**BEFORE THE WASHINGTON STATE BAR ASSOCIATION**
**OFFICE OF DISCIPLINARY COUNSEL**

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| In re: The Matter of the Disciplinary | ) | |
| Proceeding Against | ) | |
| | ) | MEMORANDUM IN SUPPORT |
| MARK E. LINDQUIST | ) | OF FILED GRIEVANCE |
| DAWN FARINA | ) | |
| JOHN SHEERAN | ) | |
| JARED AUSSERER | ) | |
| LORI KOOIMAN | ) | |
| TIMOTHY LEWIS | ) | |
| JAMES RICHMOND | ) | |
| Attorneys at Law | ) | |

COMES NOW ______________________________, Attorney at Law and citizen of this state, and hereby files a professional grievance against the attorneys above named. Prosecutor Lindquist, individually and through his deputies, has engaged in misconduct to include withholding evidence, obstructing justice and gross abuse of authority. Prosecutor Lindquist, individually and through his deputies filed serious criminal charges against Lynn Dalsing to cover up his own wrong doing and to gain strategic and tactical advantage in a civil lawsuit. This motion in support of filed grievance is supported by Rules of Professional Conduct 1.7, 1.10, 3.2, 3.3, 3.4, 3.5, 3.6, 3.8, 4.1, 4.4, 5.1, 5.2, 8.4 and the following statement of facts, authority and memorandum:

## SYNOPSIS

In December of 2010, the Pierce County Prosecuting Attorney filed charges of child sex abuse against Lynn Dalsing. (Lynn Dalsing's husband was charged and convicted in July 2010 of child sexual abuse of their daughter). The sole basis of the charges against Lynn Dalsing was one photograph depicting a sex act between an unidentifiable adult female and a prepubescent female child. The photograph was recovered from a computer in the Dalsing residence. The prosecutor's theory of the case was that the photograph depicted Dalsing committing a crime of sexual abuse. Dalsing was held in custody pending her trial.

Despite repeated requests from Dalsing's attorney, the prosecutor failed to provide a copy of the photo for several months. While Dalsing was still in custody facing trial on the charges, Detective Ames, who recovered the photo from a computer in the Dalsing home, sent an e-mail that was received by the prosecuting attorney. Detective Ames' email informed the prosecuting attorney that Dalsing could not be identified in the photo, and that there was "definitely no link" between Dalsing and any other child pornography on the computer. The prosecutor did not provide this exculpatory e-mail to Dalsing or her attorney. Nor did prosecutors inform Dalsing's attorney that there was "definitely no link" between Dalsing and other child pornography that was found. Dalsing remained in custody.

When Dalsing's attorney finally obtained the photograph, he contacted a detective at another agency for help. Within one hour of contacting a Tacoma Police Detective, Dalsing's attorney was able to unequivocally establish that the photograph did not depict Dalsing. The photo was determined to be from a known series of child pornography completely unrelated to Dalsing. The charges against Dalsing were dismissed and she was released, after spending over seven months in custody and in jeopardy.

Several months later, Dalsing filed a civil suit against Pierce County. The Pierce County Prosecutor intentionally stalled litigation and withheld discovery for years to avoid providing Detective Ames' e-mail to Dalsing. On March 25, 2014, the Pierce County Prosecutor lost his final bid to avoid providing the e-mail to Dalsing in her civil law suit. Three days later, on March 28, 2014, the Pierce County Prosecutor re-filed new and more serious charges against Dalsing. The new charges were not based on new evidence, but the Prosecuting Attorney had a new, and novel, legal theory. The Prosecuting Attorney then argued that the "new" pending criminal charges alleviated the Prosecutor from providing discovery (i.e. Detective Ames' e-mail).

Nearly another year went by while Dalsing was in jeopardy of new charges and still she was trying to obtain discovery in her civil law suit. She had not yet been provided with Detective Ames' e-mail, the e-mail that would expose the Prosecuting Attorney's wrongdoing. The "new" criminal charges were eventually dismissed with prejudice by a Superior Court Judge who found that the prosecution was vindictive.

Dalsing has obtained a copy of the e-mail in question and the depth of the Prosecuting Attorney's wrongdoing has now been exposed.

The Pierce County Prosecutor and his deputies have abused the power and authority of the prosecutor's office. The Pierce County Prosecutor and his deputies filed criminal charges against a civil litigant to cover up their own wrongdoing, to seek advantage in a civil lawsuit, and to avoid liability. The Pierce County Prosecutor's abuses of office violate the Rules of Professional Conduct.

**AUTHORITY**

RPC 1.7(a): CONFLICT OF INTEREST: CURRENT CLIENTS

> **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 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).

RPC 1.7

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of “informed consent” and “confirmed in writing,” see Rule 1.0(e) and (b).

RPC 1.7, Comment 1.

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

RPC 1.7, Comment 9.

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

RPC 1.7, Comment 10.

[37] Use of the term “significant risk” in paragraph (a)(2) is not intended to be a substantive change or diminishment in the standard required under former Washington RPC 1.7(b), i.e., that “the representation of the client may be

> materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests."

RPC 1.7, Comment 37.

> [41] Various legal provisions, including constitutional, statutory and common law, may define the duties of government lawyers in representing public officers, employees, and agencies and should be considered in evaluating the nature and propriety of common representation.

RPC 1.7, Comment 41.

Washington courts have recognized an inherent conflict can arise for a prosecuting attorney. *Snohomish Cnty. v. Nichols*, 47 Wn. App. 550, 556-57, 736 P.2d 670, 674 (1987) aff'd, 109 Wn. 2d 613, 746 P.2d 1208 (1987). In *Nichols*, a deputy sheriff filed a claim against the sheriff's department seeking reinstatement. The prosecutor, who represented the sheriff's department, refused to provide representation to the deputy arguing that the prosecutor had discretion to make such a decision.

The Appellate Court reasoned as follows:

> The respondent argues that the prosecutor improperly exercised discretion because the office was representing the Snohomish County Sheriff's Department in the same case and therefore should have appointed a special prosecutor to represent Nichols.
>
> RCW 73.16.061 imposes a mandatory obligation on county prosecutors to represent veterans seeking reinstatement under the Veterans' Reemployment Rights Act. It is undisputed that the Snohomish County Prosecuting Attorney's Office is the legal advisor and attorney for the Snohomish County Sheriff's Office. RCW 36.27.005. **The prosecuting attorney could not, in the fair exercise of his professional duties, give an impartial and unbiased evaluation of Nichols' case. The conflict of interest was clear and the prosecuting attorney had an ethical obligation to step aside in favor of an independent special prosecutor. RPC 1.7,** CPR 5 and DR 5–105. The fees expended by Nichols in retaining private counsel are therefore recoverable as the equivalent of legal services the prosecutor was directed by statute to provide but refused. We thus reject the County's immunity argument. It would clearly defeat the purpose of RCW 73.16.061 to allow the County to shift the burden of providing legal representation to a plaintiff whose claim proves to be meritorious.

*Nichols*, at 556-57 (emphasis added).

In *Westerman v. Cary*, 125 Wn. 2d 277, 892 P.2d 1067 (1994), the court's appointment of a special prosecutor was upheld when the prosecuting attorney was disqualified due to a conflict concerning representation of two different public bodies, presiding District Court judge, and the Sheriff. The *Westerman* Court's analysis relied on RPC 1.7 (b) and RPC 1.15, requiring an attorney to withdraw if representation of a client "may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests. Where representation of two different public bodies requires the prosecutor to take directly adversary positions in the same case conflict exists." *Westerman,* 125 Wn.2d at 300, *quoting* RPC 1.15.

Similarly, in *State v. Tracer,* 173 Wn. 2d 708, 272 P.3d 199 (2012), the court found improper a conflict appointment where a criminal defense attorney had been appointed in a limited capacity at a pre-trial hearing to assist in the taking of a plea on behalf of the State in a criminal case. The court found that the conflict was one of concurrent representation in violation of RPC 1.7 (a)(1), which prohibits such representation if "[t]he representation of one client will be directly adverse to another client." The Court reasoned that the rationale for the rule lies in "the appearance of impropriety created by vesting the "inherently antagonistic and irreconcilable" roles of the prosecution and the defense in one attorney." *Tracer,* 173 Wn.2d at 720, *quoting Howerton v. State*, 1982 OK CR 12, 640 P.2d 566, 567. The *Tracer* Court observed that the Court of Criminal Appeals of Oklahoma had faced a similar dilemma and, in holding that a part-time district attorney may not represent a criminal defendant anywhere in the state of Oklahoma, the court reasoned that although it was difficult or impossible to determine whether the representation was actually affected, "[t]he public has a right to absolute confidence in the integrity and impartiality of the administration of justice. The conflicts presented in this

case, at the very minimum, give the proceeding an appearance of being unjust and prejudicial."

*Id., quoting Howerton* at 568 (footnote omitted).

RPC 1.10(a): IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

> **(a)** 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.

RPC 1.10(a).

> [1] For purposes of the Rules of Professional Conduct, the term "firm" denotes lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization. See Rule 1.0(c). Whether two or more lawyers constitute a firm within this definition can depend on the specific facts. See Rule 1.0, Comments [2]-[4].

RPC 1.10, Comment 1.

> [2] **[Washington revision]** The rule of imputed disqualification stated in paragraph (a) gives effect to the principle of loyalty to the client as it applies to lawyers who practice in a law firm. Such situations can be considered from the premise that a firm of lawyers is essentially one lawyer for purposes of the rules governing loyalty to the client, or from the premise that each lawyer is vicariously bound by the obligation of loyalty owed by each lawyer with whom the lawyer is associated. Paragraph (a) operates only among the lawyers currently associated in a firm. When a lawyer moves from one firm to another, the situation is governed by Rules 1.9(b) and 1.10(b) and (e).

RPC 1.10, Comment 2.

> [9] The screening provisions in Washington RPC 1.10 differ from those in the Model Rule. Washington's adoption of a nonconsensual screening provision in 1993 preceded the ABA's 2009 adoption of a similar approach in the Model Rules. Washington's rule was amended and the screening provision recodified as paragraph (e) in 2006, and paragraphs (a) and (e) were further amended in 2011 to conform more closely to the Model Rules version. None of the amendments to this Rule, however, represents a change in Washington law. The Rule preserves Washington practice established in 1993 with respect to screening by allowing a lawyer personally disqualified from representing a client based on the lawyer's prior association with a firm to be screened from a representation to be

undertaken by other members of the lawyer's new firm under the circumstances set forth in paragraph (e). See Washington Comment [10].

RPC 1.10, Comment 9.

[10] Washington's RPC 1.10 was amended in 1993 to permit representation with screening under certain circumstances. Rule 1.10(e) retains the screening mechanism adopted as Washington RPC 1.10(b) in 1993, thus allowing a firm to represent a client with whom a lawyer in the firm has a conflict based on his or her association with a prior firm if the lawyer is effectively screened from participation in the representation, is apportioned no part of the fee earned from the representation and the client of the former firm receives notice of the conflict and the screening mechanism. However, prior to undertaking the representation, non-disqualified firm members must evaluate the firm's ability to provide competent representation even if the disqualified member can be screened in accordance with this Rule. While Rule 1.10 does not specify the screening mechanism to be used, the law firm must be able to demonstrate that it is adequate to prevent the personally disqualified lawyer from receiving or transmitting any confidential information or from participating in the representation in any way. The screening mechanism must be in place over the life of the representation at issue and is subject to judicial review at the request of any of the affected clients, law firms, or lawyers. However, a lawyer or law firm may rebut the presumption that information relating to the representation has been transmitted by serving an affidavit describing the screening mechanism and affirming that the requirements of the Rule have been met.

RPC 1.10, Comment 10.

RPC 3.2 EXPEDITING LITIGATION

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

RPC 3.2

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

RPC 3.2, Comment 1.

RPC 3.3: CANDOR TOWARD THE TRIBUNAL

**(a)** A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false.

**(b)** The duties stated in paragraph (a) continue to the conclusion of the proceeding.

**(c)** If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

**(d)** If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.

**(e)** A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

**(f)** In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

RPC 3.3

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to

vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

RPC 3.3, Comment 2.

[3] **[Washington revision]** An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also Comment [4] to Rule 8.4.

RPC 3.3, Comment 3.

[8] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

RPC 3.3, Comment 8.

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

RPC 3.3, Comment 13.

RPC 3.4: FAIRNESS TO OPPOSING PARTY

A lawyer shall not:

**(a)** unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

**(b)** falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

**(c)** knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

**(d)** in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party; or

**(e)** in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

RPC 3.4

RPC 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

A lawyer shall not:

**(a)** seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

**(b)** communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

**(c)** communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

**(d)** engage in conduct intended to disrupt a tribunal.

RPC 3.5

[1] **[Washington revision]** Many forms of improper influence upon a tribunal are proscribed by criminal law. Others are specified in the Washington Code of Judicial Conduct, with which an advocate should be familiar. A lawyer is required to avoid contributing to a violation of such provisions.

RPC 3.5, Comment 1.

[2] During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

RPC 3.5, Comment 2.

RCP 3.6 TRIAL PUBLICITY

**(a)** A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
**. . .**
**(d)** No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

RPC 3.6

[5] There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
. . .
(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;
. . .
(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

RPC 3.6, Comment 5.

RPC 3.8: SPECIAL RESPONSIBILITIES OF A PROSECUTOR

The prosecutor in a criminal case shall:

**(a)** refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

**. . .**

**(d)** make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

. . .

**(f)** except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.

RPC 3.8

[1] [Washington revision.] A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. The extent of mandated remedial, action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which in turn are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the government may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard of those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.RPC 3.8, Comment 1.

RPC 3.8, Comment 1.

[5] Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused. Nothing in

this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).

RPC 3.8, Comment 5.

[6] Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and nonlawyers who work for or are associated with the lawyer's office. Paragraph (f) reminds the prosecutor of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.

RPC 3.8, Comment 6.

RPC 4.1, TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

**(a)** make a false statement of material fact or law to a third person; or

**(b)** fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

RPC 4.1

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

RPC 4.1, Comment 1.

RPC 5.1: RESPONSIBILITIES OF PARTNERS, MANAGERS, AND SUPERVISORY LAWYERS

**a)** A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, 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.

**(b)** 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.

**(c)** A 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 lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

RPC 5.1

[1] Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. See Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.

RPC, Comment 1.

[2] Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.

RPC, Comment 2.

[4] Paragraph (c) expresses a general principle of personal responsibility for acts of another. See also Rule 8.4(a).

RPC, Comment 4.

> [6] Professional misconduct by a lawyer under supervision could reveal a violation of paragraph (b) on the part of the supervisory lawyer even though it does not entail a violation of paragraph (c) because there was no direction, ratification or knowledge of the violation.

RPC 5.1, Comment 6.

> [7] **[Washington revision]** Apart from this Rule and Rule 8.4(a), a lawyer does not have disciplinary liability for the conduct of a partner, associate or subordinate lawyer. Whether a lawyer may be liable civilly or criminally for another lawyer's conduct is a question of law beyond the scope of these Rules.

RPC 5.1, Comment 7.

> [8] The duties imposed by this Rule on managing and supervising lawyers do not alter the personal duty of each lawyer in a firm to abide by the Rules of Professional Conduct. See Rule 5.2(a).

RPC 5.1, Comment 8.

RPC 5.2: RESPONSIBILITIES OF A SUBORDINATE LAWYER

> **a)** A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
>
> **(b)** 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.

RPC 5.2

> [1] Although a lawyer is not relieved of responsibility for a violation by the fact that the lawyer acted at the direction of a supervisor, that fact may be relevant in determining whether a lawyer had the knowledge required to render conduct a violation of the Rules. For example, if a subordinate filed a frivolous pleading at the direction of a supervisor, the subordinate would not be guilty of a professional violation unless the subordinate knew of the document's frivolous character.

RPC 5.2, Comment 1.

> [2] 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 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.

RPC 5.2, Comment 2.

RPC 8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

**(a)** violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

. . .

**(c)** engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

**(d)** engage in conduct that is prejudicial to the administration of justice;

. . .

**(f)** knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law;

. . .

**(k)** violate his or her oath as an attorney;

**(m)** violate the Code of Judicial Conduct; or

**(n)** engage in conduct demonstrating unfitness to practice law.

RPC 8.4

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

RPC 8.4

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent and officer, director or manager of a corporation or other organization.

RPC 8.4

In *In re Disciplinary Proceeding Against Preszler*, 169 Wn.2d 1, 232 P.3d 1118 (2010), an attorney's violations of former RPC 3.4(c), 8.4(d), plus his other offenses under former RPC 1.5(a), 1.4(b), 5.3(b), (c)(1) amounted to multiple offenses; while certain counts carried a presumptive sanction of only admonition and reprimand, even if less serious than the other misdeeds, they were not to go uncounted, and the court ultimately found that the aggregate impact of the multiple offenses deserved to be weighed as an aggravating factor, particularly given that his misconduct went beyond his client and extended to his abuse of the legal process and to his mismanagement of his paralegal.

## VIOLATIONS COMMITTED

### Deputy Prosecuting Attorney Lori Kooiman WSB # 30370

### FACTS

Deputy Prosecuting Attorney (DPA) Kooiman violated Rules of Professional Conduct 3.2; 3.3; 3.4; 3.8; 4.1; and 8.4(c).

On December 9, 2010, DPA Kooiman filed the original criminal charges against Lynn Dalsing in Pierce County Superior Court Cause No. 10-1-05184-0. The charges were based on one photograph. DPA Kooiman declared under oath that the photo in question depicted Lynn Dalsing's bedroom, a fact that has been irrefutably determined to be false. The case was assigned to DPA Lewis, along with DPA Kooiman.[1] After filing the charges, DPA Kooiman and DPA Lewis failed to timely provide, and/or failed to cause the Sheriff's Department to provide, the photograph to Dalsing's attorney.[2]

While the charges were pending, DPA Kooiman and DPA Lewis were informed by Detective Ames via e-mail that the photo could not be identified as Dalsing, or linked to Dalsing. Detective Ames is the forensic computer analyst who evaluated the evidence on computers seized from the Dalsings' residence. Detective Ames also informed DPA Kooiman and DPA Lewis that even though there was child pornography found on a computer from the Dalsings' residence (where others resided), there was no evidence to connect the pornography to Lynn

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[1] In a declaration dated May 12, 2014, DPA Lewis asserts, "I, along with Deputy Prosecutor Lori Kooiman, represented the State of Washington in the matter *State o/Washington vs. Lynn Daising,* Pierce County Superior Court Case No. 10-1-05184-0."

[2] After repeated attempts to obtain a copy of the photograph, Dalsing's attorney, Mr. Clower, was eventually provided with a copy of the photograph on May 31 or June 1, 2011, almost five months after Dalsing had been arraigned. App. 12. The next day, Mr. Clower was informed by Dalsing's husband that the photo was not Lynn Dalsing, but part of the Felisha series of child pornography, *Id*. at 2. Mr. Clower immediately provided that information to prosecutors. Mr. Clower eventually contacted a detective from another agency, Tacoma Police Department, and with the detective's help, was able to determine within one hour that the photograph was a known series and unequivocally did not depict Dalsing. App. 1.

Dalsing. DPA Kooiman responded by e-mail, and cc'ed DPA Lewis, informing Detective Ames that the e-mail would need to be turned over to the defense.

Neither DPA Kooiman nor DPA Lewis ever provided a copy of the e-mail to Dalsing's attorney. Instead, DPA Kooiman and DPA Lewis appeared in court and requested a continuance of the trial date, informing the court that the State could proceed to trial and lay evidentiary foundation to introduce this evidence against Dalsing. The trial was still pending and Dalsing remained in custody.

Dalsing's attorney eventually obtained a copy of the photograph. Dalsing's attorney contacted a Tacoma Police Detective, Richard Voce, and asked for assistance comparing the photograph in question to known series of child pornography. With Detective Voce's assistance, Dalsing's attorney was able to unequivocally establish that the photograph did not depict Dalsing. The next day, July 13, 2011, Pierce County Superior Court Judge Ronald Culpepper dismissed the charges without prejudice. Nearly a year later, Dalsing, who had been incarcerated for eight months on the criminal case, filed a claim for damages and a civil lawsuit against Pierce County.

While Dalsing's civil suit was pending, DPA Kooiman and DPA Lewis each filed a declaration under oath in which they individually declare under oath that they turned over to Dalsing's counsel all the exculpatory evidence. The Prosecuting Attorney, Mark E. Lindquist, has acknowledged that DPA Kooiman did not turn over the exculpatory evidence. Prosecutor Lindquist has stated that he should have terminated DPA Kooiman's employment.

## ANALYSIS

**Prosecution of Case**

DPA Kooiman violated the Rules of Professional Conduct (RPC) when she filed the criminal charges against Dalsing. RPC 3.8 delineates special responsibilities of a prosecutor. DPA Kooiman's responsibilities as a deputy prosecutor are coextensive with the responsibilities of a prosecuting attorney. [3] "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." RPC 3.8, Comment 1.

RPC 3.8 specifically requires that a prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause and that the prosecutor make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. DPA Kooiman failed at both requirements.

The preamble to the RPC's describes the use of the term "shall" in the RPC's to designate an imperative. Because RPC 3.8 uses the term "shall," it is an imperative and does not leave room for lawyer discretion. Preamble and Scope (14). The term "knows" in the RPC denotes actual knowledge, which may be inferred from circumstances. RPC 1.0(f).

DPA Kooiman filed an Information in Pierce County Superior Court charging Lynn Dalsing with Count I, Child Molestation in the First Degree and Count II, Sexual Exploitation of a Minor. Appendix (App) 1. In support of the Information, DPA Kooiman filed a Declaration

[3] RCW 36.27.040 provides in part as follows: "The prosecuting attorney may appoint one or more deputies who shall have the same power in all respects as their principal."

for Determination of Probable Cause. App. 2. DPA Kooiman's declaration indicates that the factual basis was provided to her in Pierce County Sheriff's Department investigation reports identified as Pierce County Sheriff's incident report number 10-251-0339. App. 3. The sole basis for the charges against Dalsing was one photograph recovered from a computer in the Dalsing residence. The photograph depicts an adult female and a prepubescent child engaged in a sexual act. It is undisputed that the face of the adult depicted in the photograph are not identifiable. DPA Kooiman's declaration falsely asserts that the background of the photograph depicts Dalsing's bedroom. The photograph in question has subsequently and unequivocally been determined to be from a series of child pornography photographs, well known to law enforcement authorities and referred to as "The Felicia series," and in no way involves Dalsing.

At the time she filed the criminal charge, DPA Kooiman knew that the photo did not depict Dalsing.[4] First, it is undisputed that the face of the adult is not visible. Second, the photo depicts a white female, and Dalsing is of Hispanic descent. Third, there is no basis in the reports relied upon by DPA Kooiman for the assertion that the background of the photo depicts Dalsings' bedroom.[5] App. 3. Fourth, the police reports indicate that Detective Ames, a forensic computer analyst, located a series of child pornography images on one of the Dalsings' computers with the file name "Felisha." App. 3. The photograph in question is inconsistent with any of the other photographs that depict the interior of the Dalsing residence. App. 4. [6]

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[4] DPA Kooiman's knowledge can be inferred from the circumstances described. RPC 1.0(f).

[5] The declaration filed by DPA Kooiman attributes Detective Heishman with reporting that the detective recognized the background of the photograph to be Dalsing's bedroom, but that information is demonstrably false, and is not contained in any of the police reports authored by Detective Heishman that serve as the basis for the declaration.

[6] In complete contradiction, DPA Kooiman informed Maes' attorney that the photos were taken at Maes' residence, and added "Lynn naked in one of the photos with [KD] on top of her." App. 47.

The photo jpeg file name itself contains the name "Felisha, 11 years old."[7] App. 2; App. 4. Finally, the photograph has an identifiable date stamp of the year 2000, indicating that the photo was produced before the birth of the Dalsing child and before the Dalsings' purchased the residence DPA Kooiman identified in her declaration as Dalsing's bedroom. DPA Kooiman declared that the Dalsings bought the residence April 25, 2005. *Id*.

Because it was obvious this photograph belonged to a series of child pornography with a file name identified by the police reports (The Felisha series) and unrelated to Dalsing, DPA Kooiman should have refrained from filing the Information and initiating these criminal charges against Dalsing. Further, even assuming there was ever a basis to suspect the photo was produced in Dalsing's bedroom, the photograph was date stamped prior to the date Dalsing purchased the residence. Because it was obvious from the face of the photograph that it belonged to the "Felicia series," and because it was produced prior to the date Dalsing purchased the residence, DPA Kooiman should have refrained from filing the Information and initiating these criminal cases against Dalsing.

DPA Kooiman further violated RPC 3.8 when she continued with the prosecution of this criminal case after specifically being informed the photo could not be identified as Dalsing. An e-mail from Detective Ames was forward to DPA Kooiman on June 9, 2011. The e-mail informed DPA Kooiman that the photograph could not be identified as Dalsing. App. 4.
The email also informed DPA Kooiman that there was "definitely no link to her [Lynn Dalsing] and the child porn." *Id*. DPA Kooiman acknowledged in an e-mail response to Detective Ames that same day, June 9, 2011, "I do have to provide your e-mail to defense." *Id*.

**Discovery Violations**

[7] DPA Kooiman's Declaration for Determination of Probable Cause acknowledges that there is a name on the photo, but she did not include that the name on the photo was "Felisha."

DPA Kooiman did not provide the e-mail to Dalsing's defense attorney.[8] Instead, at a July 12, 2011 hearing, DPA Kooiman sought a continuance of the trial date while Dalsing remained in custody. App. 5 at 4. DPA Kooiman acknowledged to the court that Dalsing's attorney had informed DPA Kooiman several weeks earlier that the photograph was part of a known series (The Felisha series) unrelated to Dalsing.[9] *Id*. at 7. DPA Kooiman also acknowledged that the basis of the criminal charges against Dalsing was the one photograph in question. *Id*. at 10. Despite Det. Ames e-mail to the contrary, DPA Kooiman informed the Pierce County Superior Court that the State could proceed to trial and that she could lay foundation for introducing the photograph in question along with thousands of images of child pornography and it would be likely Dalsing would be convicted. *Id*. at 9; 17-18. The court denied DPA Kooiman's request to continue the trail date stated he expected the trial to start July 25, 2011. *Id.* at 26. Dalsing's attorney argued for her release, and Dalsing was released on her personal recognizance. *Id*. at 26.

Because DPA Kooiman specifically knew as of June 9, 2011, that the State could not prove the photograph depicted Dalsing, DPA Kooiman should have refrained from continuing to prosecute this criminal case, as required by RPC 3.8(a). Her role is a minister of justice and not simply that of an advocate. The responsibility of a prosecutor carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence. Instead of fulfilling her role, and complying with RPC 3.8, DPA Kooiman continued with the prosecution of the case and even sought to continue the trial date.

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[8] DPA Lewis, co-counsel to Kooiman, appeared at a hearing on July 8, 2011. App. 6. DPA Lewis conceded that the State could probably not prove the charges. From the transcript, Appendix 6 at page 10 :

The Court: But the current charges, that's what I'm concerned with. Does the State have the ability to prove those charges?

Mr. Lewis: I would say at this point probably not.

[9] Even after being provided this information from Dalsing's attorney, apparently DPA Kooiman took no steps to determine whether this was in fact part of the "Felisha series."

DPA Kooiman's failure and delay in making the photograph available to Dalsing's attorney violated RPC 3.2(d), 3.4(c), 3.4(d) and 8.4(d). RPC 3.4(a) provides that an attorney shall not unlawfully obstruct another party's access to evidence. 3.4(d) provides that a lawyer shall not fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party.

RPC 3.2(d) provides that a lawyer shall not knowingly disobey an obligation under the rules of a tribunal. Similarly, RPC 8.4(d) provides that it is professional misconduct for an attorney to engage in conduct that is prejudicial to the administration of justice. The rules of the tribunal, Pierce County Superior Court, are set forth as the Superior Court Criminal Rules (CrR). The Superior Court rule on discovery provides that a prosecutor is obligated to disclose relevant information and material to the defendant no later than the omnibus hearing. CrR4.7. Even assuming this photo was not in the prosecutor's possession or control, the rule also provides in relevant part as follows:

> Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting attorney, the prosecuting attorney shall attempt to cause such material or information to be made available to the defendant. If the prosecuting attorney's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant

CrR(d).

Dalsing was arraigned on December 10, 2011. Bail was set at $150,000. On January 13, 2011, Dalsing's attorney provided the prosecutor with an agreed protective order, signed by Superior Court Commissioner Oishi, which would enable Dalsing's attorney to obtain a copy of

the photograph in question. App. 7.[10] The prosecutor did not make available, nor attempt to cause the Sheriff's Department to make available to Dalsing's counsel the photograph in question.

Dalsing's attorney made repeated requests for the photograph, and informed the prosecutor that his client maintained that she was not depicted in the photograph. See App. 5; App. 6. In May of 2011, about five months after Dalsing was arraigned, it became apparent that DPA Kooiman could not locate the signed, agreed protective order Dalsing's attorney had provided to her nearly four months earlier. Accordingly, on Friday, May 6, 2011, Dalsing's defense attorney provided a second, agreed protective order signed by Judge Culpepper, to the defense attorney to obtain a copy of the photograph. App. 10.

The e-mail records show that on on Friday May, 6, 2011, DPA Kooiman contacted the Sheriff's Department in an effort to cause the Sheriff's Department to provide the photograph to Dalsing's attorney. App. 11. The content of the e-mail indicates this is the first time the prosecutor's office had attempted to cause the Sheriff's Department to make the material available to Dalsing's attorney. Dalsing's attorney finally obtained a copy of the photograph on May 31 or June 1, 2011. The next day, Dalsing's attorney informed the prosecutor the photo did not depict his client. Dalsing's attorney told the prosecutor that, according Michael Dalsing, the photo was from "The Felisha series," a known series of child pornography unrelated to Lynn Dalsing. Dalsing's attorney suggested the prosecutors compare the photo to the "Felisha series" identified in the original police reports.[11]

DPA Kooiman knowingly disobeyed her obligation under the tribunal rule, CrR 4.7. The Superior Court rule on discovery provides that a prosecutor is obligated to provide discovery

[10] On December 29, 2010, Dalsing's attorney was provided a discovery receipt and protective order, which would enable him to obtain the photograph. App. 8.
[11] Dalsing's attorney had only been provided the one photo image that served as the basis for the criminal charges.

no later than the omnibus hearing. If the prosecutor does not possess or control the material, and upon the defendant's request, the prosecutor "shall" attempt to cause the material to be provided to the defendant. DPA Kooiman did neither. Despite her false assurances to Dalsing's attorney, no attempt was ever made until May 6th, 2011. App. 11.

DPA Kooiman's failure to timely provide a copy of the photograph also constitutes unlawful obstruction of Dalsing's access to evidence under RPC 3.4(a) and 3.4(d). DPA Kooiman not only failed to provide a copy of the photo, she obstructed Dalsing's attorney by providing false assurances that the discovery would be provided, and by twice requiring Dalsing's attorney to provide a signed, agreed protective order. DPA Kooiman's conduct does not comport with making a reasonably diligent effort to comply with a legally proper discovery request by an opposing party, thus her conduct violates RPC 3.4. DPA Kooiman's failure, delay and false assurances, constitute an obstruction of Dalsing's access to evidence.

DPA Kooiman's unjustifiable failure, delay and false assurances to Dalsing's attorney was prejudicial to the administration of justice, violating RPC 8.4. As a result of the failure, delay, and false assurances, Dalsing needlessly and unjustifiably lost significant liberty; she was subjected to several months in custody and in jeopardy of a Class A felony.

**Exculpatory Evidence**

DPA Kooiman's failure to provide Det. Ames' email, and her failure to inform Dalsing's attorney of the content of the e-mail, violated RPC 3.8(d) and RPC 4.1. RPC 3.8 provides that the prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or

mitigates the offense. RPC 4.1 provides that in the course of representing a client, a lawyer shall not knowingly make a false statement of material fact or law to a third person.

On June, 9, 2011, while the criminal charge was pending against Dalsing, DPA Kooiman received an e-mail communication from Detective Ames, a forensic computer analyst. App. 4. Det. Ames had forensically examined the Dalsing computer and analyzed the evidence some months prior. DPA Kooiman was sent an e-mail from Detective Ames, in which he informed her that the photograph in question could not be identified as Dalsing. *Id*. Further, Det. Ames informed DPA Kooiman that there was nothing linking Dalsing to other child pornography and no link between the pornography and Dalsing. *Id*. DPA Kooiman responded by e-mail informing Detective Ames that the e-mail would need to be turned over to Dalsing's defense and that DPA Kooiman wanted to speak/meet with Detective Ames. *Id*.

DPA Kooiman did not provide the e-mail to Dalsing's attorney.[12] Instead, DPA Kooiman appeared in Pierce County Superior Court on July 12, 2011 and sought a continuance of the trial. App. 5. The transcript reflects that DPA Kooiman told the court that the State (her client) could proceed to trial and lay evidentiary foundation to introduce this evidence against Dalsing, but the State wanted additional time to investigate further. The transcript demonstrates that DPA Kooiman failed to inform the court or Dalsing's attorney of the content of Detective Ames' e-mail. Specifically, DPA Kooiman knew there was "definitely no link" between Dalsing and the child pornography, yet she misrepresented to the court that she could lay foundation and for such evidence and that Dalsing would likely be convicted. *Id*. at 9. Her misrepresentation to the court and failure to disclose Detective Ames statements constitutes a failure to disclose the

[12] The e-mail was eventually turned over more than 8 months after the original criminal charges against Dalsing were dismissed, and after significant litigation in King County Superior Court, where Dalsing was prosecuting her civil law suit.

defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, in violation of RPC 3.8.

Further, DPA Kooiman's misrepresentation to the court, that she could lay foundation for thousands of photos, and that Dalsing would likely be convicted, was made in the course of representing her client, the State, and she was knowingly making a false statement of material fact or law to a third person, namely Dalsing and her attorney, in violation of RPC 4.1.

**Lack of Candor**

DPA Kooiman made misrepresentations and misled the tribunal, which violated RPC 3.3 and RPC 4.1. RPC 3.3 provides that a lawyer shall not knowingly make a false statement of fact or law to a tribunal. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. RPC 3.3, Comment 3. RPC 4.1 provides that in the course of representing a client, a lawyer shall not knowingly make a false statement of material law or fact.

DPA Kooiman was unequivocally informed by Detective Ames that the photograph in question could not be identified as Dalsing, a fact and report she withheld from Dalsing's attorney. Further, on June 9, 2011, Detective Ames e-mail informed DPA Kooiman that there was "definitely no link" between Dalsing and the child pornography found on the computer, which was also withheld from Dalsing's attorney.

In fact, in her July 12, 2011 request for a continuance, DPA Kooiman affirmatively told the court and counsel that she could proceed to trial, that she could lay the foundation to admit thousands of depictions of child pornography and link them to Dalsing. DPA Kooiman's blatant false statements to the court constitute a knowing false statement of fact to a tribunal. Further her statements to the court, in the presence of the defendant and defense counsel, were knowingly

false and material statements of fact made during the course of representing her client, the State. As such, the statements constitute a violation of RPC 4.1.

DPA Kooiman further violated RPC 3.3 when she filed a declaration in the matter of *Michael Ames vs. Pierce County*, Pierce County Superior Court Cause No. 13-2-13551-1.[13] DPA Kooiman, in a declaration dated May 12, 2014 made numerous false statements. Further, DPA Kooiman's declared under oath, "All evidence I was aware of, inculpatory and exculpatory, was disclosed to Lynn Dalsing's criminal defense attorney Clower." DPA Kooiman also declared under oath, "When I learned that Ames failed to connect Lynn Dalsing to the computers that contained child pornography, I provided that information to Gary Clower. I told him this over the telephone and in person."

These statements in DPA Kooiman's declaration are blatantly false, and another instance of violation of RPC 3.3, knowingly making a false statement of fact to a tribunal. The first statement, that DPA Kooiman had "disclosed" all inculpatory and exculpatory evidence to Dalsing's attorney is false. DPA Kooiman has never, as of this writing, provided the e-mail to Dalsing's attorney. Similarly DPA Kooiman's claim that she provided the information to Dalsing's attorney is false. DPA Kooiman argued in court on July 12, 2011 for a continuance (more than one month after she received the Ames e-mail); DPA Kooiman told the court she could "lay foundation" and introduce evidence and likely convict Dalsing. App. 5 at 17-18. Obviously, if DPA Kooiman actually had informed Dalsing's attorney of the content of the Ames' e-mail, she would not have made this argument in front of Dalsings and her attorney. Nor, certainly, would Dalsing's attorney have allowed this misrepresentation to stand. DPA

[13] Detective Michael Ames had been identified by the prosecutor as a law enforcement officer subject to disclosure of potential impeachment material (Brady Cop). The case is a declaratory action in which Det. Ames is seeking to clear his name and reputation.

Kooiman’s declaration constitutes another violation of RPC 3.3 in that it is another instance of knowingly making a false statement of fact to a tribunal.

**Deputy Prosecuting Attorney Timothy Lewis, WSB # 33767_____**

Deputy Prosecuting Attorney (DPA) Lewis violated Rules of Professional Conduct 3.2; 3.3; 3.4; 3.8; 4.1; 8.4.

## FACTS

The foregoing facts and analysis are incorporated herein.

## ANALYSIS

**Prosecution of Case**

DPA Lewis violated RPC 3.8 when he proceeded with a prosecution of a criminal case against Dalsing knowing there was no evidence to support the charges. RPC 3.8 delineates special responsibilities of a prosecutor. DPA Lewis' responsibilities as a deputy prosecutor are coextensive with the responsibilities of a prosecuting attorney. [14] "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence." Comment to RPC 3.8.

RPC 3.8 specifically requires that a prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause and that the prosecutor make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense. DPA Lewis failed at both requirements.

The preamble to the RPC's describes the use of the term "shall" in the RPC's to designate an imperative. Because RPC 3.8 uses the term "shall," it is an imperative and does not leave

[14] RCW 36.27.040 provides in part as follows: "The prosecuting attorney may appoint one or more deputies who shall have the same power in all respects as their principal."

room for lawyer discretion. Preamble and Scope (14). The term “knows” in the RPC denotes actual knowledge, which may be inferred from circumstances. RPC 1.0(f).

DPA Kooiman filed an Information in Pierce County Superior Court charging Lynn Dalsing with Count I, Child Molestation in the First Degree and Count II, Sexual Exploitation of a Minor. App 1. In support of the Information, DPA Kooiman filed a declaration of probable cause. App. 2. The sole basis for the two counts against Dalsing was one photograph recovered from a computer in the Dalsing residence. The photograph depicts an adult female and a prepubescent child engaged in a sexual act. It is undisputed that the face of the adult depicted in the photograph are not identifiable. DPA Kooiman’s declaration of probable cause falsely asserts that the background of the photograph depicts Dalsing’s bedroom. The photograph in question has subsequently and unequivocally been determined to be from a series of child pornography photographs, well known to law enforcement authorities and referred to as “The Felicia series.”

The case was assigned to DPA Lewis to handle with DPA Kooiman.[15] DPA Lewis knew the photograph did not depict Dalsing.[16] First, it is undisputed the face is not visible. Second, the photo depicts a white female, and Dalsing is of Hispanic descent. Third, there is no basis in the reports relied upon by DPA Kooiman for the assertion that the background of the photo depicts Dalsings’ bedroom. App. 3. Fourth, the police reports indicate that Detective Ames, a forensic computer analysts, located a series of child pornography images on one of the Dalsings’ computers, with the file name “Felisha” series. App. 3. The photograph in question is inconsistent with any of the other photographs that depict the interior of the Dalsing residence. App 4. The photograph jpeg file name contains the name “Felisha, 11 yo.”[17] App. 2. Finally, the

[15] DPA Lewis was handling the case by January 14, 2011, when he entered a joint motion for continuance.
[16] DPA Lewis’ knowledge can be inferred from the circumstances described. RPC 1.0(f).
[17] DPA Kooiman’s Declaration of Probable Cause acknowledges that there is a name on the photo, but she did not include that the name on the photo was “Felisha.”

photograph has an identifiable date stamp of the year 2000, indicating that the photo was produced before the birth of the Dalsing child and before the Dalsings purchased the residence DPA Kooiman identified in her declaration as Dalsing's bedroom. DPA Kooiman declared that the Dalsings bought the residence April 25, 2005. *Id*. [18]

Because it was obvious this photograph could not be identified as Dalsing, and because the photo was produced years before the Dalsings bought the residence that was the supposed background for the photo, and because the photo was the sole basis for the charges against Dalsing, DPA Lewis should have refrained from prosecuting this criminal case against Dalsing.

DPA Lewis further violated RPC 3.8 when he continued the prosecution of this criminal case after being specifically informed that Dalsing could not be identified in the photograph. On June 9, 2011, an e-mail from Detective Ames was forward to DPA's Kooiman and DPA Lewis was cc'ed. The e-mail informed DPA Kooiman and DPA Lewis that the woman in the photograph could not be identified as Dalsing. App 4. The email also informed DPA Kooiman and DPA Lewis that there was "definitely no link to her [Lynn Dalsing] and the child porn." *Id*. DPA Kooiman acknowledged in an e-mail response to Detective Ames that same day, June 9, 2011, and cc'ed to DPA Lewis, "I do have to provide your e-mail to defense." *Id*.

DPA Lewis did not provide the e-mail to Dalsing's attorney. Instead DPA Lewis, along with co-counsel, sought a continuance of the case. DPA Lewis and DPA Kooiman appeared for the State at a July 12, 2011 hearing; DPA Kooiman informed the Pierce County Superior Court that the State could proceed with the prosecution. App. 5. DPA Kooiman informed the court that she could lay foundation for the evidence in question. *Id*. at 9. Because DPA Lewis specifically knew that the photograph could not be identified as Dalsing, DPA Lewis should have corrected

[18] DPA Lewis' knowledge can be inferred from the circumstances described. RPC 1.0(f).

DPA Kooiman’s misstatements to the court and refrained from continuing to prosecute this criminal case.

**Discovery Violation**

DPA Lewis violated RPC 3.4(c) and 3.4(d) and 8.4(d) by failing to make the photograph available to Dalsing’s defense attorney in a timely manner. RPC 3.4(c) provides that a lawyer shall not knowingly disobey an obligation under the rules of a tribunal. RPC 3.4(d) provides that a lawyer shall not, in pretrial procedure, fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party. The rules of the tribunal, Pierce County Superior Court, are set forth as the Superior Court Criminal Rules (CrR). The Superior Court rule on discovery provides that a prosecutor is obligated to disclose relevant information and material to the defendant no later than the omnibus hearing. CrR4.7. Even assuming the photo was not within the possession and control of the prosecutor, the rule also provides in relevant part as follows:

> Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting attorney, the prosecuting attorney shall attempt to cause such material or information to be made available to the defendant. If the prosecuting attorney's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant

CrR(d).

Dalsing was arraigned on December 9, 2010. Her bail was set at $150.000. On January 13, 2011, Dalsing’s attorney provided the prosecutor with an agreed protective order signed by Commissioner Oishi, and a blank CD, which would enable him to get a copy of the photograph

in question. App. 7. [19] The prosecutor did not make available, nor attempt to cause the Sheriff's Department to make available to Dalsing's counsel the photograph in question.

Dalsing's attorney made repeated requests for the photograph, and informed the prosecutor that his client maintained that she was not depicted in the photograph. App. 5; App. 6. By May 6, 2011, five months after Dalsing was arraigned, it became apparent that the prosecutor could not locate the signed, agreed protective order Dalsing's attorney had provided. Accordingly, Dalsing's defense attorney provided a second, agreed protective order, signed by Judge Culpepper, to enable him to get a copy of the photograph. App. 10.

The e-mail records show that DPA Kooiman contacted the Sheriff's Department on Friday, May 6, 2011, in an effort to cause the Sheriff's Department to provide the photograph to Mr. Clower. App.11. The content of the e-mail indicates this is the first time the prosecutor's office had attempted to cause the Sheriff's Department to make the material available to Mr. Clower. *Id*. Mr. Clower finally obtained a copy of the photograph on May 31 or June 1, 2011. The next day, Mr. Clower informed the prosecutor the photo did not depict his client. Mr. Clower told the prosecutor that according Michael Dalsing, the photo was from "The Felisha series," a known series of child pornography. Dalsing's attorney suggested that the prosecutor compare the photo in question to the "Felisha series" which was references in the original police reports.

DPA Lewis knowingly disobeyed his obligation under the tribunal rule, CrR 4.7. The Superior Court rule on discovery provides that a prosecutor is obligated to provide discovery no later than the omnibus hearing. If the prosecutor does not possess or control the material, and upon the defendant's request, the prosecutor "shall" attempt to cause the material to be provided

[19] Dalsing's Attorney had been notified by the prosecutor's office that he needed to provide with instructions about how to obtain the material. The instructions required a signed protective order and a blank CD. App. 8.

to the defendant. DPA Lewis did neither. Despite her false assurances to Dalsing's attorney, no attempt was ever made until May 6, 2011. App. 11.

DPA Lewis' failure to timely provide a copy of the photograph also constitutes unlawful obstruction of Dalsing's access to evidence, in violation of RPC 3.4. DPA Lewis repeatedly assured Dalsing's attorney he would provide the photograph, or cause it to be provided. App. 5; App. 6. Despite repeated requests for a copy of the photo, and despite twice providing the prosecutor a signed, agreed protective order, the prosecutor did not make any effort to provide, or cause the material to be provided until nearly five months after Dalsing had been arraigned. App. 11. DPA Lewis' failure, delay and false assurances, constitute an obstruction of Dalsing's access to evidence, and violate RPC 3.4. [20]

DPA Lewis' unjustifiable failure, delay and false assurances to Dalsing's attorney was prejudicial to the administration of justice, in violation of RPC 8.4. As a result of the failure, delay, and false assurances, Dalsing needlessly and unjustifiably lost significant liberty; she was subjected to several months in custody and in jeopardy of a Class A felony.

**Exculpatory Evidence**

DPA Lewis violated RPC 3.8(d) and RPC 4.1. RPC 3.8 provides that the prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.

On June 9, 2011, while the criminal charge was pending against Dalsing, DPA Kooiman received an e-mail communication from Detective Ames, a forensic computer analyst.

[20] At the hearing, Dalsing's attorney told the court he did not "fault" the DPAs for the delay in getting the photo and the delay in determining whether the photo was part of a known and unrelated series of pornography. At that time , however, Dalsing's attorney did not know that the prosecutor's office made no attempt to instruct the sheriff's office to provide the photograph until May of 2011. Further, Dalsing's attorney did not know how easy and expeditious it actually was to determine whether the photo was part of the "Felicia" until the next day, when he was able to get an answer within one hour from a Tacoma Police Detective.

Det. Ames had forensically examined the Dalsing computer and analyzed the evidence some months prior. Detective Ames sent an e-mail to DPA Kooiman unequivocally informing her that the photograph in question could not be identified as Dalsing. Further, Det. Ames informed DPA Kooiman that the photograph did not appear to have been taken inside the Dalsing residence. That same day, June 9, 2011, DPA Kooiman responded by e-mail, included Detective Ames message and cc'ed DPA Lewis, informing Detective Ames that his e-mail, writing, "I do have to provide your e-mail to the defense." App. 4.

DPA Lewis did not provide the e-mail to Dalsing's attorney.[21] Instead, DPA Lewis appeared in Pierce County Superior Court on July 8, 2011, and sought a continuance of the trial. App. 6. DPA Lewis conceded to the court that the photo in question likely did not depict Dalsing. *Id*. at 8. The court denied the continuance and left the trial date as set, for July 12, 2011, *Id.* at 9.[22] On July 12, 2011, DPA Lewis appeared and again sought a continuance of the trial date. App. 5. The transcript reflects that DPA Kooiman, with DPA Lewis present, told the court that the State (her client) could proceed to trial and lay evidentiary foundation to introduce this evidence against Dalsing, but the State wanted additional time to investigate further. App. 5. DPA Lewis failed to inform the court or Dalsing's attorney of Detective Ames' statements. DPA Lewis specifically knew there was definitely no link between Dalsing and the child pornography, yet he stood silent while DPA Kooiman misrepresented to the court that she could lay foundation and admit such evidence. App. 5 at 9. The misrepresentation to the court and failure to disclose Detective Ames exculpatory statements constitutes a failure to disclose the defense of all

[21] The e-mail was eventually turned over more than 8 months after the original criminal charges against Dalsing were dismissed, and after significant litigation in King County Superior Court, where Dalsing was prosecuting her civil law suit.

[22]

evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.

**Lack of Candor**

DPA Lewis violated RPC 3.3 and RPC 4.1. RPC 3.3 provides that a lawyer shall not knowingly make a false statement of fact or law to a tribunal. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. RPC 3.3, Comment 3. RPC 4.1 provides that in the course of representing a client, a lawyer shall not knowingly make a false statement of material law or fact.

DPA Lewis was unequivocally informed by Detective Ames that the photograph in question could not be identified as Dalsing, a fact and report he withheld from Dalsing's attorney. Further, on June 9, 2011, Detective Ames e-mail informed DPA Lewis there was "definitely no link" between Dalsing and the child pornography found on the computer, a fact that was also withheld from Dalsing's attorney.

Despite knowing there was "definitely no link" between Dalsing and the child pornography, DPA Lewis twice asked the court for further continuances to investigate the case, on July 8, 2011 (App. 6) and on July 12, 2011 (App. 5). At the July 12, 2011 hearing, DPA Kooiman, with DPA Lewis present, affirmatively told the court and counsel that the State could proceed to trial, that the State could lay the foundation to admit thousands of depictions of child pornography and link them to Dalsing. App. 5 at 9. DPA Kooiman's blatant false statements to the court constitute a knowing false statement of fact to a tribunal. DPA Lewis was present and did nothing to correct the knowing false statements of fact made to the tribunal, inviolaton of RPC 3.3. Further DPA Kooiman's statements to the court, and defense counsel, were knowingly false and material statements of fact made during the course of representing her client, the State.

DPA Lewis was present and did nothing to correct the knowing false statements and material statements of fact made on behalf of his client, during the course of representing his client, in violation of RPC 4,1.

DPA Lewis further violated RPC 3.3 when he filed a declaration in the matter of *Michael Ames vs. Pierce County*, Pierce County Superior Court Cause No. 13-2-13551-1.[23] DPA Lewis asserted in his declaration, "All evidence I was aware of, inculpatory and exculpatory, was disclosed to Lynn Dalsing's criminal defense attorney Clower." To the date of this writing, DPA Lewis has never provided the Ames' e-mail to Dalsing's attorney. Further, DPA Lewis has never even informed Dalsing's lawyer of the contents of the e-mail. As evidence that this information was never disclosed is the transcript from the July 12, 2011 hearing, where DPA Kooiman and DPA Lewis sought a continuance of the trial date. More than a month after receiving the Ames' e-mail, DPA Kooiman, along with DPA Lewis, argued in court for more time to investigate the case. DPA Kooiman also told the court she was ready to proceed to trial and she could "lay foundation" and introduce evidence and likely convict Dalsing. App. 5. Obviously, if DPA Lewis had ever actually informed Dalsing's attorney of the content of the Ames' e-mail, he and DPA Kooiman would not have made this argument in front of Dalsings and her attorney. Nor, certainly, would Dalsing's attorney have allowed this misrepresentation to stand. DPA Lewis' declaration constitutes another violation of RPC 3.3 in that it is another instance of knowingly making a false statement of fact to a tribunal. DPA Lewis' declaration constitutes another violation of RPC 3.3 in that it is another instance of knowingly making a false statement of fact to a tribunal.

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[23] Detective Michael Ames had been identified by the prosecutor as a law enforcement officer subject to disclosure of potential impeachment material (Brady Cop). The case is a declaratory action in which Det. Ames is seeking to clear his name and reputation.

**Deputy Prosecuting Attorney James Richmond WSB #_15865**

Deputy Prosecuting Attorney James Richmond violated rules of Professional Conduct 1.7; 1.10; 3.2; 3.3; 3.4; 3.8; and 8.4.

**FACTS**

The foregoing facts and analysis are incorporated herein. Further, on (date) Dalsing, through her attorney Fred Diamondstone, brought a civil action against Pierce County. The claim alleges false arrest and malicious prosecution, King County Cause No. 12-2-08659-1 SEA. The case is assigned to King County Superior Court Judge Andrus. Deputy Prosecuting Attorney (DPA) Jim Richmond was tasked with representing Pierce County in that lawsuit. Early in the discovery process, on February 14, 2013, Mr. Diamondstone deposed Pierce County Sheriff's Detective Mike Ames. Sometime in October, prior to the deposition, Det. Ames conferred by telephone with DPA Richmond. Also in October, prior to the deposition, Det. Ames forwarded to DPA Richmond, by e-mail, the June 9, 2011 e-mail exchange with DPA's Kooiman, DPA Lewis and Detective Heishman. (Ames' e-mail) During the course of the deposition, it became apparent to Detective Ames that DPA Richmond had not provided a copy of the Ames e-mail to Mr. Diamondstone. App. 14 at 70; 145-46. Detective Ames testified that the evidence that he had seen against Ms. Dalsing failed to establish probable cause to believe that she had committed a crime. App. 14 at 141 [24] He testified that in processing family photographs and crime scene photographs from the home computers, he had not seen a room that could have been the one in the photograph in the Dalsing home and that he had discussed that issue with Detective Heishman prior to Dalsing's arrest. *Id*. at 73-78, DPA Richmond prevented Detective Ames from

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[24] These statements made during his deposition contradict statements attributed to Detective Ames in Detective Heishman's report.

answering many of Mr. Diamondstone's questions, asserting the answers were protected under work product. *Id*. at 96; 118-131.

Following the deposition, Det. Ames felt that he could not "clear his name" if he was not allowed to answer questions about the investigation he had conducted. He specifically felt that "DPA Richmond was trying to protect his own staff at the expense of the Sheriff's department and [Ames] personally." App.15 at 2. Accordingly, Detective Ames sought legal counsel and filed a motion to compel Pierce County to pay for his legal defense. Detective Ames wanted his e-mails turned over to Dalsing and through his attorney he sought such an order from Judge Andrus.

Also following the deposition, Dalsing herself sought an order compelling the Ames e-mail in discovery. Significant litigation ensued on this issue. DPA Richmond produced a scant few documents, withholding many others that were eventually submitted for *in camera* review by Judge Andrus. DPA Richmond specifically asserted the Ames e-mail constituted work product. DPA Richmond also asserted DPA Kooiman and DPA Lewis could not be deposed. On April 22, 2013, Judge Andrus held that the Deputy Prosecutors could be deposed and she ordered email, including Detective Ames' June 9, 2011 email, to be turned over to Dalsing.[25] App 19. DPA Richmond sought discretionary review in Division I. The Commissioner granted a temporary stay of discovery pending a decision on the motion for discretionary review.

During the course of Dalsing's motion to compel, DPA Richmond denied receiving the June 9, 2011 e-mail from Detective Ames. App.16.[26] Detective Ames declared that he had provided the e-mail to DPA Richmond. In addition to ordering that the Ames e-mail be turned

[25] Three days later, on April 25, 2013, Judge Andrus after *in camera* review also ordered DPA Richmond to turn over two memoranda drafted by DPAs.
[26] Specifically, on July 17, 2013, DPA Richmond filed a declaration as follows: "Mr. Ames falsely states he turned over County e-mails to me that would 'clear his name and his department.'" App. 16.

over to Dalsing, Judge Andrus on July 22, 2013, held that "Pierce County's discovery conduct was substantially unjustified." By the same order, the judge ordered Pierce County to pay Det. Ames legal fees. App. 22.[27] Much later, Pierce County Superior Court Judge Murphy summed up the events, "On August 12th, 2013, Judge Andrus denied the County motion's for reconsideration of her July 23rd decision, and warned that a general request for a continued stay would not be sufficient. Pierce County filed a notice of discretionary review of that decision, and the commissioner of the Court of Appeals granted a temporary stay pending a hearing or decision on discretionary review. App. 23 at 15.

Within one month of Det. Ames prevailing on the discovery issue and the issue of his legal fees, on September 18, 2013, Prosecutor Lindquist notified Detective Ames that pursuant to *Brady v. Maryland*, Prosecutor Lindquist's office would routinely be disclosing impeachment material to defense attorneys in all Detective Ames' cases. App. 18. The letter notified Det. Ames that the basis of Prosecutor Lindquist's decision for this action against Det. Ames was the fact that Det. Ames had filed four declarations related to Dalsing's motion to compel, and Ames' declarations are disputed by Lindquist's "DPAs assigned to the case." *Id*.[28] Later, DPA Penner, declared under oath that "Specifically, Det. Ames signed declarations in a civil case which contained factual assertions which were deemed false by DPA James Richmond." App. 40.

Following this "Brady" determination, Detective Ames actually produced proof that he had forwarded the June 9, 2011 e-mail to DPA Richmond, resolving the "disputed fact."

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[27] Pierce County sought discretionary review of Judge Andrus order in Division I, Cause No. 708503, which was denied on December 18, 2013. The County filed a motion to modify which was denied on March 25, 2014.

[28] The only identifiable disputed "fact" is whether Det. Ames provided his email to DPA Richmond, which DPA Richmond declared was a "false statement." Since then, DPA Richmond admitted he had received the e-mail.

Thereafter, DPA Richmond filed a second declaration dated May 12. 2014, admitting that he had received the e-mail from Det. Ames. App. 17.[29]

As described above, rather than comply with Judge Andrus' order compelling discovery, DPA Richmond sought discretionary review of Judge Andrus' order.[30] The Commissioner temporarily stayed discovery pending review of the motion. The court of appeals denied discretionary review on December 18, 2013. App. 27. Thirty days later, on January 17, 2014, Pierce County filed a motion to modify the ruling. The motion to modify was denied on March 25, 2014. App. 28. Accordingly, Judge Andrus' order to compel discovery immediately took effect.[31]

Three days later, on March 28, 2015, DPA Ausserrer re-filed criminal charges against Lynn Dalsing, much more serious than the original charges. App. 20.[32] The "re-filed" Information charged Dalsing with eight counts: Two counts of Rape of a Child in the First Degree; three counts of Child Molestation in the First Degree; and three counts of Sexual Exploitation of a Minor. DPA Ausserrer filed a Supplemental Declaration in Support of Probable Cause in support of the new charges. App. 21. Prosecutor Lindquist sought review in the Supreme Court. The newly, re-filed criminal charges had the practical effect of halting discovery in the pending civil law suit.[33]

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[29] DPA Richmond later admitted he had received the e-mail from Detective Ames; he clarified in a much later declaration dated May 12, 2014: "I have never denied receiving the June 9, 2011 e-mail. Instead, I stated that it was not given to me at the Oct. 12, 2012 meeting." App. 16.

[30] Court of Appeals Division I, Cause No. 704559.

[31] The Pierce County Prosecutor sought discretionary review in the Supreme Court Cause No. 90173-2) which denied by Commissioner Pierce on October 28, 2014.

[32] DPA Ausserrer's declaration for probable cause is dated March 27, 2013, just two days after the adverse ruling in Division I. The declaration was not filed until the next day, March 28, 2014.

[33] DPA Ausserrer's Supplemental Probable Cause Declaration, alleged a novel theory that Ms. Dalsing acted as an accomplice to her husband's sexual abuse of the children. DPA Ausserer acknowledged that he did not know of any other cases where Pierce County pursued child sexual abuse charges against a suspect on a theory of accomplice culpability. (Appendix 38 is partial transcript, the full transcript will reflect this exchange).

It has, since then, become abundantly clear that DPA Richmond significantly involved himself in "re-opening" the criminal investigation. According to the May 2, 2013 declaration of DPA Ausserrer, the "criminal investigation" against Dalsing was brought back to life on the same day DPA Richmond got the adverse ruling from Judge Andrus on the motion to compel." See App. 24.

Pierce County Superior Court Judge Edmund Murphy recently ordered that the "new" charges against Dalsing be dismissed with prejudice on the basis of prosecutorial vindictiveness. As Judge Murphy recognized in his oral ruling:

> This is a case where the defendant exercised her right to sue the County after her case was dismissed without prejudice. The merits of that case have not been addressed in over three years. Discovery has been effectively halted for almost two years, first for over ten months because of a stay put in place because of the prosecutor's claim they were investigating the defendant for criminal charges, and now for over a year by the existence of this criminal case. Under these circumstances, the Court finds that the defendant can raise a claim of presumption of vindictiveness.

App. 23, March 30, 2015 Transcript of Judge Murphy ruling at page 8:8-24.

## ANALYSIS

### Conflict of Interest

DPA Richmond violated RPC 1.7, 1.10 and 8.4(d) and 8.4(n) when he involved himself in the criminal investigation and when he involved himself in the re-filing of criminal charges against Dalsing. RPC 8.4 provides that it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; to engage in conduct involving dishonesty, fraud, deceit or misrepresentation; to engage in conduct that is prejudicial to the administration of justice; to violate one's oath as an attorney; and to engage in conduct demonstrating unfitness to practice law. DPA Richmond has violated all these provisions.

First DPA Richmond continued his representation despite a clear conflict of interest. Washington courts have recognized an inherent conflict can arise for a prosecuting attorney. *Snohomish Cnty. v. Nichols*, 47 Wn. App. 550, 556-57, 736 P.2d 670, 674 (1987) aff'd, 109 Wn. 2d 613, 746 P.2d 1208 (1987). In *Nichols*, a deputy sheriff filed a claim against the sheriff's department seeking reinstatement. The prosecutor, who represented the sheriff's department, refused to provide representation to the deputy arguing that the prosecutor had discretion to make such a decision.

The Appellate Court reasoned as follows:

> The respondent argues that the prosecutor improperly exercised discretion because the office was representing the Snohomish County Sheriff's Department in the same case and therefore should have appointed a special prosecutor to represent Nichols.
>
> RCW 73.16.061 imposes a mandatory obligation on county prosecutors to represent veterans seeking reinstatement under the Veterans' Reemployment Rights Act. It is undisputed that the Snohomish County Prosecuting Attorney's Office is the legal advisor and attorney for the Snohomish County Sheriff's Office. RCW 36.27.005. **The prosecuting attorney could not, in the fair exercise of his professional duties, give an impartial and unbiased evaluation of Nichols' case. The conflict of interest was clear and the prosecuting attorney had an ethical obligation to step aside in favor of an independent special prosecutor. RPC 1.7,** CPR 5 and DR 5–105. The fees expended by Nichols in retaining private counsel are therefore recoverable as the equivalent of legal services the prosecutor was directed by statute to provide but refused. We thus reject the County's immunity argument. It would clearly defeat the purpose of RCW 73.16.061 to allow the County to shift the burden of providing legal representation to a plaintiff whose claim proves to be meritorious.

*Nichols*, at 556-57 (emphasis added).

Here, as in *Nichols*, DPA Richmond did not fairly exercise his professional duties. DPA Richmond did not act in an impartial and unbiased way, instead he involved himself in the criminal investigation and prosecution of a plaintiff, while he was defending the plaintiff's claim. DPA Richmond's involvement in the criminal case is a direct conflict of interest, in that he used

the authority and power of the prosecutor's office to file criminal charges against Dalsing for the purpose of covering up wrong-doing of DPA's Kooiman and Lewis and obtaining strategic advantage against her in her civil law suit. DPA Richmond's conduct constitutes professional misconduct, as he engaged in conduct that is prejudicial to the administration of justice and demonstrated unfitness to practice law.

It is undeniable in the Dalsing case, that the Pierce County Prosecuting Attorney could not, and did not, in the fair exercise of professional duties, give an impartial and unbiased evaluation of Dalsing's criminal case. Judge Murphy later found that situation to be a conflict. App. 23 at 15-16; App. 35 at 16. The conflict of interest was clear and the prosecuting attorney had an ethical obligation to step aside in favor of an independent special prosecutor.

Instead of stepping aside, DPA Richmond assisted in the investigation that led to the re-filing of the Amended Information against Dalsing, while at the same time performing his duties as the civil deputy assigned to defend the county against Dalsing's civil claims. DPA Richmond worked on both cases, civil and criminal, despite a clear and direct conflict between the two. DPA Richmond was assisting in the criminal investigation as a way to ensure a successful outcome of the civil case. Not only did the "on-going" criminal investigation serve to delay discovery for advantage in the civil case, a conviction on the new re-filed criminal charge would essentially exenterate the civil matter.

To keep the discovery process stayed in the civil case, DPA Richmond represented to Judge Andrus that the criminal investigation against Dalsing had been re-opened. App. 37. The transcript reflects that on May 2, 2013, DPA Richmond told Judge Andrus, "The on-going criminal investigation, to be clear, your Honor, is something that began apparently ten days ago or so." *Id*. at 14. Richmond informed Judge Andrus that the Pierce County Prosecutor had a

conflict of interest and would not be involved in the investigation. *Id*. at 25. DPA Richmond also filed a declaration by DPA Ausserer (dated May 2, 2013) in which DPA Ausserrer informed Judge Andrus that the Pierce County Prosecutor's Office would remove itself from the criminal case, and would be referring the investigation to the Lakewood Police Department and the prosecutorial oversight to the Snohomish County Prosecutor's Office:

> Because my office and the Pierce County Sheriff's Office apparently are the subject of the instant civil suit filed by Ms. Dalsing, to avoid any appearances of a conflict of interest, I have provided the case file and other information and new intelligence to other law enforcement so that they can independently continue the investigation of Ms. Dalsing in association with the Snohomish County Prosecutor's Office.

APP 24*,* Declaration of Jared Ausserer*,* May 2, 2013, at p. 2:14-18. DPA Ausserer also asserted that if Judge Andrus allowed depositions and production of discovery to go forward, it could have an undesired affect:

> At this point in time while the investigation phase is on-going by agencies other than those of Pierce County**,** and before it is submitted to the Snohomish County Prosecuting Attorney for a charging decision, production of the subject criminal file, depositions of the involved prosecutors and their investigators, as well as disclosure of their communications between each other and with other involved law enforcement and investigative agencies **will result in the disclosure of sensitive information that could undermine the investigation and any potential future criminal prosecution.** Such discovery also has the potential to disrupt communications between the involved law enforcement and investigative agencies with the same undesired effect.

*Id*. A few days later, on May 7, 2013, DPA Richmond filed another declaration by DPA Ausserrer, again referring to, "the Snohomish County Prosecutor's Office, which is now overseeing the investigation, asked me as one of my last functions in the criminal investigation…" App. 25, Declaration of Jared Ausserer*,* May 7, 2013, at 2.

DPA Richmond, too, acknowledged this conflict of interest in a hearing on May 8, 2013, telling the Court, "So we well understand that Pierce County cannot any longer handle the

criminal investigation…" App. 26 at 25:18-19. Thereafter, instead of removing himself from the case, on June 4 and June 5, 2011, DPA Richmond spoke to Lakewood detectives and met with a Lakewood detective to turn over information he had obtained in the civil case. App 29 at 367.

Lakewood Police Detectives Eggleston and Bowl did conduct a new investigation into the proposed new charges and said this about the so-called new information ,"the information [K.D.] provided to Jessica Diaz about her mother's knowledge and or involvement with the abuse was not new information and had been disclosed in the forensic interview." App. 29. The Snohomish County Prosecutor's Office then reviewed the case, and determined that there was a lack of new evidence, and likewise concluded that KD had not in fact made any new disclosures as initially alleged by Pierce County in re-opening the case. The Snohomish County Prosecutor declined to conduct a new interview with KD, and further declined to file charges against Ms. Dalsing, reporting that there was no new evidence to support those charges. App. 30. The Snohomish County Prosecutor sent a formal "Decline Notice" to Lakewood Police Detective Brent Eggleston. *Id*. The decline notice indicates the Prosecutor reviewed the case for charges of Sexual Exploitation of a Minor. Id. The decline notice is dated June 11, 2013 states the following:

> We are declining to file this case in Superior Court for the following reasons:
>
> I reviewed this case after the Pierce County Prosecutor's Office developed a conflict. There was some indication that the victim on the original case that was charged against Ms. Dalsing in Pierce County but later dismissed may have made new disclosures about the participation of her mother in sexual exploitation of the victim. Detective Eggleston and I agreed that if the victim had made new disclosures, we would have her forensically interviewed, but otherwise would not.
>
> Detective Eggleston from the Lakewood Police Department investigated the potential new disclosures… I reviewed the DVD from the original forensic child interview done in the Pierce County case, as well as the statements the victim

made to her aunt in 2012, and find that they are not new information which would warrant re-interviewing this child.

App. 30.

Within one month, after the formal decline memo was issued by Snohomish County, DPA Richmond cultivated more "evidence" to re-open the criminal investigation: he informed the criminal prosecutor that Michael Dalsing's co-defendant, William Maes, had come forward with bizarre evidence in the criminal matter. App. 29 at 374. [34] DPA Richmond had presented this new evidence to DPA Sheeran, a criminal DPA acting in Ausserer's absence. *Id*. DPA Sheeran re-engaged the Lakewood Police Department for further investigation. The detectives called DPA Richmond to be filled in the details of the new developments. *Id.* DPA Richmond then met with the detectives to describe the new evidence from Maes. *Id*. at 376. The detectives report that Maes described a photograph of Dalsings – which was never found – that was "eerily similar" to the discredited photo that was the basis for the original charges. App. 29 at 374. The detectives' report also reveals that Mr. Maes wrote to DPA Richmond following DPA Richmond's interview of Mr. Maes, and advised DPA Richmond that "he would only agree to continue to speak about this if he was granted release from prison." *Id.* at 375-77. The "Maes development" was essentially discredited.

On July 23, 2013, DPA Richmond appeared before Judge Andrus seeking to continue the discovery stay. App. 34. In support of the stay, DPA Ausserer filed another declaration, on July 18, 2013, with Judge Andrus, in which he asserted that the criminal investigation was still proceeding. DPA Richmond also filed a declaration from Lakewood Detective Eggleston confirming that he was working on a criminal investigation. App. 34 at 4-5. Judge Andrus had concerns because she had earlier been informed that Pierce County Prosecutor "recognized a

[34] Michael Dalsing and William Maes were both convicted of crimes of child sexual abuse involving Dalsing's daughter.

conflict and had no intention to participate in a charging decision." *Id*. at 6. Judge Andrus then wanted to know if Snohomish County Prosecutor would be making a charging decision. App. 34 at 5. DPA Richmond responded, "I'm not sure about that." *Id*. Judge Andrus again asked, "Well, will it or will it not be the Pierce County prosecuting Attorney's office?" *Id*. at 6. DPA Richmond responded, "That's what I don't have the answer to." *Id*. Judge Andrus went on to say, that she understood the Pierce County Prosecutor's Office had disqualified itself, and asked again, "So is that no longer the case?" *Id.* Richmond responded, "I can't answer that, your Honor, because I haven't talked to Mr. Ausserer about that particular point." *Id*.

DPA Richmond informed the court that he did not know what was going on in the criminal investigation (App 34 at 9-10" . . .that's the extent of what I know . . .") which is belied by the Lakewood police reports that show DPA Richmond had frequent and recent contact with the detectives to discuss the case. See App 29. The Judge informed DPA Richmond: " . . . I have to say that filing Mr. Eggleston's declaration was a very good decision on your part because until I had Mr. Eggleston's declaration, I had some pretty serious questions in my own mind as to what was really going on." App. 34 at 12.

DPA Richmond assured the court he was aware of the obligation to make discovery available. He told the court, "It concerns me, your Honor, that you would think that, as an attorney, that I would be part of causing a delay. I mean, our obligations under the civil rules or rules of professional conduct, they're all very seriously taken." App. 34 at 10.

Regarding the referral to Snohomish County Prosecutor's Office, DPA Ausserer tried to re-frame the issue declaring that, notwithstanding that the Snohomish County Prosecuting Attorney's Office (SCPAO) formally declined to file charges, that SCPAO actually only had a very limited role in the case: specifically that the office had merely reviewed whether there was

sufficient reason to re-interview KD, but not to handle the filing of new charges against Ms. Dalsing:

> Though at the time I wrote the [earlier] declaration I understood that the SCPAO might make a charging decision, the SCPAO decided to conduct a review of some of the evidence for the limited purpose of determining whether new information warranted another interview of the child victim K.D.
>
> On June 24, I learned from SCPAO Deputy Prosecutor Lisa Paul that in her limited role she had only made a determination that there was not sufficient new information to warrant a re-interview of the child victim under that office's criteria for such child interviews. This office, however, always reserves the right to re-interview K.D. if circumstances so warrant.
>
> Snohomish County's opinion that an interview of the victim was not appropriate at the time of their review did not end – or provide reason to end – the on-going investigation of Dalsing for various crimes.
>
> Following Snohomish County's review, our office obtained and provided additional information regarding Ms. Dalsing's possible crimes to law enforcement …

App. 33. DPA Ausserer also reiterated that discovery in the civil case should remain stayed:

> I also continued to have serious concerns that, without an extension of the Court's stay of discovery in the instant civil action, until the criminal matter is resolved by law enforcement, plaintiff's civil representatives and those aligned with them will continue to undermine the criminal investigation phase, intimidate witnesses, and disrupt communications, cooperation, and free flow of information between those involved and the applicable law enforcement agencies.

*Id*. at 3.

However, the only "additional information" uncovered by the prosecutor's office is the fantastical tale told by Mr. Maes, provided solely in an attempt to bargain for his release from prison. DPA Ausserer's reframing of the role of Snohomish County does nothing to dispel the clear conflict of interest between the civil and criminal cases, and simply drops that acknowledgment, claiming that there was in fact no conflict and that Pierce County had referred the criminal case out only in an excess of caution.

Judge Andrus, the Judge in the civil suit, expressed concern at this sudden turn of events:

> Because I was under the impression from you [DPA Richmond] and from Mr. Ausserer that a decision had been affirmatively made that it would not be the Pierce County Prosecuting Attorney's office, and that you with someone had decided that, given the pendency of this civil lawsuit, that your organization – particularly when we're talking about the disqualification, that your organization was -- recognized a conflict and had no intention to participate in a charging decision.

App. 34, page 6. Judge Andrus, a neutral observer, was then able to sum up the conflict between the two cases:

> The problem that I see is I have no -- because I have no idea what's going on in this investigation, I have no idea whether there really is anything to investigate, **whether this is just a way of trying to keep discovery from happening pending your appeal, which I'm sure is what the plaintiffs suspect**. Whether I conclude that or not, I'm not drawing any conclusions. But you can see their suspicion here as to you're just dragging this out so that whether there's really a true, true investigation worthy of charges, this is a way of postponing having to comply with my underlying order, which if that's what's going on would obviously be a serious concern of mine.

*Id.* at 8 (emphasis added).

On August 16, 2013, DPA Ausserer e-mailed and informed them he was running up against the statute of limitations (on child pornography case); he wanted to know whether detectives had obtained a warrant yet, and he wanted to set up a joint "viewing" of the pornography images for the civil investigators and the criminal detectives. App. 32.

DPA Richmond also informed Lakewood detectives that he had retained a computer expert. App. 29 at 375. During August of 2013, DPA Richmond engaged Robert Young of Ability Systems to conduct a warrantless search of computers that remained in the possession of Pierce County's evidence department. The computers had been searched by Detective Ames pursuant to a warrant in 2010, but nothing tying the case to Dalsing had been found. Apparently DPA Richmond, without a warrant or court order, had computer evidence removed from the

sheriff's department evidence room where it had been held since September 2010 in the criminal case. How DPA Richmond did this is unknown. The subsequent warrantless search in August 2013 by Ability Systems likewise identified no evidence to connect Dalsing with her husband's illegal activities, but appears to imply that Dalsing *could* have accessed the computers. The Lakewood detectives contacted the computer expert to follow up. App. 31 at 7-8.

The Lakewood investigation nevertheless continued under the direction of DPA Ausserer until March 2014. Contrary to the claims in the re-filed declaration of probable cause, however, the "continuing" investigation consisted largely of a re-hash of old evidence from the initial charges filed against the Dalsings in 2010. Lakewood Police reviewed again the computers, hard-drives, digital photo cards and other electronic media seized from the Dalsing home and from Mr. Maes. App. 29 at 394. Review of some digital media identified numerous "bookmarked" images that were further reviewed by Detectives Bowl and Eggleston, ***none*** of which were images of evidentiary value. *Id*. at 395.

In January 2014, DPA Ausserer emailed Detective Eggleston asking what had been found on two encrypted discs, and asking the detective to pass along specific questions for T.N.s mother with respect to Lynn's involvements with T.N.'s visits to the Dalsing residence. See App. 29 at 385. DPA Ausserrer also directed Detective Eggleston to obtain KD's mental health records, though it is unclear whether any new records of mental health treatment were obtained, aside from the 2013 Harborview reports that show no new disclosures. In total, Detective Eggleston's reports only that years of therapy led K.D. to say that she felt hurt or betrayed that her mother (Dalsing) did not better protect her. The detective appears to agree that "the information [K.D.] provided to Jessica Diaz about her mother's knowledge and or involvement

with the abuse was not new information and had been disclosed in the forensic interview." App. 29.

On February 14, 2013, Dalsing's civil attorney provided DPA Richmond with a copy of Dalsing's psychosexual evaluation.[35] Judge Andrus issued a protective order to cover the psychosexual evaluation. App. 42. Obviously, DPA Richmond provided the protected material to DPA Ausserer, as Ausserer referred to it in his Supplemental Declaration for Determination of Probable Cause dated March 28. App. 21. DPA Ausserer has since filed yet another declaration with Judge Andrus, wherein he declares that he obtained the psychosexual evaluation pursuant to a subpoena in the criminal case, a subpoena that post-dates the Supplemental Declaration of Probable Cause where he referred to it. See App. 43.

It is clear DPA Richmond had a direct conflict of interest when he involved himself in the "new" criminal investigation and "new" charges against Dalsing. He was defending Pierce County in a civil suit, and simultaneously not only involved himself, but instigated a criminal investigation. DPA Richmond then argued to Judge Andrus that the on-going criminal investigation should serve to stay the discovery process in the civil law suit, while claiming he did not really have any information about the criminal investigation. He wanted the stay of discovery to avoid providing Dalsing with the Det. Ames e-mail, an e-mail that would undoubtedly subject the prosecutor's office to liability. The stay also served to prevent DPA Kooiman and DPA Lewis from being deposed, depositions that would likely expose wrong-doing and subject the prosecutor's officer to liability. The conflict could not be more direct nor more clear.

[35] After the original criminal charge was dismissed, Dalsing, in an attempt to regain custody of her daughter, underwent a psychosexual evaluation. The evaluation is dated November 11, 2011. App 21.

DPA Richmond further had a direct conflict of interest because while actively defending Pierce County in a civil suit, DPA Richmond's involvement in the criminal investigation resulted in new criminal charges against Dalsing. A criminal conviction against Dalsing could serve to alleviate Pierce County from any liability for the wrong-doing that resulted in Dalsing's loss of liberty. Because the conflict was clear, DPA Richmond had a clear ethical obligation to step aside in favor of an independent special prosecutor.

In an apparent recognition of the ethical duty to step aside in favor of an independent prosecutor, DPA Richmond in May 2013, acknowledged that he, along with the Pierce County Prosecutor's Office, had a conflict of interest with the criminal case. Indeed, DPA Richmond and DPA Ausserer stepped aside in favor of an independent prosecutor, Snohomish County Prosecuting Attorney. But once the Snohomish Prosecutor declined to file new criminal charges, DPA Richmond, who had been using the on-going criminal investigation to delay the discovery process, again arranged for DPA Ausserer to re-open a criminal investigation. This final re-opening of the criminal investigation was based soley on a fantastical report provided by William Maes, a report apparently provided directly to DPA Richmond. Beyond the fact that Maes report was incredible and fantastic, Maes was in prison serving a sentence and provided the information in hopes of shortening his sentence. Nonetheless, DPA Richmond arranged to again "re-open" the criminal investigation and he continued to argue that further delay of discovery in the civil case was necessary due to the on-going criminal investigation . Even the court found this turn of events troubling. Judge Murphy, in dismissing the new criminal charges against Dalsing, also found that Pierce County had a conflict of interest. Judge Murphy said:

> Judge Andrus' concern about the mixed signals of which Prosecutor's Office was overseeing the criminal investigation into the defendant was legitimate. How could a conflict exist in May 2013 based upon the County being a defendant in the civil lawsuit, and then disappear in June 2013 after Snohomish County issues

> their decline notice? It makes no sense for the case to be sent to another county to determine only whether there needed to be additional interviews of one of the alleged victims. The conflict does not end when another county makes a decision that you don't agree with.
> . . .
> The decision to pull the case back from Snohomish County taints, in this Court's opinion, all of the actions taken by the Pierce County Prosecutor's Office in the criminal case. . . . The problem in this case is the lack of an objective assessment of the prosecutor's position. Pierce County recognized a conflict within the office in 2013, but only for a month and only until Snohomish County made a decision that they did not agree with

App. 23 at 15-17.

DPA Richmond could not, in the fair exercise of his professional duties, make an impartial and unbiased evaluation of the criminal case. His continued involvement constituted a clear conflict of interest.

**Discovery**

DPA Richmond violated RPC's 3.4 which provides that a lawyer shall not unlawfully obstruct another party's access to evidence; shall not counsel or assist another person to do any such act; and shall not fail to fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party. Further RPC 3.4 provides that a lawyer shall not knowingly disobey an obligation under the rules of the tribunal. In Dalsing's case, Civil Rules 26-37 govern discovery. It is clear DPA Richmond was obstructing, delaying and thwarting Dalsings attempts to obtain discovery, and DPA Richmond was using unlawful and improper means.

DPA Richmond failed to make reasonably diligent effort to comply with a legal discovery request, and he unlawfully obstructed Dalsing's access to evidence. As early as February 14, 2012, DPA Richmond claimed Det. Ames' e-mail was subject to a work product claim, and refused to provide the email to Dalsing. App. 14 at 118-130. DPA Richmond had not

yet responded to Dalsing's requests for production, and had not yet even provided a privilege log. On March 13, 2013, Judge Andrus found that a request for production was served on DPA Richmond on July 13, 2012 and that Det. Ames provided his e-mail to RDPA Richmond on October 18, 2012. The email was never identified to Dalsing until Det. Ames mentioned it in his deposition on February 14, 2012. App. 38. Further, in an effort to prevent Dalsing from obtaining discovery, DPA Richmond prevented Detective Ames from answering many of the questions posed to him by Dalsing's civil counsel. App. 14.

Detective Ames felt that "DPA Richmond was trying to protect his own staff at the expense of the Sheriff's department and [Ames] personally." App.15 at 2. Accordingly, Detective Ames sought legal counsel and filed a motion to compel Pierce County to pay for his legal defense, which was granted.

Judge Andrus also ruled on July 22, 2013, that DPA Richmond's "discovery conduct was not substantially justified." App. 22 at 6.[36] DPA Richmond tried to defend his claim of work product orally and in filed documents before the King County Superior Court, the Division Two Court of Appeals, and the Washington State Supreme Court. DPA Richmond failed in each venue, but still he failed and refused to turn over the documents even after a total of eleven judges found his work product claim unsubstantiated. Instead, DPA Richmond instigated and aided in the criminal investigation and resulting re-filed criminal charges, to further delay and obfuscate the resolution of the civil matter and unlawfully obstructed Dalsing's access to evidence, in violation of ROC 3.4.

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[36] The July 22, 2013 ruling included an award of attorney fees to Det. Ames, who hired an attorney in an effort to allow him to turn over his email.

**Lack of Candor**

DPA Richmond violated RPC 3.3 when he knowingly made false statements of fact or law to a tribunal or failed to correct a false statement of material fact or law previously made to the tribunal by the lawyer. Specifically, DPA Richmond assisted DPA Ausserer in framing the evidence against Dalsing as "new evidence." DPA Richmond also misrepresented to the court that he had no involvement with the "re-opened" criminal investigation, a claim that is belied by the Lakewood police reports that document repeated phone calls, e-mails and meetings. Indeed, DPA Richmond's false statements to the court in the face of the court expressing grave concerns about the suspicion that the new investigation may be conjured up for the explicit purpose of delaying discovery, constitute blatant lack of candor.

DPA Richmond cannot claim that his blatant violations of the rules of professional conduct are a result of orders from superiors. Under RPC 5.2, DPA Richmond had a duty to refuse to violate his oath of office and the RPCs, and cannot now escape liability for his actions by claiming he was simply following orders. DPA Richmond knew or should have known of the unethical nature of his actions, and those actions cannot be blamed upon the directions of other attorneys.

**Misconduct**

Further DPA Richmond's use the authority and power of the prosecutor's office to stall discovery and re-file criminal charges against Dalsing for the purpose of obtaining strategic advantage against her in her civil law suit constitutes professional misconduct in that he violated the rules of Professional Conduct [8.4(a)]; he knowingly assisted or induced DPA Ausserer to do so too [8.4(a)]; he commit misconduct through the acts of DPA Ausserer [8.4(a)]; he engaged in conduct involving dishonesty, fraud, deceit or misrepresentation [8.4(c)]; he engaged in conduct

that is prejudicial to the administration of justice [8.4(d)]; he violated his oath as an attorney [8.4(k)]; and he engaged in conduct demonstrating unfitness to practice law [8.4(n)].[37]

It can hardly be coincidental that the new "criminal investigation" against Dalsing was brought back to life on the same day DPA Richmond got the adverse ruling from Judge Andrus on the motion to compel. See App. 24. DPA Ausserer's various, and sometimes contradictory, declarations were used by DPA Richmond throughout the two years of litigation during which DPA Richmond sought to avoid providing Dalsing with the Det. Ames' e-mail and depositions of DPA Koooiman and DPA Lewis. Several times throughout approximately 2 years, DPA Richmond used declarations from DPA Ausserer for that purpose. The declarations and representations to the court were dishonest and designed to deceive Judge Andrus. There is no doubt that the Ausserer declarations were conjured up for the purpose of assisting DPA Richmond avoid providing discovery.

Nor can it be coincidental that DPA Ausserer prepared new and more serious charges against Dalsing within two days the Court of Appeals denial discretionary review, a ruling that put the discovery process back on track. DPA Richmond had avoided, until that time, turning over Det. Ames' e-mail and he had avoided subjecting DPA Kooiman and DPA Lewis to deposition. The e-mail and depositions would likely result in exposing wrong-doing and significant liability for the prosecutor's office in that the DPAs had failed to turn over the exculpatory e-mail in Dalsing's criminal case, which resulted in Dalsing's continued confinement and jeopardy. The re-filing of new charges served to further allow DPA Richmond

[37] DPA Richmond specifically violated the following portions of his oath as an attorney: "I will not counsel, or maintain any suit, or proceeding, which shall appear to me to be unjust or any defense except as I believe to be honestly debatable under the law, unless it is in defense of a person charged with a public offense. I will employ for the purpose of maintaining the causes confided to me only those means consistent with truth and honor. I will never seek to mislead the judge or jury by any artifice or false statement."

to avoid providing the Ames' e-mail to Dalsing. The new criminal charge served to further allow DPA Richmond to avoid making DPA Kooiman and DPA Lewis available for deposition.

The re-filing of serious criminal charges has been found to be vindictive, and a vindictive criminal prosecution for strategic gain in a civil lawsuit is not just prejudicial, but fatal to the administration of justice. [38] DPA Richmond is further implicated by RCP 3.8, which applies to prosecutors in a criminal case. Although he was not directly assigned to the criminal case, his obvious conflict of interest and his involvement in the criminal case subject him to the requirements of RPC 3.8. DPA Richmond's abuse of the prosecutor's authority for an improper purpose is so destructive and prejudicial to the administration of justice, that it renders DPA Richmond unfit to practice law.

In summary, DPA Richmond obstructed Dalsing's access to material that would aid in her civil law suit; material that would serve to prove liability on the part of his employer, the Pierce County Prosecutor. DPA Richmond provided false statements to King County Superior Court Judge Andrus when he claimed he had no knowledge or involvement in the "on-going" criminal investigation all the while participating and involved in what DPA Ausserer and the detectives were doing. DPA Richmond involved himself in the filing of new criminal charges against Dalsing. His multiple, devious and outrageous abuses of the authority and power of the prosecutor's office to file criminal charges against Dalsing for the purpose of gaining strategic advantage in her civil law suit constitute misconduct.

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[38] The RPC's set forth fundamental principles of professional conduct. "Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct." RPC Principles.

The responsibilities of lawyers holding public office go beyond those of other citizens. RPC 8.4, Comment 1. “A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers.” *Id*. Deputy Prosecutors “have the same power in all respects as their principal.” RCW 36.27.040. Wielding the power of the office comes with significant responsibility. DPA Richmond has, through his various violations detailed above, exercised gross abuse of authority and power vested in him, and demonstrated that he is unfit to practice law.

**<u>Deputy Prosecuting Attorney Jared Ausserer, WSB # 32719</u>**

DPA Jared Ausserer violated Rules of Professional Conduct 1.7, 1.10, 3.2, 3.3, 3.4, 3.6, 3.8, 4.1, and 8.4.

**FACTS**

The foregoing facts and analysis are incorporated herein.

**ANALYSIS**

**Conflict of Interest**

DPA Ausserer violated RPC 1.7, 1.10, 3.8, 4.1, 8.4(d) and 8.4 (n) when he re-filed criminal charges against Dalsing. DPA Ausserer has a direct conflict of interest, in that he used the authority and power of the prosecutor's office to file criminal charges against Dalsing for the purpose of obtaining strategic advantage against her in her civil law suit. As a prosecutor in a criminal case, RPC 3.8 requires that DPA Ausserer refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause and required to make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused. DPA Ausserer's conduct constitutes professional misconduct, as he engaged in conduct that is prejudicial to the administration of justice and demonstrated unfitness to practice law, in violaton of RPC 8.4.

Washington courts have recognized an inherent conflict can arise for a prosecuting attorney. *Snohomish Cnty. v. Nichols*, 47 Wn. App. 550, 556-57, 736 P.2d 670, 674 (1987) <u>aff'd,</u> 109 Wn. 2d 613, 746 P.2d 1208 (1987). In *Nichols*, a deputy sheriff filed a claim against the sheriff's department seeking reinstatement. The prosecutor, who represented the sheriff's

department, refused to provide representation to the deputy arguing that the prosecutor had discretion to make such a decision.

The Court reasoned as follows:

> The respondent argues that the prosecutor improperly exercised discretion because the office was representing the Snohomish County Sheriff's Department in the same case and therefore should have appointed a special prosecutor to represent Nichols.
>
> RCW 73.16.061 imposes a mandatory obligation on county prosecutors to represent veterans seeking reinstatement under the Veterans' Reemployment Rights Act. It is undisputed that the Snohomish County Prosecuting Attorney's Office is the legal advisor and attorney for the Snohomish County Sheriff's Office. RCW 36.27.005. **The prosecuting attorney could not, in the fair exercise of his professional duties, give an impartial and unbiased evaluation of Nichols' case. The conflict of interest was clear and the prosecuting attorney had an ethical obligation to step aside in favor of an independent special prosecutor. RPC 1.7,** CPR 5 and DR 5–105. The fees expended by Nichols in retaining private counsel are therefore recoverable as the equivalent of legal services the prosecutor was directed by statute to provide but refused. We thus reject the County's immunity argument. It would clearly defeat the purpose of RCW 73.16.061 to allow the County to shift the burden of providing legal representation to a plaintiff whose claim proves to be meritorious.

*Nichols*, at 556-57 (emphasis added).

It is undeniable in the Dalsing case, that the Pierce County Prosecuting Attorney could not, in the fair exercise of his professional duties, give an impartial and unbiased evaluation of Dalsing's case. The conflict of interest was clear and the prosecuting attorney had an ethical obligation to step aside in favor of an independent special prosecutor.

Instead of stepping aside, DPA Ausserer assisted in the investigation that led to the filing of the amended Information against Dalsing, while working in conjunction with DPA Richmond, who was performing his duties as the civil deputy assigned to defend the county against Dalsing's civil claims. DPA Ausserer worked in conjunction with DPA Richmond on both the civil and "new" criminal case despite a clear conflict between the two. DPA Ausserer's

involvement in keeping the "new" criminal investigation open served to assist and ensure a successful outcome in the civil case.

The "ongoing" investigation served to delay discovery, which would have undoubtedly been detrimental to the Pierce County Proscutor's Office. The new charges, if resulting in any kind of conviction, would exonerate the county from liability in the civil case. DPA Ausserer's conspired with DPA Richmond to use the authority and power of the prosecutor's office to stall discovery in the civil case and gain strategic advantage, conduct that is extremely prejudicial to the administration of justice and demonstrated unfitness to practice law, in violation of RPC 8.4.

It can hardly be coincidental that the new "criminal investigation" against Dalsing was brought back to life by DPA Ausserer on the same day DPA Richmond got the adverse ruling from Judge Andrus on the motion to compel. See App. 24. DPA Ausserer's various, and sometimes contradictory, declarations were used by DPA Richmond throughout the two years of litigation during which DPA Richmond sought to avoid providing Dalsing with the Det. Ames' e-mail and he sought to avoid having DPA Koooiman and DPA Lewis deposed. Several times throughout approximately two years, DPA Richmond used declarations from DPA Ausserer for that purpose. The declarations and representations to the court were dishonest and designed to deceive Judge Andrus. There is no doubt that the Ausserer declarations were conjured up for the purpose of assisting DPA Richmond avoid providing discovery.

Nor can it be coincidental that DPA Ausserer, prepared new and more serious charges against Dalsing within two days the Court of Appeals ruling that put the discovery process back on track. DPA Richmond had avoided, until that time, turning over Det. Ames' e-mail and he had avoided subjecting DPA Kooiman and DPA Lewis to deposition. The e-mail and depositions would result in exposing wrong-doing by DPA Kooiman and Lewis, and would

subject the Prosecutor's officer to significant liability based on the DPAs failure to turn over the exculpatory e-mail in Dalsing's criminal case, which resulted in Dalsing's continued confinement and jeopardy. The re-filing of new charges served to allow DPA Richmond to avoid providing the Ames' e-mail to Dalsing. The new criminal charges further served to DPA Richmond to avoid making DPA Kooiman and DPA Lewis available for deposition.

It is clear that DPA Ausserer had a direct conflict of interest. He was acting in conjunction with the DPA who was defending Pierce County in a civil suit. DPA Ausserer involved himself in the "new" criminal investigation in an effort to assist DPA Richmond obtain and maintain a stay of discovery. Because the conflict was clear, DPA Ausserer had a clear ethical obligation to step aside in favor of an independent special prosecutor.

In an apparent recognition of the ethical duty to step aside in favor of an independent prosecutor, DPA Ausserer in May 2013, acknowledged that he, along with the Pierce County Prosecutor's Office, had a conflict of interest. Indeed, DPA Ausserer stepped aside in favor of an independent prosecutor, Snohomish County Prosecuting Attorney. But once the Snohomish Prosecutor declined to file new criminal charges, DPA Ausserer arranged to "reopen" the criminal investigation yet again. This final re-opening of the criminal investigation was based soley on a fantastical report provided by William Maes, a report apparently provided directly to DPA Richmond. Beyond the fact that Maes report was incredible and fantastic, Maes was in prison serving a sentence and provided the information in hopes of shortening his sentence. Nonetheless, DPA Richmond arranged with DPA Ausserer to again open the investigation. Thereafter, DPA Richmond continued to argue that further delay of discovery in the civil case was necessary. Judge Andrus found this startling turn of events troubling. Judge Murphy, in

dismissing the new criminal charges against Dalsing, also found that Pierce County had a conflict of interest. Judge Murphy said:

> Judge Andrus' concern about the mixed signals of which Prosecutor's Office was overseeing the criminal investigation into the defendant was legitimate. How could a conflict exist in May 2013 based upon the County being a defendant in the civil lawsuit, and then disappear in June 2013 after Snohomish County issues their decline notice? It makes no sense for the case to be sent to another county to determine only whether there needed to be additional interviews of one of the alleged victims. The conflict does not end when another county makes a decision that you don't agree with.
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> The decision to pull the case back from Snohomish County taints, in this Court's opinion, all of the actions taken by the Pierce County Prosecutor's Office in the criminal case. . . . The problem in this case is the lack of an objective assessment of the prosecutor's position. Pierce County recognized a conflict within the office in 2013, but only for a month and only until Snohomish County made a decision that they did not agree with

App. 23 at 15-17.

DPA Ausserer could not, in the fair exercise of his professional duties, make an impartial and unbiased evaluation of the criminal case. His continued involvement constituted a clear conflict of interest and he had an ethical duty to step aside in favor of a special prosecutor. DPA Ausserer apparently recognized his ethical obligation, but when the Snohomish County Prosecutor declined to file charges, effectively ending the argument for a stay of discovery, DPA Ausserer rekindled the investigation with “new” information provided to him by DPA Richmond, filed another new declaration with Judge Andrus, and advocated for a stay of discovery in the civil case. The desire to avoid providing Ames’ e-mail to Dalsing’s attorney trumped DPA Ausserer’s ethical duty, and he acted under a conflict of interest.

**Discovery**

DPA Ausserer’s conspiring and conniving with DPA Richmond to delay discovery by keeping the criminal case alive violated RPC 3.4(a) and RPC 4.1. RPC 3.4(a) provides that a

lawyer shall not unlawfully obstruct another party's access to evidence. The rule also provides that a lawyer shall not counsel or assist another person to do any such act. In this case DPA Ausserer seemed to file a helpful declaration each time DPA Richmond sought to stay the discovery in Dalsing's civil case. DPA Ausserer's actions have violated RPC 3.4.

**Lack of Condor**

DPA Ausserer violated RPC 3.3 by making false statement to the court in his various declarations, including his re-filed Declaration for Determination of Probable Cause to support the new charges against Dalsing. RPC 3.3 provides that a lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer. Further RPC 3.3 provides that a lawyer shall not offer evidence that is false. RPC 3.3 provides that the duty of candor to the court continues until the conclusion of the proceeding.

According to the comments to RPC 3.3, provide that an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. RPC 3.3, Comment 3.

DPA Ausserer made numerous false statements in various declarations in conjunction with DPA Richmond in an effort to delay and avoid providing damaging discovery.

**Misconduct**

DPA Ausserer also violated RPC 8.4 by using the authority and power of the prosecutor's office to re-file "new" criminal charges against Dalsing. RPC 8.4 provides that it is professional

misconduct to violated any of the rules of professional conduct [8.4(a)]; to knowingly assist or induce DPA Richmond to also do so [8.4(a)]; to engage in conduct involving dishonesty, fraud, deceit or misrepresentation [8.4(c)]; to engaged in conduct that is prejudicial to the administration of justice [8.4(d)]; to violate the oath as an attorney [8.4(k)]; and to engage in conduct demonstrating unfitness to practice law [8.4(n)].[39] DPA Ausserer's actions throughout this case have violated each subsection as outlined above.

The re-filing of serious criminal charges has been found to be vindictive, and a vindictive criminal prosecution for strategic gain in a civil lawsuit is not just prejudicial, but fatal to the administration of justice.[40] DPA Ausserer's obvious and intentional abuse of the prosecutor's authority for an improper purpose is so destructive to the judicial system, that it renders DPA Ausserer unfit to practice law.

DPA Ausserer violated RPC 3.8, which specifically requires that a prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause and that the prosecutor make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense.[41] DPA Ausserer failed at both requirements.

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[39] DPA Ausserer specifically violated the following portions of his oath as an attorney: "I will not counsel, or maintain any suit, or proceeding, which shall appear to me to be unjust or any defense except as I believe to be honestly debatable under the law, unless it is in defense of a person charged with a public offense. I will employ for the purpose of maintaining the causes confided to me only those means consistent with truth and honor. I will never seek to mislead the judge or jury by any artifice or false statement."

[40] The RPC's set forth fundamental principles of professional conduct. "Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to maintain the highest standards of ethical conduct." RPC Principles.

[41] RCW 36.27.040 provides in part as follows: "The prosecuting attorney may appoint one or more deputies who shall have the same power in all respects as their principal."

The preamble to the RPC's describes the use of the term "shall" in the RPC's to designate an imperative. Because RPC 3.8 uses the term "shall," it is an imperative and does not leave room for lawyer discretion. Preamble and Scope (14). The term "knows" in the RPC denotes actual knowledge, which may be inferred from circumstances. RPC 1.0(f).

DPA Ausserer re-filed the criminal charges against Dalsing knowing the case was not supported by probable cause. Further DPA Ausserer did not make timely disclosure to the defense (or the court) all evidence or information known to him that tended to negate the guilt of the Dalsing, in violation of RPC 3.8.

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.

The new Supplemental Declaration for Probable Cause contains six full pages of single spaced narrative detailing information about Dalsing. The declaration insinuates that child sexual abuse victims had made addition disclosure about Dalsing's involvement in their victimization. See App. 21. But there were no material new disclosures by any of the children. During the time frame when DPA Ausserer actually acknowledged his conflict of interest, the disclosures were reviewed by Lakewood Police Department detectives and by the Snohomish County Prosecutor's Office. Both entities determined that there was no basis to re-interview any of the children. App. 30. DPA Ausserer' assertion that there was new information from the children was disingenuous and designed to be misleading to the court, not to mention the public.

The Supplemental Declaration for Probable Cause also refers to a forensic analysis performed on the computers in the defendant's home that concluded she was using these computers during the same time period child pornography was being accessed. App. 20. As was

pointed out originally by Detective Ames, this does not show really anything regarding her involvement in these charges, only that she had the availability of the computer at the time that these items were being accessed, but not at the same time; information that was known at the time that the case was dismissed by Judge Culpepper. See e.g., App. 23 at 18-19.

DPA Ausserer characterizes the Ability Systems evidence as contrary to the initial opinion of the Pierce County Sheriff's Department, but it is not contrary. Indeed. Detective Ames identified and described the computer set up inside the Dalsing residence, and reached essentially the same finding as Ability Systems. The difference was that Detective Ames was acting pursuant to a valid search warrant. Significantly, DPA Ausserer specifically declined to include in his declaration for probable cause the relevant exculpatory evidence that Det. Ames' finding, there is "definitely no link" between Dalsing and the child pornography on the computer.

Furthermore, the forensic analysis by Ability Systems Corporation appears to have been a warrantless search. Accordingly, even if the warrantless search by Ability System yielded any useful information, the information would most likely be inadmissible evidence.

In his re-filed Supplemental Declaration for Probable Cause, DPA Ausserer also refers to Dalsing's psychosexual evaluation dated November 25th, 2011, which predates her civil law suit. There are multiple problems with DPA Ausserer relying this November 2011 report:

First, the report was provided to DPA Richmond by Dalsing's attorney in the civil law suit with a protective order. The fact the DPA Richmond provided the report to DPA Ausserer is further evidence of a direct conflict of interest (RPC 1.7), and violates a court order (RPC 8.4(j).[42] Based on the psychosexual evaluation, DPA Ausserer declares Dalsing admitted to

[42] In perhaps the most obvious display of the on-going conflict of interest, during the pendency of the "new" criminal case, DPA Ausserer told the court he was willing to provide the certain materials in discovery to Dalsing's

knowing in 2003 that her husband, Michael Dalsing, was a convicted sex offender. DPA Ausserer also asserts that the November 2011 report informed him that Dalsing had completed psychoeducational sessions for maintaining the safety of her children while married to a sex offender. But this was not new evidence. Dalsing acknowledged in a September 2010 interview with the Pierce County Sheriff's Department and CPS that she knew her husband had been convicted of a sex offense and she had received education about that. The December 9, 2010 Declaration for Determination of Probable Cause, written by DPA Kooiman reads in pertinent part as follows: "In a prior conversation with the defendant, she had disclosed she knew her husband was a child molester in the past, and they allowed K.D. to sleep in bed with them, and she and her husband did not have a sex life." App. 2.

DPA Ausserer also included in his Supplemental Declaration for Probable Cause that new evidence included counseling records from Comprehensive Mental Health that documented counseling sessions with K.D. that had arisen since the charges were dismissed. The records indicate that K.D. said that her mom had known what was going on, had walked in on the activities on several occasions and had done nothing about it. But this is also not new information. Again, in DPA Kooiman's Declaration for Determination of Probable Cause that was dated December 9, 2010, DPA Kooiman wrote: "She [KD] also disclosed her mom, the defendant, knew what was going on and even watched it happen."

DPA Ausserer also included "new" information in his Supplemental Declaration for Probable Cause that William Maes and Michael Dalsing had been interviewed with additional information being provided. Some of the information recited consisted of hearsay that Maes had learned from Michael Dalsing. None of it was information that could be corroborated. Mr. Maes

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criminal defense attorneys only if they agreed "it only be used or viewed by counsel in the criminal matter and not give copies to their client or her civil attorneys." App. 38 at 7.

was seeking consideration from the State regarding his sentence and reported he was holding back information unless he got that consideration.

In sum, there was no new evidence to justify filing eight serious felony counts against Dalsing. DPA Ausserer's stretch to find a basis for the new, very serious, and coincidentally helpful criminal charges demonstrates that he re-filed the criminal charges against Dalsing knowing the case was not supported by probable cause, in violation of RPC 3.8.

Notably, in violation of RPC 3.8, DPA Ausserer did not make timely disclosure to the defense (or the court) in his Supplemental Declaration for Determination of Probable Cause all evidence or information known to him that tended to negate the guilt of the Dalsing. For instance, DPA Ausserer did not disclose that the Lakewood Police Department also searched the computers pursuant to a warrant issued in September 2013, and failed once again to identify any evidence tying Ms. Dalsing to her husband's criminal actions, failed to establish that Ms. Dalsing was depicted in *any* photographs of abuse or pornography, that no items of evidentiary value were developed, and that forensic experts using sophisticated software ran over a billion password combinations in an unsuccessful effort to determine the contents of some of the digital media. App. 29. Nor is it disclosed that the PATC-Tech search of the computers likely came to the same conclusion as did the Lakewood Police Department. [43] Nor did DPA Ausserer disclose to the Court the fact that the child victims contradict that Dalsing participated, was present, or involved in sexual abuse.

DPA Ausserer has previously informed the local newspaper, The News Tribune, that the decision to re-file criminal charges against Dalsing was made by Prosecutor Mark E. Lindquist. App. 39. There have been reports that DPA Ausserer was summoned back to work on March 22,

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[43] It can only be presumed that the PATC-Tech review unclosed no new evidence, as no reports from this company were ever disclosed in this case.

2014 (while he was on extended leave of absence) to draft the declaration of probable cause. Even assuming DPA Ausserer was acting on advice or orders from a manager, superior, or the elected prosecutor, that does not alleviate his culpability under the Rules of Professional Conduct. RPC 5.2 provides that a lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

DPA Ausserer violated RPC 3.6, RPC 3.8 and RPC 4.4. DPA Richmond obtained the psychosexual evaluation of Dalsing in the civil lawsuit, the evaluation was subject to a protective order issued by Judge Andrus. App. 42. Not only did DPA Ausserer refer to the psychosexual evaluation in his March 27, 2014 Supplemental Declaration for Determination of Probable Cause, he has since filed the sensitive material in a public court file, and deceptively, perhaps perjuriously, declared the he received the material subject to an August 2014 subpoena. App. 42; App. 43. Filing this highly sensitive evaluation not only violates the protective order put in place by Judge Andrus, creates the additional problem of increasing public condemnation of the accused in violation of RPC 3.8. This conduct serves only to embarrass Dalsing in violation of RPC 4.4(a). Dalsing would like this material removed from public view, but Prosecutor Lindquist has refused to try to resolve this issue by agreement. App. 44.

The responsibilities of lawyers holding public office go beyond those of other citizens. RPC 8.4, Comment 1. “A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers.” *Id*. Deputy Prosecutors “have the same power in all respects as their principal.” RCW 36.27.040. Weilding the power of the office comes with significant responsibility. DPA Ausserer has, through his various violations

detailed above, exercised gross abuse of authority and power vested in him, and demonstrated that he is unfit to practice law.

**Pierce County Prosecutor Chief of Staff Dawn Farina, WSB #18333**

Chief Farina violated Rules of Professional Conduct 1.7, 1.10, 3.2, 3.3, 3.4, 3.6, 3.8, 4.1, 4.4, 5.1, and 8.4(a), 8.4(c), 8.4(d), 8.4(f), 8.4 (j), 8.4 (k), 8.4 (m) and 8.4 (n).

**FACTS**

The foregoing facts and analysis incorporated herein. Chief Farina has been the Chief of Staff at all times since the 2010 charges were filed against Dalsing. As such, she has managerial responsibility for all divisions within the prosecutor's office, including the criminal division (where DPA Kooiman, DPA Lewis, DPA Ausserer and DPA Sheeran work) and the civil division (where DPA Richmond works).

To recap some of the facts, Detective Ames was deposed February 14, 2012 by Dalsing's attorney in her civil law suit against the county. App 4. Following the deposition, Det. Ames felt that he could not "clear his name" if he was not allowed the answer questions about the investigation he had conducted. He specifically felt that "<u>DPA Richmond was trying to protect his own staff at the expense of the Sheriff's department and [Ames] personally</u>." App.15 at 2. Accordingly, Detective Ames sought legal counsel and filed a motion to compel Pierce County to pay for his legal defense. Detective Ames wanted his e-mails turned over to Dalsing and through his attorney he sought such an order from Judge Andrus.

Also following the deposition, Dalsing herself sought an order compelling the Ames e-mail in discovery.[44] Significant litigation ensued on this issue. DPA Richmond produced a scant few documents, withholding many others that were eventually submitted for *in camera* review by Judge Andrus. DPA Richmond specifically asserted the Ames e-mail constituted work product. DPA Richmond also asserted DPA Kooiman and DPA Lewis could not be deposed. On

April 22, 2013, Judge Andrus held the Deputy Prosecutors could be deposed and she order email, including Detective Ames' June 9, 2011 email, to be turned over to Dalsing. App19. DPA Richmond sought discretionary review in Division I. [45]

During the course of Dalsing's motion to compel, DPA Richmond denied receiving the June 9, 2011 e-mail from Detective Ames. App.16.[46] Detective Ames declared that he had provided the e-mail to DPA Richmond. In addition to ordering that the Ames e-mail be turned over to Dalsing, Judge Andrus on July 22, 2013, held that "Pierce County's discovery conduct was substantially unjustified." By the same order, the judge ordered Pierce County to pay Det. Ames legal fees. App. 22.[47] Much later, Pierce County Superior Court Judge Murphy summed up the events, "On August 12th, 2013, Judge Andrus denied the County motion's for reconsideration of her July 23rd decision, and warned that a general request for a continued stay would not be sufficient. Pierce County filed a notice of discretionary review of that decision, and the commissioner of the Court of Appeals granted a temporary stay pending a hearing or decision on discretionary review." App. 23 at 15.

Within one month of Det. Ames prevailing on the discovery issue and the issue of his legal fees, on September 18, 2013, Prosecutor Lindquist notified Detective Ames that pursuant to *Brady v. Maryland*, Prosecutor Lindquist's office would routinely be disclosing impeachment material to defense attorneys in all Detective Ames' cases. App. 18. The letter notified Det. Ames that the basis of Prosecutor Lindquist's decision for this action against Det. Ames was the fact that Det. Ames had filed four declarations related to Dalsing's motion to compel, and Ames'

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[45] The Commissioner granted a temporary stay of discovery pending a decision on the motion for discretionary review.

[46] Specifically, on July 17, 2013, DPA Richmond filed a declaration as follows: "Mr. Ames falsely states he turned over County e-mails to me that would 'clear his name and his department.'"

[47] Pierce County sought discretionary review of Judge Andrus order in Division I, Cause No. 708503, which was denied on December 18, 2013. The County filed a motion to modify which was denied on March 25, 2014.

declarations are disputed by Lindquist's "DPAs assigned to the case." *Id.*[48] Later, DPA Penner, declared under oath that "Specifically, Det. Ames signed declarations in a civil case which contained factual assertions which were deemed false by DPA James Richmond." App. 40.

Following this "Brady" determination, Detective Ames actually produced proof that he had forwarded the June 9, 2011 e-mail to DPA Richmond. Thereafter, DPA Richmond filed a second declaration dated May 12. 2014, admitting that he had received the e-mail from Det. Ames. App. 17.[49]

Detective Ames filed a Declaratory Judgment action in Pierce County Superior Court Cause No. 13-2-e13551-1, seeking to clear his name and reputation after being labeled a "Brady Officer" by Prosecutor Lindquist. Detective Ames complained that the basis of Prosecutor Lindquist's determination did not justify the determination.[50] Detective Ames case was dismissed, the court finding that Declaratory Judgment was not appropriate for such a determination. Prosecutor Lindquist then sought Rule 11 sanctions against Detective Ames and sought over $100,000 in attorney fees.

Several local attorneys, including prominent criminal defense attorneys, filed declarations on behalf of Detective Ames. Prosecutor Lindquist's motion for sanctions and attorney fees against Detective Ames was denied, but Prosecutor Lindquist has appealed that decision.[51]

Almost immediately after the declarations were filed in the Ames case, Prosecutor Lindquist ordered that his team leaders in the office hold meetings with all deputy prosecutors.

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[48] The only identifiable disputed "fact" is whether Det. Ames provided his email to DPA Richmond. DPA Richmond declared that he had not done so. Since then, DPA Richmond admitted he had received the e-mail. App 17.

[49] DPA Richmond later admitted he had received the e-mail from Detective Ames; he clarified in a much later declaration dated May 12, 2014: "I have never denied receiving the June 9, 2011 e-mail. Instead, I stated that it was not given to me at the Oct. 12, 2012 meeting." App. 16.

[50] To be clear, the "Brady" determination was based on the fact the DPA Richmond dispute that Det. Ames sent Richmond e-mail in question. The issue has since been resolved by DPA Richmond admitting her received the e-mail from Ames, but not on the October date Ames reported, it was a <u>different</u> date in October. See App 17.

[51] Court of Appeals Division II, Cause No. __________.

The names of the offending attorneys were disseminated with the message that these particular attorneys were "enemies" of the prosecutor's office. Prosecutor Lindquist dubbed the offending attorneys "The Confederacy of Dunces" and ordered that they were to be given no consideration in plea negotiations and no professional courtesy. App 47.

Several Deputy Prosecutors who have failed to comply with this directive have been chastised and scolded for being "too nice" to these attorneys, and in at least one case, for "giving the attorney a deal." Chief Farina and DPA Sheeran have been enforcing the directive that the "Confederacy of Dunces" are to be treated differently than other defense attorneys.

Chief Farina also had direct oversight of both the civil litigation and the renewed "criminal investigation." On February 13, 2014, at the direction of Chief Farina, certain DVDs were sent to PATC-Tech for further analysis. PATC-Tech had contracted with the Prosecutor's Office. App 36. That contracting agent is not identified in the March 27, 2014 Declaration for Probable Cause, nor is any report by PATC-Tech referenced. Prosecutor Lindquist and Chief Farina oversaw the civil and criminal Dalsing cases. They presided over frequent meetings of civil and criminal deputies, discussing strategy, including how the re-newed criminal case would affect the civil case and *vice versa.*

## ANALYSIS

Chief Farina has engaged in, authorized, ordered or known of and ratified a conflict of interest. Chief Farina has managerial authority over the office. [52] As such, she is required under RPC 5.1 to make reasonable efforts to ensure that the office has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. Further, RPC 5.1 requires that she make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. It is obvious from the foregoing facts, that Chief

[52] RPC 5.1 applies to a government agency. RPC 5.1, Comment 1.

Farina has failed on both counts. Clearly, the office is lacking in policies, procedures and reasonable efforts to ensure conformance with the minimum requirements of professional conduct.

RPC 5.1 further provides that Chief Farina shall be responsible for another lawyer's violation of the Rules of Professional Conduct if she orders or, with knowledge of the specific conduct, ratifies the conduct involved; or if she has direct supervisory authority over another lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. In this case, Chief Farina is responsible for the actions of the deputies. Upon information and belief, Chief Farina along with Prosecutor Lindquist personally oversaw the litigation in this case in some detail. For instance, DPA Ausserer informed the Tacoma News Tribune that he believed Prosecutor Lindquist made the decision to re-file criminal charges on Dalsing. App. 39. The same article reports that Prosecutor Lindquist said it was Chief Farina who decided to disseminate the names of defense attorneys who had offended the office. App. 39.

It is upon information and belief that when questioned about such matters, deputies will confirm that he ordered the foregoing conduct and/or with knowledge of the conduct, ratified it.

Chief Farina is the Chief of Staff for the Prosecuting Attorney for Pierce County. As such, she is responsible for the acts and decisions of her subordinate employees and deputies. The definition of the Prosecutor responsibility deputies is also defined by statute:

> The prosecuting attorney may appoint one or more deputies who shall have the same power in all respects as their principal. Each appointment shall be in writing, signed by the prosecuting attorney, and filed in the county auditor's office. Each deputy thus appointed shall have the same qualifications required of the prosecuting attorney, except that such deputy need not be a resident of the county in which he or she serves. The prosecuting attorney may appoint one or more special deputy prosecuting attorneys upon a contract or fee basis whose authority shall be limited to the purposes stated in the writing signed by the

> prosecuting attorney and filed in the county auditor's office. Such special deputy prosecuting attorney shall be admitted to practice as an attorney before the courts of this state but need not be a resident of the county in which he or she serves and shall not be under the legal disabilities attendant upon prosecuting attorneys or their deputies except to avoid any conflict of interest with the purpose for which he or she has been engage d by the prosecuting attorney. <u>The prosecuting attorney shall be responsible for the acts of his or her deputies and may revoke appointments at will.</u>

RCW 36.27.040 (emphasis added).

**Conflict of Interest**

Chief Farina violated RPC 1.7 and 1.10 in that she engaged in, ordered, authorized or knew of and ratified the criminal prosecution of Dalsing to be revived while simultaneously defending against her civil lawsuit.[53] Such action constitutes a violation of the RPC against conflict of interest, as discussed above. RPC 5.1 further requires that lawyers with managerial authority must make reasonable efforts to establish policies and procedures designed to detect and resolve conflicts of interest.[54] As described above, Chief Farina not only failed to establish policies to resolve a conflict of interest, she actually overlooked an identified conflict of interest. Such action constitutes a violation of the RPCs.

Washington courts have an inherent conflict can arise for a prosecuting attorney. *Snohomish Cnty. v. Nichols*, 47 Wn. App. 550, 556-57, 736 P.2d 670, 674 (1987) <u>aff'd,</u> 109 Wn. 2d 613, 746 P.2d 1208 (1987). In *Nichols*, a deputy sheriff filed a claim against the sheriff's department seeking reinstatement. The prosecutor, who represented the sheriff's department,

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[53] RPC 1.10 provides that 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.

[54] Although a "screening" process is possible to ameliorate a conflict of interest, the law firm must be able to demonstrate that it is adequate to prevent a disqualified lawyer from receiving or transmitting any confidential information or from participating in the representation in any way. Here, it is patently obvious that DPA Richmond and DPA Ausserer were not screened from each other, rather they were working in conjunction with each other. RPC 1.10, Comment 10.

refused to provide representation to the deputy arguing that the prosecutor had discretion to make such a decision.

The Appellate Court reasoned as follows:

> The respondent argues that the prosecutor improperly exercised discretion because the office was representing the Snohomish County Sheriff's Department in the same case and therefore should have appointed a special prosecutor to represent Nichols.
>
> RCW 73.16.061 imposes a mandatory obligation on county prosecutors to represent veterans seeking reinstatement under the Veterans' Reemployment Rights Act. It is undisputed that the Snohomish County Prosecuting Attorney's Office is the legal advisor and attorney for the Snohomish County Sheriff's Office. RCW 36.27.005. **The prosecuting attorney could not, in the fair exercise of his professional duties, give an impartial and unbiased evaluation of Nichols' case. The conflict of interest was clear and the prosecuting attorney had an ethical obligation to step aside in favor of an independent special prosecutor. RPC 1.7,** CPR 5 and DR 5–105. The fees expended by Nichols in retaining private counsel are therefore recoverable as the equivalent of legal services the prosecutor was directed by statute to provide but refused. We thus reject the County's immunity argument. It would clearly defeat the purpose of RCW 73.16.061 to allow the County to shift the burden of providing legal representation to a plaintiff whose claim proves to be meritorious.

*Nichols*, at 556-57 (emphasis added). There is no doubt that in this case Chief Farina could not, in the fair exercise of her professional duties, give an impartial and unbiased evaluation of Dalsing's case. The conflict was clear and Chief Farina had an ethical duty to step aside in favor of an independent special prosecutor. Unfortunately, when the Snohomish County Prosecutor effectively ended the on-going criminal investigation by declining to file charges, Chief Farina, along with Prosecutor Lindquist suddenly overlooked the clear conflict and took very detrimental action against Dalsing.

**Intentional Delay of Litigation**

Chief Farina violated RPC 3.2 by not taking reasonable efforts to expedite litigation. Upon information and belief, Chief Farina engaged in, authorized, ordered or knew of and

ratified the delay tactics employed by DPA Richmond and DPA Ausserer. As such, she violated RPC 3.2.

**Lack of Candor**

Chief Farina violated RPC 3.3. Chief Farina engaged in, authorized, ordered or knew of and ratified herself and deputy prosecutors knowingly making false statements to a tribunal. Upon information and belief, Chief Farina personally engaged in drafting declarations signed by DPA Kooiman and DPA Lewis dated May, 12, 2014. Both declarations contain false statements as outlined above. App. 9. Further, Chief Farina has known and ratified the false representations of DPA Ausserer and DPA Richmond. As such, she has violated RPC 3.3.

**Discovery**

Chief Farina has violated RPC 3.4. Chief Farina has engaged in, authorized, ordered or known of and ratified unlawful obstruction of Dalsing's access to evidence and knowingly disobey an obligation under the rules of a tribunal, the discovery rules under RPC 4.7 and CR 26-37. Further, Chief Farina has engaged in, authorized, ordered or known of and ratified the failure to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party. There can be no doubt that Chief Farina, who personally oversaw this litigation, is responsible for the violations of the deputy prosecutors involved. Upon information and belief, Chief Farina, along with Prosecutor Lindquist, personally oversaw this litigation and she is acutely and intensely aware of the publicity generated by this case.

**Statements to the Press**

Chief Farina also violated RPC 3.6, which provides that a lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. Chief Farina, along with Prosecutor Lindquist, has released prejudicial statements regarding Dalsing, statements that were published in the local news paper. On February 4, 2015, the same day that the Washington Supreme Court conclusively denied Pierce County's motion for discretionary review of Judge Andrus' discovery order, Chief Civil Deputy Prosecutor Doug Vanscoy, DPA Richmond's supervisor, told a *Tacoma News Tribune* reporter, via email, that Ms. Dalsing, "facilitated his [Mike Dalsing's] sexual abuse of the minors." DPA Vanscoy neglected to modify his statement with the word allegedly as required by the RPC 3.8(f). Upon information and belief, deputy prosecutor will confirm this statement was released by Chief Farina and Prosecutor Lindquist.

**Duty of Prosecutor**

Chief Farina violated RPC 3.8, which provides that the prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. Further the rule requires that a criminal prosecutor make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused. Chief Farina engaged in, ordered, authorized, or knew of and ratified deputy prosecutors who have violated RPC 3.8. The new, re-filed charges were not supported by probable cause and have been dismissed with prejudice.

The criminal charge was brought for the purpose of covering up wrong doing on the part of Prosecutor Lindquist's deputies.

Chief Farina has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice. RPC 3.8, Comment 1. Chief Farina conduct has violated RPC 3.8.

Moreover, Prosecutor Lindquist's deputy, DPA Ausserer, filed a psychosexual evaluation of Dalsing that was obtained, subject to a protective order, in the civil litigation. RPC 3.8. Not only did DPA Ausserer refer to the psychosexual evaluation in his March 27, 2014 Supplemental Declaration for Determination of Probable Cause, he has since filed the sensitive material in a public court file, and deceptively, perhaps perjuriously, declared the he received the material subject to an August 2014 subpoena. App. 42; App. 43. Filing this highly sensitive evaluation not only violates the protective order put in place by Judge Andrus, but creates the additional problem of increasing public condemnation of the accused in violation of RPC 3.8. This conduct serves only to embarrass Dalsing in violation of RPC 4.4(a). Dalsing would like this material removed from public view, but Prosecutor Lindquist has refused to try to resolve this issue by agreement. App. 44. Due to her involvement, Chief Farina is responsible for this breach as well as she engaged in, authorized, or knew of and ratified the decision.

Chief Farina also engaged in, ordered, authorized, or knew of and ratified the deputies who have violated RPC 4.1, which provides that in the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a

third person. As described above, deputy prosecutors have knowingly made false statements of material fact during the course of this years' long litigation.

**Misconduct**

Chief Farina has violated RPC 8.4, which provides that it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; engage in conduct involving dishonesty, fraud, deceit or misrepresentation; engage in conduct that is prejudicial to the administration of justice; knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; violate his oath as an attorney; or engage in conduct demonstrating unfitness to practice law.

As described in the foregoing memorandum, Chief Farina has engaged in, authorized, ordered or knew of and ratified herself and the deputies knowingly violated every section cited in RPC 8.4.

One particularly troubling aspect of Chief Farina's violation, is the determination that specific defense attorneys would suffer retaliation after supporting Detective Ames. RPC 8.4 specifically defines as misconduct any conduct that is prejudicial to the administration of justice. Retaliating against defense attorneys, or prohibiting deputy prosecutors from fairly negotiating with these defense attorney substantially prejudices the administration of justice. The order to deputy prosecutors to treat certain defense counsel, differently extends to their clients. The order itself, restricting access to the offices, ensuring that clients were not given consideration for plea agreements, and in general rendering those clients more likely to be found guilty of increase charges than the clients of other defense counsel in the county, is very substantially prejudicial to

the administration of justice in violation of RPC 8.4. These attorneys and by extension their clients were plainly not accorded procedural justice or fair treatment by the "minister of justice" of Pierce County.

There have undoubtedly been situations involving these attorneys, and more importantly their clients, that implicate constitutional rights under the United State Constitution and the Constitution of the State of Washington. Accordingly, the WSBA should make a criminal referral to another investigative and prosecuting authority at the State and Federal level.

This conduct violates the oath of an attorney and the obligation of a prosecutor as a minister of justice, to seek justice. See RPC 3.8, Comment 1. Further, Chief Farina, by ordering, authorizing, engaging in, or knowing of and ratifying disparate treatment of these attorneys, constitutes a violation of RPC 8.4(a), in that she induced (this is actually on on-going violation) deputy prosecutors to commit misconduct.

The responsibilities of lawyers holding public office go beyond those of other citizens. RPC 8.4, Comment 5. "A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers." *Id*. Chief Farina has, by her gross abuse of authority and power vested in the office of the prosecutor, demonstrated that she is unfit to practice law.

**Deputy Prosecuting Attorney John Sheeran WSB #26050**

Deputy Prosecuting Attorney John Sheeran violated Rules of Professional Conduct 1.7, 1.10, 3..8 and 8.4.

**FACTS**

The foregoing facts and analysis is incorporated herein. Deputy Prosecutor Sheeran has been the Felony Chief at all times since the spring of 2011. As such, he has managerial responsibility for the felony division where DPA Ausserer, DPA Kooiman, DPA Lewis work.

**ANALYSIS**

DPA Sheeran has not only authorized, ordered or known of and ratified a conflict of interest, he has directly participated in that conflict. DPA Sheeran has managerial authority over the felony division. [55] As such, he is required under RPC 5.1 to make reasonable efforts to ensure that the office has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. Further, RPC 5.1 requires that he make reasonable efforts to ensure that the other lawyers conform to the Rules of Professional Conduct. It is obvious from the foregoing facts, that DPA Sheeran has failed on both counts. Clearly, the office is lacking in policies, procedures and reasonable efforts to ensure conformance with the minimum requirements of professional conduct.

RPC 5.1 further provides that DPA Sheeran shall be responsible for another lawyer's violation of the Rules of Professional Conduct if he orders or, with knowledge of the specific conduct, ratifies the conduct involved; or if he has direct supervisory authority over another lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. In this case, DPA Sheeran is responsible for the

[55] RPC 5.1 applies to a government agency. RPC 5.1, Comment 1.

actions of his subordinates. Upon information and belief, DPA Sheeran along with Chief Farina and Prosecutor Lindquist personally oversaw the litigation in this case in some detail.

It is upon information and belief that when questioned about such matters, Prosecutor Lindquist's deputies will confirm that he ordered the foregoing conduct and/or with knowledge of the conduct, ratified it as did DPA Sheeran.

**Conflict of Interest**

Washington courts have Supreme have recognized an inherent conflict can arise for a prosecuting attorney. *Snohomish Cnty. v. Nichols*, 47 Wn. App. 550, 556-57, 736 P.2d 670, 674 (1987) aff'd, 109 Wn. 2d 613, 746 P.2d 1208 (1987). In *Nichols*, a deputy sheriff filed a claim against the sheriff's department seeking reinstatement. The prosecutor, who represented the sheriff's department, refused to provide representation to the deputy arguing that the prosecutor had discretion to make such a decision.

The Appellate Court reasoned as follows:

> The respondent argues that the prosecutor improperly exercised discretion because the office was representing the Snohomish County Sheriff's Department in the same case and therefore should have appointed a special prosecutor to represent Nichols.
>
> RCW 73.16.061 imposes a mandatory obligation on county prosecutors to represent veterans seeking reinstatement under the Veterans' Reemployment Rights Act. It is undisputed that the Snohomish County Prosecuting Attorney's Office is the legal advisor and attorney for the Snohomish County Sheriff's Office. RCW 36.27.005. **The prosecuting attorney could not, in the fair exercise of his professional duties, give an impartial and unbiased evaluation of Nichols' case. The conflict of interest was clear and the prosecuting attorney had an ethical obligation to step aside in favor of an independent special prosecutor. RPC 1.7,** CPR 5 and DR 5–105. The fees expended by Nichols in retaining private counsel are therefore recoverable as the equivalent of legal services the prosecutor was directed by statute to provide but refused. We thus reject the County's immunity argument. It would clearly defeat the purpose of RCW 73.16.061 to allow the County to shift the burden of providing legal representation to a plaintiff whose claim proves to be meritorious.

*Nichols*, at 556-57 (emphasis added). There is no doubt that in this case DPA Sheeran could not, in the fair exercise of his professional duties, give an impartial and unbiased evaluation of Dalsing's case. DPA Sheeran personally participated by providing information from DPA Richmond to the Lakewood police department. The conflict was clear and DPA Sheeran had an ethical duty to step aside in favor of an independent special prosecutor and to require his subordinates to step aside. Unfortunately, when the Snohomish County Prosecutor effectively ended the on-going criminal investigation by declining to file charges, DPA Sheeran, along with Chief Farina and Prosecutor Lindquist suddenly overlooked the clear conflict and took very detrimental action against Dalsing.

**Duty of Prosecutor**

DPA Sheeran violated RPC 3.8, which provides that the prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. Further the rule requires that a criminal prosecutor make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused. DPA Sheeran engaged in, ordered, authorized, or knew of and ratified deputy prosecutors who have violated RPC 3.8. The new, re-filed charges were not support by probable cause and have been dismissed with prejudice. The criminal charge was brought for the purpose of covering up wrong doing on the part of Prosecutor Lindquist's deputies.

DPA Sheeran has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice. RPC 3.8, Comment 1. DPA Sheeran conduct has violated RPC 3.8.

**Misconduct**

DPA Sheeran has violated RPC 8.4, which provides that it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; engage in conduct involving dishonesty, fraud, deceit or misrepresentation; engage in conduct that is prejudicial to the administration of justice; knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; violate his oath as an attorney; or engage in conduct demonstrating unfitness to practice law.

As described in the foregoing memorandum, DPA Sheeran has engaged in, authorized, ordered or knew of and ratified himself and other deputies to commit misconduct in violation of RPC 8.4. Particularly, DPA Sheeran has been personally involved in carrying out the directive that specific defense attorneys would suffer retaliation after supporting Detective Ames. RPC 8.4 specifically defines as misconduct any conduct that is prejudicial to the administration of justice. Retaliating against defense attorneys, or prohibiting deputy prosecutors from fairly negotiating with these defense attorneys substantially prejudices the administration of justice. The order for retaliation applies not only to the defense attorneys, but by extension, to their clients.

The order that specific defense attorneys would suffer retaliation after supporting Detective Ames is yet another violation of the RPC. RPC 8.4 specifically defines as misconduct any conduct that is prejudicial to the administration of justice. Retaliating against defense attorneys, or prohibiting deputy prosecutors from fairly negotiating with these defense attorney substantially prejudices the administration of justice. The order to deputy prosecutors to treat

certain defense counsel differently extends to their clients. The order itself, restricting access to the offices, ensuring that clients were not given consideration for plea agreements, and in general rendering those clients more likely to be found guilty of increase charges than the clients of other defense counsel in the county, is very substantially prejudicial to the administration of justice in violation of RPC 8.4. These attorneys and by extension their clients were plainly not accorded procedural justice or fair treatment by the "minister of justice" of Pierce County.

There have undoubtedly been situations involving these attorneys, and more importantly their clients, that implicate constitutional rights under the United State Constitution and the Constitution of the State of Washington. Accordingly, the WSBA should make a criminal referral to another investigative and prosecuting authority at the State and Federal level.

The responsibilities of lawyers holding public office go beyond those of other citizens. RPC 8.4, Comment 1. "A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers." *Id*. DPA Sheeran substantially violated the RPCs and should be held accountable for his misconduct.

**Prosecuting Attorney Mark E. Lindquist, WSB #25076**

Prosecuting Attorney Mark E. Lindquist violated Rules of Professional Conduct 1.7, 1.10, 3.2, 3.3, 3.4, 3.5, 3.6, 3.8, 4.1, 4.4, 5.1, and 8.4(a), 8.4(c), 8.4(d), 8.4(f), 8.4 (j), 8.4 (k), 8.4 (m) and 8.4 (n).

**FACTS**

The foregoing facts and analysis are incorporated herein. Prosecutor Lindquist has been the elected prosecutor at all times since the 2010 charges were filed against Dalsing. As such, he has managerial responsibility for all divisions within the prosecutor's office, including Chief Farina, DPA Sheeran, DPA Kooiman, DPA Lewis, DPA Ausserer, and DPA Richmond. The foregoing facts are all relevant to Prosecutor Lindquist's violations

Prosecutor Lindquist and Chief Farina oversaw the civil and criminal Dalsing cases. They presided over frequent meetings of civil and criminal deputies, discussing strategy, including how the re-newed criminal case would affect the civil case and *vice versa.*

Further, following Judge Murphy's dismissal of the Dalsing criminal case, Prosecutor Lindquist filed a motion for reconsideration. A DPA will affirm he attended a meeting where Prosecutor Lindquist said the office needs to "reach out to a judge to go talk to Ed." ("Judge Edmund Murphy"). Prosecutor Lindquist himself then contacted Superior Court Judge Nevin, asking, "How do we frame a motion for reconsideration" or "how do we get a judge to change his mind on a motion for reconsideration." Prosecutor Lindquist reportedly also asked Judge Nevin to review the State's briefing on the Motion to Reconsider. Judge Nevin asked if the inquiry was about Judge Murphy's decision in the Dalsing case, and when Lindquist affirmed it was, Judge Nevin ended the conversation on the subject and immediately reported the contact to

Judge Cuthbertson, the presiding judge in Pierce County Superior Court.[56] Judge Nevin and Judge Cuthbertson, will verify this contact.

## ANALYSIS

Prosecutor Lindquist has engaged in, authorized, ordered or known of and ratified a conflict of interest. Prosecutor Lindquist has managerial authority over his office. [57] As such, he is required under RPC 5.1 to make reasonable efforts to ensure that the office has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. Further, RPC 5.1 requires that he make reasonable efforts to ensure that the other lawyers conform to the Rules of Professional Conduct. It is obvious from the foregoing facts, that Prosecutor Lindquist has failed on both counts. Clearly, his office is lacking in policies, procedures and reasonable efforts to ensure conformance with the minimum requirements of professional conduct.

RPC 5.1 further provides that Prosecutor Lindquist shall be responsible for another lawyer's violation of the Rules of Professional Conduct if he orders or, with knowledge of the specific conduct, ratifies the conduct involved; or if he has direct supervisory authority over another lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action. In this case, Prosecutor Lindquist is responsible for the actions of his deputies. Upon information and belief, Prosecutor Lindquist personally oversaw the litigation in this case in some detail. For instance, DPA Ausserer informed the Tacoma News Tribune that he believed Prosecutor Lindquist made the decision to re-file criminal charges on Dalsing. It is upon information and belief that when questioned about such matters, Prosecutor Lindquist's deputies will confirm that he ordered the foregoing conduct

[56] Judge Nevin did not act on Prosecutor Lindquists's attempted improper *ex parte* contact. Judge Murphy will confirm that he was not told of this attempted contact until after he ruled on the motion to reconsider.
[57] RPC 5.1 applies to a government agency. RPC 5.1, Comment 1.

and/or with knowledge of the conduct, ratified it. Mr. Linquist is the Prosecuting Attorney for Pierce County. As such, he is responsible for the acts and decisions of his subordinate employees and deputies. The statutory definition of Mr. Lindquist's responsibility for his deputies is as follows:

> The prosecuting attorney may appoint one or more deputies who shall have the same power in all respects as their principal. Each appointment shall be in writing, signed by the prosecuting attorney, and filed in the county auditor's office. Each deputy thus appointed shall have the same qualifications required of the prosecuting attorney, except that such deputy need not be a resident of the county in which he or she serves. The prosecuting attorney may appoint one or more special deputy prosecuting attorneys upon a contract or fee basis whose authority shall be limited to the purposes stated in the writing signed by the prosecuting attorney and filed in the county auditor's office. Such special deputy prosecuting attorney shall be admitted to practice as an attorney before the courts of this state but need not be a resident of the county in which he or she serves and shall not be under the legal disabilities attendant upon prosecuting attorneys or their deputies except to avoid any conflict of interest with the purpose for which he or she has been engage d by the prosecuting attorney. The prosecuting attorney shall be responsible for the acts of his or her deputies and may revoke appointments at will.

RCW 36.27.040 (emphasis added).

**Conflict of Interest**

Prosecutor Lindquist violated RPC 1.7 and 1.10 in that he engaged in, ordered, authorized or knew of and ratified the criminal prosecution of Dalsing to be revived while simultaneously defending against her civil lawsuit.[58] Such action constitutes a violation of the RPC against conflict of interest, as discussed above. RPC 5.1 further requires that lawyers with managerial authority must make reasonable efforts to establish policies and procedures designed to detect and resolve conflicts of interest.[59] As described above,

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[58] RPC 1.10 provides that 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.

[59] Although a "screening" process is possible to ameliorate a conflict of interest, the law firm must be able to demonstrate that it is adequate to prevent a disqualified lawyer from receiving or transmitting any confidential information or from participating in the representation in any way. Here, it is patently obvious

Prosecutor Lindquist not only failed to establish policies to resolve a conflict of interest, he actually overlooked an identified conflict of interest. Such action constitutes a violation of the RPCs.

Washington courts have recognized an inherent conflict can arise for a prosecuting attorney. *Snohomish Cnty. v. Nichols*, 47 Wn. App. 550, 556-57, 736 P.2d 670, 674 (1987) aff'd, 109 Wn. 2d 613, 746 P.2d 1208 (1987). In *Nichols*, a deputy sheriff filed a claim against the sheriff's department seeking reinstatement. The prosecutor, who represented the sheriff's department, refused to provide representation to the deputy arguing that the prosecutor had discretion to make such a decision.

The Appellate Court reasoned as follows:

> The respondent argues that the prosecutor improperly exercised discretion because the office was representing the Snohomish County Sheriff's Department in the same case and therefore should have appointed a special prosecutor to represent Nichols.
>
> RCW 73.16.061 imposes a mandatory obligation on county prosecutors to represent veterans seeking reinstatement under the Veterans' Reemployment Rights Act. It is undisputed that the Snohomish County Prosecuting Attorney's Office is the legal advisor and attorney for the Snohomish County Sheriff's Office. RCW 36.27.005. **The prosecuting attorney could not, in the fair exercise of his professional duties, give an impartial and unbiased evaluation of Nichols' case. The conflict of interest was clear and the prosecuting attorney had an ethical obligation to step aside in favor of an independent special prosecutor. RPC 1.7,** CPR 5 and DR 5–105. The fees expended by Nichols in retaining private counsel are therefore recoverable as the equivalent of legal services the prosecutor was directed by statute to provide but refused. We thus reject the County's immunity argument. It would clearly defeat the purpose of RCW 73.16.061 to allow the County to shift the burden of providing legal representation to a plaintiff whose claim proves to be meritorious.

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that DPA Richmond and DPA Ausserer were not screened from each other, rather they were working in conjunction with each other. RPC 1.10, Comment 10.

*Nichols*, at 556-57 (emphasis added). There is no doubt that in this case Prosecutor Lindquist could not, in the fair exercise of his professional duties, give an impartial and unbiased evaluation of Dalsing's case. The conflict was clear and Prosecutor Lindquist had an ethical duty to step aside in favor of an independent special prosecutor. Unfortunately, when the Snohomish County Prosecutor effectively ended the on-going criminal investigation by declining to file charges, Prosecutor Lindquist suddenly overlooked the clear conflict and took very detrimental action against Dalsing.

**Intentional Delay of Litigation**

Prosecutor Lindquist violated RPC 3.2 by not taking reasonable efforts to expedite litigation. Upon information and belief, Prosecutor Lindquist engaged in, authorized, ordered or knew of and ratified the delay tactics employed by DPA Richmond and DPA Ausserer. As such, he violated RPC 3.2.

**Lack of Candor**

Prosecutor Lindquist violated RPC 3.3. Prosecutor Lindquist engaged in, authorized, ordered or knew of and ratified himself and his deputies knowingly making false statements to a tribunal. Upon information and belief, Prosecutor Lindquist personally engaged in drafting declarations signed by DPA Kooiman and DPA Lewis dated May, 12, 2014. Both declarations contain false statements as outlined above. App. 9. Further, Prosecutor Lindquist has known and ratified the false representations of DPA Ausserer and DPA Richmond. As such, he has violated RPC 3.3.

Prosecutor Lindquist engaged in, ordered, authorized, or knew of and ratified his deputies who have violated RPC 4.1, which provides that in the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a

third person. Prosecutor Lindquist has engaged in, authorized, ordered or knew of and ratified himself and his deputies knowingly violated this RPC.

**Discovery**

Prosecutor Lindquist has violated RPC 3.4. Prosecutor Lindquist has engaged in, authorized, ordered or known of and ratified unlawful obstruction of Dalsing's access to evidence and knowingly disobey an obligation under the rules of a tribunal, the discovery rules under RPC 4.7 and CR 26-37. Further Prosecutor Lindquist had engaged in, authorized, ordered or known of and ratified the failure to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party. There can be no doubt that Prosecutor Lindquist is responsible for the violations of his deputies. Upon information and belief, Prosecutor Lindquist personally oversaw this litigation and he acutely and intensely aware of the publicity generated by this case.

***Ex Parte* Judicial Contact**

Prosecutor Lindquist has violated RPC 3.5. RPC 3.5 provides that a lawyer shall not seek to influence a judge; shall not communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order. During a proceeding a lawyer may not communicate ex parte with persons serving in an official capacity in the proceeding, such as judges, masters or jurors, unless authorized to do so by law or court order.

Prosecutor Lindquist's attempt at *ex parte* contact with Judge Murphy, in an attempt to change an adverse ruling, constitutes a blatant disregard for the integrity of the judicial system,

but shows disrespect for the judges, the process and the parties. His conduct is a violation of RPC 3.5.

**Statements to Press**

Prosecutor Lindquist violated RPC 3.6, which provides that a lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter. Prosecutor Lindquist has released prejudicial statements regarding Dalsing, statements that were published in the local news paper. On February 4, 2015, the same day that the Washington Supreme Court conclusively denied Pierce County's motion for discretionary review of Judge Andrus' discovery order, Chief Civil Deputy Prosecutor Doug Vanscoy, DPA Richmond's supervisor, told a *Tacoma News Tribune* reporter, via email, that Ms. Dalsing, "facilitated his [Mike Dalsing's] sexual abuse of the minors." DPA Vanscoy neglected to modify his statement with the word allegedly as required by the RPC 3.8(f). Further, Prosecutor Lindquist specifically attempted to influence the local newspaper to print negative information bout Dalsing. He did this using public resources and he used case specific information accessible to his office.

**Duty of Prosecutor**

Prosecutor Lindquist violated RPC 3.8, which provides that the prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause. Further the rule requires that a criminal prosecutor make

timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused. Prosecutor Lindquist engaged in, ordered, authorized, or knew of and ratified his deputies who have violated RPC 3.8. Based on the comments of DPA Ausserer to the News Tribune, it is apparent that Prosecutor Lindquist personally made the decision to re-file charges against Dalsing. The charges were not supported by probable cause and have been dismissed with prejudice. The criminal charge was brought for the purpose of covering up wrong doing on the part of Prosecutor Lindquist deputies.

Prosecutor Lindquist's has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice. RPC 3.8, Comment 1. Prosecutor Lindquist's conduct has violated RPC 3.8.

Moreover, Prosecutor Lindquist's deputy, DPA Ausserer, filed a psychosexual evaluation of Dalsing that was obtained, subject to a protective order, in the civil litigation. RPC 3.8. Not only did DPA Ausserer refer to the psychosexual evaluation in his March 27, 2014 Supplemental Declaration for Determination of Probable Cause, he has since filed the sensitive material in a public court file, and deceptively, perhaps perjuriously, declared the he received the material subject to an August 2014 subpoena. App. 42; App. 43. Filing this highly sensitive evaluation not only violates the protective order put in place by Judge Andrus, but creates the additional problem of increasing public condemnation of the accused in violation of RPC 3.8. This conduct serves only to embarrass Dalsing in violation of RPC 4.4(a). Dalsing would like this material removed

from public view, but Prosecutor Lindquist has refused to try to resolve this issue by agreement. App. 44.

**Misconduct**

Prosecutor Lindquist violated RPC 8.4. RPC 8.4 provides that it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; engage in conduct involving dishonesty, fraud, deceit or misrepresentation; engage in conduct that is prejudicial to the administration of justice; knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; violate his oath as an attorney; violate the Code of Judicial Conduct; or engage in conduct demonstrating unfitness to practice law.

As described in the foregoing memorandum, Prosecutor Lindquist has engaged in, authorized, ordered or knew of and ratified himself and his deputies knowingly violated every section cited in RPC 8.4.

One particularly troubling aspect of Prosecutor Lindquist's misconduct, is the directive that specific defense attorneys would suffer retaliation after supporting Detective Ames. RPC 8.4 specifically defines as misconduct any conduct that is prejudicial to the administration of justice. Retaliating against defense attorneys, or prohibiting deputy prosecutors from fairly negotiating with certain defense attorney substantially prejudices the administration of justice. The order to deputy prosecutors to treat certain defense counsel differently extends to their clients. The order itself, restricting access to the offices, ensuring that clients were not given consideration for plea agreements, and in general rendering those clients more likely to be found guilty of increased charges than the clients of other defense counsel in the county, is very substantially prejudicial to

the administration of justice in violation of RPC 8.4. These attorneys and by extension their clients were plainly not accorded procedural justice or fair treatment by the "minister of justice" of Pierce County.

The order to deputy prosecutors to treat certain attorneys differently likely constitutes the violations of state and federal law. There have undoubtedly been situations involving these attorneys, and more importantly their clients, that implicate constitutional rights under the United State Constitution and the Constitution of the State of Washington. Accordingly, the WSBA should make a criminal referral to another investigative and prosecuting authority at the State and Federal level.

The responsibilities of lawyers holding public office go beyond those of other citizens. RPC 8.4, Comment 5. "A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers." *Id*. Prosecutor Lindquist has, by his gross abuse of authority and power vested in his office, demonstrated that he is unfit to practice law.

**Conclusion**

The criminal prosecution of Lynn Dalsing has spawned perhaps the ugliest sequence of events ever in the legal history of Pierce County. Dalsing was prosecuted and jailed for over seven months due to a wrongful identification of her in a single photograph. This travesty was compounded when overzealous prosecutors continued the prosecution and her incarceration after they knew their case was unjust.

After Dalsing filed a civil lawsuit against the County, criminal and civil prosecutors worked together to both derail the civil suit entirely, and to charge her with serious new crimes which would vindictively punish her for filing suit, and which would simultaneously impede discovery.

Two Superior Court judges in two counties and multiple appellate judges all the way to the Supreme Court have ruled against these prosecutors on every significant issue presented. Judges have questioned the prosecutor's discovery tactics, their excessive claims of privilege and work product to thwart discovery, their conflicts of interest and their condor to the court. This case has become the talk of the legal community, even beyond Pierce County, and has been the subject of extensive, front page coverage by the Tacoma News Tribune, all of which has been unfavorable in describing the prosecutors' tactics and behavior. The Dalsing case has also been the impetus for multiple whistle blower complaints that are overlapping with these RPC violations.

We have never formally complained of a fellow attorney's ethical behavior. However, we, along with many other lawyers in Pierce County, believe the conduct by the prosecutors in the Dalsing case is so egregious that it must be reviewed by the Washington State Bar Association.