



Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON

AGO POLICY III.20

SCREENING FOR CONFLICTS/SEPARATION OF FUNCTIONS

Contact: Ethics Committee

Cross References: *RPC 1.7(a)(2); RPC 1.8(l); RPC 1.9; RPC 1.11(a)(2) and (d)(1) and (2); RPC 1.12(a) (c)(1) and (2); RPC 5.3; RCW 42.52; Employee Training and Development Policy; Transfers and Hiring of Attorney Staff, Law Clerks and Legal Externs; Protocols for Screening Staff¹; Sample Memo to Agency; Conflicts Screening Questionnaire; Memo to Management Team and Law Clerk Recruitment Coordinators; Notice of Screening Letter to Former Client's Agency; Affidavit; Letter to Court*

Approved: March 24, 2015

I. POLICY STATEMENT:

The AGO is committed to ensuring that staff members perform their duties consistent with the Rules of Professional Conduct and free of conflicts of interest. It is the policy of the AGO that individual members of the staff, whether employees or volunteers, be screened from participation in matters within the office when such screening is required or advisable under the Rules of Professional Conduct. This policy also addresses situations where either the role that staff have with respect to a particular matter or other considerations may suggest that some separation of functions should be considered. This policy applies equally to non-attorneys and volunteers, including law clerks.

Absent written conflict waivers obtained based on informed consent, formal screening should be put in place under the following circumstances:

- An attorney or non-attorney assistant who, prior to employment with the AGO, represented or assisted in the representation of a client in the same or a substantially related matter where the former client's interests are materially adverse to the interests of the state, should

be screened from participation in that matter on behalf of the state. [RPC 1.11\(d\)\(1\)](#); [RPC 1.9\(a\)](#); [RPC 5.3](#).

- An attorney or non-attorney assistant who, prior to employment with the AGO, was involved personally and substantially in a matter in which the state is also involved should be screened from participation in that matter on behalf of the state. [RPC 1.11\(d\)\(2\)](#); [RPC 5.3](#).
- An attorney or non-attorney assistant who, prior to employment with the AGO, was a judge, arbitrator, mediator, adjudicative officer, or law clerk to such person, and in that capacity participated personally and substantially in a matter in which the state is involved can participate in the matter on behalf of the state only if all parties to the proceeding give written consent after disclosure. [RPC 1.12\(a\)](#). If all parties do not consent, the attorney or non-attorney assistant should be screened from the matter and the parties and tribunal sent written notice. [RPC 1.12\(c\)](#); [RPC 5.3](#).

While screening and written notice may not be technically required in all of these instances, such actions are consistent with the spirit of the RPC. See [RPC 1.11, Comment 2](#).

The screening process applied to particular situations may vary according to the circumstances. Linked to this policy is a set of recommended [Protocols for Screening Staff](#). In circumstances described in the protocols, screening should be implemented at least in part by means of a screening memorandum. (See [Sample Screening Memorandum](#)). When a new staff member is hired, or when a current staff member transfers to another division, he or she should review and fill out a [Conflicts Screening Questionnaire](#). The process for conflicts screening is described in [Conflicts Screening Process](#). For new attorneys or non-attorney assistants who had clients in a previous position or who served in a judicial or related capacity, the division chief may need to apprise that attorney's former clients or the courts of his or her new position and how potential conflicts screening will be handled. See [Sample Letter to New AAG's or Non-Attorney Assistant's Former Clients](#). See also [Sample Affidavit for New AAG's or Non-Attorney Assistant's Former Clients](#) which can be used in circumstances that may pose a conflict situation. [Sample Notice Letter to Court](#) is to inform the court of the screening when a new AAG or non-attorney assistant previously served in a judicial or related capacity. See [RPC 1.12](#).

The office will provide training and education to staff to ensure that all staff are aware of their responsibilities regarding the identification of potential and actual conflicts. Staff must complete training at least once every five years, and should additionally complete training within one month of transferring to a new division or returning to the Attorney General's Office, even if they have previously completed training within the prior five years.

In addition, there are occasional situations where multiple attorneys and non-attorney assistants in the Attorney General's Office participate in the same matter, either in different capacities requiring a separation of functions or where they represent or have represented different state parties, whose positions in the matter are truly adverse. Formal screening is not necessarily required by the RPCs in these situations since the state and not the individual agency is the client. However, imposing a level of separation between the activities of those attorneys in such circumstances both eliminates any question of RPC compliance and contributes to ensuring the public that office responsibilities are being conducted in a fair and equitable manner. In addition, such separation and screening

may be used to meet other legal requirements such as avoiding impermissible ex parte communications under the Administrative Procedure Act.

This separation of functions in many instances will not rise to the same level as formal “screening” as that concept is reflected in the RPC. For example, a staff member who is “screened” from a matter under the RPC may not discuss the matter with a staff member who is handling the matter. However, if staff members are simply working on the matter in an adversarial role, discussion of the matter is allowed just as any two attorneys who are on opposite sides of a case routinely discuss the case with each other. If members are performing different functions such as representing the hearing officer and presenting the case, a presentation by one attorney in an adjudicative proceeding that is reviewed by the other attorney is likely. In these situations, discussions of the matter would be limited by the provisions of the Administrative Procedure Act.

Finally, on occasion, the AGO is involved in matters that affect a broad category of persons that may include members of the staff that are working on the matter, or their relatives or household members. Examples include actions affecting the rights or responsibilities of public employees, members of certain professions, residents of a particular community, etc. The fact that individual employees of the AGO may be affected by the outcome of the matter as part of a larger group does not preclude them from working on the matter, except for those individual employees who believe that their interests (or the interests of their relatives or household members) in the matter are such that the employees will be unable to fulfill their responsibility to protect the interests of the state. *RPC 1.7(a); RPC 1.7(b)*. However, class actions in which members of the class are also employees of the AGO present a situation that should be discussed with the Division Chief and appropriate Deputy.

There may be situations where an employee, or a relative or household member of an employee, has a personal or financial interest in a matter being handled by the AGO. In such situations, the employee should not participate in the matter to assure that the matter is being handled free of any actual or perceived influence by such individual. Any questions about whether the interest is of sufficient significance to be of concern should be discussed with the Division Chief. See, e.g. *RPC 1.7(a)(2); RPC 1.7(b); RPC 1.8(l); RCW 42.52*. Again, formal screening may not be required, depending on the circumstances. Members of the Office Ethics Committee may be consulted at any time for assistance or guidance on these issues. *See Membership List for Ethics Committee*.

II. RESPONSIBILITIES:

The **Hiring Coordinator/HRO** shall ensure that all applications for employment include answers to the three general conflicts questions identified in the *Protocols for Screening Staff*. For attorney positions, the **Attorney Recruitment Administrator** shall provide the *Conflicts Screening Questionnaire* to preferred candidates prior to their final interview with the Chief Deputy Attorney General or his or her designee. For non-attorney positions, **Lead Support** shall provide the *Conflicts Screening Questionnaire* to new employees as soon as practicable after the new employee begins work with the Attorney General’s Office.

Newly hired attorneys shall complete and return the Conflicts Screening Questionnaire prior to their first day of employment with the Attorney General’s Office. **Newly hired non-attorney staff**

shall complete and return the Conflicts Screening Questionnaire as soon as practicable after beginning work with the Attorney General's Office.

The ***Division Chief (or Administrative Office Manager in the case of non-legal divisions)*** shall review the questionnaire, and other information reported by staff, to determine whether any actual or potential conflicts, to the extent they exist, may be adequately addressed through screening. If such screening is not possible, the ***newly hired employee*** will not be permitted to work in the position. If such screening is deemed appropriate, the ***Division Chief*** shall ensure that such screening or other separation measures are implemented as appropriate. The ***Division Chief*** shall retain copies of all screening questionnaires for all staff currently working in his or her division and (a) if a staff member transfers to another division will provide the relevant questionnaire to the staff member's new Division Chief, and (b) if a staff member leaves the Attorney General's Office will provide the relevant questionnaires to the Human Resources Office for retention in the staff member's personnel file. When screening memoranda are issued, the ***Division Chief*** shall retain them in a location known to and accessible by all staff in the division. ***He or she*** shall also ensure that appropriate notices are sent to the former client's current attorney, if ascertainable, or to other appropriate entities. See ***Protocols for Screening Staff***. When one becomes aware of either staff or a matter in other division(s) that should be subject to screening or other separation of functions, the ***Division Chief*** shall contact other Division Chief(s) to apprise them of the situation and shall monitor techniques used for screening or other separation of functions. ***He or she*** shall modify as necessary and shall report significant situations or issues to the assigned Deputy. In the event that the screen or separation of functions is "broken," or was not established but should have been, the ***Division Chief*** shall ensure that appropriate notification is made where required by applicable RPC and that screening or other separation of functions is established or reestablished in an appropriate manner. ***He or she*** shall ensure attorney staff who leave the office are advised that notice required by ***RPC 1.11(a)(2)*** should be addressed to the "Attorney General's Office" as the "appropriate government agency."

All staff shall complete training at least once every five years, and must additionally complete training within one month of transferring to a new division or returning to the Attorney General's Office after time away, even if they have previously attended training within the prior five years. ***All staff*** shall be sensitive to situations described above indicating that screening or other separation of functions should be considered. ***All staff*** shall report individual situations to the appropriate supervisor and shall adhere to instructions regarding screening. If, for any reason, the screen is broken, ***they*** shall report it to the supervisor and follow instructions.

The ***Leadership Team*** shall monitor office-wide implementation of this policy and resolve issues as necessary.



BOB FERGUSON
Attorney General

¹ This policy applies to all staff, including volunteers, irrespective of the use of terminology herein that references employee(s), hiring or employment.