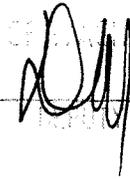


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COURT OF APPEALS
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY 

NO. 40459-1-II

STATE OF WASHINGTON,

Real Party of Interest – The Clallam County Prosecuting Attorney’s Office

Appellant,

vs.

LOVERA MARJORIE BLACKCROW,

Real Party of Interest – Ms. Karen Unger

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 09-1-00342-3

BRIEF OF APPELLANT

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SERVICE	Ms. Karen Unger 332 E. 5th Street, Suite 100 Port Angeles, WA 98362	This brief was served via U.S. Mail or the recognized system of interoffice communications as follows: original + one copy to Court of Appeals, 950 Broadway, Suite 300, Tacoma, WA 98402, and one copy to counsel listed at left. I CERTIFY (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: May 18, 2010 at Port Angeles, WA 
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I. INTRODUCTION:

This appeal contests the trial court's award of CR 11 sanctions to defense counsel in a criminal proceeding. The underlying criminal proceeding involves a vehicular homicide, and the State filed charges against two defendants: Ms. Lovera Marjorie Blackcrow and Mr. Roger Dean Mallicott.

When the deputy prosecuting attorney (DPA) moved to sever the proceedings, she made a mistake. The DPA misstated a supplementary fact: that Mr. Mallicott was a member of the *Hells Angels* motorcycle club. As a result of this mistake, the DPA erroneously inferred that Ms. Blackcrow's attorney, Ms. Karen Unger, might have previously represented the *Hells Angels* based on Mr. Mallicott's effort to contact her office.

The trial court sanctioned the Clallam County Prosecuting Attorney's Office (the Prosecutor's Office) for the two inadvertent misstatements. The trial court ordered the Prosecutor's Office to pay \$500 to Ms. Unger, reasoning that the statements potentially damaged Ms. Unger's reputation and violated the DPA's duty of candor to the trial court.

The State filed a notice of supersedeas and appealed the sanction order.

II. ASSIGNMENT OF ERROR:

1. The trial court erred when it found that the deputy prosecuting attorney (DPA) prepared a motion to sever that “alleged a conflict” of interest by defense counsel. *See* CP 8 - Finding of Fact 8.
2. The trial court erred when it found that the DPA made key factual misstatements to the trial court. *See* CP 8 - Finding of Fact 9.
3. The trial court erred when it concluded that the DPA’s motion was “incorrect.” *See* CP 9 – Conclusion of Law 2.
4. The trial court erred when it concluded that the DPA’s motion was disparaging to opposing counsel. *See* CP 9 – Conclusion of Law 2.
5. The trial court erred when it concluded that the DPA “alleged a conflict of interest that did not exist.” *See* CP 9 - Conclusion of Law 2.
6. The trial court erred when it concluded that the DPA’s signed motion was a breach of her duty of candor towards the tribunal and opposing counsel. *See* CP 9 - Conclusion of Law 4.
7. The trial court erred when it concluded that the DPA’s signed motion was a breach of CR 11. *See* CP 9 - Conclusion of Law 4.
8. The trial court erred when it determined that \$500 was the appropriate sum to remedy the disparaging and inaccurate statement and to deter future misconduct. *See* CP 10 - Conclusion of Law 6.

III. STATEMENT OF THE ISSUE:

1. Did the trial court abuse its discretion by sanctioning the Clallam County Prosecuting Attorney's Office pursuant to CR 11 when the trial judge (1) found that the deputy prosecuting attorney did not have a malicious purpose when she misstated two facts in her motion to sever, (2) concluded that the DPA filed her motion in good faith, (3) concluded that the motion was not frivolous, and (4) granted the motion to sever the proceedings?

IV. STATEMENT OF THE CASE:

FACTS¹

On August 16, 2009, a terrible traffic collision occurred at the intersection of Dry Creek Road and Edgewood Drive in Port Angeles, Washington. CP 24, 40. The collision involved a vehicle owned by Ms. Lovera Marjorie Blackcrow, and a motorcycle owned by Mr. Roger Dean Mallicott. CP 24, 40.

Ms. Blackcrow was traveling North bound on Dry Creek Road, while Mr. Mallicott was driving East bound on Edgewood Drive. CP 25, 40. Ms. Blackcrow failed to yield the right of way and drove into the path of Mr. Mallicott, who was traveling in excess of the posted speed limit. CP 25, 40. While Mr. Mallicott attempted to brake, he overturned the

¹ The State notes that the underlying criminal trial is still pending. The trial is scheduled to begin May 24, 2010. The facts included in this section are those alleged in the probable cause statements and the police reports. CP 24-27; 39-41.

motorcycle. CP 25, 40. Mr. Mallicott's passenger, Ms. Shelly Bartlett, collided with the side of Ms. Blackcrow's vehicle. CP 24-25, 40. The next day, Ms. Bartlett died from the injuries she sustained in the collision.

As police investigated the accident, they observed a strong odor of intoxicants on Ms. Blackcrow's breath. CP 25. Ms. Blackcrow poorly performed a series of field sobriety tests, and provided a PBT result that revealed a blood alcohol concentration of .123. CP 25.

Ms. Blackcrow told investigating officers that she had come to a complete stop at the intersection. CP 25. Ms. Blackcrow claimed that she saw two cars heading East on Edgewood drive, and after they cleared the intersection she pulled forward to initiate a turn. CP 25. However, halfway through the turn, she felt a "thump" against the side of her vehicle. CP 25.

Police officers also noticed that Mr. Mallicott exhibited signs of intoxication. CP 25. Mr. Mallicott smelled of alcohol, was unsteady on his feet, and had watery bloodshot eyes. CP 25. Mr. Mallicott even admitted to consuming alcohol earlier that evening. CP 25.

According to Mr. Mallicott, Ms. Blackcrow pulled out in front of him and stopped in the middle of the intersection. CP 25. When he tried to brake and avoid Ms. Blackcrow's vehicle, he lost control of the motorcycle. CP 25. Mr. Mallicott maintained that he was not speeding at the time of the collision. CP 25.

When officers asked Mr. Mallicott to perform certain field sobriety tests, he responded: “Wait. I’m not sure I should be doing this I’m a member of a club (Amigos) and we have procedures for this.” CP 25. Mr. Mallicott then stated that he wanted to call his attorney before submitting to any tests. CP 25.

Mr. Mallicott called Information and requested the telephone number for Ms. Karen Unger, a local defense attorney. CP 26. Mr. Mallicott dialed the number, but he claimed that the number the operator provided him was incorrect. CP 26. Mr. Mallicott dialed Information a second time and, again, requested Ms. Unger’s phone number. CP 26. Mr. Mallicott dialed the number and left a message on Ms. Unger’s answering machine. CP 26. After leaving a message with Ms. Unger’s office, Mr. Mallicott refused to comply with any further investigation. CP 26.

The police arrested Ms. Blackcrow and Mr. Mallicott for driving under the influence and vehicular assault. CP 26-27; 40-41.

Procedural History

Because Ms. Bartlett succumbed to her injuries, the State charged Ms. Blackcrow and Mr. Mallicott with vehicular homicide in violation of RCW 46.61.520(1)(a). CP 37-38. The State filed the charges under cause numbers: 09-1-00341-5 (*State v. Mallicott*) and 09-1-00342-3 (*State v.*

Blackcrow). Ms. Karen Unger entered a notice of appearance on behalf of Ms. Blackcrow. CP 36.

On February 5, 2010, the parties appeared before the Honorable George Wood. RP (02/05/2010) at 2. Ms. Erika Soublet, a deputy prosecuting attorney (DPA), informed the trial court that she would move to sever the proceedings. RP (02/05/2010) at 4. The DPA advised the court that the case presented a *Bruton*² issue. RP (02/05/2010) at 4. The trial court scheduled a severance hearing for February 19, 2010. RP (02/05/2010) at 5.

On February 8, 2010, the DPA filed a motion to sever the proceedings pursuant to CrR 4.4(c)(2)(i).³ CP 33. In support of the motion, the DPA argued that (1) the State anticipated that both defendants would present “antagonistic defenses,” claiming that the other was responsible for the death of Ms. Bartlett; (2) the State anticipated that “complex” evidence would make it difficult for the jury to separate the evidence that related to each defendant when determining the issues of guilt or innocence; and (3) there was sufficient evidence to warrant amended

² *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) (admission of codefendant's confession that implicated defendant at joint trial constituted prejudicial error even though trial court gave clear, concise and understandable instruction that confession could only be used against codefendant and must be disregarded with respect to defendant).

³ CrR 4.4(c)(2) provides: The court, on application of the prosecuting attorney ... should grant a severance of defendants whenever: (i) if before trial ... it is deemed appropriate to promote a fair determination of the guilt or innocence of a defendant[.]

charges against Mr. Mallicott, alleging that he committed the offense with disregard for the safety others. CP 34-35.

Additionally, the DPA expressed her concern that (1) Ms. Blackcrow might try to capitalize on Mr. Mallicott's membership in a particular motorcycle club, and (2) Ms. Blackcrow's attorney might have a conflict of interest. CP 35. Specifically, the DPA stated:

The State also reasonably anticipates that defendant Blackcrow will attempt to capitalize on the fact that defendant Mallicott is a member of the Hells Angels and a convicted felon while attempting to paint herself in a more favorable light. The State would also note the potential conflict of interest caused by the fact that defendant Blackcrow's attorney was, apparently, at the time of the collision the attorney for the Hells Angels and the attorney defendant Mallicott attempted to contact for legal advice at the scene of the collision.

CP 35.

On February 9, 2010, an associate of Ms. Unger filed a response to the DPA's motion to sever the two proceedings. CP 28. The associate argued that the trial court should (1) strike the motion to sever, and (2) impose CR 11 sanctions against the State. CP 28. According to the associate, "[t]he motion to sever is not only a baseless filing and not well grounded in fact, it is also absolutely frivolous and can only be meant to harass defendant's counsel and bolster the State's motion to sever. The

State's motion is a waste of the court's time and the taxpayer's dollars.”

CP 29.

In support of its position, the associate argued that (1) motions *in limine* would preclude the parties from referencing prior criminal history and irrelevant associations, and (2) an individual's unsuccessful attempts to contact an attorney does not establish a conflict of interest. CP 30. However, the primary grievance articulated in the request for sanctions was counsel's belief that the DPA improperly suggested a relationship existed between Ms. Unger and the *Hells Angels*:

More importantly and to the point, Ms. Unger has never, ever represented the Hells Angels. In fact, there are no Hells Angels in Port Angeles. The State, through its prosecuting attorneys, has a duty to submit the truth to the court and to refrain from carelessly offering facts gathered from unreliable sources or made up in order to bolster motions. Such unscrupulous behavior casts a poor light on the prosecuting authority and the general appearance of fairness as it now becomes a question of whether the litigation is being pursued out of justice or out of personal distaste for defense counsel.

CP 30. The response continued to show its contempt for the DPA's motion:

[The DPA] has alleged falsities to support her motion to sever and the motion itself is baseless. As a result, defense counsel has now had to undergo the time and expense of responding to the frivolous motion; time that would have better been spent preparing for trial. Further, counsel has

suffered outrage at the allegation that she is has [sic] a conflict of interest in representing her client because of a failed attempt made by the co-defendant to secure her services of representation. By suggesting that defendant Mallicott is a member of a motorcycle gang that Ms. Unger has represented in the past, when no such motorcycle gang exists in this county, nor has been represented in the past by Ms. Unger, to even hint of [sic] any kind of ethical conflict of interest, adds to the outrage of the state's representation.

CP 31-32. As a result, defense counsel demanded that the trial court impose CR 11 sanctions against the State, penalizing the perceived “unethical behavior.” CP 32

On February 12, 2010, pursuant to Mr. Mallicott's motion to compel discovery, the parties appeared before the Honorable George Wood. RP (02/12/2010) at 2. In an effort to fuel the flames, Mr. Mallicott's attorney stated the following:

[The DPA] stated unequivocally that my client was a member of the Hell's Angels and stated pretty unequivocally that co-defendant's counsel was apparently the attorney for the Hell's Angels. And I was seriously taken aback by those allegations[.] ... So, we're just asking for the basis of that information, presumably since the allegation was made in a sworn statement and made unequivocally, the basis for that should be pretty easy for the State to give to us.

RP (02/12/2010) at 4-5. The trial court instructed the DPA to provide the requested information, believing that it was “the basis [for the State's] severance motion[.]” RP (02/12/2010) at 6. The trial court then

rescheduled the discovery hearing for February 16, 2010. RP (02/12/2010)
at 6.

On February 16, 2010, the DPA acknowledged that she had erred
when she stated that Mr. Mallicott was a member of the *Hells Angels*:

The motorcycle gang/club defendant Mallicott indicated he
was a member of is the Amigos. The State wrote the
previous motion from memory and mistakenly identified
the motorcycle gang/club as the Hells Angels.⁴

⁴ The *Amigos* Motorcycle Club (MC) website expressly links itself to an outlaw
motorcycle gang known as the *Bandidos* MC. See <http://www.amigosmcwa.com>.

The Department of Justice (DOJ) provides the following information about outlaw
motorcycle gangs:

Outlaw Motorcycle Gangs (OMGs) are organizations whose members
use their motorcycle clubs as conduits for criminal enterprises. OMGs
are highly structured criminal organizations whose members engage in
criminal activities such as violent crime, weapons trafficking, and drug
trafficking. There are more than 300 active OMGs within the United
States, ranging in size from single chapters with five or six members to
hundreds of chapters with thousands of members worldwide. The Hells
Angels, Mongols, *Bandidos*, Outlaws, and Sons of Silence pose a
serious national domestic threat and conduct the majority of criminal
activity linked to OMGs, especially activity relating to drug-trafficking
and, more specifically, to cross-border drug smuggling. Because of
their transnational scope, these OMGs are able to coordinate drug
smuggling operations in partnership with major international drug-
trafficking organizations (DTOs).

See <http://www.justice.gov/criminal/gangunit/gangs/motorcycle.html> (emphasis added).

The DOJ gives the following description of the *Bandidos* MC:

The *Bandidos* Motorcycle Club (*Bandidos*) is an OMG with a
membership of 2,000 to 2,500 persons in the U.S. and in 13 other
countries. The *Bandidos* constitute a growing criminal threat to the U.S.
Law enforcement authorities estimate that the *Bandidos* are one of the
two largest OMGs operating in the U.S., with approximately 900
members belonging to 93 chapters. The *Bandidos* are involved in
transporting and distributing cocaine and marijuana and are involved in

CP 22. The DPA further explained that she concluded a prior legal relationship might have existed between Ms. Unger and Mr. Mallicott and/or his motor cycle club based upon his efforts to contact her office. CP 22.

Later that day, the parties appeared before Judge Wood pursuant to Mr. Mallicott's previous motion to compel discovery regarding the *Hells Angels* allegation. RP (02/16/2010) at 3. Again, Mr. Mallicott's counsel sought to enflame the dispute:

the production, transportation and distribution of methamphetamine. The Bandidos are most active in the Pacific, Southeastern, Southwestern and the West Central regions of the U.S. The Bandidos are expanding in each of these regions by forming additional chapters and allowing members of supporting clubs, known as "puppet" or "duck" club members who have sworn allegiance to another club but who support and do the "dirty work" of a mother club—to form new or join existing Bandidos chapters.

See <http://www.justice.gov/criminal/gangunit/gangs/motorcycle.html>

Finally, the National Alliance of Gang Investigators Associations (NAGIA), in partnership with the Federal Bureau of Investigation (FBI); National Drug Intelligence Center (NDIC); and Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) provided the following information regarding OMG's and their support clubs:

All of the major OMGs have puppet clubs that serve as a recruitment source and as foot soldiers in conducting criminal activities. The Hells Angels' principal puppet club is the Red Devils, the Outlaws have the Black Pistons and the Forsaken-Few, and the Pagans have the Tribe and the Blitzkrieg and Thuderguards (in Maryland). The Bandidos have several support clubs, including the *Amigos*, *Pistoleros*, *LA Riders*, *Hombres*, and *Hermanos*.

See 2005 National Gang Threat Assessment, Bureau of Justice Assistance (BJA), U.S. Department of Justice at 14 (emphasis added).

See also http://www.ojp.usdoj.gov/BJA/what/2005_threat_assesment.pdf.

Your Honor, I'm sure the Court has read the motion that was filed that's in question here and it stated a couple things unequivocally. It said that my client was a member of the Hell's Angels, and it said that Ms. Unger was the local attorney for the Hell's Angels.

...

So, we asked the State to specify for us what information they were relying on to make that – and it wasn't an allegation, it was a bald assertion of fact, it wasn't qualified, it wasn't couched, it wasn't qualified in any manner, it was stated as a bald assertion of fact.

Now, the Court knows that that assertion of fact, that claim, is maybe not a nuclear bomb in cases like this but it's pretty close, it's pretty inflammatory. ... [C]all them a Hell's Angel and that carries with it a whole bunch of baggage. A whole bunch of baggage.

...

So I'm a little concerned, and I have great difficulty believing that anybody could make that mistake [the difference between Amigos and Hells Angels] who's been around the criminal justice system for more than a week or two, so I'm concerned that that mistake was made, and I'm concerned now that my client was tarred and feathered with that brush.

And now we can say, well, I guess it was a mistake. Yeah, it was a mistake. And my client is very upset that it was made. We still haven't heard a good reason why it was made and we will be moving for terms for having to be here. This has to stop. And the only way I think it can stop is if it gets stopped. It's that simple.

RP (02/16/2010) at 3-4, 6. Ms. Unger echoed the sentiments of Mr.

Mallicott's counsel:

[T]here are no Hell's Angels in Clallam County. I don't think there have ever been any Hell's Angels before this Court in Clallam County.

So, I am now here almost an hour and I am a private practitioner and I don't make money if I'm sitting in court on a case like this. So, unless the Court sets some sort of standard as to what's acceptable here, gee, I made a mistake – she might have well said I represent John – the Gotti family because after all that's probably possible, I am from New York, so I could represent the Mafia. That's more likely than me representing the Hell's Angels. So, gee, I'm sorry, I made a mistake that doesn't cut it here.

So, I think not only do the pleadings need to be stricken and maybe that should be dealt with on Friday, I think some sanction should be imposed here, Your Honor because this is really irresponsible. My client got upset. She thought I represented the Hell's Angels when she read the motion.

RP (02/16/2010) at 8-9. The trial court refused to address the motion for sanctions, reserving the matter for the severance hearing that it previously scheduled for February 19, 2010. RP (02/16/2010) at 10.

However, the trial court did find there was no basis for the *Hells Angel* reference. RP (02/16/2010) at 10. The trial court noted:

[T]here's a big difference between being the member of a motorcycle club or group and being a member of an organization with a rather notorious reputation, [that] being the Hell's Angels. And also I think to indicate

unequivocally and probably worse than the mistake with regard to the – what group it is, to say that Ms. Unger is the attorney for the Hell’s Angels, or even the motorcycle group, has really not a whole lot of foundation to it. I think in a small community such an allegation is particularly harmful and particularly egregious especially when it comes from somebody in the prosecutor’s office.

...

I think the main concern the Court has with – when motions of this sort are made, or statements of this sort are made, that the Court has confidence that an officer of the court is going to present that information accurately and not make allegations that are not supported by the evidence. And whether that means taking a look at the police report or whatever that takes to look, I think before those allegations are made, you know, the Court expects the attorneys to look into that and make sure that it’s accurate information and it’s relevant to the case.

RP (02/16/2010) at 10-11. The trial court affirmed its expectation that the attorneys review police reports and refrain from making allegations that are not supported by the evidence. RP (02/16/2010) at 11.

On February 19, 2010, the State filed a response to the motion for sanctions, which reiterated the purpose behind the motion to sever the proceedings:

Defendant Blackcrow and Defendant Mallicott are both charged with causing the death of the same third person through vehicular homicide. Each made out of court statements which are both inculpatory as to themselves and as to their co-defendants. These statements are clearly

admissible against themselves whether they testify or not but raise what are called “Bruton issues.”

Because these statements refer to their co-defendants, case law would permit their redaction to refer to “another” as long as there was someone other than their co-defendant to whom the statement could possibly refer and an instruction is given which prohibits the jury from using one defendant’s statements against the co-defendant. If there is not such a third party[,] which is the situation in this case, case law prohibits their introduction unless the defendant testifies and is subject to cross-examination by their co-defendant.

Since the State has no right to force a defendant to take the stand, a motion to sever is properly granted here as separate trials would permit the introduction of each Defendant’s out of court statement as to themself [sic] and each Defendant and State are assured of a fair trial [sic]. This meets the requirements of CrR 4.4(b) in that severance clearly promotes the fair determination of guilt or innocence.

CP 18-19 (citations omitted). Finally, the State explained that the DPA only raised the potential conflict of interest so that the trial court could make any inquiry it believed appropriate. CP 20. The State argued that the DPA’s choice of language was regrettable, but it did not support a sanction pursuant to CR 11. CP 20. The State maintained that sanctions were inappropriate because (1) the motion was grounded in both fact and law, and (2) the DPA did not file the motion for any improper purpose. CP 20.

At the sanctions hearing, the Honorable S. Brooke Taylor presided.

RP (02/19/2010) at 2. Ms. Unger argued:

We filed CR 11 sanctions, Your Honor, because I think that any attorney who puts their name to [a] pleading has to have a reasonable belief that what they're writing is true, and that there's a basis of fact for this. You don't get to say, oh, sorry I wrote a memo in a major case to sever two defendants that are going to cost the county a substantial amount of money if there are two trials and I did it from my memory.

...

My client was directly impacted by this mis-statement that could have easily been avoided. There is absolutely no way that a rational person could translate I'm a member of a club to Ms. Unger is a lawyer for the Hell's Angels. That's quite a leap.

I believe that there should be sanctions imposed, that this should not be encouraged, it should not be sanctioned by this Court, and I think that we need to hold all of the lawyers to some higher level of practice here. You don't just say gee, sorry, I filed a motion and didn't look at the police reports and didn't look at the pleadings, didn't have them in front of me, I used it from memory. That's quite a memory, sounds like a dream to me.

RP (02/19/2010) at 16-18.⁵

The State – *i.e.* the DPA's supervisor and elected prosecutor – apologized to Ms. Unger, in open court, explaining that the Prosecutor's Office did not seek to offend counsel. RP (02/19/2010) at 18. Again, the

⁵ Ms. Blackcrow's declaration is found at CP 58-59.

Prosecutor emphasized that the police reports stated that Mr. Mallicott “said [he] wanted to call his attorney and he immediately called Ms. Unger.” RP (02/19/2010) at 18. The Prosecutor reiterated that the potential conflict of interest was not the primary basis for its motion to sever. RP (02/19/2010) at 18-19; *See also* CP 20. The Prosecutor explained that the motion to sever largely addressed *Bruton* related issues, and was not intended to be a “personal attack” on Ms. Unger’s character. RP (02/19/2010) at 19.

Judge Taylor made the following oral ruling:

[T]he mis-statements that were made by [the DPA] in her motion for a severance were made in support of a major motion in this case ... of great significance. The facts alleged in the pleadings which she signed were false, and the facts that she alleged were disparaging to opposing counsel. So I think on two levels there was a departure from the loyalty to the truth that we expect in this court and all proceedings. This entire process is at the end of the day a search for the truth. That will never be accomplished if this Court cannot rely on 100 percent truthful, accurate statements by counsel both verbally and in their pleadings.

And I do find that that breach of honesty to the Court and counsel has been – that duty has been breached and I’m going to impose a monetary sanction of \$500 to be paid to the moving party within 30 days from today. And that will hopefully be the end of it.

RP (02/19/2010) at 19-20. The trial court then rescheduled the severance hearing for February 26, 2010. RP (02/19/2010) at 20.

On February 26, 2010, Ms. Unger submitted two different orders purporting to capture the trial court's oral ruling. RP (02/26/2010) at 2. The State also submitted proposed findings of fact and conclusions of law. RP (02/26/2010) at 2. The trial court accepted the State's proposed findings/conclusions, but with some interlineations. RP (02/26/2010) at 3. Ms. Unger requested that the trial court's final order reference the specifics of CR 11 in order to survive appellate review. RP (02/26/2010) at 4, 7. The State made a formal exception to the judge's finding that the DPA alleged an actual conflict of interest. RP (02/26/2010) at 5.

The State reiterated that the DPA's motion to sever only expressed concern that there was "a potential conflict of interest." RP (02/26/2010) at 5. The trial court affirmed its finding that the DPA alleged an actual conflict of interest "as a ground[] for the motion to sever." RP (02/26/2010) at 5-6. While the trial court recognized that the DPA's motion referred to a potential conflict, the court maintained, "the substance of the allegation was there was a conflict and that [the court] needed to sever these trials[.]" RP (02/26/2010) at 6.

The trial court then heard argument with respect to the DPA's motion to sever. RP (02/26/2010) at 8. Mr. Mallicott did not oppose the motion to sever. RP (02/26/2010) at 9, 15. However, Ms. Blackcrow argued that severance was not necessary. RP (02/26/2010) at 15-17.

During its argument to sever, the State presented the trial court with additional documents, which established Ms. Unger did in fact previously represent Mr. Mallicott in 2007. CP 49-56; RP (02/26/2010) at 11-12. With respect to the State's most recent filing, the trial court concluded:

I do not consider [the supplemental filing] additional grounds for the severance of the cases because there's nothing in there that would establish a conflict that I can determine. I have reviewed the RPC's and I simply do not find any basis there for a severance[.]

RP (02/26/2010) at 12.

However, the trial court did agree that the *Bruton* issues, which the DPA identified in the motion to sever, required separate trials. RP (02/26/2010) at 12, 19-21. Thus, the trial court severed the proceedings. CP 15; RP (02/26/2010) at 21

The State then requested an opportunity to revisit the potential conflict of interest. RP (02/26/2010) at 24-25. The State noted that while Ms. Unger's previous representation of Mr. Mallicott was brief, it requested that the trial court inquire whether Ms. Unger received any information in the course of that representation that could be used to her former client's disadvantage. RP (02/26/2010) at 25-26. The trial court refused the State's request, noting that Ms. Unger has a duty to disclose any conflicts. RP (02/26/2010) at 26-27. The trial court reasoned that a

conflict did not exist because Ms. Unger did not withdraw from the case. RP (02/26/2010) at 27. While the trial court did not find a conflict, it stated:

[T]o the extent there's [the] slightest possibility [of a conflict of interest], it seems to me we have pretty much eliminated that by the severance that was granted a few minutes ago. She's not going to be involved in any way in Mr. Mallicott's trial.

RP (02/26/2010) at 27, 29. Ms. Unger replied that she had forgotten that she previously represented Mr. Mallicott,⁶ and affirmed that she did not receive any information that could be used to the disadvantage of her former client. RP (02/26/2010) at 27-29.

On March 3, 2010, the trial court formally entered findings of fact and conclusions of law. CP 7-10. The trial court stated:

If the inference from Defendant Mallicott's statement that Ms. Unger had previously been or was currently his attorney was true, Ms. Unger's representation of Defendant Blackcrow might constitute a potential conflict, and particularly so if the cases were joined[.] ...

CP 8. Additionally, the trial court formally found and concluded that (1) the DPA had no malicious purpose when she misstated the two facts, (2) the DPA filed her motion in good faith, and (3) the motion was not frivolous. CP 9-10.

⁶ Ms. Unger represented Mr. Mallicott in an unrelated misdemeanor under cause CCR1156. The State dismissed the matter shortly after Ms. Unger filed a notice of appearance. *See* CP 49-56.

However, the order imposing sanctions relied on the following findings:

9. [The DPA] did not reexamine the investigative reports while drafting the motion to sever but relied upon her personal recollection of the facts from her prior review of them; her personal recollection was mistaken with respect to the statement made as detailed in Paragraph 10, causing her to make key factual misstatements to the court.
10. In support of the motion to sever and to alert the court to a potential conflict, [the DPA] made the following statement: “The State would also note the potential conflict of interest caused by the fact that defendant Blackcrow’s attorney was, apparently, at the time of the collision the attorney for the Hells Angels and the attorney defendant Mallicott attempted to contact for legal advice at the scene of the collision.”
11. In that statement, [the DPA] mistakenly substituted the names of the Hells Angels Motorcycle Club for the Amigos Motorcycle Club, and claimed that Ms. Unger was the attorney. The “Hells Angels” have a negative reputation among law-abiding citizens in the community.
12. The substitution of the names, and the fact that Ms. Unger has never represented the Hells Angels or any other motorcycle gang, made the statement inaccurate.

CP 8-9. The trial court concluded that “[the DPA] has a duty to review the investigative reports and get her facts straight before filing [a motion to sever]” and the “motion was incorrect, disparaging towards Ms. Unger, potentially damaging to [h]er reputation, and alleged a conflict of interest

that did not exist.” CP 9. Thus, the trial court imposed sanctions because it believed that the DPA’s inaccurate statements were a breach of her duty of candor and a breach of CR 11. CP 9.

The State filed a notice of supersedeas and appealed the imposition of sanctions. CP 5-6. The underlying criminal matter proceeded towards trial. The trial court set Ms. Blackcrow’s trial for May 24, 2010. RP (03/05/2010) at 3.

V. ARGUMENT:

**A. THE TRIAL COURT ABUSED ITS DISCRETION
BECAUSE IT MISAPPLIED CR 11.**

CR 11(a) requires attorneys to date and sign all pleadings, motions, and legal memoranda. This signature constitutes the attorney’s certification that:

[T]o the best of the ... attorney’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it [the pleading, motion, or memoranda] is well grounded in fact; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

CR 11(a). If an attorney violates CR 11, “the court, upon motion or upon its own initiative, may impose ... an appropriate sanction” which may include reasonable fees and expenses. CR 11(a).

The purpose of CR 11 is to deter baseless filings and curb abuses of the judicial system.⁷ *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994); *Bryant v. Joseph Tree*, 119 Wn.2d 210, 219-20, 829 P.2d 1099 (1992). See also *Business Guides, Inc. v. Chromatic Communications Enterprises Inc.*, 498 U.S. 533, 552, 11 S.Ct. 922, 112 L.Ed. 1140 (1991); *Cooter & Gell v. Hartmarx Corporation*, 496 U.S. 384, 393, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).⁸ Thus, the court rule sanctions two types of filings: (1) those that lack a factual or legal basis (baseless filings), and (2) those that are filed for an improper purpose. *Bryant*, 119 Wn.2d at 217; *MacDonald v. Korum Ford*, 80 Wn. App. 877, 883, 912 P.2d 1052 (1996); *Hicks v. Edwards*, 75 Wn. App. 156, 162, 876 P.2d 953 (1994), review denied, 125 Wn.2d 1015, 890 P.2d 20 (1995).

⁷ The filing of motions without taking the necessary care in their preparation is an abuse of the judicial system. *Cooter & Gell*, 496 U.S. at 398. This is because a “baseless filing puts the machinery of justice in motion, burdening courts and individuals alike with needless expense and delay.” *Id.* Ultimately, a CR 11 penalty involves a determination of “whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate.” *Biggs*, 124 Wn.2d at 198 (citing *Cooter & Gell*, 496 U.S. at 396).

⁸ Washington’s CR 11 is modeled after and is substantially similar to the Federal Rule of Civil Procedure 11 (Rule 11). Thus, this Court may look to federal decisions interpreting Rule 11 for guidance in construing CR 11. See *Bryant*, 119 Wn.2d at 218-19.

CR 11 is applicable to criminal cases under CrR 8.2,⁹ which incorporates the civil rule pursuant to CR 7(b).¹⁰ The State has found no case where a CR 11 sanction was imposed in a criminal proceeding. The State, therefore, relies upon case law that applies CR 11 in civil proceedings. The application of these cases requires this Court to reverse the trial court's order imposing sanctions because (1) the judge's findings of fact and conclusions of law do not support a sanctions award, (2) the judge failed to connect the monetary fine to the alleged injury, and (3) the judge sanctioned the DPA without considering factors that mitigated the need for sanctions.

Finally, an attorney sanctioned under CR 11 is an aggrieved party and may appeal the sanction order under RAP 3.1. *Splash Design, Inc. v. Lee*, 104 Wn. App. 38, 44, 14 P.3d 879 (2000). This Court reviews a trial court's decision to grant or deny CR 11 sanctions for an abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 112 Wn.2d 299, 338, 858 P.2d 1054 (1993); *Biggs*, 124 Wn.2d at 197. A trial court abuses its discretion when a sanction order is manifestly unreasonable or based on untenable grounds. *Fisons Corp.*, 112 Wn.2d at

⁹ CrR 8.2 provides: "Rules 3.5 and 3.6 and CR 7(b) shall govern motions in criminal cases.

¹⁰ CR 7(b)(3) provides: "All motions shall be signed in accordance with rule 11."

339. An order based upon an erroneous view of the law necessarily constitutes an abuse of discretion. *Id.*

1. The trial court's findings of fact and conclusions of law do not support a sanctions award.

(a) *The DPA filed the motion for a proper purpose.*

Here, the DPA's motion to sever was proper and sought to reinforce fair judicial processes. Because the State intended to admit both defendants' inculpatory statements at trial, the DPA filed her motion in order to ensure a fair determination of guilt or innocence pursuant to CrR 4.4(c)(2), *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), and *State v. Jones*, 93 Wn. App. 166, 968 P.2d 888 (1998). CP 33-35, RP (02/05/2010) at 4.

The trial court expressly found that the DPA did not make the contested statements with any malicious purpose. CP 9. Additionally, the trial court recognized the propriety of the DPA's severance motion, concluding that the motion "was not frivolous and was brought in good faith." CP 10. As such, the trial court granted the motion and severed the proceedings. CP 15; RP (02/26/2010) at 19-21. This Court should hold that the sanction order cannot be sustained as penalizing a motion filed for an improper purpose.

(b) *The DPA's motion was not baseless.*

As previously stated, CR 11 also applies to baseless filings. *Biggs*, 124 Wn.2d at 197; *Bryant*, 119 Wn.2d at 217. A filing is “baseless” when it is (a) not well grounded in fact, or (b) not warranted by existing law. *MacDonald*, 80 Wn. App. at 883-84. *See also Bryant*, 119 Wn.2d at 219-20. Thus, the trial court must determine that the contested pleading, motion, or legal memorandum lacks a factual or legal basis before it can impose a CR 11 penalty. *Bryant*, 119 Wn.2d at 220. If the contested filing lacks a factual or legal basis, the trial court cannot impose CR 11 sanctions “unless it also finds that the attorney who signed and filed the [motion] failed to conduct a *reasonable inquiry* into the factual and legal basis of the claim.” *Bryant*, 119 Wn.2d at 220 (emphasis in original); *MacDonald*, 80 Wn. App. at 884.

(1) The DPA supported her motion with fact and law.

a. The facts support the motion to sever.

Here, the DPA supported her motion with facts. The material facts, which the DPA recognized from her previous review of the police reports, were that both defendants made statements that inculpated themselves and the other. CP 33-35. *See also* CP 18-19; RP (02/19/2010) at 18-19. Because the statements did not reasonably relate to a third party, the

defendants' statements presented *Bruton* issues so long as the two trials remained joined in the same proceedings. *See Bruton*, 391 U.S. at 130-137.¹¹

While the DPA inadvertently stated that (1) Mr. Mallicott was a member of the *Hells Angels*, and (2) Ms. Unger may have previously represented the *Hells Angels*, these assertions did not render the motion devoid of facts. The mistaken assertions were immaterial to the underlying motion and did not vitiate the need to sever the proceedings. As noted above, the trial court agreed that the facts required that it sever the proceedings. CP 15; RP (02/26/2010) at 12, 19-21.

The DPA also had an absolute obligation to alert the trial court to the potential conflict of interest, which she inferred from the fact Mr. Mallicott attempted to contact Ms. Unger. *See United States v. Friedman*, 854 F.2d 535, 572 (2nd Cir. 1988) (the prosecution's interest in avoiding conflicts that might place any conviction it obtains at risk gives it standing to bring disqualification motions even if the defendant wishes to privately retain counsel); *Mannhalt v. Reed*, 847 F.2d 576, 583-84 (9th Cir. 1988) (appellate court chastising the prosecution for not bringing a potential

¹¹ The U.S. Supreme Court in *Bruton v. United States* recognized that “[a] defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice.” 391 U.S. at 132.

conflict to the attention of the trial judge and for not moving for disqualification of the defense attorney); *United States v. Iorizzo*, 786 F.2d 52 (2d Cir. 1985) (appellate court chastising the prosecution for merely advising the trial judge of a potential conflict, and not also filing a disqualification motion). *See also* Green, Her Brother's Keeper: The Prosecutor's Responsibility When Defense Counsel Has a Potential Conflict of Interest, 16 Am. J. Crim. L. 323 (1989).

Additionally, the DPA's assertions are based in fact and not as strained as the defense and the trial court implied. First, Mr. Mallicott is a member of a motorcycle club. While he is not a member of the *Hells Angels*, he does associate with the *Amigos*. CP 25. The *Amigos* are a "support club" of the *Bandidos* (also known as the *Bandidos Nation*). The Department of Justice has identified the *Bandidos* as an outlaw motorcycle gang, similar to the *Hells Angels*. *See* 2005 National Gang Threat Assessment, Bureau of Justice Assistance (BJA), U.S. Department of Justice, pgs. 12, 14, 32.

Second, Mr. Mallicott sought Ms. Unger's legal counsel after informing officers that his motorcycle club required its members to follow certain "procedures" when confronted legal issue.

As I [the arresting officer] started to explain the first test to Mallicott he stated, "Wait, I'm not sure I should be doing this I'm a member of a club (Amigos) and we have

procedures for this. Mallicott then stated that he wanted to call *his* attorney before submitting to the field sobriety tests. Mallicott called information on his cellular telephone and asked for the telephone number of Karen Unger, a local defense attorney. ... Mallicott called information a second time, got the number for Unger, and called her office. The answering machine answered the telephone at Unger's office and Mallicott left a message for her to call.

CP 25-26 (emphasis added). Based on these facts, the DPA reasonably believed that Ms. Unger may have had a legal relationship with Mr. Mallicott and/or his motorcycle club.

Finally, Ms. Unger did in fact represent Mr. Mallicott in 2007. CP 49-56. The trial court's written findings stated:

If the inference from Defendant Mallicott's statement that Ms. Unger had previously been or was currently his attorney was true, Ms. Unger's representation of Defendant Blackcrow might constitute a potential conflict, and particularly so if the cases were joined and Ms. Unger cross-examined Defendant Mallicott, unless both Defendants supplied appropriate written waivers.

CP 8. Thus, the DPA properly highlighted what she perceived as a "potential conflict," affording the trial court an opportunity to inquire into the previous relationship to dispel any potential conflict of interest. *See State v. Dhaliwal*, 150 Wn.2d 559, 565-68, 79 P.3d 432 (2003).

This Court should hold that the DPA supported her motion to sever with facts.

b. The law supports the motion to sever.

The DPA supported her motion with legal authority. The DPA informed the trial court and defense counsel that *Bruton v. United States* required that the proceedings be severed. RP (02/05/2010) at 4. The DPA filed her motion to sever pursuant to CrR 4.4(c)(2)(i). CP 33. The DPA relied on the factors that require separate proceedings as announced in *State v. Jones*.¹² CP 34-35. The fact that Ms. Unger's associate challenged the DPA's application of *Jones* highlights the legal authority that the State offered in support of its motion. CP 30-31. Finally, the State expressly cited *Bruton v. United States*, in its reply to the motion for sanctions to refocus the trial court's attention on the facts that compelled separate proceedings. CP 18-19; RP (02/19/2010) at 19. This Court should hold that the contested motion was grounded in law.

Because the DPA grounded the severance motion in both fact and law, the trial court erred when it sanctioned the Office. This Court should hold that the motion was not "baseless."

¹² "On appeal from denial of a motion for severance, the defendant has the burden of demonstrating that a joint trial was so manifestly prejudicial as to outweigh the concern for judicial economy. To meet this burden, the defendant must show specific prejudice. We infer specific prejudice from the following: (1) antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive; (2) a massive and complex quantity of evidence making it almost impossible for the jury to separate evidence as it related to each defendant when determining each defendant's innocence or guilt; (3) a co-defendant's statement inculcating the moving defendant; (4) or gross disparity in the weight of the evidence against the defendants." *State v. Jones*, 93 Wn. App. 166, 171-72, 968 P.2d 888 (1998).

(2) The DPA performed a reasonable inquiry.

If the trial court sanctions an attorney for filing a “baseless” pleading, motion, or memorandum, it must make a finding that the filing is (1) not grounded in fact or law, and (2) that the attorney failed to make a reasonable inquiry into the facts or law. *Biggs*, 124 Wn.2d at 201; *Bryant*, 119 Wn.2d at 219-20. This is a two-step process. As argued above, the DPA’s motion was grounded in fact and law. Thus, the analysis need go no further. *See Bryant*, 119 Wn.2d at 221-23.

The trial court must use an objective standard when it evaluates an attorney’s inquiry, asking “whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified.” *Bryant*, 119 Wn.2d at 220. *See also Biggs*, 124 Wn.2d at 197; *MacDonald*, 80 Wn. App. at 884. “To avoid the 20/20 hindsight view, the trial court must conclude that the claim clearly has no chance of success.” *In re Cooke*, 93 Wn. App. 526, 529, 969 P.2d 127 (1999) (citing *MacDonald*, 80 Wn. App. at 884). *See also Bryant*, 119 Wn.2d at 220.

Here, the trial court found that the DPA failed to reexamine investigative reports before she filed her motion, and that this failure and her reliance on her memory resulted in “key” factual misstatements. CP 8-9; RP (02/19/2010) at 19-20. The State concedes that it was not advisable

for the DPA to prepare a motion based upon her memory of the police reports. However, the DPA was obviously familiar with the material facts of the case and recognized that they presented *Bruton* issues. See CP 33-35; RP (02/05/2010) at 4.

In sum, CR 11 sanctions were not appropriate in this case. The DPA's mistakes do not constitute an abuse of the judicial process. The DPA's motion remained grounded in fact – *i.e.* the defendants made statements that inculpated themselves and one another, and Mr. Mallicott did attempt to contact Ms. Unger for legal advice. The DPA supported the motion with legal authority – *i.e.* CrR 4.4, *Bruton v. United States*, and *State v. Jones*. The DPA filed the motion in good faith – *i.e.* to ensure a fair determination of guilt or innocence. And, the trial court ultimately granted the motion. Thus, the DPA's filing was proper and it did not put the machinery of justice in motion in a manner that burdened the court and counsel with needless expense and delay. In light of these facts, the sanction order constitutes an abuse of discretion because it was based on an erroneous view/application of CR 11. This Court should so hold.

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2. The trial court failed to connect the monetary fine to the alleged injury.

If it appears that CR 11 has been violated, “the court, upon motion or upon its own initiative, may impose upon the person ... an appropriate sanction” which may include the reasonable expense incurred while responding to a challenged filing. CR 11. The trial court has discretion to determine what sanction is appropriate. *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 355, 858 P.2d 1054 (1993). However, the choice of sanctions is subject to the arbitrary, capricious, or contrary to law standard of review. *State v. S.H.*, 102 Wn. App. 468, 473, 8 P.3d 1058 (2000).

When deciding upon a sanction, the trial court should impose the least severe sanction necessary to carry out the purpose of the rule and remedy the alleged harm. *Biggs v. Vail*, 124 Wn.2d 193, 197, 201-02, 876 P.2d 448 (1994); *Bryant v. Joseph Tree*, 119 Wn.2d 210, 225, 829 P.2d 1099 (1992). CR 11 should not be used as a wealth shifting mechanism. *Biggs*, 124 Wn.2d at 201; *Bryant*, 119 Wn.2d at 220. The burden is on the movant to justify the request for sanctions. *Biggs*, 124 Wn.2d at 202.

Here, Ms. Unger’s associate filed a motion for sanctions the day after the DPA filed a motion to sever the proceedings. CP 28, 33. The defense alleged that it was required to “undergo the time and expense of

responding; time that would have better been spent preparing for trial.” CP 31. However, the defense never advised the court how much time it expended to respond to the DPA’s inadvertent misstatements of fact, as opposed to the *Bruton* and *Jones* issues. Without the aforementioned information, the trial court could not reasonably determine that \$500 was the appropriate sum to compensate the defense for any burden imposed by the DPA’s misstated facts.

While Ms. Unger stated that she was required to attend three separate hearings as a result of the DPA’s motion, RP (02/19/2010) at 17, the trial court ultimately concluded that the motion was not frivolous, nor filed with the intent to harass counsel, CP 10. Additionally, two of the appearance that Ms. Unger attended was due to the motion to compel filed by Mr. Mallicott. RP (02/12/2010) at 1-8; RP (02/16/2010) at 1-13. Thus, this Court should hold that Ms. Unger’s appearance at any hearings to discuss the severance issue was proper.

It is readily apparent that Ms. Unger and the trial court found offensive the DPA’s incorrect statements regarding Mr. Mallicott’s motorcycle affiliations and the potential conflict of interest. Ms. Unger’s associate claimed:

[The DPA’s] unscrupulous behavior casts a poor light on the prosecuting authority and the general appearance of fairness as it now becomes a question of whether the

litigation is being pursued out of justice or out of personal distaste for defense counsel.

CP 30. Additionally, the associate decried the DPA's mistake as an example of unethical behavior:

Further, counsel has suffered outrage at the allegation that she is has [sic] a conflict of interest in representing her client because of a failed attempt made by the co-defendant to secure her services of representation. By suggesting that defendant Mallicott is a member of a motorcycle gang that Ms. Unger has represented in the past, when no such motorcycle gang exists in this county, nor has been represented in the past by Ms. Unger, to even hint of [sic] any kind of ethical conflict of interest, adds to the outrage of the state's representations. This kind of baseless accusation in and of itself supports the finding of a CR 11 violation. This court should not sanction this type of unethical intimidation.

CP 31-32. The trial court agreed, finding “[t]he ‘Hells Angels’ have a negative reputation among law-abiding citizens in the community[,]” and concluding that the DPA's misstatement was “disparaging towards Ms. Unger, potentially damaging to [h]er reputation,” and that “no amount less than \$500.00 is sufficient to remedy the disparaging and inaccurate statement and deter future conduct of this type.” CP 9-10; RP (02/19/2010) at 19-20. *See also* RP (02/16/2010) at 10-11. However, the trial court did not explain why a lesser sum or an admonishment was insufficient to remedy the alleged injury.

Additionally, defense counsel made no showing that her professional reputation suffered because of the DPA's mistaken assertion of fact. This fact is highlighted by the trial court's assumption that the DPA's mistaken assertions were "potentially damaging" to counsel's reputation. CP 9. Because the court merely speculated that the DPA's mistake harmed defense counsel's representation, it abused its discretion when it determined that \$500 was the appropriate sum to remedy the alleged injustice. Defense counsel failed to meet its burden to justify the request for sanctions as required by law. *See Biggs*, 124 Wn.2d at 202.

Finally, the State submits that the indignation of being linked to an unpopular client (*e.g.* the *Hells Angels*) is not an appropriate basis for sanctions. On occasion, the Sixth Amendment¹³ requires attorneys to represent an individual/organization that is decidedly unpopular with the community.¹⁴ *See* RPC 6.2, comment 1.

¹³ "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

¹⁴ The Attorney General to the United States, Mr. Eric Holder, recently praised those individuals who represent the unpopular as follows:

And, as you have stood by your clients, you have also stood up for, and honored, a basic principle that defines who we are as a nation of laws. As you all know, advancing the cause of justice sometimes means working for the sake of the fairness and integrity of our system of justice. This is why lawyers who accept our professional responsibility to protect the rule of law, the right to counsel, and access to our courts – even when this requires defending unpopular positions or clients – deserve the praise and gratitude of all Americans. They also deserve respect. Those who reaffirm our nation's most essential and enduring

When confronted with this situation, attorneys should adhere to the standard set forth in the ABA Defense Function Standard 4-1.6(b), that “all ... qualified lawyers should stand ready to undertake the defense of an accused regardless of public hostility toward the accused or personal distaste for the offense charged or the person of the defendant.”

1 Chap. L. Rev. 105, 108 (1998) *ESSAY: A Lawyer’s Ethical Duty to Represent the Unpopular Client*. Furthermore, the representation of an unpopular client is not an endorsement of the client’s views or behavior. See RPC 1.2(b).¹⁵

Here, the trial court imposed sanctions to remedy what it perceived as a disparaging comment and potential harm to Ms. Unger’s reputation. CP 9-10. The primary objection to the DPA’s mistake was that it linked Ms. Unger to an unsavory organization, an organization that has “a negative reputation among law-abiding citizens in the community.” CP 9-10, 30. CR 11 does not contemplate a remedy in this context. The trial court’s justification that \$500 was the appropriate amount to remedy any harm to Ms. Unger’s reputation is contrary to the principle that every

values do not deserve to have their own values questioned. Let me be clear about this: Lawyers who provide counsel for the unpopular are, and should be treated as what they are: patriots.

See <http://www.justice.gov/ag/speeches/2010/ag-speech-100319.html>.

¹⁵ RPC 1.2(b) provides: “A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”

defendant, no matter how nefarious the individual/organization, is entitled to the assistance of counsel.

In sum, the defense failed to establish a quantifiable injury. The trial judge did not articulate why \$500 was a reasonable recompense, or why a lesser sanction (*i.e.* censure) would not remedy the error or deter similar conduct in the future. Finally, the uproar surrounding the offensive association contradicts the principles of criminal defense.

The trial court's order was arbitrary and capricious, transferring wealth from the State to a private party under the guise of a deterrent. This Court should hold that the trial court abused its discretion when it sanctioned the Prosecutor's Office \$500.

3. The trial court failed to consider factors that mitigated the need for sanctions.

The purpose of CR 11 is to deter baseless filings and to curb abuses of the judicial system. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994). The trial court should reserve sanctions for "egregious conduct and not be viewed as simply another weapon in a litigator's arsenal." *MacDonald v. Korum Ford*, 80 Wn. App. 877, 892, 912 P.2d 1052 (1996).

Thus, proper notice is an essential prerequisite to CR 11 sanctions: "Prompt notice of the *possibility* of sanctions fulfills the primary purpose

of the rule, which is to deter litigation abuses.” *Biggs*, 124 Wn.2d at 198 (emphasis added). Practitioners and judges who perceive a possible violation of CR 11 must bring it to the offending party’s attention as soon as possible. *Id.* This allows the attorney to correct the offending behavior without the need to resort to sanctions. If there is no notice, CR 11 sanctions are unwarranted. *Id.*

In light of the notice and timing requirements, the trial court erred when it imposed CR 11 sanctions in this case. The DPA filed the motion for severance on February 8, 2010. CP 33. The next day, Ms. Unger’s associate filed a response on February 9, 2010. CP 28. While Ms. Unger informed the trial court that she communicated her outrage to the elected prosecutor the day she received the DPA’s motion, *see* RP (02/16/2010) at 7-8, her associate moved for sanctions before the DPA could correct the error and apologize, effectively denying the State a meaningful opportunity to remedy the situation. Because the State was not provided with an opportunity to correct its error before sanctions were contemplated and imposed, the trial court abused its discretion when it imposed a \$500 sanction.

Furthermore, the DPA admitted that she made a mistake, *see* CP 22, RP (02/16/2010) at 10, and the DPA’s supervisor, the elected prosecutor, apologized to Ms. Unger in open court, *see* RP (02/19/2010) at

18. Thus, there was no risk that the error/conduct would present itself anew. This Court should hold that the trial court did not impose the least sever sanction necessary to remedy the alleged harm. *See Biggs*, 124 Wn.2d at 197, 201-02; *Bryant*, 119 Wn.2d at 225.

B. THE TRIAL COURT ABUSED ITS DISCRETION BECAUSE IT MISAPPLIED RPC 3.3.

RPC 3.3(a) provides that “[a] lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer[.]” The remedy for a claimed violation of the Rules of Professional Conduct (RPC), is a request for discipline by the Washington State Bar Association. *State v. Lord*, 117 Wn.2d 829, 887, 822 P.2d 177 (1991).

Here, the trial court reasoned, in part, that sanctions were appropriate because the DPA “signed the pleading and thereby certified its accuracy, and because the statement was inaccurate, it was a breach of the duty of candor towards the tribunal and opposing counsel[.]” CP 9. To the extent that the trial court relied on RPC 3.3 to support the sanction order, it misapplied the rule because (1) the DPA’s inadvertent misstatements of fact were immaterial, (2) the DPA did not knowingly make false statements, and (3) the DPA corrected her mistake. This constitutes an abuse of discretion. *See Wash. State Physicians Ins. Exch. & Ass’n. v.*

Fisons Corp., 112 Wn.2d 299, 339, 858 P.2d 1054 (1993) (an order based upon an erroneous view of the law is an abuse of discretion).

1. The DPA's inadvertent misstatement of facts were immaterial.

The duty of candor is concerned with attorneys who knowingly fail to correct false statements of material fact. RPC 3.3(a)(1). "Material facts are generally those facts upon which the outcome of the litigation depends in whole or in part." *In re Disciplinary Proceedings Against Dynan*, 152 Wn.2d 601, 613-14, 98 P.3d 444 (2004) (quoting *In re Disciplinary Proceedings Against Carmick*, 146 Wn.2d 582, 600, 48 P.3d 311 (2002)). Whether a false statement is material is a matter reviewed *de novo*." *See Dynan*, 152 Wn.2d at 613.

As stated above, a factual and legal basis existed for the DPA's motion to sever the proceedings. *See* Brief of Appellant at 27-30. The material facts upon which the motion to sever depended was the information that the two defendants gave statements that inculpated themselves and one another. CP 18-19, 33-35; RP (02/19/2010) at 19. The trial court severed the proceedings on this very basis. CP 15; RP (02/26/2010) at 12, 19-21. In fact, the trial court expressly stated that the risk of a conflict of interest did not factor into its decision to sever the proceedings. RP (02/26/2010) at 12. This Court should hold that the

DPA's misstated facts, while unfortunate, were immaterial to the motion to sever.

2. The DPA did not knowingly make false statements.

The duty of candor prohibits an attorney from knowingly making false statements of fact or law. RPC 3.3(a)(1). Here, the DPA did not knowingly make false statements to the trial court. The DPA explained that she "wrote the previous motion from memory and mistakenly identified the motorcycle gang/club[.]"CP 22, 25. *See also* RP (02/16/2010) at 10. When the inadvertent misstatements are viewed in the appropriate context, it is clear that the DPA did not violate RPC 3.3. *See* Brief of Appellant at 28-29. This Court should hold that the DPA did not knowingly make false statements.

3. The DPA corrected the misstated facts.

Finally, RPC 3.3 is concerned with false statements that the parties refuse to correct. In the present case, the DPA corrected the inadvertent statements. CP 22, 25; RP (02/16/2010) at 10. Additionally, the DPA's supervisor personally apologized to opposing counsel and the trial court.¹⁶ RP (02/16/2010) at 18. This Court should hold that the DPA complied with her ethical obligation.

¹⁶ RCW 36.27.040 indicates that the Prosecuting Attorney is responsible for the acts of her deputy attorneys.

In sum, the DPA's mistaken factual assertions were not material to the motion to sever. The DPA did not knowingly make false statements to the trial court. Finally, the DPA and her supervisor made efforts to correct the misstatements and apologize. This Court should hold that the trial court abused its discretion to the extent that it relied on the RPC's to support its order for CR 11 sanctions.

VI. CONCLUSION:

While Ms. Unger may have been offended by the DPA's suggestion that she may have previously represented the *Hells Angels*, and frustrated by the DPA's concern that a conflict of interest may have existed, this is not an appropriate basis to request CR 11 sanctions. While this Court may not be impressed with the DPA's error regarding two non-material facts, the DPA's mistake does not support an award of sanctions pursuant to CR 11. CR 11 applies to filings that are not grounded in fact, law, or filed for an improper purpose. As argued above, the DPA's motion was (1) grounded in fact and law, (2) filed in good faith, and (3) appropriate, albeit worded poorly.

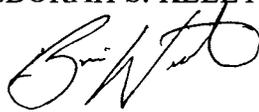
Lastly, the DPA did not violate her duty of candor to the tribunal:
(1) the DPA did not knowingly make false statements to the tribunal, (2)

the DPA corrected the error, and (3) the statements were not material to the underlying motion to sever.

For the forgoing reasons, the Clallam County Prosecuting Attorney's Office respectfully requests that this Court reverse the trial court's ruling and vacate the order that imposed sanctions.

DATED May 18, 2010.

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Deputy Prosecuting Attorney