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## **Court of Appeals Cites Common Law Roots Of Lawyer-Witness Rule in Overturning Conviction**

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Division I of the Court of Appeals recently discussed the common law roots of the “lawyer-witness rule” in overturning a criminal conviction. The decision in *State v. Sakawe*, 2015 WL 7721826 (Wn. App. Nov. 30, 2015) (unpublished), was unusual because it found that there was no violation of the corresponding Rule of Professional Conduct—RPC 3.7—but concluded, nonetheless, that the common law doctrine underlying RPC 3.7 prohibited a deputy prosecutor who had tried the case initially from testifying as a key witness in a retrial.

The predicate facts involving the prosecutor’s testimony were unusual. She had successfully prosecuted the defendant for assault and robbery. A central piece of evidence in the first trial was a video taken by a hotel security system that helped identify the defendant. The first conviction was later reversed for unrelated reasons. By the time the case was retried, the hotel security system had been replaced and, as a result, the video was not available. Instead, the first prosecutor was called—over defense objection—at the retrial to testify about her recollection of the video. The trial judge permitted the testimony because the first prosecutor was not handling the retrial. The Court of Appeals reversed.

In doing so, the Court of Appeals began by agreeing that there was no violation of RPC 3.7. RPC 3.7(a) generally precludes a lawyer from trying a case at which the lawyer will be a witness. But, RPC 3.7(b) permits another lawyer at the firm involved to try the case as long as the lawyer-witness' testimony will be consistent with the position of the firm's client. Under RPC 1.0A(c) and *State v. Bland*, 90 Wn. App. 677, 679-80, 953 P.2d 126 (1998), a prosecutor's office is considered a "firm" for purposes of the RPCs. As noted, the first prosecutor was only a witness at the retrial and her testimony was consistent with the prosecution's theory of the case.

The Court of Appeals, however, went beyond the regulatory rule to survey its common law underpinnings in the criminal context. The Court of Appeals stressed the unique risk in the criminal setting that a jury would assign inordinate weight to a prosecutor's testimony simply by virtue of the witness' position. It concluded, therefore, that allowing the prosecutor to testify about such a central issue as identification was an abuse of discretion and reversed.

*Sakawe* turned heavily on its specific facts and the Court of Appeals did not fashion a rule of automatic disqualification. In *Bland*, for example, Division I permitted testimony of a witness in her capacity as a social worker even though she was also a deputy prosecutor. In short, whether viewed through the prism of

RPC 3.7 or its common law antecedents, the decision on potential testimony by a prosecutor-witness in a criminal proceeding will be influenced largely by its individual circumstances.

### **ABOUT THE AUTHOR**

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the quarterly Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB *Ethical Oregon Lawyer*, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.