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STATE OF WASHINGTON
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NO. 96943-4

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

DAVID EMERSON NICKELS,

Respondent.

**BRIEF OF AMICUS CURIAE
ATTORNEY GENERAL OF WASHINGTON**

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I. INTRODUCTION

Public law offices, such as the Attorney General's Office and county prosecuting attorney offices, face unique obligations to the public and their client agencies that do not apply to private law firms. Recognizing the need to balance the constitutional and statutory duties of these offices with every lawyer's ethical obligations, the Rules of Professional Conduct and this Court's decisions authorize screening of public lawyers from matters in which they have a personal or professional conflict. *See, e.g.*, RPC 1.7, 1.9, 1.11; *Sherman v. State*, 128 Wn.2d 164, 186, 195, 905 P.2d 355 (1995); *In the Matter of Johnston*, 99 Wn.2d 466, 480, 663 P.2d 457 (1983). When appropriately screened, the individual lawyer's conflict is not imputed to disqualify the entire public law office from the representation. *See id.*

This same ethical rule should apply here. Contrary to the Court of Appeals' rationale, there is no reason to disqualify an entire public law office simply because the conflicted attorney is the elected head of the agency, or because the case is particularly significant. Rather, as this Court has recognized, disqualification is a drastic measure that should apply only in the rare circumstance where an effective screen is not timely or possible. To hold otherwise unnecessarily undercuts the ability of the Attorney General's Office and prosecuting attorney offices to provide full and exclusive representation to the State as the law requires.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Attorney General of Washington submits this amicus brief. State law charges the Attorney General with representing multiple public agencies, officials, and employees, as well as the State of Washington, across a diverse range of civil and criminal matters. Const. art. III, § 21; RCW 43.10.030, .040, .090. Specifically, the Attorney General must represent and defend “the state and all officials, departments, boards, commissions and agencies of the state” in all legal and quasi-legal matters except those designated to be the duty of a county prosecutor. RCW 43.10.040. State agencies, meanwhile, cannot “employ, appoint or retain” anyone “to act as attorney in any legal or quasi legal capacity” other than the Attorney General’s Office. RCW 43.10.067.

State law also authorizes the Attorney General to consult with and advise county prosecuting attorneys, and “when the interests of the state require” to attend the trial of any person accused of a crime and assist in the prosecution. RCW 43.10.030(4). The Attorney General may also investigate or prosecute criminal matters if requested to do so by the Governor or a county prosecuting attorney. *See* RCW 43.10.090, .232.²

² Due to the disqualification of the entire Grant County Prosecuting Attorney’s Office, attorneys with the Attorney General’s Office have entered a Notice of Appearance in this matter and will represent the State in any new trial unless this Court reverses the order of disqualification. The assistant attorneys general assigned to potentially handle Mr. Nickel’s criminal case have not participated in the preparation or filing of this amicus brief.

In all cases, the Attorney General’s “paramount duty” is to protect the interests of the people of the State of Washington. *Reiter v. Wallgren*, 28 Wn.2d 872, 880, 184 P.2d 571 (1947).

The Attorney General has a significant interest in the ethical rule to be set by this case. As just described, the Attorney General is a public officer who oversees the provision of legal services to state government, but always in the context of statewide concerns and the public’s interest. The Attorney General himself or herself has historically been screened from a variety of matters within the office because of prior work, personal affiliations, or other circumstances that could create the appearance of or an actual conflict of interest.³ A court decision that directs disqualification of the entire Attorney General’s Office because of a need to screen its elected head would significantly disrupt this structure and impair the Office’s ability to represent the State.

III. ARGUMENT

A. Public Law Offices Like the Attorney General’s Office Hold Unique Responsibilities In the State

Washington courts have long recognized the unique constitutional and statutory role that public law offices, such as the Attorney General’s Office, fulfill when representing public agencies, officials, and employees,

³ See, e.g., <https://www.atg.wa.gov/news/news-releases/ago-files-campaign-finance-complaint-against-king-county-democratic-central> (last visited July 31, 2019).

as well as the State of Washington. *E.g.*, *Sherman*, 128 Wn.2d at 186, 195; *State v. Stenger*, 111 Wn.2d 516, 522, 760 P.2d 357 (1988); *Johnston*, 99 Wn.2d at 480; *Sammamish Cmty. Mun. Corp. v. City of Bellevue*, 107 Wn. App. 686, 693, 27 P.3d 684 (2001); *Amoss v. Univ. of Wash.*, 40 Wn. App. 666, 686, 700 P.2d 350 (1985).

For instance, the Attorney General has an express statutory duty to represent and defend state officials and offices. RCW 43.10.040; *Goldmark v. McKenna*, 172 Wn.2d 568, 575, 259 P.3d 1095 (2011). The Attorney General also has “general discretionary authority to act in any court, state or federal, trial or appellate, on a matter of public concern, provided that there is a cognizable common law or statutory cause of action.” *City of Seattle v. McKenna*, 172 Wn.2d 551, 556, 562, 259 P.3d 1087 (2011) (citations and internal quotation marks omitted). Given this structure of representing both state officers and the interests of the people, this Court has recognized that it is often “incumbent upon the attorney general to both prosecute and defend an action.” *Reiter*, 28 Wn.2d at 878. And because state agencies may sometimes have differing interests or perspectives in a case, it is common for assistant attorneys general within the office to be assigned to advise and represent clients with differing interests.

Because the Attorney General’s legal duties may at times require representation of competing public interests, the Attorney General’s Office

has long employed screening mechanisms to ensure strict adherence to its ethical duties. *See Sherman*, 128 Wn.2d at 186-87, 195-96. This Court has sanctioned this process, saying that, if “actual conflicts of interest” do arise, different assistant attorneys general in the office “can, and should, be assigned to handle those inconsistent functions.” *Johnston*, 99 Wn.2d at 480. Likewise, courts have found it acceptable for different attorneys within other public law offices to represent “conflicting or potentially conflicting interests so long as an effective screening mechanism exists” to keep those interests separate. *See Sammamish Cmty. Mun. Corp.*, 107 Wn. App. at 693. These screening mechanisms allow public law offices to fulfill their legal obligation to the State while also ensuring that no person participates in a matter where they have an ethical conflict. These mechanisms protect the ethical duties of all public lawyers equally, including elected officials, assistants or deputies, and non-legal staff. *C.f. Sherman*, 128 Wn.2d at 187 (“[N]o authority is cited for the proposition that a supervisor is disqualified from any matter in which the conduct of a subordinate is at issue. Nor are we able to discern a reason to create such a rule.”).

B. The Rules of Professional Conduct Control for Conflicts of Interest

The Rules of Professional Conduct further recognize the unique role that public law offices hold, striking an appropriate balance between these

offices' mandatory duties and ethical obligations. RPC 1.0A(k), 1.7, 1.9, 1.11; *see also* RPC 1.10(d); RPC 1.11 comments 2 and 3. The RPCs are clear that even though a lawyer currently serving as a public officer or employee cannot participate in a matter for which they have a personal or professional conflict, that conflict does not extend to disqualify their entire government agency. RPC 1.11(d). This no-imputation rule for government law offices applies regardless of whether the conflicted lawyer is an elected officer or employee. *See* RPC 1.11 comment 2 (“Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees[.]”).

This rule for government lawyers stands in contrast to RPC 1.10, which imputes any private lawyer's conflicts to the rest of their firm. *See* RPC 1.10(a). Nonetheless, even a private firm may counteract imputation by effectively screening the conflicted attorney under certain circumstances, eliminating the need for any further vicarious disqualification. *See* RPC 1.10(e). Thus, in some circumstances, the RPCs permit screening for both public offices and private firms. Notably, this Court rejected a *per se* disqualification rule even for private firms under both case law and the then-recently enacted RPCs. *See First Small Bus. Inv.*

Co. of California v. Intercapital Corp. of Oregon, 108 Wn.2d 324, 331, 335-36, 738 P.2d 263 (1987).

The fact that screening can suffice even in the context of private firms, where conflicts are imputed, supports the conclusion that screens are at least equally protective in public offices not subject to imputation. Thus, the screening provisions set forth by RPC 1.11 can effectively ameliorate conflicts of interest posed by individual officials, eliminating the need for office-wide disqualification. The current RPCs control: any contrary conclusions from cases like *Stenger* that would resort first to disqualification must yield to these Rules.

C. Courts Should Impose Vicarious Disqualification Only When Necessary

The disqualification rule applied by the Court of Appeals ignores the balance struck by these cases and the ethical rules. Absent extraordinary circumstances where an effective screen is impossible, the disqualification of a public law officer, such as the Attorney General or a county prosecuting attorney, should not be imputed to disqualify the entire public office. Indeed this Court recognizes that disqualification of even a single counsel is a “drastic measure” that should be imposed only when “absolutely necessary.” See *Sherman*, 128 Wn.2d at 194; *In re Matter of Firestorm*, 129 Wn.2d 130, 140, 916 P.2d 411 (1996). The drastic nature of disqualification

compounds itself when an entire office can be disqualified for one attorney's conflict. In light of available and effective screening procedures, this risk makes presumptive reliance on vicarious disqualification "neither necessary nor wise," regardless of who the disqualified attorney may be. *Sherman*, 128 Wn.2d at 195.

1. The Court of Appeals decision below pushes *Stenger* past the limits of its holding

The Court of Appeals relied primarily on *Stenger*, but its application of that case was misguided because *Stenger*'s singular facts do not accurately reflect the typical use of ethical screens.

Stenger involved the disqualification of an entire prosecuting attorney's office after it was determined that its elected head had participated in the prosecution of an aggravated murder case even though he should have been disqualified for having represented the defendant in a prior criminal matter. *Stenger*, 111 Wn.2d at 517-22.

Stenger, however, is not a case about routine ethical conflicts. It is a case about the rare circumstance of an attorney who "candidly acknowledge[d]" that he participated in the case, even after he should have effectively screened and separated himself because of his prior representation. *Stenger*, 111 Wn.2d at 519, 523. The screen thus failed not because screens are ineffective, but because the elected prosecutor created

a situation of unsalvageable ethical taint. Public law offices with unique legal duties should not be precluded from relying on these typically effective tools simply because the screen in *Stenger* was doomed to fail under the facts of that case.

Moreover, *Stenger* involved a death penalty case. From the instant these cases originate, they involve a heightened exercise of prosecutorial discretion. *See id.* at 521-22 (noting that the prosecutor’s prior representation of the defendant gave him “information closely interwoven with [his] exercise of discretion in seeking the death penalty”). There, the unique function of the elected prosecutor’s decision-making linked his conflict to the entire office in an inextricable manner, making disqualification the only option. *Id.* at 522. The nature of conflicts in the context of a death penalty case should not be conflated with the nature of conflicts across all civil and criminal cases.

Facts like these demonstrate the importance of not overextending *Stenger*’s outcome: Indeed, the *Stenger* Court framed its decision narrowly, limiting it to “the facts of *this* case.” *Stenger*, 111 Wn.2d at 520 (emphasis added). That vicarious disqualification was the only remaining option in *Stenger* neither commands nor justifies its presumptive application to all or even most conflicts involving an elected legal officer. Instead, most attorney

conflicts can and should be cured with individual screens, no matter who the conflicted attorney may be.

2. Later authority reflects the now-controlling standard enshrined in the Rules of Professional Conduct

Following *Stenger*, this Court in *Sherman v. State* approved the use of effective screens to ameliorate attorney conflicts of interest for the Attorney General's Office. The reasoning that undergirds this decision better comports with the current Rules of Professional Conduct and should be applied here.

In *Sherman*, the Court explicitly rejected any supervisory exception to the regular implementation of screens. The Court explained that supervisors should not be presumptively disqualified based on the conflicts of their subordinates. *Sherman*, 128 Wn.2d at 187 (“[N]o authority is cited for the proposition that a supervisor is disqualified from any matter in which the conduct of a subordinate is at issue. Nor are we able to discern a reason to create such a rule.”). No other part of the decision suggests that the converse should be true either. *Sherman* demonstrates that the key inquiry when remedying an ethical conflict is not the role of the conflicted attorney, but whether they and their conflict were timely and effectively quarantined. Even if attorneys need to be screened from their immediate supervisors or the elected official under specific facts, a screening mechanism can provide

for an alternative supervisory structure. *See id.* (the screen in *Sherman* precluded a supervisory attorney from evaluating his subordinates' conduct). A public law office should only be disqualified in the rare event that a screen could not prevent the conflicted attorney, whomever they may be, from drawing all other attorneys in the office into their conflict.

3. Like Washington, many other state jurisdictions endorse screening over disqualification

Other state jurisdictions acknowledge that “a timely and effective screening policy . . . serve[s] as a presumptive safe harbor from office-wide disqualification.” *State v. Addison*, 166 N.H. 115, 89 A.3d 1214, 1220 (2014) (alteration in original). Indeed, *Addison* notes that at least twenty state jurisdictions reject an approach that would always require vicarious disqualification, *id.* at 1218 (referencing *State v. Pennington*, 115 N.M. 372, 851 P.2d 494, 497 (App. 1993)), and instead embrace flexible, screening-based approaches, *id.* at 1219 (citing *Lux v. Com.*, 24 Va. App. 561, 484 S.E.2d 145, 151–52 (1997), and *State v. Kinkennon*, 275 Neb. 570, 747 N.W.2d 437, 443 (2008)). *See also State v. Camacho*, 329 N.C. 589, 406 S.E.2d 868, 875 (1991) (“[A]ny order of disqualification ordinarily should be directed only to individual prosecutors who have been exposed to such information.”).

Decided within the last five years, *Addison* itself serves as an out-of-state exemplar that confirms the soundness of Washington’s rule emphasizing screening. Featuring the New Hampshire Attorney General’s Office, *Addison* involved an attorney who began defending a client’s death penalty case, and then switched employers to the Attorney General’s Office while appeals for that client continued. *See Addison*, 89 A.3d at 1215-16. The New Hampshire Supreme Court denied the defendant’s motion to disqualify the entire office based on that attorney’s conflict of interest, because the State “demonstrated that it implemented screening procedures that have prevented the disclosure of any confidential information about the defendant’s case.” *Id.* at 1221. This reasoning mirrors that of *Sherman*, which focuses on the effectiveness of the screen as to the particular attorney.

IV. CONCLUSION

The Attorney General asks this Court to reject the disqualification rule for elected officials set forth by the Court of Appeals. This Court should instead affirm that screening is the appropriate mechanism to protect against conflicts of interest for all public lawyers, including elected officials. Effective screening of conflicted government attorneys permits public law offices to fulfill their constitutional and statutory responsibilities while ensuring that their ethical obligations are also carried out.

RESPECTFULLY SUBMITTED this 5th day of August 2019.

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