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## WHATCOM COUNTY PUBLIC DEFENDER

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July 28, 2017

Susan L. Carlson  
Clerk of the Supreme Court  
PO Box 40929  
Olympia, WA 98504-0929

RE: Public Defender Imputed Conflicts/Changes to RPC 1.10

Dear Interested Parties:

This is not the first time that changes to RPC 1.10 have been proposed. Such changes were proposed in 2014, but not adopted when the Supreme Court amended the RPCs on March 23, 2015.

*2 Wash. Prac., Rules Practice RPC 1.0A (8th ed.), Washington Practice Series TM, Rules Practice, August 2016 Update, Karl B. Tegland, Part I. Rules of General Application, Rules of Professional Conduct (RPC, RPC1.0A.Terminology).*

(k) "Screened" denotes the isolation of a lawyer or an LLLT from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or LLLT is obligated to protect under these Rules, the LLLT Rules of Professional Conduct, or other law.

### **Screened**

[8] [Washington revision] This definition applies to situations where screening of a personally disqualified lawyer or LLLT is permitted to remove imputation of a conflict of interest under Rules 1.10, 1.11, 1.12, 1.18, or 6.5.

### **Firm**

[12] Although the definition of "firm" or "law firm" in Rule 1.0A(c) differs from the definition set forth in the Terminology section of Washington's former Rules of Professional Conduct, there is no intent to change the scope of the definition or to alter existing Washington law on the application of the Rules of Professional Conduct to lawyers in a government office.

Then, as now, the premise upon which the proposed amendments to the RPCs is based, is that under existing rules and comments, government public defenders may not be subject to the same imputed conflict rules as private or non-profit public defenders.

Then, as now, I oppose any changes to the RPCs as suggested. Such changes are unnecessary because under the existing rules and case law all public defenders are subject to the same imputed conflict rules, whether they are government, private, or non-profit public defenders.

Such changes are unwise because they would marginalize and disqualify the most experienced public defenders in a particular office.

Most importantly it is fundamentally unfair to the accused whose case would be conflicted out despite the existence of effectively screening mechanisms.

### **Statute**

It is clear that all public defenders represent individuals.

RCW 36.26.070, Duty to represent indigent defendants.

The public defender must represent, without charge to any accused, every indigent person who is or has been arrested or charged with a crime for which court appointed counsel for indigent defendants is required either under the Constitution of the United States or under the Constitution and laws of the state of Washington:

(1) If such arrested person or accused, having been apprised of his or her constitutional and statutory rights to counsel, requests the appointment of counsel to represent him or her; and

(2) If a court, on its own motion or otherwise, does not appoint counsel to represent the accused; and

(3) Unless the arrested person or accused, having been apprised of his or her right to counsel in open court, affirmatively rejects or intelligently repudiates his or her constitutional and statutory rights to be represented by counsel.

[2009 c 549 § 4043; 1984 c 76 § 18; 1969 c 94 § 7.]

### **Government Public Defenders/Public Law Offices**

In *State v. Stenger*, 111 Wn.2d 516 (1988), an *En Banc* panel said:

There is a difference between the relationship of a lawyer in a private law firm and a lawyer in a public law office such as prosecuting attorney, public defender, or attorney general; accordingly, where a deputy prosecuting attorney is for any reason disqualified from a case, and is thereafter effectively screened and separated from any participation or discussion of matters concerning which the deputy prosecuting attorney is disqualified, then the disqualification of the entire prosecuting attorney's office is neither necessary nor wise.

*Id.* at 361. The Washington Supreme Court found authority for this statement in several cases from around the country. See *Id.*, fn. 15.

### **Non-Profit Public Defenders**

The most recent case of which counsel is aware addressing imputed conflicts within the framework of a non-profit public defender office is, *State v. Reeder*, 181 Wash.App. 897 (2014). Affirmed on other issues, *State v. Reeder*, 184 Wash.2d 805 (2015).

Before trial, *Reeder* moved to substitute counsel based on an alleged conflict of interest. *Reeder* claimed that his attorney had a conflict of interest because another attorney at the law firm previously gave legal advice to *Reeder's* sister. The trial court denied the motion based on the *Stenger* analysis.

I just don't see a conflict of interest here. Even if there is one, the Court will deem it resolvable by a Chinese Wall, and Mr. Roberson is now ordered not to discuss this with anyone at all. Mr. Pang is ordered not to discuss with Roberson, Mr. Pang is ordered to advise all-any investigators that they are not to discuss it with Mr. Roberson. There's no file to warn off so that doesn't make any difference.

On appeal the court upheld the trial court and analyzed *Reeder's* claim in the context of RPC 1.7(a), RPC 1.10, RPC 1.7 and RPC 1.9. Citing *Stenger*, the court said,

*Reeder* identifies no facts showing that the attorneys did not impose a proper Chinese wall or that this Chinese wall did not resolve any alleged conflict of interest.

The law firm that *Reeder's* trial counsel were members of was SCRAP (Society of Counsel Representing Accused).

### Private Criminal Defense

In the case of *Personal Restraint of Gomez*, 180 Wn.2d 337 (2014), our State Supreme Court considered actual versus theoretical conflicts in the context of private defense counsel, in a case in which the defendant was convicted of homicide by abuse for the death of her infant son.

The defense counsel at trial is described in part as not being a public defender and working in private practice on criminal and tort matters. The defendant claimed that since defense counsel had represented her husband (the biological father of the child) at a prior dependency hearing regarding the same child and then represented her in the instant case, that this created a conflict of interest that violated her right to effective assistance of counsel. The defendant further claimed that her defense counsel actively represented conflicting interests because he violated the RPCs regarding conflicts of interest.

The court rejected both claims finding that at most there was a theoretical conflict of interest. The court distinguished between possible or theoretical conflicts versus actual conflicts.

“Defense counsel has a duty of loyalty to the defendant, and thus the right to effective assistance of counsel includes the right to conflict-free counsel. But a conflict of interest is not a per se violation of the right. See *Holloway v. Arkansas*, 435 U.S. 475, 482, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978) (stating that joint representation of codefendants is not a per se violation of the Sixth Amendment). To show a violation of her right, a defendant must show that (a) defense counsel “actively represented conflicting interests” and (b) the “actual conflict of interest adversely affected” his performance. *Cuyler v. Sullivan*, 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). Possible or theoretical conflicts of interest are “insufficient to impugn a criminal conviction.” *Id.* at 349–50, 100 S.Ct. 1708.”

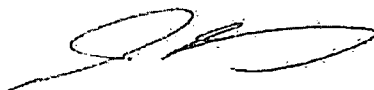
This distinction between possible or theoretical conflicts versus actual conflicts is consistent with the analysis in *Stenger*.

### Summary

No change to the RPCs is advisable or necessary. The effective screening mechanisms contemplated by *Stenger* and *Reeder* make no mention of physically separate buildings. Imposing this requirement would have a disproportionate impact on small counties like Whatcom. Actual conflicts should be sent out to conflict counsel.

Imputed conflicts need to be considered on a case by case basis. In Whatcom County, we do not automatically conflict out co-defendants. Our screening mechanism typically consists of separate attorneys and separate investigators. The court is the final arbiter. No access to co-defendant's files. No access to former client files without prior approval of the Director. What is in the best interest of each individual client is our primary focus.

Sincerely,  
WHATCOM COUNTY PUBLIC DEFENDER

A handwritten signature in black ink, appearing to read 'Jon C. Komorowski', with a long horizontal flourish extending to the left.

JON C. KOMOROWSKI  
Director

JCK/bb

cc: Washington Defender Association Directors

**Tracy, Mary**

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**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Friday, July 28, 2017 9:46 AM  
**To:** Tracy, Mary  
**Subject:** FW: Proposed Changes to RPC 1.10  
**Attachments:** rpc 1.10\_20170728092627.pdf

Forwarding.

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**From:** Jon Komorowski [mailto:JKomorow@co.whatcom.wa.us]  
**Sent:** Friday, July 28, 2017 9:37 AM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** Proposed Changes to RPC 1.10

Dear Clerk Carlson,

Please find attached my comment regarding proposed changes to RPC 1.10.

Thank you for your consideration!

Jon C. Komorowski, Director  
Whatcom County Public Defender  
215 N. Commercial Street  
Bellingham, WA 98225  
360-778-5640