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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

SUPPLEMENTAL BRIEF OF PETITIONER

PAMELA B. LOGINSKY
Special Deputy Prosecuting Attorney
WSBA No. 18096
206 10th Ave. SE
Olympia, WA 98366
(360) 753-2175

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

 A. The Screening of a Personally Disqualified Attorney is an Accepted and Effective Practice 3

 1. The Dawn of Ethical Screens 4

 2. The Codification of Limited Ethical Screens 7

 3. Washington and the Model Rules 8

 4. Increasing Acceptance of Screening Devices to Avert Attorney Disqualification 10

 5. Washington Embraces Ethical Screens 11

 6. ABA Ethics 2000 12

 7. Washington Ethics 2003 13

 8. The ABA Endorses Nonconsensual Screening for All Lawyers 16

 B. Public Policy Disfavors Office Wide Disqualification... 17

III. CONCLUSION 20

Appendix A: Links to American Bar Association Materials 21

TABLE OF AUTHORITIES

TABLE OF CASES

Alpha Inv. Co. v. Tacoma, 13 Wn. App. 532, 536 P.2d 674 (1975)..... 5

Board of Education v. Nyquist, 590 F.2d 1241 (2nd Cir. 1979) 5

Bracy v. Gramley, 520 U.S. 899, 117 S. Ct. 1793, 1799 (1997) 17

Doyle v. Lee, 166Wn. App. 397, 272 P.3d256 (2012) 15

First Small Business Inv. Co. v. Intercapital Corporation of Oregon, 108 Wn.2d 324, 738 P.2d 263 (1987) 2

In re Personal Restraint of Stenson, 153 Wn.2d 137, 102 P.3d 151 (2004) 15

People v. Lepe, 164 Cal. App. 3d 685, 211 Cal. Rptr. 432 (1985)..... 9

Sherman v. State, 128 Wn.2d 164, 905 P.2d 355 (1995)..... 9

Smith v. Whatcott, 757 F.2d 1098 (10th Cir. 1985) 10

State v. Eighth Judicial Dist. Court of the State, 321 P.3d 882 (2014) 15

State v. Finch, 137 Wn.2d 792, 975 P.2d 967 (1999) 15

State v. Fitzpatrick, 464 So.2d 1185 (Fla. 1985) 6

State v. George, 160 Wn.2d 727, 158 P.3d 1169 (2007) 15

State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011) 17

<i>State v. Ladenburg</i> , 67 Wn. App. 749, 840 P.2d 228 (1992)	9
<i>State v. Sledge</i> , 133 Wn.2d 828, 947 P.2d 1199 (1997)	20
<i>State v. Stenger</i> , 111 Wn.2d 516, 760 P.2d 357 (1988)	3, 9
<i>State v. Terrovonia</i> , 64 Wn. App. 417, 824 P.2d 537 (1992)	17
<i>State v. Tippecanoe Cy. Court</i> , 432 N.E.2d 1377 (Ind. 1982).....	9
<i>State v. Tracer</i> , 173 Wn.2d 708, 272 P.3d 199 (2012)	19
<i>Stein v. New York</i> , 346 U.S. 156, 73 S. Ct. 1077, 97 L. Ed. 1522 (1952), <i>overruled on other grounds</i> in <i>Jackson v. Denno</i> , 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964)	19
<i>Teja v. Saran</i> , 68 Wn. App. 793, 846 P.2d 1375 (1993).....	2
<i>United States v. Caggiano</i> , 660 F.2d 184 (6th Cir. 1981).....	6
<i>United States v. Newman</i> 534 F. Supp. 1113 (S.D. N.Y. 1982)	6

CONSTITUTIONS

Const. art. XI, § 5	18
---------------------------	----

STATUTES

RCW 36.16.070 18

RCW 36.27.030 19

RCW 36.27.040 18

RULES AND REGULATIONS

American Bar Association Model Rule of Professional
Conduct 1.10 (2009)..... 4, 14, 17

American Bar Association Model Code of Professional
Responsibility DR 5-105 (1969)..... 4

American Bar Association Model Code of Professional
Responsibility Canon 9 (1969) 5

American Bar Association Model Code of Professional
Responsibility DR 1-105(C) (1969) 4

American Bar Association Model Code of Professional
Responsibility DR 5-105(D) (1974) 5, 6

American Bar Association Model Code of Professional
Responsibility DR 9-101(B) (1969) 5, 7

American Bar Association Model Code Preliminary
Statement (2003)..... 4

American Bar Association Model Rule of Professional
Conduct 1.10 13, 16, 17

American Bar Association Model Rule of Professional
Conduct 1.11 (1983)..... 7, 12, 15

American Bar Association Model Rules of Professional Conduct 1.7-1.9 (1983)	4
American Bar Association, Canons of Professional Ethics (1908)	3
American Bar Association, Model Code of Professional Responsibility (1969)	3
American Bar Association, Model Rules of Professional Conduct (1983)	3, 8
CrR 3.3(c)(vii)	19
CrRLJ 3.3(c)(vii)	19
Former RPC 1.10, 119 Wn.2d 1102 (1992)	11
Former RPC 1.10, 104 Wn.2d 113-14 (1985)	8, 9
Former RPC 1.10(b)(3), 119 Wn.2d 1102 (1992)	11
Former RPC 1.11, 104 Wn.2d 114-15 (1985)	8, 9
Former Rules of Professional Conduct, 104 Wn.2d 1101-1172 (1985)	8
RPC 1.1 Comment 5	19
RPC 1.10 Comment 7	15
RPC 1.10 Comments 9-12	13
RPC 1.10(d)	14
RPC 1.10(e)	13
RPC 1.11	14, 15, 20
RPC 1.11 Comment 2	14

RPC 1.16	19
RPC 1.3 Comment 2	19
RPC 1.7(a)(1)	19
RPC 5.3	18
RPC 6.2	19
RPC Scope Paragraph 17	14

OTHER AUTHORITIES

Alabama State Bar Office of General Counsel Formal Opinion 1994-10 (Jan. 1, 1994)	8
American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 342 (Nov. 24, 1975)	5-7
American Bar Association Center for Professional Responsibility Policy Implementation Committee, <i>Variations of the ABA Model Rules of Professional Conduct: Rule 1.10: Imputation of Conflicts of Interest: General Rule</i> (Dec. 11, 2018)	17
American Bar Association Center for Professional Responsibility Policy Implementation Committee, Variations of the ABA Model Rules of Professional Conduct: Rule 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees (Apr. 26, 2019)	15
American Bar Association Formal Opinion 88-356 (Dec. 16, 1988)	10

Berkman, <i>Temporarily Yours: Associates for Hire</i> , Am. Law., Mar. 1988	10
<i>Comment, The Use of Screens to Cure Imputed Conflicts of Interest: Why the American Bar Association's and Most State Bar Associations' Failure to Allow Screening Under- mines the Integrity of the Legal Profession</i> , 35 U. Balt. L. Rev. 367 (2006)	10
Edward A. Adams, <i>ABA House Oks Lateral Lawyer Ethics Rule Change</i> , ABA Journal, 2/16/2009	17
Erik Wittman, <i>Current Development 2008-2009: A Discussion of Nonconsensual Screens as the ABA Votes to Amend Model Rule 1.10</i> , 22 Geo. J. Legal Ethics 1211 (2009)	10
Ethics 2000 Reporter's Explanation of Changes to Model Rule 1.11	12, 13
G. Hazard & D. Rhode, <i>The Legal Profession: Responsibility and Regulation</i> 92 (2d. ed. 1988)	3
Grant Dawson, <i>Conflict of Interest: Working Guidelines for Successive Conflicts of Interest Involving Government and Private Employment</i> , 11 Geo. J. Legal Ethics 329 (1998)	7
Jonathan Glover, <i>Spokesman Review, Among Washington's largest counties, Spokane County has the largest rate of drug felonies – and it's not even close</i> , May 20, 2019	18
Lawrence J. Fox <i>Minority Report– Center for Professional Responsibility</i>	13
Lawrence K. Hellman, <i>When "Ethics Rules" Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions</i> , 10 Geo. L. J. Legal Ethics 317 (1997)	6

Margaret Colgate Love, <i>The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000</i> , 15 Geo. J. Legal Ethics 441 (2002).	12
Margaret Graham Tebo, <i>A Treacherous Path</i> , 86 A.B.A. J. 54 (2000).	11
Mary T. Robinson, <i>Screening and Spector of Harm to Clients</i>	17
Neil W. Hamilton and Kevin R. Coan, <i>Are We a Profession or Merely a Business?: The Erosion of the Conflicts Rules Through the Increased Use of Ethical Walls</i> , 27 Hofstra L. Rev. 57 (1988)	4
Note, <i>Ohio's New Ethical Screening Procedure</i> , 31 U. Tol. L. Rev. 145 (1999).	11
Robert H. Aronson, <i>Washington Survey: An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed</i> , 61 Wash. L. Rev. 823 (1986).	8
Standing Comm. on Ethics & Professional Responsibility, Am. Bar Ass'n, Report to the House of Delegates (Feb. 2009)	13, 16
State Bar of Arizona, Formal Ethics Opinion 85-06: Conflicts (Oct. 1, 1985)	8
Wash. State Bar Ass'n, <i>Report and Recommendation of the Special Committee for Evaluation of the Rules of Professional Conduct (Ethics 2003) to the Board of Governors</i> (2004)	13

I. INTRODUCTION

Every criminal defendant is entitled to loyalty and confidentiality from his or her attorney. The defendant's rights are the same whether he is charged with murder or trespass. Every criminal defendant's right to loyalty and confidentiality is fully respected and protected when his former attorney joins a prosecuting attorney's office through the erection of a timely and adequate screen.

Screening an individually disqualified attorney from otherwise untainted attorneys is specifically authorized by the Rules of Professional Conduct. Screening furthers important public interests by allowing the public the greatest choice of candidates for prosecuting attorney and deputy prosecuting attorneys. Screening also increases confidence in the criminal justice system by ensuring that tactical disqualification motions do not deprive the public of adequate representation.

The proper focus when a defendant seeks to disqualify an entire prosecuting attorney's office under a theory of imputed disqualification is the current conduct of the defendant's prior counsel. When, as here, the personally disqualified attorney was promptly and effectively screened from all contact with the case, there is no basis for granting a defendant's motion to deprive the State of representation at retrial by a deputy prosecuting attorney who represented the State at David Nickels's first trial.

II. ARGUMENT

The analysis of attorney conflicts with former clients is complicated because Washington cases construe four different sources of law: common law; the previously enacted Model Code of Professional Responsibility; the initially adopted Model Rules of Professional Conduct; and the Rules of Professional Conduct currently in force. *See Teja v. Saran*, 68 Wn. App. 793, 796 n. 1, 846 P.2d 1375 (1993). The rules governing former client conflicts have grown increasingly precise, containing provisions that protect both the interests of the former client and the public. The current versions of the rules and cases that interpret those rules apply to the instant case. *See, e.g., 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 the case because the cases relied upon were based upon pre-ethics rule case law and prior versions of the Code of Professional Responsibility).

The analysis of office-wide disqualification based upon a prosecutor's prior representation of a defendant is complicated by variances in rules. Even when a sister state's ethics rules are identical to those of Washington, their opinions regarding office-wide disqualification may be inapplicable because other jurisdictions either apply the doctrines of appearance of fairness or appearance of impropriety to prosecuting attorneys, or evaluate these

doctrines from the defendant's point of view, rather than the public's point of view.

David Nickels's briefing does not acknowledge the fundamental changes in the ethics rule that have rendered *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988), an anachronism. Application of the current Rules of Professional Responsibility establish that the Grant County Prosecuting Attorney and his office acted appropriately throughout this matter. This Court must reverse Division III's disqualification of the entire Grant County Prosecuting Attorney's Office.

A. The Screening of a Personally Disqualified Attorney is an Accepted and Effective Practice

Over the years, the American Bar Association ("ABA") promoted professional responsibility by promulgating ethical standards in two forms: comprehensive compilations and individual opinions issued by the ABA Committee on Ethics and Professional Responsibility. Over the years, the ABA adopted three comprehensive compilations: the Canons of Professional Ethics in 1908, the Model Code of Professional Responsibility in 1969; and the Model Rules of Professional Conduct in 1983. G. Hazard & D. Rhode, *The Legal Profession: Responsibility and Regulation* 92, 100 (2d. ed. 1988). Many states, including Washington, adopted some variation of the Model Code and/or the Model Rules.

Both the Model Code and the Model Rules included provisions meant

to prevent attorneys from representing clients with conflicting interests. *See generally* DR 5-105; RPC 1.7-1.9. This prohibition reflects two primary concerns. The first concern relates to the attorney's duty of loyalty to the client, which requires that an attorney's judgment not be clouded by concerns unrelated to or antagonistic to those of the client. The second concern relates to protection of client confidences because of the possibility that an attorney might use a confidence in a subsequent action, consciously or unconsciously.

Both the Model Code and the Model Rules impute an individual lawyer's conflicts to other affiliated attorneys. *See generally* DR 1-105(C); RPC 1.10. The rule of imputation arose from the idea that lawyers in firms presumptively share confidences. *See* Neil W. Hamilton and Kevin R. Coan, *Are We a Profession or Merely a Business?: The Erosion of the Conflicts Rules Through the Increased Use of Ethical Walls*, 27 Hofstra L. Rev. 57, 73-74 (1988) (hereinafter "*Are We A Profession*"). The rule of imputation is prophylactic and overinclusive, purposefully encompassing behavior that may be ethically proper in an attempt to prohibit improper behavior. The Model Code and the Model Rules differ significantly with respect to the impact imputation has upon an affiliated attorney's future conduct.

1. The Dawn of Ethical Screens

A cornerstone of the Model Code was an aspirational goal to avoid even the appearance of impropriety. *See* ABA Model Code Preliminary

Statement (“The Ethical Considerations are aspirational in character and represent the objectives toward which every member of the profession should strive.”); ABA Model Code Canon 9 (“A Lawyer Should Avoid Even the Appearance of Professional Impropriety.”). Many courts held that a mere appearance of impropriety was, absent actual impropriety, “too slender a reed on which to rest a disqualification order.”¹ Washington courts in the 1970’s, however, strictly applied the concept to former government attorneys. See *Alpha Inv. Co. v. Tacoma*, 13 Wn. App. 532, 536 P.2d 674 (1975) (“spirit of canons” observed to disqualify a former criminal prosecuting attorney from representing a private client in a civil lawsuit against the county).

A few months after the *Alpha Inv. Co.* decision was issued, the ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 342 (Nov. 24, 1975). Formal Opinion 342 sought to address the impact of the 1974 amendment to DR 5-105(D), which, in conjunction with DR 9-101(B),² extended every disqualification of an individual former government lawyer to all lawyers in his new firm. After examining the policy considerations underlying DR 9-101(B), Formal Opinion 342 determined that a too harsh reading of DR 9-101(B) and the extension of DR 9-101(B) to all future associates of a government lawyer would actually thwart public policy

¹*Board of Education v. Nyquist*, 590 F.2d 1241, 1247 (2nd Cir. 1979).

²DR 9-101(B) provided that “A lawyer shall not accept private employment in a manner in which he had substantial responsibility while he was a public employee.”

by enabling litigants to deprive an opponent of competent counsel.

An inflexible application of DR 5-105(D) would demand too great a sacrifice of lawyers entering government service by severely restricting future employment. It would interfere with the ability of government to recruit lawyers and reduce the opportunity for litigants to obtain competent counsel of their own choosing. It could also result in significant financial hardship to a client whose firm must withdraw after completing significant work prior to the time the government lawyer joined the firm. The opinion, therefore, concluded that so long as the individual lawyer is screened from direct or indirect involvement in the matter when leaving or entering government service, the appearance of impropriety is avoided.

Courts promptly embraced Formal Opinion 342's screening recommendation, rejecting office-wide disqualification motions when a private attorney turned prosecutor was screened from any direct or indirect participation in a case involving a former client or other personal conflict. *See, e.g., United States v. Caggiano*, 660 F.2d 184, 190-191 (6th Cir. 1981); *State v. Fitzpatrick*, 464 So.2d 1185 (Fla. 1985); *United States v. Newman*, 534 F. Supp. 1113 (S.D. N.Y. 1982) (personally disqualified attorney was the United States Attorney for the District). Some scholars, however, rejected Formal Opinion 342 due to its reliance on policy concerns rather than the language of the rule. *See, e.g., Lawrence K. Hellman, When "Ethics Rules"*

Don't Mean What They Say: The Implications of Strained ABA Ethics Opinions, 10 Geo. L. J. Legal Ethics 317 (1997).

2. The Codification of Limited Ethical Screens

The ABA Model Rules combined Formal Opinion 342 and Model Code DR 9-101 into Model Rule 1.11. Grant Dawson, *Conflict of Interest: Working Guidelines for Successive Conflicts of Interest Involving Government and Private Employment*, 11 Geo. J. Legal Ethics 329, 333-34 (1998). Model Rule 1.11 clarified when an individual lawyer is personally disqualified from a matter upon moving from government to private practice. Model Rule 1.11 allowed for the new private employer to screen the individually disqualified attorney to avoid imputation of the conflict to the entire firm. While the consent of the former government client was not required, the former client could challenge the adequacy of the screening and could request judicial oversight of the screen. *Id.* at 335-36. Screens were deemed adequate if they were implemented in a timely manner, prohibited communication between the personally disqualified attorney and other employees on the topic of the litigation, and denied the personally disqualified attorney access to the files concerning the matter from which she is disqualified. *Id.* at 336.

Legal ethics advisors and courts immediately recognized that Model Rule 1.11 altered the landscape with respect to vicarious disqualification

when an attorney enters or leaves government service. *See, e.g.*, Alabama State Bar Office of General Counsel Formal Opinion 1994-10 (Jan. 1, 1994); State Bar of Arizona, Formal Ethics Opinion 85-06: Conflicts (Oct. 1, 1985). Many jurisdictions that rejected screening under the Model Code embraced it under the Model Rules.

3. Washington and the Model Rules

On September 1, 1985, the Washington Rules of Professional Conduct went into effect. *See* Former Rules of Professional Conduct, 104 Wn.2d 1101-1172 (1985). The RPC were virtually identical to the Model Rules. *See* Robert H. Aronson, *Washington Survey: An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 825 (1986). This Court, however, did not adopt nor publish the Comments to the Model Rules which provide necessary interpretation and application. *Id.* at 827.

The RPC, as adopted, distinguished between attorneys leaving or joining a private firm from those joining a government agency. A personally disqualified attorney who was leaving a government agency could be screened, while a personally disqualified attorney who joined a new private firm infected the whole firm. *See Id.* at 852-53; Former RPC 1.10, 104 Wn.2d 113-14 (1985); Former RPC 1.11, 104 Wn.2d 114-15 (1985).

While former RPC 1.11 contained explicit language authorizing the

use of screens when a former government lawyer joined a private firm, neither former RPC 1.10 nor former RPC 1.11 explicitly excused government officers from RPC 1.10's imputed disqualification provisions. This Court, however, expressly authorized screening of a personally conflicted deputy prosecuting attorney as a means of avoiding office wide disqualification. *See State v. Stenger, supra.*

Relying upon out-of-state decisions applying the Model Code, the *Stenger* opinion indicated in dicta that an entire office should ordinarily be disqualified when the elected prosecuting attorney is personally disqualified from a matter under the RPC. *See Stenger*, 111 Wn.2d at 522 n. 13 (relying upon an Indiana Supreme Court case, *State v. Tippecanoe Cy. Court*, 432 N.E.2d 1377 (Ind. 1982), and a California Court of Appeals case, *People v. Lepe*, 164 Cal. App. 3d 685, 211 Cal. Rptr. 432 (1985), that construed the Code of Professional Responsibility which was no longer in effect in Washington). Subsequent case law, however, recognized that subordinate government attorneys should not be disqualified from a matter simply because a supervisory attorney has a personal conflict of interest. *See Sherman v. State*, 128 Wn.2d 164, 187, 905 P.2d 355 (1995) (rejecting a "supervisory attorney" office wide disqualification rule for government attorneys); *State v. Ladenburg*, 67 Wn. App. 749, 840 P.2d 228 (1992) (where no evidence existed that the prosecuting attorney actively participated

in a prosecution involving his nephew there was no reason to disqualify the prosecuting attorney's entire office).

4. Increasing Acceptance of Screening Devices to Avert Attorney Disqualification

Legal employment underwent rapid change in the 1980s. A growing number of attorneys began practicing in increasingly large, multi-office law firms. There was also an increase in attorney mobility between firms and a growing number of temporary lawyers.³ These trends resulted in the ABA extending screening to temporary lawyers,⁴ led more courts to allow screening as a means to avert disqualification,⁵ and kicked off a debate that still rages today.⁶

Policy justifications in support of extending the use of ethical screens beyond government attorneys included an individual's right to choose his or her own counsel, greater mobility of attorneys, and the high cost of disqualification. *See generally Comment, The Use of Screens to Cure Imputed Conflicts of Interest: Why the American Bar Association's and Most*

³In 1988, there were approximately 1300 temporary attorneys, represented by at least nine placement agencies. *See Berkman, Temporarily Yours: Associates for Hire*, Am. Law., Mar. 1988, at 24.

⁴*See* ABA Formal Opinion 88-356 (Dec. 16, 1988).

⁵*See, e.g., Smith v. Whatcott*, 757 F.2d 1098, 1101 (10th Cir. 1985) ("courts have extended the logic of screening beyond the context of government lawyers").

⁶*See* Erik Wittman, *Current Development 2008-2009: A Discussion of Nonconsensual Screens as the ABA Votes to Amend Model Rule 1.10*, 22 Geo. J. Legal Ethics 1211 (2009) (summarizing both sides of the debate).

State Bar Associations' Failure to Allow Screening Undermines the Integrity of the Legal Profession, 35 U. Balt. L. Rev. 367 (2006). Many supporters of screens further noted that because attorneys are aware of the severe consequences that they face as a result of sharing confidences, a motion for disqualification is usually "a tactical effort to force the other side to switch firms in midstream, rather than a move based on genuine concern that confidential information may be disseminated." Margaret Graham Tebo, *A Treacherous Path*, 86 A.B.A. J. 54 (2000).

5. Washington Embraces Ethical Screens

This Court was one of the first to determine that public policy was best served by expanding the use of screening devices. In 1992, Washington amended RPC 1.10 to allow for nonconsensual screening of a personally conflicted attorney who moves between private firms. *See* Former RPC 1.10, 119 Wn.2d 1102 (1992). When this Court adopted former RPC 1.10, only four other states had amended their ethics rules to allow screening. *See* Note, *Ohio's New Ethical Screening Procedure*, 31 U. Tol. L. Rev. 145, 172 n. 274 (1999).

Former RPC 1.10 did not contain any language limiting its applicability to private firms. Government offices, therefore, followed the procedures contained in former RPC 1.10(b)(3) when a personally disqualified attorney joined the agency from either private practice or another

government agency. The personally disqualified attorney promised not to participate in the matter or to discuss the matter or the representation with any other attorney or employee of the agency, and all agency personnel were apprised that the personally disqualified attorney was screened. Upon the request of the former client or the personally disqualified attorney's former employer, the court would supervise the screen.

6. ABA Ethics 2000

In 1997, the ABA formed the Ethics 2000 Commission to review the Model Rules. The process was undertaken, in part, to clarify the rules and to address the changing organization and structure of modern law practice. *See generally* Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 Geo. J. Legal Ethics 441 (2002).

The Ethics 2000 Commission recommended significant amendments to Model Rule 1.11. The amendments, which were all adopted by the ABA House of Delegates, clarified that the rule applies equally to lawyers moving from government service to private practice and visa versa, and to lawyers moving from one government agency to another. *See* Reporter's Explanation of Changes to Model Rule 1.11. The amended rule and newly adopted comment 2 also clarified that a former client conflict is not imputed to other employees of a government agency even when formal screening is not

instituted. *Id.*

Although the ethics rules of only a handful of jurisdictions allowed nonconsensual screening of a personally disqualified non-governmental lawyer who joins a private firm,⁷ the Ethics 2000 Committee recommended amending Model Rule 1.10 to explicitly sanction the practice. *See* Rule 1.10 as Proposed by Commission. A minority of the Ethics 2000 Commission dissented from this recommendation. *See* Lawrence J. Fox Minority Report—Center for Professional Responsibility. The ABA House of Delegates rejected extending screening to private attorneys. *See* Rule 1.10 As Passed By House.

7. Washington Ethics 2003

Shortly after the ABA's amended Model Rules were adopted in 2003, Washington began re-evaluating its own RPC. The Special Committee for the Evaluation of the Rules of Professional Conduct ("Ethics 2003 Committee") was created by the Washington State Bar Association to consider whether Washington should adopt the ABA's 2003 Model Rules of Professional Conduct. The Ethics 2003 Committee ultimately recommended adopting the ABA's 2003 Model Rules with a few changes.⁸ *See* Wash. State

⁷*See* Standing Comm. on Ethics & Professional Responsibility, Am. Bar Ass'n, Report to the House of Delegates 9 (Feb. 2009) ("Report 109") (at the time of the Ethics 2000 vote, only 13 states' rules allowed for screening when a private attorney made a lateral transfer to another private firm).

⁸One significant difference between the 2003 Model Rules and Washington's 2006 RPC is Washington's continued recognition of nonconsensual screening in private practice. *See* RPC 1.10(e); RPC 1.10 Comments 9-12.

Bar Ass'n, *Report and Recommendation of the Special Committee for Evaluation of the Rules of Professional Conduct (Ethics 2003) to the Board of Governors* 4, 9-15 (2004). This Court adopted the Ethics 2003 Committee's recommendations in 2006. See 157 Wn.2d 1129, 1135-1342 (2006).

The newly adopted ethics rules affirmatively recognized that governmental lawyers may have constitutional, statutory, and common law responsibilities that differ from those of private attorneys, and that the RPCs do not abrogate their authority. Scope Paragraph 17. This acknowledgment manifested itself in the rules of vicarious disqualification.

RPC 1.11 was amended to make it consistent with the 2003 Model Rule 1.11. Comment 2 to RPC 1.11 expressly provided that RPC 1.11, not RPC 1.10, is applicable to former and current government officers:

Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. 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.

Accord RPC 1.10(d) ("The disqualification of lawyers associated in a firm

with former or current government lawyers is governed by Rule 1.11.”); RPC 1.10 Comment 7.⁹

Nothing in the plain language of RPC 1.11 or the comments provides that a supervisory attorney or elected attorney’s personal conflict should be imputed to their entire office.¹⁰ Nor is there support for creating such an exception in cases interpreting similar post-Ethics 2000 versions of RPC 1.11.¹¹ *See, e.g., State v. Eighth Judicial Dist. Court of the State*, 321 P.3d 882 (2014) (office wide disqualification denied when defense attorney

⁹RPC 1.10 Comment 7 reiterates that a prior private attorney’s conflicts are not imputed to government attorneys associated with him or her:

Where a lawyer has joined a private firm after having represented the government, imputation is governed by Rule 1.11(b) and (c), not this Rule. Under Rule 1.11(d), 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.

¹⁰Court rules are interpreted the same way as statutes. *State v. George*, 160 Wn.2d 727, 735, 158 P.3d 1169 (2007). A court will not add restrictions to an unambiguous rule. *See, e.g., In re Personal Restraint of Stenson*, 153 Wn.2d 137, 146-47, 102 P.3d 151 (2004).

¹¹Today, virtually every jurisdiction has adopted a version of Model Rule 1.11 which does not require vicarious disqualification of an entire government agency or office when a personally disqualified private attorney is hired. *See* American Bar Association Center for Professional Responsibility Policy Implementation Committee, Variations of the ABA Model Rules of Professional Conduct: Rule 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees (Apr. 26, 2019).

Decisions on office wide disqualification of prosecuting attorneys emanating from some jurisdictions both pre- and post- Ethics 2000, are, however, inapplicable to Washington. This is because many states apply the “appearance of impropriety” to prosecuting attorneys while Washington does not. *See generally State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (appearance of fairness doctrine does not apply to the executive branch functions of a prosecuting attorney), and *Doyle v. Lee*, 166 Wn. App. 397, 403, 272 P.3d256 (2012) (“mere appearance of impropriety is insufficient to remove a prosecutor”).

transitioned to head of a prosecutor's office).

8. The ABA Endorses Nonconsensual Screening for All Lawyers

In August of 2008, the ABA Standing Committee on Ethics and Professional Responsibility ("Standing Committee") proposed to the House of Delegates an amendment to Model Rule 1.10 designed to permit the use of nonconsensual screens when attorneys lateral between private firms. Over the next year, substantial evidence was amassed in support of and in opposition to the proposal. The Standing Committee's final report concluded that "Screening is a mechanism to give effect to the duty of confidentiality, not a tool to undermine it." Report 109, at 10.

The Standing Committee's conclusion was based, in part, on the results of an inquiry of disciplinary counsel, state bar association officials, and practicing lawyers in those jurisdictions that authorize lateral screens. That inquiry discovered no pattern of disciplinary actions arising out of screening. *Id.* at 11. The Committee further noted that since screening of current or former government lawyers was first authorized in 1983, it was not aware of "even a handful of instances in which confidentiality has been breached." *Id.* The absence of a history or pattern of ethical screen breaches was further supported by the director of Illinois's lawyer disciplinary agency, who reported that over a 15 year period not one complaint out of 93,000 received from clients, attorneys, and others involved an alleged breach of a

conflicts screen. See Mary T. Robinson, *Screening and Spector of Harm to Clients*.

Ultimately the House of Delegates adopted a slightly modified version of Model Rule 1.10. See Edward A. Adams, *ABA House Oks Lateral Lawyer Ethics Rule Change*, ABA Journal, 2/16/2009.¹² While this rule is not quite as permissive as Washington RPC 1.10, it dramatically increased the availability of nonconsensual screening of lateral attorneys. The majority of the states now permit lateral screening.¹³

The approval of universal screening of lateral attorneys is consistent with the presumption that lawyers will act properly. See, e.g., *Bracy v. Gramley*, 520 U.S. 899, 909, 117 S. Ct. 1793, 1799 (1997) (“Ordinarily, we presume that public officials have ‘properly discharged their official duties.’”); *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (strong presumption that defense counsel’s performance was reasonable); *State v. Terrovonia*, 64 Wn. App. 417, 421, 824 P.2d 537 (1992) (presumption that prosecutors act in good faith). The rare violation of this presumption may be addressed through the disciplinary process and/or the courts.

B. Public Policy Disfavors Office Wide Disqualification.

¹²Article available at http://www.abajournal.com/news/article/aba_house_oks_lateral_lawyer_ethics_rule_change (last visited Jul. 5, 2019).

¹³See American Bar Association Center for Professional Responsibility Policy Implementation Committee, *Variations of the ABA Model Rules of Professional Conduct: Rule 1.10: Imputation of Conflicts of Interest: General Rule* (Dec. 11, 2018).

Prosecuting attorneys are elected by county. *See* Const. art. XI, § 5. Through this process, the electorate influences the criminal justice policies that will be pursued. *See, e.g.,* Jonathan Glover, Spokesman Review, *Among Washington's largest counties, Spokane County has the largest rate of drug felonies – and it's not even close*, May 20, 2019 (comparing Spokane County policies with that of other counties).¹⁴

An elected prosecuting attorney is generally unable to personally represent the State in every criminal case filed in his or her jurisdiction. He therefore assembles a team of deputies, victim advocates, witness coordinators, investigators, paralegals, budget managers, and others. Each member of the team is personally selected by the prosecuting attorney to ensure that his or her policies are carried out. *See generally* RCW 36.16.070 (prosecutor responsible for acts of employees and deputies); RCW 36.27.040 (same).

Office wide disqualification based upon the election of a prosecuting attorney who represented criminal defendants prior to his election extends to the prosecuting attorney's entire team. *See generally* RPC 5.3 (non-lawyer assistants may not engage in conduct that his or her supervisor may not do). This can result in a victim or victim survivor being deprived of an advocate who has supported her throughout a difficult or lengthy prosecution. This can

¹⁴Available at <https://www.spokesman.com/stories/2019/may/19/as-counties-around-the-state-move-to-reduce-felony/> (last visited Jul. 7, 2019).

also result in substitute counsel lacking the resources to effectively or efficiently try a case.

Office wide disqualification places the superior court judge, rather than the people, in charge of selecting a substitute. *See* RCW 36.27.030. The pool of attorneys that may be selected is limited. Most experienced criminal attorneys in private practice may not accept an appointment due to RPC 1.7(a)(1). *See, e.g., State v. Tracer*, 173 Wn.2d 708, 718-21, 272 P.3d 199 (2012) (special prosecuting attorney cannot represent defendants in actions brought by the State). Neighboring prosecuting attorneys and the attorney general may reject an appointment due to other commitments and time constraints.¹⁵ *See generally* RPC 1.16 (proper to decline representation to avoid violating another RPC); RPC 6.2 (same with respect to appointments); RPC 1.3 Comment 2 (attorney must control workload so that each matter may be handled competently); RPC 1.1 Comment 5 (competent handling of a matter includes adequate preparation).

Appointing an inexperienced and time-constrained attorney to represent the State in a murder case undermines public confidence in the outcome of the trial and deprives the people of the State of due process. *See generally Stein v. New York*, 346 U.S. 156, 197, 73 S. Ct. 1077, 97 L. Ed.

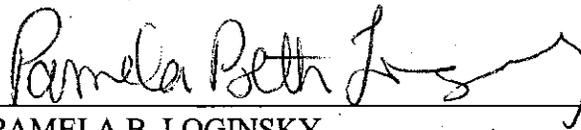
¹⁵An attorney who is appointed to a matter following the disqualification of an entire office generally has less than 60 days to prepare for trial. *See generally* CrR 3.3(c)(vii) (new 60- or 90- day time for trial period begins on date prosecutor is disqualified); CrRLJ 3.3(c)(vii) (same).

1522 (1952), *overruled on other grounds in Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964) (“The people of the State are also entitled to due process of law” in criminal matters.); *State v. Sledge*, 133 Wn.2d 828, 839, 947 P.2d 1199 (1997) (“Fairness is mandated to ensure public confidence in the administration of our justice system.”). Applying the plain language of RPC 1.11 to all government attorneys avoids these consequences.

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 8th day of July, 2019.



PAMELA B. LOGINSKY
Special Deputy Prosecuting Attorney
WSBA No. 18096
206 10th Ave. SE
Olympia, WA 98366
(360) 753-2175

Appendix A

Links to American Bar Association Materials

1. **Current ABA Model Code of Professional Responsibility** may be found at
https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_migrated/mcpr.pdf (last visited Jul. 2, 2019)
2. **Current ABA Model Rules of Professional Conduct** may be found at
https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/ (last visited Jul. 2, 2019)
3. **ABA Ethics 2000** materials may be found at
https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/ (last visited Jul. 5, 2019). The reporter's explanations, the Commission's proposed rules, and the rules as adopted by the ABA House of Delegates may all be found at
https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_report_home/ (last visited Jul. 5, 2019)
4. **Standing Comm. on Ethics & Professional Responsibility, Am. Bar Ass'n, Report to the House of Delegates** (Feb. 2009) ("Report 109") may be found at
https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility1/final_report_adopted109.pdf
5. **Lawrence J. Fox Minority Report– Center for Professional Responsibility** may be found at
https://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission/e2k_dissent/ (last visited Jul. 5, 2019)

6. **Center for Professional Responsibility Policy Implementation Committee, Variations of the ABA Model Rules of Professional Conduct: Rule 1.11: Special Conflicts of Interest for Former and Current Government Officers and Employees** (Apr. 26, 2019) may be found at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_11.pdf (last visited Jul. 4, 2019)).
7. **Background Materials to 2009 Amendment to Model Rule 1.10** may be found at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/background_resources/ (last visited Jul 5, 2019)
8. **Center for Professional Responsibility Policy Implementation Committee, Variations of the ABA Model Rules of Professional Conduct: Rule 1.10: Imputation of Conflicts of Interest: General Rule** (Dec. 11, 2018) may be found at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_10.pdf (last visited Jul. 4, 2019)

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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.

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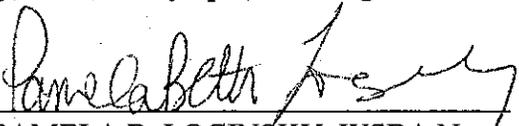
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John Strait at straitj@seattleu.edu

Rita Griffith at griff1984@comcast.net

Hillary Behrman at hillary@defensenet.org

Signed under the penalty of perjury under the laws of the state of Washington this 8th day of July, 2019, at Olympia, Washington.


PAMELA B. LOGINSKY, WSBA No.
18096

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