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No. 96943-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

DAVID EMERSON NICKELS,

Respondent.

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

STATE'S RESPONSE TO BRIEF OF AMICI CURIAE
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
AND WASHINGTON DEFENDER ASSOCIATION

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I. INTRODUCTION

Amici curiae, Washington Association of Criminal Defense Lawyers and Washington Defender Association (collectively “WACDL”), offers numerous policy arguments in support of “a bright-line rule disqualifying the entire prosecutor’s office from prosecuting a defendant whenever the elected prosecutor has represented that defendant *in the same case* or a substantially related case.” WACDL Brief at 3 (emphasis in the original). Notably absent from WACDL’s brief is any reference to RPC 1.11 or any explanation as to why elected prosecuting attorneys should be treated differently than other government attorneys.

Ignoring the plain language of RPC 1.10 and the detailed history of current RPC 1.10 and RPC 1.11 contained in the State’s supplemental brief, WACDL claims that only “minor adjustments” were made to the Rules of Professional Conduct since 1988, and that “no subsequent modification of the Rules of Professional Conduct warrants any reconsideration of the *Stenger*^[1] bright line rule.” WACDL Brief at 10-11. WACDL’s arguments wholly ignore the substantial 2006 amendments to the Rules of Professional Conduct.

The following is a brief response to selected points in WACDL’s amicus brief. Points not addressed in this response are not conceded; rather

¹*State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988).

they are not addressed because the State believes them to be adequately addressed in the State's Petition for Review and Supplemental Brief.

II. ARGUMENT

A. The Current Rules of Professional Conduct Control the Resolution of this Case

"This court has previously stated that where a disqualified attorney can be effectively screened and separated from participation, 'then the disqualification of the entire prosecuting attorney's office is neither necessary nor wise.'" *Sherman v. State*, 128 Wn.2d 164, 195, 905 P.2d 355 (1995) (quoting *State v. Stenger*, 111 Wn.2d 516, 523, 760 P.2d 357 (1988) (footnote omitted). This principle was codified when this Court amended the Rules of Professional Responsibility in 2006. *See* RPC 1.11(d); Comment 2 to RPC 1.11. *See also* Comment 7 to RPC 1.10.

The current Rules of Professional Responsibility and the comments to those rules control resolution of this appeal. *See Plein v. USAA Casualty Insurance Co.*, No. 78190-1-I, ___ Wn. App. 2d ___, ___ P.3d. ___, 2019 Wash. App. Lexis 1973 ¶¶ 21-23, 2019 WL 3407107 (Wash. App. July 29, 2019). *Accord First Small Business Inv. Co. v. Intercapital Corporation of Oregon*, 108 Wn.2d 324, 322-32, 738 P.2d 263 (1987) (overruling the Court of Appeals' decision disqualifying firm's involvement in case because the cases relied upon by the Court of Appeals were based upon pre-ethics rule case law and prior versions of the Code of Professional Responsibility). The

current rules supersede appellate decisions issued before 2006. *See generally State v. Miller*, 188 Wn. App. 103, 352 P.3d 236 (2015) (amendment to court rule superseded Washington Supreme Court opinion issued prior to the amendment); *Splattstoesser v. Scott*, 159 Wn. App. 332, 246 P.3d 230 (2011) (same); *State v. Thomas*, 146 Wn. App. 568, 575-76, 191 P.3d 913 (2008) (same). *See also Wallace v. Evans*, 131 Wn.2d 572, 576-77, 934 P.2d 662 (1997) (the court need not expressly overrule old cases that have been superseded by a significant change in the relevant court rules).

Rather than address the current ethics rules, WACDL contends that this case is controlled by the 1988 case of *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988). WACDL, however, pushes *Stenger* past the limits of its holding, ignoring significant factual differences between *Stenger* and the instant case. *Stenger* involved a death penalty case. *Stenger* involved a case in which any screen was doomed to fail as the elected prosecuting attorney “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. Indeed, the *Stenger* Court framed its decision narrowly, limiting it to “the facts of *this* case.” *Id.* at 520.

In the instant case, the current Grant County Prosecuting Attorney, Garth Dano, was promptly and effectively screened from David Nickels’s

case. Dano, moreover, was not in office when Nickels was charged with murder and the case was initially tried. The complexity of the underlying murder case which Nickels candidly acknowledges would take new attorneys “months, if not years,” 2RP 40, to master amply supported the trial judge’s decision to deny Nickels’s motion for office wide disqualification. *See* Petition for Review at 2-6, 18-20.

WACDL claims that only “minor adjustments” were made to some of the ethics rules since 1988 and that “the current version of these rules are for all relevant purposes to the *Stenger* rule, the same.” WACDL Brief at 10. WACDL’s position is contrary to the history of current RPC 1.10 and RPC 1.11. *See generally* Supplemental Brief of Petitioner at 10-16.

WACDL’s stance is unsupported by the plain language of the current rules and comments. *See, e.g.*, RPC 1.10(d) (“The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.”); Comment 7 to RPC 1.10 (“where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, former-client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer”); Comment 2 to RPC 1.11 (“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, although ordinarily it will be prudent to screen such lawyers.”). WACDL’s brief, therefore, provides no assistance in resolving the instant appeal.

B. Office Wide Disqualification Does Not Increase the Elected Prosecuting Attorney’s Control of His Office

The prohibition upon an attorney representing clients with conflicting interests is supported by two concerns: the attorney’s duty of loyalty to the clients and the protection of client confidences. *See generally* Supplemental Brief of Petitioner at 3-4. Prosecutor Dano is personally disqualified from representing the State of Washington in the prosecution of Nickels due to his pre-election participation in the case on Nickels’ behalf. Prosecutor Dano has given effect to his duties of confidentiality and loyalty to Nickels by recusing himself from this case and erecting a screen between himself and his deputies and employees.

Prosecutor Dano was selected to represent the State of Washington in criminal matters by the citizens of Grant County. *See generally* Const. art. XI, § 5 (providing for election of prosecuting attorney); RCW 36.16.030 (same). The citizenry expects that the State of Washington will only be represented in criminal matters arising in Grant County by Prosecutor Dano personally, by attorneys whom Prosecutor Dano authorizes to represent the State of Washington, and, in extremely rare circumstances, by an RCW

36.27.030 court appointed independent prosecuting attorney.² *See generally State ex rel. Banks v. Drummond*, 187 Wn.2d 157, 385 P.3d 769 (2016) (an attorney may only perform the core functions of an able and willing prosecuting attorney with the prosecuting attorney's consent); *State v. Heaton*, 21 Wash. 59, 62-63, 56 P. 843 (1899) (a court's power to replace a prosecuting attorney with an independent prosecutor is extremely limited because a superior court judge's power derives from the same constitution as the prosecuting attorney); *Herron v. McClanahan*, 28 Wn. App. 552, 557, 625 P.2d 707 (1981) (RCW 36.27.030 applies only if the prosecuting attorney refuses to appoint an attorney to perform the duties that he cannot perform due to a conflict of interest); RCW 36.27.030 (superior court may only appoint a qualified person to discharge the duties of the prosecuting attorney when the prosecuting attorney is temporarily unable to perform his duties due to illness or disability).

Prosecutor Dano has tendered consent to certain attorneys exercising all of his powers, including representing the State of Washington in criminal

²A number of cases refer to an attorney appointed pursuant to RCW 36.27.030 as a "special prosecuting attorney." *See, e.g., Westerman v. Carey*, 125 Wn.2d 277, 301, 892 P.2d 1067 (1994); *In re Lewis*, 51 Wash. 2d 193, 202, 316 P.2d 907 (1957). The word "special," however, does not appear in RCW 36.27.030. The word "special" in Chapter 36.27 RCW refers to deputy prosecuting attorneys who are under the direct supervision of the county prosecuting attorney. *See* RCW 36.27.040; RCW 36.27.130. Attorneys appointed pursuant to RCW 36.27.030 are not subordinate to the prosecuting attorney. They are only answerable to the court that appointed them. For this reason, and to avoid confusion with RCW 36.27.040 special deputy prosecuting attorneys, the word "independent" will be used when referring to an RCW 36.27.030 court appointed prosecuting attorney.

matters, by appointing these attorneys as his deputies. *See* RCW 36.27.040 (“The prosecuting attorney may appoint one or more deputies who shall have the same power in all respects as their principal.”). Prosecutor Dano is personally responsible for selecting his deputies. *Id.* Prosecutor Dano confers appointments on attorneys whom he trusts to follow his policies regarding sentencing, disclosure of potential impeachment information, plea offers, retention of expert witnesses, use of incentivized witnesses, victim relations, and a myriad of other topics. A deputy prosecuting attorney who fails to comply with Prosecutor Dano’s policies, whose ethical conduct is questionable, or whose legal knowledge and skills are sub par may be terminated at will. *See generally* RCW 36.16.070; RCW 36.27.040 (same).

The appointments Prosecutor Dano confers on his regular deputy prosecuting attorneys empower them to represent the State of Washington even when Prosecutor Dano has a disability that prevents him from personally representing the State. *See generally* RCW 36.27.040. The ethics rules allow Prosecutor Dano’s regularly appointed deputies to represent the State in cases in which Prosecutor Dano is personally disqualified. *See* Comment 2 to RPC 1.11. Having these deputies handle the case does the least violence to the electorate's will, and allows consistency in sentencing recommendations, access to potential impeachment information, and representation by attorneys who are familiar with local jury pools, police

officers, and procedures.

Despite the clear advantages of screening, WACDL claims that office-wide disqualification is preferable to a screen because a screened elected prosecutor would have no way of knowing that subordinates were not following the elected prosecutor's policies. *See, e.g.*, WACDL's Brief at 9.³ WACDL's identified concern is exacerbated, not reduced, by office wide disqualification.

When a court disqualifies an entire prosecuting attorney's office from representing the State of Washington in a matter, the judge must select a willing qualified person to serve as an independent prosecutor. *See* RCW 36.27.030. A "qualified individual" for this purpose is any attorney who is not barred from serving by the Rules of Profession Conduct. *See State v. Tracer*, 173 Wn.2d 708, 718-19, 272 P.3d 1999 (2012). The attorney appointed as an RCW 36.27.030 independent prosecutor is not required to have any familiarity with Prosecutor Dano's policies or office practices. Nor is the independent prosecutor required to follow the policies or practices of Prosecutor Dano's office. An RCW 36.27.030 independent prosecutor, moreover, is not subject to termination by Prosecutor Dano for failing to

³WACDL cites to a Klamouth County circuit court case in its brief as support that the disqualified and screened elected prosecuting attorney may countermand her deputies actions. WACDL's citation to this Klamouth County case violates GR 14.1(b) and (d), as WACDL has not served a copy of the unpublished opinions upon the State and no Oregon statute or court rule authorizes citation of unpublished circuit court opinions.

comply with Prosecutor Dano's policies or office practices.

C. Prosecuting Attorneys and Their Deputies Are Not Less Trustworthy or Ethical Than Other Lawyers

Garth Dano was recruited by Nickels to serve as an unpaid local legal advisor prior to, during, and after Nickels' 2012 murder trial. *See generally* CP 178-179. Nickels' court appointed trial counsel selected Dano because he was "a respected local criminal attorney in Grant County." CP 178, ¶ 3.

The respect accorded to Dano in Grant County arises from his tenacity, legal acumen, probity, loyalty, and high ethical standards. The same qualities that led Nickels to seek assistance from Dano in 2010, led the electorate to select Dano as Grant County Prosecuting Attorney in 2014. The election altered Prosecutor Dano's client, but not his essential qualities.

Although Nickels has not identified a single ethical lapse or breach of confidentiality by Dano over the last decade, WACDL asserts that Prosecutor Dano, his duly appointed employees and deputies, and all other prosecuting attorneys and their deputies are inherently untrustworthy. WACDL claims that former clients of prosecuting attorneys will only be protected through the adoption of a unique rule that disqualifies the elected prosecutor and his or her entire office. WACDL offers no empirical data to support its view that an attorney who takes an oath to faithfully discharge his or her duties as a prosecuting attorney or deputy prosecuting attorney is uniquely untrustworthy.

Finding no factual support for its thesis that prosecutors are uniquely unethical, WACDL claims that screening is difficult in “a relatively small office with proximity and easy access among attorneys and staff.” WACDL Brief at 10. The appellate record, however, contains no information regarding the number of deputies and other persons employed by Prosecutor Dano and no evidence regarding office layout. The appellate record does contain evidence that Grant County Superior Court Judge David G. Estudillo was satisfied that the screening procedures implemented by the Grant County Prosecuting Attorney’s Office were adequate to prevent any violation of Prosecutor Dano’s duties of loyalty and confidentiality. *See* CP 159-60; 2 RP 29-32.

While the State concedes that the Grant County Prosecuting Attorney’s Office is “relatively small” with respect to the King County Prosecuting Attorney’s Office, Grant County ranks 13th of 39 counties in population⁴ and the prosecuting attorney’s office is large enough to provide representation to the State last year in 6,794 superior court criminal cases, 1,360 juvenile offender matters, and 3,642 district court criminal matters.⁵

⁴*See* Municipal Research and Services Center Washington County Profiles available at [http://mrsc.org/Home/Research-Tools/Washington-County-Profiles.aspx?orderby=county pop&dir=up](http://mrsc.org/Home/Research-Tools/Washington-County-Profiles.aspx?orderby=county%20pop&dir=up) (last visited Aug. 29, 2019).

⁵*See* Caseloads of the Courts of Washington, Superior Court Total Proceedings by Type of Case – 2018 Annual Report (available at <http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=s&freq=a&tab=summary&fileID=hrgyr> (last visited Aug. 29, 2019)), and Caseloads of the Courts of Washington Courts of Limited Jurisdiction Cases Filed – 2018 Annual Report (available at

Even offices smaller than Grant County's can implement adequate screens between a personally disqualified elected prosecuting attorney and other members of the office. *Cf.* Comment 1 to RPC 1.10 (whether two or more lawyers constitute a firm for purposes of imputed disqualification depends upon the specific facts); Comment 2 to RPC 1.0(A) (associated lawyers with an office-sharing agreement will not be considered a firm when they do not conduct themselves as a firm and do not "have mutual access to information concerning the clients they serve").

Ultimately WACDL claims that "the integrity of the criminal justice system" and "public confidence" can only be maintained with a bright line office wide disqualification rule. WACDL Brief at 12. WACDL's position is contrary to the history of ethical screens.

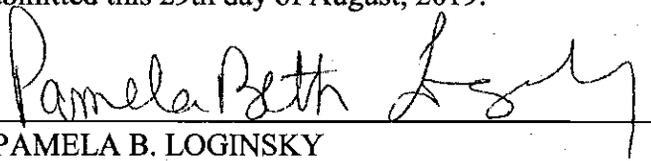
This Court's adoption of WACDL's proposed elected prosecuting attorney exception to screens would do more damage to the integrity of the criminal justice system and public confidence by undermining confidence that prosecuting attorneys will perform their duties in an ethical manner absent court supervision and oversight. Office-wide disqualifications would also result in the State being represented by inexperienced and time-constrained attorneys.

http://www.courts.wa.gov/caseload/?fa=caseload.showReport&level=D&freq=A&tab=&fileID=rpt01#Grant_County (last visited Aug. 29, 2019)).

III. CONCLUSION

The Grant County Prosecuting Attorney was timely and effectively screened from this matter. Allowing the State to be represented at retrial with a deputy prosecuting attorney who was trial counsel in the original trial is in the public's interest. Division III's decision to the contrary must be overruled.

Respectfully Submitted this 29th day of August, 2019.

A handwritten signature in cursive script that reads "Pamela Beth Loginsky". The signature is written in black ink and is positioned above a horizontal line.

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PROOF OF SERVICE

I, Pamela B. Loginsky, 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 29th day of August, 2019, an electronic copy the document to which this proof of service is attached was, pursuant to the agreement of the parties and amici curiae, served upon the following individuals via the CM/ECF System and/or e-mail:

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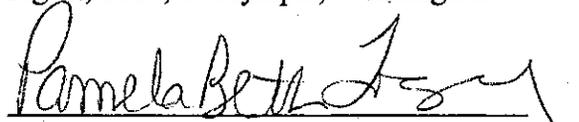
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Signed under the penalty of perjury under the laws of the state of Washington this 29th day of August, 2019, at Olympia, Washington.


PAMELA B. LOGINSKY, WSBA No. 18096

WASHINGTON ASSOC OF PROSECUTING ATTY

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