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Washington State Court of Appeals  
Division I

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Docket No. 75090-9-I

King Cy. Sup. Ct. Cause No. 15-1-01438-9 KNT

**STATE OF WASHINGTON,**

*Plaintiff-Respondent,*

-against-

**JAMES O'NEIL,**

*Defendant-Appellant,*

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**APPELLANT'S REPLY**

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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## **I. REBUTTAL**

### **A. The appropriate standard of review.**

Determining a conflict under the ethical rules is a question of law reviewed de novo. *State v. Vicuna*, 119 Wn.App. 26, 30-1, 79 P.3d 1 (2003) review denied 152 Wn.2d 1008 (2004); but see *PUD v. International Ins. Co.*, 124 Wash.2d 789, 812, 881 P.2d 1020 (1994). (“Under the circumstances, we find the trial court’s ruling under RPC 3.7 to be an appropriate compromise, balancing the interests of both the plaintiffs and the defendants. We find no abuse of discretion.”).

The State incorrectly frames the standard of review in this appeal. The State suggests that the issues in this appeal relate to evidentiary rulings, which is an abuse of discretion standard. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2006). The disputed issues are not about the admissibility of evidence. Mr. O’Neil agrees that evidence about the objective standard of reasonable attorney conduct for arraignment is relevant. This appeal deals with the ethical quandaries that the trial court created. The proper standard of review appears to be de novo despite the language in the *PUD* case.

- i. **Mr. O’Neil has the right to conflict free counsel. The trial court did not recognize that a lawyer’s own interests can have an adverse effect on the representation of a client.**

Mr. O’Neil has the right to conflict free counsel at the trial level. Vargas and Aralica have a personal interest that will have an adverse effect on his representation. RPC 1.7; RPC 3.7. The Sixth Amendment right to assistance of counsel includes the right to assistance of counsel free from conflicts of interest. *State v. Davis*, 141 Wn.2d 798, 860, 10 P.3d 977 (2000); *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 1103 (1981) (record strongly suggested a conflict and remanded for court inquiry).

The State suggests in its response that Aralica’s and Vargas’s personal and professional relationship does not create a conflict per RPC 3.7. The State is correct that RPC 3.7(a) does not apply in this case because she is not representing Mr. O’Neil. RPC 3.7(b), however, applies in this case.

“(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.”

RPC 1.7 is implicated because the trial court allowed the State to interview Vargas and call her as a witness. This creates a personal conflict of interest, which is a conflict per RPC 1.7.

RPC 1.7 makes clear that a personal interest is a conflict of interest. RPC 1.7(a)(2) (“...or by personal interest of the lawyer.”); *State v. Jensen*, 125 Wash.App. 319, 104 P.3d 717 (2005). The comments to RPC 1.7 declare: “[l]oyalty and independent judgment are essential elements in the lawyer’s relationship to a client. Concurrent conflicts can arise from the lawyer’s responsibilities to another client, a former client or a third person or **from the lawyer’s own personal interests.**” RPC 1.7 general principles [1] (emphasis added). The comments further state: “[t]he lawyer’s own interests should not be permitted to have an adverse effect on the representation of a client.” RPC 1.7 general principles [10].

RPC 1.7 specifically addresses the problem of divided loyalty related to a personal interest. Professor Strait affirmed in *Jensen* how a personal conflict of interest can affect representation. “There is a substantial likelihood that Mr. Phelps could not bring the independent judgment, aggressive advocacy and adequate preparation...” *Jensen*, 125 Wash.App. at 333. Moreover, attorneys must avoid “even the appearance of impropriety, and that an actual conflict of interests was not necessary in order for an attorney to be disqualified.” *State v. Irizarry*, 271 N.J.Super. 577, 597, 639 A.2d 305 (1994); *State v. Galati*, 64 N.J. 572, 576, 319 A.2d 220 (1974) (“a lawyer must avoid even the appearance of impropriety...to

the end that the image of disinterested justice is not impoverished or tainted”).

Here, the State presented contradictory arguments about Vargas’s relevance and value in an unsuccessful attempt to nullify the personal conflict of interest per RPC 1.7. The State claimed that she will not be a fact witness. (Brief of Respondent, pg. 19 & 23). Her credibility will not be questioned. (*Id.* pg. 19). Her memory and sensory perception are not relevant. (*Id.*). She will not provide false testimony. (*Id.*). She will present unbiased facts like a “records custodian.” (*Id.*). And, the State suggested that her testimony will not incriminate Mr. O’Neil. (*Id.* pg. 23). The State is essentially arguing that she will not be prejudicial to Mr. O’Neil.

Rhetorically speaking then, what is Vargas’s specific value? Why is she, in particular, relevant? The State believes she is relevant and valuable because she provides evidence that would support its case. “Ms. Vargas has been consistently identified as having the greatest level of experience with RJC arraignment calendars.” (Brief of Respondent, pg. 9). This makes her a prejudicial witness.

The State wants it both ways in this appeal—Vargas is a necessary witness, but not that necessary to justify an ethical concern. The reality is that the State believes she is an expert witness in regards to arraignment

practices, but it does not want to plainly assert it. As an expert, her qualifications, experience, work history, education history, employment history, CLE history, and so on is relevant to her credibility. Aralica has a duty to zealously represent his client, Mr. O’Neil. He will need to investigate her qualifications. He will need to prepare for her interview. The Washington State Supreme Court highlighted the importance of investigation and nexus to the Sixth Amendment right to effective assistance of counsel. *State v. A.N.J.*, 168 Wash.2d 91, 225 P.3d 956 (2010).

Aralica will need to impeach Vargas’s credibility. Ultimately, the information Vargas will provide is prejudicial. “Testimony is considered prejudicial under this Rule if it is so adverse to the client’s side that the bar or the client might have an interest in discrediting the testimony.” *Smith v. New Orleans Fed. Sav. & Loan Ass’n*, 474 F.Supp. 742, 749–50 (E.D.La.1979).

RPC 3.7 and RPC 1.7(c) is implicated because Vargas and Aralica work together at ACA—Division. They have worked together for about ten years. She has unrestricted access to all files at ACA—Division including Mr. O’Neil’s file. Further, Aralica is a supervising attorney at ACA—Division. He has a duty to be effective and responsible manager.

ACA—Division has a management team responsible for the supervision of employees and for the day to day operations of this public defense law firm. The management teams consist of a managing attorney who directly supervises supervising attorneys who in turn are responsible for particular units within the firm. Those units include felony, misdemeanor, dependency, Drug Court/Mental Health Court, ITA, and so on. The management team will meet on a regular basis to make decisions about attorney assignments, disciplinary issues, policy issues, and other employment issues.

ACA—Division has two main offices. One office is in Seattle, and the other office is Kent. Approximately thirty four employees work in the Kent office. Two supervising attorneys are physically located in the Kent office. Aralica is one of the supervisors in the Kent office.

Aralica supervises the adult felony unit, which includes individual felony trial cases and the felony arraignment calendar. As a supervisor, he provides guidance and advice on matters affecting representation including ethical obligations. He is responsible for disciplinary and corrective actions. He is responsible for employee evaluations. He is also responsible for a whole host of other office supervision issues.

Aralica was Vargas's direct supervisor up until 5 July 2016.<sup>1</sup> Around Thursday 30 June 2016, Gordon Hill (Hill), the interim Managing Attorney at King County Department of Public Defense—ACA Division, informed Aralica that he may transfer Vargas's direct supervision to another supervisor Karen Murray (Murray). Murray was the supervisor at the Seattle Municipal Court unit located in the Seattle office. Murray is now supervising the Drug Court/Mental Health Court unit. This was an internal supervision change unrelated to this appeal. The Seattle Municipal Court unit had two supervisors. Due to staffing changes, the Seattle Municipal Court unit went down to one supervisor. The Drug Court/Mental Health Court unit required a supervisor. Murray became the new Drug Court/Mental Health Court unit supervisor.

Vargas works in both the Drug Court unit (where Murray is her supervisor) and the Felony unit (where Aralica is the supervisor). With the supervisor change, Hill decided to transfer Vargas's supervision to Murry. Aralica is no longer directly supervising Vargas in regards to administrative duties such as vacation, sick leave, and other related issues. ACA—Division has an electronic payroll system called "Peoplesoft." Supervisors will enter employee time, sick leave, and vacation time.

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<sup>1</sup> The Appellant filed a memorandum regarding additional evidence on review per RAP 9.11 on 14 July 2016. Additional facts developed after review was accepted. The Court of Appeals commissioner ruled on this issue allowing the appeal to continue.

Aralica is no longer responsible for these administrative tasks. He is, however, still supervising her in regards to the felony arraignment calendar and other duties. This is a hybrid supervision.

Aralica is responsible for supervising the felony arraignment coverage attorney at the Regional Justice Center. Vargas is the coverage attorney. He is tasked in making sure that Vargas is in court. If she is not available, Aralica must find coverage; not Murray. Further, Vargas coordinates her vacation schedule with Aralica and Murray. Aralica could, hypothetically, deny Vargas's request for vacation time in consultation with Murray.

Aralica and Murray are essentially both responsible for Vargas' professional development, discipline, work place competence, training, and working conditions. He will provide input to Murray. For example, public defense attorneys are required to provide quarterly "certification of counsel" declarations per court rule. Because Aralica is responsible for the felony arraignment calendar, he provides critical input regarding Vargas's compliance. Vargas continues to consult and seek approval from Aralica regarding arraignment practices. He is responsible to make sure that Vargas is doing a competent job as the arraignment attorney. If she is not, he would inform and consult with Murray about corrective action.

Finally, as part of the management team, he has power over Vargas regarding her placement in the firm, including promotional opportunities.<sup>2</sup>

The State and the trial court did not recognize the divided loyalty problem in this case. Aralica's duty as a supervisor conflicts with his duty to investigate Vargas, prepare for her witness interview, and cross-examine her at a motions hearing in regards to representing his client. For example, as a supervisor, he has unfettered access to her personnel file, which could include employment evaluations, grievances, work performance issues, and other information. It is not possible to screen his access at this point because he has already seen it and contributed to it.

Mr. O'Neil may expect Aralica to investigate Vargas's employment history. Effective representation requires it. As a supervisor, Aralica has a duty to protect an employee's information. Vargas may rightly hold that her information confidential and she may believe that Aralica must protect her information. If he used this information based on his position, or more importantly if she believed he used this information, he could be subject to an employment grievance.

Aralica's personal conflict of interest exists as long as the threat exists that Vargas will be interviewed and could testify against his client. This is not an imagined threat. On Monday 25 July 2016, a jury in King

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<sup>2</sup> Aralica was on the Senior Promotion committee at the King County Department of Public Defense.

County Superior Court found that the Seattle Police chief retaliated against employees over a dispute handling overtime pay. Steve Miletich, \$2.8 million verdict against Seattle police chief; jury sees retaliation in 2 cop transfers, The Seattle Times, 25 July 2016 <http://www.seattletimes.com/seattle-news/jury-finds-seattle-police-chief-retaliated-against-2-officers-in-overtime-dispute/>. Aralica's position as a supervisor with his duties, his powers, and his responsibilities create a personal conflict of interest because every decision potentially affecting Vargas's working conditions is now colored by what happens with this case.

The State and the trial court simply did not accept or understand the serious nature of this ethical quagmire. But, another judge, the Honorable James Cayce, recognized this personal conflict of interest when he recused himself from the underlying motion. Judge Cayce understood that he could not fairly judge Vargas's credibility based on his relationship with her. Aralica's personal conflict of interest is more compelling. The trial court committed error by not allowing withdrawal. Mr. O'Neil has the right to conflict free counsel at the trial level.

ii. **The State's contradictory arguments show beyond any doubt that Vargas is simply not a necessary witness.**

The State suggested that the proper standard is not whether Vargas is a necessary witness. The proper standard is “whether Ms. Vargas can provide relevant evidence.” (Brief of Respondent, pg. 9). When confronted with a lawyer-witness, the State is partly correct. It has to show that the evidence is “more than marginally relevant.” *Mills v. Hausmann-McNally*, S.C., 992 F.Supp.2d 885, 895 (2014). But, that is only one part of the test.

Because the State wants to call Vargas (who works with Aralica) as a witness, RPC 3.7 is implicated. As a result, Aralica could be disqualified as Mr. O’Neil’s attorney because of a personal conflict of interest. Courts, however, do not want disqualify counsel in these circumstances. *People v. Hagos*, 250 P.3d 596, 609 (2009); *PUD*, 124 Wash.2d at 812. Before disqualification is considered, the State must show that the evidence the witness will provide is not obtainable from other sources. *State v. Schmitt*, 124 Wash.App. 662, 666, 102 P.3d 856 (2004). In other words, the State must show that Vargas is a necessary witness. *Id.*; see also *Smaland Beach Ass’n, Inc. v. Genova*, 461 Mass. 214, 222, 959 N.E.2d 955 (2012) (trial court could not disqualify attorney as a necessary witness without determining whether information sought could be obtained through other means).

“Consequently, allegations that opposing counsel is a “necessary

witness” for purposes of Rule 3.7 cannot rest on the mere naming of the attorney.” *Hagos*, 250 P.3d at 609. The trial court must consider whether the information sought from the lawyer-witness can be obtained from other sources. *Smaland Beach Ass’n, Inc.*, 461 Mass. at 222. The court should consider the following factors to determine if the lawyer-witness is a necessary witness. *Hagos*, 250 P.3d at 609. First, the trial court must consider the nature of the case. *Id.* Second, the weight the testimony should be considered in resolving the disputed issues. *Id.* Third, the availability of other “witnesses or documentary evidence which might independently establish the relevant issues” is also factor. *Id.*

The fact that a party does not want to consider alternative sources of information is different from the existence of other sources. In *State v. Irizarry*, the defendant wanted to call prosecutor as a witness to provide information about the defendant. 271 N.J.Super. 577, 592, 639 A.2d 305 (1994). While a member of the prosecutor’s office could provide this information, there were other sources. *Id.*

“Moreover, the State argues that no member of the prosecutor’s office is a “necessary witness” within the meaning of R.P.C. 3.7 because defendant’s assistance in the prosecution of Boeglin is public record and can be proved by witnesses other than members of the prosecutor’s office.”

*Id.* *Horaist v. Doctor’s Hosp. of Opelousas* also illustrated that just because a party prefers a witness to provide the information does not mean

that witness is necessary when there are other sources. 255 F.3d 261, 267 (2001).

“Each item of information that Toce could provide is already available from another source, and defendants have failed to articulate how Toce’s corroboration would prejudice Horaist. Horaist may testify to the nature of her relationship with Toce and to the fact that she did not reveal her harassment to him at the time. Other co-workers may shed light on Horaist’s behavior with her alleged harassers. She may produce business records or testify to her earnings. Her psychologist, family, friends, and former co-workers can testify to her emotional state.”

*Id.*

Here, applying the *Hagos* factors is helpful in concluding that Vargas is not a necessary witness. 250 P.3d at 609. First, the nature of the case evinces that she is not necessary. The primary issue is whether Mr. O’Neil’s first attorney, Zangri, met the definition of a minimum objective standard of reasonable attorney conduct at arraignment. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). As noted in Mr. O’Neil’s opening brief, this is an objective standard. The subjective or cultural traditions at the Regional Justice Center in Kent are irrelevant. What is relevant is whether Zangri met objective standards. This includes preparing for the arraignment (which is a plea hearing). Research, understanding, and/or knowing “Third Strike” jurisprudence is effective assistance of counsel. Advising her client that he had the right to plead guilty at the arraignment is effective assistance of counsel. Vargas is not a

necessary witness given the nature of the case.

Second, the weight Vargas's testimony has no value in resolving the disputed issues in Mr. O'Neil's case. As noted above, the State presented contradictory arguments about Vargas's relevance and value in an unsuccessful attempt to nullify the personal conflict of interest per RPC 1.7. These arguments, however, evince that she is not a necessary witness. The State suggested that: "Ms. Vargas has been consistently identified as having the greatest level of experience with RJC arraignment calendars." (Brief of Respondent, pg. 9). But, the State also argued that she will present unbiased facts like a "records custodian." (*Id.* pg. 19). Her testimony will not incriminate Mr. O'Neil. (*Id.* pg. 23). She will not be a fact witness. (*Id.* pg. 19 & 23). Her memory and sensory perception are not relevant. (*Id.* pg. 19). Her credibility will not be questioned. (*Id.*). She will testify about standard arraignment practices. (*Id.*).

Rhetorically speaking then, what is Vargas's specific value? Why is she, in particular, relevant? The State wanted to downplay the personal conflict of interest by suggesting that her credibility is not at issue. In essence, the State suggested that no nexus exists with her being a valuable and relevant witness and impeaching her credibility. If her credibility is not at issue, then her testimony is not prejudicial. If her credibility is not at issue, then the weight of the testimony is minimal because other "witnesses or documentary evidence" can provide the same information.

*Hagos*, 250 P.3d at 609. But, the State still claimed she is a valuable witness. Either she is a valuable and relevant witness, or she is not. The State’s contradictory arguments show beyond any doubt that the weight of her information has no value in resolving any disputed issues. She is not a necessary witness.

Third, the availability of other “witnesses or documentary evidence which might independently establish the relevant issues” also evinces that Vargas is not a necessary witness. *Hagos*, 250 P.3d at 609. As outlined in Mr. O’Neil’s opening brief, there are other sources of information; other criminal defense lawyers, law school professors, case law, judicial notice, and so on.

The State obviously wants to interview and call Vargas as its witness. She is the first choice for the State. There is, however, a distinction between “wants” and “needs.” See *Horaist*, 255 F.3d at 267; see also *Irizarry*, 271 N.J.Super. at 592. For example, the State needs unbiased facts like a “records custodian” about arraignment. (Brief of Respondent, pg. 9). And, the State needs evidence about the standard practice of arraignment—the objective standards of arraignment. (*Id.*). But, if her credibility is not at issue, another criminal defense lawyer who has practiced at the Regional Justice Center can testify about the objective arraignment practices. (*Id.*). The State acts, however, as if Vargas is the only source in King County and Washington State who can provide this

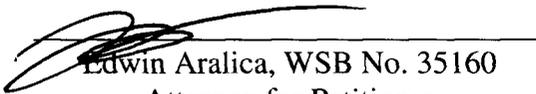
evidence. The State simply does not want to consider other sources, but they exist. Vargas is not a necessary witness.

## II. CONCLUSION

For the above reasons, this Court should reverse the trial court's decisions in this case by ordering the State to not call Vargas as a witness or in the alternative allow Aralica to withdraw as trial counsel.

Dated Tuesday 20 September 2016

King County Department of Public Defense—ACA Division

  
Edwin Aralica, WSB No. 35160  
Attorney for Petitioner

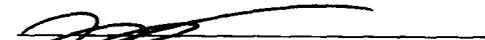
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on 26 September 2016, I caused a true and correct copy of the foregoing document to be served upon the following person(s) in the following manner:

[ x ] email on 26 September 2016 to Senior Deputy Prosecutor Tod Bergstrom and Deputy Prosecutor Gavriel Jacobs.

[ X ] will provided a copy in person at the King County Prosecutor's office 401 4<sup>th</sup> Ave N Kent, WA 98032 on 28 or 29 September 2016. Please be aware that I was on Family Medical Leave from 12-27 September 2016.

26-9-16 Seattle, WA  
Date and place

  
Edwin Aralica