SUPERIOR COURT OF WASHINGTON

FOR GRANT COUNTY

ALBERT H. LIN,

Plaintiff,

vs.

GRANT COUNTY, a municipal corporation,

Defendant.

Case No. 12-2-01309-4

EXPERT AFFIDAVIT OF PETER R. JARVIS

I declare under penalty of perjury that the following is true and correct:

I. Personal Qualifications

1. I am an attorney and the Managing Partner of the Portland, Oregon office of the law firm Hinshaw & Culbertson, LLP. I am also the leader or chair of Hinshaw's Lawyers' Professional Responsibility/Risk Management practice group, which I believe to be the largest of its type in the country. For a great many years, my practice has emphasized legal ethics/professional responsibility and lawyer risk management issues.

2. I am licensed to practice in the following jurisdictions: Oregon (1976); U.S. District Court, District of Oregon (1976); U.S. Court of Appeals, Ninth Circuit (1977); Washington State (1983); U.S. District Court, Western District of Washington (1983); U.S. Claims Court (1984); U.S. District Court, Eastern District of Washington (1985); U.S. Tax Court (1992); California (2002);

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Alaska (2003); New York (2009).

3. I hold the following degrees and academic distinctions: Yale University, J.D. (1976), M.A., economics (1976), editor, Yale Law Review; Harvard University, B.A., economics, PhiBeta Kappa, magna cum laude (1972).

4. I am a frequent writer and speaker on professional responsibility/risk management issues. Among other things, I am a coauthor with Geoffrey C. Hazard, Jr., and W. William Hodes of The Law of Lawyering, a leading national treatise on these issues and a coauthor with Anthony E. Davis of the second edition of Risk Management: Survival Tools for Law Firms, published by the ABA in 2007. I am also a former member of the Washington State Bar Rules of Professional Conduct Committee and the Oregon State Bar Legal Ethics Committee as well as other Bar committees including the Washington State Bar Future of the Profession Committee and the Washington State Bar Committee to Define the Unauthorized Practice of Law. In addition I am a member and past president of the Association of Professional Responsibility Lawyers and a speaker and past program planning chair for the ABA National Conference on Professional Responsibility.

5. In the course of my two terms on the Oregon State Bar Legal Ethics Committee, I wrote or coauthored most of the formal ethics opinions, including but not limited to the conflict of interest opinions, that were published in the renewed sets of formal ethics opinions published in 1991 and in 2005. I am also the author or coauthor of the multiple client conflicts and conflicts waiver chapters in the present or former editions of The Ethical Oregon Lawyer.

6. My practice presently includes and has long included defending lawyers, and sometimes judges, who have been accused of or wish to avoid being accused of legal or judicial

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ethics violations. My practice also includes and has long included advising law firms—from solo practitioners and small firms to large multistate and even multinational firms about practices and procedures that can be used to minimize or avoid ethical and malpractice risks. This includes but is not limited to work as the principal in-house lawyer on professional responsibility issues at Stoel Rives, my former firm, from approximately the middle or late 1980s until I left to join Hinshaw in 2003. By the time I left Stoel Rives, it had approximately 300 lawyers and offices in four states, including offices in Seattle and Vancouver, Washington. I am also a Special Assistant Attorney General in Washington State and, in that context, advise the Washington Attorney General's office on professional responsibility issues. I have also advised a number of other Washington local governments on professional responsibility issues.[1]

7. My practice necessarily calls upon me to study and advise upon developments and issues throughout the country and not only in those states in which I personally happen to be licensed. This follows because of the substantial similarities in the professional responsibility rules, the practice of law and the business of law from jurisdiction to jurisdiction. In addition, the relationships between lawyers or firms on the one hand and their clients on the other are more similar than different. I also confer with lawyers from other jurisdictions about professional responsibility and risk management issues on a regular basis.

8. I have given live expert testimony in Oregon State Circuit Court, Washington State Superior Court (including Clark County and King County), the United States District Court for the District of Oregon and the United States Bankruptcy Court for the District of Montana as well as the Michigan Attorney Discipline Board. Based upon my study and experience, I believe I am

[1] The views expressed herein, however, are entirely my own.

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competent to testify to the matters referenced herein.

9. I am a member of the American Law Institute. In 1991, I received the Harrison Tweed Award from ALI-ABA and the Oregon State Bar President's Member Services Award for my professional responsibility work. In 2012, I received the Burton Award for Distinguished Legal Writing.

10. In addition to my work as a professional responsibility/risk management lawyer, I have also spent and continue to spend significant time as a civil litigation attorney.

11. Attached hereto as Exhibits A through C are lists of my public speaking engagements, published written materials and deposition/trial testimony as noted therein.

12. I am being employed in this matter at an hourly rate of $475.

II. Basis for Opinion

13. I have read the documents listed on Exhibit D hereto.

14. For purposes of this opinion, I assume as true all facts alleged by plaintiff Albert H. Lin ("Lin") in his September 21, 2012 complaint (the "Complaint") which are admitted by defendant Grant County (the "County") in its answer. I have also assumed as true the facts referenced in the course of my opinion as expressed below.

III. Brief Statement of Opinion

15. In connection with the aspects of this matter that I have been asked to review,[2] Grant

[2] I express no opinion on matters not addressed herein. I also reserve the right to alter or amend my opinion to address different assumed facts or to respond to assertions or opinions offered by plaintiff

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County Attorney Derek Angus Lee ("Lee") has not violated any of the Washington Rules of Professional Conduct (the "RPCs"). Alternatively stated, each of the decisions that Lee made and actions that he took were ethically permissible.

IV. Detailed Statement of Opinion

E. General Conflicts and Attribution Principles

16. Government attorneys are not subject to generally higher standards of conduct under the RPCs than attorneys in private practice. *Lybbert v. Grant County*, 141 Wash.2d 29, 37, 1 P.3d 1124 (2000).

17. The assessment of the conflict of interest claims in the Complaint logically begins with RPC 1.7, which provides in pertinent part:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other

in this matter.

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proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

18. Conflicts of interest under RPC 1.7 are not assessed on a strict liability basis. An individual lawyer only has a conflict of interest under RPC 1.7 (and the question of firm-wide or office-wide imputation can only arise) if the lawyer actually knows or reasonably should know the facts giving rise to the conflict at the time of the alleged conflict. *Cf. In re Haley,* 156 Wash.2d 324, 340, 126 P.3d 1262 (2006), which notes that a negligent conflict ordinarily results in a reprimand, the lowest level of discipline. In fact, there are even times when a lawyer will not retroactively be held responsible for a new legal interpretation of the RPCs. *Id.* at 338-39.

19. When a lawyer who does not practice alone has a conflict, it becomes necessary to consider whether or when that conflict will or may be attributed to the lawyer's colleagues. For lawyers who have not been and are not in government practice, RPC 1.10(a) provides:

> Except as provided in paragraph (e), while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

In other words, conflicts based on "a personal interest of the disqualified lawyer [which] does not prevent a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm" are not attributed firm-wide unless the personal interest of the disqualified lawyer is sufficient under the circumstances to create a significant risk of a material limitation on the ability of other lawyers in the office to represent their clients competently, diligently and with appropriate loyalty.

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20. As a matter of black-letter law, however, and even separate and apart from the personal interest carve-out in RPC 1.10(a), there is no general rule of firm-wide or office-wide attribution whatsoever as to government lawyers. In other words, neither personal interest conflicts nor other types of conflicts are automatically attributed from one government lawyer to another. This is clear from a reading of RPC 1.10(d) and RPC 1.11.

21. RPC 1.10(d) provides that:

> The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

22. RPC 1.11 provides in turn that:

> (a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employees of the government:
>
> (1) is subject to Rule 1.9(c); and
>
> (2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.
>
> (b) When a lawyer is disqualified from representation under paragraph(a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:
>
> (1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule. * * *
>
> (d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:
>
> (1) is subject to Rules 1.7 and 1.9; and

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(2) shall not:

(i) 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 writing * * *

23. Taken together, the common and correct reading of these two rules is that even a litigation-based (as distinct from personal) conflict on the part of one attorney in a government legal office is not automatically attributed to any other attorney in that office. *See also,* Andrews, Aronson, Fucile & Lachman, The Law of Lawyering in Washington at 7-116 (2012) ("RPC 1.10 covers imputation for private lawyers; however, when the disqualified lawyer is a current or former government lawyer, RPC 1.11 controls."). I also note that ¶29 of the Complaint expressly acknowledges that RPC 1.11, not RPC 1.10, applies to this case.

24. The distinction between RPC 1.10 and RPC 1.11 is made clear in Washington Advisory Opinion 2101 (2006). The first question in that opinion was whether there would be a conflict of interest if a county prosecutor pursued a felony charge of illegal voting against an individual who had briefly been a paid employee of a political campaign to elect the wife of the prosecuting attorney to public office. The answer was that it would depend on the circumstances. The second question was "whether, if the individual prosecutor had a conflict, that conflict would be imputed to other attorneys in his office." The answer was that unless others in the office had their own conflicts, any disqualification of the prosecutor would be limited to the prosecutor himself and that the rest of his office would not be disqualified. As the opinion concludes, "assuming that a deputy decided that he or she was not materially limited by responsibilities to a third-person or personal interests, and that an appropriate screening is maintained, the County Prosecuting

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Attorney's Office could proceed with the prosecution on behalf of the State."

25. The result reached in Advisory Opinion 2101 is neither a mistake nor an anomaly. *See, e.g.,* Official Comment [2] to RPC 1.11;[3] Hazard, Hodes & Jarvis, The Law of Lawyering §15.2 (2005-1 Supp.) ("government lawyers in the same government agency are not subject to the imputation rule"); *id* at §15.3 ("woodenly applying the automatic imputation rule that usually governs private law firms would be impractical and against the public interest"). There also is clear Washington appellate caselaw recognizing that government lawyers and legal departments must be treated differently than private lawyers on questions of conflicts attribution. For example, it has been held that different members of a government legal office may simultaneously represent such arguably or potentially adverse parties as an agency decisionmaker and the agency staff that is pursuing a claim that the decisionmaker will decide. *See, e.g., Sherman v. State,* 128 Wash.2d 164, 905 P.2d 355 (1995). Similarly, different members of a government legal office may represent both sides in litigation between government agencies. *See, e.g., Goldmark v. McKenna,* 172 Wash.2d 568, 259 P.3d 1095 (2011).[4]

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[3] "Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. 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."

[4] There are many good reasons to distinguish between private and public practice attributions of conflicts. For example: (a) the "profit motive" that could theoretically tempt private practice lawyers is not present in government practice: (b) an overly broad set of attribution rules in a government context could make it very difficult for government legal departments to attract the best talent; and (c) the rights and duties of government lawyers are often different because the

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26. None of the conflict of interest letters submitted at the time on behalf of Lin to Lee reference either the personal conflict exclusion in RPC 1.10(a) nor any differences between RPC 1.10 and RPC 1.11. In addition, the Lin deposition does not reflect that he was aware of these provisions at the time.

27. When a supervisory lawyer is disqualified from a matter under RPC 1.10 on the basis of a personal interest conflict or under RPC 1.11, that supervisory lawyer may ethically delegate responsibility for the matter to a subordinate lawyer in the same firm or office. As a part of that delegation, the supervisory lawyer may ethically ask the subordinate lawyer to state preliminary whether the matter is worth pursuing.

28. No ethics rules automatically or inherently prohibit private practice or government lawyers or law firms from:

a. simultaneously or serially handling multiple matters against or involving the same adversary;

b. handling matters adverse to a former employee;

c. being political opponents who work in the same office; or

d. responding to question at public fora unless the responses are knowingly and materially false or the response is prohibited by duties of confidentiality.

29. The distinction between private practice and government lawyers and law firms that is reflected in the different attribution rules in RPC 1.10 and 1.11 is not the only such distinction recognized by the RPCs. As noted in Official Comment [15] to the Scope section of the RPCs, "[t]he Rules presuppose a larger legal context" which includes "laws defining specific obligations of lawyers." As Official Comment [18] goes on to note, "the responsibilities of government lawyers

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roles played by governments are not the same as the roles played by private parties.

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may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships" and "[t]hese rules do not abrogate such authority." Thus, although a private client, and not that client's lawyer, ordinarily decides such matters as whether to sue and when or on what terms to settle, a county prosecutor is generally entitled if not in fact required to make such decisions on his or her own.

30. Apart from questions of individual lawyer conflicts and the potential office-wide or department-wide attribution of conflicts, there is a separate RPC that can apply to lawyers who order or assist others in committing ethical violations. Lawyers who "knowingly assist or induce" other lawyers to violate the RPCs violate RPC 8.4(a). Although knowledge "may be inferred from the circumstances," the requirement here is "actual knowledge of the fact in question." RPC 1.0(f). In other words, RPC 8.4(a) is not violated by conduct that is merely negligent. *Cf.* RPC 5.1(b)(requiring a supervisory lawyer to "make reasonable efforts to ensure" that others in the office comply with the RPCs). The wording of RPC 8.4(a) also makes plain that there must actually be an underlying violation which was knowingly assisted or induced. In other words, knowingly assisting another in an attempted, but not completed, violation would not itself violate RPC 8.4(a).

F. <u>The First/Employee Matter</u>

31. ¶9 of the Complaint asserts that "Lee asked Lin to review a misdemeanor case against a former employee ('Employee') of the office who was also a friend of Lin's and had worked on Lin's campaign." Although I would agree that Lin ethically could not personally prosecute a personal friend and campaign worker, I do not agree that this friendship-based or campaign-based personal conflict would have disqualified any lawyer other than Mr. Lin from handling the prosecution. Even in a private practice setting, this would simply have been a personal interest

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conflict under RPC 1.10(a) that would not be attributed firm-wide. *A fortiori*, it would not do so in a government setting in which no automatic office-wide attribution rule exists. *See, e.g.*, RPC 1.10(d), RPC 1.11, WSBA Advisory Op 2101 (2006).

32. ¶9 of the Complaint also asserts that "Employee had a pending lawsuit for wrongful termination against Grant County and Lee. Lee had filed a counterclaim against Employee in that action." Although I would agree that Lee himself ethically could not personally prosecute someone whom Lee was then suing for personal money damages, this too is a personal conflict not attributable office-wide.

33. Similarly, any personal involvement of Lee in making a prior report against the Employee or in helping a colleague obtain a no contact order would at most give rise to a personal conflict.[5]

34. None of the letters that Lin had his lawyers send to Lee about the Employee conflict address the critical issues of whether Lee's personal interest conflict would have prevented Lin from evaluating or prosecuting a potential criminal case against the Employee if Lin did not have a personal interest conflict or whether Lee is chargeable with knowledge of the Lin-Employee personal friendship and support before Lin told Lee about it. Similarly, neither Lin nor his lawyers called Lee's attention at the time to any authority that would prevent the steps that Lee took. The most that can thus be said about Lin's allegations of ethical violations pertaining to the Employee matter is that Lin, and perhaps his lawyers, had a different view than is expressed in the authorities cited above but that they failed to substantiate this view with pertinent Washington or non-

[5] For the reasons noted in ¶28(a) and (b), there would also be no office-wide conflict due to Lee's alleged prior involvement in events giving rise to the criminal report against the Employee.

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Washington authority .

35. A lawyer in Lee's position does not have to be clairvoyant and know in advance which of his or her colleagues know which potential adversaries or the circumstances under which they know them. Indeed, it would be impossible for any lawyer in Lee's position to know everything about the personal lives of his colleagues, and any attempt to do so would involve serious questions of invasion of privacy. Lee was entitled to assign this matter to Lin and to rely upon Lin to tell him about this personal interest conflict. In fact, Lee, like most if not all managers of others, could do nothing else.[6]

36. This analysis also disposes of any assertion that Lee violated RPC 8.4(a) by knowingly assisting or inducing Lin to violate the conflicts rules. In the context of a county prosecutor's office, it was within Lee's ethical discretion to ask Lin to evaluate a potential case which Lee himself could not evaluate, to insist on a complete explanation of why Lin thought there was or might be a conflict and to withdraw the matter from Lin once Lin finally articulated the personal conflict connection. And for his part, Lin did not violate any RPC by being asked to review a file, by stating initially (though incorrectly) that he believed that there was an office-wide conflict, by stating subsequently that he had a personal interest conflict and by thereafter having no further connection with the Employee matter. In short, Lin himself did not violate the conflicts rules and Lee, once informed of Lin's underlying personal concern, neither induced nor even asked Lin to consider violating the rules.

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[6] In the Washington State Bar portion of the Lee deposition (but not in the Complaint), Lee was asked about the no-confidence letter signed by both Lin and the Employee. My understanding is that Lee did not know at the time that both Lin and the Employee had signed that letter. Even if Lee had known this, however, this would not by itself have put him on notice of a personal friendship or campaign-support relationship between Lin and the Employee.

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37. In summary, an ethical prosecutor was entitled to take every step Lee took on the Employee matter. Lee was ethically entitled to ask Lin to review a file, to ask Lin to explain the basis for his ostensibly office-wide conflicts concerns, to press Lin for information about these conflicts concerns and then to withdraw the matter from Lin (if not also from the office entirely[7]) when Lin finally disclosed the personal interest conflict that he had previously kept to himself.

G. The Second Matter

38. ¶10 of the Complaint asserts that "Lee demanded that Lin review a second criminal referral ('Second Matter') that included reference to the Employee. Lin refused [but] Lee continued * * * to press Lee to review the matter." ¶11 then adds that based upon Lin's continuing refusal, "Lee disciplined Lin in writing." ¶12 states further that Lin's continuing refusal led to additional discipline. Here too, there are no RPC violations.

39. Although the Employee's name is mentioned one time in the file, she was not a suspect, not a person of interest in and not a target of any investigation that might relate to the criminal referral. Indeed, it does not even appear that she was or would have been expected to be a fact witness. No conflict of interest that would have limited Lin, Lee or any other attorney in the same office, was present. *Cf. State v. MacDonald*, 122 Wash. App. 804, 814, 95 P. 3d 1248 (2004); *State v. Vicuna*, 119 Wash. App. 26, 31-33, 79 P.3d 1 (2003).

40. As with the Employee matter, any assertion of an RPC 8.4(a) violation fails because Lin did not violate the conflicts rules and because Lee did not ask Lin to do so.

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[7] I do not mean by this to state that Lee could not have kept the Employee matter in the office by assigning an attorney other than Lin or Lee himself to handle it, but that issue is purely theoretical in this context.

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H. The Third/Judge Matter

41. ¶15 of the Complaint asserts that Lee asked Lin to review a potential criminal matter that involved a sitting judge of the Grant County District Court, that Lin told Lee that no one in their office could review that matter because doing so would violate the appearance of fairness doctrine and give rise to a conflict of interest, that Lin told Lee that such matters had to be referred to the State Attorney General for review; that Lee had recently referred a matter to the State Attorney General due to a conflict; and that Lee threatened Lin with discipline if Lin did not review the matter. As with the prior two matters, there are no RPC violations even if these facts are all assumed true as stated.

42. The appearance of fairness doctrine does not itself apply to county prosecuting attorneys. *See, e.g.,* WSBA Advisory Opinion 2101 (2006); *see also, State v. Post*, 118 Wash.2d 596, 618-19, 826 P.2d 172, 837 P.2d 599 (1992), quoted in ¶16 of the Complaint for the proposition that the purpose of the doctrine is to prevent "the evil of a biased or potentially interested judge" and that judicial decisionmakers "appear to be impartial." Consequently, Lee, Lin and other lawyers working with them could not violate the appearance of fairness doctrine.

43. Nonetheless, a lawyer who is a judge and who, acting as a judge, engages in conduct that violates the appearance of fairness doctrine could conceivably be said to violate RPC 8.4(d), which prohibits "conduct that is prejudicial to the administration of justice." *See* WSBA Advisory Opinion 1556 (1994). And if a lawyer-judge did violate the appearance of fairness doctrine and thereby violated RPC 8.4(d), then another lawyer—such as a prosecutor—who knowingly assisted or induced the lawyer-judge's violation could be said to violate RPC 8.4(a). The questions here thus becomes whether the district court judge in question violated the appearance of fairness doctrine and

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whether Lee knowingly assisted or induced the district court judge to do so. Unless both questions are answered in the affirmative, no violation of RPC 8.4(a) exists. For the reasons noted below, however, both questions must be answered in the negative.

44. As a matter of law, "evidence of a judge's actual or potential bias is required before the appearance of fairness doctrine will be applied." *State v. Dominguez*, 81 Wash. App 325, 329, 914 P.2d 141 (1996). Furthermore, the test for determining whether this doctrine has been violated "is an objective one." *State v. Witherspoon*, 171 Wash.App. 271, 288, 286 P.3d 996 (2012). *See also, In re King,* 168 Wash 2d 888, 906, 232 P.3d. 1095 (2010) ("Bald accusations are insufficient to support claims for appearance of fairness violations").

45. The facts reflect, and the judge undoubtedly knew, that the automotive matter involving the judge led to a very small amount, if any, of vehicular damage and to a handshake between the judge and the other driver. In such circumstances, there is no *a priori* reason to believe that the judge would have thought that any prosecutor in any government legal office was considering or would consider a potential criminal case against him or that the judge would have reason to be concerned about a potential baseless or frivolous prosecution. Absent any reason for the judge to have believed that such a case was under consideration and that there could or even might be anything of substance to it, there was no objective basis on which to even begin to find a potential violation of the appearance of fairness doctrine. Within the meaning of this doctrine, the judge cannot be influenced by something which the judge did not know and had no reason to believe would occur.

46. Alternatively, and even if the judge had some reason to believe that some prosecutorial office might investigate him, there is no indication that he knew that Lee's office was

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doing so. Once again, then, there is no objective basis to support a potential appearance of fairness violation.[8]

47. Also alternatively, it is speculation whether sufficient protective action could not have been taken even if the judge did become aware of this review and was sufficiently concerned about a potential violation of the appearance of fairness to want or meet to take protective action. If, for example, the judge arranged not to sit on any county-prosecuted criminal cases during the review or to work out of another county during the review, there would be no appearance of fairness violation for this reason as well.

48. Finally, and even if it could be shown that the district court had knowledge, was sufficiently fearful of being prosecuted by an attorney in Lee's office and was (or should have been) concerned about appearance of fairness questions, there is no apparent basis in the record from which to conclude that Lee himself (or, for that matter, Lin himself, insofar as his personal disciplinary risk might be concerned) knew at the time that this was so. Absent proof of such knowledge, there can again be no violation of RPC 8.4(a).

49. Since no prosecution of the judge occurred, it is unnecessary to consider whether, if such a prosecution had been brought by Lee, Lin or someone working in their office, a violation might have existed under either RPC 8.4(a), as discussed above, or RPC 3.8 (special responsibilities of a prosecutor).

50. There also are no other ethical violations here. Assuming for the sake of discussion that Lee could have sent this matter out of the office without having anyone in his office conduct

[8] This is all the more so because Lin did not then appear before the judge.

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even the most preliminary of reviews, no violation would be present merely because Lee asked one of his colleagues to conduct such a review in order to decide, for example, whether an outside referral was or might be appropriate.

I. Additional Statements of Opinion

51. I take no position on the legal question whether the existence of Washington's lawyer disciplinary system prevents the pursuit of a public policy/wrongful termination action on facts such as these. *See, e.g., Weiss v. Lonnquist*, ___ Wash.App. ___, 293 P.3d 1264 (2013). I can say, however, that if one or more RPC violations by Lee did appear to exist, the Washington State Bar would investigate and, if justified, seek to impose discipline upon him. In point of fact, however, Lee committed no RPC violations, did not ratify, direct or assist anyone else in committing such violations and cannot be said to have run an office in which ethical issues were ignored or were not fully and timely addressed.

52. I can also say that if and to the extent that Lin must prove, in order to prevail, that Lee pushed Lin to or over the brink of an ethics violation, Lin faces a further and potentially significant burden pursuant to RPC 5.2(b), which provides 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.

As Official Comment [2] to RPC 5.2 goes on to state:

> When lawyers in a supervisor-subordinate relationship encounter a matter involving professional judgment as to ethical duty, the supervisor may assume responsibility for making the judgment. Otherwise a consistent course of action or position could not be taken. If the question can reasonably be answered only one way, the duty of both lawyers is clear and they are equally responsible for fulfilling it. However, if the question is reasonably arguable, someone has to decide upon the course of action. That authority ordinarily reposes in the supervisor, and a subordinate may be guided

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> accordingly. For example, if a question arises whether the interests of two clients conflict under Rule 1.7, the supervisor's reasonable resolution of the question should protect the subordinate professionally if the resolution is subsequently challenged.

In order for Lin to assert that he was compelled to violate one or more RPCs or pushed to or over the brink of a violation, he would therefore have to prove not only that his differing view of the RPCs was correct but also that no other view is reasonable.

53. Nothing in the Fundamental Principals of Professional Conduct is inconsistent with my opinions. The RPCs are "rules of reason [which] should be interpreted with reference to the purposes of legal representation and of the law itself." Official Comment [14] to RPC Scope section. However deeply a subordinate lawyer may hold his opinions and regardless of what that subordinate lawyer may (or may not) in good faith believe, the RPCs cannot be interpreted to create an ethics violation where none exists in order to allow the subordinate lawyer to control a legal office that is, by law, not his to control.

I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in court and is subject to penalty for perjury.

Dated this 4th day of June, 2013.

Peter R. Jarvis

Subscribed and sworn to before me this 4 day of June, 2013.

OFFICIAL SEAL
HEATHER E GILPIN
NOTARY PUBLIC - OREGON
COMMISSION NO. 444243
MY COMMISSION EXPIRES JANUARY 11, 2014

Notary Public of Oregon
My Commission Expires: Jan. 11, 2014

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