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## **Court of Appeals Discusses Elected Prosecutor Conflicts**

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Division III of the Washington Court of Appeals recently discussed elected prosecutor conflicts in *State v. Nickels*, \_\_\_ Wn. App. 2d \_\_\_, 434 P.3d 535, 2019 WL 479494 (Feb. 7, 2019). *Nickels* was a murder case in which the elected prosecutor in the county concerned had represented the defendant through a first trial before being elected. Once he assumed office, the prosecutor recused himself and there was no dispute that he did not participate in any aspect of the case going forward. When the case was remanded following an appeal of the initial conviction, the defendant moved to disqualify the entire prosecutor's office notwithstanding the recusal. The trial court denied the motion and then certified its order for immediate review. The Division III appellate panel split 2-1 in reversing the trial court.

Both the majority and the dissent acknowledged that Washington Rule of Professional Conduct 1.11 did not control the imputation issue. Unlike its private practice counterpart in RPC 1.10, when a lawyer moves from private to public practice RPC 1.11(d) does not impute the lawyer's former client conflicts to the public agency as whole. The majority and the dissent also agreed that the decision was instead controlled by the Supreme Court's decision in *State v.*

*Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988). The majority and the dissent, however, parted company on the scope and implications of *Stenger*.

*Stenger* was a death penalty case in which a lawyer who had represented the defendant on unrelated misdemeanor charges was later elected county prosecutor. Although the newly elected prosecutor in *Stenger* was not planning to personally try the death penalty case, he supervised the case administratively and participated in media relations concerning the case. The defendant moved to disqualify both the prosecutor and his office. On discretionary review, the Supreme Court held that the prosecutor should be personally disqualified for a former client conflict because the earlier misdemeanor case might become relevant to sentencing since *Stenger* was a capital case. The Supreme Court then concluded that the entire prosecutor's office should be disqualified as well. In doing so, however, the Supreme Court articulated a balancing test for imputing an elected prosecutor's conflict to the office as a whole:

“Where the prosecuting attorney (as distinguished from a deputy prosecuting attorney) has previously personally represented the accused in the same case or in a matter so closely interwoven therewith as to be in effect a part thereof, the entire office of which the prosecuting attorney is administrative head should ordinarily also be disqualified from prosecuting the case and a special deputy prosecuting attorney appointed. This is not to say, however, that anytime a prosecuting attorney is disqualified in a case for any reason that the entire prosecuting attorney's office is also disqualified. Where the previous case is not the same case (or one

closely interwoven therewith) that is being prosecuted, and where, for some other ethical reason the prosecuting attorney may be totally disqualified from the case, if that prosecuting attorney separates himself or herself from all connection with the case and delegates full authority and control over the case to a deputy prosecuting attorney, we perceive no persuasive reason why such a complete delegation of authority and control and screening should not be honored if scrupulously maintained.” *Id.* at 522 (citations omitted).

The majority and dissent in *Nickels* disagreed over the scope and implication of the *Stenger* test.

The majority found that *Stenger* did not create a *per se* rule and “an exception can apply in extraordinary circumstances.” 2019 WL 479494 at \*3. It then reasoned that the criteria for an exception stems from the earlier representation rather than the elected prosecutor’s administrative duties: “Rather than being informed by the nature of an elected prosecutor’s current work as prosecutor, we interpret *Stenger*’s extraordinary circumstances standard to be focused on the elected prosecutor’s prior work as counsel for the accused.” *Id.* at \*4. The majority drew a distinction between death penalty cases where a defendant’s entire criminal history might be relevant and others with less sweeping implications. Although *Nickels* was not a death penalty case, the majority concluded that first degree murder was serious enough to impose disqualification on the entire office.

The dissent argued that the majority’s approach amounted to a *per se* disqualification of the entire office—at least at least in serious cases—and was concerned about its impact in small counties: “The likely outcome is that no small county attorney with significant practice involving the county government, nor a head public defender in any county, could become the elected prosecutor without causing severe conflict of interest problems.” *Id.* at \*6. The dissent suggested that the analytical focus on imputation should be on the elected prosecutor’s current duties because the prosecutor would be personally disqualified in any event under the former client conflict rule (RPC 1.9) if the present case was substantially related to the earlier one or would involve using or revealing confidential information. The dissent argued for a “totality of the circumstances” approach that examined whether the prosecutor’s administrative duties over the office could instead be addressed through screening rather than an outright disqualification of the entire office.

The contours of *Stenger* are discussed further in Professor Aronson’s Chapter 7 in the WSBA *Law of Lawyering in Washington*.

## ABOUT THE AUTHOR

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