a claim of violation of the constitutional right to counsel, when a court appointed one public defender after another had, according to the defendant, rendered ineffective assistance during pre-trial proceedings. Simpson, 769 A.2d at 1266-71. The court held that the constitution required a case-by-case approach, rather than per se reversal. Id. at 1270. The case did not, therefore, decide what rule a court should apply when a court decides whether to appoint one public defender to litigate the effectiveness of another.
practice, as well as public defenders, sometimes to litigate a claim of ineffective assistance though the claim involved a colleague. In adopting a case-by-case analysis, the Tenth Circuit identified no considerations unique to public defenders.\(^{49}\) Rather, after acknowledging that an ineffectiveness claim involves the “bold” assertion that a colleague’s “performance was not only inferior, but unreasonable,” the Tenth Circuit focused on the institutional structure of the particular public defender office:

A statewide public defender’s office with independent local offices, and perhaps even a distinct appellate office, would not raise the same concerns as when trial and appellate counsel work in adjacent rooms. The culture of an office can also make a substantial difference. A history of raising ineffective-assistance claims could allay concerns.\(^{50}\)

That line of reasoning could apply as readily to attorneys associated in a private firm divided into branch offices, as to public defenders.

All of the state courts have taken the second course, finding an escape from the imputation rule not in the nature of the ineffectiveness claim, but

\(^{49}\text{Cannon, 383 F.3d at 1173-74.}\)

\(^{50}\text{id.}\)
in the nature of public defenders as such. 51 Citing differences between public defenders and private practitioners, those courts prefer to inquire into the disqualification issue case-by-case, rather than enforcing a presumption that collegial relationships would inhibit advocacy. 52 They offer one or more of three reasons to justify that different treatment of public defenders.

First, some courts find significance in the fact that public defenders, unlike private practitioners, have no financial interest in the outcome of any case nor in the professional reputation of any public defender colleague. 53 “[U]nlike the public defender, the private attorney is in competition with other law firms for clients’ business, so diminished reputation more directly affects the finances of private sector attorneys.” 54 A necessary premise of the argument that financial conflicts justify a per se rule while “conflicts driven by loyalty, reputation and esprit de corps” do not, is that influences of the latter sort simply do not affect lawyers so

51 E.g., Banks, 520 N.E.2d at 619; Morales, 100 P.3d at 669-670; Lentz, 639 N.E.2d at 786.

52 The Illinois Supreme Court, for example, concluded that “any such loyalty to one’s office was too remote to justify a per se conflict of interest rule.” Banks, 520 N.E.2d at 619.

53 E.g., Lentz, 639 N.E.2d at 786.

54 Id.
strongly as do conflicts rooted in financial interests.\textsuperscript{55}

Second, some courts conclude that a public defender ethos precludes public defenders from feeling such concern for the professional reputation of colleagues as might prevent them from litigating zealously an ineffectiveness claim involving a colleague.\textsuperscript{56} Public defenders, on this account, possess “inbred adversary tendencies” which make them zealous in the defense of their clients, and heedless of any professional loyalty owed to other persons.\textsuperscript{57} Thus, “a public defender does not owe an allegiance to the reputation of his office such as to interfere with his undivided loyalty towards his client.”\textsuperscript{58}

The courts offer little by way of justification for the premise that office loyalty does not exist, or if it exists, does not much influence individual public defenders. At most, courts tend to praise the dedication of public defenders, and implicitly to minimize the strength of the ties of loyalty to the institution. Thus, some judges prefer to emphasize “the extent of the professional and personal commitment made by these outstanding public servants in their quest to provide indigent defendants with the most

\textsuperscript{55}Id.

\textsuperscript{56}See, e.g., Banks, 520 N.E.2d at 619-20.

\textsuperscript{57}Id. at 621 (quoting ABA Standards, The Defense Function, Commentary, at 212-13 (1970)).

\textsuperscript{58}Id. at 620.
effective representation possible." Finally, some suggest that no conflict at all exists between loyalty to office and loyalty to client: “[t]o the contrary, it can equally be argued that a positive image [of the office] is fostered where an office aggressively pursues allegations made against some of its members.”

Third, some courts refer to practical considerations supporting the appointment of public defenders to litigate ineffective assistance claims. Some argue that a policy allowing the appointment of private practitioners would encourage prisoners represented at trial by public defenders to bring frivolous claims of ineffective assistance, simply in order to obtain representation by a non-public defender. That argument presumes the greater desirability, at least as judged by indigent defendants, of private counsel. A second argument arising from the opposite presumption proposes that public defenders better represent indigent defendants than do the likely substitute attorneys. Thus, it would be wrong to apply the conflict rules in such a way as to provide defendants a less qualified lawyer than the disqualified lawyer.

\[59\] Id. at 623 (Clark, C.J., specially concurring).

\[60\] Id. at 620.

\[61\] Id. at 622 (Clark, C.J., specially concurring).

\[62\] E.g., Morales, 100 P.3d at 670.
(B) The *Per Se* Rule.

Courts in Arkansas, Colorado, the District of Columbia, Florida, Georgia, New Hampshire, New Jersey, and Pennsylvania have adopted a *per se* rule barring public defenders from litigating the ineffectiveness of affiliated public defenders.\(^63\) Insofar as applying a *per se* rule to public defenders simply treats public defenders the same as private-firm lawyers, many judges seem to see no need to justify the application of the *per se* rule.\(^64\) Those who do discuss the matter defend the *per se* rule by replying to

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\(^{63}\) *Hill v. State*, 566 S.W.2d 127 (Ark. 1978); *McCall v. District Court*, 783 P.2d 1223 (Colo. 1989); *Angarano v. U.S.*, 329 A.2d 453 (D.C. 1974); *Adams v. State*, 380 So. 2d 421 (Fla. 1980) (appointing public defender from different judicial circuit to litigate ineffectiveness of trial public defender); *Ryan v. Thomas*, 409 S.E.2d 507, 509 (Ga. 1991) (noting that Georgia courts restrict the *per se* disqualification to instances in which both the appointed lawyer and the allegedly ineffective lawyer remain public defenders at the time of the litigation of the ineffectiveness claim); *but see Chatman v. Mancill*, 626 S.E.2d 102, 106 (Ga. 2006) (general rule barring appellate public defender from litigating ineffectiveness claim involving trial public defender ceases to apply when trial public defender no longer works at public defender); *Veale*, 919 A.2d 794; *State v. Bell*, 447 A.2d 525 (N.J. 1982); *Commonwealth v. Moore*, 805 A.2d 1212, 1215 (Pa. 2002) (general rule barring public defenders from litigating such claims does not apply where trial lawyer, a part-time public defender, was privately retained by defendant).

\(^{64}\) *E.g.*, *Hill*, 566 S.W.2d at 127; *Angarano*, 329 A.2d at 457-58; *Bell*, 447 A.2d at 528 n.2;
the public-defender exceptionalism advocated by the case-by-case courts.

Summarizing the case against public defender exceptionalism, one judge wrote:

We are reluctant ever to make an exception from the professional norm for attorneys employed by the government or others who provide legal representation without compensation from the client because then we might encourage a misapprehension that the special nature of such representation justifies departure from the profession’s standards. We should avoid always any action that would give the appearance that government attorneys are ‘legal Hessians’ hired ‘to do a job’ rather than attorneys at law.\(^\text{65}\)

In response to the lack-of-a-financial-incentive argument, some judges contend that public defenders do, in fact, have a financial interest in each other’s reputation and in that of their office generally. Thus, “by denigrating the abilities of assistant public defenders, they prejudice[] their own prospects for employment after leaving the public defender’s office.”\(^\text{66}\)

\textit{Ryan}, 409 S.E.2d at 508-09.

\(^{65}\)\textit{Angarano}, 329 A.2d at 465 (Gallagher, J., dissenting) (quoting \textit{Borden v. Borden}, 277 A.2d 89, 92-93 (D.C. App. 1971)).

\(^{66}\)\textit{Banks}, 520 N.E.2d at 625 (Simon, J., dissenting).
Some courts also note that “financial interests are not the only interests that could influence an attorney, and, arguably, are not the most powerful influences.”67 Pursuing that insight, some courts emphasize the existence of “powerful individual loyalties to one’s colleagues.”68 Lawyers having ties of loyalty to each other can face “hostility from their peers and supervisors,” as a consequence of litigating an ineffectiveness claim.69

Loyalty runs not only to individual colleagues, but to the public defender institution itself. “Every attorney, like every worker in the marketplace, associates his or her sense of worth in his or her job with the reputation of his or her organization.”70 Public defenders have a “natural inclination” to protect the reputation of the organization “by defending against the charges of incompetency.”71 Lawyers who must allege a colleague ineffective have to “argue that their peers, and ultimately their supervisors

67Veale, 919 A.2d at 733.

68Banks, 520 N.E.2d at 625 (Simon, J., dissenting).

69Banks, 520 N.E.2d at 625 (Simon, J., dissenting); see also Angarano, 329 A.2d at 467 (Gallagher, J., dissenting) (quoting brief of Public Defender Service).

70Lentz, 639 N.E.2d at 788 (Wright, J., dissenting).

71Banks, 520 N.E.2d at 623-24 (Simon, J., dissenting) (quoting People v. Smith, 230 N.E.2d 169, 170 (Ill. 1967)); see also Adams, 380 So.2d at 422.
and themselves, [are] second-rate lawyers in a second-rate office.”72 The result of such an event would be “personal discord as well as general office disruption.”73

Judges supporting the per se rule also contest the claim that practical considerations compel adoption of a case-by-case approach. Courts could appoint fully qualified private counsel in appropriate cases or, in states that do not have only a state-wide public defender, courts could appoint a public defender who has no organizational affiliation with the allegedly-ineffective public defender.74 Moreover, the rarity of successful claims of ineffective assistance limits the incentive of prisoners to bring frivolous claims, or at least limits the burdens faced by courts with respect to such claims.75

A related practical concern involves the discreditable appearance of the judicial system when one lawyer alleges a colleague ineffective. “Such an occurrence might well leave the trial judge with a suspicion of a

72Banks, 520 N.E.2d at 626 (Simon, J., dissenting).

73Angarano, 329 A.2d at 470 (Gallagher, J., dissenting).

74Adams, 380 So.2d at 422-23 (appointing unaffiliated public defender); Veale, 919 A.2d at 798 (noting adequacy of representation afforded by substitute private counsel); Lentz, 639 N.E.2d at 789 (Wright, J., dissenting).

75Angarano, 329 A.2d at 469 (Gallagher, J., dissenting).
collusive attempt to secure relief for a convicted client; it might leave the
client wondering whether, in fact, these office colleagues were conspiring
against him....” 76

Finally, advocates of the per se rule claim that courts can easily
apply it, as it “eliminates the need to make case-by-case assessments of
conflicting loyalties that very well may be extremely subtle or
 subconscious.” 77 By reason of the subtlety of those influences, courts can
struggle to detect and measure their influence over a lawyer. The case-by-
case rule affords judges very little guidance in how to detect and measure
such loyalties. 78 Perhaps not coincidentally, the courts applying a case-by-
case approach that actually reach a decision on the facts before them, 79
tend to find no conflict barring representation by the public defender. 80

76Angarano, 329 A.2d at 467 (Gallagher, J., dissenting) (quoting brief of the Public
Defender Service).

77Banks, 520 N.E.2d at 625 (Simon, J., dissenting); see also Lentz, 639 N.E.2d at 787 (Wright,
J., dissenting).

78See Banks, 520 N.E.2d at 625 (Simon, J., dissenting); Lentz, 639 N.E.2d at 787, 789.
(Wright, J., dissenting); Veale, 919 A.2d at 799.

79This excludes Cannon, which resulted in a remand on the issue.

80In the following cases, courts applying the case-by-case approach found no bar to
public defender representation. Banks, 520 N.E.2d at 621; People v. Munson, 638 N.E.2d 1207,
reported decision of which I am aware, has a court, applying the case-by-case analysis to the problem, found the public defender barred from litigating the ineffectiveness claim. The case-by-case rule, thus, may tend to function in practice like the opposite per se rule, in declaring that collegial loyalty never provides grounds to disqualify one public defender from litigating an ineffectiveness claim against a colleague.81

(C) A Procedural Approach.

Some courts try to avoid the issue by means of procedural devices that postpone the decision as to what counsel to appoint, when a prisoner raises a claim of ineffective assistance.82 The New Hampshire Supreme Court, for example, requires prisoners who would raise a claim of ineffective assistance

1211-12 (Ill. App. 3d 1994). In none of the cases cited in this article did a court applying a case-by-case rule find a lawyer disqualified.

81See, e.g., Banks, 520 N.E.2d at 625 (Simon, J., dissenting) ("The court's 'case-by-case inquiry,' it appears, is but window dressing for a new per se rule that loyalty to the public defender's office or a lawyer's associates in it cannot form the basis of a conflict of interest").

82See, e.g., People v. Mills, 163 P.3d 1129, 1133-35 (Colo. 2007) (establishing procedure limiting need to appoint private counsel to circumstances in which a colorable basis is shown in support of the claim of ineffective assistance); Angarano, 329 A.2d at 457-58; Veale, 919 A.2d at 800.
during the pendency of their direct appeal to elect whether to hold that claim until after the conclusion of the direct appeal, or litigate that claim immediately in the trial court and hold the direct appeal in abeyance. If the prisoner chooses the first course, the court will appoint the appellate public defender to handle an appeal which, by the prisoner’s election, no longer involves a claim of ineffective assistance. If the prisoner chooses the second course, the court awaits the outcome of the lower court proceeding, and will only appoint a non-public defender appellate counsel if the court accepts an appeal from that proceeding.

That procedure may well reduce the frequency of the need to appoint private counsel to handle an indigent appeal. It does not, though, altogether eliminate the possibility of appellate litigation of an ineffectiveness claim involving a public defender. Neither does the procedure compromise the court’s conclusion that no public defender lawyer can litigate an ineffectiveness claim involving the performance of another public defender attorney. Thus, New Hampshire’s third approach simply combines the per se rule with a procedure designed to minimize the frequency with which appointment issues arise.

III. AN ANALYSIS OF THE PREMISES.

The debate between the per se rule and the case-by-case rule arises, thus, from a disagreement about basic premises. Adherents of the case-by-case approach presume that collegial or institutional loyalty influences lawyers less than does a lawyer’s own financial interest. Adherents of the
per se approach suspect that personal or institutional loyalties exert as strong an influence as does financial gain. The case-by-case approach posits a typical public defender characterized by a single-minded devotion to client representation. The per se approach contemplates a typical public defender whose professional self-esteem depends, to a significant extent, on the quality and reputation of colleagues and of the public defender institution. The case-by-case approach finds social utility in preserving the option of appointing a public defender to litigate such claims. The per se approach finds no sufficient practical advantages to that option. This article next evaluates those disputes about premises.

(A) FOR LOVE?: THE LOYALTY INTEREST.

Nobody contends that considerations of collegial loyalty can never disqualify a public defender from litigating a claim alleging a colleague ineffective. Indeed, it would reveal a remarkable characteristic of public defenders if no public defender’s advocacy of an ineffectiveness claim would ever be inhibited by considerations of collegial loyalty. Rather, advocates of the case-by-case rule argue only that collegial loyalty does not always create a disqualifying conflict. Sometimes, at least for some public defenders, those considerations would not inhibit advocacy. The case-by-case approach claims the advantage of achieving the correct result in each case; courts can disqualify public defenders inhibited by collegial loyalty, while appointing public defenders not so inhibited.

Advocates of the per se rule could perhaps argue that considerations of
collegial loyalty always operate upon lawyers, or at least, upon public
defenders, so as to create a disqualifying conflict of interest with respect
to ineffective assistance claims. That assertion would, in its way, be just
as extraordinary as the opposite claim that collegial loyalty never
influences public defenders. However, advocates of the per se rule need not
assert any such universally-shared, essential “public defender character.”

The best case for the per se rule instead advances a critique of the
case-by-case rule. As we have seen, some judges have criticized the case-by-
case rule for requiring courts to investigate the influence of collegial
loyalty in particular cases, without providing adequate guidance as to how to
do so.83 Controversy between advocates of case-by-case and per se rules is
not unique to the specific context of this article. Courts and commentators
in a variety of contexts have considered the advantages and disadvantages of
case-by-case and per se rules.84

83See, e.g., Banks, 520 N.E.2d at 625 (Simon, J., dissenting); Veale, 919 A.2d at 799; Lentz,
639 N.E.2d at 787 (Wright, J., dissenting).

(antitrust context); N. Jersey Media Group, Inc. v. Ashcroft, 308 F.3d 198, 219 (3rd Cir. 2002)
(media access to deportation hearings); Shotwell v. Donohoe, 85 P.3d 1045, 1048-52 (Ariz. 2004)
(Title VII employment discrimination); Cantu v. State, 930 S.W.2d 594, 600 (Tex. Crim. App. 1996)
(denial of assistance of counsel); Larry A. DiMatteo, Depersonalization of Personal Service
A complete analysis of the reasons cited by courts for choosing, in various contexts, between case-by-case and per se rules would require a separate article. Here, I identify several factors relevant to the choice between a case-by-case approach and a per se approach.

The relevant factors divide into two categories. First, policy considerations may bear upon the choice between a case-by-case rule and a per se rule. Courts wishing to create incentives for some person to behave in a certain way might, for that reason, prefer a per se rule that requires that person to act in that way. On the other hand, courts willing to tolerate a variety of approaches to a particular issue might, for that reason, prefer a case-by-case approach that leaves the issue susceptible to varying resolutions depending on the particulars of the situation.

Second, concerns about practical administrability may bear upon the choice between a case-by-case rule and a per se rule. Case-by-case rules require courts to discover and measure the relevant facts using the tools of judicial fact-finding. In settings in which those tools cannot reliably discover the facts, the case-by-case method cannot deliver on its promise of supplying the right result for each case. Reason therefore exists to adopt a per se rule. In *Miranda v. Arizona*, for example, the Supreme Court promulgated a kind of per se rule in conditioning the admissibility of (discussing assignability of personal services contracts).

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confessions made under custodial interrogation on the giving of certain warnings, in part because of a dissatisfaction with the ability of courts reliably to discover, through case-by-case adjudication, the true facts relating to the voluntariness of such confessions.86

In the following sections, this article explores, in the context of the public defender-ineffectiveness claim, the considerations bearing on the choice between the case-by-case rule and the per se rule.

(1) Policy Considerations.

One can frame the policy concerns in various ways. Some advocates of the per se rule argue, as we have seen, that undesirable consequences follow from a rule that excuses public defenders from the professional conduct rules applicable to other lawyers.87 They worry that excluding public defenders from rules otherwise applicable to all lawyers creates a kind of lawyer-caste system that bespeaks a lack of concern for the indigent clients of public defenders.88

Advocates of the case-by-case rule have framed the policy question

86Id. at 457.
differently. Seeing the question as involving a conflict between loyalty to clients and to colleagues, some courts view collegial and institutional loyalty as something regrettable, to be discouraged to the extent that it compromises loyalty to clients. On that view, the per se rule suffers the flaw of recognizing, and therefore perhaps of encouraging, a misplaced loyalty that the law should discourage.

In response, one might argue that institutional and collegial loyalties are beneficial qualities in public defenders, in that they enhance the quality of client representation. Lawyers perform better when surrounded by supportive and respected colleagues, and a public defender institution strong enough to earn the esteem of its lawyers will benefit their clients by holding the lawyers to high standards of practice.

A third way to frame the policy question focuses not on the consistent application of ethical rules as between public defenders and private lawyers, nor on the desirability of collegial and institutional loyalty. Instead, some courts have focused on the role of public defenders in the criminal justice system, and regarded the choice of rule from the point of view of the desirability of having public defenders available for appointment in such cases.

Some have argued, for example, that public defenders in general better represent their clients than do the private practitioners most likely

See, e.g., Banks, 520 N.E.2d at 620-21; Lentz, 639 N.E.2d at 786.
otherwise to receive the appointments.90 Other studies have suggested, on the contrary, that indigent clients receive better outcomes when represented by private practitioners than by public defenders.91 With respect to expense, it bears mention that public defenders may well cost the court system less to appoint than do private practitioners, insofar as public defenders are salaried and appointed counsel must be paid on a per-case basis.

Such policy considerations, perhaps inevitably, depend on an evaluation of circumstances that may vary at different times and places, and according to the values of the inquirer. Certainly, no permanent, universal, or logically-definitive answer can be given to the question of a particular court system’s need to conserve funds by appointing the public defender. Neither, perhaps, can one expect to achieve a durable consensus on the value of collegial and institutional loyalty. One’s conclusion about such questions, as with many questions of policy, depends upon premises not readily susceptible either to challenge or to confirmation.

Therefore, I do not rely on policy considerations in choosing between the per se and case-by-case rules. Instead, I find the answer in the second category of considerations: those relating to the practicability of applying

90Robinson, 402 N.E.2d at 160-61 (reporting State’s argument).

(2) Practicability Considerations.

The case-by-case approach depends on the assumption that the processes of judicial fact-finding can discover and accurately measure the influence of collegial loyalty in a particular case. If that assumption proves unjustified - if courts cannot reliably discover and measure the influence of collegial loyalty - the case-by-case’s method of analysis, and hence its advantage, collapses. In that event, the law has to choose between per se rules, or at least between presumptions that, in the absence of reliable evidence, amount in practice to per se rules. One per se rule would always bar public defenders from litigating claims of ineffective assistance involving colleagues. That is the position of the advocates of the per se rule that finds some support in the law.

Another possible per se rule would always allow a court to appoint a public defender to litigate an ineffectiveness claim involving a colleague. No court has argued for that per se rule. Accepting as sound the universal recognition of the possibility that collegial loyalty may sometimes require disqualification, this article will not imagine a controversy where none exists. It shall not, therefore, further discuss that possible rule. The real controversy over the courts’ ability to discover and measure the influence presents enough complexity.
(a) A Practical Challenge to the Per Se Rule.

Before investigating the capacity of a case-by-case approach reliably to find the facts, one practical challenge to the per se rule deserves discussion. Courts should rarely, if ever, establish a per se rule that presumes the existence of an unlikely state of affairs. If, in fact, considerations of collegial or institutional loyalty would influence only a few public defenders in the context of the litigation of an ineffectiveness claim, the law should not, via a per se rule, irrebutably presume that those loyalties would influence all public defenders in that context. The establishment of such a counterfactual presumption would bring the law into disrepute. Therefore, even if, as noted above, the advocates of the per se rule need not prove the influence of those loyalties on all public defenders, their case fails unless they can credibly show that collegial and institutional loyalties would influence many public defenders.

To answer that challenge without resorting to broad generalizations about public defenders, one may look to the research of social psychologists, who study human social behavior with as much scientific rigor as the subject’s nature allows. Other legal scholars have recently taken note of the findings of social psychologists, as the relevance of that discipline’s

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92See Coleman v. Thompson, 501 U.S. 722, 737 (1991) (finding per se rules should be applied only where the presumption they reflect is generally true as an empirical matter).
insights become increasingly apparent.93

Upon studying the influence of groups on the behavior of their members, social psychologists have noted “[t]he power of group membership to alter attitudes and behaviors....”94 That power exists even in groups not defined by immutable characteristics or long-term membership.95 “In-group favoritism was found even in groups where there was no basis for discrimination between in-group and out-group members (i.e. random selection to membership).... [I]n group favoritism and prejudice do not need any basis in history or intergroup


94Randall S. Peterson, Toward a More Deontological Approach to the Ethical Use of Social Influence, in SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS 21, 22 (J. Darley, D. Messick & T.R. Tyler eds., 2001) (Citing MIZAFER SHERIF, THE PSYCHOLOGY OF SOCIAL NORMS (1936)).

95/d. at 24 (citing DIFFERENTIATION BETWEEN SOCIAL GROUPS: STUDIES IN THE SOCIAL PSYCHOLOGY OF INTERGROUP RELATIONS (Henri Tajfel ed., 1978) and HENRI TAJFEL, SOCIAL IDENTITY AND INTERGROUP Relations (1982)).
A manifestation of in-group favoritism relevant here is the “effect known as the intergroup attributional bias.”\textsuperscript{97} The phrase “refers to the finding that positive behaviors by an in-group member are more likely to be attributed to the person’s disposition (“He’s a nice person”) than are those same behaviors when performed by an out-group member, and that negative actions by an in-group member are more likely to be attributed to external reasons (“The heat was getting on his nerves”).\textsuperscript{98} The effect prevails only in ambiguous situations, when possible justifications could be advanced for the in-group member’s negative actions.\textsuperscript{99} When such a possible justification exists, “in-group members are less likely to be held accountable or blamed for negative behaviors or for failures to do something positive.”\textsuperscript{100} That insight, applied here, suggests that a public defender, when called upon to litigate the ineffectiveness of an affiliated public defender, may fail to

\textsuperscript{96}Id. at 24.


\textsuperscript{98}Id.

\textsuperscript{99}Id.

\textsuperscript{100}Id.
perceive, and thus to litigate, a claim that an outside lawyer would perceive and litigate. “Coldly objective judgment seems to be reserved for members of out-groups.”\textsuperscript{101}

No reason exists, so far as I am aware, to regard public defenders as immune from such influences.\textsuperscript{102} Therefore, accepting as valid the research attributing significant influence over behavior of a shared group membership, I conclude that evidence does exist to support the premise that many public defenders would be influenced by the collegial or institutional bond joining them with a lawyer subject to an ineffective assistance of counsel claim.

\textsuperscript{101}Id. at 167.

(b) Practical Challenges to the Case-by-Case Rule.

The strongest critique of the case-by-case rule challenges the claim that it can reliably discover and measure the influence of collegial or institutional loyalty on particular public defenders in particular cases.\textsuperscript{103} The law reasonably depends on judicial fact-finding procedures to find a great many facts. However, the presence of several circumstances, in combination, can render judicial fact-finding unreliable as a method for discovering and measuring the influence of collegial loyalty.

(I) The Search for Future Facts.

First, most facts subjected to judicial investigation involve a past or current event, circumstance, or state of affairs. In criminal trials, for example, courts seek to discover the truth about a past crime. Sometimes, as with the investigation of a defendant’s competency to stand trial, courts investigate a current circumstance.

The degree to which a public defender’s collegial or institutional loyalty will influence his or her representation, however, typically requires a court to make a finding about a future state of affairs. At the time a

\textsuperscript{103} Scholars have noted the problem of “adjudication error” that can arise when courts apply a case-by-case analysis to issues difficult for courts to resolve. See, e.g., Evan H. Caminker, \textit{Miranda and Some Puzzles of “Prophylactic” Rules}, 70 U. CIN. L. REV. 1, 8 (2001).
court must decide whether to appoint a public defender to litigate a colleague’s ineffectiveness, the court and the public defender will know facts about the nature of the relationship between the two lawyers, such as whether one has supervisory responsibility over the other. However, at that time, neither the court nor the post-conviction public defender may know much about the details of the ineffectiveness claim. Few lawyers, before being appointed to a case, will have undertaken much investigation of the circumstances of that case. The lawyer may not know the details of the client’s claim, and still less may know how the colleague will account for the challenged aspect of the colleague’s performance on the case.

Without that knowledge of the details of the case, the appointed lawyer’s self-assessment of the influence of collegial loyalty will necessarily be abstract in the extreme. For example, an ineffectiveness claim that, upon investigation, reveals alcoholism-related impairment of a lawyer’s judgment presents a colleague with a very different litigation prospect than does an ineffectiveness claim that reveals only an investigator’s failure to locate an important witness. At the time of appointment of defense counsel, neither the court nor the lawyer may know how the ineffectiveness claim will develop, and therefore will be in a poor position to predict how the claim’s future development will implicate considerations of collegial loyalty.

The investigation of past facts can, of course, also prove difficult, especially the more distant in the past the occurrence under investigation. The investigation of a future circumstance, however, necessarily involves a kind of speculation not required of the inquiry into a past event.
(II) Limited Sources of Evidence.

Second, partly because of the future-directed nature of the inquiry, courts seeking to apply the case-by-case rule can expect usually to draw upon very limited sources of evidence. Indeed, given that the inquiry focuses on the future influence of collegial loyalty on a particular public defender, courts can expect to receive very little evidence beyond the self-assessment of that public defender. No other person, nor any non-testimonial evidence, seems likely to shed much light on the question.

Perhaps the case-by-case courts will avoid that difficulty by developing over time a body of jurisprudence attributing dispositive significance to objective, readily ascertainable circumstances. For example, they may disqualify a public defender if, and only if, the public defender has a supervisory relationship with the allegedly ineffective lawyer, or whenever the two work together in the same office. Thus, rather than weighing the self-assessment of the public defender in question, case-by-case courts would create a case-by-case rule that is itself a kind of per se rule, which identifies a subset of all affiliated public defenders and automatically disqualifies only all the lawyers within that subset. The inability to give content to the case-by-case rule with factors subject to variation by degree, bespeaks the challenge confronting a case-by-case analysis in the context of highly limited sources of evidence.
(III) Ineffability of the Fact.

Third, a case-by-case analysis confronts the difficulty that the fact it seeks to investigate – the influence on the appointed lawyer of collegial loyalty – constitutes a very subtle matter, as to which even the lawyer may have little reliable insight.\textsuperscript{104} To be sure, courts frequently have to investigate subtle, psychological facts. Factual disputes relating to criminal \textit{mens rea}, for example, can involve much subtlety.

Nevertheless, the challenge in the context of discovering the influence of a public defender’s collegial and institutional loyalties is at least as great, if not greater, than the challenge of discovering the \textit{mens rea} of a criminal defendant. Here, developments in social psychology research again support that conclusion. Social psychologists have identified a phenomenon they have called “the fundamental attribution error.”\textsuperscript{105} “The Fundamental

\textsuperscript{104}See Caminker, \textit{supra} note 102, at 10 (making similar point in \textit{Miranda} context, in noting that even if the historical events can be established “it still remains difficult, perhaps conceptually impossible, for the court to construct a metric by which to determine whether a particular defendant’s will was actually “overborne” by those events”).

Attribution Error is the tendency for attributers to underestimate the impact of situational factors and to overestimate the role of dispositional factors in controlling behavior.” ¹⁰⁶ In other words, people tend to overestimate the strength of their own disposition in controlling their behavior, while underestimating the influence of aspects of their situation, such as their employment setting. That insight, applied to the present issue, suggests that lawyers will tend to underestimate the significance of collegial and institutional loyalty, in assessing the likely influence of those factors over their own behavior. ¹⁰⁷

(IV) Non-Adversarial Fact-Finding.

Finally, a fourth challenge undermines the capacity of courts, using a case-by-case approach, to discover and measure the extent of the influence of collegial loyalty. The Supreme Court has described cross-examination as “the greatest legal engine ever invented for the discovery of truth.” ¹⁰⁸ In this

¹⁰⁶ Id. (p. 135 in the original source); p. 157 in Strudler.

¹⁰⁷ This phenomenon may be a specific application of the more general principle, also well-established by social psychologists that people tend to have poor awareness of their own biases. See generally Deborah Goldberg et al., The Best Defense: Why Elected Courts Should Lead Recusal Reform, 46 WASHBURN L. J. 503, 525 n. 120 (2007).

context, however, a court investigates largely without adversarial cross-examination, because largely without prosecutorial participation. In few of the reported cases in which the issue arises before adjudication of the ineffectiveness claim, do courts report prosecutors as taking a position opposed to that of defense counsel as to whether the court should appoint an affiliated public defender to represent the defendant, or some other lawyer.\footnote{See, e.g., Morales, 100 P.3d at 670 (noting concurrence between prosecution and defense counsel); Veale, 919 A.2d at 796 (noting that State concurred with defense counsel’s position); Garland v. State, No. S07G0940, 2008 WL 480053 at *3 n.3 (Ga. February 25, 2008) (noting that, in trial court, prosecutor declared that State did not “have a dog in the fight” about whether to appoint new counsel on appeal in a case involving a claim of ineffective assistance). The prosecution, reasonably and unsurprisingly, does tend to take a position when the matter is litigated post-adjudication of the claim; in such circumstances, the State seeks the rule that leads to the affirmation of the conviction; see also People v. Thompson, 477 N.E.2d 532, 533 (Ill. App. 3d 1985).}

Insofar as one of the parties will often make no contribution to the evidentiary record on which a court must rely in deciding what lawyer to appoint, that absence of participation further undermines the capacity of the court reliably to apply a case-by-case rule.

\textbf{(c) Conclusion.}

Social psychology informs us that the setting in which a person works
will have significant influence over the person’s working behavior. Thus, it follows that, in some significant number of cases, lawyers appointed to litigate ineffectiveness claims will be influenced, in their litigation decisions, by their professional affiliation with the lawyer who is the object of those claims. Courts, however, cannot rely on a case-by-case approach to identify those cases in which the affiliation would adversely affect a particular lawyer’s representation. For the reasons stated above, that approach cannot, in this context, deliver on its promise of ability to distinguish those cases in which an adverse affect would arise, from those in which it would not. The collegial loyalty concern, therefore, justifies adoption of a per se rule.

(B) FOR MONEY?: THE FINANCIAL INTEREST.

The Supreme Court has considered on at least two occasions issues that have led the Court to comment on the existence and extent of financial incentives affecting lawyers practicing in non-profit, public interest organizations.\textsuperscript{110} Both cases involved efforts by States to prohibit solicitation of potential plaintiffs by such lawyers. In \textit{Button}, the Court found:

“no showing of a serious danger here of professionally reprehensible conflicts of interest ... partly because no monetary stakes are involved, and

so there is no danger that the attorney will desert or subvert the paramount interests of his client to enrich himself....”\(^{111}\) In *Primus*, the Court noted that the lawyer’s conduct “was not in-person solicitation for pecuniary gain.... And her actions were undertaken to express personal political beliefs ... rather than to derive financial gain.”\(^{112}\)

Those rulings support the conclusion that lawyers employed by non-profit entities and engaged in public interest work differ from private lawyers in a respect relevant to the conflict of interest rules. Such lawyers lack the kind of financial interest in the outcome of their cases that can give rise, in private lawyers, to a disqualifying conflict of interest.

The financial interest argument, in itself, cannot decide the question in favor of the case-by-case rule. Even if a financial interest exerts more influence on a lawyer than does any other kind of interest, that fact would not advance very far the resolution of the dispute. The strength of one influence does not, in this context, diminish the strength of the loyalty influence, insofar as the issue does not pit those influences against each other. Rather, the issue confronts collegial or institutional loyalty with the interest in a zealous presentation of an ineffective assistance claim. The conclusion that a financial interest necessarily requires the

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\(^{111}\) *Button*, 371 U.S. at 443.

\(^{112}\) *Primus*, 436 U.S. at 422; see also id. at 437.
disqualification of a colleague does not exclude the possibility that some other consideration might also necessarily require the disqualification of a colleague. The immunity of public defenders from the financial ground for disqualification does not establish their immunity from all possible grounds for disqualification.

IV. CONCLUSION.

In the end, no resolution of the matter seems entirely satisfactory. The case-by-case rule suffers a practical defect. In requiring courts to identify and measure the influence of collegial loyalty, it sets a task at which courts all too often must fail. The *per se* rule avoids that error, but at a cost. The *per se* rule bars courts from appointing a lawyer even when it seems clear that the affiliation with the allegedly ineffective lawyer would not inhibit the appointed lawyer’s advocacy of the ineffectiveness claim. This article concludes that the law should accept the cost of the *per se* rule in preference to the case-by-case approach’s error, because the *per se* rule better accommodates the reality of a court system equipped with imperfect fact-finding tools.

In response to that claim of superior accommodation of reality, one might counter with a practical challenge. If courts cannot appoint public defenders to litigate such claims, their awareness of the greater expense of appointing private counsel may lead them not to appoint any lawyer, at least when not constitutionally required to do so. In that event, a rule designed to provide unconflicted counsel to indigent prisoners could deprive some
proportion of prisoners of counsel altogether. In the context of civil legal services, one scholar has advocated a kind of case-by-case approach to disqualification, for exactly that reason.\textsuperscript{113}

That practical challenge only has force in circumstances in which a court has discretion whether to appoint counsel. It does not apply when, as on direct appeal of a criminal conviction, the constitution requires appointment of counsel.\textsuperscript{114} Nevertheless, the challenge raises a point worth considering, insofar as claims of ineffective assistance will often be raised in post-conviction proceedings, when no constitutional right to counsel exists. Will judges who would otherwise have exercised their discretion to appoint a lawyer in such a case, choose to appoint no lawyer when the law bars appointment of a public defender?

The answer to that question may well vary, from judge to judge and from jurisdiction to jurisdiction. An empirical survey could, perhaps, answer the question, at least as of the time and place of the survey. Some reason exists, though, to suspect that the \textit{per se} rule may have, in general, no great inhibiting effect on discretionary appointments of counsel.

For the inhibiting influence of cost to affect a substantial number of cases, it must outweigh the countervailing considerations that would


otherwise prompt the judge to appoint counsel. One must therefore identify and measure those considerations. Why do judges ever exercise their discretion to appoint counsel to litigate a claim of ineffective assistance?

The inclination to exercise the discretion to appoint counsel correlates, I suspect, with a judge’s perception of the possible merits of the ineffectiveness claim. If a judge perceives an ineffectiveness claim as frivolous, the judge is unlikely to choose to appoint any lawyer, public defender or private counsel, to advance that claim. Rather, judges will feel inclined to appoint counsel only in those cases in which they believe that, with the assistance of counsel, a prisoner has some chance of actually proving the claim. To put the matter even more plainly, judges will most likely appoint counsel in cases in which they suspect that the prisoner’s trial counsel may have rendered ineffective assistance.

If one accepts that premise, the cost consideration faces a considerable countervailing influence. On the one hand, as evidenced merely by the judge’s inclination to appoint counsel, the judge feels some concern that trial counsel’s performance may have compromised the integrity of the verdict in the case. In a case involving a lengthy prison sentence, that concern equates to an acknowledgment of the possibility that trial counsel’s performance may forebode years, even decades, of unjustified imprisonment. On the other hand, the appointment of private counsel to litigate the claim will require some expenditure of scarce indigent defense funds.

I suspect that judges, faced with that choice, will most often appoint counsel, at least when they perceive the doubts about trial counsel’s
performance to rest on more than mere speculation. In making that prediction, I acknowledge a certain tension with the skepticism expressed above with respect to the ability of judges to discover and measure the inhibiting influence on advocacy of collegial loyalty. The *per se* rule, thus, ultimately rests on a composite foundation, combining an aspect of skeptical realism with an aspect of idealism. The argument for the *per se* rule doubts the ability of judges to discover, through the fact-finding tools available to them, the existence and inhibiting extent of collegial loyalty. These concluding observations reveal, however, that the argument also rests to some extent on idealism about the desire of judges to see justice done in the cases before them, even when justice has a monetary cost.