THE CPCS PUBLIC DIVISION CONFLICT RESOLUTION POLICY
Revised 1/10/20

The CPCS Public Division Conflict Resolution Policy ("Policy") was drafted in accordance with the Massachusetts Rules of Professional Conduct (the "Mass.R.Prof.C." or the "Rules") and CPCS's commitment to zealous advocacy and client centered representation. The Policy primarily references Rules 1.6, 1.7, 1.9, and 1.10, which govern privilege, confidentiality, conflicts of interest involving current and former clients, as well as imputed disqualifications. The Rules set forth specific requirements that Massachusetts attorneys must consider and follow when determining whether to represent a client in a particular matter. Where necessary, the Policy cites to other relevant Rules. In addition to the requirements of the Rules, the CPCS Performance Guidelines require that in all cases, "Counsel must be alert to all potential and actual conflicts of interest that would impair the ability to represent a client."

For the purposes of this Policy, **the "Public Division" of CPCS** includes all staff who provide direct client representation in the Children and Family Law Division (CAFL), the Mental Health Litigation Division (MHLD), the Public Defender Division (PDD) and the Youth Advocacy Division (YAD) through the Trial and Appeals Unit offices. It **excludes** direct representation by attorneys in Private Counsel Appeals, the Immigration Impact Unit, the Innocence Program, the Alternative Commitment and Registration Support Unit and all Administrative Units. For the purposes of determining whether a conflict of interest exists, all staff members in the Public Division are considered members of one law firm. See Mass.R.Prof.C. 1.0(d); 1.10.

GUIDELINES FOR RUNNING CONFLICT CHECKS

It is the attorney's responsibility to ensure that a conflict check is conducted as soon as possible. Offices must make every effort to ensure that a person trained in conflicts is available to check names and dates of birth of prospective clients and any other known individuals involved in a case before representation begins so that the Public Division accepts and continues to represent clients in the maximum number of cases without compromising the rights of existing or former clients or disrupting the continuity of representation in any given case.

When the Public Division is to be appointed to a defendant or juvenile in a co-defendant case or to a party in a multi-party case and any co-defendant or party (defined below) is a current or past CPCS client, **the attorney should request appointment of the current or past CPCS client**.

Whenever possible, **before a case is accepted**, every potential client's name and the names of any known co-defendants, witnesses, complainants, cooperating individuals and parties to the case must be checked for conflicts.

If a conflict check cannot be run before the case is assigned, the attorney must submit a completed Conflict Form (see Appendix) to a support staff member who will run a conflict check **within two (2) business days** of appointment.

Whether the initial conflict check is completed before or after appointment, the attorney has a continuing duty to ensure that additional conflict checks are conducted as soon as, and no more than two (2) business days after, the attorney receives discovery, notice, or information from any source that identifies additional witnesses and/or parties to a case.

Role of the AIC and Supervisor in Ongoing Conflict Checks:
The Attorney-in-Charge and any Supervising Attorneys of the office shall be responsible for assuring that attorneys are promptly and thoroughly conducting conflict checks, especially ongoing conflict checks in cases where discovery continues throughout the pendency of the case.

Definition of Party: Party includes a parent and guardian of a client with an open delinquency or youthful offender matter.

CAUTION ON ACCESSING FORMER CLIENT FILES

Even if there is no conflict in taking a new case, a Public Division attorney cannot review a former Public Division client's file to see if there is information about a co-defendant, witness, complainant, cooperating individual or party. Nor can the newly assigned attorney use any of the information in the former case without a proper analysis of whether the information is confidential. If it is confidential, its use is governed by Rules 1.6, 1.9, 3.3 and 4.1 and this Conflict Policy. Only the attorney who is resolving the potential conflict, the former client's attorney, or the Attorney-in-Charge (AIC) of the former attorney's office can review the former client's file to complete the analysis.

CPCS PUBLIC DIVISION ATTORNEY WHO FORMERLY PRACTICED IN MASSACHUSETTS

If an attorney practiced in Massachusetts prior to becoming a CPCS Public Division attorney, the attorney may not participate in any case in which the attorney participated while in private practice, and the attorney should be screened from any information about the Public Division case. So long as the attorney is screened, the attorney's personal disqualification will not be imputed to other Public Division attorneys. See Rule 1.11(d) and Comment 2.

CPCS PUBLIC DIVISION ATTORNEY WHO FORMERLY SERVED AS A LAW CLERK OR AN INTERN TO A MASSACHUSETTS JUDGE

If an attorney was a law clerk or intern to a Massachusetts judge prior to becoming a CPCS Public Division attorney, the attorney may not represent anyone in connection with a matter in which the attorney participated personally and substantially as a law clerk or intern unless all parties are provided informed consent, confirmed in writing. See Rule 1.12(a).

Furthermore, all other Public Division attorneys are disqualified from the matter unless

(a) The former law clerk or intern is screened from any participation in the matter and
(b) Written notice is promptly given to all parties and the tribunal. See Rule 1.2(c).

WHAT DOES THE CONFLICT CHECK ATTORNEY NEED TO KNOW IN ORDER TO DETERMINE IF REPRESENTATION OF A PROSPECTIVE CLIENT WILL RESULT IN A CONFLICT OF INTEREST?

The attorney will need answers to at least some of the following questions in order to determine whether the Public Division has a conflict of interest prohibiting it from accepting appointment or continuing to provide representation in a matter:

1. What is the client's name?
2. Does the client have any known aliases?
3. Are there alternative spellings to the client's name?
4. What is the client's date of birth?
5. If the name is common, it may be necessary to ask the client's address or residence.
6. What is the name and date(s) of birth of the complainant(s) in the case?
7. What is the name and date(s) of birth of the co-defendant(s) in the case?
8. What is the name and date(s) of birth of the known witnesses in the case? (Police Officers are not considered witnesses for the purpose of conflict checks.)
9. If it is a CAFL case, what are the names and date(s) of birth of the parties in the case?
10. If it is a YAD case, what are the names and date(s) of birth of the parent(s) or guardian in the case?

THE CONFLICT CHECK PROCESS – STEP BY STEP

1. Attorney is assigned a new case and completes a Conflict Check Form.
2. Attorney copies the Conflict Check Form for the file and gives the original to a support staff member.
3. Support staff member enters the names on the Form into the Case Management System.
4. If the names entered are not in the Case Management System, the support staff member dates the Conflict Form, checks the box(es) labeled "No Information Found in Case Management System" to indicate that the names have been entered, and returns the original Form to the requesting attorney.
5. If one or more of the names are in the Case Management System, the support staff member prints the relevant Case Management system page(s), dates the Conflict Form, checks the "See Attached Case Management System Information" box(es) as appropriate, attaches the printed Case Management System page(s) to the Conflict Form, and gives the package to an AIC, Supervising Attorney or trained attorney for resolution.
6. The supervisor or trained attorney ordinarily resolves the conflict and directs the attorney as to whether the attorney may represent the new client. In some circumstances, detailed below, only an AIC, Managing Director, Assistant Director, Deputy Chief or Division Director may resolve a conflict.
7. The AIC, Supervising Attorney or trained attorney (or Managing Director, Assistant Director, Deputy Chief or Division Director) may need to ask additional questions of the attorney to resolve the conflict.
8. If the attorney is directed to withdraw from the case, the attorney must do so immediately so as to limit any delay in the client's case.
9. The attorney should avoid any further direct contact with the client, but should take whatever steps are necessary to ensure that the court is notified and private counsel is appointed as soon as possible.
10. Whenever possible, AICS, Supervising Attorneys and trained attorneys should avoid resolving potential conflicts in their own cases.

WHO DETERMINES IF A CONFLICT EXISTS?

1. Straight forward resolutions where a withdrawal is not necessary can be handled by a trained attorney in the office;
2. Conflicts that necessitate a withdrawal should be handled by an AIC or Supervising Attorney;
3. Conflicts that involve two offices within the Agency should be resolved by the AICs of the offices;
4. In cases where the resolution may necessitate the gathering of additional information or a decision that may seriously impact an existing client or clients, the Managing or Assistant Director, or Deputy Chief/Director of the Division(s) must be consulted to ensure a fair and consistent outcome for all Public Division clients.

WHAT IS THE ROLE OF SUPPORT STAFF IN FACILITATING CONFLICT CHECKS?

Support staff must enter into the Case Management System the names and the associated information included on a completed Conflict Form.

CONFLICT CHECKS: GUIDANCE BY EXAMPLES

In order to avoid and/or minimize a conflict of interest that necessitates withdrawing from an existing case, the conflict check attorney must analyze the potential conflicts of each individual using the scenarios set forth below. It is important to note that, in some circumstances, an analysis will have to be done under more than one scenario.

Scenario 1 – Current Client of the Public Division

- If the prospective new client is a **co-defendant or a complainant** in **any current OPEN case**, we **cannot** accept the case. (Rule 1.7)
- In most instances, if the prospective new client is a **witness or other party** in a current open case, we cannot accept the new case. In rare circumstances, however, Rule 1.7 allows for the witness or other party to waive the conflict of interest if,

> “(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
>
> (2) each client consents after the consultation.”

Note, however, that 1.7 (b) defines the parameters and limitations of such waivers, and any scenario where such a waiver is sought must be referred to and evaluated by the Managing or Assistant Director, or Deputy Chief or Division Director of the respective Division(s). **The Rule does lay out scenarios where a conflict is so clearly adverse to the interest of a client that it cannot be waived.**

Example:

You pick up John Doe’s case on a Duty Day. Upon receiving discovery, you fill out the Conflict Form and include the name, Jane Smith, date of birth, October 15, 1970, as a witness listed in one of the police reports. Jane Smith is revealed to be a current client of the Public Division.

Ask: Is Jane Smith an adverse or potentially adverse witness against your client?

- ➔ *If your answer is YES, you may not represent John;*
- ➔ *If your answer is NO, you probably cannot represent John, but may, in rare circumstances, reach out to your Managing or Assistant Director, or Deputy Chief or Division Director for further analysis under Rule 1.7 to determine if a waiver of the conflict is at all appropriate or permitted by the Rule.*

Scenario 2 – New Client is a Former Co-Defendant in a Public Division Case

- If the prospective new client was a **co-defendant in a former <u>unrelated</u> case** that is now **closed**, we **can** represent the new client. (Rules 1.7 and 1.9)

Example:

John Doe is a new client. Your conflict check reveals that five years ago, John Doe was a co-defendant in Bob Jones' case. Bob was a former Public Division client and his case is now closed.

Ask: Is John Doe's case the same or substantially related to Bob's closed case?

➔ *If the answer is YES, you may not represent John;*
➔ *If the answer is NO, you may represent John.*

Scenario 3 – New Client Was a Complainant in a Closed Public Division Case

- If the prospective new client was a **former complainant in an <u>unrelated</u> case** that is now **closed**, you **may** represent the new client. (Rules 1.7 and 1.9)

Example:

Jane Smith is a new client. A conflict check of her name reveals that the Public Division represented Mary Hill in an assault case three years ago in which Jane was the complainant. That case is now closed.

Ask: Is Jane Smith's current case the same or substantially related to Mary's closed case?

➔ *If the answer is YES, you may not represent Jane;*
➔ *If the answer is NO, you may represent Jane.*

Scenario 4 – New Client Was a Witness in a Closed Public Division Case

- If the prospective new client was a **former witness in an <u>unrelated</u> case** that is now **closed**, you **may** represent the new client. (Rule 1.9)

Example:

Bob Smith is a new client. A conflict check reveals that Bob was a witness against Mark Jones in a robbery case in 2011. Mark Jones was represented by the Public Division. His case is now closed.

Ask: Is Bob's current case the same or substantially related to Mark Jones' now closed case?

➔ *If the answer is YES, you may not represent Bob;*
➔ *If the answer is NO, you may represent Bob.*

Scenario 5 – New Client Was a Former Party in a Public Division Case

- If the prospective new client is a **former party in an unrelated case that is now closed**, you may represent the new client. (Rule 1.9)

Examples:

Mavis Peterson is a new client. She is also the parent of a former juvenile client whose delinquency matter is now closed.

Ask: Is Mavis' current case the same or substantially related to her child's former case? Is the former YAD client involved in any way in Mavis' current case?

➔ *If the answer to **either** question is YES, you may not represent Mavis;*
➔ *If the answer to **both** questions is NO, you may represent Mavis.*

John Jones is a prospective new client in an assault and battery case. He is the father of Jane Jones, the subject child of a now closed care and protection case. Jane was represented by the Public Division in the former care and protection case.

Ask: Is John's current case the same or substantially related to the former care and protection case?

➔ *If the answer to the question is YES, you may not represent John;*
➔ *If the answer to the question is NO, you may represent John*

Scenario 6 - Former Client in New Public Division Case

What do you do if a conflict check in a new case reveals a former Public Division client?

If the former client is the **complainant, an adverse party, a co-defendant or an witness in the new case**, an AIC or Supervising Attorney must do an analysis under Rule 1.9 to determine whether there is a conflict.

Rule 1.9 prohibits representation of a new client if the new case is "substantially related" to the prior case of the former client. Comment 3 defines matters as substantially related "if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the [new case]." (emphasis added)

If the former client was a client of the MHLD, then we cannot accept the case. Because civil commitment proceedings under all sections of Chapter 123 are confidential and not available to the general public, prior representation by a CPCS attorney results in a conflict under Rule 1.9. The nature of the representation in civil commitment cases is such that the information in the file, such as psychiatric evaluations, mental health records and substance use disorder evaluations could be used to the benefit of a new client and to disadvantage the former client.

If the former client was a client of the PDD, CAFL or YAD, an AIC or Supervising Attorney must determine whether the new case is "substantially related" to the prior representation of the witness. The analysis should include consideration of the following factors:

- What was the nature of the prior representation – are there common factual issues – is there a clear connection between the matters? Is there a substantial risk that confidential information in the former client's file would be useful to the new client or, if revealed, be harmful to the former client? If so, you cannot represent the new client.

- How long ago was the prior representation? Time may be a factor in the analysis if the prior representation was so long ago that any information obtained from the former client's file would no longer be relevant to or admissible in a trial on the new case. This is much less likely if the former client was a YAD or CAFL client.

    - YAD and CAFL files ordinarily contain extensive client and family histories which are likely to be relevant long after the representation of the former client has ended;

    - In a CAFL care and protection case, relevant facts typically extend back to the birth of a child and forward through events that occur during the representation, making it much more likely that facts in a former client's file will remain relevant long after the representation of the former client has ended. CAFL cases are generally closed proceedings, the files of which are impounded. As a result, representation of a new client where a former CAFL client is involved in the proceedings will likely be precluded by the duty of confidentiality to the former client.

- How lengthy and involved was the prior representation? A longer and more in-depth representation of the former client would suggest that more information was obtained, thereby increasing the risk that information relevant to the new case may have been acquired. For example, representation lasting one day that entailed arraignment and a bail hearing with information obtained only from a criminal client in lock up will likely produce less information that may be relevant in a future case of a new client than would representation continuing through plea or disposition.

- What confidential information would normally be obtained in the prior representation of the former client?

- Is there a significant risk that the confidential information would materially advance the position of the new client?

In the ordinary course, the conflict determination should be made without reviewing the former client's file. Reviewing the file of a former client may **only** occur in extraordinary circumstances. For example, if an attorney discovers a possible conflict with a former client after having represented the new client for a significant period of time, the attorney may ask the AIC of the former client's office to check the file of the former client as a last resort before withdrawing.

If the AIC or Supervising Attorney conducting the conflict analysis determines that the Public Division **may** represent the new client, then the AIC or Supervising Attorney **must** attach to the conflict form a written explanation of why the Public Division is not required to withdraw from the case. If the AIC or Supervising Attorney determines that the Public Division has a conflict with the new case, no written explanation is necessary.

Scenario 7 – Complainant in New Public Division Case Was Party in Closed CAFL Case

Example:

Mr. and Mrs. Smith's children were the subject of a care and protection matter which was closed 18 months ago. Mr. Smith was represented by a CAFL staff attorney. Mrs. Smith was represented by private counsel. Mr. and Mrs. Smith had the same position in the care and protection case. A Public Defender District Court office is asked to represent Mr. Jones, who has been charged with assault and battery on Mrs. Smith.

➔ The Public Division staff office may only represent Mr. Jones if the care and protection and assault and battery cases are not "substantially related" as defined in Rule 1.9. Before accepting representation of Mr. Jones, an AIC, Managing Director and/or Deputy Chief or Division Head must first make a determination that there is **not** a substantial risk that confidential information as would normally have been obtained in the representation of Mr. Smith in the care and protection matter would materially advance Mr. Jones' position in the assault and battery matter. If it is determined that the cases are not substantially related and the Public Division accepts representation of Mr. Jones, Mr. Jones' attorney may not review Mr. Smith's file in connection with the representation of Mr. Jones.

APPENDIX: Conflict Form

CPCS Conflict Check Form - Updated 1/10/20

Before participating in an arraignment or accepting an assignment, all efforts must be made to run a conflict check. This conflict check is to be completed within **two** business days from case assignment, first meeting, arraignment, receipt of discovery or additional discovery or receiving new information. **Additional conflict checks must be completed within two (2) business days after the attorney receives discovery, notice, or information from any source that identifies additional witnesses and/or parties to the case.**

Date of request	Division - Office	Attorney making the request:

Client Name:	DOB:	Held: **Yes** ☐ **No** ☐

Client Alias(es):

Have you met with client? **Yes** ☐ **No** ☐

Are you aware of any potential conflict? **Yes** ☐ **No** ☐

If you aware of any potential conflicts, explain:

Person who ran the check:	Date check was performed:

Types: W-Witness; AV-Alleged Victim or CW-Complaining witness; CD-Codefendant; CI-Cooperating Individual; F-Family Members; OP-Other Party; O-Other (describe in CASEY)

Type	**Name (last, first, middle) and/or known aliases**	**DOB**	**Last four digits of SSN (if available)**	**See Attached CASEY information**	**No information found in CASEY**

***Whenever CPCS ACCEPTS representation, a completed copy of this form must be placed in the CPCS case file. This Conflict Check form is an administrative document completed solely to determine whether CPCS has a conflict with a case, and is therefore NOT a part of the client's file.**

ADDITIONAL CHECKS MUST BE RUN EVERY TIME DISCOVERY REVEALS A NEW WITNESS OR PARTY.