Office of Public Defense

Conflicts of Interest Case Analysis Protocols

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Conflicts Work Group

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Draft Public Defense Conflicts Policy
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1. Introduction

Scope of policy: This is to provide guidance in determination of conflicts for the purpose of accepting a case, and guidance in determining a conflict which may arise during the proceedings. Ultimately the Rules of Professional Conduct (RPC) provide the rule of decision regarding conflicts of interest, and this policy in no way is intended to supersede or contradict the RPCs.

These principles outline a client-centered approach to the ethical responsibilities of public defenders in King County.

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the court and a public citizen having special responsibility for the quality of justice. Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a conscientious and ardent advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

In the nature of law practice *in general, and public defense especially*, however, conflicting responsibilities are encountered. Virtually 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.

This policy respects and preserves all attorneys' ethical duties as independent professionals. (*See* RPC 5.4(c), "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."). Both supervisors and subordinate attorneys are bound by those ethical duties. RPC 5.1; RPC 5.2. If a supervisor and subordinate attorney disagree as to an ethical duty, and the decision of the supervisor is reasonably arguable, then the subordinate attorney can rely on the decision of the supervisor. *See* comment [2] to RPC 5.2. However, in some instances it is appropriate for the subordinate attorney to bring a question of ethics to the attention of the court, for purposes of review or for ensuring that a full record is made for the client's benefit. Such review is appropriate when it is intended to protect a client, and a staff attorney shall suffer no adverse consequence as a result.

2. Applicable Rules

RPC 1.6, 1.7, 1.8, 1.9(a), 1.9(c), 1.10, 1.11(d), 1.15(b), (2), (3), (5) and (d), 3.7, 5.1, 5.2, 5.4, 6.2, 6.5,

3. Definitions

Attorney–Client Relationship: the existence of this relationship is a matter of fact. It is grounded in the client's reasonable belief that an attorney-client relationship exists. This reasonable belief may be based upon the attorney's words or actions; the relationship exists if the client is relying upon the legal expertise of the attorney and the attorney was specifically making that expertise available to the client. *In Re Matter of McGlothlen*, 99 Wn.2d 515 (1983), *State v. Hansen*, 122 Wn.2d 712 (1993), *Dietz v. Doe*, 80 Wn.App.785 (1996). An attorney-client relationship can be formed without an attorney being assigned by the court or the Office of Public Defense (OPD) and without the attorney appearing in the matter. The privileges accorded by the attorney–client relationship exist beyond the active relationship and survives the death of the client, *TC Theatre Corp. v. Warner Bros. Pictures, Inc*., 113 F. Supp.265 (1953), *State v. Thorne,* 43 Wn.2d 47 (1953).

Client: a client is any person who receives legal representation in court or advice during a consultation. The scope of the attorney–client relationship is limited to the purpose of the representation as it reasonably appeared to the client. An attorney-client relationship may be established without an assignment of counsel by the government. Whether a person actually is a client is independent of whether they have a right to be one, i.e., whether they have a right to counsel. The method of determining the scope of representation is the same as noted above in the existence of the attorney-client relationship.

Current Client: a client in any pending civil or criminal matter. This includes a client who has been sentenced and is awaiting a motion for reconsideration, WSBA Formal Opinion 176, and a client who has been assigned or given advice ("sub advice") on a case not yet filed.

Former Client: a client no longer being represented by the agency. Someone who absconds and whose case is not "concluded" may still be a former client if the agency has ceased representation. By the same token, representation may not actually end when the funder views the case as being concluded for purposes of credit & payment. For instance the client may still be seeking advice on a related matter, such as how best to deal with a problem with a treatment agency while on probation. Whether the client is a current or former client must be determined by the actual relationship rather than the agency's payment or credit status.

Firm: Public defense organizations are law firms under RPC 1.10. "For purposes of the Rules of Professional Conduct, the term 'firm' denotes lawyers in a law partnership… lawyers employed in a legal services organization or the legal department of a corporation or other organization. *Id.* comment [1] "Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules." Comment [4] to RPC 1.0.

The public defenders of King County, having reviewed their organizations and structures, have determined that they are law firms for purposes of these rules.
Pending Matter: an active matter where there is either on-going or reasonably anticipated future attorney representation of a client.

Concluded Matter: a matter in which the attorney reasonably believes that the client is no longer expecting representation or in which the attorney has informed the client that the attorney can no longer represent the client. For example, a client we represent for a line up may call us with questions which we may choose to answer when he has not yet been filed on and has no other lawyer; we may do so without assignment or credit. That does not mean the attorney-client relationship is not ongoing. That must be determined empirically on a case-by-case basis.

Information Relating to the Representation of a Client: 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 RPC 1.6(b). The phrase "information relating to the representation" should be interpreted broadly. (See definitions for confidences and secrets below). (Washington Comment 19 to RPC 1.6).

Confidences: information protected under attorney client privilege, RCW 5.60.060.

Limited Appearance (RPC 1.2): an appearance made by an attorney who is clearly stated on the record to be for a limited purpose only, or can be observed to be for a limited purpose, based upon all of the surrounding facts..

Practice of Law: the practice of law is the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person which require the knowledge and skill of a person trained in the law. *For further definition see* General Rule (GR) 24.

Secret: [Under former RPCs:] information gained as a result of the professional relationship with the client, which the client has requested be kept secret, or information which would embarrass the client or be detrimental to the client. The scope of secret is broader than the scope of confidences, *Seventh Elect Church in Israel v. Rogers,* 102 Wn.2d 527 (1980). [Current RPCs replace “secrets” with “confidential information, which is considerably broader. It encompasses “not only matters communicated in confidence by the client but also all information relating to the representation, whatever its source.” Commentary to RPC 1.6.]

Witness: consistent with the Rules of Evidence, a witness is a person whose testimony or out of court statement may be offered by any party in a hearing or deposition.

4. Policy

4.1. Ethical duties regarding conflicts of interest

Supervisors’ ethical duties: RPC 5.1 sets out the duties of supervisors and other lawyers who “individually or together with other lawyers possess

comparable managerial authority in a law firm." RPC 5.1(a) requires that such supervisors "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of Professional Conduct." RPC 5.1(b) mandates that "a lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." RPC 5.1(c) clarifies that a supervising lawyer "shall be responsible for another lawyer's violation of the Rules of Professional Conduct if: (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or (2) the [supervising] lawyer … "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action."

Subordinate lawyers' ethical duties: RPC 5.2(a) sets out the duties of a subordinate lawyer. RPC 5.1(a) states that "a lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person". This is circumscribed by RPC 5.2(b), which clarifies that "a subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty."

Non-lawyers assistants' ethical duties: RPC 5.3 mirrors the obligations of a supervisor under 5.1, with respect to non-lawyer assistants as to whom the lawyer has direct supervisory authority.

Taken together, these RPC's provide guidance for the OPD policy for the process of determining conflicts of interests. Supervising attorneys, including the Deputy Director for the Public Defense divisions, and others acting in a direct supervisory role over other lawyers, are obligated to ensure that the lawyers and non-lawyers comply with the RPC. This applies as to ensuring that ongoing vigilance is maintained to identify and to properly address potential conflicts of interest. It also applies to the obligation to provide direct supervision regarding the actions of the lawyers and non-lawyers within the division in regard to identified potential conflicts of interest.

In order to ensure this process is applied consistently to all such circumstances, it is the policy of OPD that with respect to all matters of identified potential conflicts of interest affecting an assigned client and case, all staff ("subordinate") lawyers shall review such conflicts issues with their immediate supervisor. In consultation with the lawyer, the supervisor shall determine the appropriate course of action, which may include a determination that no real conflict of interest exists, that appropriate steps short of seeking to withdraw from representation can be taken, and/or determining that the attorney and the division must seek to withdraw from representation.

In most situations, this process should resolve the matter consistent with the ethical obligations of the lawyer involved. See: RPC 5.2(b) and comment thereto. In the rare circumstance that the lawyer believes that the supervisor's resolution of the issue was unreasonable under the circumstances presented,

the lawyer shall seek the review by the Director or Deputy Director of the Division. In the event that the resolution determined by the Deputy/Director of the Division is still believed by the lawyer to be unreasonable, and the lawyer continues to believe that s/he must seek to withdraw from the case, then the lawyer can at that stage, proceed to file a motion to withdraw and to allow substitution of counsel. The motion should be filed in the applicable court, under seal and with appropriate protective orders and should include adequate detail as to the reasons for the motion including the steps taken within the Division to seek resolution of the issue, and the details regarding the proposed resolution.

4.2. Concurrent representation of more than one person who is involved in a single matter.

This presumptively should not be done. The office should consider withdrawing from one client and may be required to withdraw from more. See RPC 1.7, 1.9 and ABA Final Opinion 92-367.This type of conflict is significant and exceptions are limited (i.e. compelling reasons exist, the attorney has explained the potential conflict fully, and all clients' consent is in writing). What appears to be an agreed representation quite often unravels to the detriment of the clients and the attorney.

a) **Arraignment or investigation calendars:** representation on these calendars is limited in scope. The client shall be advised of the limited scope of the representation for the purpose of assessing and challenging probable cause to detain and addressing issues of bond. Generally, these do not pose substantive conflicts problems. Conflicts in these circumstances must be known to the attorney; the attorney does not have an obligation to investigate for possible conflicts. If an attorney believes that being required to represent co-defendants or any individual defendant presents a conflict and no conflict counsel can be made immediately available, the attorney should advise the client and the court and reserve release arguments until another attorney can appear.

   Absent extraordinary circumstances, the Attorney of the Day (AOD) must address the issue of probable cause and must address the arraignment.

b) **Probation violation hearings and reviews: e**ach type of hearing requires an independent assessment about the existence of a conflict. If there was a conflict at trial, the same conflict may not apply at a probation violation hearing. By the same token, if there was not a conflict when the case was assigned originally, one may have arisen prior to a probation violation hearing being set.

4.3. Conflicts with witnesses, co-defendants, co-respondents in a dependency case or suspects who are former clients

This situation is governed by RPC 1.9 (a)-(c) and RPC 1.10. RPC 1.6 does not create an independent source of conflict; RPC 1.7 addresses current clients only.

If an individual lawyer in the office is precluded by RPC 1.9 from representing a particular client, then all the members of the law firm are likewise prohibited from representing the client under RPC 1.10(a).

RPC 1.9(a) has two separate components. Both of these must be satisfied for a conflict to exist.

1) The current client's interest must be **materially adverse** to the former client, such as in *State v. Hatfield* 51 Wn. App.408 (1988), where a current client/defendant sought to blame a former client for the current assault charge. Whether a particular representation is adverse to a former client is fact specific. Former clients may have adverse interests due to financial, reputational, associational, liberty, and other interests.

And

2) The matter must be the **same or a substantially related matter**.
In *State v. Hunsaker*, 74 Wn. App.38 (1994), the court defined "substantially related matter" as a factual context analysis. The facts of the former client's case or cases are to be considered, in conjunction with additional facts, which would have been gleaned from the former client or others during the previous representation. This set of facts is to be compared with the current set of facts and information gathered from the current client. If there is a relevant interconnection, the matters are substantially related. The relevancy determination is made based upon the admissibility of evidence in court, which will turn on the legal issues present in the current trial.

However, if the former client's privileged information may be used in the exercise of substantive discretion prior to trial, that point is the relevant point of consideration, *State v. Stenger*, 111 Wn.2d 516 (1988), where a prosecutor who was deciding whether to ask for the death penalty had previously represented a defendant, the entire prosecutor's office is disqualified by the conflict. If the charge had been Murder 1, the prosecutor would not have been disqualified.

This is an objective analysis. If a substantial relationship is found, the prejudice to the former client is presumed. *Teja v. Saran*, 68 Wn. App.793 (1993).

The 2008 revisions of the RPCs provide commentary clarifying the definition of "substantially related" under this Rule:

> (3) Matters are "substantially related" for purposes of this rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would ***normally have been obtained*** in the prior representation would materially advance the client's position in the subsequent matter. (Emphasis added)

This means the analysis is independent of what was actually learned in the prior representation. The assessment depends on what would normally have been learned in a case of that type, under those circumstances, in that period of time (e.g., little would normally be learned via investigation in a routine case type that we closed after three days, but it is very likely we would at least have had discovery).

The attorney has a duty to the former client and may not act adversely to the former clients interests when defending the current client if the prior representation would be substantially related to the current representation (RPC 1.9(a)) or by using actual information from the prior case (RPC 1.9(c)).

RPC 1.9(c)

This section prohibits **using information related to the representation of the former client** to the disadvantage of the former client. One would not reach this question if the current representation is both substantially related and adverse to the former client – that would be a conflict under Section 1.9(a). This is a fact specific analysis for each case. The fact of prior representation alone will not give rise to a finding of conflict.

In addition to the client-specific prohibitions in RPC 1.9(a) and (c), defense counsel may also be subject to limitations under RPC 1.11(a), if a lawyer previously worked "as a public officer or employee of the government" on a particular matter. The rule states that a lawyer shall not "represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee," unless the governmental agency gives informed consent. While these situations will be rare, there may be matters that a lawyer previously handled as a prosecutor or other official which would give rise to criminal prosecutions that could trigger the bar. Even if that lawyer is disqualified, RPC 1.11(b) allows the firm to continue with the representation if there is a timely screen.

Actual access to the information related to the prior representation is key on this prong; screening may be considered in limited circumstances. *See Section 4.4*. "Screening" the prior attorney(s), staff who worked on the prior case, and the prior client's file(s) from the current attorney will sometimes preclude actual use of the former client's confidences and secrets, and will allow the current representation to go forward.

Public source rule: if the relevant information to be used against the former client in cross-examination is a matter of public record, that in the past would not ordinarily have been the source of a conflict. The public record includes all information which may be obtained in discovery, court files and police reports, *State v. Anderson*, 42 Wn. App.659 (1986). Current analysis of the expansion of the definition of protected information under RPC 1.6 indicates that this exception may have narrowed. Cases in which the relevant information is a matter of public record should be assessed carefully. RPC 1.9(c)(1) refers to this information as "generally known." If the public record is readily accessible, such as local criminal history, then it probably still qualifies as "generally known" or public record and would not be a basis for withdrawal. Other information, such as out-of-state criminal history, arrests that did not result in charges, or police reports which would have to be requested in a public disclosure request, might be considered public record only with more caution.

It is essential to avoid the appearance of unfairness or impropriety. Therefore, if a former client is a witness in a current case, the current case ordinarily should not be assigned to the same attorney who previously represented the witness. This is to avoid the appearance of unfairness, rather than necessarily because of a substantive conflict.

4.4. Screening for prior representation

Screening for information which the firm has already received is complicated and raises many ethical considerations. Attorneys rotate from unit to unit; attorneys cover substantial hearings for other attorneys, in some units a hearing, before the client is assigned to a particular defender, can involve full representation and litigation of complex disputed issues which is done by the attorney of the day. In public defense supervising attorneys are fully informed regarding the details of many if not most cases, and attorneys routinely avail themselves of the collective wisdom gained by other lawyers in the office. Full discussion of cases is not only a component of representation; it's a necessary component. In addition, staff in the various units, including investigators, social workers, and paralegals, are fully integrated and professional members of the defense team, and thus acquire and remember information related to the cases of many clients. These are the practical realities of public defense: they are also some of the reasons that public defenders provide excellent representation despite high caseloads and limited resources.

Screening the prior attorney(s) and staff who worked on the prior case, and all access to the prior client's file information, from the current attorney may sometimes prevent actual access to and use of the former client's confidences and secrets, and will allow the current representation to go forward. To be effective, a screen must convincingly ensure that no material information relating to the former representation is transmitted by any personally disqualified staff member. A screen must also ensure that no information about the current representation is transmitted to the personally disqualified staff. The following are some examples of ways information may be transmitted in a public defender office that must be effectively restricted by a screen: casual

hallway conversation; group discussions; discussions by the screened attorney with the unit supervisor; and all access to file information whether in the physical file, case management system or shared drives. Because of these requirements, screening should not be attempted where the personally disqualified staff member works in the same unit as other staff who are working on the current case. For example, a disqualified felony unit attorney may not be screened from a felony unit case, nor may any personally disqualified support staff be screened from any case that where other members of their work unit are involved in the current case. For a screen to be effective, the agency must be able to convincingly demonstrate that all staff who may have had prior personal involvement in the former client's matter are identified and appropriately screened. Because supervisors must have responsibility and oversight over all cases within their units, it is not possible to screen personally disqualified supervisors.

There are instances where screening is appropriate and possible. Examples would be cases where a court order requiring screening has been entered, cases where an attorney or staff person has a personal conflict regarding a case, or where an attorney or staff person is joining the firm with information from an adverse client, as referenced in RPC 1.10(e) or RPC 1.11 (prior governmental employment). However, as a practical matter effective screening in a public defender office is extremely difficult and a resource-consuming process. Although we often feel a loyalty to our clients that draws us towards keeping a case, the client is better served by conflict-free representation.

4.5. Imputed Conflict RPC 1.10

Public defense organizations are law firms under this rule, *State v. Ramos,* 83 Wn. App.622 (1996) and *State v Hunsaker*, 74 Wn. App. 38 (1994). There is a dictum to the contrary in *State v. Stenger*, 111 Wn2d 516 (1988). However, this policy adopts the more expansive rule, which is that a conflict for one member of a firm is a conflict for all. See comment [4] to RPC 1.0. "Similar questions can also arise with respect to lawyers in legal aid and legal services organizations. Depending upon the structure of the organization, the entire organization or different components of it may constitute a firm or firms for purposes of these Rules." The public defenders of King County, having reviewed their organizations and structures, have determined that they are law firms for purposes of these rules.

Attorney terminating relationship with a firm. When an attorney terminates a relationship with a public defense firm, the imputed conflicts rule may cease to exist for cases handled by that attorney, if it can be determined that no other attorney or staff have information covered by RPC 1.6 See RPC 1.10.

4.6. Attorney Serving as a Public Officer RPC 1.11(d)

Multiple courts have taken the position that conflicts of interest in the public defender's office are governed by Rules of Professional Conduct 1.11(d) because these offices are governmental offices and as such must be examined

in a different way. See, Anderson v. Commissioner of Correction, 127 Conn. App. 538, 15 A.3d 658 (2011), App. Granted, 301 Conn. 921, 22 A.3d 1280 (2011). In light of the *Dolan* decision which determined that the contractors were arms and agencies of the County, a strong argument can be made that the appropriate conflicts analysis should be done under RPC 1.11, which states in part: "except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee is subject to Rules 1.7 and 1.9; and 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."

Still other courts have come to the conclusion that if there is an administrative distinction between two offices, this separation is sufficient to avoid a per se conflict. See, People v. Robinson, 79 Ill.2d 147, 37 Ill. Dec. 267, 402 N.E.2d 157 (1979), and Castro v. Los Angeles County Bd. of Supervisors (1991), 232 Cal. App. 3d 1432 [284 Cal.Rptr. 154].

4.7. Attorney joining agency from prior practice, RPC 1.10(e) and 1.11.

Pursuant to RPC 1.10(e), an agency may represent a client with whom a particular staff lawyer has a conflict based on his or her association with a prior firm if the lawyer is effectively screened from participation in the representation and the client of the former firm receives notice of the conflict and the screening mechanism. *See discussion regarding screening supra in Section 4.4.* Comment 10 to RPC 1.10 also requires the agency to evaluate the firm's ability to provide competent representation even if the disqualified member can be screened in accordance with this rule. In order to meet these obligations, prior representation history for new hires must be collected prior to cases being assigned (and ideally during the hiring process) and recorded in the case management software. Supervisors reviewing potential case assignments for conflicts must carefully consider whether screening procedures will adequately and convincingly resolve potential conflicts such that adequate representation can be provided. Supervisors must also ensure that that appropriate notice is sent to the former client. A screened attorney may not supervise, cover, access information about, provide information for, access information from, provide information to, or be privy to any discussion about the case. *See discussion regarding Section 4.4.*

If a personally disqualified attorney believes that the agency has not adequately screened him or her from the representation, that attorney may seek judicial review of the screening mechanism, as provided in Rule 1.10. Agency management shall permit any staff member to seek such review and the staff member shall suffer no adverse consequence as a result of his or her decision to seek judicial review.

4.8. Transfer due to irreconcilable conflict with defendant

Simple lack of rapport is insufficient to establish a basis to withdraw under irreconcilable differences, *State v. Hegge*, 53 Wn. App. 345 (1989). General discomfort with an attorney is not a reason to withdraw, *State v Sinclair*, 46 Wn. App. 433 (1986). Significant disagreement over trial strategy is not a basis to withdraw, *In re: Stenson*, 142 Wn.2d 710 (2001).

This basis for withdrawal is only available where the relationship between the client and counsel has collapsed completely and conversation is not occurring. *U.S. v. Moore*, 159 F.2nd 1154 (9th Cir. 1998); *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970); *U.S. v. Williams*, 594 F.2d 1258 (9th Cir. 1979); *Frazer v. US*, 18 F.3d 778 (9th Cir. 1994). See RPC 3.3 footnote 15.

The agency may reassign representation which one of its attorneys finds repugnant to another attorney in order to improve the attorney-client relationship. A decision whether to transfer should be reserved to the discretion of the agency. Transfer caused by repugnancy is a personal conflict for the attorney which generally is not imputed to the other members of the firm.

4.9. Client complaints

If a defendant files a bar complaint against the attorney, this alone is not a reason for the attorney to withdraw, *State v. Sinclair*, 46 Wn. App. 433 (1986).

If a defendant raises a claim of ineffective assistance of counsel in the present case, that alone is not a basis for withdrawal, *State v. Rosborough*, 62 Wn. App. 341 (1991). If an essential component of effective representation of a client entails arguing that the present attorney or another member of her firm was previously ineffective, however, the present attorney has a conflict and must withdraw.

The issue may be addressed to the sound discretion of the court, *State v. Stark*, 48 Wn. App.245 (1987).

Generally, a client's motion to substitute counsel because of ineffectiveness is a pro se motion, unless the assigned attorney agrees with the defendant, *State v. Staten*, 60 Wn. App. 341 (1991). See also *Stenson*, 142 Wn.2d 710 (2001). However, it is appropriate for an attorney to provide his/her client with advice as to the general nature and standards for such a claim.

4.10. Attorney as a witness, RPC 3.7

No lawyer from the firm may represent a client where he or she will personally testify substantively in the client's trial. If an attorney from a firm performed work as an AOD, providing substantial advice during investigation or providing representation during an investigation bond hearing, the assigned attorney must immediately assess in good faith whether the AOD attorney is likely to be

called to testify at trial and, if so, whether it will be tactically disadvantageous for an attorney from the same firm to be representing the defendant.

4.11. Employee of the firm as a witness for the prosecution

If an employee of the firm is a current witness for the prosecution, the firm may not represent the defendant or any other witness.

4.12. Employee of the firm with knowledge of the defendant or any witness, including a victim, RPC 2.1

If the employee has a personal relationship with a defendant, witness or victim, this alone is not a basis to withdraw. A personal relationship will only be a basis for the specific individual to withdraw if the relationship clouds the person's objectivity to such a degree that the employee cannot participate in the case, RPC 2.1. This basis for withdrawal is personal to the employee and may not be imputed to the entire firm.

If the employee would be a substantive witness in the current case, for either the prosecution or defense, the firm should consider RPC 3.7.

4.13. Attorney Duty upon withdrawal

If the issue of a conflict of interest is addressed by the court, the assigned attorney or representative is required to fully disclose the basis for the withdrawal to the court upon an inquiry, *State v. Vicuna*, 119 Wn. App. 26 (2003). The defense ordinarily should seek to provide the disclosure in camera, as required by law, and the attorney may seek whatever protective orders are necessary to protect the client's interests.

The office should not provide any information regarding a withdrawal on any records that will be provided to the case assigning authority when that information would reveal confidences or secrets of current or former clients, or could compromise current or former clients. The withdrawing attorney must relinquish the contents of the file to the substituting attorney at the informed direction of the client, including all discovery, investigation and notes from interviews with witnesses or the defendant; in any event, the withdrawing attorney shall forward discovery after learning the identity of the new attorney. Where possible, counsel should seek written release.

Information about another client must be withheld, absent that client's consent to release it, if it came from the private files of the withdrawing firm.

The withdrawing attorney shall make a copy of the file for the firm's records.