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STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant,

v.

RICHARD CHARLES TRACER, Respondent.

STATE OF WASHINGTON, Appellant,

v.

RICHARD CHARLES TRACER, Respondent,

NOAH HARRISON, Real Party in Interest

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

BRIEF OF APPELLANT

Juelanne B. Dalzell
Prosecuting Attorney

PAMELA B. LOGINSKY
Special Deputy Prosecuting Attorney
206 10th Ave. SE
Olympia, WA 98501
(360) 753-2175

p.m. 10/15/2008

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I. ASSIGNMENTS OF ERROR

1. The trial court judge erred by appointing a special prosecuting attorney. CP 90-91.

2. The trial court judge erred by not providing the elected Jefferson County Prosecuting Attorney with reasonable notice and an opportunity to be heard before the court appointed the special prosecuting attorney.

3. The trial court judge erred by appointing an attorney who was representing criminal defendants in Jefferson County as a special prosecuting attorney for Jefferson County. CP 90-91.

4. The trial court judge erred by enforcing an unwritten settlement agreement that no attorney for the State of Washington had placed on the record. CP 91.

5. The trial court judge erred by granting the special prosecuting attorney's oral motion to amend the charge from vehicular assault to driving while under the influence of intoxicants (DUI). CP 96.

6. The trial court judge erred by accepting a guilty plea to the charge of DUI. CP 5, 96.

7. The trial court judge erred by entering judgment and sentence on the charge of DUI. CP 9, 97-98.

8. The trial court judge erred by not imposing the mandatory crime victim compensation fund assessment. CP 9, 97-98.

9. The trial court judge erred by denying the State's motion to vacate the appointment of the special prosecuting attorney. CP 178.

10. The trial court judge erred by denying the State's motion to rescind all of the actions taken by the special prosecuting attorney and vacate the judgment. CP 178.

11. The trial court judge erred by awarding compensation to Mr. Harrison for the work performed as a special prosecuting attorney. CP 184.

12. The trial court judge erred by awarding compensation to Mr. Harrison for the time Mr. Harrison spent reviewing whether his actions as a special prosecuting attorney violated the Rules of Professional Conduct. CP 184.

II. STATEMENT OF ISSUES

1. Whether a trial court may appoint a special prosecuting attorney solely because the deputy prosecuting attorney who appears for the hearing is unwilling to consummate an unwritten plea agreement?

2. Whether an attorney is qualified for appointment as a special prosecuting attorney when the attorney is representing individuals who have been charged by the State of Washington with felonies?

3. Whether actions taken by an improperly appointed special prosecuting attorney are void and must be set aside?

4. Whether an attorney who is unlawfully appointed a special prosecuting attorney is entitled to compensation for actions performed as a special prosecuting attorney?

5. Whether an attorney is entitled to compensation for telephone calls to the Washington State Bar Association (WSBA) ethics hotline and for time spent reviewing ethics opinions when these actions were solely for the benefit of the attorney, and not for the benefit of his "client"?

6. Whether a judge who, through the unlawful appointment of a special prosecutor exercises prosecutorial responsibilities in a case, should be disqualified from presiding over the case on remand?

III. STATEMENT OF THE CASE

The defendant, Richard Charles Tracer, was charged with one count of vehicular assault on May 29, 2007. CP 1. Because Tracer was related to some employees of the Jefferson County Sheriff's Office, Juelanne Dalzell, the elected Jefferson County Prosecuting Attorney, appointed a special deputy prosecuting attorney, Andrea Vingo. CP 3, 86, 134. Ms. Dalzell, however, did not recuse her office from the case as no conflict of interest existed.[1] *See* CP 20, 90, 134.

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[1]Tracer's relationship to a sheriff's department's employee did not mandate the removal of the Jefferson County Prosecuting Attorney, Juelanne Dalzell, or her office. *See State v. Finch*, 137 Wn.2d 792, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999) (defendant's motion in a capital murder case to force the recusal of the Snohomish County Prosecuting Attorney's Office due to their friendship with the murdered Snohomish County deputy sheriff relationship was properly denied as the appearance of fairness doctrine does not apply to a prosecutor's office); *State v. Perez*, 77 Wn. App. 372, 377, 891 P.2d 42, *review denied*, 127

Tracer's case was scheduled for a pre-trial hearing on May 9, 2008. CP 175. In anticipation of the pre-trial hearing, Tracer's attorney, Richard Davies and Ms. Vingo discussed a negotiated resolution of the matter. The two agreed in principle that the charge would be amended from vehicular assault to DUI. CP 134, 140-41. No agreement, however, was reached prior to the pre-trial hearing with respect to restitution, jail term to be served, length of supervision, court costs, or the date upon which the agreement would be consummated. CP 134-35,[2] 140-42, 145. The nascent agreement, moreover, was never reduced to writing and was not placed on the record by any attorney appointed by Ms. Dalzell. CP 136-37, 141-42, 145.

On May 9, 2008, Ms. Vingo was absent from court due to illness when Tracer's case was called. CP 86, 134. Deputy Prosecuting Attorney (DPA) Ted DeBray, however, appeared on behalf of the State. CP 89. DPA

Wn.2d 1014 (1995) (deputy prosecutor was also not disqualified by her friendship for the victim's cousin, who was a police officer; court noted that "[i]t is not unusual for prosecuting attorneys and law enforcement officers to be friends."). *Accord McCall v. Devine*, 334 Ill. App. 3d 192, 777 N.E.2d 405 (2002) (a close professional relationship between a prosecutor's office and a police agency does not create a conflict of interest that justifies replacing the prosecutor with a special prosecutor).

[2]As noted by Ms. Vingo, entry of the plea agreement could not occur prior to victim notification:

> If I had not been ill and I had been able to attend court on May 9, 2008, I would not have been able to reduce the charges and to accept Mr. Tracer's plea to DUI on that day as I had not been able to communicate with the victim of the collision prior to the hearing. *See* Victim Rights Act, RCW 7.69.030(2) (11)-(15), Const. art. I, § 35, and RCW 9.94A.421.

CP 135.

DeBray requested a one week continuance of the pre-trial hearing to allow for Ms. Vingo to appear. CP 89.

Tracer objected to the continuance on the grounds that he had a job offer that was contingent upon his resolving this matter today, and he was "prepared to plead guilty to a DUI with a breath test/blood test below .15." CP 89. When DPA DeBray indicated an unwillingness to accept such a plea, Judge Verser indicated that if Ms. Vingo could not appear over the noon hour he would appoint Noah Harrison as a special prosecutor. CP 90. Judge Verser did not cite any statute, case law, or court rule in support of his oral appointment of Mr. Harrison. CP 91-92. In fact, Judge Verser characterized his initial suggestion that Mr. Harrison be appointed a special prosecuting attorney as "sort of facetiously" made.[3] CP 90.

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[3]Judge Verser's entire on-the-record analysis regarding the appointment of a special prosecuting attorney is as follows:

[Judge] Verser:	All right, get a hold of her and see if she can do it. If not then maybe we can appoint a special prosecutor, Mr. Harrison.

(laughter outside of camera's view)

Harrison:	It's a conflict.
DeBray:	(jokingly turning around to face Harrison at defense attorneys' table and shrugging his shoulders) It's already been worked out. It couldn't be easier.
[Judge] Verser:	Well, yeah, I said that to Mr. Harrison sort of factiously, but I don't know why we couldn't do that tell you the truth if it's all worked out.

CP 90.

Noah Harrison was present in court when Tracer's matter was called because he was attorney of record for three defendants Joe Martinez, Anthony Bancroft, and Michael Mahle, whose cases were scheduled for hearings on May 9, 2008. CP 112-122, 149, 168, 174, 175. Mr. Harrison's initial reaction to Judge Verser's suggestion was that it would be "a conflict." CP 90. Mr. Harrison ultimately put aside his qualms on the grounds that "by agreeing to the appointment [he] would be able to help all the parties involved." CP 149.

After a brief recess, Tracer expressed a willingness to have Mr. Harrison step in as a special prosecutor. CP 91. No representative of the State made a similar assertion. CP 91. To the contrary, Ms. Dalzell concludes that Mr. Harrison's current representation of criminal defendants in Jefferson County rendered him ineligible to be appointed as a special deputy prosecuting attorney. CP 86.

Judge Verser, aware that no one from the State had appeared to confirm Tracer's attorney's representation that there was a deal to allow Tracer to plead guilty to the lesser offense of DUI, indicated that he knew Tracer's attorney "would not misrepresent anything." CP 91. Judge Verser and Tracer's attorney then engaged in the following exchange:

> [Tracer's attorney]: Right. Well I could tell you that as far as I was able to negotiate the specifics, basically, first time, mandatory minimums for penalties for a DUI with no priors.

> [Judge] Verser: I would also ask the prosecutor why they are doing it? Why are they doing that? Do they have a proof problem?
>
> [Tracer's attorney]: I have hired an accident reconstructionist and basically it is as if Mr. Tracer had had too much to drink, which he had, it was a blood test of .13, and his car was hit by a meteor. It was an accident but it turns out that it was all the other car's fault. At least initially I was, you know, and I think a lot of us are under the misimpression that vehicular assault is a strict liability statute. You are driving, you get in an accident, it's vehicular assault. That's not the case. There has got to be some ... what's the language .. there has to be some proximate cause.
>
> [Judge] Verser: Proximate cause.
>
> [Tracer's attorney]: And here, there just wasn't. There wasn't anything that Mr. Tracer could have done, whether he had drank over the legal limit or below. This car swerved this way and that and ran into him. So, that why the State was willing to drop it to what I believe is the appropriate charge which is DUI.

CP 9.

After hearing from Tracer's attorney, Judge Verser orally appointed Noah Harrison a special deputy prosecutor and continued the matter until the afternoon. CP 91. Judge Verser's appointment of Mr. Harrison was never reduced to writing, and Mr. Harrison never took an oath of office as a special prosecuting attorney.

During the lunch recess, Mr. Harrison unsuccessfully attempted to contact Ms. Vingo to discuss the Tracer case. CP 134-35, 149-150. He reviewed Tracer's expert's report and the police reports that were in Tracer's

possession. CP 93, 143, 149. Mr. Harrison, however, made no attempt to contact the victim of the charged crime to ascertain whether or not the plea was acceptable, as required by RCW 9.94A.431 and RCW 9.94A.421.[4] CP 149-150, 156-59.

When the court reconvened at 12:50 p.m., Mr. Harrison, who had not conducted any legal research regarding vehicular assault, had not reviewed any prior plea offers made by Ms. Vingo, had not reviewed Ms. Vingo's notes, and had not discussed the defense expert's report with the State's expert,[5] indicated that it appeared that a change of plea to DUI was an appropriate resolution "based on counsel's assertion that the previous prosecuting attorney had reached this deal." CP 93. Mr. Harrison then recommended an illegal deferred sentence that did not include the crime victim compensation fund assessment mandated by RCW 7.68.035(1)(a) and (2), reimbursement for the cost of defense as authorized by RCW 10.01.160, restitution as required by RCW 9.94A.753(5), or probation. CP 93.

Judge Verser then proceeded to inform Tracer of the consequences of a guilty plea to DUI, indicating that Judge Verser would be adding a requirement that Tracer reimburse the $2,295 paid to the defense expert. CP 94. Tracer initially objected to this "addition" to the plea agreement, but

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[4]Vehicular assault is included in RCW 9.94A.411(2)(a)'s list of crimes against persons.

[5]Mr. Harrison's representation of the State in this matter fell far below what is expected from a prosecuting attorney in a vehicular assault case. *See generally* CP 123.

eventually agreed to the assessment. CP 95. Ultimately, Judge Verser completed the plea negotiations by prompting Mr. Harrison to make an oral motion to amend the information from vehicular assault to DUI. CP 96. Judge Verser then accepted Tracer's guilty plea, and imposed a minimal sentence that omitted both restitution and the mandatory crime victim compensation assessment. CP 5-10; 96-98.

Ms. Dalzell promptly filed a motion to preclude Mr. Harrison from representing the State of Washington in the Tracer matter, a motion to vacate the appointment of Mr. Harrison, and a motion to vacate the judgment. CP 13-100. Although Ms. Dalzell brought a motion to shorten time, Judge Verser set the hearing on the State's motion beyond the 30-day period for filing an appeal. CP 11-12; CP 163. The State, therefore, filed an appeal from the judgment and sentence on June 2, 2008. CP 127.

The hearing on the State's motions to vacate was held on June 13, 2008. During this hearing, Judge Verser indicated that he never removed the prosecuting attorney in this case, but instead asked Mr. DeBray to stand in and to find out if a deal had been entered. 1RP 15.[6] Judge Verser denied that his appointment of Mr. Harrison when Mr. DeBray was unwilling to accept a plea to DUI was in any way an attempt to meddle in plea negotiations. 1RP

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[6]The two volumes of transcripts will be cited as follows:

1RP – June 13, 2008, hearing
2RP - June 27, 2008, hearing

17, 19; accord 2RP 5-7. Judge Verser denied the motions to vacate, indicating that he did not see that "there was any harm done" in the resolution of the case. CP 178; 1RP 20. The State filed a timely notice of appeal from this order. CP 180.

While the State's motions to vacate were pending, Mr. Harrison filed an ex parte motion for compensation for the work he performed as a special prosecutor. CP 101. Mr. Harrison requested a rate of pay of $200.00 per hour, despite the fact that Ms. Dalzell's salary and benefits amount to a rate of pay of $ 56.61 per hour. CP 101, 126. Of the five hours billed, only 1.58 hours were for services rendered up until the signing of the judgment and sentence. Of the remaining 3.42 hours, .75 hours was spent by Mr. Harrison on the WSBA ethics hotline and reading the ethics opinions sent to him by the WSBA attorney. CP 102.

The State filed timely objection to Mr. Harrison receiving any compensation. CP 105. The State further objected to Mr. Harrison receiving compensation for the time spend exploring the propriety of his conduct with the WSBA, as these actions were solely for his benefit and not for the benefit of his client. CP 151. The State also objected to the rate of pay Mr. Harrison was seeking. CP 151. Ultimately, Judge Verser awarded Mr. Harrison compensation for five hours of work at a rate of $ 65.00 per hour to be paid by Jefferson County. CP 184; 2RP 7, 9-10. The State filed a timely

notice of appeal from this order. CP 185.

All three of the State's appeals were consolidated by this court on July 31, 2008.

IV. ARGUMENT

A. A Court May Not Appoint A Special Deputy Prosecuting Attorney Solely to Consummate a Nascent Plea Proposal on a Particular Day

This case involves a fundamental issue of separation of powers. The trial judge removed this case from the control of the elected Prosecutor and her duly appointed deputies. He did this without giving the elected Prosecutor any opportunity to appoint a deputy that held her confidence. The judge's sole reason for this action was his desire to consummate an immediate plea agreement. The judicial branch cannot assume control of the executive branch's duties, simply because it disagrees with the manner in which those duties are being performed.

1. Separation of Powers

The separation of powers doctrine is not specifically enunciated in either the Washington or Federal Constitutions, but is universally recognized as deriving from the tripartite system of government established in both Constitutions. *State v. Blilie*, 132 Wn.2d 484, 489, 939 P.2d 691 (1997), citing Wash. Const. Arts. II, III, and IV; U.S. Const. Arts. I, II, and III; *Carrick v. Locke*, 125 Wn.2d 129, 134-35, 882 P.2d 173 (1994). When

separation of powers challenges are raised involving different branches of state government, only the state constitution is implicated. *Carrick*, 125 Wn.2d at 135 n.1. However, federal principles regarding the separation of powers doctrine are relied upon in interpreting and applying the state's separation of powers doctrine. *State v. Wadsworth*, 139 Wn.2d 724, 735, 991 P.2d 80 (2000); *Blilie*, 132 Wn.2d at 489.

While the separation of powers doctrine does not require that one branch of government be hermetically sealed off from another, the doctrine does seek to ensure that the fundamental functions of each branch remain inviolate. To that end, the doctrine precludes the assignment to, or assumption by, one branch of a task that is more properly accomplished by other branches. The doctrine also prohibits any law impermissibly threatens the institutional integrity of another branch. *Carrick*, 125 Wn.2d at 135; *In re Juvenile Director*, 87 Wn.2d 232, 239-40, 552 P.2d 163 (1976).

A violation of the separation of powers doctrine does not directly damage the rights of the people. The damage caused by a separation of powers violation accrues directly to the branch invaded, causing harm to institutional interests. *Carrick*, 125 Wn.2d at 136. As stated by the United States Supreme Court:

> The interference of the court with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to

be given to them.

Decatur v. Pudding, 39 U.S. (14 Pet.) 497, 516 (1840).

When the violation consists of the judiciary's encroachment on the executive branch's prosecutorial authority, the end result can be tyranny. *See, e.g.,* James Madison, *The Federalist* no 47, at 2:92-93 (1788) ("The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."); Montesquieu, *The Spirit of the Laws*, 38 Great Books of the Western World 70 (Hutchins ed. 1952) ("Again there is no liberty if the judiciary power be not separated from the legislative and executive. . . . Were it joined to the executive power, the judge might behave with violence and oppression."). The California Court of Appeals, consistent with these sentiments, has stated that the spectacle of a judge, who attempted to assume the rule of both judge and prosecutor in order to move a prosecution forward, "should be repugnant to anyone dedicated to our system of jurisprudence." *People v. Municipal Court for the Ventura Judicial District of Ventura County*, 27 Cal. App. 3d 193, 103 Cal. Rptr. 645, 652 (1972).

2. The Prosecuting Attorney is a Member of the Executive Branch

The Washington Constitution vests the criminal prosecution function in the constitutionally created locally elected-executive branch office of prosecuting attorney. Const. art. XI, §§ 4, 5; *State v. Campbell*, 103 Wn.2d

1, 25-26, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985) (recognizing prosecuting attorney as executive branch official); *State v. Cascade District Court*, 94 Wn.2d 772, 781-782, 621 P.2d 115 (1980) (same); *State v. Thorne*, 129 Wn.2d 736, 762, 921 P.2d 514 (1996) (same).

This same constitution assigns the Legislature the task of determining the duties of the prosecuting attorney. *See* Const. art. XI, § 5 (Legislature to prescribe the duties of the prosecuting attorney). Among the duties assigned to the prosecuting attorney is the obligation to "[p]rosecute all criminal and civil actions in which the state or the county may be a party." RCW 36.27.020(4).

Among the functions vested solely in the executive branch prosecutor is the decision whether to initially file charges, the decision what charges to file, and the decision of when to file charges. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999) ("A prosecutor's determination to file charges, to seek the death penalty, or to plea bargain are executive, not adjudicatory"). *Accord Greenlaw v. United States*, ___ U.S. ___, 128 S. Ct. 2559, 2565, 171 L. Ed. 2d 399 (2008) ("This Court has recognized that 'the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case.' *United States* v. *Nixon*, 418 U.S. 683, 693, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)"); *People v. Adams*, 43 Cal. App. 3d 697, 117 Cal. Rptr. 905, 911-12 (1974) (the discretion

whether or not to file a charge is not in any way "an exercise of judicial power or function").

In addition, the prosecutor is vested with the sole authority to engage in plea negotiations. *Finch*, 137 Wn.2d at 810. The court's role with respect to such negotiations is the authority to reject a plea bargain that is not in the interests of justice, and to rule upon any necessary amendment to the information. *See, e.g.*, *State v. Wakefield*, 130 Wn.2d 464, 471, 925 P.2d 183 (1996); *State v. Haner*, 95 Wn.2d 858, 631 P.2d 381 (1981); RCW 9.94A.431; RCW 9.94A.421. A court may not dismiss charges because a prosecutor refuses to engage in plea negotiations, as there is no requirement that the prosecutor engage in such a practice. *See State v. Crawford*, 159 Wn.2d 86, 102, 147 P.3d 1288 (2006); *State v. Moen*, 150 Wn.2d 221, 76 P.3d 721 (2002); *accord Weatherford v. Bursey*, 429 U.S. 545, 561, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977) ("the prosecutor need not [plea bargain] if he prefers to go to trial"; "[i]t is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty"). It should be equally clear, therefore, that a court may not replace a prosecutor with a special prosecuting attorney solely because the prosecutor is unwilling to consummate a nascent plea proposal on a particular day. *See State v. Eckelkamp*, 133 S.W.3d 72 (Mo. App. 2004) (trial court lacked the authority to appoint a special prosecutor to enter into plea agreement discussions with

the assistant public defender)

3. Statutory Authority for the Appointment of a Special Prosecuting Attorney

In conformity with the 1889 constitution's designation of the prosecuting attorney as an independently elected officer, the legislature took affirmative action to limit the ability of the courts to remove the people's chosen lawyer. *See generally* Bal. Code, §§ 466, 471, 4755. Within a decade, the Supreme Court had the opportunity to consider the propriety and efficacy of the legislature's action.

In *State v. Heaton*, 21 Wash. 59, 56 P. 843 (1899), a prosecutor moved to dismiss an information that he had filed against a defendant for forgery after the defendant made full restitution. One superior court judge granted this motion, while two other superior court judges convened a grand jury to investigate whether the prosecuting attorney had acted corruptly. While that grand jury exonerated the prosecutor of any wrongdoing, finding that the prosecutor acted in the best interests of the county relative to the dismissal of the suit, it nonetheless, indicated that this defendant should be prosecuted to the fullest extent of the law and it recommended that a special counsel be appointed by the court to advise the grand jury as the prosecuting attorney was compromised by his prior position that charges should be dismissed. This request was granted by the superior court over the objections of the prosecuting attorney. *Heaton*, 21 Wash. at 60-61.

Ultimately the grand jury indicted the defendant, but this indictment was set aside on the grounds that the special counsel was not required or permitted by law to attend the grand jury. *Id.*, at 59. On appeal, a unanimous Supreme Court affirmed the dismissal of the indictment. In its opinion, the Court recognized that the prosecuting attorney's office is defined and his authority comes from the Washington constitution. The prosecuting attorney must exercise his independent judgment as to the prosecution or dismissal of an information or indictment and "his discretion in the exercise of his duties must not be in any wise controlled by legal consequences unpleasant or unfavorable to himself." *Heaton*, 21 Wash. at 62.

The Court went on to hold that a superior court judge may only replace a prosecuting attorney as authorized by statute. The only statutory grounds for replacing a prosecuting attorney with a special prosecuting attorney is when the prosecuting attorney fails, from sickness or other cause, to attend court. *Heaton*, 21 Wash. at 61-62.

The statutory grounds for replacing a prosecuting attorney with a special prosecuting attorney have remained essentially unchanged. RCW 36.27.030 now provides that:

> When from illness or other cause the prosecuting attorney is temporarily unable to perform his duties, the court or judge may appoint some qualified person to discharge the duties of such officer in court until the disability is removed.

> When any prosecuting attorney fails, from sickness or other cause, to attend a session of the superior court of his county, or is unable to perform his duties at such session, the court or judge may appoint some qualified person to discharge the duties of such session, and the appointee shall receive a compensation to be fixed by the court, to be deducted from the stated salary of the prosecuting attorney, not exceeding, however, one-fourth of the quarterly salary of the prosecuting attorney: PROVIDED, That in counties wherein there is no person qualified for the position of prosecuting attorney, or wherein no qualified person will consent to perform the duties of that office, the judge of the superior court shall appoint some suitable person, a duly admitted and practicing attorney-at-law and resident of the state to perform the duties of prosecuting attorney for such county, and he shall receive such reasonable compensation for his services as shall be fixed and ordered by the court, to be paid by the county for which the services are performed.

Case law generally equates "other cause" to a conflict of interest. *See Westerman v. Carey*, 125 Wn.2d 277, 892 P.2d 1067 (1994) (prosecutor disagreed with his client's position); *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988) (defendant was prosecutor's former client); *State v. Tolias*, 84 Wn. App. 696, 929 P.2d 1178 (1997), *rev'd on other grounds*, 135 Wn.2d 133, 954 P.2d 907 (1998) (prosecutor had mediated dispute that gave rise to criminal charges). Case law further indicates that an appointment pursuant to RCW 36.27.030 is improper if the prosecuting attorney has already appointed a suitable person to act. *See Herron v. McClanahan*, 28 Wn. App. 552, 625 P.2d 707, *review denied*, 95 Wn.2d 1029 (1981).

A prosecutor's decision to not file charges, to not reduce the filed charges, or to not engage in plea negotiations in a particular case does not

create a conflict of interest that triggers RCW 36.27.030. *See generally Venhaus v. Pulaski County*, 186 Ark. 229, 691 S.W.2d 141 (1985) (a prosecutor's refusal to file charges against a person the prosecutor believed to be innocent not grounds for the prosecutor's replacement); *State v. Iowa District Court for Johnson County*, 568 N.W.2d 505, 509 (Iowa Sup. 1997) (a prosecutor's controversial professional judgment about the appropriateness of pressing charges does not constitute a conflict of interest disqualifying him); *People v. Herrick*, 216 Mich. App. 594, 550 N.W.2d 541, 542 (1996) (a court commits an error of law in ruling that a prosecutor's decision not to prosecute constitutes a conflict of interest authorizing the appointment of a special prosecutor); *State v. Eckelkamp*, 133 S.W.3d 72 (Mo. App. 2004) (trial court lacked the authority to appoint a special prosecutor to enter into plea agreement discussions with the assistant public defender); *State v. Heaton, supra.*

Judge Verser found that the absence of a deputy prosecuting attorney, the absence of an elected prosecutor appointed special deputy prosecuting attorney, or the absence of the elected prosecuting attorney are all sufficient to authorize the court to appoint a statutory special prosecuting attorney. 1RP 19. Thus, he found Ms. Vingo's absence from the May 9th hearing, despite the presence of another representative of the elected Jefferson County Prosecutor, provided a sufficient basis for appointing a special prosecuting

attorney. *See* 1RP at 19. This conclusion, however, is contrary to the plain language of RCW 36.27.030.

Title 36 RCW governs counties. Chapter 36.16 RCW deals with elected county officers in general and contains a general authorization for the appointment of deputies. *See* RCW 36.16.030; RCW 36.16.070. A separate chapter sets out the duties and authority of each of the elected officers. *See* Chapter 36.21 - 36.24 RCW; Chapter 36.27 - 36.28 RCW; Chapter 36.29 - 32 RCW.

Chapter 36.27 RCW pertains to prosecuting attorneys. Chapter 36.27 RCW uses the terms "prosecuting attorney", "deputy prosecuting attorney", and "special prosecuting attorney" in different sections. *See, e.g.* RCW 36.27.040 (authorizes "the prosecuting attorney" to appoint "one or more deputies" and "one or more special deputy prosecuting attorneys"); RCW 36.27.060 (authorizes "deputy prosecuting attorneys" of moderate size counties to "serve part time and to engage in the private practice of law if the county legislative authority so provides", but not "the prosecuting attorney"). These three terms must each refer to different people. *See, e.g., State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002) ("[w]hen the legislature uses different words within the same statute, we recognize that a different meaning is intended."); *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (it is "well established that when 'different words

are used in the same statute, it is presumed that a different meaning was intended to attach to each word.'" (quoting *State ex rel. Pub. Disclosure Comm'n v. Rains*, 87 Wn.2d 626, 634, 555 P.2d 1368 (1976))).

RCW 36.27.005 and RCW 36.27.010 clearly limit the application of the phrase "the prosecuting attorney" to the person who is elected to serve as the prosecuting attorney by the people of the county. Since RCW 36.27.030 only uses the phrase "the prosecuting attorney", the absence of a "deputy prosecuting attorney" or a "special deputy prosecuting attorney" does not authorize a court to appoint a special prosecuting attorney. This conclusion is only bolstered by the fact that the court-appointed special prosecuting attorney is to be compensated from "the stated salary of the prosecuting attorney." RCW 36.27.030.

The linguistic analysis only reinforces the basic constitutional considerations. The elected prosecutor is the individual chosen by the people to exercise their sovereign power of prosecution. Deputy prosecutors, whether regular or special, are the prosecutor's agents in performing this function. *See* RCW 36.27.040. If one of these agents fails to perform his or her duties, corrective measures should be taken by the elected prosecutor. It is only if the prosecutor herself fails to perform her duties that there is any need for an outsider (the judiciary) to act.

As eloquently stated by the Illinois Court of Appeals

> "[R]emoval of a duly elected public official is a drastic measure for it disenfranchises the very electorate who, through its votes, has spoken. As respondent notes, the Office of the State's Attorney is an office of constitutional dimension reposing in the executive branch of government. Under our tripartite system of government that branch is co-equal to the legislature as well as the judiciary. And while the legislature has empowered judges to disqualify the State's Attorney in certain limited situations, respect for the doctrine of separation of powers cautions against the exercise of such power unless clearly warranted."

McCall v. Devine, 334 Ill. App. 3d 192, 777 N.E.2d 405, 416-17 (2004) (quoting a trial court judge).

Here, "the prosecuting attorney" appeared for the pretrial hearing through her deputy, Ted DeBray. While DPA DeBray was unwilling to engage in plea negotiations with Tracer during the hearing, neither Tracer nor Judge Verser had the authority to compel the State to engage in negotiations. Judge Verser had the option of granting the State's requested one-week continuance of the pretrial hearing or of denying the motion and calling the case for trial on May 19th. If Judge Verser opted for the latter option, the sole authorized sanction under Jefferson County LCrR 4.9[7] for the State's failure to resolve the case on May 9th, was the imposition of a "jury administrative reimbursement fee" if the case was not tried on May 19th. Dismissal of charges was neither requested by Tracer, nor was authorized by

[7]Jefferson County LcrR 4.9 is reproduced in appendix A.

existing case law. *See, e.g., State v. Moen, supra* (charges cannot be dismissed pursuant to CrR 8.3(b) based upon a prosecutor's refusal to plea bargain); *State v. Rohrich*, 110 Wn. App. 832, 43 P.3d 32 (2002), *rev'd on other grounds*, 149 Wn.2d 647, 655-56, 71 P.3d 638 (2003) (only prejudice to a defendant's ability to have a fair trial will support the dismissal of charges under CrR 8.3(b); inability to plea bargain or to potentially serve sentences concurrently will not support a dismissal).

Since none of the statutory reasons for appointing a special prosecutor were present in the instant case, Judge Verser's appointment of Noah Harrison was void.

4. Procedure for Appointing a Special Prosecuting Attorney

The Washington statute regarding the appointment of a special prosecuting attorney sets forth no procedure. The Fourteenth Amendment, however, requires that deprivation of life, liberty, or property by adjudication must be preceded by notice and an opportunity to be heard.

Ms. Dalzell, as the duly elected prosecuting attorney, has an interest in the office of Jefferson County Prosecuting Attorney that may only be diminished during her term in accordance with the law. As noted by the Arkansas Supreme Court,

> Incumbent prosecuting attorneys, like all Constitutional officers, have the right and the duty to perform the functions of their office until they are legally removed from office or legally disqualified to act.

Venhaus v. Pulaski County, 286 Ark. 229, 691 S.W.2d 141, 143 (1985). Absent such removal or disqualification, a judge lacks the authority to appoint a special prosecutor. *Id.*[8] Removal, as discussed below, may only occur after notice and an opportunity to be heard.

Ms. Dalzell also has a property interest in her salary, which RCW 36.27.030 identifies as the source of payment for any special prosecuting attorney. Not surprisingly, every court that has considered the prosecutor's property interest has determined that a special prosecutor may not be appointed by a court without providing notice and an opportunity for the elected prosecuting attorney to be heard on the appointment. *See, e.g.*, *State ex rel. Ilvedson v. District Court*, 70 N.D. 17, 291 N.W. 620, 627-28 (1940); *In re Disqualification of Cirigliano*, 105 Ohio St. 3d 1223, 826 N.E.2d 287 (2004); *Lattimore v. Vernor*, 142 Okla. 105, 288 P. 463 (1930); *In re Guerra*, 235 S.W.3d 392, 420-24 (Tex. App. 2007) (notice must be given to the district attorney unless the grand jury on its own initiative is investigating the district attorney for possible criminal wrongdoing); *State ex rel. Preissler v. Dostert*, 163 W. Va. 719, 260 S.E.2d 279 (1979). A failure to give the required notice to the elected prosecuting attorney is fatal to the appointment. *Cirigliano*, 826 N.E.2d at 291; *State ex rel. Brown v. Merrifield*, 182 W. Va.

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[8]Judge Verser adamantly denied that he removed Ms. Dalzell prior to appointing Mr. Harrison. *See* 1RP 14-15 ("Well, there's a couple of things that come to mind here. The first is the idea that somehow I removed the Prosecutor. I did not. And, nowhere in the transcript of the proceedings do I say I remove the Prosecuting Attorney. I didn't do that.").

519, 389 S.E.2d 484, 487 (1990). A failure to provide the required notice to the electing prosecuting attorney may also give rise to judicial discipline. *See In the Matter of Spencer*, 798 N.E.2d 175, 183 (Ind. 2003).

These cases are consistent with the recent contempt case of *State v. Jordan*, ___ Wn. App. ___, 190 P.3d 516, 2008 Wash. App. LEXIS 2057 (2008). In *Jordan*, the defendant's appointed counsel failed to appear at a pretrial omnibus hearing. Without notice to the appointed counsel, the trial court entered an order to show cause in which it found the appointed counsel in contempt of court and ordered the counsel to serve two days in jail or pay a fine of $150.00. *Jordan*, 190 P.3d 516, at ¶ 2. This sanction was vacated by the appellate court on the grounds that the trial court violated the appointed counsel's due process rights by imposing a sanction without first finding out the reason for counsel's absence. *Id.*, at ¶¶ 6 and 13.

Here, Judge Verser provided no notice to Ms. Dalzell of his intention to appoint a special prosecutor due to Ms. Vingo's absence from court. Judge Verser did not set a time for Ms. Dalzell to appear in court to rebut the need for a special prosecutor. The 23 minute interval[9] between Judge Verser's facetious on-the-record statement that Mr. Harrison should be appointed as a special prosecutor and the actual oral appointment of Mr. Harrison as a special prosecutor was insufficient to provide Ms. Dalzell with a meaningful

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[9]*Compare* CP 89-90 (setting the time of the proceeding at 9:52 a.m.) *with* CP 91 (setting the time of the proceeding at 10:15 a.m.).

opportunity to appear in court. This is because neither the Washington Constitution, nor the statues governing prosecuting attorneys bar the office holder from leaving the state or the county for continuing legal education, other business, or pleasure.[10]

5. An Individual Who is Currently Representing Criminal Defendants is Not Qualified to Serve as a Special Prosecuting Attorney

RCW 36.27.030 limits the court's selection of a substitute to someone who is "qualified" to serve. An attorney who is also representing criminal defendants in the same court is not "qualified" to serve as a special prosecutor.

RPC 1.7(a) provides that:

> Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client:
>
> . . . .

Official Comment no. 6 to RPC 1.7 reinforces the plain language of the rule stating that "absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even

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[10]Case law appears to accept the fact that prosecutors are entitled to take vacations, attend classes, and see to their physical well-being. *Cf. State v. Kelley*, 64 Wn. App. 755, 828 P.2d 1106 (1992) (a prosecutor's scheduled vacation may provide grounds for continuing a trial date beyond the time-period contemplated by CrR 3.3); *State v. Greene*, 49 Wn. App. 49, 742 P.2d 152 (1987) (continuance of trial was proper due to prosecutor's illness).

when the matters are wholly unrelated." If a lawyer is asked to represent a client who is directly adverse to another client, the lawyer must decline the representation absent written informed consent from both clients. *See* RPC 1.7(b)(4); Official Comment no. 3 to RPC 1.7. This obligation applies even when a tribunal seeks to appoint the attorney to the case. *See* RPC 6.2(a) (good cause for declining an appointment is when representing the client is likely to result in violation of the Rules of Professional Conduct); Official Comment No. 2 to RPC 6.2 (same).

This court recognizes that RPC 1.7(a) is violated when an individual serves as a special deputy prosecuting attorney on behalf of the State of Washington, simultaneously represents an individual who stands charged with crimes by the State of Washington. *See State v. Tjeerdsma*, 104 Wn. App. 878, 884-85, 17 P.3d 678 (2001). The WSBA's Rules of Professional Conduct Committee also acknowledges that a prosecutor pro tem may not simultaneously represent criminal defendants in the same court in which the prosecutor pro tem serves. WSBA Informal Opinions 1766 (1997).[11]

Numerous authorities agree that an attorney who represents criminal defendants should not contemporaneously represent the government in criminal cases. *See, e.g., State v. White*, 114 S.W.3d 469 (Tenn. 2003) (it is an actual conflict of interest for an attorney to serve as a prosecutor and as

[11]The full text of WSBA Informal Opinion 1766 (1997) is reproduced in appendix B.

a defense attorney in the same county); *State v. Brown*, 853 P.2d 851,856-59 (Utah 1992) (loyalty is compromised when an attorney represents criminal defendants at the same time that he has prosecutorial responsibilities); *Howerton v. State*, 640 P.2d 566, 567 (Okla. Crim. App. 1982) ("A public prosecutor has as his client the state. It is obvious, therefore, that he cannot appear for any defendant in cases in which the state is an adverse party. . .") (citing A.B.A. Comm. on Professional Ethics and Grievances, Formal Op. 142 (1935)); A.B.A. Defense Function Standard 4-3.5(g) ("Defense counsel should not represent a criminal defendant in a jurisdiction in which he or she is also a prosecutor."); A.B.A. Prosecution Function Standard 3.13(b) ("A prosecutor should not represent a defendant in criminal proceedings in a jurisdiction where he or she is also employed as a prosecutor."); J. Burkoff, *Criminal Defense Ethics 2d: Law and Liability* § 6:11, at 304-307 (2005 ed.) (surveying cases related to serving simultaneously as a criminal defense lawyer and a prosecutor).

The same rule applies to special prosecutors or prosecutors pro tem. *See, e.g.,* Utah State Bar Ethics Advisory Opinion Committee: Opinion No. 1998-04 (1998) (a private practitioner who has been appointed as special deputy county attorney to investigate and prosecute a single matter may not represent criminal defendants in any jurisdiction in Utah while he is also acting as a special prosecutor for a county); Wisconsin State Bar Standing

Committee on Professional Ethics, Formal Opinion E-81-5, 54 Wis. Bar Bull. No. 8, at 68 (Aug. 1981) (a person appointed by the court as a district attorney pro tempore may not act as defense counsel in criminal matters in the same county); J. Hall, *Professional Responsibility in Criminal Defense Practice* § 13.8 at 536 (3rd ed. 2005) ("Part-time prosecutors should not be defending criminal cases even in other counties or the same county in the same state. Part-time prosecutors still have the state as a regular client in one county. The rule should seem obvious, but obviousness does not prevent violations.").

The conflict arising from Mr. Harrison's representation of defendants Joe Martinez, Anthony Bancroft, and Michael Mahle might not have barred his services as a court appointed special prosecutor if Mr. Harrison obtained informed consent from each of these defendants, from Mr. Harrison's other criminal defendants, and from the State of Washington. *See* RPC 1.7(b)(4) ("Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: . . . (4) each affected client gives informed consent, confirmed in writing. . ."). No representative of the State of Washington,[12] however, ever tendered written consent to Mr.

[12]Early ethics opinions and case indicated that governments could not waive conflicts of interest. *See, e.g.,* A.B.A. Comm. on Professional Ethics and Grievances, Formal Op. 16 (1929). More recent opinions opine that governments can waive conflicts of interest. *See, e.g.,* New York State Formal Opinion 629 (1992). Since the current Washington Rules of Professional Conduct authorize a lawyer to represent a government agency when otherwise disqualified when "the appropriate government agency gives its informed consent, confirmed in writing to the representation", RPC 1.11(a)(2), it appears that Washington adheres to the

Harrison's serving as a prosecutor while simultaneously serving as a criminal defense counsel and Judge Verser lacked the authority to compel the State to accept a conflict-ridden representative. *See White*, 114 S.W.3d at 480 (Tenn. RPC 1.7 requires written consent from both the state and the criminal defendant client before an attorney could simultaneously serve as an assistant district attorney general and criminal defense lawyer; a defendant cannot unilaterally waive such a conflict).

6. All Actions Performed By an Unqualified and Unlawfully Appointed Special Prosecuting Attorney are Null and Void

A party is entitled to be relieved of the acts performed by an attorney who is not authorized to represent the party. *See* RCW 2.44.020 (when an attorney purports to appear for a party without that party's permission, the party may be relieved of the consequences of that attorney's actions). This rule applies to unlawfully appointed special prosecuting attorneys. *See State v. Heaton*, *supra* (indictment obtained by improperly appointed special prosecutor must be quashed). *Accord United States v. Providence Journal Company*, 485 U.S. 693, 99 L. Ed. 2d 785, 108 S. Ct. 1502 (1988) (where an attorney purportedly representing the United States is without authority to do

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"governments can waive conflicts of interest" school. The ethics rules, however, do not identify which person (the governor, the attorney general, or an elected prosecuting attorney) or which body (the Legislature) is authorized to waive a conflict of interest when the client is the "State of Washington." This case does not provide a vehicle for answering this complex question, as neither Judge Verser nor Mr. Harrison obtained a written consent from anyone purporting to act on behalf of the State of Washington.

so, the court lacks jurisdiction over the matter); *Smith v. State*, 42 Okla. Crim. 308, 275 P. 1071, 1073 (1929) (ordering a new trial because "[t]he appointment of James W. Smith as special prosecutor being without authority of law, all his acts are void."); *Brunty v. State*, 22 Va. App. 191, 468 S.E.2d 161, 164 (1996) (holding that a final order that was signed by an illegally appointed "special prosecutor" must be vacated as it "was entered improperly, without endorsement of counsel of record").

Here, Mr. Harrison's appointment as a special prosecutor was not authorized by statute and was entered in violation of Ms. Dalzell's due process rights. Mr. Harrison's agreement to accept a guilty plea to the included offense of DUI could not bind the State of Washington, and his oral amendment of the vehicular assault charge to DUI is also void. *See generally State v. Sanchez*, 146 Wn.2d 339, 348, 46 P.3d 774 (2002) (a prosecutor is not bound by a plea agreement entered between the defendant and any other person); *Grossman v. Will*, 10 Wn. App. 141, 151, 516 P.2d 1063 (1971) ("an unauthorized consent judgment is not a valid judgment at all").

This conclusion is not undermined by Tracer's attorney's May 9, 2008, claim that he had reached an agreement with Ms. Vingo. To be binding upon the State, Ms. Vingo's offer needed to be in writing or placed on the record by Ms. Vingo. *See generally Eddleman v. McGhan*, 45 Wn.2d 430, 432, 275 P.2d 729 (1954); *Long v. Harrold*, 76 Wn. App. 317, 884 P.2d 934

(1994); *Bryant v. Palmer Coking Coal Co.*, 67 Wn. App. 176, 179, 858 P.2d 1110 (1992), *review denied*, 120 Wn.2d 1027 (1993); CR 2A; RCW 2.44.010.

To be an agreement, all material terms needed to be resolved. *See, e.g., Lavigne v. Green*, 106 Wn. App. 12, 23 P.3d 515 (2001); *Howard v. Dimaggio*, 70 Wn. App. 734, 855 P.2d 335 (1993). Tracer's counsel's affidavit makes clear that prior to the May 9, 2008, hearing, no agreement had been reached regarding restitution to the victim of the collision, recoupment of expert witness fees, or the term of suspension. CP 142, ¶ 142. In other words, there was no enforceable plea agreement to be executed on May 9, 2008. *See State v. Yates*, 161 Wn.2d 714, 741, 168 P.3d 359 (2007), *cert. denied*, 128 S. Ct. 2964 (2008) (a defendant does not have a right to enforce a plea proposal); *State v. Wheeler*, 95 Wn.2d 799, 631 P.2d 376 (1981) (only the defendant's plea, or some other detrimental reliance upon the arrangement, renders a plea proposal irrevocable).

Since no binding agreement existed between Tracer and the State and Mr. Harrison had no authority to enter into an agreement on behalf of the State of Washington, the trial court was without authority to accept a guilty plea to any offense other than that contained in the information filed by Ms. Dalzell's office. *See generally State v. Bowerman*, 115 Wn.2d 794, 801, 802 P.2d 116 (1990) (a defendant may not plead guilty to only a portion of a

count). The judgment and sentence imposed for the crime of DUI, therefore, is void and must be vacated. *See, e.g., In re Wesley v. Schneckloth*, 55 Wn.2d 90, 93-94, 346 P.2d 658 (1959); CrR 7.8(b)(4) (a final judgment may be vacated if it is void).

B. An Unqualified and Unlawfully Appointed Special Prosecuting Attorney is Not Entitled to Compensation

Judge Verser's appointment of Mr. Harrison was void as the statutory grounds for appointing a special prosecutor did not exist, and Judge Verser did not provide Ms. Dalzell with notice and an opportunity to be heard regarding the diminishment of her office. Washington case law is clear that an improperly appointed special prosecutor is not entitled to compensation. *Osborn v. Grant County*, 130 Wn.2d 615, 628, 926 P.2d 911 (1996); *Hoppe v. King County*, 95 Wn.2d 332, 340, 622 P.2d 845 (1980). This rule is consistent with the holdings of other jurisdictions. *See, e.g.*, *Venhaus*, 691 S.W2d at 144; *Venhaus v. Hale*, 281 Ark. 390, 663 S.W.2d 930, 932 (1984); *Mills v. Board of County Commissioners of Minidoka County*, 35 Idaho 47, 204 P. 876 (1922).

Mr. Harrison, moreover, labored under an actual conflict of interest during his representation of the State of Washington. Case law establishes that an attorney who represents a client while under an actual conflict of interest forfeits the right to any attorney's fees. *See State v. O'Connell*, 83 Wn.2d 797, 523 P.2d 872 (1974). This rule is particularly applicable when,

as here, the attorney did not have the client's permission to act. *See* RCW 2.44.020 (attorney who represents a party without that party's permission is entitled to have the attorney repair the injury to the party). Judge Verser, therefore, erred by awarding any compensation to Mr. Harrison.

Finally, even when an appointment of a special prosecutor is authorized, courts must insure that the requested fees are reasonable, under the factors enumerated in RPC 1.5. *Osborn*, 130 Wn.2d at 628. Under this standard, Mr. Harrison's fee requested should have been denied.

Mr. Harrison did not exercise the standard of care expected of a prosecuting attorney assigned to a serious offense. Before entering into the plea agreement, Mr. Harrison: (1) did not review the prosecutor's case file or Ms. Vingo's notes; (2) did not review or discuss the defense expert's report with the State's expert; (3) did not review the prosecutorial standards contained in RCW 9.94A.431; (4) did not contact the victim to ascertain whether or not the plea was acceptable, as required by RCW 9.94A.431 and RCW 9.94A.421; (5) did not establish whether restitution was owed to the victim for his out-of-pocket expenses or to the victim's insurance company as required by RCW 9.94A.753(5); and (6) did not request the imposition of the victim compensation assessment of $250.00 mandated by RCW 7.68.035(1)(a) and (2). *Compare* CP 149 (declaration of Mr. Harrison), *with* CP 123 (Certification of King County Senior Deputy Prosecuting Attorney).

Mr. Harrison requested payment for the time he spent exploring his exposure to WSBA discipline. Mr. Harrison's calls to the WSBA ethics hotline were solely for his benefit,[13] not for that of his unwilling client, the State of Washington. *Cf. Chuong Van Pham v. Seattle City Light*, 159 Wn.2d 527, 541, 151 P.3d 976 (2007) ("The court should discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time.").

Mr. Harrison billed for other "work" performed after the May 9, 2008, hearing. As Judge Verser's appointment of Mr. Harrison was solely for the purpose of transforming Ms. Vingo's tentative plea proposal into a consummated plea agreement,[14] all other activities exceeded the time limits imposed by the "client" and/or the circumstances. *See* RPC 1.5(a)(5). In addition, all actions taken by Mr. Harrison subsequent to May 9th, were duplicative of the actions taken by the authorized attorneys for his "client", the State of Washington.

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[13]The rule governing the ethics hotline, APR 19(e), is reproduced in appendix C.

[14]Judge Verser set forth his understanding of the oral appointment when Ms. Dalzell requested an order barring Mr. Harrison from taking any further actions on behalf of the State of Washington:

> I just appointed him the Special Pros– Special Deputy Prosecutor for a limited purpose on that Friday. But, uh, I don't know if you need an order excluding him from anything. He's no longer Deputy Prosecuting – Special Deputy – or, Special Prosecuting Attorney in this case.

CP 164.

C. This Matter Should Be Remanded to a Different Judge

Granting the State's appeal will necessarily return this matter to the trial court. The State believes that upon remand, the case should be assigned to someone other than Judge Verser.

Reassignment of a case on remand is justified

> 'if the judge has shown a personal bias or if "unusual circumstances' exist." *McSherry v. City of Long Beach,* 423 F.3d 1015, 1023 (9th Cir. 2005). Such unusual circumstances include:
>
> > "(1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness."
> >
> > . . . If either of the first two factors is present, reassignment is appropriate.
>
> *McSherry*, 423 F.3d at 1023 (quoting *United States v. Sears, Roebuck & Co., Inc.,* 785 F.2d 777, 779-80 (9th Cir.), *cert. denied,* 479 U.S. 988 (1986)).

Saldivar v. Momah, COA No. 34891-8-II, ___ Wn. App. ___, ___ P.3d ___, 2008 Wash. App. LEXIS 2116 (Aug. 26, 2008). The State contends that the first two factors are present in the instant case.

Judge Verser's unauthorized control of the prosecution through the unlawful appointment of a conflict-ridden special prosecutor is an unusual circumstance. *See Municipal Court for the Ventura Judicial District of Ventura County*, 103 Cal. Rptr. at 656 (a "special prosecutor" who is appointed by a judge as a way to override the judgment of the elected prosecutor essentially becomes the deputy of the judge in clear violation of the doctrine of separation of powers).

Judge Verser's continued animosity toward the State and bias in favor of Tracer is reflected in the record. During the hearings on the State's motion for reconsideration and motion to vacate, Judge Verser kept identifying dismissal of charges as the alternative response for Ms. Vingo's absence on May 9, 2008. *See, e.g.,* 1RP 13, 21. These statements, as well as Judge Verser's comment to Tracer on May 9, 2008, that "I'm glad it worked out this way. I'm glad this wasn't your fault but it certainly could have been.", CP 98, indicate that Judge Verser is no longer a disinterested jurist.

V. CONCLUSION

Judge Verser's unlawful appointment of a conflicted attorney as special prosecutor was void, and all actions taken by the special prosecutor must be set aside. This matter should be remanded for further proceedings before a different jurist.

Dated this 15th day of October, 2008.

Respectfully Submitted,

Juelanne B. Dalzell
Prosecuting Attorney

Pamela B. Loginsky, WSBA 18096
Special Deputy Prosecuting Attorney

APPENDIX A: Jefferson County LCrR 4.9

LCrR 4.9. Criminal Pretrial Hearings

4.9.1 Pretrial hearings shall be set on all felony charges.

4.9.2 Pretrial hearings shall be set on the 8:30 a.m. Friday motion calendar at least ten (10) days prior to the trial date.

4.9.3 The defendant shall be present at the pretrial hearing. Should defendant fail to appear, unless good cause is shown, the trial date shall be stricken and a warrant for arrest of the defendant shall issue.

4.9.4 At the pretrial hearing the court shall determine: (i) whether discovery has been completed, (ii) whether discovery has been reviewed by defendant and counsel, (iii) whether a plea offer from the prosecuting attorney has been received by defendant and counsel, (iv) whether defendant is going to change his plea, (v) whether the defendant is going to petition for Drug Court or Diversion, and (vi) such other matters as may be appropriate.

4.9.5 If defendant advises the court that he intends to enter a guilty plea or petition for Drug Court or Diversion, the trial date will be stricken and a date scheduled for entry of plea or Drug Court or Diversion contract. If defendant does not indicate an intent to enter a guilty plea or petition for Drug Court or Diversion, the case will proceed to trial on the charge(s) as filed.

4.9.6 In the event that a trial is cancelled after pretrial subsequent to the jury call having been processed, counsel or parties to the action shall be subject to a jury administrative reimbursement fee equal to the actual costs incurred by the court for jury fee payments or administrative costs in calling the jury panel. Upon a showing of good cause, said fee may be waived by the court.

APPENDIX B: WSBA Informal Opinion 1766 (1997)

[The inquiry concerned] possible conflicts of interest in serving as a misdemeanor defense attorney in local municipal courts while also acting as prosecutor pro tem for two local courts. Your representation is never "in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee". You also ask whether or not there is any prohibition against your representation of a person who has a civil rights claim against one of these same municipalities for which you occasionally serve as prosecutor.

It was the Committee's opinion that your conduct is not controlled by RPC 1.11. The purpose of that rule is to control the conduct of a lawyer who has left public service for private practice. Because you intermittently represent the city as its prosecutor and have the expectation of continuing to do so, you must consider the city to be your client. Consequently, your conduct is controlled by RPC 1.7. Under these provisions, it is a conflict of interest to represent criminal defendants in a municipal court where your are intermittently employed as a prosecutor. However, the conflict can be waived if you comply with the provisions of RPC 1.7(a)(1) and (2). Assuming you could satisfy the same provisions, you could also represent your former client in her civil suit against the city. Depending on the facts of the case, there will be unwaivable conflicts under RPC 1.7(a) and (b) and 1.6.

Informal opinions are provided for the education of the Bar and reflect the opinion of the Rules of Professional Conduct Committee. Informal opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official opinion of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The committee's answer does not include or opine about any other applicable law than the meaning of the Rules of Professional Conduct. Informal opinions are based upon facts of the inquiry as presented to the committee.

APPENDIX C: APR 19(e)

The ethics hotline is authorized by APR 19(e). That rule also explains the purpose of the hotline and its limitations:

(e) Professional Responsibility Program.

(1) Authorization. The Washington State Bar Association is authorized to maintain a program to assist lawyers in complying with their obligations under the Rules of Professional Conduct, thereby enhancing the quality of legal representation provided by Washington lawyers.

(2) Professional Responsibility Counsel. "Professional responsibility counsel" denotes a lawyer employed or appointed by the Bar Association to act as counsel on the Bar Association's behalf in performing duties under part (e) of this rule, and any other lawyer employed or appointed by the Bar Association, including but not limited to disciplinary counsel or general counsel, whenever such lawyer is temporarily performing those duties.

(3) Ethics Inquiries. Any member of the Bar Association, or any lawyer or legal intern permitted by rule to practice law in this state, may direct an ethics inquiry to professional responsibility counsel. Such inquiries should be made by telephone to the Bar Association's designated ethics inquiry telephone line. The provisions of this rule also apply to ethics inquiries initially submitted in writing, including facsimile, e-mail, or other electronic means, but do not apply to requests for written ethics opinions directed to the Bar Association's Rules of Professional Conduct Committee or its equivalent.

(4) Scope. An inquirer may request the guidance of professional responsibility counsel in identifying, interpreting or applying the Rules of Professional Conduct as they relate to his or her prospective ethical conduct. If the inquiry presents a set of facts, those facts should ordinarily be presented in hypothetical format. Professional responsibility counsel provides only informal guidance. Professional responsibility counsel provides no legal advice or opinions,

and the inquirer is responsible for making his or her own decision about the ethical issue presented. The inquiry shall be declined if it (i) requires analysis or resolution of legal issues other than those arising under the Rules of Professional Conduct; (ii) seeks an opinion about the ethical conduct of a lawyer other than the inquirer; or (iii) seeks an opinion about the ethical propriety of the inquirer's past conduct.

(5) Limitations and Inadmissibility. Neither the making of an inquiry nor the providing of information by professional responsibility counsel under this rule creates a client-lawyer relationship. Any information or opinion provided during the course of an ethics inquiry is the informal, individual view of professional responsibility counsel only. No information relating to an ethics inquiry, including the fact that an inquiry has been made, its content, or the response thereto, may be asserted in response to any grievance or complaint under the Rules for Enforcement of Lawyer Conduct, nor is such information admissible in any proceeding under the Rules for Enforcement of Lawyer Conduct.

(6) Records. Professional responsibility counsel shall not make or maintain any permanent record of the identity of an inquirer or the substance of a specific inquiry or response. Professional responsibility counsel may keep records of the number of inquiries and the nature and type of inquiries and responses. Such records shall be used solely to aid the Bar Association in developing the Professional Responsibility Program and developing additional educational programs. Such records shall be exempt from public inspection and copying and shall not be subject to discovery or disclosure in any proceeding.

(7) Confidentiality. Communications between an inquirer and professional responsibility counsel are confidential and shall be privileged against disclosure except by consent of the inquirer or as authorized by the Supreme Court. Professional responsibility counsel shall not use or reveal information learned during the course of an ethics inquiry except as RPC 1.9 would permit with respect to information of a former client. The provisions of RPC 8.3 do

not apply to information received by professional responsibility counsel during the course of an ethics inquiry.

PROOF OF SERVICE

I, Amber Haslett, declare that I have personal knowledge of the matters set forth below and that I am competent to testify to the matters stated herein.

On the 15th day of October, 2008, I deposited in the mails of the United States of America, postage prepaid, the original document to which this proof of service is attached in an envelope addressed to:

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

On the 15th day of October, 2008, I deposited in the mails of the United States of America, postage prepaid, a copy of the document to which this proof of service is attached in an envelope addressed to:

Noah Harrison
Harrison Law, Inc., P.S.
210 Polk St Suite 4A
Port Townsend, WA 98368

On the 15th day of October, 2008, I deposited in the mails of the United States of America, postage prepaid, two copies (one for Mr. Tracer and one for his counsel of record) of the document to which this proof of service is attached in an envelope addressed to:

Thomas E. Weaver, Jr.
Attorney at Law
PO Box 1056
Bremerton, WA 98337-0221

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Signed this 15th day of October, 2008, at Olympia, Washington.

Amber Haslett

Amber Haslett