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State Supreme Court Revisits Elected Prosecutor Conflicts

**By Mark J. Fucile
Fucile & Reising LLP**

Last April, we looked at a then-recent decision on elected prosecutor conflicts by Division III of the Washington Court of Appeals in *State v. Nickels*, 7 Wn. App. 2d 491, 434 P.3d 535 (2019). In *Nickels*, a lawyer who had represented the defendant in a murder trial was later elected prosecutor of the county involved while the case was on appeal. Once he assumed office, the prosecutor recused himself from the case. On remand, however, the defendant moved to disqualify the entire prosecutor's office based on *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988)—in which the Supreme Court imputed an elected prosecutor's personal conflict to the prosecutor's office as a whole. The trial court denied the motion, but Division III reversed—holding that the entire office must be disqualified under *Stenger* even though RPC 1.11 does not automatically impute a government lawyer's personal conflict to the lawyer's office as a whole.

The Supreme Court granted review and, in a 5-4 decision, affirmed the Court of Appeals. 2020 WL 480382 (Wn. Jan. 30, 2020).

The Supreme Court majority adhered to *Stenger*—harmonizing it with RPC 1.11 by reading the RPC as applying to government lawyers generally and *Stenger* as only applying to the state's 39 elected prosecutors:

“[RPC 1.11] enumerate[s] a general rule for imputation of conflicts of interest between government attorneys and their offices that we read in harmony with *Stenger*’s narrow rule. Accordingly, we hold that office-wide disqualification is presumptively proper when an elected prosecutor has previously represented the defendant in the same case or closely interwoven matter.” *Id.* at *3.

The dissent argued that 2006 amendments to the RPCs effectively superseded *Stenger*. While noting several associated amendments, the dissent focused on Comment 2 to RPC 1.11, which reads, in relevant part:

“Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.” *Id.* at *7.

Because the prosecutor in *Nickels* had clearly participated in the defense of the same case when he was in private practice, neither the majority nor the dissent at the Supreme Court addressed *Stenger*’s exception for “extraordinary circumstances.” The contours of *Stenger* are discussed further in Professor Aronson’s Chapter 7 in the WSBA *Law of Lawyering in Washington*.

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 a member of the Oregon State Bar Legal Ethics Committee and the Idaho State

Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the 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.