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July 28, 2017

Honorable Susan Carlson
Washington Supreme Court
Temple of Justice
P. O. Box 40929
Olympia, WA 98504-0929

Re: Comment to proposed amendments to RAP 1.10 and 1.11

Because the net effect of the proposed changes to RPC 1.10 and 1.11 is to clarify that RPC 1.10 controls relative to conflicts as applied to public defense providers regardless of the form of provider, the process of addressing such conflicts as applied to public defense should also be clarified. RPC 1.10 is complex and difficult to read and understand, especially the screening rules in subsection (e). These screening devices are, as I understand it, written with large civil practice law firms in mind. However, there are some unique considerations in public defender practice such that some allowance should be considered for them.

These factors include the volume of cases and clients represented in a given year, the demographics of the client base which tends to produce multiple contacts with the legal system over time and in different roles, the relatively long life of dedicated public defender agencies, and the career movement and practice opportunity of lawyers between a limited number of defender agencies¹. Practical considerations include difficulty in contact with former clients over time and the potential need for an incoming attorney to bring his prior client list, which may be huge, into a new defender agency.

Additionally, criminal practice inherently involves obtaining and using prior criminal history of witnesses, which is generally available and obtained from both public and prosecution sources. Yet this may technically be considered "client information" if the agency or law firm has ever represented a witness, even a minor one, years in the past by a lawyer no longer in the defender office.

And, finally, while motions to disqualify counsel are common civil practice, they are not in criminal practice. Instead case law requires public defenders to note potential conflicts to the court and obtain a ruling on whether to withdraw or continue. This is commonly done by a number of defender agencies, including my own, and often involves court review of

¹ For example, in the last 22 years, Clallam Public Defender, the primary indigent criminal defense provider for that county, has been appointed on approximately 54,000 cases in a county whose population is approximately 70,000. Its staff attorneys average in excess of 15 years tenure with the office.

administrative screening devices implemented by the defender office, but may not include notice to the former client.

Those processes and the ample case law² supporting them can be incorporated into RPC 1.10 with language as follows:

in the case of lawyers or law firms who are public defenders, the screening procedures otherwise required under subsection (b) and (c) of RPC 1.10 may be satisfied without notice to the former client if former client information is protected by other adequate means, including effective administrative screening of files and lawyers. Any presumption of disqualification or release of former client information under RPC 1.10 or RPC 1.9 (b) or (c) is rebutted by prior judicial review and approval of a screening plan in the currently pending case or case(s). If available and obtained from public or prosecutorial sources, the criminal history of a former client obtained and/or used by public defenders or public defender law firms is not presumed to have been obtained from the former representation of a client.

I believe the current proposed changes will not completely address the issues unique to indigent criminal defense until and unless RPC 1.10 is further amended to include similar language.

Thank you for your time and consideration.

Very truly yours,



Harry Gasnick
Director, Clallam Public Defender

2 State v Stenger, 111 Wn. 2nd 516 (1986) "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." (emphasis added). State v. Reeder, 181 Wn. App. 897, 330 P.3d 786 (2014), affirmed on other issues State v. Reeder, 184 Wn. 2nd 805 (2015). "Although he claims that Mr. Roberson continues to owe a duty of loyalty to Ms. Cuzak, Reeder cites insufficient facts to establish that Cuzak ever reasonably believed an attorney-client relationship existed. He fails to identify any interest Cuzak had that was adverse to his own or any responsibility owed to Cuzak that materially limited his attorney's representation. 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. Reeder fails to show a conflict of interest or prejudice. Because he must demonstrate both, the trial court did not abuse its discretion in denying his request to substitute counsel."

Tracy, Mary

From: Harry Gasnick <gasnickcpd@olyphen.com>
Sent: Sunday, July 30, 2017 8:45 AM
To: Tracy, Mary
Subject: Re: comment re proposed changes to RPC 1.10 and 1.11
Attachments: comment re RPC 1-10Gasnick.pdf; gasnickcpd.vcf

hope this works.

sorry for the initial difficulties.

harry gasnick

On 07/28/2017 04:42 PM, Tracy, Mary wrote:

> I am not able to open your attachment. Please re-send.

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> Thank you,

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> Mary Tracy

> PRP Docket Clerk/Capital Case Manager

> Washington State Supreme Court

> (360) 357-2072

> mary.tracy@courts.wa.gov

>

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> -----Original Message-----

> From: Harry Gasnick [mailto:gasnickcpd@olyphen.com]

> Sent: Friday, July 28, 2017 1:43 PM

> To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>

> Subject: comment re proposed changes to RPC 1.10 and 1.11

>

> Honorable Susan Carlson

> Washington Supreme Court

> Temple of Justice

> P. O. Box 40929

> Olympia, WA 98504-0929

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> Please accept the attached pdf file as my comments to the proposed changes to RPC 1.10 and 1.11.

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> Thank you.

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> Harry Gasnick

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> director, Clallam Public Defender

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