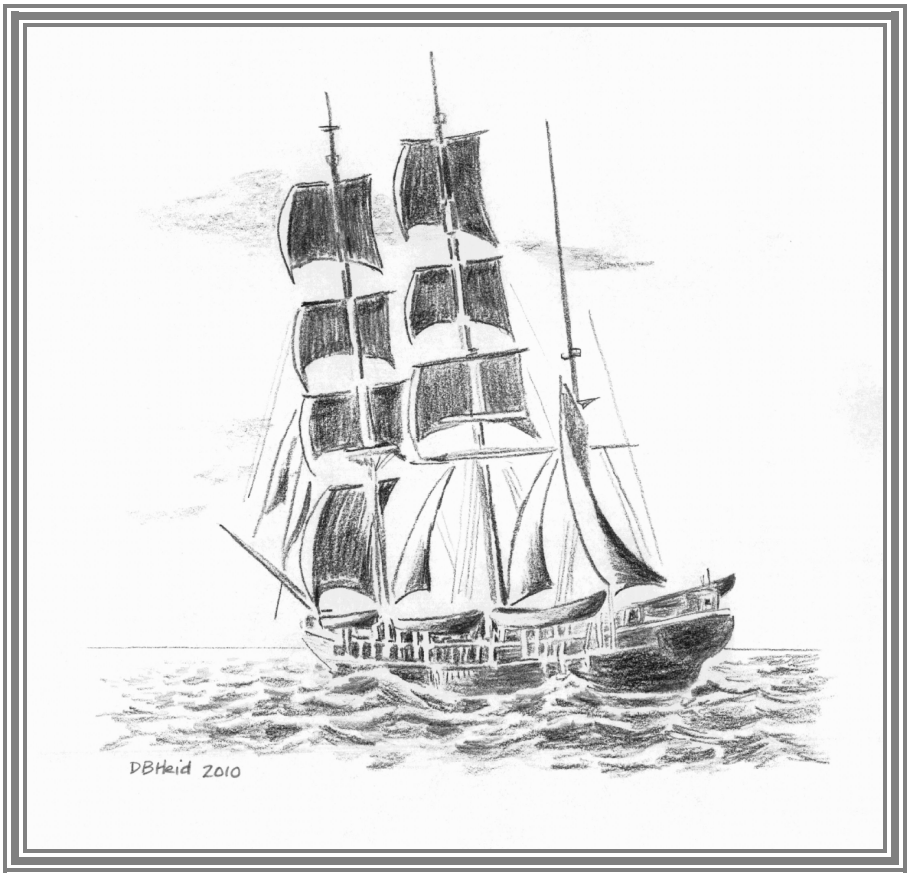
Public Law Ethics Primer

2010 Update



In civilized life, law floats in a sea of ethics.

Earl Warren

PREFACE

This primer was initially drafted in 1998 as a service of the Washington State Municipal Attorney's Association. It was the fruition of a strategic planning session of the Washington State Associations of Municipal Attorney's (WSAMA) Board of Directors. It focused on the ethical issues facing public and private section city attorneys. It did not cover the application of these issues for lawyers in the Attorney General's office. The contributing authors of the first edition included the following: Jennifer Simpson, Steve Karavitis, Alison Chinn, Debra Quinn, Judith Zeider, William A. Coats, Oma LaMothe, Celeste E. Zehr, Londi K. Lindell, Bob C. Sterbank, Mike Hoge, Arthur Pat Fitzpatrick, Laurie Flinn Connelly, Zanetta Fontes, Richard Little, Ronald H. Clark, Daniel B. Heid, Michael J. Finkle, and Scott Sonju.

This edition is an effort to update and in some cases reorganize the materials. Our goal was to create a primer that was substantive, informative and user friendly. The new tables of contents, as well as the appendices at the end indexing cited case law, statutes and rules, and the list identifying internet resources, were parts of that effort. The authors of this version are identified in the short table of contents. Five of those authors, Tim Donaldson, Dan Heid, Pat Mason, Heidi Wachter and I, Mike Connelly, served as an editorial board who worked to put together the final product.

We would also like to acknowledge the technical editing provided by law students at Gonzaga School of Law, Jeana Poloni, Jandon Mitchell and Chris Longman as well as Erik Lamb, a partner with Koegan Edwards.

Mike Connelly
Chair, Ethics Primer Update Committee

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I. INTRODUCTION – REPRESENTING A GOVERNMENTAL ENTITY

Lawyers working for a governmental entity as outside or in-house counsel advise and listen to elected officials, staff, the governmental entity as a whole, and the general public. The sometimes complex and conflicting interrelations of this environment make it essential for lawyers to know always whom they actually represent. Knowing the client will guide lawyers in determining 1) whose interests they are protecting; 2) from whom they take direction; and 3) whose confidences they are obligated to protect. These issues usually arise when there are conflicts between the parties identified above. Often these questions can be answered by referring to the laws governing the establishment and operation of a city. Difficulties almost always can be avoided by establishing clear guidelines of which all parties are aware.

II. RPC 1.13, ADOPTED SEPTEMBER 1, 2006

When Washington originally established its Rules of Professional Conduct (RPC), it rejected a rule addressing entity practice. *See* Mark J. Fucile, *The "Who is the Client?" Question Revisited,* Washington State Bar News, August 2007. Legislative history indicates that the drafters thought it best for entity practice issues to be fleshed out through case law, as opposed to adopting a rule for entities. *Id.* Case law never really developed in this area, so in 2006, the Washington Supreme Court adopted RPC 1.13, entitled "Organization as Client." This rule adopts an entity representation approach and is based on ABA Model Rule of Professional Conduct (ABA Model Rule) 1.13, although there are some modifications. As a result, unless Washington case law interpreting RPC 1.13 develops differently, other authority interpreting ABA Model Rule 1.13 is helpful in applying the same or similar components of recently adopted RPC 1.13. Below is the text of RPC 1.13:

> RULE 1.13 ORGANIZATION AS CLIENT.
>
> (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
>
> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) and (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

(h) For purposes of this Rule, when a lawyer who is not a public officer or employee represents a discrete governmental agency or unit that is part of a broader governmental entity, the lawyer's client is the particular governmental agency or unit represented, and not the broader governmental entity of which the agency or unit is a part, unless:

(1) otherwise provided in a written agreement between the lawyer and the governmental agency or unit; or

(2) the broader governmental entity gives the lawyer timely written notice to the contrary, in which case the client shall be designated by such entity. Notice under this subsection shall be given by the person designated by law as the chief legal officer of the broader governmental entity, or in the absence of such designation, by the chief executive officer of the entity.

III. IDENTIFYING WHO THE CLIENT IS

The entity is the client. RPC 1.13(a) states that "[a] lawyer employed or retained by an organization represents the organization *acting through its duly authorized constituents*." (emphasis added). If staff members, officials, or members of the public appear to believe that you represent them in their individual capacity, clarify to them that you represent the municipality as a whole, as directed by the public officials authorized to give direction, pursuant to the pertinent statutes or code provisions determining the operation of municipal government. Further, RPC 1.13(f) states that "[i]n dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."

IV. EFFECT OF ENTITY'S STRUCTURE/CHAIN OF COMMAND

Because the entity is the client, government lawyers must understand their entity's organizational structure and chain of authority. Comment 9 of RPC 1.13 explains that in the government context, "[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult . . . and is a matter beyond the scope of these Rules." However, government lawyers can overcome this difficulty by understanding their entity's organizational structure and chain of authority. For example, in a council-manager form of government, the executive head is the city manager, but in a strong mayor-council form of government, the mayor is the executive head. Where there are conflicts among the entity's constituents, the matter should be resolved by the higher authority. For certain decisions, the legislative body is charged with the responsibility, and that legislative body is the only authorized constituent of the entity.

V. DUTY TO REPRESENT/OFFICIAL CAPACITY

Government lawyers represent entity officials only insofar as entity officials are engaged in "official conduct" or act in an "official capacity." Outside of constituents' official capacity, constituents are not the government lawyers' clients. An example of this is found in the Revised Code of Washington (RCW) 36.27.020, which requires county prosecutors to "be [a] legal advisor to all county and precinct officers and school [district] directors in all matters relating to their official business . . . " Another example is found in RCW 35.23.111, which requires city attorneys to " . . . advise the city authorities and officers in all legal matters pertaining to the business of the city . . . [and] represent the city in all actions brought by or against the city or against city officials in their official capacity."

Courts have held that RCW 36.27.020 (which sets forth the duties of a county prosecutor) does not require a county prosecuting attorney to bring an action on behalf of a county officer

whenever the officer makes such request, if the prosecuting attorney determines that the officer is not entitled to representation. In *Hoppe v. King County*, 95 Wn.2d 332, 622 P.2d 845 (1980), the county assessor (Hoppe) sought to challenge the validity of a county ordinance which levied a property tax. Hoppe requested that the county prosecuting attorney represent him in an action against the county, the State and certain county officials. The county prosecutor refused. The Washington Supreme Court held that "nothing in the duties of the prosecuting attorney (RCW 36.27.020), requires that officer to bring an action simply because a request is made by another county officer or to provide legal representation." *Id*. In *Fisher v. Clem*, 25 Wn. App. 303, 607 P.2d 326 (1980), a district court judge (Fisher) contended that budget reductions "interfered with the court's ability to perform its statutory and constitutional duties in violation of the separation of powers doctrine." He sought mandamus to compel a county prosecutor to sue the Board of County Commissioners. The court held that RCW 36.27.020 "does not specifically compel the prosecutor to bring any civil suit." *Id.* at 307. Further, the court held that although RCW 36.27.040 grants prosecutors discretion to appoint a special prosecutor, it does not require such an appointment. Only if "they have totally failed to exercise their discretion to act, and therefore it can be said they have acted in an arbitrary and capricious manner," can one seek a writ of mandamus. *Id*. at 308.

VI. DUAL REPRESENTATION OF SEPARATE AGENCIES WITHIN A SINGLE ENTITY

Washington permits lawyers to represent two separate agencies within a single entity in the same matter. *See Amoss v. University of Washington*, 40 Wn. App. 666, 700 P.2d 350 (1985), where a professor who was denied tenure sought an appeal to the University of Washington President and Board of Regents. The parties advocating before the Board were the professor who was denied tenure and the Dean of the Department who denied the professor tenure. One Assistant Attorney General (AAG) represented and advised the President and Board of Regents. A different AAG from the same office represented the Dean. The two Assistant Attorneys General (AAGs) did not confer with each other, did not share advice or correspondence, and kept separate files. The Court of Appeals found the dual representation acceptable and held that this dual representation did not amount to an appearance of fairness violation or a violation of the Code of Professional Responsibility. The court favorably cited *Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 480-81, 663 P.2d 457 (1983), which stated that "when the performance of any legal duties required of the Attorney General presents actual conflicts of interest, a different assistant attorney general can, and should, be assigned to handle those inconsistent functions. . . . [W]hen the dual roles of the Attorney General present such a conflict, two separate attorneys should handle those functions."

See a similar holding in *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995), concerning the termination of a medical resident from the University of Washington Medical School program. Three AAGs were involved in this case and represented different interests. One

AAG was the supervisor of the other two AAGs. The three AAGs implemented a screening process and kept separate files. The Court held that this dual representation was permissible and did not create a conflict of interest. The Court further noted that appearance of fairness does not apply to attorneys; rather, it applies only to the decision-making body.

Howitt v. Superior Court, 3 Cal.App.4th 1575, 5 Cal.Rptr.2d 196 (1992), dealt with representing an internal tribunal and a party before that tribunal. In this case, county counsel was asked to represent the county in an adversarial hearing before the County Employment Appeals Board, while at the same time advising the Board on legal issues relevant in deciding the outcome of the hearing. To avoid federal constitutional due process concerns, the court required the county to show "an effective screening procedure" between the advisor for the decision-maker and the attorney for the advocate.

CHAPTER 2: CONFIDENTIALITY OF INFORMATION AND ATTORNEY-CLIENT PRIVILEGE

I. AUTHORITY

A. Rule of Professional Conduct – Text of RPC 1.6 – Confidentiality

RPC 1.6 provides:

RULE 1.6 CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer to the extent the lawyer reasonably believes necessary:

(1) shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm;

(2) may reveal information relating to the representation of a client to prevent the client from committing a crime;

(3) may reveal information relating to the representation of a client to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) may reveal information relating to the representation of a client to secure legal advice about the lawyer's compliance with these Rules;

(5) may reveal information relating to the representation of a client to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) may reveal information relating to the representation of a client to comply with a court order; or

(7) may reveal information relating to the representation of a client to inform a tribunal about any breach of fiduciary responsibility when the client is serving as a court appointed fiduciary such as a guardian, personal representative, or receiver.

The previous version of RPC 1.6 stated that a lawyer "may" reveal information under certain circumstances. The current rule, adopted in 2006, requires a lawyer to reveal information " . . . to prevent reasonably certain death or substantial bodily harm." While adding several instances of when information may be revealed, disclosure is not mandatory except under RPC 1.6(b)(1).

B. Statutory and Common Law Confidentiality

1. Text of RCW 5.60.060(2)(a). "An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment." RCW 5.60.060(2)(a).

2. Common Law Privilege. The same privilege of confidentiality is extended to the client under the common law rule. It applies to communications and advice and includes documents which contain privileged communications. The privilege is not absolute, but rather strictly limited to the purpose for which it exists. *Pappas v. Holloway*, 114 Wn.2d 198, 203-204, 787 P.2d 30 (1990) (internal cites omitted).

3. The Purpose of the Rule. The purpose of the rule is " . . . to encourage clients to make full disclosure to an attorney so that the attorney is able to render effective legal assistance." *R.A. Hanson Co., Inc. v. Magnuson*, 79 Wn. App. 497, 502, 903 P.2d 496 (1995), *review denied* 129 Wn.2d 1010, 917 P.2d 130.

C. Difference Between Statute and RPC

"The rule of confidentiality found in Canon 4 of the [previous Code of Professional Responsibility] is considerably broader than the statutory attorney-client privilege discussed above. The provisions of the code cover both 'confidences', which is coextensive with the statutory privilege, and 'secrets,' which 'refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client.'" *Seventh Elect Church in Isr. v. Rogers*, 102 Wn.2d 527, 688 P.2d 506 (1984) (comparing Canon 4 of the Canons of Professional Ethics (the precursor to RPC 1.6) to RCW 5.60.060(2)).

D. General Discussion

The Washington Supreme Court provides a general discussion of the statutes, RPC and Washington case law related to the attorney/client privilege in *Dietz v. Doe*, 131 Wn.2d 835, 935 P.2d 611 (1997).

II. APPLICATION TO GOVERNMENT ATTORNEYS

A. General Rules

1. General Rule Applicable to Government Lawyers. The general rule applies to the attorney for a governmental organization. *Port of Seattle v. Rio*, 16 Wn. App. 718, 559 P.2d 18 (1977). Public agencies are entitled to effective legal representation, and government lawyers have the same obligation to protect the confidences of their government clients as a private lawyer has to protect the confidences of a private client. *Lybbert v. Grant County*, 141 Wn.2d 29, 37, 1 P.3d 1124 (2000). To obtain effective advice, the protection of the attorney-client privilege is essential. The *Rio* case related to an exception to the Open Public Meetings law. *See infra* Chapter 2, Section V. However, the language of the case spells out the basic principle, applicable to public agencies and client confidentiality as well.

2. Recitation of Basic Principle. "When a communication is confidential and concerns contemplated or pending litigation or settlement offers, the necessity for the attorney-client privilege exists as between a public agency and its lawyers to as great an extent at it exists between other clients and their counsel." *Id*. at 725.

3. Conclusion. The attorney's obligations and the client's privilege are both preserved in their essential form with respect to public agencies.

4. Survival upon Termination of Attorney-Client Relationship. The privilege, and a lawyer's obligations to preserve it, survives after termination. *See* RPC 1.9(c), Duties to Former Clients.

B. Exceptions

1. Court Order. Attorneys may disclose information if under court order. *Seventh Elect Church in Isr. v. Rogers*, 102 Wn.2d at 534. However, a trial court ordering disclosure should stay any contempt proceeding with respect to a good faith claim of privilege pending appellate review of the issue. *Id*. at 536. *See also Dike v. Dike*, 75 Wn.2d 1, 448 P.2d 490 (1968). *But see Matter of Kerr*, 86 Wn.2d 655, 662 n.2, 548 P.2d 297 (1976), where a claim of privilege did not justify disobedience of a subpoena duces tecum duly served.

2. Furtherance of a Crime. The attorney-client privilege is not applicable to a client's remarks concerning the furtherance of a crime, fraud or to

conversations regarding the contemplation of a future crime. *State v. Hansen*, 122 Wn.2d 712, 720, 862 P.2d 117 (1993). *See State v. Richards*, 97 Wash. 587, 167 P. 47 (1917); *State v. Metcalf*, 14 Wn. App. 232, 540 P.2d 459 (1975), *rev. denied*, 87 Wn.2d 1009 (1976). It does not apply to past crimes. *In re Disciplinary Proceeding Against Schafer*, 149 Wn.2d 148, 166, 66 P.3d 1036 (2003).

3. Employees of Client Corporation. *See Odmark v. Westside Bank Corp. Inc.*, 636 F. Supp. 552 (W.D. Wash. 1986) (counsel did not have a joint attorney-client relationship with individual officers and employees of a corporation). *But see Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975) (state prison officials are "clients" of the Attorney General; but note that some communications are not included).

4. Two Clients with Same Attorney. Note the possible analogy to the cases of two clients with the same attorney. *See Cummings v. Sherman*, 16 Wn.2d 88, 132 P.2d 998 (1943) (where the impact on the privilege was to defeat it). This is why the public agency counsel must not forget that the client is the agency not the individual official, though the privilege may cover the official. While the agency may act through the decisions of the official, the distinction is still important, particularly in ethical situations where it needs to be remembered who owns the privilege and where the attorney's primary loyalty must reside.

C. Waiver

1. General Rule. The privilege with respect to communications between a client and an attorney is the privilege of the client alone, and it may be waived by the client testifying or otherwise alluding to the substance or content of the communication. *Hunt v. Blackburn*, 128 U.S. 464, 9 S. Ct. 125, 32 L. Ed. 488 (1888), cited in *Malco Manufacturing Company v. Elco Corporation*, 307 F. Supp. 1177, 1178 (E.D. Pa. 1969); *Eastern Technologies Inc. v. Chem-Solv. Inc.*, 128 F.R.D. 74, 76 (E.D. Pa. 1989).

2. Washington Cases in Accord. The privilege may be waived, but waiver must be distinct and unequivocal. *State v. Ingels*, 4 Wn.2d 676, 713, 104 P.2d 944 (1940). The privilege belongs to the client and not the attorney, and actions, such as testimony by the client, may constitute waiver. *Id*. at 714.

3. Malpractice Waiver. The privilege is considered waived if the attorney is sued by the client for malpractice. *Pappas v. Holloway*, 114 Wn.2d at 204. *See also Stern v. Daniel*, 47 Wash. 96, 98, 91 P. 552 (1907).

4. Implied Waiver. In *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975), the United States District Court postulated an implied waiver test. There is an implied waiver where (a) there is an affirmative act, such as filing a suit or testifying on the subject, (b) the affirmative act places the protected communication in issue, and (c) an application of the privilege would deny the other party information vital to the defense. In *Pappas v. Holloway*, 114 Wn.2d at 208, the Washington Supreme Court followed *Hearn*, though limited to the facts of that case.

Hypothetical: A disappointed bidder files an action seeking to enjoin award of the contract by a municipality claiming favoritism and conflict of interest. The City wishes to present the testimony of the Mayor to the effect that the contract was awarded in accordance with the law and after advice by the City Attorney. If the testimony is presented that the City officials relied on attorney advice, is the privilege waived with respect to the advice given? Under the above waiver tests the answer is yes.

Practice Consideration: Caution should be exercised with respect to how far the door may be opened with this type of testimony. If the attorney is in fact a critical witness and the client wants to waive the privilege and present the testimony, it would seem advisable to document this with a distinct and unequivocal waiver executed by an official authorized to act for the client.

5. Bad Faith or Fraudulent Conduct. The attorney-client privilege may be lost through bad faith dealings or fraudulent conduct. *Seattle Northwest Securities Corp. v. SDG Holding Co.*, 61 Wn. App. 725, 812 P.2d 488 (1991); *Escalante v. Sentry Ins. Co.*, 49 Wn. App. 375, 743 P.2d 832 (1987), *rev. denied*, 109 Wn.2d 1025 (1988).

6. Inadvertent Waiver. There is a split of authority with respect to accidental release of information. Some courts hold any disclosure, however unintentional, defeats the privilege. *See, e.g., In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989). Other courts reach the opposite result, arguing that only an intentional relinquishment of a known right is effective. *Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936, 938 (S.D. Fla. 1991); *Lois Sportswear U.S.A. Inc. v. Levi Straus & Co.*, 104 F.R.D. 103 (S.D. N.Y. 1985).

a. At least one appellate court decision adopts the balancing test, which considers five factors in evaluating an inadvertent release of information to determine if the privilege should be regarded as waived by the release. These factors are: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) any overriding issues of fairness. In *Sitterson v. Evergreen School District #114*, 147 Wn. App. 576, 196 P.3d 735 (2008), the Court of Appeals, in a case involving inadvertent disclosure of privileged materials during discovery, held that an attorney could waive the privilege if the attorney was authorized to speak on behalf of the client, and the attorney disclosed materials within the scope of the attorney's authority.

Practice Consideration: By far the most important of these factors is the first one, because it is the one factor over which the attorney will have the most control. Documents, particularly communications to the client which are privileged, should be identified as such to reduce the possibility of inadvertent release. A large and complex file ought to have a privilege subfile, so that documents which should not be released are filed appropriately. (There is nothing worse than discovering that the engineering documents that comply with your opponent's discovery request fill 28 archive boxes and the client never created any subfile for attorney-client communications.)

b. Does a press leak by an official constitute wavier? Probably not. The privilege belongs to the public agency, not the individual official who would be acting for his or her own interests. The extent of the precautions taken and other factors noted above could then come into play.

III. APPLICATION TO OFFICIALS OF THE PUBLIC ENTITY

A. Which Employees and/or Officials are Covered by the Privilege?

1. Control Group Theory. The control group theory holds that the privilege applies " . . . if the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in the decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority." *City of Philadelphia v. Westinghouse Corp.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962), cited in *Barr Marine Products Co. Inc. v. Borg-Warner*, 84 F.R.D. 631,

634 (E.D. Pa. 1979). *See also Philadelphia v. Westinghouse Elec. Corp.*, 205 F. Supp. 830, 831 (E.D. Pa. 1962).

2. Extent of Control Group. "While the attorney-client privilege may in certain instances extend to lower level employees not in a 'control group'. . . the privilege extends only to protect communications and not the underlying facts." *Wright v. Group Health Hosp.*, 103 Wn.2d 192, 195, 691 P.2d 564 (1984) (citation omitted).

3. Validity of "Control Group" Concept. In *Upjohn Co. v. United States*, 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981), a corporation's general counsel conducted an internal investigation regarding certain questionable payments to foreign governments. The federal government sought to compel production of communications with the attorney. The Court of Appeals found that the communications with certain overseas employees were not communications with officers and agents responsible for directing the corporation's actions in response to legal advice, and thus were not communications with the client. This was clearly a "control group" analysis.

a. The Supreme Court reversed the Court of Appeals in a decision which severely criticized the "control group" analysis. "In the corporate context, however, it will frequently be employees beyond the control group . . . who will possess the information needed by the corporation's lawyers." *Upjohn*, 449 U.S. at 391.

b. "The control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation." *Upjohn*, 449 U.S. at 392.

c. However, while criticizing the control group test for potential uncertainty of application, the Court noted that the communications concerned " . . . matters within the scope of the employees' corporate duties . . ." *Upjohn*, 449 U.S. at 394. Furthermore, the Court noted that it was only deciding this particular case on its facts and that these matters would, of necessity, require resolution on a case by case basis. (This approach hardly addresses the criticism of the control group analysis and leaves the matter of the scope of the employee's duties as a relevant consideration.)

d. It should also be noted that *Wright v. Group Health Hosp.*, 103 Wn.2d. at 195, in which the Washington Supreme Court used a control group approach was decided three years after *Upjohn*. Consequently, the question of an employee's duties and responsibilities will still require some consideration by counsel.

Hypothetical: A janitor is involved in a disciplinary matter, and claims that what is really happening is discrimination. His foreman, a working level supervisor, attends a meeting with the next level supervisor and the County's Attorney to discuss the discrimination claim. Are discussions which take place in front of the low level supervisor privileged? What about working supervisors or foremen? Arguably those employees and officers who are a necessary part of the process to make the appropriate decision should fall within the ambit of the protection.

4. Individual versus Corporate Identity. Questions relating to individual versus corporate identity may be subject to political controversies, in which the legislative body and the public may be divided as to where the public's interests lie. Since the public body can only act through individuals, the individuals' interests in confidentiality must be balanced against the public's interests in the actions of the particular governmental body. Moreover, there is a certain tension between the individual actor and the corporate entity, because in circumstances where the actor has done wrong the corporate entity may need to defend itself on the basis of the corporate official's wrongdoing. (On the other hand, high enough officials make decisions for the company that may include determining who is included in the defense of a claim.)

5. *Whitewater* cases. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), *cert. denied* (1997), a case stemming from the widely reported development matter involving Hillary Clinton and the Rose Law firm, known as the *Whitewater* case, surprised many commentators by drawing a distinction between the status of government attorneys and corporate attorneys. Previously the argument, advanced elsewhere in this chapter, had been to reason from the premise that the logic of *Upjohn* applied equally to government attorneys. The Eighth Circuit altered that assumption. Narrowly applying federal common law in the context of a criminal matter, the court found that Mrs. Clinton was not the client of the White House Counsel's Office, and that her reasonable though mistaken belief that the communications were confidential was irrelevant.

In another *Whitewater* case (*In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998)), the D.C. Circuit Court of Appeals examined the applicability of the privilege to a Deputy White House Counsel. In that case, the Court held that: (1) Deputy White House Counsel could not assert the government attorney-client privilege to avoid responding to a grand jury if he possessed information relating to possible criminal violations; (2) government attorneys may not rely on the government attorney-client privilege to shield information related to criminal misconduct from disclosure to a grand jury; (3) information that Deputy White House Counsel learned when acting as intermediary between the President and his private counsel was protected by the President's personal attorney-client privilege; (4) intermediary doctrine did not apply to instances in which Deputy White House Counsel consulted with the President's private counsel on litigation strategy; and (5) Deputy White House Counsel could not rely on the "common interest" doctrine and the President's personal attorney-client privilege to withhold information about possible criminal misconduct obtained in conferring with the President and his private counsel on matters of overlapping concern to the President personally and in his official capacity. *Id*.

6. Disclosure to other City Officials. In some circumstances, disclosure of attorney-client privileged material may lose their privilege if subsequently shared with another employee. In *Morgan v. Federal Way*, 166 Wn.2d 747, 213 P.3d 596 (2009), the Washington Supreme Court declined to find an e-mail sent by a municipal court judge to the city attorney to be subject to the privilege, because the judge subsequently forwarded the e-mail to a city councilmember. The Court found that the judge had not shown that the councilmember's inclusion was necessary to the privileged communication, nor that there was a "common interest" sufficient to protect the privilege.

Hypothetical: The Mayor advises you that you should win the upcoming lawsuit easily because he took the precaution of secretly taping all his meetings with his former deputy, the current plaintiff. Your client is the City, not the Mayor. While in most cases the official acts for and on behalf of the client, he or she does not do so when violating the law.

Practice Consideration: When is it necessary for a governmental attorney (ethically) to advise a public employee or official that he/she should secure private counsel? Any time the attorney believes that the interests of the individual or interests of the official will conflict with those of the public agency. If the only defense available to the public agency is that the official acted improperly and without authority, then this would be necessary.

Conclusion. Not all public employees are necessarily "the client" for purposes of the attachment of the privilege. However, limiting the privilege to employees or officers who have the authority to speak for and bind the corporation is too restrictive. *See* discussion below.

Practice Consideration: An attorney's meeting and discussion with employees, if they are not involved with the decision process, may well not be privileged. Even a meeting with the control group, at which others are present may cause some difficulty. If the conversation at a staff meeting is moving into areas of attorney-client privilege, then the attorney needs to be conscious of who is present and whether the attendance needs to be reduced to preserve the privilege. If employees who are clearly not part of the "control group" must be interviewed to seek information for a control group decision, it would be best done in a separate meeting.

7. Exceptions to RPC 1.6 in the Public Arena.

a. Unlawful Action. Under certain circumstances it may appear to counsel that the public agency is contemplating government action which is not lawful. The rule states that the attorney may reveal a client secret to prevent the client from committing a crime.

Question: Is the government attorney free of any obligation to disclose wrongful conduct as long as it is not criminal? The rule is stated in terms of future conduct, not conduct that has already occurred. But the public agency lawyer has an easier answer than the private counsel. The crime, if any, would have been committed by an individual. The commission of criminal acts could never be within the scope and course of employment of a public official. Hence, when the individual commits criminal acts, such individual could not be acting as a representative of the public agency and thus could not be the client or acting for the client under these circumstances. This analysis is easy where the illegality is clear.

b. Breach of Client's Fiduciary Duty. A narrow construction would point out that a government is not likely to be a guardian, personal representative, receiver, or court-appointed fiduciary. A more liberal construction would take heed of the fact that the public agency may have fiduciary duties in several settings, such as, for example, the holders of employee retirement funds.

Hypothetical: As a municipal attorney advising a retirement system official you are asked to review an employee's eligibility for retirement. The eligibility depends on an interpretation of a particular provision of the retirement law. Based on your legal research, you believe the provision would be interpreted in the employee's favor and so advise the official. The retirement system official states that the system prefers another interpretation and advises you to keep your opinion of the error in their interpretation confidential. You later learn that the employee was told, "Our lawyers looked into it and you are not entitled to the benefit."

Analysis: Your legal advice to the client is privileged and you may not be questioned with respect to it. The fact that the employee may have an arguable claim is a client secret, and the disclosure of the information would violate the privilege. It would also be embarrassing and detrimental to the "official" who administers the system. However, would it be detrimental to the client, which is the public retirement system? The system has no interest in unfairly denying benefits so that the "official" in charge may look good. Moreover, the concealment of the potential retirement rights violates the "official's" fiduciary duty to administer the fund for the benefit of the members. But, this analysis only works if the public official is intentionally concealing from the claimant a benefit that the claimant has a right to expect. What if the matter involves an interpretation adopted by the public official, which, while the weaker argument, is still plausible? Your advice is that, if challenged, it is likely that the claimant will prevail. The public official replies that if you maintain the client's secret, there will not be a challenge to the preferred interpretation. Does the attorney's duty of zealous representation and the privilege together result in a proper silence? Can counsel go so far as to disclose the possibility of another interpretation and advise the claimant to seek independent counsel?

B. Indemnity for Public Officials

Many municipalities have ordinances providing indemnity for their officers which require a determination that the official acted within the scope and course of his or her authority and is cooperating appropriately in the defense of the action.

Hypothetical: Are communications with an official of a public agency, which would be privileged under normal circumstances, rendered non-privileged because the official has

been found to be acting beyond the scope of his or her employment? No. Even if it is determined that the official's status does not entitle him or her to a defense, the communication itself would be protected since it occurred through the official as a representative of the client.

Practice Consideration: If this type of enactment protects the officials of a public agency and litigation is commenced in which officials are named individually, the determination of status should proceed expeditiously. The public agency attorney may enter an appearance on behalf of all defendants, but an official determination is desirable before answering the complaint in most cases.

IV. PUBLIC DISCLOSURE LAW

A. Public Disclosure Act

A related area of the law is the Public Disclosure Act, Chapter 42.17 RCW. Unless advice to clients is properly privileged, it may be subject to disclosure.

B. General Rule

As a general rule all documents should be regarded as public unless a specific exception applies. *See Hafemehl v. University of Washington*, 29 Wn. App. 366, 628 P.2d 846 (1981). Exemptions from disclosure are narrowly construed to effect broad public policy favoring disclosure. The Public Disclosure Act is interpreted liberally to effect the purpose of open government. Note that, while interpretations of the Freedom of Information Act may be used on a general basis, the Washington Supreme Court has commented on the fact that the statutes are significantly different. *See, e.g., Servais v. Port of Bellingham*, 127 Wn.2d 820, 904 P.2d 1124 (1995); *Dawson v. Daly*, 120 Wn.2d 782, 845 P.2d 995 (1993). *See generally* the MRSC publication *Public Records Act for Washington Cities, Counties, and Special Purpose Districts*, Report No. 61 Revised, November 2009.

V. OPEN PUBLIC MEETINGS

A. Open Public Meetings Act Generally

This statute deals with when and under what circumstances a public attorney may advise an assembled council or board.

B. General Rule

The Open Public Meetings Act (the "Act"), Chapter 42.30 RCW, is to be liberally construed as remedial in nature. *Port Townsend Publ'g Co. v. Brown*, 18 Wn. App. 80, 83, 567 P.2d 664 (1977).

1. All Meetings Open. "All meetings of the governing body of a public agency shall be open to the public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter." RCW 42.30.030.

2. Applicability of the Act. The Act applies to " . . . all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of the state and subdivisions thereof. . . " RCW 42.30.010. *See* definition of "public agency" in RCW 42.30.020(1).

3. Purpose of the Act. The purpose of the Act is to permit the public to observe all steps in the making of governmental decisions. The governing body is the body which actually makes the policy and rules. *Cathcart v. Anderson*, 85 Wn.2d 102, 106, 530 P.2d 313 (1975). A subcommittee is required to comply with the Act when acting on behalf of the governing body. AGO 1986 No.16.

Ironically, in a series of decisions, the State and Federal Courts have batted back and forth the issue of how a quorum factors into the responsibility of complying with the Act. In *Clark v. Lakewood*, 259 F.3d 996, 1012 (9th Cir. 2001), the 9th Circuit Court of Appeals reversed the Federal District Court, holding that the Act was violated when an informally formed sub-quorum task force of the planning commission was directed to explore adult entertainment issues. (This is curious since the reason that a smaller group of the planning commission was engaged in the adult entertainment exploration was to assure that less than a quorum of the planning commission was involved, intending to keep the planning commission from implicating the Act. Additionally, the task force made no decision and only reported back to the planning commission which took whatever action was going to be taken.) The *Clark* case was decided within weeks of the decision by the Washington State Court of Appeals in *Wood v. Battlegrounds School District*, 107 Wn. App. 550, 27 P.3d 1208 (2001), which ruled that less than a quorum of a legislative body does not trigger the Act. As an aside, following *Clark*, the same City of Lakewood ordinance/process was again

challenged, this time in state court, by another adult entertainment enterprise. Notwithstanding essentially the same arguments *and* citation to *Clark*, the state Court of Appeals declined to follow the lead of *Clark*. *See Heesan Corp. v. City of Lakewood*, 118 Wn. App. 341, 75 P.3d 1003 (2003) *review denied* 151 Wn.2d 1029, 94 P.3d 960 (2004), wherein the court ruled that Lakewood's adoption of its ordinance did not violate the Act.

4. Violation of the Act. Action taken in violation of the Act is null and void. RCW 42.30.060. *Mason County v. PERC*, 54 Wn. App. 36, 40-41, 771 P.2d 1185 (1989), *review denied*, 113 Wn.2d 1013, 779 P.2d 730 (holding that the Act applies to collective bargaining sessions with decision-making representatives of the public agency).

C. Exceptions

1. No Official Business Transacted. "Action" means the transaction of any official business of the public agency. *Matter of Recall of Estey*, 104 Wn.2d 597, 604, 707 P.2d 1338 (1985). A meeting occurs only when action takes place. A gathering of members of the governing body does not automatically constitute a meeting. *Id*.

2. Governing Body. The Act applies to governing bodies of Washington public agencies. Advisory committees including agencies, which cross state boundaries, are not subject to the law. *U.S. v. State of Oregon*, 699 F. Supp. 1456, (D. Or. 1988), *aff'd*, 913 F.2d 576 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991).

3. Matters Relating to Litigation.

a. This exception is rooted in the need for public agencies to have effective legal representation. To obtain effective advice, the protection of the attorney-client privilege is essential. "When a communication is confidential and concerns contemplated or pending litigation or settlement offers, the necessity for the attorney-client privilege exists as between a public agency and its lawyers to as great an extent at it exists between other clients and their counsel." *Port of Seattle v. Rio*, 16 Wn. App. 718, 725, 559 P.2d 18 (1977) (citation omitted).

b. "A communication between an attorney and his public agency client must pass a four-step test to qualify as a exception to the right-to-

know statutes: (1) The communication must originate in a confidence that it will not be disclosed; (2) the element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties; (3) the relation must be one which in the opinion of the community ought to be sedulously fostered; and (4) the injury that would inure to the relation by the disclosure of the communication must be greater than the benefit thereby gained . . . ." *Id*. at 725.

VI. EXECUTIVE SESSIONS

A. Statute (RCW 42.30.110)

1. Generally. Executive sessions are exempt from the Open Public Meetings Act and its requirements.

2. When Authorized. Executive sessions are authorized in eleven specified circumstances. The principle justification for each exemption is that the potential for public loss by public discussion of the particular matter outweighs the potential gains of a public process. Some areas with most potential for legal concern are noted below:

a. Acquisition of real property where public knowledge would increase the price, including discussions of the sale or lease price of property. *Port of Seattle v. Rio*, 16 Wn. App. at 725.

b. Review of negotiations on the performance of publicly bid contracts.

c. Consideration of qualifications of applicants for public employment, including general discussions as to the advisability and potential funding for hiring future unnamed employees. *Port Townsend Publ'g Co. v. Brown*, 18 Wn. App. 80, 567 P.2d 664 (1977).

d. Consideration of complaints or charges brought against a public officer or employee. *Columbian Publ'g. Co. v. City of Vancouver*, 36 Wn. App. 25, 671 P.2d 280 (1983).

Note: Different than executive sessions, there are instances in which legislative bodies are not required to conform to the Act, or the requirements or limitations of executive sessions. Specifically, RCW 42.30.140 lists certain uses which are exempted from the Act. The Open

Public Meetings Act does not apply to (1) proceedings regarding formal issuance of orders granting, suspending, revoking or denying licenses or permits; (2) the portion of a meeting involving quasi-judicial decision making by the legislative body; (3) matters governed by Chapter 34.05 RCW, the Administrative Procedures Act; or (4) collective bargaining sessions. RCW 42.30.140.

B. Specific Application

1. Change of Subject. What should counsel do when, in executive session, the discussion wanders away from the topic for which the executive session was convened? How far from the topic must the discussion be before the attorney has a duty to advise that the executive session is no longer authorized?

Hypothetical: In an executive session to discuss litigation relating to a City's zoning ordinances, the Mayor suddenly says, "Now that the media's out of here, let's plan how we're going to adopt this new newspaper tax." Despite cautioning the Council that this topic is not authorized for executive session, the discussion continues on the issue of the tax. What is the attorney's ethical duty with respect to the unlawful meeting? The attorney should warn the public body that it is authorized to conduct an executive session for certain limited purposes, and if it wishes to proceed with other matters, the public meeting should reconvene.

2. Inadvertent or Intentional Disclosure as Waiver. Can an executive session's confidentiality be waived by inadvertent or intentional disclosure of the discussions? Probably not, as the individual making the disclosure (whether inadvertent or intentional) is not acting on behalf of the public body. Perhaps the analogy should be drawn to the earlier analysis of waiver of privilege, and who is and is not the client.

3. Subject Raised in Public Meeting. How should a public agency attorney deal with the circumstance where matters which could or should be addressed in executive session are raised in the council or board meeting by a single member? It is recommended that a reminder of the potential need for executive session be made. In the face of persistence reiterate that executive session is the decision of the public body and if directly asked to address privileged matters in public, the privilege needs to be waived by a majority vote. Remember, that it is the client, acting through its board or council, which owns and can waive the privilege.

VII. ELECTRONIC COMMUNICATIONS AND OTHER TECHNOLOGY

A. General Rule

1. Treatment of Electronic Documents. While information may exist in an electronic form, it is not different in character. Electronic information should not, in theory, be treated any differently from a legal point of view. An electronic communication is still a communication. *See Anti-Monopoly v. Hasbro*, 1995 WL 649934 (S.D.N.Y 1995), not reported in Fed. Supp., *citing Sanders v. Levey*, 558 F.2d 636 (2d Cir. 1976). This is the probable application in state law as well.

2. Example. An e-mail message to an attorney may be as privileged as the contents of a phone call, or a letter, or a verbal communication. It simply comes in a different form. The key is to avoid being misled by the manner of the communication and focus on the content of the communication.

3. Assumption of Discoverability. It is reasonable to assume that public agency e-mail is generally discoverable under public disclosure laws.

Practice Consideration: The public officials using e-mail should be put on notice in the strongest possible terms that they are creating official records subject to disclosure in almost all instances. This form of communication is not for casual discussion or joking, which could come back to haunt the agency. The public agency attorney should encourage the development of official e-mail policies. Attorney communications on e-mail, if privileged, should be so labeled.

B. Future Problems

1. Retention Policies. There are three possible approaches to retention policies:

a. Treat the records in the same manner as if they were paper records. Retain those which, if paper, would be retained and discard those which, if paper, would be discarded.

b. Discard all e-mail on grounds it is like transitory communication like telephone conversations. (Apparently NASA has decided on this approach.) This seems questionable legally.

c. Save all e-mail. Probably doomed as a policy as impractical. E-mail files become massive once people begin to use it.

2. Content Analysis. Some content analysis will probably be necessary for certain e-mail retained under the policy of a. above. There has been some discussion about the form of e-mail storage. Should retained e-mail be printed and stored on paper or is it sufficient to archive a disk? In theory the disk should be sufficient, but as the technology changes there may be difficulties in retrieving older material.

3. Effect of Other Electronic Capabilities. Other electronic capabilities will affect the public agency in various ways. For example, there is no reason why a City Council meeting could not occur in "public" through an electronic medium, such as a conference call, with all, or some of the members present electronically, provided that there was also some provision for the public to be present at the meeting, as the Open Public Meetings Act would apply.

CHAPTER 3: CONFLICTS OF INTEREST

I. STATUTORY DISQUALIFICATIONS

Numerous state statutes and local codes, policies, and charters address the authority and scope of representation an attorney can provide a government entity. This section is an overview of applicable state laws. However, it is necessary to consider specific circumstances to apply the appropriate law.

A. RCW 2.48.200 Part of the State Bar Act, RCW 2.48.200, sets forth a general overview of the practice restrictions which apply to certain public officers, including prosecuting attorneys.

B. Chapter 42.23 RCW "Code of Ethics for Municipal Officers – Contract Interests." This chapter addresses permissible and impermissible conflicts by local government officers, including beneficial interests in contracts.

C. Chapter 42.52 RCW "Ethics in Public Service" for state officers and employees. This chapter covers a broad and detailed spectrum of the do's and don'ts for the executive and legislative branches of state government, including financial interests, confidential information, testimony, gifts, honoraria, and employment after public service.

D. Other RCWs Setting Forth Attorney Disqualifications

1. Counties.

a. Attorney as Auditor. RCW 36.22.110 states: "The person holding the office of county auditor, or deputy, or performing its duties, shall not practice as an attorney or represent any person who is making any claim against the county, or who is seeking to procure any legislative or other action by the board of county commissioners."

b. Attorney as Coroner – Limitation. RCW 36.24.170 states: "The coroner shall not appear or practice as attorney in any court, except in defense of himself or herself or his or her deputies." However, in counties with a population of less than 40,000, no coroner is elected, and the prosecuting attorney is ex officio coroner. RCW 36.16.030.

c. No Reward/Fee for Prosecution. "No prosecuting attorney shall receive any fee or reward from any person, on behalf of any prosecution,

or for any of his or her official services, except as provided in this title [Title 36 RCW], nor shall he or she be engaged as attorney or counsel for any party in any action depending upon the same facts involved in any criminal proceeding." RCW 36.27.050.

d. Prosecutors in Private Practice – Limitation. In counties with a population of at least 18,000, the prosecuting attorney and the deputy prosecuting attorneys may not "engage in the private practice of law." RCW 36.27.060(1). But note, in counties with a population of at least 18,000 and less than 125,000, deputy prosecuting attorneys "may serve part time and engage in the private practice of law if the county legislative authority so provides." RCW 36.27.060(2).

e. Attorney as Sheriff – Limitation. An attorney serving as a county sheriff may not "appear or practice as attorney in any court, except in [his or her] own defense." RCW 36.28.110.

f. Boundary Review Board. In counties with a population of less than one million, a county boundary review board appointee may not be "an official or employee of the county or a governmental unit in the county, or a consultant or advisor on a contractual or regular retained basis of the county, any governmental unit in the county, or any agency or association thereof." RCW 36.93.061. This provision effectively prohibits public sector attorneys who are employed or retained by such a county from serving on the county boundary review board.

2. Courts of Record.

a. Court of Appeals Judge. "No judge, while in office, shall engage in the practice of law." RCW 2.06.090.

b. Superior Court Judge or Commissioner. "An attorney may not serve as a superior court judge pro tempore or a superior court commissioner pro tempore in a judicial district while appointed to or serving on a case in that judicial district as a guardian ad litem for compensation under Title 11, 13, or 26 RCW, if that judicial district is contained within division one or two of the court of appeals and has a population of more than one hundred thousand." RCW 2.08.185.

c. Judicial Officer. "A judicial officer is a person authorized to act as a judge in a court of justice." RCW 2.28.030. Such officer may not serve in such a capacity in a court in which he or she has been an attorney in the action, suit, or proceeding in question for either party. *Id.*

d. Part-Time District Judge. "A part-time district judge, if permitted by court rule, may act as an attorney in any court other than the one of which he or she is judge, except in an action, suit or proceeding removed therefrom to another court for review." RCW 2.28.040.

e. Court Clerks, Reporters and Bailiffs. "Each clerk of a court is prohibited during his continuance in office from acting, or having a partner who acts, as an attorney of the court of which he is clerk." RCW 2.32.090.

f. Administrator for the Courts. An attorney serving as the administrator for the courts or as an assistant to the administrator may not "engage in the private practice of law," except when "[p]erforming legal services for himself or herself or his or her immediate family[,] or [when] [p]erforming legal services of a charitable nature." RCW 2.56.020.

3. Criminal Procedure.

a. State-Wide Special Inquiry Judge Act – Judge. "The judge serving as a special inquiry judge shall be disqualified from acting as a magistrate or judge in any subsequent court proceeding arising from such inquiry except alleged contempt for neglect or refusal to appear, testify, or provide evidence at such inquiry in response to an order, summons, or subpoena." RCW 10.29.130.

b. Selection of Public Defender. "City attorneys, county prosecutors, and law enforcement officers shall not select the attorneys who will provide indigent defense services." RCW 10.101.040.

4. Juvenile Courts – Declining to Participate in Non-felony Juvenile Cases. If a county prosecuting attorney, "after giving appropriate notice to the juvenile court, . . . decline[s] to represent the state of Washington in [non-felony] juvenile court matters, . . . [then] he or she shall not thereafter until the next filing date participate in juvenile court proceedings unless so requested by the court on

an individual basis, in which case the prosecuting attorney shall participate." RCW 13.40.090.

5. Municipal Courts – Cities Over 400,000.

a. Municipal Court Judges. An attorney may not "engage either directly or indirectly in the practice of law" during the time in which he or she is serving as a municipal court judge. RCW 35.20.170.

b. Municipal Court Judge Pro Tem. An attorney appointed by the presiding municipal court judge to serve as a judge pro tempore may "not practice before the municipal court during [his or her] term of office as judge pro tempore." RCW 35.20.200.

6. Recording, Registration, and Legal Publication. While serving as registrar or deputy registrar, an attorney may not practice as an attorney at law, nor prepare any papers in any chapter 65.12 RCW proceeding, nor be in partnership with any attorney at law so practicing. RCW 65.12.065.

7. Small Claims Court. "No attorney-at-law, legal paraprofessional, nor any person other than the plaintiff and defendant, shall appear or participate with the prosecution or defense of litigation in the small claims department without the consent of the judicial officer hearing the case." RCW 12.40.080(1).

8. Special Proceedings and Actions. An attorney of the person whose property is to be held by the receiver or of a person disqualified as a receiver may not be appointed as a receiver. RCW 7.60.035(2).

9. State Government – Executive.

a. Prosecuting Attorneys. If the attorney general initiates or takes over the prosecution of a criminal action under the circumstances outlined in RCW 43.10.090, then, "[f]rom the time the attorney general has initiated or taken over a criminal prosecution, the prosecuting attorney shall not have power or authority to take any legal steps relating to such prosecution, except as authorized or directed by the attorney general." RCW 43.10.090.

b. Attorney General and Full Time Assistant Attorneys General. The attorney general and all assistant attorneys general who are employed full

time are prohibited from engaging in the private practice of law, with the exception of "(1) [p]erforming legal services for himself or herself or his or her immediate family; or (2) [p]erforming legal services of a charitable nature." RCW 43.10.130.

Special assistant attorneys general who are not employed full time may engage in the private practice of law. RCW 43.10.125. State agencies, boards, commissions, etc. (with the obvious exception of the Office of the Attorney General), are prohibited from employing any person "to act as attorney in any legal or quasi legal capacity in the exercise of any of the powers or performance of any of the duties specified by law to be performed by the attorney general, except where it is provided by law to be the duty of the judge of any court or the prosecuting attorney of any county to employ or appoint such persons . . ." RCW 43.10.067. That statute also exempts "the commission on judicial conduct, the state law library, the law school of the state university, the administration of the state bar act by the Washington State Bar Association, or the representation of an estate administered by the director of the department of revenue or the director's designee pursuant to chapter 11.28 RCW." *Id.*

II. STATUTORY CONFLICTS OF INTEREST FOR IN-HOUSE GOVERNMENT COUNSEL (EXCLUDING ATTORNEYS GENERAL)

A. Generally

Although it is commonly and correctly perceived that ethics standards for governmental officials and employees, including in-house counsel, have become stricter in recent years, there is a long history in American jurisprudence of viewing with repugnance the taking of things of value by governmental officials in return for governmental favors. Indeed, the United States Constitution, Article II, Section 4, specifically lists only two crimes—bribery and treason—as grounds for impeachment of the president, vice president, or other civil officers of the United States.

Statutory conflicts of interest, generally speaking, are prohibited situations in which government officials or employees receive (or sometimes, seek to receive) things of value in exchange for (or sometimes, in apparent exchange for, or in possible exchange for) governmental benefit of some sort to the givers of the things of value.

Except for RCW 36.27.050 (prohibiting county prosecuting attorneys from receiving fees or rewards for official services or from acting as counsel in any action involving the same facts as a criminal prosecution), there are no Washington statutes

within the scope of this chapter dealing specifically with conflicts of interest of government attorney, as opposed to non-attorney, employees. The general statutory prohibitions reviewed below apply equally to attorney and non-attorney employees (and/or "public officials," and/or "public officers," as applicable) alike.

Nevertheless, in-house government counsel as frequent interpreters and sometimes enforcers of the conflict of interest statutes pertaining to their jurisdictions have a special duty to remain above reproach in relation to the governing rules and principles, both to set an exemplary standard for their co-employee and -official clients and to avoid the untenable ethical posture that exists when one is called upon to opine as to the legality of borderline conduct that one engages in, or has engaged in, oneself. Thus, where the scope or reach of a statute is uncertain (as is frequently the case in this area), the responsible and prudent governmental attorney errs on the side of caution and against any arguable appearance of conflict of interest.

B. Bribery and Corrupt Influence

The various crimes of bribery and corrupt influence applicable to public employee attorneys, Chapter 9A.68 RCW, are one sort of statutory conflict of interest.

1. Bribery. Broadly speaking, a public servant (including an attorney) commits the felony of bribery if he or she "requests, accepts, or agrees to accept any pecuniary benefit pursuant to an agreement or understanding that his [or her] vote, opinion, judgment, exercise of discretion, or other action as a public servant will be used to secure or attempt to secure a particular result in a particular matter." RCW 9A.68.010(b). Public servants commit felonies if they request "a pecuniary benefit for the performance of an official action knowing that [they are] required to perform that action without compensation or at a level of compensation lower than that requested," RCW 9A.68.020, or if they "request[], accept[], or agree[] to accept compensation for advice or other assistance in preparing a bill, contract, claim, or transaction regarding which [they] know[] [they are] likely to have an official discretion to exercise." RCW 9A.68.030.

2. Corrupt Influence. Another criminal code form of government employee conflict of interest is found at RCW 9A.80.010, providing that public servants commit a gross misdemeanor if, "with intent to obtain a benefit or to deprive another person of a lawful right or privilege," they "intentionally commit[] an unauthorized act under color of state law," or "intentionally refrain[] from performing a duty imposed upon [them] by law."

C. Misconduct of Public Officers (Chapter 42.20 RCW)

1. Definition of "Public Officer."

Chapter 42.20 RCW contains several sections governing the conduct of "public officers," which term is undefined in the chapter.

a. Former RCW 42.20.010, repealed as part of adoption of Chapter 42.52 RCW governing state employees, provided that "public officers" would not include most state employees, but all other public officials/employees remain within potential coverage.

b. A narrow reading of "public officer" would restrict the term to elected or appointed policymaking officials, and perhaps to their chief executive or administrative functionaries, but chief municipal attorneys, for instance, are not clearly excluded.

c. Chapter 42.23 RCW, treated in Section D below, defines the perhaps similar term "municipal officer" to include not only elected and appointed "officers" of a "municipality" (*i.e.*, county, city, town, district, or other municipal or quasi-municipal corporation), but also such officers' deputies and assistants and "all persons exercising or undertaking to exercise *any* of the powers or functions of a municipal officer." RCW 42.23.020(2) (emphasis added).

d. Thus, because governmental counsel commonly take on responsibility for at least a portion of their officer-clients' duties and functions, it is not safe to assume that even subordinate in-house counsel are beyond the reach of the chapter.

2. Conflict of Interest Prohibition. Chapter 42.20 RCW contains the following conflict of interest provisions at RCW 42.20.020 in addition to other prohibitions of improper official conduct:

> Every public officer who, for any reward, consideration or gratuity paid or agreed to be paid, shall, directly or indirectly, grant to another the right or authority to discharge any function of his office, or permit another to perform any of his duties, shall be guilty of a gross misdemeanor.

Thus, government attorneys act in criminal conflict with their duties by allowing unauthorized persons to perform their duties in exchange for some personal benefit.

D. Code of Ethics for Municipal Officers – Contract Interests (Chapter 42.23 RCW)

1. General Rule. Under RCW 42.23.030, "municipal officers" are generally prohibited from "self-dealing" where they "would otherwise have the discretion to use [their] public office to favor [their] private interests over the interests of others." *City of Seattle v. State*, 100 Wn.2d 232, 246, 668 P.2d 1266, 1273 (1983).

2. Definition of "Municipal Officer." The extent of the reach of the term "municipal officer" has not been authoritatively established, but in-house governmental attorneys for cities, towns, counties, and various districts (but not for departments of the state itself) surely fall within the statute in at least some instances: RCW 42.23.020(2) provides that "municipal officer" includes not only elected and appointed officers and their deputies and assistants, but also "all persons exercising or undertaking to exercise any of the powers or functions of a municipal officer." Thus, *e.g.*, counsel—regardless of rank—who are responsible for ensuring the implementation of governing body policies, or for carrying out statutory duties of the particular entity, also fall within the definition of "municipal officer."

3. Prohibited Conflicts of Interest.

a. Conflicts Proscribed by Code of Ethics. The conflicts of interest proscribed by RCW 42.23.030 involve:

i. A contract between the governmental entity and another party which is "*made* by, through or under the supervision of [the municipal] officer, in whole or in part, or which may be made for the benefit of his or her office," (emphasis added) *and either*

ii. The officer being "beneficially interested, directly or indirectly," in the contract; *or*

iii. The officer accepting, "directly or indirectly, any compensation, gratuity or reward in connection with such contract from any other person beneficially interested therein."

b. Beneficial Interests. "Beneficial interests" are financial interests and not other interests of a personal nature. *Barry v. Johns*, 82 Wn. App. 865, 868, 920 P.2d 222, 223 (1996).

c. Strict Construction of Prohibition. The prohibition against an officer having a beneficial interest in a contract is strictly construed. *City of Northport v. Northport Town Site Co.*, 27 Wash. 543, 68 P. 204 (1902), is illustrative:

> The general public policy upon which the statute . . . is founded is of ancient origin, and [has] been inexorably enforced by the courts throughout the history of the common law. It is that principle which requires the trustee to always occupy a position that shall be free from the dictates of any interest that may conflict with the obligations of his trust. . . .
>
> Long experience has taught law makers and courts the innumerable and insidious evasions of this statutory principle [prohibiting self-interest in contracts] that can be made, and therefore the statute denounces such a contract if a city officer shall be interested not only directly but indirectly. *However devious and winding the chain may be which connects the officer with the forbidden contract, if it can be followed and the connection made, the contract is void.*

Id. at 548-49, 68 P. at 205-6 (emphasis added).

d. Officer Involvement Requirement. To trigger the statute, the contract in question must actually be made "by, through or under the supervision of" the officer. RCW 42.23.030. For example, it is not impermissible for a city council member to have a beneficial financial interest in a contract executed and supervised by an independent city official according to "purely objective criteria." *City of Seattle v. State*, 100 Wn.2d 232, 244-47, 668 P.2d 1266, 1272-74 (1983).

e. Spousal Income. In the event a spouse of an attorney/officer with responsibility over personnel matters is an employee of the entity, the spouse's income constitutes a prohibited beneficial interest unless exempted by statute (such exemptions are extremely narrow*, e.g.*, spouses

may be bus drivers in very small school districts) or, possibly, avoided pursuant to a bona fide separate property agreement. *State v. Miller*, 32 Wn.2d 149, 201 P.2d 136 (1948).

f. Remote Interests. Prohibited beneficial interests do not encompass "remote interests," defined in RCW 42.23.040 to include, for example, ownership of less than one percent of the shares of a contracting company.

i. Care must be taken to observe the procedural requirements for taking advantage of the remote interest exception: the fact and extent of the interest in a particular contract must be disclosed to the governing body prior to contract approval, and recorded in official minutes or comparable records. RCW 42.23.040.

ii. A remote interest holder may not influence or attempt to influence any other "officer" to enter into the contract in question. *Id.*

g. Direct or Indirect Compensation. There is no Washington case law defining direct or indirect compensation, gratuity, or award, RCW 42.23.030, and the few cases from other jurisdictions vary in their severity. Receiving gifts, trips, lodging, meals, alcoholic beverages and refreshments (including everything down to coffee during the course of a negotiation over a prospective contract) might all be said to fall within the language of the statute, but no reported case has condemned less than the acceptance of meals and drinks. *See*, *e.g.*, *State v. Prybil*, 211 N.W.2d 308 (Iowa 1973) (Iowa statute similar to Washington's violated by county official's acceptance of dinner and drinks in connection with contract with company).

i. Chapter 42.52 RCW, discussed below, provides some guidelines for *state employees* in this regard (*e.g.*, meals under $50 may generally be accepted, RCW 42.52.150(5), but not from contractors, RCW 42.52.150(4)). However, this is not applicable by its terms to other governmental employees.

ii. Thus, prudent, non-state governmental attorneys involved in contract matters, or as to whom a particular contract may be said to be "for the benefit of his or her office," RCW 42.23.030, will

draw the line for tolerable "gratuities" from contractors at a low level.

h. Violation. Violation of the provisions of Chapter 42.23 RCW voids the particular contract, exposes the violator to fines and other criminal and civil penalties (*e.g.*, prosecution for bribery), and "may be grounds for forfeiture of [the violator's] office." RCW 42.23.050. However, another section, RCW 42.23.060, provides generally that if provisions of the chapter conflict with any provision of a city charter, the city charter will prevail, but only if it contains stricter requirements than Chapter 42.23 RCW. (Notwithstanding that, RCW 35.17.150 specifies that it is a misdemeanor for officers and employees of cities and towns to receive, from any enterprise operating under public franchise, any free tickets or services unless they are granted to the public generally.)

4. Additional Prohibitions.

RCW 42.23.070, enacted in 1994 with Chapter 42.52 RCW, *infra,* added self-explanatory prohibitions (without indicating the consequences for violations), some of which deal with conflicts of interest. The statute states as follows:

42.23.070 Prohibited acts

(1) No municipal officer may use his or her position to secure special privileges or exemptions for himself, herself, or others.

(2) No municipal officer may, directly or indirectly, give or receive or agree to receive any compensation, gift, reward, or gratuity from a source except the employing municipality, for a matter connected with or related to the officer's services as such an officer unless otherwise provided for by law.

(3) No municipal officer may accept employment or engage in business or professional activity that the officer might reasonably expect would require or induce him or her by reason of his or her official position to disclose confidential information acquired by reason of his or her official position.

(4) No municipal officer may disclose confidential information gained by reason of the officer's position, nor may the officer otherwise use such information for his or her personal gain or benefit.

E. Ethics in Public Service (Chapter 42.52 RCW)

1. Generally. In recent years the legislature has consolidated former statutes and adopted and amended lengthy and relatively detailed conflict of interest provisions, Chapter 42.52 RCW, which apply generally to officers and employees of the state (but not to comparable persons within units of local or special-purpose government). The chapter has little or no authoritative interpretive guidance as yet, but is sufficiently prescriptive, taken together with interpretations of similar provisions in Chapter 42.23 RCW, *supra*, that it provides helpful ethical standards for state government attorney-employees.

2. Prohibitions. "No state officer or state employee may have an interest, financial or otherwise, direct or indirect, or engage in a business or transaction or professional activity, or incur an obligation of any nature, that is in conflict with the proper discharge of the state officer's or state employee's official duties." RCW 42.52.020. The chapter provides the following more specific prohibitions:

a. No state officer or employee "may be beneficially interested, directly or indirectly," in contracts or other specified transactions that are "made by, through, or is under [their] supervision" (*note here the expansion beyond "made" under supervision in RCW 42.23.030*), "or accept, directly or indirectly, any compensation, gratuity, or reward from any other person beneficially interested in the contract . . ." RCW 42.52.030.

b. State officers and employees cannot assist others in transactions involving the state where the officer or employee has participated on behalf of the State. RCW 42.52.040(1)(a).

c. State officers and employees cannot engage in employment or business that they might "reasonably expect" to involve the disclosure of confidential information. RCW 42.52.050.

d. State officers and employees may not receive things of value under any contract outside their official duties except in certain carefully limited situations, RCW 42.52.120, or receive honoraria from state contractors or potential state contractors within the officer/employees area of influence, or from persons/companies likely to seek or oppose enactment of rules, policies or legislation by their agency if they may participate in such processes, RCW 42.52.130, or receive or solicit any thing of economic

value if it could reasonably be expected that such would influence their action or judgment. RCW 42.52.140.

3. Minor Gifts, Meals and Beverages, Private Gain from Control/Direction.

a. Minor Gifts. Certain minor gifts are rebuttably presumed to not influence officials/employees and are allowed in most circumstances. RCW 42.52.150(2), (3).

b. Meals and Beverages. As to perhaps the most common type of ethical gray area in public employment—acceptance of meals and beverages—the statute provides some helpful guidance: officers and employees may accept food and beverage "on infrequent occasions in the ordinary course of meals where attendance by the officer[s] or employee[s] is related to the performance of official duties," provided that "[g]ifts in the form of food and beverage that exceed fifty dollars on a single occasion . . . be reported as provided in chapter 42.17 RCW." RCW 42.52.150(5). Note, however, that the officers and employees may not accept meals and beverages or other items, except in carefully enumerated and controlled circumstances, from potential contractors or regulatees of their agency. RCW 42.52.150(4).

c. Private Gain from Control/Direction. And of course, the officers and employees may not employ or use "any person, money, or property under [their] official control or direction, or in [their] official custody," for their private benefit or gain. RCW 42.52.160.

4. Sanctions for Violation. Violations of the chapter are subject to sanction by fine, costs, and damages determined by ethics boards set up by the chapter (*see, e.g.*, RCW 42.52.480), in addition to any criminal sanctions (*e.g.*, for bribery) that may also be applicable.

F. Conclusion

In-house government attorneys may use the above to calibrate their actions in relation to their duties, but the broad principles are simple ones: do not have financial interests in, or engage in, any activity that interferes or may appear to interfere with the proper discharge of official duties, and do not use one's official position to secure special privileges for yourself or others. The trend is distinctly toward tighter interpretation of

what is ethically acceptable, so when in doubt, don't do it! Personal reputation and the public's perception that their instruments of government are not subject to improper influence are far more valuable and important than any temporary and (by almost any measure) minor personal advantages that may accrue from crossing or skirting the lines.

III. RPC DISQUALIFICATIONS AND CONFLICTS OF INTEREST

A. RPC 1.7 - General Rule

A government lawyer must continually examine his or her personal interests, the interests of external constituencies (such as former or current private practice clients and law firm members), and the interests of other governmental employees and officials. Charles W. Wolfram, *Modern Legal Ethics*, 450 (1986). The first question that must be answered when determining whether or not a government attorney should be disqualified due to a conflict of interest is, "Who is the client?" *See* Chapter 1, *supra*.

A conflict of interest exists if "the representation of one client will be directly adverse to another client," RPC 1.7(a)(1), or if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." RPC 1.7(a)(2).

In general, a lawyer cannot "represent a client if the representation involves a concurrent conflict of interest." RPC 1.7(a). In spite of a conflict of interest, however, RPC 1.7(b) does not prohibit a lawyer from representing a client if:

> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

(RPC 1.7(b).)

If the government lawyer's role is more oriented toward policy making, conflicts with individuals are considered policy differences and are not a matter for regulation. Charles W. Wolfram, *Modern Legal Ethics*, 450 (1986). *See* Stephen Curran,

Government Lawyers and Conflicts of Interest, 3 Geo. J. Legal Ethics 191, 191-92 (1989). If a lawyer's role is as a litigator, the conflicts issue is treated like that of a counselor in private practice, and confidentiality and the client's interests have more relevance. Charles W. Wolfram, *Modern Legal Ethics*, 450 (1986).

1. Lawyer Partiality. Prior to 1992, "no Washington cases [had] addressed the issue of whether prosecuting one's relatives is a *per se* conflict of interest requiring disqualification. Furthermore, the Washington Rules of Professional Conduct [did] not speak directly to the issue." *State v. Ladenburg*, 67 Wn. App. 749, 751, 840 P.2d 228, 230 (1992). In *Ladenburg*, the court found that the existence of an uncle-nephew relationship between the county prosecutor's office and a juvenile was not a *per se* conflict of interest. *Id.*

In *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988), a prosecuting attorney and his staff were disqualified from participation in a prosecution because the attorney had earlier represented the defendant in an unrelated criminal matter. The court recognized that although the attorney had "acted in good faith throughout and had only the best interest and motivation for his actions, . . . that [fact was] not material." *Id.* at 523, 760 P.2d at 361. In this case, the attorney had privileged information from when he was the defendant's counsel, which the court concluded "could well work to accused's disadvantage." *Id.* at 521, 760 P.2d at 360.

The lawyer's personal interest may be financial, emotional, or political. Charles W. Wolfram, *Modern Legal Ethics*, 453 (1986).

The remote possibility of inappropriate motives is not itself disabling. *Id.*

An emotional interest, in order to be disqualifying, must create a bias or hostility in the government lawyer sufficiently strong to interfere seriously with the lawyer's exercise of public responsibility. *See id.*

Political interest can also create serious conflicts of interest on the part of a prosecutor. But the remote possibility of inappropriate motives, alone, is not enough for disqualification. *See id.*

2. Conflicts of Interest and the Appearance of Fairness Doctrine. "Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would conclude that all parties

obtained a fair, impartial, and neutral hearing." *State v. Ladenburg*, 67 Wn. App. 749, 754-55, 840 P.2d 228, 231 (1992).

This doctrine does not apply once the adversary proceeding has commenced; however, it *may* apply when the prosecutor is acting in a quasi judicial capacity (*i.e.*, determining what charges to bring, plea bargaining). *Id.* at 754, 840 P.2d at 231. *See generally State v. Tolias*, 84 Wn. App. 696, 929 P.2d 1178 (1997) (where the district attorney violated the appearance of fairness doctrine by first trying to mediate between two adverse parties and subsequently prosecuting one of the parties on the matter originally at issue).

"The appearance of fairness doctrine does not apply to legislative actions." *Barry v. Johns*, 82 Wn. App. 865, 871, 920 P.2d 222, 224-25 (1996; *Zehring v. City of Bellevue*, 99 Wn.2d 488, 494, 663 P.2d 823, 826 (1983).

3. Dual Public Service – Actual Conflict Required. When an attorney acts as a prosecuting attorney as well as an attorney for the P.U.D. (or a similar organization) there is may be implied conflict of interest. *See Westerman v. Cary*, 125 Wn.2d 277, 300-301, 892 P.2d 1067, 1079-80 (1994). This case states that a conflict of interest arises when a prosecutor represents two different public bodies with directly adversarial positions in the same case. The court found that there was a conflict of interest in dual public service. In this case, the prosecutor represented two different public bodies that took directly adversarial positions in the same case. The court said that in this circumstance the prosecutor should withdraw from one representation and have a special prosecutor appointed.

A conflict of interest may arise where a government attorney has the responsibility of enforcing civil remedies and prosecuting persons for violating the penal version of the related law. For example, a conflict may arise where the lawyer uses special investigative techniques that can be used in the civil area but may not be used solely for the purposes of preparing a criminal case. In this situation, the attorney is required to act in "good faith" and not abuse his or her power. Charles W. Wolfram, *Modern Legal Ethics*, 452 (1986).

B. RPC 1.9 - Conflict of Interest; Former Clients

RPC 1.9 Duties to Former Clients states as follows:

> (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially

related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom that lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

See infra Chapter 4 on part-time government practice; Charles W. Wolfram, *Modern Legal Ethics*, 454 (1986).

The following are Washington cases treating the subject of RPC 1.9's "same or substantially related matters":

1. *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988) discusses prior representation of unrelated criminal charges. In this case, the prosecutor was disqualified from trying a death penalty murder case because the prosecutor had previously represented the defendant on unrelated criminal charges. The court concluded that the prosecutor's knowledge of confidential information regarding the defendant's past criminal conduct prohibited the prosecutor from making an impartial decision. In other words, the confidential information was closely interwoven with the prosecutor's exercise of discretion in seeking the death penalty. The court used the factual context analysis. The court stated: "[A] prosecuting attorney is disqualified from acting in a criminal case if the prosecuting attorney has previously personally represented or been consulted professionally by an accused with respect to the offense charged or in relationship to matters so closely interwoven therewith as to be in effect a part thereof." *Id.* at

520, 760 P.2d at 359; *See also State v. Greco*, 57 Wn. App. 196, 201, 787 P.2d 940, 942-43 (1990).

2. *State v. Greco*, 57 Wn. App. 196, 787 P.2d 940 (1990), *review denied* 114 Wn.2d 1027, 793 P.2d 974 (1990). Here, a county prosecutor who had previously represented a county officer in actions relating to the officer's official duties, but not the officer's personal affairs, did not have a conflict of interest when prosecuting the officer. *Id*. at 201, 787 P.2d at 942-43.

3. *State v. Hunsacker*, 74 Wn. App. 38, 873 P.2d 540 (1994). This case interprets what is meant by "substantially related matters." It says two matters are substantially related if the factual contexts of the prior and present representations are similar or related. The question should be, "is any fact in the prior representation so similar to any fact that is projected to be involved in the present representation that an attorney would consider it useful in advancing the interests of the client in the present representation?"

A lawyer is disqualified from filing suit against an agency which the lawyer had previously counseled on the issue of legality but later changed his or her mind as to the legality. The court found that it was likely that government officers who were formerly represented by the lawyer disclosed confidential information to him or her. Charles W. Wolfram, *Modern Legal Ethics*, 454 (1986).

C. RPC 1.10 - Imputed Qualification; General Rule

RPC 1.10 states as follows:

> (a) Except as provided in paragraph (c), while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.
>
> (b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:
>
> (1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(e) When a lawyer becomes associated with a firm, no other lawyer in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is screened by effective means from participation in the matter and is apportioned no part of the fee therefrom;

(2) the former client of the personally disqualified lawyer receives notice of the conflict and the screening mechanism used to prohibit dissemination of information relating to the former representation;

(3) the firm is able to demonstrate by convincing evidence that no material information relating to the former representation was transmitted by the personally disqualified lawyer before implementation of the screening mechanism and notice to the former client.

Any presumption that information protected by Rules 1.6 and 1.9(c) has been or will be transmitted may be rebutted if the personally disqualified lawyer serves on his or her former law firm and former client an affidavit attesting that the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current law firm, and attesting that during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter. Such affidavit shall describe the procedures being used effectively to screen the personally disqualified lawyer. Upon request of the former client, such affidavit shall be updated periodically to show actual compliance with the screening procedures. The law firm, the personally disqualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening mechanism used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.

(RPC 1.10.)

When a prosecuting attorney of a county is disqualified from acting in a criminal case based on his representation of the defendant in the same case or in a matter so closely interwoven with the same case as to be in effect a part of that case, the entire attorney staff directed by the prosecuting attorney will ordinarily be disqualified from prosecuting the case, and a special deputy attorney should be appointed. *State v. Stenger*, 111 Wn.2d 516, 522, 760 P.2d 357, 360 (1988). There is a possibility that the attorney with the conflict may be screened (barred from participating in the prosecution) so as not to disqualify the entire prosecuting attorney's office. *Id*. at 522-23, 760 P.2d at 361.

In *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995), a conflict of interest arose from multiple representation by the Attorney General's Office in the performance of its legal duties. However, in this case, a screening mechanism was in place, where different assistant attorneys general were assigned to each side of the conflict of interest. They kept separate files and the attorneys did not talk to each other about the matter. The court found this screening sufficient. *See also City of Hoquiam v. Employment Relations Comm'n*, 29 Wn. App. 319, 628 P.2d 1314 (1981).

D. Standard of Review - De Novo

Whether an attorney's representation of a client violates the RPC's is a question of law reviewed *de novo*. *State v. Hunsacker*, 74 Wn. App. 38, 42, 873 P.2d 540, 542 (1994). The Court of Appeals reviews *de novo* the trial court's decision not to disqualify a prosecutor under RPC 1.9 (Conflicts of Interest - Former Client). *State v. Greco*, 57 Wn. App. 196, 200, 787 P.2d 940, 942 (1990); *State v. Stenger*, 111 Wn.2d 516, 521-22, 760 P.2d 357, 359-60 (1988). The attorney's motives are irrelevant when determining whether or not there is a conflict of interest requiring disqualification. *Id.* at 523, 760 P.2d at 361.

IV. INTERNAL INVESTIGATIONS

A. Basic Considerations

Conflict issues often arise when the attorney for the entity is involved in the early stages of investigations of employee matters such as sexual harassment, employee misconduct or ADA compliance. In such circumstances, consider the following: 1) throughout internal investigations, it is important for the attorney to know who his or her client is. *See infra* Chapter 1; 2) if an attorney/investigator is deemed to be a necessary witness in later administrative or judicial proceedings, he or she might be disqualified as an advocate; 3) there is protection from discovery under attorney/client privilege or work product of investigative materials prepared by and for the attorney in the course of an investigation. *See* CR 26 and RCW 5.60.060(2); 4) potential due process or appearance of

fairness challenges could result in an administrative proceeding when an attorney plays the dual role of investigator and legal advisor in a quasi-judicial context.

B. RPC Provisions

The provisions of the Rules of Professional Conduct that could be implicated include the following:

1. RPC 1.8 Conflict of Interest - current clients.

> RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES
>
> (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;
>
> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.
>
> (b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.
>
> (c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.
>
> (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or

media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not, while representing a client in connection with contemplated or pending litigation, advance or guarantee financial assistance to a client, except that:

(1) a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses; and

(2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, confirmed in writing. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not:

(1) have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them at the time the client-lawyer relationship commenced; or

(2) have sexual relations with a representative of a current client if the sexual relations would, or would likely, damage or prejudice the client in the representation.

(3) For purposes of Rule 1.8(j), "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

(l) A lawyer who is related to another lawyer as parent, child, sibling, or spouse, or who has any other close familial or intimate relationship with another lawyer, shall not represent a client in a matter directly adverse to a person who the lawyer knows is represented by the related lawyer unless:

(1) the client gives informed consent to the representation; and

(2) the representation is not otherwise prohibited by Rule 1.7.

(m) A lawyer shall not:

(1) make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm:

(i) to bear the cost of providing conflict counsel; or

(ii) to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law firm personnel; or

(2) knowingly accept compensation for the delivery of indigent defense services from a lawyer who has entered into a current agreement in violation of paragraph (m)(1).

2. RPC 1.9 Conflict of Interest - former clients.

RULE 1.9 DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the

interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1. 6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

3. RPC 1.10 Imputed Disqualification

RULE 1.10 IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) Except as provided in paragraph (e), while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

(e) When a lawyer becomes associated with a firm, no other lawyer in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:

(1) the personally disqualified lawyer is screened by effective means from participation in the matter and is apportioned no part of the fee therefrom;

(2) the former client of the personally disqualified lawyer receives notice of the conflict and the screening mechanism used to prohibit dissemination of information relating to the former representation;

(3) the firm is able to demonstrate by convincing evidence that no material information relating to the former representation was transmitted by the personally disqualified lawyer before implementation of the screening mechanism and notice to the former client.

Any presumption that information protected by Rules 1.6 and 1.9(c) has been or will be transmitted may be rebutted if the personally disqualified lawyer serves on his or her former law firm and former client an affidavit attesting that the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current law firm, and attesting that during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter. Such affidavit shall describe the procedures being used effectively to screen the personally disqualified lawyer. Upon request of the former client, such affidavit shall be updated periodically to show actual compliance with the screening procedures. The law firm, the personally disqualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening mechanism used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual compliance has been achieved.

C. Cases

The following court cases may also prove helpful in determining courses of conduct:

1. Legal Memorandum as Work Product.

Memorandum prepared by county legal counsel regarding sufficiency of Environmental Impact Statement (EIS) was protected from public disclosure and pretrial discovery as attorney work product rule, CR 26(b), and the attorney-client privilege, RCW 5.60.060(2). *Harris v. Pierce County*, 84 Wn. App. 222, 928 P.2d 1111 (1996).

2. Ex Parte Contact with Opposing Party's Counsel.

Court held that the *ex parte* contact of attorneys with expert witness of opposing party (*i.e.*, fire expert who came to plaintiffs after suit filed and who believed he had identified the cause of fire) did constitute a violation of CR 26(b)(5), but sanction of attorney disqualification was not warranted by the facts of this case. *In re Firestorm 1991*, 129 Wn.2d 130, 916 P.2d 411 (1996). (*See* dissent by J. Madsen for exposition on work product and CR 26.)

3. Multiple Representation.

In a case involving the termination of a medical resident's residency at the University of Washington Medical School, different assistant attorneys general (AAG) represented and/or advised 1) the department chair regarding the termination; 2) the adjudicative committee which reviewed the termination, and 3) the chair of the committee regarding an "errant fax" which was inadvertently sent to a committee member. *Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995). Where Attorney General's office used the screening mechanisms discussed in *Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 663 P.2d 457 (1983), and by the court of appeals in *Amoss v. Univ. of Wash.*, 40 Wn. App. 666, 700 P.2d 350 (1985, the entire Attorney General's office should not have been disqualified on account of such multiple representation/advice. Of significance in internal investigations, no attorney/client relationship was established between one AAG and the medical resident on account of the AAG having earlier, in an unrelated tort claim, asked the resident to provide the University with the resident's factual account of the incident from which the claim arose. Also, the acts of individual attorneys, as opposed to the administrative tribunal, do not

trigger an appearance of fairness violation. *Sherman v. State*, 128 Wn.2d 164, 185, 905 P.2d 355, 368 (1995).

4. Property Appraisal – Work Product.

After the owner of property which was the subject of a planned land use regulation claimed that application of the regulation would deprive it of reasonable economic use of the property, the City Attorney commissioned an appraisal of the property. The owner/developer obtained its own appraisal of the property, but also sought disclosure of the appraisal done at the City Attorney's direction. The court held the City's appraisal was exempt from public disclosure as attorney work product under CR 26(b)(4). It did not reach the question whether the appraisal was protected by attorney-client privilege. *Overlake Fund v. Bellevue*, 70 Wn. App. 789, 855 P.2d 706 (1993), *review denied*, 123 Wn.2d 1009 (1994).

V. THE ATTORNEY AS WITNESS

A. Rule 3.7 of the Rules of Professional Conduct, Lawyer as Witness

RPC 3.7 states as follows:

> RULE 3.7 LAWYER AS WITNESS
>
> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) the testimony relates to an uncontested issue;
>
> (2) the testimony relates to the nature and value of legal services rendered in the case;
>
> (3) disqualification of the lawyer would work substantial hardship on the client; or
>
> (4) the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate; or [sic]
>
> (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.

In applying this rule, "courts have been reluctant to disqualify an attorney absent compelling circumstances." *Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 812, 881 P.2d 1020, 1033 (1994) (citing *Smithson v. United States Fid. & Guar. Co.*, 411 S.E.2d 850 (W. Va. 1991)). *See also Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 128 Ariz. 99, 624 P.2d 296 (1981).

B. Motion to Disqualify

Application of the lawyer as witness rule will occur in both disciplinary proceedings and in court, usually pursuant to a motion to disqualify a particular attorney. A review of the pertinent cases indicates that it is far more likely for the issue to arise during the course of a trial and that there are very few disciplinary procedures involving RPC 3.7. *See, e.g.*, American Bar Association, *Annotated Model Rules of Professional Conduct* (3rd ed. 1996); *cf. State ex. rel. Neb. State Bar Ass'n v. Neumister*, 449 N.W.2d 17 (Neb. 1989) (disciplining lawyer who failed to withdraw when he knew he would be a material witness.); *Office of Disciplinary Counsel v. Collins*, 643 N.E.2d 1082 (Ohio 1994) (reprimanding lawyer for taking case in which he knew he would be witness).

C. Timing

As a general rule, a party must move to disqualify an attorney in a timely manner. *See Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 812, 881 P.2d 1020 (1994) . A motion to disqualify presented just before trial may prejudice the non-moving party and may be perceived by the court as constituting "unseemly tactics." *Id*. However, at least in a disciplinary proceeding, the court will require an unequivocal waiver by the party that could object to the lawyer-witness, or the issue may be reviewed at a later date. *See In re Vetter*, 104 Wn.2d 779, 711 P.2d 284 (1985) (court found that a party's decision not to challenge the lawyer-witness during a disciplinary hearing did not preclude the party from raising this issue in court).

D. Factors Determining When a Lawyer is a Necessary Witness

1. Testimony Related to Issue in Dispute.

The testimony must relate to an issue that is in dispute. RPC 3.7(a)(1) specifically exempts the testimony that relates to an issue that is uncontested.

2. Balance of Client's and Court's Interests.

The comments to the Annotated Rules state that a court should balance the interest of a client in having the lawyer of his or her choice versus the possible prejudice the client might suffer. In determining the prejudice, a court should consider the importance of the testimony and whether it is in conflict with other witnesses.

3. Evidence Available from Other Sources.

A lawyer will generally not be a necessary witness if the evidence is reasonably attainable from other available sources. *See Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020 (1994) , in which one of the attorneys had been involved in drafting a settlement agreement. The trial court initially found that other parties could testify regarding the various parties' intent. The court in this case noted that courts have been reluctant to disqualify an attorney absent compelling circumstances, and that the burden was on the moving party to establish that the evidence to be provided by the attorney was otherwise unobtainable. When it became clear immediately prior to trial that the attorney was a necessary witness, the court found that the attorney could both testify and act as an advocate as it would unfairly prejudice the attorney's client to disqualify him or her at that late date.

4. Testimony Unnecessarily Repetitious.

In a criminal case, the Washington Supreme Court reversed a defendant's conviction for murder when the prosecution called the defendant's lawyer to the stand because the lawyer's testimony was repetitious and unnecessary to the state's case. *State v. Sullivan*, 60 Wn.2d 214, 373 P.2d 474 (1962). The court noted that there must be a sensitive balance between the right of the state to prove its case compared to the defendant's right to effective and unhampered counsel. The repetitive nature of the attorney's testimony tilted the balance in favor of the defendant.

5. Testimony of Vital Concern.

An attorney whose testimony was "of vital concern" to the trial violated the predecessor to RPC 3.7 when he also acted as advocate. *Knutsen v. Miller*, 28 Wn.2d 837, 867, 184 P.2d 255, 270-71 (1947). The court concluded that "[b]ecause of his activities in deliberately violating the ethics of his profession, we feel unable to give his evidence much credit." *Id*. As the court attempts to balance the interests of the parties, it appears that the actual need for the attorney must be established and that the timing of the motion is extremely important to avoid prejudice to the client.

E. Necessary Witness as an Advocate at Trial

Although RPC 3.7 prohibits necessary witnesses from acting as advocates at trial, it does not require lawyers to disqualify themselves from representing a party or from participating in pretrial preparation. In *State v. Fackrell*, 44 Wn.2d 874, 271 P.2d 679 (1954), the prosecuting attorney called and questioned witnesses. During the course of the trial an issue arose concerning the validity of a confession. The prosecuting attorney was called as a witness to support the voluntariness of the confession. Thereafter, the attorney did not meaningfully participate in the trial of the case. The court found no violation of RPC 3.7. While the *Fackrell* case is not an example of the best practice, it illustrates the court's reluctance to disqualify counsel, particularly after there is substantial preparation or the trial has begun. The ABA Standing Committee on Ethics and Professional Responsibility, in Informal Opinion 83-1503, has concluded that the rule does not prohibit a lawyer who testified at trial from briefing or arguing the appeal as long as the lawyer's testimony is not at issue and there is no conflict of interest.

F. Law Firm Not Disqualified Under Rule 3.7(b)

RPC 3.7(b) states: "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. [conflict of interest]." In the terminology section of the rules, "law firm" is defined as follows: "'Firm' or 'law firm' denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." RPC 1.0(c).

G. Other Exceptions to the Rule

RPC 3.7 recognizes four other exceptions: "(1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; (3) disqualification of the lawyer would work substantial hardship on the client; or (4) the lawyer has been called by the opposing party and the court rules that the lawyer may continue to act as an advocate." RPC 3.7(a)(1)-(4).

The ABA Committee on Ethics and Professional Responsibility issued Formal Opinion 339 on the meaning of "substantial hardship" stating:

[W]here a complex suit has been in preparation over a long period of time, any development which could not be anticipated makes the lawyer's testimony essential, it

would be manifestly unfair to the client to be compelled to seek new trial counsel at substantially additional expense and perhaps to have to seek delay of the trial.

See also Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co., 124 Wn.2d 789, 881 P.2d 1020 (1994) . Some factors courts have considered to determine whether substantial hardship exists include:

1. Emotional Attachment.

A client's emotional attachment to a lawyer would not usually be enough to create a substantial hardship. *See Comden v. Sup. Ct.*, 20 Cal.3d 906, 576 P.2d 971 (Cal. 1978).

2. Additional Expense and Delay.

A showing of additional expense and delay may not always qualify as a sufficient hardship. *See McCarthur v. Bank of N.Y.*, 524 Fed. Supp. 1205 (S.D. N.Y. 1981).

3. Attorney's Expertise, Training and Involvement.

In most instances, the court appears to look at the expertise, training and involvement of the attorney to determine whether there would be substantial hardship. *See*, *e.g.*, *In re Conduct of Lathen*, 294 Or. 157, 654 P.2d 1110 (1982) (finding no hardship from loss of attorney's expertise); *American Bar Association, Annotated Model Rules of Professional Conduct* (3rd ed. 1996).

As a practice tip, to avoid disqualification during trial, attorneys should seek a court ruling at the time of pretrial preparation that they believe they are likely to be a necessary witness or may be subpoenaed by opposing counsel.

VI. MULTIPLE INTERNAL CLIENT SCREENING – WAYS AND MEANS

A. Situations In Which Conflict Arises

A conflict of interest arises when the government lawyer has a statutory duty to provide legal representation to agencies or individual employees, and some disability, such as one of those described in RPC 1.7, prevents fulfillment of that duty. *See Osborn v. Grant County By and Through Grant County Com'rs*, 130 Wn.2d 615, 926 P.2d 911 (1996) (an example of conditions under which a special prosecutor must be appointed). Government lawyers must be very careful not to enter into a relationship where there is a

potential conflict of interest that is likely to adversely affect their ability to exercise independent and professional judgment.

In a government attorney's office, one civil lawyer typically represents multiple governmental agencies as clients. The lawyer has a duty to represent each client so that each client's interests are protected. Where clients' interests are adverse to one another, an impermissible conflict of interest exists, and other arrangements for representation, such as appointment of special deputies, need to be instituted. *See Sherman v. State*, 128 Wn.2d 164, 905 P.2d 355 (1995).

B. Impermissible Conflict

1. Opposing Government Clients.

A government attorney may not represent opposing governmental clients (agencies) in litigation. *Westerman v. Cary*, 125 Wn.2d 277, 892 P.2d 1067 (1994).

2. Lawsuit by Government Attorney.

An attorney may not initiate a lawsuit against the governmental entity (city, county, state) that employs him, except under extremely limited circumstances. *Osborn v. Grant County By and Through Grant County Com'rs*, 130 Wn.2d 615, 926 P.2d 911 (1996); *Nichols v. Snohomish County*, 109 Wn.2d 613, 746 P.2d 1208 (1987); *Hoppe v. King County*, 95 Wn.2d 332, 622 P.2d 845 (1980). *But see* RCW 73.16.061 (prosecuting attorney represents veterans seeking re-employment after active military duty, and the employer may be the county). *Nichols v. Snohomish County*, 109 Wn.2d 613, 746 P.2d 1208 (1987).

3. Representation of Decision-Maker While Case Pending.

While a case is pending, representation of a board, administrative tribunal, or judges may constitute *ex parte* communication in violation of RPC 3.5 and would present an appearance of fairness issue. *Med. Disciplinary Bd. v. Johnston*, 99 Wn.2d 466, 663 P.2d 457 (1983).

4. Outside Employment.

Where outside employment is permitted, a government attorney may not accept outside employment that conflicts with the attorney's governmental responsibilities. RPC 1.7; RCW 36.27.040; RCW 36.27.060; RCW 35.23.111.

5. Former Government Attorney.

A former government attorney may not accept private employment concerning a matter in which he or she had personal and substantial responsibility as a public employee, unless the former government employer consents after consultation. *See* RPC 1.11; *City of Hoquiam v. Pub. Employment Relations Com'n of State of Wash.*, 97 Wn.2d 481, 646 P.2d 129 (1982).

6. Firm of Former Government Employee.

The law firm of the former government attorney is disqualified from representing the private client with whom the government attorney interacted as a public officer, unless the disqualified lawyer is "screened" and receives no fees therefrom and written notice is promptly given to the appropriate agency. *City of Hoquiam v. Pub. Employment Relations Com'n*, (*supra*).

7. Use of Confidential Information by Former Government Attorney.

A former government attorney may not use any confidential government information about a person gained while employed by a government agency when the client's position is adverse to that agency. The lawyer's firm may participate in the matter only if the lawyer is "screened." RPC 1.6.

8. Prior Involvement in Private Employment.

A lawyer serving as a governmental officer or attorney may not participate in a matter in which he or she participated personally and substantially while in private employment with a party or its attorney in such matter. RPC 1.11(a).

9. Respondeat Superior Conflicts.

A conflict of interest may arise under the theory of *respondeat superior* where an employer initially acknowledges a duty to defend its employee, but

determines later that the employee acted outside the scope of his employment or, under a Section 1983 (42 USC § 1983) cause of action, in contravention to the policies and procedures of the agency. There are a number of different ways to handle this conflict of interest, which may include hiring outside counsel. For a good discussion on the doctrine of *respondeat superior*, *see Thompson v. Everett Clinic*, 71 Wn. App. 548, 860 P.2d 1054 (1993), *review denied*, 123 Wn.2d 1027, 877 P.2d 694 (1994).

C. Permissible Dual Representation

The possibility of dual representation of clients with adverse or possibly adverse interests often arises when governmental departments or agencies are seeking to work cooperatively on a public project. Dual representation is permitted if the lawyer reasonably believes the representation will not adversely affect the relationship with the other client, and the clients are aware of and consent to the dual representation. Doubts are to be resolved against the propriety of the representation.

D. Imputed Disqualification

When a single attorney is disqualified because of a conflict of interest, the disqualification applies to the other lawyers in the same firm as well. When a potential conflict of interest arises the attorney should inform the client and explain the implications of the conflict of interest. Because government attorneys have a statutory duty to provide legal advice to government agencies, the office should arrange for separate attorneys to handle the matter and to "screen" the attorneys within the office. Alternatively, it may be necessary or desirable to hire outside attorneys or to exchange attorneys with other comparable offices who will act as "special deputies." [**Note:** Remember to take this into account at budget time.] *See State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988); *State v. Ladenburg*, 67 Wn. App. 749, 840 P.2d 228 (1992).

E. Screening Isolation

Screening is necessary when an attorney has had a prior professional relationship with a client wherein he or she obtained confidential information that could be used to the client's disadvantage. *State v. Ladenburg*, 67 Wn. App. 749, 840 P.2d 228 (1992). When the performance of legal duties presents actual conflicts of interest, different attorneys in the office should handle the inconsistent functions. *Amoss v. Univ. of Wash.*, 40 Wn. App. 666, 700 P.2d 350 (1985).

Adequate screening is established when the attorney having a conflict of interest:

1. Disqualifies himself or herself from all participation in the matter;

2. Does not participate in and allows no discussions in his or her presence involving the matter;

3. Sees no documents or correspondence pertaining to the matter and keeps separate files, and takes no part in the decision of the case. *See City of Hoquiam v. Pub. Employment Relations Com'n of State of Wash.*, 97 Wn.2d 481, 646 P.2d 129 (1982); *Amoss v. Univ. of Wash.*, 40 Wn. App. 666, 700 P.2d 350 (1985).

F. Special Deputies

1. State.

There is no express statutory provision describing the circumstances under which the Attorney General may appoint special assistant attorneys general. However, RCW 43.10.060 and 43.10.065 provide for special assistant attorneys general as part of the general appointment power of the Attorney General. Special assistant attorneys general employed on less than a full-time basis may engage in the private practice of law. RCW 43.10.125. *See also* WAC 296-14-900 through 296-14-940 implementing RCW 51.12.102 and 51.24.110, which authorize the Department of Labor & Industries to use special assistant attorneys general.

2. Counties.

A special prosecutor may be appointed to represent a party when (i) a government attorney has the authority and the duty to represent such party in the given matter; and (ii) some disability prevents the government attorney from fulfilling that duty. *See* RCW 36.27.030; *Hoppe v. King County*, 95 Wn.2d 332, 339, 622 P.2d 845, 849-50 (1980.

3. Towns.

Outside legal counsel may be retained by a city's mayor or by a municipal board or officer "in the good-faith prosecution or defense of an action taken in the public interest . . . where the municipality's attorney refuses to act or is incapable of or is disqualified from acting." *State v. Volkmer*, 73 Wn. App. 89, 94, 867 P.2d 678, 681 (1994).

VII. SUCCESSIVE EMPLOYMENT

A. The Rule – RPC 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

1. From Representation of Government to Representation of a Private Client.

a. Three General Rules.

i. Representation in Same Matter. "[A] lawyer who has formerly served as a public officer or employee of the government,"
RPC 1.11(a), "shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee [*e.g.*, a government lawyer], unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation." RPC 1.11(a)(2).

ii. Confidential Information. "[A] lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee [e.g., when the lawyer was a government lawyer], may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person [about whom the information pertains]." RPC 1.11(c).

iii. Law Firm. When a lawyer is disqualified from representation under rule (i) above (RPC 1.11(a)), "no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter . . ." RPC 1.11(b).

b. Exceptions.

i. Exception to the RPC 1.11(a) Prohibition Against Work by Former Government Lawyer. A former government lawyer may represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer

or employee, *if* "the appropriate government agency gives its informed consent, confirmed in writing, to the representation." RPC 1.11(a)(2). This exception *does not* apply to the rule stated in RPC 1.11(c); that is, a government agency *cannot* consent to a former government lawyer's use of confidential government information about a person where the information could be used to the material disadvantage of that person.

ii. Exception to Prohibition Against Work by Firm Employing Former Government Lawyer. A firm or lawyers within it may undertake or continue representation on a matter, notwithstanding the fact that one of its lawyers is a former government attorney who would be prohibited by RPC 1.11(b) or 1.11(c) from undertaking or continuing the representation, or using confidential information, if the following requirements are met from RPC 1.11(b)(1) and (2):

> (1) [T]he disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom [RPC 1.11(b)(1) and RPC 1.11(c)]; and
>
> (2) [W]ritten notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule [RPC 1.11].

2. From Representation of a Private Client to Representation of Government.

A lawyer serving as a public officer or employee [*e.g.*, a government lawyer] shall not "participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing . . ." RPC 1.11(d)(2)(i).

3. Leaving Government Employment.

A lawyer serving as a public officer or employee shall not "negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially . . ." RPC 1.11(d)(2).

4. Term "Matter" is Defined Broadly in RPC 1.11 and May Result in Lengthy Disqualification.

Under RPC 1.11, the term "matter" includes "any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties." RPC 1.11(e)(1). "Matter" also includes "any other matter covered by the conflict of interest rules of the appropriate government agency." RPC 1.11(e)(2).

Practice Consideration: The breadth of the definition of "matter" means that disqualification of a current or former government lawyer can extend for a long period of time—as long as the "matter" continues to exist. Consider, for example, adoption of a GMA comprehensive plan, a process which can take two to three years. Absent the government agency's written informed consent, a former government lawyer who had represented the municipality during preparation of its comprehensive plan would be barred under RPC 1.11(a) from later representing a private property owner in a legal challenge to the comprehensive plan. This disqualification would occur even if the private representation occurred several years after the close of the attorney's involvement in the "matter" of the plan's preparation and adoption. Likewise, an attorney who personally and substantially represented a private property owner by writing letters and appearing at hearings protesting various components of a municipality's draft comprehensive plan, but who later became an assistant city attorney for the municipality, would be precluded from participating on behalf of the municipality in subsequent litigation concerning the plan, unless the appropriate government agency gives its informed consent, confirmed in writing. RPC 1.11(d)(2).

The only instance in which RPC 1.11's reach does not extend to the conclusion of the matter involves negotiation for private employment. Under RPC 1.11(d)(2), a government lawyer is barred from negotiating for private employment with a party or attorney for a party in a matter in which the lawyer is *currently* participating personally and substantially. However, a government lawyer is no longer barred from negotiating for private employment with a party or attorney *after* the lawyer is no longer participating in the matter— even if the "matter" is continuing. Of course, if the lawyer negotiates for and accepts employment with a party or its attorney and the "matter" continues, RPC 1.11(a) would bar the lawyer from representing the private client (unless the government agency consented). If the lawyer's new employer is a firm, RPC 1.11(b) would

require the firm to effectively screen the new lawyer in order to continue the firm's representation of the private client.

B. Other Rules of Professional Conduct May Apply In Addition to RPC 1.11

Other specific rules contained within the Rules of Professional Conduct may apply in a given situation, in addition to RPC 1.11. For example, a lawyer currently serving as a public officer or employee is subject to RPC 1.7's provisions addressing concurrent conflicts of interest, as well as RPC 1.9's provisions concerning duties to former clients. RPC 1.11(d)(1). A lawyer who formerly served as a public officer or employee is also subject to RPC 1.9(c)'s limitations on use of information relating to the former government representation. RPC 1.11(a)(1). *See also State v. Stenger*, 111 Wn.2d 516, 520-21, 760 P.2d 357, 359-60 (1988), in which the Supreme Court held that the Clark County Prosecuting Attorney was disqualified from representing Clark County on a case involving a charge of aggravated murder and in which the County was seeking the death penalty, because the prosecuting attorney had previously represented the defendant on an unrelated misdemeanor charge.

C. Other Cases

1. Disqualification of Prosecutor – Relatives.

State v. Ladenburg, 67 Wn. App. 749, 850 P.2d 228 (1992). In this case, the court rejected a claim that the Pierce County Prosecuting Attorney and his office should be disqualified because the defendant was the nephew of the prosecuting attorney. The Court of Appeals, Division II, distinguished the case from *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988), noting that, unlike in *Stenger*, the prosecuting attorney had not represented the defendant before, and therefore RPC 1.9 did not apply. It also noted that, because the charge against the nephew was for second-degree robbery, not aggravated murder, there were no instances in which mitigating circumstances or knowledge of the defendant's background would come into play. Finally, the court noted that there were no other Rules of Professional Conduct implicated, and, in any event, the record did not indicate that the prosecuting attorney had actively participated in the case or had even been aware of the charge. Thus, there was no basis to disqualify the prosecutor's entire office.

CHAPTER 4: PRIVATE ATTORNEYS WITH PUBLIC CLIENTS

Attorneys who serve as government lawyers by contract face many of the same ethics questions as do lawyers who are in-house. However, private lawyers may encounter a few different questions, particularly in the area of conflicts. Some examples are found in section III , below. The remainder of this chapter focuses on the resources that are available to aide an attorney when facing an ethics question.

I. RPC PROVISIONS WHICH MAY APPLY

While all provisions of the RPC apply to all attorneys, some rules merit special attention for contracting government attorneys.

A. RPC 1.4 – Communication

This rule requires full and open communication with your client. For those on contract this would include full and complete information about your billings to the client, including time spent and billed for legal assistants. Remember, this is a public record.

B. RPC 1.5 – Fees

In addition to the comments above, any contract should specifically set out the manner in which changes in hourly rates, flat fees, or other arrangements are made, if at all. Rules 1.4 and 1.5 require a full disclosure of those actions.

C. RPC 1.6 – Confidentiality

The concept of attorney-client privilege usually begins with an analysis of "who is the client?" This issue was brought to national attention when the 8th Circuit considered the application of the privilege to the President's spouse, Hilary Rodham Clinton, in *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997), *cert. denied*, 521 U.S. 1105 (1997).

D. RPC 1.7, 1.8, 1.9, 1.10 - Conflicts

These rules involve conflicts and disqualification, regarding both current and former clients. The rules are not necessarily the same. When a law firm represents municipalities along with developers or other private clients, the chances for a conflict to arise are legion. Section III, below, sets forth some hypothetical examples.

E. RPC 1.11 – Special Conflict Rule for Former and Current Government Lawyers

Every lawyer who has served, is serving, or will serve as a government lawyer should be familiar with this rule. In addition to affirming that government lawyers remain subject to the general conflict of interest rules found in RPC 1.7 and 1.9, the rule imposes additional restrictions on both former government lawyers who have moved to private practice, and on former private practitioners who have moved to government practice. For those who have both private and government practice, the risks increase (*e.g.*, inadvertently disclosing information acquired in an executive session contrary to RCW 42.30.110, or running afoul of the provisions of RCW 42.23.070; using his or her position to secure special privileges; giving or receiving or agreeing to receive any compensation, gift, reward, or gratuity from outside sources; accepting employment or engage in business or professional activity putting him or her in a position to disclose confidential information acquired by reason of his or her official position; or disclosing confidential information gained by reason of the officer's position, etc.).

F. RPC 1.15A and 1.15B – Safeguarding Property and Required Trust Account Records

While private lawyers serving in government positions may be accustomed to seeking advance payment of some or all of the estimated fees and costs for services, government agencies should decline those requests. RCW 42.24.080 (which statute requires an authentication and certification by an auditing officer that the materials have been furnished, the services rendered or the labor performed and that the claims represent a just, due and unpaid obligation). For government agencies that honor those requests, the receiving attorneys remain subject to this rule.

G. RPC 5.1 and RPC 5.3 – Responsibilities of Partner

The partner who is the government attorney is responsible for ethical violations of other lawyers or support staff, if the partner knows of the conduct at a time when the consequences could be avoided and the partner does nothing to correct the conduct. Attorneys in private practice must consider the implications of this rule for purposes of both client satisfaction and malpractice coverage.

H. RPC 6.1 – Pro-Bono Service

Contract government attorneys do not have the same restrictions as in-house attorneys. As private practitioners, these attorneys can have pro bono clients come to their office and can use office staff and facilities.

I. RPC 7.1 – Communication About a Lawyer's Services

There are times when law firms compete for contracts to represent a governmental entity. When participating in such a process, attorneys must follow this rule which prohibits false or misleading comments about a lawyer or a lawyer's services.

J. RPC 7.5 – Firm Name and Letterhead

This rule addresses prohibitions and requirements regarding the name of a firm. Fundamentally, this rule first requires continued compliance with RPC 7.1, prohibiting false or misleading communications about a lawyer or a lawyer's services. Private attorneys should be mindful of subsection (c), which arguably limits references to one or more of the firm's attorneys holding the office of "city attorney," at least during times when that lawyer is not "actively and regularly" practicing with that firm.

II. PLACES TO TURN

A. WSBA Legal

Call the WSBA and ask for Professional Responsibility Counsel. Although the attorneys at the Bar may not have a government lawyer background, they do have an intimate knowledge and understanding of the Rules of Professional Conduct and the prior formal and informal ethics opinions.

B. Websites

There are various websites that can address legal ethics or which can be used to search answers to legal-ethical questions, including those set forth in Appendix IV hereto.

III. HYPOTHETICAL CONFLICT SITUATIONS

Obvious ethical issues that may arise for those attorneys who have private as well as government clients include the following examples. The parameters of possible ethical issues are much wider than these few examples.

A. Contract City Attorney's Partner has Developer as a Client

Developer now wants to develop in the city. (RPC 1.7, 1.8(b), which address requirements for lawyers or a law firms sell or purchase a law practice, and duties with respect to prospective clients.)

B. City Attorney's Office is Hiring

Prospective employee was or is employed by law firm that represents (or represented while applicant was at former office) a developer intending to develop in the city. (RPC 1.7, 1.8(b), 1.10 [general conflict of interest rules].)

C. Property Owner was Previously Represented by Partner of City Attorney

The representation was 15 years ago and there has been no continued contact between property owner and the lawyer. The property of the former client adjoins a street proposed to be widened (or vacated). (RPC 1.9, duties to former clients.)

D. Current Client Conflicts

Principals of contract City Attorney's *law firm are also trustees of the firm's retirement fund*. The retirement fund seeks to develop property within city limits. The city denies the application for building permit and appeal is imminent. (RPC 1.8, specific rules for conflicts of interest regarding current clients.)

CHAPTER 5: PRO BONO SERVICE

I. THE REQUIREMENTS OF RPC 6.1

Washington Rule of Professional Conduct 6.1 makes it the professional responsibility of every attorney practicing in Washington to "aspire to render at least thirty (30) hours of pro bono" service per year.

A. Services to Clients

RPC 6.1 describes pro bono services as services provided without a fee or an expectation of a fee to: (1) persons of limited means, or (2) charitable, religious, civil, community, governmental, or educational organizations in matters which primarily address the needs of persons of limited means.

B. Delivery of Services

RPC 6.1 further describes pro bono services in terms of delivery of services as follows: (1) delivery of legal services at no fee or substantially reduced fee to individuals, groups, or organizations seeking to secure or protect civil rights, or charitable, religious, civil, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate; (2) delivery of legal services at a substantially reduced fee to persons of limited means; or (3) participation in activities for improving the law, the legal system or the legal profession.

While Comment 12 to the rule specifically provides that RPC 6.1 is not intended to be enforced through the disciplinary process, the rule does provide that a person providing fifty (50) hours of pro bono service in a given year shall receive commendation from the WSBA.

The full text of RPC Rule 6.1 is as follows:

> 6.1 PRO BONO PUBLICO SERVICE
>
> Every lawyer has a professional responsibility to assist in the provision of legal services to those unable to pay. A lawyer should aspire to render at least thirty (30) hours of pro bono publico service per year. In fulfilling this responsibility, the lawyers should:
>
> (a) provide legal services without fee or expectation of fee to:

(1) persons of limited means or

(2) charitable, religious, civil, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means; and

(b) provide pro bono publico service through:

(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, or charitable, religious, civil, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(3) participation in activities for improving the law, the legal system or the legal profession.

Pro bono publico service may be reported annually on a form provided by the WSBA. A lawyer rendering a minimum of fifty (50) hours of pro bono publico service shall receive commendation for such service from the WSBA.

Washington's RPC 6.1 is substantially similar to Rule 6.1 of the American Bar Association's Model Rules of Professional Conduct. Both Comment 2 to RPC 6.1, and Comment 5 to Model Rule 6.1 acknowledge that government attorneys may face restrictions in the performance of outside legal work. However, they both note that the broad range of pro bono opportunities provided by the rule should allow the government attorney to provide pro bono services.

In the event that the attorney is unable to provide pro bono services in a given period, Comment 9 to the rule encourages the attorney to financially support an organization that provides pro bono services. Pursuant to the comment, the financial support provided should equal the value of the time the attorney was not able to provide.

II. RESTRICTIONS ON GOVERNMENT ATTORNEYS

Generally, state law does not specifically restrict a government attorney's ability to perform pro bono services. However, laws relating to the use of government resources may make some types of representation more difficult. In addition, the county or municipal attorney should become familiar with local codes and policies that may impact the government attorney's ability to provide pro bono services.

A. Attorneys General

Although state attorneys general and certain county prosecuting attorneys cannot engage in private practice, these restrictions typically do not apply to providing legal services of a charitable nature. RCW 43.10.115 and 43.10.120 prohibit attorneys general and their deputies and assistants from engaging in private practice. However, RCW 43.10.130 provides that, notwithstanding the prohibitions in RCWs 43.10.115 and 43.10.120, attorneys general, deputies, and assistants may perform legal services for themselves or their immediate family members, and may perform legal services of a charitable nature.

The state Attorney General's Office (AGO) has issued a policy to guide its staff in providing pro bono legal services. AGO Policy III.12, June 15, 2006. The policy encourages staff attorneys to provide pro bono service as long as such service is not incompatible with the AGO's obligations to its clients. *Id.* The policy provides that *de minimus* work can be performed during the work day, and if more work is necessary, the employee should ask his or her supervisor for a flexible work schedule, or take vacation leave to perform the work. *Id.* The policy also provides that with some restrictions, the attorney can make use of limited office resources, such as computers and phones. However, the attorney cannot use the state's email system, and cannot use the office space of the AGO for meeting clients.

B. County Prosecuting Attorneys

RCW 36.27.060 prohibits some county prosecutors from engaging in private practice. Whether a county's prosecutors are prohibited depends on the size of the county for which they work. However, much like the laws applicable to attorneys general, the prohibition on private practice provides that prosecutors may perform legal services for themselves or their immediate family members, and may perform legal services of a charitable nature.

C. City, Town, and District Attorneys

The scope of permissible outside employment of a city, town, or special district attorney is a function of local code or policy, and not state law. Therefore, a city, town, or district attorney should consult local codes and policies to determine whether there are any restrictions on the performance of pro bono work.

III. ADDITIONAL CONSIDERATIONS

A. Laws and Policies Prohibiting the Use of Government Resources

RCW 42.52.160 provides that no state employee may use persons, money or property of the state for the private benefit of another. However, the statute does permit the *de minimus* use of state resources (*See* WAC 292-110-010 for guidance on permissible *de minimus* use), and permits the appropriate ethics boards to adopt rules providing for exceptions for the occasional use of resources. It is the exception in RCW 42.52.160 that authorized AGO Policy III.12, concerning AGO staff providing pro bono services discussed above.

Many municipalities will have similar local code provisions or policies in place that address the use of municipal resources for other than municipal purposes. There may or may not be exceptions to those provisions which would allow the attorney to make limited use of municipal resources when providing pro bono services. These issues should be fully researched by the municipal attorney prior to providing pro bono services.

B. Malpractice Insurance

A government attorney who is employed by a government agency (as opposed to a contract attorney) typically does not carry malpractice insurance. Rather, assuming the government attorney is acting within the scope of his or her duties, the insurance of the government agency acts to insure the work of the attorney.

When a government attorney partakes in the representation of a person or entity outside of the government agency for which he or she works, the government attorney is acting outside the scope of his or her typical duties, and therefore, such acts are typically not covered by the government's insurance.

This fact alone can limit the clientele that the government attorney should work for on a pro bono basis. The government attorney should be assured that the pro bono work he or she performs falls within the protection of malpractice insurance. There are some nonprofit organizations available that provide the opportunity for pro bono work, and provide the malpractice coverage necessary to do so.

C. Application of RPCs to Pro Bono Service

The Rules of Professional Conduct apply to the representation of the pro bono client. There are, however, some special rules that apply in terms of conflicts of interest in cases in which the attorney provides short-term assistance to clients through a non-profit organization or court. For example, RPC 6.5 recognizes that in cases in which an attorney provides pro bono assistance on a short-term basis, such as through legal advice hotlines, advice-only clinics, or clinics in which attorneys assist people in completing forms, certain terms of the conflicts of interest rules will not apply unless the attorney is aware of the conflict of interest.

In addition, RPC 6.3 provides that an attorney may serve as a director, officer, or member of a legal services organization unless the organization may serve people who have an interest adverse to the attorney's client(s). However, under RPC 6.3, the attorney may not knowingly participate in a decision or action of the organization that is incompatible with the attorney's representation of a client or the organization. *See* RPC 6.3, Comment 1.

Finally, RPC 6.4 provides that an attorney may serve as a director, officer, or member of an organization involved in legal reform notwithstanding that the reform may affect the interests of a client. However, when the attorney knows that the interests of a client may be materially benefited by the actions of the organization, the attorney must disclose that fact, though the attorney need not disclose the identity of the client.

IV. THE PRACTICAL APPROACH TO PROVIDING PRO BONO SERVICES FOR GOVERNMENT ATTORNEYS

With the clear expectation that all attorneys provide pro bono services, the next question that often arises is how should the government attorney provide pro bono services in a risk free manner? This can be a little tricky for the government attorney, as the focus of the government attorney's work is not usually within the practice area in which the pro bono services are needed. The attorney who practices in the areas of land use or public works will not find many pro bono clients with land use or public works needs. In addition, unless performing government legal work by contract, the typical government attorney will not carry liability insurance.

Practice Tips: In order to reduce the risk exposure for the government attorney, he or she should take the following measures:

1. The attorney will want to utilize a reputable pro bono agency. The attorney should make sure he or she understands the goals of the pro bono agency with whom the attorney intends to work.

2. If the attorney does not carry malpractice insurance, he or she should ensure that the pro bono agency will carry insurance on the attorney's behalf. If the attorney does perform work for the pro bono agency or a client referred by the agency, the attorney will want to make sure that he or she is added as an insured under the policy. It is recommended that the attorney obtain this assurance in writing. If the attorney does carry malpractice insurance, he or she will want to make sure that pro bono work is covered by the policy.

3. The attorney should determine whether the pro bono agency has an adequate training program if the attorney intends to represent the pro bono agency, or a client referred by the agency, in a subject matter that is outside of the attorney's normal practice area. If the pro bono agency does have a training program, the attorney should take advantage of it.

4. The attorney should determine what expenses the pro bono agency will cover and what expenses the attorney will be responsible for on his or her own. The attorney should consider who will be responsible for experts, filing fees, court reporters, etc.

5. If the attorney will be representing a client referred by the pro bono agency, the attorney should make sure that the pro bono agency adequately screens clients prior to the accepting an assignment. This will assist the attorney in determining whether he or she wishes to take on the representation of the client.

6. The attorney should understand the nature of the legal matter for which representation is needed prior to accepting the assignment. The attorney should be sure to adequately screen the case and client for the potential of a conflict of interest.

7. The attorney should also determine the support structure that he or she will be afforded by the pro bono agency. Will the organization provide secretarial or paralegal support? Will the attorney have access to the assistance of other attorneys who regularly practice in the field for which the attorney will be providing pro bono service?

8. The attorney should determine whether there is a mechanism for him or her to seek assistance or be removed from a case if the attorney feels that they do not have the legal knowledge or resources to adequately represent their client.

9. The attorney should make sure that he or she is prepared to take on the client's case. The attorney must remember that the Rules of Professional Conduct will apply as the attorney represents the pro bono client. Therefore, the attorney needs to make sure that prior to accepting an appointment, he or she is prepared to provide quality representation as required by the rules.

There are numerous resources available to assist attorneys in meeting their pro bono obligations under RPC 6.1. The American Bar Association has a web page devoted to the provision of pro bono services by government attorneys. The URL is: www.abanet.org/legalservices/probono/government_attorneys.html. The King County Bar Association web site also has resources that list agencies that need the assistance of attorneys. The King County Bar Association Pro Bono URL is: www.kcba.org/volunteer/volunteer.aspx.

CHAPTER 6: CLIENT IGNORES ADVICE/PROPOSES IMPROPER ACTION

I. OBLIGATION TO ADVISE WHEN ACTION IMPROPER

When advising a client, an attorney has an ethical obligation to advise the client when a proposed action is improper.

A. Attorney's Duty to Advise if Action Improper

When a client seeks advice about a proposed action, the attorney must advise the client if the action is improper.

1. Exercise Independent Professional Judgment. RPC 2.1 requires lawyers to "exercise independent professional judgment and render candid advice." For example, if a client proposes an executive session to discuss an item which is not permitted under the statute, the attorney should advise the client that an executive session would be illegal. A lawyer must evaluate an action's propriety and possible consequences.

2. Render Candid Advice. The advice to the client should include not only the conclusion that the action is proper or improper, but also the consequences for the client. A lawyer may rely on other considerations such as " . . . moral, economic, social and political factors, that may be relevant to the client's situation." RPC 2.1. Moral and ethical considerations may be decisive in determining how the law will be applied. "Advice couched in narrow legal terms may be of little value to a client." RPC 2.1, Comment 2. In representing public agencies and elected officials, those surrounding factors may be very important in advising a client. In a decision regarding an open meeting issue, for example, the client should be advised of the legal and political consequences of violating the Open Public Meetings Act. *See* RCW Chapter 42.30.

B. Client Determines Course of Conduct

The attorney advises the client, but it is the client who decides the course of conduct.

1. Prohibited Advice or Assistance. The scope of an attorney's representation is limited by ethical considerations. The attorney may not advise clients to engage in activity that the attorney knows is criminal or fraudulent. RPC 1.2. "Fraudulent" refers to conduct having a purpose to deceive and which is

fraudulent under the substantive and procedural laws of the jurisdiction but it is not necessary that anyone has relied upon or suffered damages from the misrepresentation or failure to inform. RPC 1.0(d). If the client has already pursued illegal conduct, the attorney may not advise or assist the client in furthering the crime or fraud. For example, in a real estate transaction, the attorney may not alter a legal description to defraud a party of security for a loan.

2. Permitted Advice. A lawyer may discuss the legal consequences of a proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law. RPC 1.2(d). An attorney must consult with the client regarding the limitations on the lawyer's conduct when the lawyer knows the client expects assistance not permitted by the Rules of Professional conduct or other law or if the lawyer intends to act contrary to the client's instructions. RPC 1.2 Comment 13 and RPC 1.4(a)(5).

3. Intent to Commit Crime not Confidential Information. Information that a client intends to commit a crime is not confidential, and an attorney may disclose information necessary to prevent a crime. RPC 1.6(b)(2).

C. Client Ignores Advice

Generally, clients are not aware that their proposed solution is improper and when so advised will follow your advice. An effective lawyer will not only advise the client that the proposal is improper, but will also advise the client how to reach the same result through alternative legal means. Alternatives include revising policy, seeking statutory change or seeking an opinion of a regulatory agency for guidance. Certainly, there will be times when a client ignores the attorney's advice. In that case, it raises questions as to what the attorney's ethical duties are. As stated above, an attorney cannot further a criminal or fraudulent scheme.

Clients may ignore advice when choosing between alternative actions when you have recommended one of several alternatives. The proposed action may not be improper, but may not have been recommended because there were more legal challenges. The client may ignore the attorney's recommendation and proceed with the client's preference. For example, client has sought advice on handling an appeal to an administrative decision. The attorney may recommend alternative basis for denying the appeal. The client may deny on another basis, and the attorney can still defend on that ground.

II. DUTY REGARDING ASSERTION OF CLAIMS AND DEFENSES

The Rules of Professional Conduct and the Civil Rules define an attorney's duty regarding asserting claims and defenses. If a client has proceeded contrary to an attorney's advice, the attorney may still represent the client with certain ethical limitations.

A. Assertion of Frivolous Position Prohibited

RPC 3.1 provides that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."

1. Inform Client. In representing a client, a lawyer must inform the client that he or she cannot advance a frivolous claim or defense.

2. Definition of "Frivolous." The motivation of the client may determine whether an action is frivolous. Comment 2 to RPC 3.1 observed that an action is frivolous if brought primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable to make a good faith argument for an extension, modification or reversal of existing law. For example, maintaining a suit against another lawyer to try to force him to convince his client from maintaining an action which the client had the right to bring is maintained only for purposes of harassment, coercion and malice and is improper. *See In re Eddleman*, 63 Wn.2d 775, 289 P.2d 296 (1964). An attorney may have advised his or her client that under the current case law, the client had to provide records in response to a public records request. If the client refused to disclose the records, the attorney may still defend if he or she has a good faith argument for nondisclosure and the client was not refusing to disclose just to be malicious or harassing.

3. Duty to Investigate Facts. Civil Rule 11 imposes a duty upon the attorney to properly investigate the law and facts alleged in a pleading. This rule requires that an attorney sign each pleading, and such signature is certification that, to the best of the attorney's knowledge and belief, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose. The purpose of the rule is to deter baseless filings and filings made for an improper purpose. *Biggs v. Vail,* 124 Wn.2d 193, 197, 876 P. 2d 448 (1994)

4. Civil Rule 11 Sanctions. In determining whether to impose sanctions, the court must first find that the complaint lacks a factual or legal basis before considering sanction. If the court makes that finding, the court then must determine whether the attorney failed to conduct a reasonable inquiry into the factual and legal basis of the claim. *Bryant v. Joseph Tree, Inc.,* 119 Wn.2d 210, 829 P.2d 1099 (1992). Attorneys need to make reasonable investigations before filing pleadings containing factual and legal allegations. Attorneys who are involved prior to litigation should be aware of the factual and legal basis of a claim. The standard for whether the pre-filing inquiry satisfies the requirements of CR 11 is measured against an objective standard, what was reasonable at the time the pleading was filed. *Id.* Rule 11 motions have themselves been subject to abuse to attempt to chill the actions of attorneys. Sanctions are merited for attempting to misuse affidavits of prejudice to delay a proceeding. *Suarez v. Newquist*, 70 Wn. App. 827, 855 P.2d 1200 (1993).

5. Discovery Process. The most extensive definition of frivolous claims or defenses governs the discovery process. In matters involving discovery, the requirements of Civil Rule 26 will apply.

a. Civil Rule 26 Certification. CR 26(g) requires the following certification by the attorney on all discovery:

> He has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

b. Objective Standard Used to Determine Violation; Sanctions. If certification is in violation of this rule, the court is required to impose an appropriate sanction. *Washington State Physicians Insurance Exchange v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993). In *Fisons*, the Washington Supreme Court held that whether a reasonable inquiry has been made by the attorney is judged by an objective standard. Good faith alone will not shield an attorney from sanctions. *Fisons*, 122 Wn.2d

at 343. The court considers the surrounding circumstances, the importance of the evidence to its proponent, and the ability of the opposing party to formulate a response or to comply with the request in determining whether an attorney has complied with the request. *Id*. In the *Fisons* case, two "smoking gun" memos had not been produced during discovery and the importance of the evidence was apparent from the documents' contents.

The limitations discussed above involve whether an attorney may advance claims and defenses. Clients may also propose that an attorney improperly represent them, but attorneys should advise them of ethical limitations.

B. Duty to Expedite Litigation

RPC 3.2 provides that "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client." The comment to the Rule states that the test is whether "a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay." As with the other rules in this area, compliance does not require ignoring the interests of the client, but is directed at tactics which serve no other purpose than delay. There will certainly be times when a client, such as a public official, is interested in resolution of a dispute within a certain time frame. For example, if an election is looming, the official may want to resolve the issue either before or after the election. A lawyer violates the ethical standards if he or she files an appeal solely for the purpose of delaying a trial. However, if there is a legitimate basis for appeal and the delay is not the purpose, there is no ethical violation even if the decision is delayed.

C. Duty to Be Candid With the Court Regarding the Facts and the Law

RPC 3.3 defines the duty of candor toward a tribunal. The interplay between the duty to maintain confidences and secrets and the duty to be candid with the court can be complex. If an attorney is concerned about the falsity of a client's testimony, he or she should act promptly to address the problem.

1. Disclosure of False Statements. A lawyer must not knowingly make a false statement of material fact or law to a tribunal. RPC 3.3(1). The lawyer is required to make reasonably diligent inquiries to ascertain the truthfulness of assertions made in affidavits or in open court. Failure to disclose a material fact is equivalent to an affirmative misrepresentation. *In re Witt*, 96 Wn.2d 56, 633 P.2d 880 (1981). If an attorney has an ongoing relationship with an agency or public

official, this duty should be easier to fulfill. The trust between an attorney and client contributes to the ability to obtain accurate information. Sometimes crucial information is not discovered because of lack of candor or miscommunication between an attorney and a client. Not only can it raise ethical issues, it can also damage the agency's claim or defense. For example, most agencies have policies and procedures, but agencies may also deviate from those policies. Before presenting a claim or defense based on a policy, an attorney should make sure he or she understands how the policy is interpreted and implemented.

2. Disclosure of Legal Problem. A lawyer must disclose an apparent legal problem to the court even though he or she has concluded that the law is unenforceable. An attorney who failed to disclose prior divorce proceedings to a court misled the judge in violation of his ethical duty. *In re Coons*, 41 Wn.2d 599, 250 P.2d 976 (1952).

3. Disclosure of Legal Authority. A lawyer has a duty to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel. RPC 3.3(a)(3). Counsel may argue that a case is not controlling or does not apply to the facts of the pending case, but cannot conceal the case from the court because it may prevent the court from making an informed decision. A monetary penalty was imposed on an attorney for misrepresenting stipulated facts and for citing a dissent of a case as if it was the holding of the case. *Sobol v. Capital Management Consultants, Inc.,* 102 Nev. 444, 726 P.2d 335 (1986).

4. Introduction of False Evidence. A lawyer may not ethically offer evidence that the lawyer knows to be false, and a lawyer may refuse to offer evidence that the lawyer reasonably believes is false. RPC 3.3(e). However, a lawyer's duty regarding false evidence which has been presented may be modified by his or her duty to maintain client confidences and secrets. If the lawyer has offered material evidence and comes to know of its falsity, the lawyer must disclose this fact to the tribunal unless such disclosure requires a lawyer to disclose a client confidence or secret in violation of RPC 1.6. RPC 3.3(c).

5. Refusal of Client to Disclosure. When a lawyer learns that false evidence has been admitted, a lawyer should first consult with the client to seek consent to disclosure. If the client refuses to consent to disclosure, the lawyer should seek to withdraw from the representation in accordance with RPC 1.15. Continued representation could violate RPC 3.3(a)(2) because it would be perpetuating a fraud. *See* WSBA Informal Opinion 1209. Termination of representation is

permitted for that reason, but the lawyer must take steps to the extent reasonably practicable to protect a client's interests. The practical problem may be how to state the basis for withdrawal without disclosing client secrets or confidences. A lawyer must disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, and the lawyer believes it reasonably necessary to prevent the commission of a crime unless such disclosure is prohibited by Rule 1.6. RPC 3.3(a)(2). WSBA Formal Opinion No. 188 illustrates the fine distinctions drawn in this situation. The opinion discusses the obligation of defense counsel to disclose information regarding a defendant's criminal history known solely through independent investigation or through disclosure by the client. Although counsel may not make an affirmative misrepresentation to either the court or opposing counsel, without consent, the lawyer can not reveal such information. The opinion advises the lawyer to decline to answer any questions regarding the defendant's criminal history if the client does not consent to disclosure.

6. Duty to Correct Mistake. An attorney has an ethical duty to correct a mistake when he becomes aware that the Court has acted based on a misrepresentation. *In re Caffrey*, 63 Wn.2d 1, 385 P.2d 383 (1963). A lawyer violated his ethical duty by advising a client to lie in a court proceeding. *In re Ballou*, 48 Wn.2d 539, 295 P.2d 316 (1956).

7. Duty in Ex Parte Proceeding. In an *ex parte* proceeding, a lawyer has the duty to inform the court of material facts known to the lawyer which the lawyer reasonably believes are necessary to permit the court to make an informed decision, whether or not the facts are adverse. RPC 3.3(f), Comment 14.

D. Duty of Fairness

The basis for RPC 3.4 is that justice is served when truthful disclosure of the facts is made in an efficient manner. A lawyer cannot unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist any other person to carry out such an act. RPC 3.4(a). An attorney's attempts to protect documents from discovery must be made through the legal process such as a motion for a protective order on the basis that the document is privileged.

1. Falsification of Evidence, Witness Inducement. A lawyer must not falsify evidence, counsel or assist a witness to testify falsely or offer an inducement to a

witness which is prohibited by law. RPC 3.4(b). A witness's compensation cannot be dependent upon the outcome of the litigation or the testimony.

2. Obeying Court Rules. A lawyer must not knowingly disobey an obligation under the rules of court except for open refusal based on an assertion that no valid obligation exists. RPC 3.4(c). The decision of whether the rules must be followed is that of the court, not the attorney. It is unfair if an attorney does not abide by the rules, unless he or she does so openly. Violation of the rules of court and court orders may be the basis for discipline. *In re Vetter*, 104 Wn.2d 779, 711 P.2d 284 (1985).

3. Duty to Be Fair. In trial, a lawyer must continue to be fair to opposing counsel and the court. The lawyer may not allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence. RPC 3.4(e). Referring to evidence which the court has ruled *in limine* as inadmissible does not meet the standard of RPC 3.4. *State v. Wood*, 44 Wn. App. 139, 721 P.2d 541 (1986). A lawyer may not assert personal knowledge of facts in issue except when testifying as a witness or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused, but may argue based on the analysis of the evidence for that position or conclusion. RPC 3.4(f). (3.4(f) is not part of the Washington RPC.)

E. Obligation to Respect the Impartiality and Decorum of the Tribunal

A lawyer may not seek to influence any trier of fact, such as a juror, potential juror, or judge, or other official by illegal means. RPC 3.5(a). The lawyer may not communicate *ex parte* with any such person except as permitted by law and may not engage in conduct intended to disrupt a tribunal. RPC 3.5(b), (c).

F. Obligations Regarding Trial Publicity

The area of trial publicity is specifically governed by RPC 3.6. Trial publicity, which is designed to influence the jury or to detract from the impartiality of the proceedings, is specifically prohibited. "A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter." RPC 3.6.

G. Summary

A lawyer's duty to represent his or her client does not override his or her ethical obligations toward opposing counsel or the court. The Preamble to the Rules of Professional Conduct notes that "[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living." RPC Preamble, Paragraph 9. Lawyers are expected to practice law with a spirit of cooperation and forthrightness. It is assumed that lawyers are abiding by the court rules. The power to decide how a rule shall be followed or applied resides in the court, not with an individual attorney. A lawyer's ethical obligations arise from admission into the Bar and license to practice in the legal profession. In return for that privilege, lawyers are obligated to comply with the rules and to act consistently with them for the proper functioning of that system.

III. PUBLIC ATTORNEY SHOPPING

When a client is unhappy with an attorney's advice, he or she may choose to ignore that advice or may shop for another opinion from another attorney in the same office. Lawyers who practice in an office with more than one attorney may have experienced their client "shopping" for another opinion. It can be uncomfortable to be in that situation. Although an attorney can't prevent a client from "shopping," certain practices can reduce its occurrence.

Practice Tips: First, an attorney-client relationship built upon trust and open communication is the best defense against opinion shopping. If the client values and trusts an attorney's judgment, they are less likely to try to circumvent the attorney's advice. Also, if there is good communication, the attorney can discuss his or her advice with the client and any reasons why the client may be unhappy with it. Maintaining the proper role, as advisor and representative is critical. The client still makes the decisions.

Some suggested practices would include the following: Maintain good working relationships with other government lawyers in your office. Discuss opinions and analysis with them. If several attorneys deal with the same client, consult each other on opinions. Be sure that attorney-client assignments are clear, as well as any backup assignments. If approached by a client regarding an issue that someone else usually handles, inquire why they are asking you. There will be issues upon which there is a difference of opinion. If so, discuss it with the other attorney first before telling the client the other opinion is wrong. There will always be issues upon which attorneys disagree, but clients manipulating the facts or omitting information in order to get the opinion they want should be avoided.

Avoid "off the cuff" opinions by making sure that you have sufficient facts to offer an informed opinion. If you are not familiar with the legal issue, let the client know you would defer to someone else with more expertise. Voice mail and e-mail encourage instant opinions, but if you do not have all the facts or have not thoroughly researched the law, you would not be giving good advice to the client.

Qualify your opinion. If you are at all concerned, restate the facts upon which you are basing your opinion. If you were asked to review and give someone a cursory opinion, state that as well. Once you have delivered an opinion, it is out of your hands and you are not in control of its distribution. If the opinion is limited in scope, make sure that it is apparent from reading the opinion.

Let the other attorney know about the request and what advice you gave. If you think that the client is shopping for an opinion, refer him or her back to the other attorney. If you do not know why you are being asked for an opinion, such as the unavailability of the attorney who usually advises the client, then you may want to make sure that this is not an instance of opinion shopping.

Check previous internal advice on the same subject.

In important matters, gather all the attorneys in the office to reach a consistent position in regards to that particular client or issue.

Do not answer hypotheticals proposed by the client. The best response is to request specific facts and circumstances before forming your opinion.

Consider carefully how you deliver an opinion. An opinion given in writing may be treated with more consideration but may be more difficult to modify. Any communication sent electronically is also subject to further distribution. If an opinion is only given verbally, it may be misunderstood or repeated inaccurately. Additionally, the State Archives Local Government Common Records Retention Schedule (Jan. 2010) lists City Attorney (formal) Opinions as *permanent records* of the city. *See* http://www.sos.wa.gov/_assets/archives/CORE2.0.pdf

Caveat: A local official may try to seek an attorney general opinion. If the client threatens to seek such opinion, you may wish to check attorney general opinions for similar circumstances. You may also wish to establish informal communications with the Attorney General's office.

CHAPTER 7: ETHICAL CONSIDERATIONS FOR THE PUBLIC ATTORNEY IN THE CONTEXT OF WHISTLEBLOWER STATUTES

I. INTRODUCTION – THE PROBLEM OF MULTIPLE CLIENTS AND MULTIPLE ROLES

State of Washington whistleblower statutes potentially involve the public attorney at several stages in the process:

(1) When the whistleblower first makes a complaint.

(2) When a public employee discloses suspected wrongdoing to the attorney.

(3) Referral of a whistleblower complaint to the appropriate party.

(4) Investigation of the complaint (including information gathering from the complainant, the subject(s) of the investigation, and his/her/their superior(s)).

(5) Report of the results of an investigation.

(6) Legal advice to the person charged with acting on the report.

(7) Being a witness in any subsequent legal action (retaliatory lawsuit, public interest lawsuit, State audit, claim for damages).

(8) Defending such a legal action.

At least six potential "clients" can be identified:

(1) The whistleblower.

(2) The person complained against, or who divulges a wrongdoing.

(3) This person's superior, if the superior had knowledge, should have known, or failed to exercise some responsibility.

(4) The responsible department head and/or chief administrative officer of the government entity.

(5) The government entity itself.

(6) The "civis;" the "public interest."

Into this thicket wades the intrepid government attorney.

Under both RCW 42.40 and Chapter 42.41 RCW, it appears that the attorney's first duty is to the whistleblower process itself: exposing the evil and protecting the whistleblower from retaliation. But, the public attorney's usual primary client is either the public interest or the entity for which he or she works. Even the "public interest" beast in this context can have *three* heads: the overall wellbeing of the common wealth, the whistleblower process itself, and the public interest in disclosure of governmental business.

At the State level, the several divisions through which the Attorney General's office operates succeed in isolating the various clients' interests. In larger municipal offices, the same

result is achieved by usual screening processes. However, in very small or one person offices, solving the multiple representation problem is more complicated. Even if outside counsel is involved, the very smallness of the municipality, the familiarity of employees with one another, and the lack of available resources make dealing with a whistleblower complaint truly problematic.

II. WASHINGTON WHISTLEBLOWER STATUTES

A. General Provisions

The two whistleblower statutes are much the same. Each defines improper government action which is the subject of whistleblower complaints as being action by a government employee or official which violates the law, is an abuse of authority, endangers public health or safety, or is a gross waste of public funds. Personnel actions are excluded since there is a well-recognized process for this type of dispute.

Both RCW 42.40 and 42.41 proscribe the use of official authority or influence to retaliate against a whistleblower. The statute applicable to State government sets out the actual procedure for handling whistleblower complaints. The statute applicable to local governments simply mandates the development of a procedure, with certain guidelines.

B. State Agency Procedures

The procedures which must be followed by **state agencies** are as follows:

1. Specific information regarding improper government action is provided to the State Auditor. Or, the Auditor's office may initiate its own investigation.

2. The Auditor must acknowledge receipt of the complaint within five days. The identity of the whistleblower is confidential throughout the process.

3. A preliminary investigation is accomplished within thirty days.

4. If the investigation determines the complaint to be "insubstantial," notification to that effect is provided to the whistleblower.

5. If there is found to be no "improper governmental action" or "less than a gross waste of public funds," the Auditor can still ask the affected agency to investigate and respond within thirty days. Results of this are sent to the whistleblower.

6. If the complaint appears well-founded, a detailed investigation is conducted over the next sixty days. The Auditor has the usual array of subpoena and other discovery tools.

7. If the allegations are borne out, the Auditor reports the same to the whistleblower, to the head of the whistleblower's agency, and to the Attorney General. Generally, the Auditor's office itself has no enforcement powers.

C. Local Government Procedures

For *local governments*, the governing body or the chief administrative officer develops a policy, posts it in a conspicuous place, and distributes it to all employees. The policy sets out to whom reports are to be submitted, both within and without the local government, including the prosecuting attorney. The policy may require submission of a written report first. Employees who do not follow the policy cannot avail themselves of the protection against retaliation. Identity of the whistleblower shall be kept confidential "to the extent possible under law." Cite?

III. RULES OF PROFESSIONAL CONDUCT

The following Rules of Professional Conduct (RPC), among others, are implicated in the whistleblower process:

A. RPC 1.6 – Confidentiality

An attorney must keep the confidences of a "client."

B. RPC 1.7 – Conflict of Interest; General Rule

An attorney cannot represent a client who is directly adverse to another client, without proper consent.

C. RPC 1.9 – Conflict of Interest; Former Client

An attorney cannot represent interests adverse to a former client or divulge that client's confidences.

D. RPC 2.1 – Advisor

An attorney shall exercise independent professional judgment on behalf of a client.

E. RPC 3.7 – Lawyer as Witness

An attorney cannot act as an advocate in a trial where he or she may be a material witness.

F. RPC 4.3 – Dealing with Unrepresented Persons

An attorney cannot state or imply that he or she is disinterested and must be sure the client understands this.

IV. WHO IS THE CLIENT?

A. General Considerations

The earlier and somewhat metaphysical concept was that the client is the "public interest" -- the "people as a whole." However, this turns out to be not very workable if for no other reason than it frequently leaves to the individual attorney the decision of what the public interest is, which is not an attorney's traditional role.

Later, there developed the prevailing concept, that of the client being the "agency" or "entity." Among others, the Federal Bar Association Professional Ethics Committee and the District of Columbia Bar Special Committee of Government Lawyers endorse this approach. While not answering every ethical dilemma, the approach recognizes the real-world facts that the agency hires, pays, and fires the lawyer. Also, every public agency has its own agenda and litigation strategy, as do its other sibling Federal and state agencies.

But the strict "entity" rule presents its own problems. What happens in everyday life, and what at least potentially addresses every ethical dilemma, is an almost intuitive blend of both concepts: Within the bounds of the entity where he or she is employed, an attorney applies his or her own conscience about what the public interest is and what is "legal" and what is not.

As to client confidences regarding possible wrongdoing by an organization or one of its employees, the standard set by ABA Model Rule 1.13 is as follows:

> In determining how to proceed, the lawyer [representing an organization] shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of

the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation persons outside the organization.

ABA Model Rule 1.13 Comment 7 speaks to attorneys for government organizations, saying that "a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved." It is a " . . . more difficult task," says the Comment, allowing "more extensive" questioning of the conduct.

See also supra Chapter 1 for further discussion on client identification.

B. What of the Whistleblower Arena?

Whistleblower legislation has the effect of nudging the attorney back toward the public interest end of the spectrum. In a sense, the client can be said to be the process itself.

1. State Agencies.

As to State agencies, the client identity issue does not present as much of a problem because each department has its own legal staff, including the deputy attorneys general assigned to the Auditor's Office specifically for whistleblower enforcement. A problem of perception may exist, however, since from the complainant's point of view at least, there appears to be a conflict of interest in having the same Attorney General's office involved on more than one side of the case.

In the Auditor's office, upon receipt of a complaint the deputy charged with management of the whistleblower process and her attorney plan strategy, including erecting necessary screens. This practice of isolating attorneys in the same office from one another where a conflict exists has been sanctioned by the courts in Washington. *Amoss v. University of Washington*, 40 Wn. App. 666, 700 P.2d 350 (1985). The process then follows the outline described in Section 2 below.

2. Local Governments.

At the local level, particularly in a small office, the problem is much more perplexing. The first "client" the attorney sees may be the whistleblower, his or her supervisor, a department head, the mayor, or a city council member. At the earliest opportunity, this person must be advised about the nature of the process, the role of the city attorney, and the various parts others will play. The advice must be designed to head off misconceptions which may be in the individual's mind, such as who his or her legal representative is and how confidential the discussion will be.

The specific advice will vary depending on the details of the policy the local government has adopted. At this critical juncture, it must be decided who will conduct the investigation. Having the city attorney do this may disqualify him or her from representing anyone else in the process.

V. THE INVESTIGATION AND REPORT

A. The Substance of the Statute: Improper Governmental Action

At the local level, once screens are erected and/or separate counsel arranged for if needed, the investigator is required to make decisions, chief among them being whether the action complained of constitutes a "substantial and specific" danger to the public health and safety or a "gross" waste of public funds.

In the case of a clear violation of the law, the prosecuting attorney will make this determination. In clear cases of harassment, discrimination, or violation of explicit policy, the answers may not be difficult. But, there are cases in which a violation is more ambiguous.

For example, an employee (which could be an attorney-employee) in good faith believes that a proposed affirmative action policy will violate the law. Or, a public works employee believes in good faith that non-placement of a traffic signal will result in a dangerous condition. Or, a public attorney or council member has a good faith belief that agreeing to settle a lawsuit will needlessly spend taxpayer's money.

The statute defines improper governmental action broadly enough to include all of these examples. At one end of the spectrum there can be clearly improper course of action, and blowing the whistle is called for. At the other end of the spectrum a governmental entity is simply weighing policy pros and cons, but the would-be whistleblower believes superiors are exercising bad judgment.

In the middle of this spectrum, where plausible legal arguments can be made on behalf of the agency's actions, courts will ultimately decide whether the whistleblower process -- or more likely, the rights of the retaliated-against whistleblower -- outweighs the right, and probably the duty, of the governmental body to make debatable policy decisions. And since any action adverse to a whistleblowing employee will be perceived as retaliation, the facts must be diligently marshaled and the options carefully weighed.

Care must be taken by the public attorney, as either investigator or legal advisor to the investigator, that the investigation itself be neutral and impartial and that the extent of "wrongdoing" is objectively assessed. If that attorney is usually the primary legal advisor to the mayor of chief administrative officer and/or the affected department, his or her independent professional judgment will be sorely taxed.

If that attorney is usually the primary legal advisor to the mayor or chief administrative officer or the affected department, the attorney must be careful to avoid an actual or perceived conflict. It may appear that the attorney cannot give impartial legal advice (or conduct an impartial investigation) regarding an accusation of wrongdoing by a government official if the same attorney would also be responsible for defending the actions of that government official. If your legal department is large enough, you may want to consider building a "firewall" between the attorney advising or conducting the investigation and the attorney advising the accused government official.

B. Completeness of the Investigation

How far, fast, and diligently to pursue a complaint will always be a difficult judgment to make. Both this and what remedial actions to take also have monetary components, not just budgetary but also in terms of potential litigation.

The State statute prescribes 30 and 60 day timeframes depending on the circumstances. The test for a local government's timeliness and depth of investigation would likely be the usual "abuse of discretion" and/or "arbitrary and capricious" standards.

C. Confidentiality and the Public Disclosure Law

Under the State whistleblower statute, the identity of the complainant is protected. In addition, the State Auditor considers anyone providing information during the investigation to be a "whistleblower" also. At the local government level, the extent of confidentiality is less clear – "to the extent possible under law."

The Public Disclosure Act embodies Washington's strong policy in favor of open government and public disclosure of documents. The Attorney General has ruled that not only the final report of a whistleblower investigation but also the working papers are public documents. In an attempt to reconcile this, the Auditor's Office undertakes an extensive redaction process, with advice from its deputy attorney general, before the final report is released.

In the smaller, local government environment, nowhere is the public attorney's conflicting interests better exemplified than in making the determination between the public interest in exposing governmental wrongs via the public disclosure act (and the monetary penalties for wrongdoing) on the one hand, and the public interest in exposing governmental wrongs via the whistleblower process (and the monetary sanctions for wrongdoing) on the other. Stated another way: Does representing the governmental entity mean one must protect disclosure of a whistleblower's identity based on RCW 42.41, and at the same time allow disclosure based on RCW 42.17? Thus is presented the unique situation of a lawyer having to represent the same interest of the same client, whether defined as the "entity" or the "public interest," and coming to diametrically opposite results!

Regardless, the whistleblower's identity will be protected initially. However, a well-drafted public disclosure request and threatened lawsuit raises the specter of frequently unpredictable decisions by courts as to the extent of redaction allowed, to whom privacy rights are extended, and similar issues. Both RPC 1.7, the general conflict of interest rule, and RPC 2.1, independent professional judgment, can be implicated here.

D. Special Confidentiality Considerations for Federal Government Employees

While not involving a whistleblower's allegation (per se), a balancing act was performed by the Federal court in addressing First Lady Hillary Rodham Clinton's right to keep her White House attorney's notes of conversations regarding Vincent Foster's death out of the hands of the Office of Independent Counsel. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910 (8th Cir. 1997). Although recognizing the broad protection of confidentiality in the *private* corporation context (*Upjohn Co. v. United States*, 449 U.S. 383 (1981)), the court held this to not apply so readily when the *government* is involved. Instead, the district court upheld "the general principle that the government's need for confidentiality may be subordinated to the needs of the government's own criminal justice processes." *Duces* Tecum, 112 F.3d at 919. The court pointed out that Federal government lawyers are under a statutory duty to report criminal wrongdoing. *See* 28 U.S.C. § 535(b). The court said that a government official who fears he or she

may have violated the law should talk to a private, not a government, attorney. 112 F.3d at 921. *See supra* Chapter 2, Section III.B.2 for further discussion. Certainly, Washington's whistleblower statutes are analogous to a government's "own criminal justice processes."

VI. THE ATTORNEY AS WHISTLEBLOWER

A. Two Scenarios

In one instance, the government attorney reaches a conclusion based on his or her observations that some wrongdoing has occurred. In the second, more common instance, an employee reveals to his or her government attorney previous or contemplated activity which violates law or policy.

B. The Attorney Alone

Stated one way, is an attorney protected from retaliation if he or she provides information in good faith that wrongdoing has occurred, which information was obtained in confidence as the agency's attorney? Examples might include a department's decision to not take a protective health or safety action, a mayor's decision to undertake litigation which would arguably result in a gross waste of public funds, or the personnel department's decision not to discipline a subordinate employee who may have acted illegally; a "cover up" according to the lawyer who disagrees.

Which controls: the duty to keep confidences, the duty to exercise independent judgment, or the whistleblower's duty to expose wrongdoing?

In *Crandon v. State*, Crandon, general counsel of the State Banking Commission, was fired for blowing the whistle to the FDIC about a Commission officer's allegedly improper loan. *Crandon v. State*, 257 Kan. 727, 897 P.2d 92 (1995). She filed a lawsuit arguing that she had been retaliated against. The Kansas Supreme Court held that she had not been terminated in retaliation for whistleblowing, holding that she (a) was hired to represent the Commission, not prosecute it (the "entity" rule), (b) acted with reckless disregard of the truth or falsity of her claim (she had only second-hand knowledge), and (c) had not gone through channels, i.e., through her supervisor, who was also the immediate supervisor of the official complained of and to whom she owed a duty to keep advised. *Id.* The court also said that the duty to advise her supervisor was at " . . . the core of an attorney-client relationship". *Crandon*, 257 897 P.2d at 101. Had she done so, she would have found out that the superior had already looked into the facts and found the loan to be proper.

Certainly, the unfortunate (for Crandon) fact pattern helped the court decide to whom she owed her primary loyalty. As the discussion in Section C, immediately below, indicates, if the facts demonstrate clear wrongdoing a different result would be expected.

C. The Public Employee, Innocently or Not, Reveals a Past or Contemplated Misdeed

This issue can occur whether the employee is casually chatting with the attorney or is actively seeking legal advice. RPC 1.6 does not require client confidences to be kept if necessary to prevent commission of a crime, but what if the questionable act has already taken place, or if the act is not technically a crime?

The District of Columbia Bar has advised that when, in the course of representing an agency, a government lawyer while providing legal advice learns from an employee that he or she has committed or is about to commit an impropriety, the lawyer owes a fiduciary duty to the agency which is the client, not the individual employee. And, the lawyer must disclose that information and may also testify as to it later. *ABA/BNA Lawyers' Manual on Professional Conduct*, Vol. 1, No. 32, 705-7, *reporting* D.C. Bar Committee on Legal Ethics Opinion No. 148, January 22, 1985. Also cited are (former) Ethical Consideration 5-18 and ABA Model Rule 1.13.

In Washington, in the private corporation context, the courts have held that the attorney-client privilege belongs to the corporation, not to individual officers and directors. *Odmark v. Westside Bancorp., Inc.*, 636 F.Supp. 552 (W.D. Wash. 1986).

Likewise, for purposes of RPC 1.9 and disqualification of an attorney due to prior representation of a client, it has been held that a public attorney in Washington represents government employees only in their official, not personal, capacities. *State v. Greco*, 57 Wn. App. 196, 787 P.2d 940 (1990).

The sum total of these considerations, coupled with the *In re Grand Jury Subpoena Duces Tecum* case's insistence on deference to the government's own investigative processes of which whistleblowing seems certainly to be one -- and assuming that there has been no opportunity to warn the client of the limited confidentiality -- is that the attorney not only cannot keep the wrongdoing private, but is under an affirmative duty to disclose it.

With this conclusion, particularly for the small governmental entity, comes the full array of ethical considerations mentioned at the outset of this section. *See* Section II.C.1-6, *supra*.

VII. RETALIATION

A. Protection From Retaliatory Discipline

From the perspective of the governmental entity, the litmus test in many cases involving whistleblowers is the ability to avoid or at least prevail in a lawsuit that alleges retaliation. Cases discussing retaliation against a whistleblower are, not surprisingly, fact-intensive. *See Dicomes v. State*, 113 Wn.2d 612, 782 P.2d 1002 (1989).

Ethical considerations in this setting have not yet been evaluated by the courts. As just one such issue, consider the lawyer's role protecting the governmental entity's interest in managing its work force through the disciplinary process and that lawyer's role advancing the public interest by investigating a whistleblower complaint. Can the attorney who shepherded the whistleblower investigation and advised the entity to take no action also provide legal advice to the personnel department justifying terminating the complaining employee? Is his or her judgment impaired by the earlier decision?

The safest guidance, once again and undoubtedly costly, would seem to be independent counsel. Absent this, the argument certainly should be made that this is no different from the multiple roles a public attorney daily plays, particularly in small communities, dispensing advice on a wide range of matters where the results of that advice have differing and sometimes opposing ramifications. *See* Section E.3*, supra*.

B. "Good Faith" of the Activity Complained of

Farnham blew the whistle on her employer's life-support termination policies and practices, and was herself, "terminated." *Farnham v. Crista Ministries*, 116 Wn.2d 659, 807 P.2d 830 (1991). The court found that her firing was for good cause and not retaliatory, in part, because the employer in good faith believed its policies were in accordance with applicable law. *Id.*

The court in *Farnham* is arguably less protective of overzealous challenges to *policies* with which an employee disagrees, as opposed to allegations of outright violations of law. *See* Section V.B, *supra*. The public benefit of the whistleblowing process may justify, at least morally, an employee erring on the side of making a complaint. But, when the investigation reveals little or no wrongdoing, and in fact shows the whistleblower to have been a problematic employee, the public lawyer -- who may

have advised a "Nurse Farnham" and/or participated in the investigation of her complaint -- must now consider the ramifications of defending an alleged wrongful termination. And in a medium or small city, the personalities and employment histories and all sorts of other extraneous (and maybe or maybe not irrelevant) considerations abound.

VIII. GENERAL PRACTICE POINTERS

(1) Identify the "client" and advise him or her accordingly at the first opportunity, including advice regarding client confidences and your duty to disclose.

(2) Erect a screen or otherwise assign conflicting legal representation, and inform affected parties to this effect.

(3) Review and make recommendation regarding the investigative report, keeping the *whistleblower process* itself in mind.

(4) Consider public disclosure issues arising from release of final report.

(5) Be prepared for the situation where you yourself may be the whistleblower.

CHAPTER 8: THE ETHICAL ISSUES FOR PROSECUTORS

I. PROSECUTOR'S ROLE

A. Prosecutorial Power

In *Wayte v. United States*, 470 U.S. 598, 607-608, 105 S. Ct. 1524, 84 L. Ed. 2d 547 (1985), the United States Supreme Court wrote:

> In our criminal justice system, the Government retains "broad discretion" as to whom to prosecute. "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

B. Dual Roles

The dual roles of a prosecutor are recognized by both the rules of professional conduct and case law. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." RPC 3.8, cmt. 1; *see also State v. Pettit*, 93 Wn.2d 288, 295, 609 P.2d 1364 (1980); *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935)).

This dual role requires prosecutors to "take the high road." "As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in

the interest only of justice." *State v. Warren,* 165 Wn.2d 17, 27, 195 P.3d 940 (2008), *cert. denied* 129 S.Ct. 2007 (2009). The Court in *Warren* went on to write:

> It is not our purpose to condemn the zeal manifested by the prosecuting attorney in this case. We know that such officers meet with many surprises and disappointments in the discharge of their official duties. They have to deal with all that is selfish and malicious, knavish and criminal, course and brutal in human life. But the safeguards which the wisdom of ages has thrown around persons accused of crime cannot be disregarded, and *such officers are reminded that a fearless, impartial discharge of public duty, accompanied by a spirit of fairness toward the accused, is the highest commendation they can hope for*. Their devotion to duty is not measured like the prowess of the savage, by the number of the victims.

State v. Warren, 165 Wn.2d at 27-28 (quoting *State v. Montgomery*, 56 Wash. 443, 105 P. 1035 (1909)). In *State v. Gibson*, 75 Wn.2d 174, 177, 449 P.2d 692 (1969), the Washington Supreme Court wrote that "[t]he closing paragraph in *State v. Montgomery* could well be on the desk of every prosecutor as a constant reminder of the high duties of his officer." A prosecutor has a duty to ensure that the accused is given a fair trial. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005); *see also State v. Charlton*, 90 Wn.2d 657, 665, 585 P.2d 142 (1978) .

II. PRETRIAL

A. Immunity

A functional analysis is used to decide whether a prosecutor is immune from civil liability. *Musso-Escude v. Edwards,* 101 Wn. App. 560, 573, 4 P.3d 151 (2000). When the prosecutor is functioning as an advocate, i.e., "initiating a prosecution and in presenting the state's case insofar as that conduct is intimately associated with the judicial phase of the criminal process," absolute immunity attaches. *Imbler v. Pachtman*, 424 U.S. 409, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976); *see also Creelman v. Svenning*, 67 Wn.2d 882, 884-85, 410 P.2d 606 (1966). However, immunity may not attach if a prosecutor is acting beyond his or her traditional advocacy role. *See Kalina v. Fletcher*, 522 U.S. 118, 129-31, 118 S. Ct. 502, 139 L. Ed. 2d 471 (1997) (prosecutor deemed to be acting as a witness when attesting to the truth of averments made in a probable cause certification). When a prosecutor gives legal advice to the police during the pre-filing investigatory stage which is neither a historical nor common law prosecutorial function, the prosecutor receives qualified, not absolute, immunity. *Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934, 114 L. Ed 2d 547 (1991); *see also Robinson v. City of Seattle*, 119 Wn.2d 34, 68, 830 P.2d 318 (1992). Other situations where the United States Supreme Court has held that the prosecutor had qualified, but not absolute immunity, included: (1)

fabrication of false evidence by shopping for a favorable expert witness before probable cause developed, and (2) making allegedly false statements during a press conference. *Buckley v. Fitzsimmons*, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993). *See generally infra* Section III for a discussion of immunity cases.

B. Charging Decision

1. Constitutional Limitations.

Prosecutors are vested with wide discretion in determining whether to file charges. *State v. Korum*, 157 Wn.2d 614, 625, 141 P.3d 13 (2006). Also, the prosecutor's exercise of discretion in charging some but not others with the same crime does not violate the equal protection clause of the federal constitution so long as it was not "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456, 81 S. Ct. 502, 7 L. Ed. 2d 446 (1962); *see also State v. Judge*, 100 Wn.2d 706, 712-13, 675 P.2d 219 (1984).

However, prosecutors are not allowed to utilize vindictiveness when making charging decisions. Vindictiveness occurs when a prosecution is designed to penalize a defendant for exercising his or her rights. *State v. Bonisisio,* 92 Wn. App. 783, 790-91, 964 P.2d 1222 (1998), *review denied* 137 Wn.2d 1024 (1999).

2. RPC's Minimal Filing Standard.

The prosecutor in a criminal case shall "[r]efrain from prosecuting a charge that the prosecutor knows is not supported by probable cause." RPC 3.8(a). This probable cause determination is a subjective determination which may be guided by a prosecutor's personal experience and training so long as the decision is rational. "The fact that one prosecutor decides to charge based on particular evidence hardly implies that another prosecutor would be acting improperly by seeking additional information.. Indeed, such an implication would violate the broad discretion that has been granted to prosecutor's charging decisions." *State v. Lidge*, 111 Wn.2d 845, 850, 765 P.2d 1292 (1989).

3. Washington's Statutory Recommended Prosecuting Standards for Charging and Plea Dispositions.

Washington is unique in having statutory standards for the prosecutor's filing and case disposition functions. RCW 9.94A.411-.460 enunciates recommended filing and disposition standards for prosecutors. Those statutes set a higher standard than the RPC's "probable cause" requirement described in subsection II(B)(2) above. For example, crimes against property are to be filed only if the admissible evidence is sufficient to make a conviction "probable." RCW 9.94A.411(2)(a). The statutory standards apply only to felonies. *City of Bremerton v. Bradshaw*, 121 Wn. App. 410, 413, 88 P.3d 438 (2004). In addition, they do not confer substantive rights enforceable by defendants. RCW 9.94A.401; *State v. Lee*, 69 Wn. App. 31, 847 P.2d 25 (1993). However, they do provide valuable guidance, because American Bar Association guidelines similarly recommend use of a higher standard than mere probable cause for continuation of a prosecution. *See* American Bar Association, *Standards for Criminal Justice, Prosecution Function*, Standard 3-3.9(a) (3d ed. 1993) [hereinafter "*ABA Standards for Criminal Justice*"].

C. Publicity

1. Trial Publicity Prejudicial to Defendant May Violate Due Process.

In the seminal case of *Sheppard v. Maxwell*, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), Dr. Sam Sheppard was accused of murdering his wife, Marilyn. The United States Supreme Court held that when trial publicity creates a probability of prejudice to the defendant, the defendant is denied due process of law if the trial judge does not take steps sufficient to ensure a fair trial for the defendant.

When a defendant shows that pretrial publicity has created a probability of unfairness or prejudice, a presumption arises that courts should reject claims by potential jurors that they can be impartial. Courts must examine the totality of the circumstances to determine whether such a presumption arises. The relevant question is not whether the community remembered the case, but whether the jurors at the trial had such fixed opinions that they could not judge impartially the guilt of the defendant.

State v. Whitaker, 133 Wn. App. 199, 135 P.3d 923 (2006), *review denied* 159 Wn.2d 1017 (2007), *cert. denied* 552 U.S. 948 (2007).

2. Protection Codified.

RPC 3.6 states that a lawyer "shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding . . . ." The Washington Supreme Court adopted an official comment to the rule in 2006 which enumerates the following among prejudicial, improper statements: (a) "character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;" (b) "the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;" (c) testing results or the refusal of a person to submit to an examination or test; (d) "any opinion as to the guilt or innocence of a defendant or suspect…;" and (e) information that the lawyer reasonably should know is likely to be inadmissible at trial or even "the fact that a defendant has been charged with a crime[,]" unless it is accompanied by a statement explaining that the defendant is presumed innocent until and unless proven guilty. RPC 3.6, cmt. (5).

In addition, RPC 3.8(f) provides that prosecutors shall refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused, except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose.

3. Responsibility for Others.

The prosecutor shall "exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or [Rule 3.8]." RPC 3.8 (f).

D. Plea Negotiations

A defendant does not have a constitutional right to plea bargain. *State v. Wheeler,* 95 Wn.2d 799, 804, 631 P.2d 376 (1981). "[I]n general, a prosecutor's decision to

engage in plea bargaining is discretionary." *State v. Moen*, 150 Wn.2d 221, 228, 76 P.3d 721 (2003).

1. Nature of Bargaining.

Once a prosecutor chooses to engage in plea bargaining, many of the rules carry over which apply to charging decisions. The Washington Supreme Court wrote in *Moen*, 150 Wn.2d at 227 (citations omitted):

> [P]rosecutors have broad discretion whether to charge a crime or enter into plea bargaining.... However that discretion is not "unfettered"; the State's discretionary authority may not be exercised in a manner that constitutes a violation of due process rights. For example, if the prosecutor enters a plea bargain, there is a good faith obligation not to undercut the terms of the plea agreement, either explicitly or by conduct designed to circumvent the agreement. Additionally, a prosecutor is precluded from engaging in selective enforcement to avoid the substantive goals of the Fourteenth Amendment to the United States Constitution. Thus, a prosecutor may not file charges based merely on vindictiveness, even if the charges are otherwise warranted, nor may a prosecutor threaten or file charges solely to gain advantage in a civil proceeding.

This does not mean, however, that a prosecutor cannot plea bargain aggressively. "Prosecutorial vindictiveness must be distinguished...from the rough and tumble of legitimate plea bargaining." *State v. Lee*, 69 Wn. App. 31, 35, 847 P.2d 25, *review denied*, 122 Wn.2d 1003 (1993).

Plea bargaining is a legitimate process, so long as it is carried out openly and above the table, between prosecutors and defendants who are represented by counsel and fully informed. That a prosecutor may offer "hardball" choices to a defendant does not make the process constitutionally unfair, so long as the choices are realistically based upon evidence and options known to both sides.

State v. Lee, 69 Wn. App. 31, 36, 847 P.2d 25, *review denied*, 122 Wn.2d 1003 (1993). In *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 (1978), the United States Supreme Court recognized:

> Plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial. Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to

prosecutorial persuasion, and unlikely to be driven to false self-condemnation. Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial.

A prosecutor may also make conditional offers, and, in most cases may revoke an offer previously made. "[A]bsent a guilty plea or some other detrimental reliance by the defendant, the prosecutor may revoke any plea proposal." *Wheeler*, 95 Wn.2d at 805. However, a prosecutor cannot engage in conduct tantamount to witness tampering in the name of plea bargaining. *In re Disciplinary Proceedings Against Bonet*, 144 Wn.2d 502, 29 P.3d 1242 (2001).

2. The Negotiated Contract.

The bargain is a contract that the prosecutor is bound to keep. In the key 1971 case, *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971), the prosecutor mistakenly made a recommendation for the maximum sentence although the prior prosecutor promised to make no recommendation. The United States Supreme Court remanded the case for a hearing to decide whether to re-sentence or allow a plea withdrawal. The Court held that this measure was necessary to preserve the integrity of the plea bargaining process and "(t)his is in no sense to question the fairness of the sentencing judge; the fault here rests on the prosecutor, not on the sentencing judge." *Id*. at 263. A prosecutor cannot undercut a plea agreement. *Moen*, 150 Wn.2d at 227.

3. Codified Requirements.

RCW 9.94A.421-.460 outline standards for plea agreements and the plea disposition process. While the statutory standards are applicable only in felony cases, the disposition process is similar to CrRLJ 4.2(e), which applies to misdemeanor cases, and prosecutors have a duty of candor to the court:

If a plea of guilty is based upon an agreement between the defendant and the prosecuting authority, such agreement must be made a part of the record at the time the plea is entered. No agreement shall be made which specifies what action the court shall take on or pursuant to the plea, or which attempts to control the exercise of the court's discretion, and the court shall so advise the defendant.

Task Force comments indicate that CrRLJ 4.2(e) is intended to fill gaps in District & Municipal Court procedure which are addressed by the SRA in Superior Court criminal proceedings.

In 1984, CrRLJ 4.2(e) was amended to accommodate specific provisions of the SRA. Prior to these amendments, the superior court rule required that a defendant pleading guilty be specifically advised that no plea agreement could be made which would specify what action the court would take or which attempted to control the exercise of the court's discretion. Because the sentencing reform act does not apply to proceedings in courts of limited jurisdiction, the task force decided to incorporate the prior provisions of CrRLJ 4.2(e) into this new set of criminal rules. Thus, the rule provides that a defendant pleading guilty must be specifically advised that no agreement can be entered into which specifies what action the court will take or which attempts to control the court's discretion.

See Karl B. Tegland, 4B *Wash. Prac., Rules Practice CrRLJ 4.2* (6th ed., 2006). Therefore, while the statutory standards are not directly binding in misdemeanor cases, they should be considered in conjunction with obligations imposed by CrRLJ 4.2(e).

E. Discovery

1. Exculpatory Evidence.

Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) involved a prosecution for murder where the defendant requested records of extrajudicial statements of the defendant's accomplice in which the accomplice admitted committing the murder. The Supreme Court held:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
>
> (This principle) is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of

> the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the court." A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals.

Brady, 373 U.S. at 87-88; *see also State v. Wright*, 78 Wn. App. 93, 895 P.2d 713, *rev. denied*, 127 Wn.2d 1024, 904 P.2d 1157 (1995). These obligations apply even if no express discovery request is made by a defendant. *Strickler v. Greene,* 527 U.S. 263, 280-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

2. *Brady* Codified.

a. Rules of Professional Conduct. The prosecutor in a criminal case shall make timely disclosure to the defense, of all evidence or information known to the prosecutor, that tends to negate the guilt of the accused or mitigates the offense and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal. RPC 3.8(d).

b. Discovery Rules. Except as otherwise provided as to protective orders, the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged. CrRLJ 4.7(a)(3).

The prosecuting attorney's obligation under this section is limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff. CrRLJ 4.7(a)(4).

The duty to disclose is ongoing. When additional information is found, the prosecutor is to "promptly" notify defense counsel, and, if the

case is in trial at the time, also notify the judge. CrRLJ 4.7(g)(2). *See infra* Section III(A).

3. Material Held by Others.

a. Discovery Rules. Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting attorney, the prosecuting attorney shall attempt to cause such material or information to be made available to the defendant. If the prosecuting attorney's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant. CrRLJ 4.7(d).

b. Duty to Learn of Favorable Evidence. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police. *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 1567, 131 L. Ed. 2d 490 (1995).

F. Contacts with Judge, Witnesses and Others

1. Communicating with Person Represented by Counsel.

RPC 4.2 provides: "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law so to do."

An official comment to the rule explains: "When communicating with an accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate…a constitutional right is insufficient to establish that the communication is permissible under this Rule." RPC 4.2, cmt. (5)..

2. Dealing with Unrepresented Person.

RPC 4.3 provides that a lawyer shall not state or imply that the lawyer is disinterested when dealing with a person who is not represented by counsel.

When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. RPC 4.3 additionally provides that a lawyer shall not give legal advice to the unrepresented person, other than advice to secure counsel, if the lawyer reasonably should know that the interests of the unrepresented person are in conflict with the interests represented by the lawyer.

In addition to the ordinary ethical obligations which apply to all lawyers when dealing with unrepresented persons, a prosecutor has a special obligation to "make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given a reasonable opportunity to obtain counsel." RPC 3.8(b). Similarly, RPC 3.8(c) states that a prosecutor shall "[n]ot seek to obtain from an unrepresented accused a waiver of important pretrial rights...." A prosecutor therefore must not overreach when dealing with an unrepresented person. In *State v. Likakur*, 26 Wn. App. 297, 302-303, 613 P.2d 156 (1980) (citations omitted), the Court of Appeals commented:

> We believe that the various constitutional rights of the accused are accorded different procedural safeguards depending on the nature of the right itself and the circumstances of each case. A guilty plea amounts to a waiver of the entire arsenal of the accused's constitutional rights. Because of this, the acceptance of such a plea must be preceded by appropriate safeguards to determine that the plea is made intelligently and freely. The right to counsel is also a right to be guarded carefully. The ordinary layman would effectively be denied his right to a fair trial, which right embodies many other constitutional rights, without the assistance of counsel. He lacks both the skill and knowledge to adequately prepare and present his defense even though he has a perfect one. The determination of whether there has been an appropriate waiver must depend in each case on the particular facts and circumstances including the experience and capabilities of the accused. ... At a different level are the right to jury trial, the right to remain silent, and the right to confront witnesses. The trial strategy of any particular case may perhaps dictate the waiver of one or more of these rights while still preserving to the accused the right to a fair trial.

The rough and tumble world of plea bargaining with defense attorneys is considerably different than plea dealing when counsel is not present. *See State v. Swindell*, 93 Wn.2d 192, 198-199, 607 P.2d 852 (1980).

3. Barricading a Witness.

a. Rules of Professional Conduct. RPC 3.4 provides that a lawyer shall not "unlawfully obstruct another party's access to evidence." In addition, a lawyer shall not counsel or assist another person to do such an act. RPC 3.4(a).

b. Court Rules. CrRLJ 4.7 (g)(1) provides:

> *Investigation Not to Be Impeded*. Except as is otherwise provided by protective orders or as to matters not subject to disclosure, neither the lawyers for the parties nor other prosecution or defense personnel shall advise persons other than the defendant, who have relevant material or information to refrain from discussing the case with the opposing lawyer or showing the opposing lawyer any relevant material, nor shall they otherwise impede the opposing lawyer's investigation of the case.

c. WSBA Opinion. WSBA Ethics Opinion 1020 (1986) concludes that a prosecutor who discourages or otherwise obstructs witnesses from consenting to defense interviews would violate RPC 3.4. It also concludes that a prosecutor violates the rule by encouraging witnesses not to be interviewed unless the prosecutor is present. However, the opinion also concludes that it is permissible for a prosecutor to advise a witness of his or her rights including the right to have the prosecution present at a defense interview as long as the prosecutor does not obstruct access and the witness is informed that it is in the interests of justice for the witness to make himself or herself available for an interview. *See infra* Section III(A) for additional citations and discussion.

4. Judicial Contacts.

a. Rules of Professional Conduct. RPC 3.5 provides that a lawyer shall not: "(i) seek to influence a judge. . .by means prohibited by law; or (ii) communicate ex parte with such a person. . .unless authorized to do so by law or court order."

b. Rules of Judicial Conduct.

i. Under the Rules of Professional Conduct, it is unprofessional conduct for a lawyer to knowingly assist a judge "in conduct that is a violation of applicable rules of judicial conduct or other law." RPC 8.4(f)

ii. Canon 3(A)(4) of the Code of Judicial Conduct provides: "Judges should accord to every person who is legally interested in a proceeding, or that person's lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding . . . ."

III. THE PROSECUTOR OR DEFENSE ATTORNEY AS A WITNESS

The provisions of RPC 3.7 apply equally to criminal and civil cases. *See supra* the discussion of this rule at Chapter 3, Section III.

Attorney Called by Opposing Party

RPC 3.7(a)(4) permits a lawyer to act as an advocate at trial if the lawyer is called as a witness by the opposing party *and* the court rules that the lawyer may continue to act as an advocate. *See generally State v. Bland*, 90 Wn. App. 677, 680-681, 953 P.2d 129 (1998), *review denied* 137 Wn.2d 1005 (1999).

Practice Tip: Avoid the problem in the first place by having a non-attorney present with you when you interview witnesses. That way, the defense can subpoena that person instead of you. If you are unable to do so, and receive a subpoena, consider offering to stipulate to the testimony your opponent wishes to elicit. Even if your opponent declines the stipulation, you will be in a better position to argue to the court that you should be allowed to continue to act as trial counsel.

IV. TRIAL ISSUES

A. Prosecutorial Misconduct

1. Duty of Fairness and Impartiality in Court.

A prosecuting attorney's duty to be fair is as important as his duty to the general public to actively prosecute violators of the law. *Charlton*, 90 Wn.2d 657.

The prosecutor also has a duty to ensure that the accused receives a fair trial. *In re Wiatt*, 151 Wn. App. 22, 211 P.3d 1030 (2009).

In *Wiatt*, the court stated, "[t]he doctrine of prosecutorial misconduct is based on prosecutors' heightened duty, as quasi-judicial officers, to ensure the accused receives a fair trial." *Id*. at 48, *citing State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096 (1969).

The prosecutor must act impartially, and trial behavior must be worthy of the position. *State v. Music*, 79 Wn.2d 699, 489 P.2d 159 (1971); *State v. Perez-Mejia*, 134 Wn. App. 907, 916, 143 P.3d 838 (2006).

a. Duty to Present Facts and Law Fairly. A prosecutor has a duty to present the facts and the law fairly, not mislead the jury, and see that a defendant in a criminal prosecution is given a fair trial. *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984). Prosecuting attorneys are quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant. *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 937 (2009).

b. Duty to Make Witnesses Available. A prosecutor has a reasonable duty to make prosecution witnesses available to the defense. *State v. Simonson*, 82 Wn. App. 226, 917 P.2d 599 (1996).

c. Duty to Provide Exculpatory Evidence. The prosecutor has a duty to provide any evidence that creates a reasonable doubt as to defendant's guilt. *State v. Campbell*, 103 Wn.2d 1, 17, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985); *see also Brady*, 373 U.S. 83. However, the mere possibility that an item of undisclosed evidence might have helped the defense does not establish the duty. *State v. Mak*, 105 Wn.2d 692, 704-05, 718 P.2d 407, *reconsideration denied*, *cert. denied*, 479 U.S. 995 (1986); overruled on other grounds in *State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994); *see also State v. Bashaw*, 144 Wn. App. 196, 182 P.3d 451 (2008). On the other hand, misconduct may stem from the failure to provide less direct (less obvious) exculpatory information. In *United States v. Sipe*, 388 F.3d 471, 477 (5th Cir. 2004), the court held that a *Brady* violation existed when the prosecutor misrepresented the scope of the benefits provided to testifying witnesses and failing to divulge bias information regarding the government's main witness.

2. Chilling the Exercise of Constitutional Rights.

Prosecutors may not act in a manner that would unnecessarily chill the exercise of a constitutional right. *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984).

3. ABA Standards of Criminal Justice – Courtroom Decorum.

The American Bar Association has promulgated rules that address general responsibilities of a prosecutor in the courtroom during trial, including Standard 3-5.2, Courtroom Decorum of the *ABA Standards of Criminal Justice*. This standard provides that the prosecutor should support the authority of the court and the dignity of the trial courtroom by strict adherence to the rules of decorum and by manifesting an attitude of professional respect toward the judge, opposing counsel, witnesses, defendants, jurors, and others in the courtroom. *ABA Standards for Criminal Justice*, Standard 3-5.2.

4. Rules of Professional Conduct.

The Rules of Professional Conduct include provisions that address responsibilities of attorneys, including prosecutors, to maintain fairness and proper decorum in court. Those provisions, in summary, include:

a. RPC 3.4 – Fairness to Opposing Party and Counsel. A lawyer shall not interfere with another party's access to evidence. A lawyer shall also not disobey the court (without an assertion of a valid obligation). A lawyer shall also not make a frivolous discovery request nor fail to make reasonably diligent effort to comply with a legally proper discovery request, nor allude to matters that are not relevant or not supported by admissible evidence, nor assert personal knowledge of facts in issue except when testifying as a witness; nor state personal opinions as to the justness of a cause or the credibility of witnesses.

b. RPC 3.5 – Impartiality and Decorum. A lawyer shall not disrupt proceedings nor seek to influence a judge, juror, prospective juror or other official by means prohibited by law.

5. Ex Parte Communications – Prosecutor and Court.

In *United States v. Alverson*, 666 F.2d 431 (9th Cir. 1982), the court vacated a defendant's sentence and remanded for re-sentencing before a different judge due to *ex parte* communications between the original judge and government officials involved in that case, even though the information conveyed to the court was essentially the same as that contained in the pre-sentence report. The protection afforded criminal defendants from ex parte communications between the court and the prosecutor is "not merely a matter of ethics; it is part of a defendant's right to due process and effective representation." *United States v. Carmichael*, 232 F.3d 510, 528 (6th Cir. 2000), (*quoting Haller v. Robbins*, 409 F.2d 857, 861 (1st Cir. 1969)).

6. Burden on Misconduct cases.

The appellate courts review trial court rulings on motions for mistrial based on prosecutorial misconduct under the "abuse of discretion" standard. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967, *cert. denied*, 528 U.S. 922 (1999). Additionally, the defense has the burden of proving the prosecutor's conduct was improper and prejudicial and that "there is a substantial likelihood the misconduct affected the jury's verdict." *Id*. To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct and prejudicial effect. *State v. Roberts*, 142 Wn.2d 471, 533, 14 P.3d 713 (2000).

B. Voir Dire, Jury Challenges

1. ABA Standards of Criminal Justice.

> The prosecutor should be prepared for the jury selection function, including use of challenges for cause and peremptory challenges. Voir dire should be used only to obtain information for the intelligent exercise of challenge. It should not be used to argue the case or present factual matter that would not be admissible at trial.

ABA Standards of Criminal Justice, Standard 3-5.3.

2. State Constitution – Religious Beliefs.

Article 1, Section 11 of the Washington State Constitution spells out a limitation in the voir dire process relating to religious beliefs:

No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.

3. Voir Dire Purpose – To Select Qualified Jurors (Determining Whether to Use Challenges).

The purpose of voir dire is to enable the parties to learn the state of mind of prospective jurors so that they can know whether or not any prospective juror may be challenged for cause, and to determine the advisability of interposing their peremptory challenges. It is not a function of voir dire to educate the jury panel to particular facts, to compel the jurors to commit themselves to a particular vote, to prejudice the jury for or against a particular party, to argue the case, to indoctrinate the jury, or to instruct the jury in matters of law. *State v. Frederiksen*, 40 Wn. App. 749, 752, 700 P.2d 369 *review denied*, 104 Wn.2d 1013 (1985).

4. Race-Based Exclusion.

The equal protection clause of the United States Constitution prohibits a prosecutor from using peremptory challenges to exclude jurors solely on the basis of race. To make a prima facie case of discrimination in use of peremptory challenges, the defendant must show that challenge was exercised against member of constitutionally cognizable racial group, and that use of the challenge and other relevant circumstances raised an inference of discrimination. *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

a. Burden – Prima Facie Case. Under *Batson*, the defendant has the initial burden of establishing a prima facie case of purposeful discrimination in jury selection. *State v. Rhodes*, 82 Wn. App. 192, 196, 917 P.2d 149 (1996). First, the defendant must show the peremptory challenge was exercised against a member of a constitutionally cognizable racial group. Second, the defendant must show that this fact, taken together with other relevant circumstances, raises an inference that the prosecutor's challenge was based on the status of the venire-person as a member of that group. The burden to prove that the jury selection system used at trial was constitutionally invalid is on the challenger. *State v. Barajas*, 143 Wn. App. 24, 34, 177 P.3d 106 (2007), *citing State v. Hilliard*, 89 Wn.2d 430, 440, 573 P.2d 22 (1977).

If the defendant establishes a prima facie case of purposeful discrimination, the burden shifts to the prosecution to articulate a neutral explanation related to the particular case to be tried. This must be more than a general denial of discriminatory intent. In determining whether a prosecutor's explanation is based on discriminatory intent, courts consider whether the prosecutor has stated a reasonably specific basis for the challenge.

If the trial court concludes that no prima facie case of racial discrimination in state's use of peremptory challenges exists, the prosecutor is not required to offer a race-neutral explanation. The prosecutor may nevertheless state the race-neutral explanation for the record. However, upon a showing of a prima facie case, the trial court must then determine whether purposeful discrimination did in fact occur. *State v. Burch*, 65 Wn. App. 828, 840, 830 P.2d 357 (1992); *see also State v. Thomas*, 166 Wn.2d 380, 407-08, 208 P.3d 1107 (2009)

Evaluation of the prosecutor's race-neutral explanation lies peculiarly within a trial judge's province, and is accorded great deference on appeal. *State v. Sanchez*, 72 Wn. App. 821, 826, 867 P.2d 638 (1994), (*quoting Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 1868, 114 L. Ed. 2d 395 (1991)).

b. Pattern of Strikes, Possible Racial Motive. Circumstances which raise an inference of discrimination in the use of peremptory challenges under *Batson* include a pattern of strikes against members of a constitutionally cognizable group and the prosecutor's questions and statements during voir dire examination. *State v. Wright*, 78 Wn. App. 93, 896 P.2d 713, *review denied*, 127 Wn.2d 1024, 904 P.2d 1157 (1995).

Exclusion of a single juror does not generally establish a pattern, but the exclusion of the only eligible minority juror "may imply a discriminatory act or motive." *State v. Vreen*, 99 Wn. App. 662, 666, 994 P.2d 905 (2000), *citing State v. Rhodes*, 82 Wn. App. 192, 201, 917 P.2d 149 (1996).

However, the court in *State v. Ashcraft*, 71 Wn. App. 444, 459, 859 P.2d 60 (1993), held that even if the exclusion of the lone African-American from the jury panel could be considered a pattern of exclusion, a prima facie case of racial exclusion was not established, absent other

circumstances indicating purposeful exclusion of African-Americans from the jury. In that case, the court noted that there were no other circumstances indicating purposeful exclusion.

In *State v. Luvene*, 127 Wn.2d 690, 700, 903 P.2d 960 (1995), the court rejected a *Batson* challenge where the prosecutor who exercised a peremptory challenge of one of two African-Americans on the jury venire, immediately offered two race-neutral explanations; that the challenged juror's brother had been convicted of an armed robbery and had been committed to the Washington Department of Corrections and that the challenged juror was very vague on the topic of the death penalty. The prosecutor indicated he felt, based on the juror's body language, that the prospective juror was attempting to avoid answering questions about the death penalty. Finally, the prosecutor mentioned that he did not intend to exercise a peremptory challenge against the other African-American person in the venire.

5. Gender-Based Exclusion.

Gender-based peremptory challenges are also impermissible under Washington's Equal Rights Amendment since such challenges deny female venire persons' equal rights and responsibilities on the basis of gender. Wash. Const., art. XXXI, § 1; *Burch*, 65 Wn. App. at 833.

6. Physical Handicap Exclusion.

The application of *Batson* to handicapped or disabled persons is not well settled.

In *People v. Wiley*, 165 Ill.2d 259, 270, 651 N.E. 189 (1995), the court was asked to rule on a challenge to the exclusion of a person who was suffering from some obvious disability or impairment that may have been physical or may have been alcohol or drug related. After holding a *Batson* hearing, the court held that a prospective juror's affliction with a condition that renders the juror unable to be attentive during the course of trial is an acceptable reason for excluding that juror.

In *Galloway v. Superior Court of District of Columbia*, 816 F. Supp. 12 (D.D.C., 1993), the trial court was enjoined from categorically excluding blind persons from jury service where evidence supported the contention that visual

observations were not necessarily essential to the function of jurors, and that the plaintiff had individual qualifications to serve competently on the jury. As such, the action violated 29 U.S.C. Section 794 and 42 U.S.C. Sections 1983 and 12132.

7. Language-Based Exclusion.

In *Sanchez*, 72 Wn. App. at 827, the court addressed language in terms of its applicability to the *Batson* test. In that case, a juror was challenged because English was his second language. In ruling that the prosecutor's explanation was race-neutral, the court cited *Hernandez*, 500 U.S. 352, in which the prosecutor had concerns about jurors who might have difficulty in accepting the translator's rendition of Spanish-language testimony.

8. Third-Party Equal Protection Clause.

The court in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), held:

> [A] defendant in a criminal case can raise the third-party equal protection claim of jurors excluded by the prosecution because of their race …To bar petitioner's claim because his race differs from that of the excluded jurors would be to condone the arbitrary exclusion of citizens from the duty, honor, and privilege of jury service.[W]e hold that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race.

C. Opening Statements

1. ABA Standards for Criminal Justice.

The prosecutor's opening statement should be confined to a statement of the issues in the case and the evidence the prosecutor intends to offer which the prosecutor believes in good faith will be available and admissible. A prosecutor should not allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.

ABA Standards for Criminal Justice, Standard 3-5.5.

2. Opening Statement - Brief Statement of Issues and Evidence.

The prosecutor's opening statement should be confined to a brief statement of the issues of the case, an outline of the anticipated material evidence, and reasonable inferences to be drawn therefrom. *Campbell*, 103 Wn.2d at 15-16.

3. Good Faith Belief Testimony Will Be Produced.

Campbell, *supra*, held that testimony may be anticipated for the purposes of reference in opening statements so long as counsel has a good faith belief such testimony will be produced at trial. The burden of showing bad faith is on the defendant. *State v. Parker*, 74 Wn.2d 269, 274-75, 444 P.2d 796 (1968), *overruled on other grounds by State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975). *See also Campbell*, *supra*.

4. Improper Opening Statement Areas.

a. Inflammatory Remarks. The purpose of the prosecutor's opening statement is to outline the material evidence the State intends to introduce. R. Ferguson, 13 *Wash. Prac., Criminal Practice & Procedure* § 4201 (3d ed. 2009). Argument and inflammatory remarks have no place in the opening statement. 30 *Wash. Prac., Wash. Motions in Limine* § 9:12 (2009), *citing State v. Kroll*, 87 Wn. 2d 829, 835, 558 P.2d 173 (1976) (en banc). A prosecutor's opening remarks may not be argumentative, inflammatory, or misleading as to the evidence to be presented. R. Ferguson, 13 *Wash. Prac., Criminal Practice & Procedure*, § 4202.

State v. Jones, 144 Wn. App. 284, 183 P.3d 307 (2008), and *State v. Rivers*, 96 Wn. App. 672, 981 P.2d 16 (1999), indicate that [prosecutorial] misconduct is prejudicial when the verdict substantially depends on witness credibility and the misconduct impacts credibility. In *Jones*, the prosecutor persistently attempted to bolster the credibility of a police officer and confidential informant with "highly inflammatory" facts not in evidence, prompting the court to reverse the conviction. The court held that repeated misconduct cumulatively deprived the defendant of a

fair trial. *Jones*, 144 Wn. App. at 297, 300-01. In *Rivers*, the prosecutor attacked defense witnesses, some of whom were incarcerated for participating in the assault at issue in the Rivers' trial, by asking the jury to imagine how those witnesses would be welcomed in the shower by their compatriots, "who are wearing pajamas up in the King County hotel," if they had testified in court that the defendant was also involved in the assault. *Rivers*, 96 Wn. App. at 674. The court reversed Rivers' conviction, holding that the prosecutor's highly inflammatory comments were clearly intended to inflame the jury's passion and prejudice.

b. Prosecutorial Testimony. A prosecutor's opening remarks should not contain statements of personal belief. Such remarks are improper when phrased in the form of testimony rather than an outline of the facts to be proved. R. Ferguson, 13 *Wash. Prac., Criminal Practice & Procedure* § 4202. It was improper for the prosecutor to present an opening statement which was so phrased as to present a narrative of the alleged crime in the form similar to testimony of the prosecutor, and not as an outline of facts which would be proven, for the prosecutor was not testifying under oath. *State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976).

c. Inadmissible Other Charges. A prosecutor's statement in opening remarks which indicates that the accused could have been charged with other offenses constitutes improper conduct. *Torres*, *supra*.

d. Evidence of Prior Criminal Records. The prosecutor cannot declare in opening statement that evidence will show that the defendant has a prior record. *Torres*, *supra*.

e. Anticipation and Rebuttal of Defense Theories. The prosecutor may not, in opening statements, state what he or she thinks the defense theory will be, or tell jurors what he or she expects to offer in rebuttal. R. Ferguson, 13 *Wash. Prac., Criminal Practice & Procedure* § 4204. However, when a defendant advances a theory exculpating him, the theory is not immunized from attack. *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).

D. Presentation of Evidence

1. ABA Standards of Criminal Justice – Evidence.

a. Standard 3-5.6 - Presentation of Evidence. It is unprofessional for a prosecutor knowingly to offer unfair or false evidence, or knowingly to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury. *ABA Standards of Criminal Justice*, Standard 3-5.6.

b. Standard 3-5.7 – Examination of Witnesses. The interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy and privileges of the witness. A prosecutor should not ask a question which implies the existence of a factual predicate for which a good faith belief is lacking. *ABA Standards of Criminal Justice*, Standard 3-5.7.

c. Standard 3-5.9 – Facts Outside the Record. The prosecutor should not intentionally refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice. *ABA Standards of Criminal Justice*, Standard 3-5.9.

2. References to Facts – Matters in Evidence.

Prosecutors have a responsibility to keep their questions and comments to facts and matters in evidence. References to matters outside the evidence of the case are improper. *State v. Jones*, 71 Wn. App. 798, 863 P.2d 85, *reconsideration denied*, 124 Wn.2d 1018, 881 P.2d 254 (1993).

3. Improper Evidentiary Areas.

a. Factual Questions – Trial Fairness. The prosecutor should not ask questions that would mislead the jury. *See United States v. Brockington*, 849 F.2d 872, 875 (4th Cir.1988). The prosecutor is obligated to ask questions for which there is a factual basis. *Foster v. Barbour*, 613 F.2d 59, 60 (4th Cir. 1980); *see also United States v. Golden*, 120 F.3d 263 (4th Cir. 1997).

b. Character Evidence to Prove Guilt. Under Washington Rule of Evidence ("ER") 404, evidence of other crimes, wrongs, or acts is inadmissible to prove character and show action in conformity therewith. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). However, under exceptions listed under ER 404(b), prior bad acts may be admissible for other purposes.

c. Improper Questions about Convictions. Questioning a defense witness about prior convictions that exceeds the bounds of ER 609 is improper. *State v. Copeland*, 130 Wn.2d 244, 922 P.2d 1304 (1996); *see also State v. Clark*, 143 Wn.2d 731, 767, 24 P.3d 1006 (2001).

d. Bolster Credibility of Witness Prior to Attack. It is improper to bolster the credibility of a witness whose credibility has not been attacked. Evidence intended to fortify or corroborate the credibility of a witness is admissible only after the credibility of the witness has been put at issue by an attack from the opposing party. *State v. Bourgeois*, 133 Wn.2d 389, 945 P.2d 1120 (1997).

e. Persistent or Excessive Use of Leading Questions. The use of extended unsworn remarks attributed to a prosecution witness which were allegedly recorded in an unverified document and which inculpate the defendant was condemned as cloaking potentially self-serving accounts of a witness's statements with dignity and credibility of the prosecutor's office, and increasing the probability that the jury will consider the statements as substantive evidence, despite any limiting instruction to the contrary. *United States v. Shoupe*, 548 F.2d 636, 641 (6th Cir. 1977); *see also Torres*, 16 Wn. App. at 258.

f. Privilege Against Self-Incrimination. A prosecutor is prohibited from calling a witness, knowing that the witness will invoke the privilege against self incrimination, for the purpose of having the jury see the witness exercise his constitutional right. *United States v. Tucker*, 267 F.2d 212 (3d Cir. 1959). It is also error for the prosecutor to call a codefendant, knowing that he will invoke the privilege. *State v. Smith*, 74 Wn.2d 744, 758, 446 P.2d 571 (1968) *overruled on other grounds by State v. Gosby*, 85 Wn.2d 758, 539 P.2d 680 (1975).

g. Disobedience to Rulings of the Court. In *State v. Tweedy*, 165 Wash. 281, 288, 5 P.2d 335 (1931), in which the court ruled that certain

testimony was inadmissible and where the prosecutor continued to seek introduction of that testimony, the court held the conduct was prejudicial, and that the injury or harm was not cured even though the testimony was stricken by the court and the jury instructed to disregard it.

h. Post-Arrest Silence – with or without *Miranda* Warnings. In *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), the Court held that use of a defendant's silence after receiving *Miranda* warnings (*Miranda v. Arizona*, 384 U.S. 436, 87 S. Ct 1602, 16 L. Ed 2d 694(1966)) usually violates the defendant's due process rights. *See also State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996); *State v. Silva*, 119 Wn. App. 422, 429, 81 P.3d 889 (2003).

4. Permissible Evidentiary Areas.

a. Invited Questions. Where the prosecutor's comments and questions of a state witness on redirect examination concerning her taking a polygraph test were invited by questioning from the defense, they were proper. *State v. Anderson*, 41 Wn. App. 85, 702 P.2d 481 (1985), *overruled on other grounds State v. Anderson*, 41 Wn. App. 85, 702 P.2d 481 (1985).

b. Warning of Potential Liabilities. Prosecutorial intimidation to prevent a defense witness from testifying for the defense is misconduct which is a denial of the right to compulsory process, and hence due process, and normally will warrant dismissal. *State v. Carlisle*, 73 Wn. App. 678, 681, 871 P.2d 174 (1994). However, the court found no constitutional violation where the prosecutor simply provides the witness with a truthful warning. *United States v. Jackson*, 935 F.2d 832, 847 (7th Cir. 1991).

c. Prior Bad Acts – ER 404(b). The trial court must always begin with the presumption that evidence of prior bad acts is inadmissible under ER 404(b). *See State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003); *State v. Wilson*, 144 Wn. App. 166, 177, 181 P.3d 887 (2008). However, character evidence under ER 404(b) is admissible for other purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *State v. Grant*, 83 Wn. App. 98, 104, 920 P.2d 609 (1996). The ER 404(b) list of other purposes for which evidence of a defendant's prior misconduct may be

introduced is not exclusive. *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995).

d. Suppressed Evidence Allowed for Impeachment. Defendant's statement taken in violation of *Miranda* but nevertheless voluntary may be used for impeachment. *State v. Brown*, 113 Wn.2d 520, 556, 782 P.2d 1013, 787 P.2d 906 (1990). A defendant does not have the right to lie under oath at a trial, and voluntary statements suppressed under the provisions of either the Fourth Amendment of the United States Constitution or Article I, Section 7 of the Washington State Constitution may be used for impeachment purposes.

Also, illegally obtained physical evidence, which is inadmissible on the government's case in chief as substantive evidence of guilt, is nevertheless admissible for purposes of impeachment. *State v. Greve*, 67 Wn. App. 166, 834 P.2d 656 (1992), *review denied*, 121 Wn.2d 1005, 848 P.2d 1263 (1993).

e. Post-Arrest Silence as Impeachment. In *Fletcher v. Weir*, 455 U.S. 603, 102 S. Ct. 1309, 71 L. Ed. 2d 490 (1982), the court held that a defendant's post-arrest silence could be used for impeachment when no *Miranda* warnings were given. *See also Portuondo v. Agard*, 529 U.S. 61, 120 S. Ct. 1119, 146 L. Ed. 2d 47, (2000). Note however that in Washington, the Court in *State v. Davis*, 38 Wn. App. 600, 686 P.2d 1143 (1984), declined to follow *Fletcher v. Weir*, because (i) limiting the exclusion of post-arrest silence to instances where *Miranda* warnings are given would penalize the knowledgeable defendant who has not been advised of his rights; and (ii) such a rule also has the potential to discourage the reading of *Miranda* warnings.

E. Closing Arguments

1. ABA Standards Criminal Justice.

a. 3-5.8 Arguments to the Jury. The prosecutor may argue all reasonable inferences from the evidence.

However, it is professional misconduct for the prosecutor to intentionally mislead the jury, or to express a personal belief or opinion as

to the truth or falsity of any testimony or evidence or the guilt of the defendant.

A prosecutor is not to use arguments calculated to inflame passion or prejudice of the jury. *ABA Standards of Criminal Justice*, Standard 3-5.8.

2. Closing Argument Generally.

During closing argument a prosecutor may state the law as set forth by the court in the instructions. The prosecutor has wide latitude to argue the facts in evidence and reasonable inferences therefrom. *State v. Mak*, 105 Wn.2d 692, 698, 718 P.2d 407, *reconsideration denied, cert. denied*, 479 U.S. 995 (1986), *overruled on other grounds by State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994); *see also Bashaw*, 144 Wn. App. 196.

3. Improper Closing Argument Areas.

a. Comment on Exercise of Privilege or Right. Prosecutors may not comment on the defendant's exercise of a privilege or constitutional right. The State can take no action which will unnecessarily chill or penalize the assertion of a constitutional right and the State may not draw adverse inferences from the exercise of a constitutional right. *State v. Gregory*, 158 Wn.2d 759, 806, 147 P.3d 1201 (2006). Note, however, a prosecutor may touch upon a defendant's exercise of a constitutional right, provided the prosecutor does not "manifestly intend[ ] the remarks to be a comment on that right." *Gregory*, 158 Wn.2d at 806-07 (*quoting State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991)).

i. Marital Privilege. It is improper for a prosecutor to make a reference to a defendant's exercise of or failure to waive the husband-wife privilege. *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978).

ii. Doctor-Patient Privilege. It is improper for a prosecutor to make a reference to a defendant's exercise of the doctor patient privilege. *Sumpter v. Nat'l Grocery Co.*, 194 Wash. 598, 600, 78 P.2d 1087 (1938).

iii. Right to Counsel. The prosecutor may not comment that the defendant consulted with his attorney soon after the crime and that such consultation was not the act of an innocent person. *United States ex rel Macon v. Yeager*, 476 F.2d 613 (3d Cir. 1973), *cert. denied*, 414 U.S. 855 (1973); *see also United States v. Abate*, 302 Fed. App'x 99 (3d Cir. 2008).

iv. Right Against Self Incrimination. It was improper for the prosecutor to say "[i]f you got a story and you're innocent, you tell the cops." *State v. Belgarde*, 110 Wn.2d 504, 510, 755 P.2d 174 (1988) (improper comment on the defendant's right to remain silent). Similarly, in *State v. James*, 63 Wn.2d 71, 385 P.2d 558 (1963), it was improper for the prosecutor to ask the defendant to prove what happened.

But if the defendant waives the right to remain silent and makes a post-arrest statement, the prosecutor may draw the attention of the jury to the fact that a story told at trial was omitted from that statement. *Belgarde*, 110 Wn.2d at 511. Such selective silence is not inherently ambiguous, but strongly suggests a fabricated defense. *Id*. at 511-12; *see also State v. Silva*, 119 Wn. App. 422, 429, 81 P.3d 889 (2003).

v. Right to Post and Pre-Arrest Silence. As the court noted in *Easter*, 130 Wn.2d at 236, "[c]ourts have generally treated comments on post-arrest silence as a violation of a defendant's right to due process because the warnings under *Miranda* constitute an 'implicit assurance' to the defendant that silence in the face of the State's accusations carries no penalty." The court further commented that, "the use of silence at the time of arrest and after the *Miranda* warnings is fundamentally unfair and violates due process." *Id*. *citing Brecht v. Abrahamson*, 507 U.S. 619, 628, 113 S. Ct. 1710, 1716-17, 123 L. Ed. 2d 353 (1993). The prosecution also may not use pre-arrest silence in argument or in its case in chief as substantive evidence of a defendant's guilt. *Easter*, 130 Wn.2d at 241.

vi. Right to Be Present at Trial. It is improper for a prosecutor to comment on a defendant's exercise of his/her right to a trial, or to argue that the defendant was the only witness who had been in

the courtroom during the entire case so he could tailor his story to fit the testimony of other witnesses. *State v. Johnson*, 80 Wn. App. 337, 908 P.2d 900 (1996).

vii. Right to Confrontation. In *Dyson v. United States*, 418 A.2d 127, 131 (D.C. App. 1980), the District of Columbia Court of Appeals concluded that prosecutorial comment on the defendant's right of confrontation constituted prosecutorial misconduct. In closing argument, the prosecutor commented on the presence of the defendant during the testimony of adverse witnesses and the delay of the defendant's own testimony until all other witnesses had taken the stand. In *Sherrod v. United States*, 478 A.2d 644, 654 (D.C. App. 1984), the District of Columbia Court of Appeals extended *Dyson* to cross-examination. *See also Johnson*, 80 Wn. App. 337, 908 P.2d 900 (1996); K. Tegland, 5C *Wash. Prac., Evidence Law and Practice* § 1300.7 (5th ed.).

b. Prosecutor Opinion. The prosecutor should not state his personal belief or opinion in the defendant's guilt. In *State v. Sargent*, 40 Wn. App. 340, 698 P.2d 598 (1985) *reversed on other grounds by* 49 Wn. App. 64, 741 P.2d 1017 (1987), it was improper for a prosecutor to express a personal belief in vouching for the credibility of a witness. *See also State v. Swan*, 114 Wn.2d 613, 664, 790 P.2d 610 (1990).

In *State v. Traweek*, 43 Wn. App. 99, 107-08, 715 P.2d 1148, *review denied*, 106 Wn.2d 1007 (1986), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991), the prosecutor's remark in the closing argument that the prosecutor knew that the defendants had committed robbery was unethical and prejudicial. It can also be error for the prosecutor to suggest that evidence is "uncontested" when the statement amounts to shifting the prosecutor's burden of proof by suggesting that a defendant could have produced evidence to rebut the government's case. *E.g., Traweek*, 43 Wn. App. at 106-107. The court also found that it was improper for a prosecutor to argue that he never filed an information against a person unless he believed him to be guilty. *State v. Susan*, 152 Wash. 365, 278 P. 149 (1929); *see also Torres*, 16 Wn. App. at 263. A statement by counsel clearly expressing a personal belief as to the credibility of the witness or the guilt or innocence of the accused is forbidden. *State v. Allen*, 57 Wn. App. 134, 788 P.2d 1084 (1990). *See*

also State v. Case, 49 Wn.2d 66, 298 P.2d 500 (1956); *Sargent*, 40 Wn. App. 340.

c. Argument Not Based on Facts – Law. The prosecutor may not comment on matters outside the evidence. *Davenport*, 100 Wn.2d 757.

Counsel is not permitted to impart to the jury his or her own personal knowledge about an issue in the case under the guise of either direct or cross-examination if such information is not otherwise admitted into evidence. *State v. Denton*, 58 Wn. App. 251, 792 P.2d 537 (1990).

d. Misrepresentation of Jury Role and Burden of Proof. It is misconduct for a prosecutor to argue that, in order to acquit a defendant, the jury must find that the prosecution's witnesses are either lying or mistaken. *State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996); *see also State v. Wheless,* 103 Wn. App. 749, 758, 14 P.3d 184 (2000).

e. Incorrect/Incomplete Information – Effects of Verdict. Prosecutorial argument that an accused may receive probation (instead of imprisonment) is generally improper. Such comment may distract the jury from its function of determining whether the defendant was guilty or innocent beyond a reasonable doubt by informing them, in substance, that it does not matter if their verdict is wrong because the judge may correct its effect. *Torres*, 16 Wn. App. at 262.

f. Inflammatory Emotional Remarks. It is improper for the prosecutor's argument to introduce extraneous inflammatory rhetoric, personal opinions, or facts unsupported by the record. *Belgarde*, 110 Wn.2d 504.

i. Name Calling. The prosecutor's remark in rebuttal that the defense counsel was being paid by the defendant to twist the words of witnesses was improper. *State v. Negrete*, 72 Wn. App. 62, 863 P.2d 137 (1993), *review denied*, 123 Wn.2d 1030, 877 P.2d 695 (1994).

In *State v. Wilson*, 16 Wn. App. 348, 555 P.2d 1375 (1976), it was improper for the prosecutor to refer to the victim as "that little angel," and to say of the defendant that, "to call him a beast would insult the entire animal kingdom" and "I say that he is not

fit to be a member of the human race." It was also improper for a prosecutor to ask a witness to express an opinion as to whether or not a police officer was lying, as it makes it appear that an acquittal would be proper only if the jurors concluded that the officer was deliberately giving false testimony. *State v. Casteneda-Perez*, 61 Wn. App. 354, 810 P.2d 74 (1991).

ii. Speculating. It was improper for the prosecutor to inflame the jury by speculating about what could have happened during a robbery. *State v. Harvey*, 34 Wn. App. 737, 664 P.2d 1281 (1983) ("what could have happened could have been a 'hostage' situation").

The Washington State Supreme Court held as misconduct the prosecutor's closing remarks which included statements which associated the defendant with an organization of mad men who kill indiscriminately. The court described that as being both inaccurate and not within the record, but also being so flagrantly appealing to passion and prejudice that it necessitated reversal, because no curative instruction could have overcome the prejudice resulting from the improper argument. *Belgarde*, 110 Wn.2d 504.

iii. "Not Guilty" Would Send a Message. The prosecutor was held to have denied the defendant who was accused of child molestation a fair trial by commenting in closing argument, that a "not guilty" verdict would send a message to children that reporting adults for sexual impropriety was ineffective, as children would not be believed. *State v. Powell*, 62 Wn. App. 914, 816 P.2d 86, *review denied*, 118 Wn.2d 1013, 824 P.2d 491 (1991).

iv. Recital of List of Prominent Murder Victims. It was censurable for the prosecutor in a firearms case to make reference in closing argument and on rebuttal to the firearm murders of prominent persons even though the court held that these comments did not make the trial inherently unfair. *United States v. Endicott*, 803 F.2d 506 (9th Cir. 1986).

v. Appeals for Sympathy. Appeals to jury sympathy and compassion have likewise been subject of misconduct complaints. In *State v. Dennison,* 115 Wn.2d 609, 801 P.2d 193 (1990), the

defendant complained because the prosecutor apologized to the victim's mother for having mispronounced the victim's name. The defendant's argument was that the apology focused attention on the victim's mother in an effort to create sympathy. In that case, however, the court ruled that since the defendant neither objected nor offered curative instruction, his objection was waived.

4. Permissible Closing Argument Areas.

a. Comment on Defendant's Silence – Exception. As an exception to the proposition that comment on post-arrest silence is improper, it is permissible when the defendant at trial insists that he did provide his explanation to the police. *Doyle v. Ohio*, 426 U.S. 610, 619 n. 11, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976).

b. Facts That Arouse Indignation. In *State v. Fleetwood*, 75 Wn.2d 80, 448 P.2d 502 (1968), the court held that a prosecutor is not muted just because the acts committed arouse natural indignation. In that case, a prosecution for robbery and assault of an 87-year-old woman, the prosecutor's argument that the defendant had stated that he was a member of the FBI, and that the victim of the assault was an 87-year-old woman, did not so inflame the jury that a fair trial was impossible.

c. Provoked Prosecutor Statements. In *Dennison*, 72 Wn.2d 842, the court indicated that even where the remarks of a prosecutor would otherwise be improper, grounds for reversal were lacking where the remarks were invited, provoked or occasioned by the defense counsel, unless remarks went beyond pertinent reply and brought before the jury extraneous matters not in the record or were so prejudicial that instruction would not cure them.

d. Inferences and Credibility. Although it is not proper for the prosecutor, in arguing before the jury, to insert his or her personal belief, it is proper for him or her to comment on the credibility of witnesses or the inferences that may be drawn from the evidence. *State v. Walton*, 5 Wn. App. 150, 486 P.2d 1118 (1971).

Once the defendant elects to testify on his own behalf, he places himself in the same footing as any other witness, and comment on his

testimony and credibility may be made by the prosecution in closing argument. *State v. Scott*, 58 Wn. App. 50, 791 P.2d 559 (1990).

Even though the prosecutor should not imply that the jury should infer guilt from a defendant's prior convictions, the prosecutor may address prior convictions before the jury to attack the credibility of a defendant who testified. *State v. Harrison*, 72 Wn.2d 737, 435 P.2d 547 (1967).

e. Lack of Corroboration for an Alibi. The prosecutor may comment on the fact that a potential witness did not appear to corroborate an alibi. *State v. Bourgeois*, 133 Wn.2d 389, 945 P.2d 1120 (1997).

f. Defendant Tailored Testimony. The court in *State v. Smith*, 82 Wn. App. 327, 335, 917 P.2d 1108 (1996), held that so long as the comment did not focus on the right to be present at trial, it was not improper for a prosecutor to question the defendant about his ability to see all the photographs, read all the discovery, and hear all the other testimony before he crafted his testimony to fit with the rest of the evidence.

F. Burdens and Consequences of Misconduct

The court can impose several remedies when the prosecutor engages in misconduct, depending on the degree of misconduct and the circumstances.

1. Admonishment and Instruction.

When it is clear to the court that prosecutorial misconduct is occurring and the defense makes no objection, the court must evaluate whether the failure to object is strategic, incompetence or the result of "the attorney's fear that an objection would only focus attention on an aspect of the case unfairly prejudicial to his client." Where this is manifestly the case, the judge may choose "to interrupt, admonish the offender and instruct the jury to disregard the improper argument." *United States v. Sawyer*, 347 F.2d 372, 374 (4th Cir. 1965). A different approach is "to call the prosecutor to the bench, admonish . . . and ask defense counsel if he wishes an instruction." Gershman, *Prosecutorial Misconduct*, § 13.2(b)(1) (1994). A third approach is an order *in limine* against specific misconduct that the trial court may be able to anticipate.

2. Censure.

Prosecutor's comments that may not constitute conduct that makes the trial inherently unfair may nevertheless be censurable. *Endicott*, 803 F.2d 506).

3. Contempt Sanctions.

Misconduct that occurs in the face of a warning is a violation that the trial court may address with contempt sanctions. *State v. Neidigh*, 78 Wn. App. 71, 895 P.2d 423 (1985); *see also* RCW 7.21.050. The virtue of contempt as a sanction is that it "can be easily administered, interferes only marginally with the criminal proceeding, punishes the prosecutor rather than society, and can be adjusted according to the severity of the misconduct." Gershman, *Prosecutorial Misconduct*, § 13.3. A further virtue is that the appellate court then has the opportunity to affirm the application of an effective remedy without circumventing or altering the harmless error inquiry. *Neidigh*, 78 Wn. App. at 80.

4. No Prejudice – No Reversal.

Improper prosecutorial conduct is not grounds for reversing a conviction where the conduct did not influence the jury's verdict. *State v. Brown*, 76 Wn.2d 352, 458 P.2d 165 (1969); *see also Finch*, 137 Wn.2d at 839.

a. Context. Whether an improper statement in closing argument prejudiced the defendant depends upon the context in which it was used and the effect it was likely to have on the jury. *State v. Rose*, 62 Wn.2d 309, 382 P.2d 513 (1963). In *State v. Day*, 51 Wn. App. 544, 754 P.2d 1021 (1988), the court found the prosecutor's calling the defendant's testimony "a pack of lies" not to be improper when taken in context.

b. Trial Court Discretion. In *State v. Guizzotti*, 60 Wn. App. 289, 803 P.2d 808, *review denied*, 116 Wn.2d 1026 (1991), the court noted that whether improper prosecutorial argument necessitates mistrial is within the discretion of the trial court.

c. Objection – Curative Instruction. In considering whether the misconduct requires reversal, the court will look to see whether there was an objection by the defense and whether a request for a curative instruction was made. *State v. Barrow*, 60 Wn. App. 869, 874-75, 809 P.2d 209, *review denied*, 118 Wn.2d 1007, 822 P.2d 288 (1991).

In egregious cases, even with a curative instruction, the court may order a mistrial. In *State v. Copeland*, 130 Wn.2d 244, 922 P.2d 1304 (1996), the court held that the giving of a curative instruction does not end the court's inquiry. "If misconduct is so flagrant that no instruction can cure it, there is, in effect, a mistrial and a new trial is the only and mandatory remedy." *Belgarde*, 110 Wn.2d at 516-17 (*quoting State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956)).

d. Burden on Defense. A defendant seeking a mistrial based on improper prosecutorial argument has the burden of showing that the prosecutor's remarks were improper and that a substantial likelihood exists that the misconduct affected the jury's verdict thereby depriving the defendant of a fair trial. The appellate courts review the trial court's determination only for abuse of discretion. *Guizzotti*, 60 Wn. App. 289.

e. Prejudice Must Be Clear, Inference vs. Opinion. The court in *State v. Papadopoulos*, 34 Wn. App. 397, 662 P.2d 59 (1983), indicated that prejudicial error will not occur unless it is clear and unmistakable that counsel is not arguing an inference from the evidence but is expressing a personal opinion. *See also Swan*, 114 Wn.2d 613.

5. Reverse the Conviction if Misconduct Too Flagrant.

Prosecutorial misconduct will require reversal of a conviction even though no curative instruction was requested only if the conduct is so flagrant and ill-intended that the error can not be deemed to be harmless. *Charlton*, 90 Wn.2d 657.

If an admonition could not have neutralized the prejudice of misconduct, even where there was no objection, and there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict, the conviction should be reversed. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994); *see also State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

6. Dismissal under CrRLJ 8.3(b) and CrR 8.3(b).

CrRLJ 8.3(b) authorizes a trial court to dismiss any criminal prosecution "on its own motion in furtherance of justice." This rule parrots the language of the CrR 8.3(b).

The purpose of CrR 8.3(b) is to insure that an accused person is fairly treated. *State v. Whitney*, 96 Wn.2d 578, 67 P.2d 956 (1981).

a. Discretionary – Manifest Abuse of Discretion. The power of the court to dismiss a charge under CrRLJ 8.3(b) is discretionary and is reviewable only for manifest abuse of discretion. *State v. Dailey*, 93 Wn.2d 454, 610 P.2d 357 (1980); *see also State v. Hanna*, 123 Wn.2d 704, 715, 871 P.2d 135, *cert. denied*, 513 U.S. 919 (1994). However, a dismissal of a prosecution in the interests of justice constitutes an abuse of discretion if there is no evidence of arbitrary prosecutorial action, governmental misconduct, or mismanagement of the case. *State v. Underwood*, 33 Wn. App. 833, 658 P.2d 50, *review denied*, 99 Wn.2d 1012 (1983).

Discretion is abused when the trial court's decision is manifestly unreasonable or is exercised on untenable grounds for untenable reasons. *State v. Blackwell*, 120 Wn.2d 822, 830 P.2d 1017 (1993).

b. Reasons in Written Order. The court must set forth its reasons in a written order when dismissing a criminal prosecution under CrR 8.3(b), although the court need not enter any findings of fact. *State v. Burri*, 87 Wn.2d 175, 550 P.2d 507 (1976); *State v. Buscher*, 45 Wn. App. 141, 724 P.2d 411 (1986).

c. Rights of the Accused Must Be Prejudiced. Absent a finding of prejudice to the defendant, dismissal of criminal charges is not warranted. *State v. Koerber*, 85 Wn. App. 1, 931 P.2d 904 (1996).

d. Extraordinary Remedy. Dismissal of criminal charges is an extraordinary remedy for prosecutorial misconduct, and will be granted only when the prejudice to the rights of the accused to a fair trial cannot be remedied by granting a new trial. *See City of Seattle v. Orwick*, 113 Wn.2d 823, 830, 784 P.2d 161 (1989); *Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

e. Truly Egregious Cases. The trial court's authority to dismiss under CrR 8.3(b) is limited to truly egregious cases of mismanagement or misconduct by the prosecutor, and it does not extend to acts of simple

negligence. *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003); *State v. Duggins*, 68 Wn. App. 396, 401, 844 P.2d 441 (1993).

G. Liability for Prosecutor Misconduct

As noted in *Robinson v. City of Seattle*, 119 Wn.2d 34, 68, 830 P.2d 318 (1992) , *reconsideration denied*, *quoting* from *Burns v. Reed*, 500 U.S. 478, 111 S. Ct. 1934, 1944, 114 L. Ed. 2d 547 (1991), "[i]t was suggested in [*Donovan v. Reinholt*, 433 F.2d 738, 744 (9th Cir. 1970)] that even the city attorney who advises disregard of a court order would be liable rather than immune from suit." Other courts have declined to extend qualified immunity to 42 U.S.C. Section 1983 defendants by holding that disobedience of a court order was not a discretionary act entitled to immunity. *See Front Royal & Warren Cy. Ind. Park Corp. v. City of Front Royal, Va.*, 708 F. Supp. 1477 (W.D. Va. 1989).

Generally, the shield of qualified immunity from 42 U.S.C. Section 1983 liability does not extend to those officials who knowingly violate law. *Robinson*, *supra*.

1. Prosecutorial Immunity.

As stated by the court in *State v. Savage*, 127 Wn.2d 434, 450, 899 P.2d 1270 (1995), "[i]n 1966, this court noted that prosecuting attorneys are individually immune, as a matter of public policy, from prosecution for acts done in their official capacity. *Creelman v. Svenning*, 67 Wn.2d 882, 884, 410 P.2d 606 (1966)." The court held that the public policy which requires quasi-judicial immunity for prosecutors also requires immunity for the state and county for the acts of the prosecutors in their official capacity. *Creelman*, 67 Wn.2d at 885. The court also held that the statutory abrogation of sovereign immunity set forth at RCW 4.92.090 did not constitute a bar to extension of prosecutorial immunity.

a. Absolute Immunity. The United States Supreme Court has granted prosecutors absolute immunity for "initiating a prosecution and in presenting the State's case." *Imbler v. Pachtman*, 424 U.S. 409, 431, 96 S. Ct 984, 995, 47 L. Ed. 2d 128 (1976).

b. Qualified Immunity. As noted in *Pachtman*, *supra*, the court left standing appellate case law holding that absolute immunity did not apply to a prosecutor's investigative function. In *Robinson*, 119 Wn.2d 34, the court, relying on *Burns v. Reed*, 500 U.S. 478, stated, "[i]t is incongruous to allow prosecutors to be absolutely immune from liability for giving

advice to the police, but to allow police officers only qualified immunity for following the advice."

In *Babcock v. State*, 116 Wn.2d 596, 606, 618, 809 P.2d 143 (1991), the court held that public officials or employees involved in investigative work were entitled to a qualified immunity. *See also Sintra, Inc. v. City of Seattle*, 119 Wn.2d 1, 829 P.2d 765 (1992).

c. Qualified – Absolute Immunity Distinction. As noted in *Burns*, 500 U.S. 478, the prosecutor's participation in a probable cause hearing was held absolutely immune. The distinction is based on the function the prosecutor performs.

d. Prosecutor Statement in Certificate of Probable Cause. In the recent United States Supreme Court case, *Kalina v. Fletcher*, 522 U.S. at 123, the court held that absolute prosecutorial immunity does not protect a prosecutor who allegedly made false statements of fact in an affidavit supporting an application for an arrest warrant. The prosecutor has qualified immunity. The court held that "[t]estifying about facts is the function of the witness, not of the lawyer. No matter how brief or succinct it may be, the evidentiary component of an application for an arrest warrant is a distinct and essential predicate for a finding of probable cause. Even when the person who makes the constitutionally required Oath or affirmation is a [prosecutor], the only function that [the prosecutor] performs is that of a witness." *Kalina*, 522 U.S. at 130-131; *see supra* Section III(A) in this chapter.

e. Investigative Function. Although the United States Supreme Court in upheld absolute immunity for prosecutors initiating prosecution and in presenting the prosecutor's case in *Pachtman*, 424 U.S. at 431, it purposefully left standing appellate case law holding that qualified, not absolute immunity, applied to a prosecutor's investigative function.

H. Sentencing

1. ABA Standards of Criminal Justice - Sentencing.

The prosecutor should make fairness, not the severity of sentences, the index of his or her effectiveness. *ABA Standards of Criminal Justice*, Standard 3-6.1.

The prosecutor should assist the court in basing its sentence on complete, relevant and accurate information. The prosecutor should disclose unprivileged mitigating information to the court and to the defense. *ABA Standards of Criminal Justice*, Standard 3-6.2.

2. Prosecutor's Role, Sound Advice with Advocacy.

The court in *United States v. Brown*, 500 F.2d 375, 377 (4th Cir. 1974), (*abrogation recognized in State v. Coppin*, 57 Wn. App. 866, 791 P.2d 228 (1990)), describes the prosecutor's role in sentencing as reasonably being expected to be the sound advice, expressed with some degree of advocacy, of a government officer familiar both with the defendant and with his record and cognizant of his public duty as a prosecutor.

3. Prosecutor's Obligation in Making Recommendation.

In making a promised sentencing recommendation pursuant to an agreement, the prosecutor may not engage in conduct which suggests terms contrary to those agreed upon under plea agreement. However, the prosecution fulfilled its obligation by simply making the promised sentencing recommendation. The prosecutor is not otherwise obligated to affirmatively advocate for the sentence recommendation. *State v. Coppin*, 57 Wn. App. 866, 791 P.2d 228 (1990).

However, where the trial court solicited the recommendation of the police officer (asking for a bigger penalty than agreed to by prosecutor and defendant), it was error for the court to refuse the request by the defense counsel that the prosecutor be permitted to address the court in support of the agreed recommendation. *State v. Peterson*, 29 Wn. App. 655, 630 P.2d 480 (1981) *aff'd* 97 Wn.2d 864, 651 P.2d 211 (1982), *appeal after remand*, 37 Wn. App. 309, 680 P.2d 445 (1984).

4. Sentencing Based on Materially False Information.

In *United States v. Hanna*, 49 F.3d 572 (9th Cir. 1995) the court held that the Constitutional guarantee of due process is fully applicable at sentencing, and, thus, a defendant's due process rights would be violated where materially false or unreliable information were used at sentencing. In such a case, vacation of the sentence is required.

I. Mistrials

1. Mistrials Where Retrial Barred.

a. Mistrial Caused by Misconduct. The general rule is that, where the defendant moves for a mistrial, the double jeopardy clause does not bar a retrial. *State v. Lewis*, 78 Wn. App. 739, 745, 898 P.2d 874 (1995) *review denied* 128 Wn.2d 1012 (1996), *citing Oregon v. Kennedy*, 456 U.S. 667, 672-73, 102 S. Ct. 2083, 2087-88, 72 L. Ed. 2d 416 (1982) . However, as noted in *State v. Cochran*, 51 Wn. App. 116, 122, 752 P.2d 1194, *review denied*, 110 Wn.2d 1017 (1988), *citing Oregon v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983), re-prosecution may be barred where the mistrial is caused by prejudicial, official misconduct, whether caused intentionally or by indifference in the results.

b. Prosecutor Negligence. Where a mistrial was declared because the prosecutor was grossly negligent in reading the defendant's grand jury testimony to jury, retrial after the mistrial would have been double jeopardy. *United States v. Martin*, 561 F.2d 135 (8th Cir. 1997). In *Downum v. United States*, 372 U.S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963) *recognized by Connecticut v. Butler*, 262 Conn. 167, 810 A.2d 791 (2002), the court held that double jeopardy barred retrial where, after the jury was sworn, the prosecutor moved for discharge of the jury on the ground that a key prosecution witness was not present who the prosecutor knew could not be found and had not been served with a subpoena.

J. Appeals

1. Prosecutor's Appellate Role.

As noted by Joseph F. Lawless, Jr. in *Prosecutorial Misconduct: Law-Procedure-Forms* (Lexis Law Publishing 1985), there are no ethical standards which specifically address the prosecutor as appellate counsel. In that regard, the author suggests that most ethical considerations involving appellate work by prosecutors can be handled similarly to the way other areas of prosecutorial misconduct are handled. However, he does identify areas where prosecutors may be engaged in misconduct in handling appeals. These include vindictive pursuit of an appeal and the addition of facts to the appeal which are not included in the record.

2. Retrial after Appeal – Exception for Misconduct.

In *Cochran*, 51 Wn. App. 116, the court, *citing Oregon v. Kennedy*, 456 U.S. 667, stated that where a conviction is reversed on appeal, re-prosecution is generally permissible; however, a bar against retrial is appropriate where prosecutorial misconduct is intended to provoke a request for mistrial, . Although this rule generally applies to mistrials, this exception should apply with equal weight to appellate reversals resulting from prosecutorial misconduct. *See United States v. Singer*, 785 F.2d 228, 239 (8th Cir. 1986), *cert. denied*, 479 U.S. 833 (1986).

V. DISSEMINATION OF INFORMATION IN THE PROSECUTOR'S POSSESSION

A. Introduction

As part of their duties within the criminal justice system, criminal prosecutors come into possession of many different types of information about people. Some of those people are former, current, or potential future criminal defendants, victims, or witnesses. Although that information is not necessarily subject to the attorney-client privilege, it is quite often private or sensitive in nature. Thus, while traditional ethical considerations of privileged communications may not apply, there are other legal considerations which are at least tangentially ethics-related.

B. Disclosure as Part of Criminal Discovery

Disclosure to defense counsel as part of the criminal discovery process is governed by CrR 4.7 and CrRLJ 4.7.

C. Disclosure Other Than as Part of Criminal Discovery

Disclosure of information, other than through the criminal discovery process, is governed by three considerations: the public disclosure law; the Washington State Criminal Records Privacy Act (chapter 10.97 RCW) [hereinafter "CRPA"]; and the rights of victims of domestic violence.

1. Public Disclosure Act.

For disclosure requirements and limitations under the public disclosure laws, *see supra* the discussion at Chapter 2, Section IV. A few of the limits to the disclosure requirements for public records, Chapter 42.56 RCW (formerly

codified in RCW 42.17.250 *et seq*.), that are especially applicable to criminal cases are discussed below.

a. Intelligence Gathering. The disclosure requirements may be limited regarding certain intelligence information gathered by law enforcement. RCW 42.56.240(1).

b. Identity of Crime Victims or Witnesses. The disclosure requirements may be limited regarding the identity of crime victims or witnesses under certain circumstances. RCW 42.56.240(2).

c. CRPA. The disclosure requirements may be limited by the application of the CRPA. For example, public records need not be disclosed under chapter 42.56 RCW if disclosure is exempt or prohibited under another statute, which could include the CRPA. *See* RCW 42.56.070(1).

D. Disclosure Limitations Under the CRPA

For disclosure issues relating to criminal history information (which might, under certain circumstances, affect a response to a public records request under chapter 42.56 RCW), public records respondents should review the CRPA in its entirety, s*ee* chapter 10.97 RCW and any other applicable privacy laws.

1. Definitions.

The relevant definitions under the CRPA are contained in RCW 10.97.030. While all of the definitions are important in applying the CRPA, special attention should be paid to the definitions of "criminal history record information," "nonconviction data," and "conviction or other disposition adverse to the subject." Also, review of RCW 10.97.030(5) for the definition of "criminal justice agency," which should include most, if not all, criminal prosecutors' offices is important.

Practice Tip: Begin any CRPA analysis by determining which portions of the records are criminal history record information, and therefore subject to the CRPA, and which are not.

2. Conviction Data and Pending Cases.

Generally speaking, conviction data and criminal history record information regarding pending cases may be disseminated without restriction. RCW 10.97.050(1), (2).

Practice Tip: Bear in mind that a record may contain both conviction and nonconviction data. If so, it is likely that only a portion of the record is subject to dissemination under the CRPA. For example, suppose a police report in a pending assault case recites that the suspect has five prior arrests for residential burglary, but has never been convicted of that crime. That portion of the report relating to the pending assault charge may be disseminated under the CRPA; that portion relating to the arrests which did not lead to convictions may not. If the report does not say whether the arrests led to convictions, be well advised to try to find out the answer as part of a CRPA analysis.

Practice Tip: If a defendant successfully completes a deferred sentence and the Court dismisses the charge, does the criminal history record become nonconviction data? According to a 1997 opinion of the Attorney General, the record retains its status as conviction data. *See* AGO 1997 No. 1.

Practice Issue: What about the status of a deferred prosecution which has been granted under chapter 10.05 RCW? The answer probably depends upon the status of the case at the time of the request. Arguably, a deferred prosecution petition which is successfully completed is nonconviction data, since the case has been dismissed. But if the petition can be used to enhance a DUI sentence (*see* RCW 46.61.5055) or a Vehicular Homicide sentence (*see* RCW 46.61.520), then arguably the dismissal is still a disposition adverse to the subject. On the other hand, one could argue that, during the five-year period that the petition is pending, it is "currently being processed" by the criminal justice system, and is therefore a pending matter. *See* RCW 10.97.030(2)-(3) for definitions of conviction and nonconviction data. There is no simple answer, and the CRPA should be applied separately to each record requested.

a. While the petition is pending, it should be permissible under the CRPA to disseminate any criminal record history information. That would likely include the police report (or those portions of it which are criminal record history information). As to the petition and the treatment plan, they are not necessarily criminal record history information subject to a CRPA analysis. Always remember to consider any other applicable privacy laws.

For example, a deferred prosecution petition alleging alcoholism must contain a case history and written assessment prepared by an approved alcoholism treatment program as designated in chapter 70.96A RCW. *See* RCW 10.105.020(1). The registration and other records of treatment agencies designated under chapter 70.96A RCW are confidential, subject to some limited exceptions. RCW 70.96A.150(1). Moreover, the obligations and protections under federal regulations are extended to treatment programs approved under RCW 70.96A.090. *See* RCW 70.96A.150(3).

As another example, chapter 70.02 RCW relates to medical records. If medical records subject to that chapter come into your hands in your capacity as a law enforcement agency (RCW 70.02.050(b)), you have to maintain their security consistent with the other provisions of that statute, (i.e., limited disclosure except on a need-to-know basis). RCW 70.02.050(1), (3); *see also* 38 U.S.C. § 7332 (confidentiality of alcohol treatment records of the Department of Veteran Affairs).

b. Once the defendant has successfully completed the deferred prosecution and the case is dismissed, records regarding the deferred prosecution are, at least arguably, nonconviction data. The case has been dismissed with prejudice, and deferred prosecutions are not listed among the types of dismissals which are considered "dispositions adverse to the subject" within the definition of "conviction data." On the other hand, a deferred prosecution can be used to enhance the mandatory minimum sentence on a DUI or vehicular homicide prosecution. *See* RCW 46.61.5055 (DUI) and 46.61.520 (vehicular homicide). Arguably the dismissal is still a disposition adverse to the subject on that basis.

3. Nonconviction Data and Criminal Justice Agencies.

Criminal history record information which includes nonconviction data may be disseminated *to* a criminal justice agency *by* another criminal justice agency *for* a purpose related to the administration of criminal justice. RCW 10.97.050 (3).

Practice Issue: What happens if the civil division of a city attorney's office requests that the criminal division provide a copy of a police report from a previously dismissed case, for purposes of civil litigation? Your criminal division

would be well advised to decline the request. Even if one assumes that the city attorney's office, as a whole, is a criminal justice agency, there is a problem. The report is being requested for *civil* purposes, not for purposes related to the administration of criminal justice. RCW 10.97.050 (3) does not appear to permit dissemination in this situation.

4. Nonconviction Data under Other Limited Circumstances.

There are other limited circumstances under which criminal history record information which includes nonconviction data may be disseminated.

General Examples. These include dissemination to implement a law or court rule, pursuant to a contract for the provision of services related to the administration of criminal justice, and pursuant to a research agreement which meets the requirements of the CRPA. *See* RCW 10.97.050 (4)-(6).

Practice Tip: For your own protection, you would be well advised to prepare affidavit or declaration forms for requestors to sign when requesting nonconviction data under one or more of these limited circumstances. The specific form should recite the requirements and any use limitations spelled out in the relevant CRPA section.

5. Discretionary Disclosure to Crime Victims.

A criminal justice agency may, in its discretion, disclose to the victim of a crime the suspect's identity, along with "such information as the agency reasonably believes may be of assistance to the victim in obtaining civil redress." RCW 10.97.070(1).

General Requirements. Note that this "victim exception" requires that the victim must have suffered physical loss, damage, or "injury compensable through civil action." *Id*. Disclosure is *discretionary*, and may be given without regard to whether the suspect is an adult or juvenile, and without regard to whether charges were filed, declined, or dismissed. *Id*.

Practice Issue: What if the victim seeks the information to obtain an anti-harassment order against the defendant? Does behavior which gives rise to potential injunctive relief constitute "injury *compensable* through civil action?" The CRPA provides no clear answer. If you take a more expansive reading of the CRPA and plan to provide information based on the circumstances of a particular

case, you might want to have the requestor confirm in writing the information which supports your conclusion. Because disclosure under this exception is *discretionary*, you may want to take the more conservative approach and deny the request.

Practice Issue: What if the victim of a domestic violence assault wants to use the information as part of a civil child custody action? Is a child custody action a form of civil redress for a domestic assault? Does it matter whether the children actually witnessed the assault? The answer is the same as in the practice issue above.

6. Updating Information Before Dissemination.

The requirements for updating information prior to dissemination, and for keeping track of information which is disseminated, are set out in the CRPA at RCW 10.97.040 and 10.97.050(7).

E. Domestic Violence Victims

Victims of domestic violence have the right to be apprised of the filing *or* the declining of domestic violence charges. *See generally* chapter 10.99 RCW.

1. Statutory Requirements.

RCW 10.99.060 provides:

> The public attorney responsible for making the decision whether or not to prosecute shall advise the victim of that decision within five days, and, prior to making that decision shall advise the victim, upon the victim's request, of the status of the case. Notification to the victim that charges will not be filed shall include a description of the procedures available to the victim in that jurisdiction to initiate a criminal proceeding.

2. Victim Complaint Procedures.

For procedures relating to filing misdemeanor or gross misdemeanor charges by a citizen, see CrRLJ 2.1(c).

3. Application to Municipal Prosecutors.

In light of the broad statement on legislative intent, found in RCW 10.99.010, and the definition of domestic violence, found in RCW 10.99.020, it seems clear that the victim contact requirement is intended to apply to municipal and county prosecutors alike.

APPENDIX

APPENDIX I: TABLE OF CASES

APPENDIX II: TABLE OF STATUTES

APPENDIX III: TABLE OF RULES

APPENDIX IV ADDITIONAL AUTHORITIES

APPENDIX V: INTERNET RESOURCES

- Access Washington (Washington State Website) - http://access.wa.gov/
- American Bar Association - www.abanet.org
- Association of Washington Cities (AWC) - http://www.awcnet.org/portal/StudioNew.asp?webid=1&mode=B1
- City Directory and Websites (list of Washington city websites) - http://www.awcnet.org/portal/StudioNew.asp?ChannelLinkID=4953&ArticleID=0&webid=1&mode=B1
- FindLaw.com (general legal information) - http://www.findlaw.com/
- Gonzaga University School of Law - http://www.law.gonzaga.edu/
- Google Scholar (search engine for legal opinions and journals) - http://scholar.google.com/
- International City/County Management Association - www.icma.org
- Legal Discussion (discussions on any legal topic) - www.lawforum.net
- Legal Information Institute (Cornell University Law School) - http://www.law.cornell.edu/
- Legal Resources on the Internet (USC Law) - http://weblaw.usc.edu/library/resources/internet.cfm
- LegalWA.org (link to several legal sites) - www.legalwa.org
- Municipal Research & Services Center - www.mrsc.org
- National League of Cities - http://www.nlc.org/
- Revised Code of Washington (RCW) - http://apps.leg.wa.gov/rcw/
- Seattle University School of Law - http://law.seattleu.edu/
- United States Federal and State Courts - http://www.ilrg.com/caselaw/
- United States Rules of Court and Statutes - http://www.ilrg.com/codes.html
- University of Washington Law School - http://www.law.washington.edu/
- Washington Administrative Code (WAC) - http://apps.leg.wa.gov/WAC/default.aspx?cite

- Washington State Attorney General - http://www.atg.wa.gov/
- Washington State Bar Association - www.wsba.org
- Washington State Code Reviser - http://www.leg.wa.gov/CodeReviser/Pages/default.aspx
- Washington State Courts - http://www.courts.wa.gov/
- Washington State Court Decisions - http://www.mrsc.org/wa/courts/index_dtSearch.html
- Washington State Court Rules - http://www.courts.wa.gov/court_rules/
- Washington State Court Rules: Rules of Professional Conduct - http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=RPC
- Washington State Legislature - http://www.leg.wa.gov/pages/home.aspx
- Washington State Public Affairs TV Network (TVW) - http://www.tvw.org/index.cfm?bhcp=1
- WSAMA (listserve) - www.wsama@yahoogroups.com