NO. 93562-9

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

SKY ALLPHIN, ABC HOLDINGS, INC., and CHEM-SAFE ENVIRONMENTAL, INC.,

Petitioners,

v.

KITTITAS COUNTY, a municipal corporation and political subdivision of the State of Washington,

Respondent.

ANSWER TO PETITION FOR REVIEW

Kenneth W. Harper, WSBA 25578
Menke Jackson Beyer, LLP
807 North 39th Avenue
Yakima, WA 98902
509-575-0313

Attorneys for Respondent Kittitas County

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

STATE CASES

FEDERAL CASES

RULES

STATUTES

REGULATIONS

PUBLICATIONS

I. INTRODUCTION

The petition for review dwells on fact-specific claims that have repeatedly been resolved against Mr. Allphin. The petition's points of law are re-arguments of theories that have also repeatedly been found wrong.

The petition does not track the grounds authorizing review pursuant to RAP 13.4(b). Mr. Allphin mistakes his disagreement over the Court of Appeals' decision for an actual conflict between the decision and any other precedent.

This Court recognizes the common interest doctrine and its applicability to the exchange of otherwise privileged materials between government agencies. The Court has confirmed that the test for the controversy exemption under the PRA is congruent with ordinary privilege determinations under the civil rules of procedure.

With the above two principles in mind, the published portion of the decision below conflicts with nothing. A contrary decision would have been in conflict with *Sanders v. State*, 169 Wn.2d 827, 853, 240 P.3d 120 (2010). One would need to return to the state of the law nearly twenty years ago, prior to *Limstrom v. Ladenburg*, 136 Wn.2d 595, 612-16, 963 P.2d 869 (1998), to seriously argue that Washington

should treat issues of attorney work product for PRA matters differently than for all other civil litigation. Only a significant departure from the bedrock policies supporting the attorney work product doctrine would justify review. The policy implications of such a shift in jurisprudence are not developed by the petition. The Court has declined opportunities to embark on a new direction in this field. *Koenig v. Pierce County*, 151 Wn. App. 221, 230-31, 211 P.3d 423 (2009), *review denied*, 168 Wn.2d 1023 (2010).

II. RESTATEMENT OF ISSUES FOR REVIEW

The County restates the issues as follows:

1. The common interest doctrine is not an exemption under the Public Records Act, Chapter 42.56 RCW ("PRA") but it is a common law exception to waiver of otherwise available privileges. *Sanders*, 169 Wn.2d at 853. Was it error for the Court of Appeals to apply the common interest doctrine to confidential communications otherwise privileged and exempt from production under the PRA?

2. The scope of the attorney work product doctrine under the PRA's controversy exemption is the same as that applicable to all civil cases pursuant to CR 26(b)(4). *Soter v. Cowles Pub. Co.*, 162 Wn.2d 716, 743, 174 P.3d 60 (2007). Was it error for the Court of Appeals to

rely on CR 26(b)(4) for its assessment of attorney work product for the records in question?

3. Should the Court restate the law on civil privileges in the context of the PRA after the topic's extensive treatment and refinement in *Limstrom*, *Soter*, and *Sanders*, and the Court's refusal to further revisit the issue in *Koenig*?

III. RESTATEMENT OF FACTS

The County adopts the facts recited by the Court of Appeals in *Kittitas County v. Sky Allphin, et al.*, No. 33241-1-III (August 9, 2016). Decision at 2-8; 17-24. For additional background on Mr. Allphin's litigation with the County, which helps inform the work product analysis, see also the companion case of *ABC Holdings, Inc. v. Kittitas County*, 187 Wn. App. 275, 348 P.3d 1222 (2015), *review denied*, 184 Wn.2d 1014 (2015). Although Mr. Allphin's version of the facts is largely refuted by the Court of Appeals, a few specific points must be addressed.

Chem-Safe was a persistent and intransigent violator of solid waste regulations. CP 1282-1283. Chem-Safe's operations were unlawful and were the focus of regulatory attention by the County and the Washington Department of Ecology ("Ecology"). CP 1265-1266.

After years of efforts to obtain voluntary compliance from Chem-Safe, the County sent a letter to Chem-Safe dated January 27, 2011, copied to, and following consultation with, Ecology employees, finding "major violations" of law at Chem-Safe's facility. CP 1265-1266.

The appropriateness of the notice and order of violation ("NOVA") was confirmed by prior and subsequent site visits by County and Ecology staff. CP 1946. The NOVA was affirmed by a hearing examiner, who considered testimony of both County and Ecology staff. CP 1273-1279. The hearing examiner's findings of fact (evidence of unknown chemical contamination, admitted operation without required permit, labeling violations) were never seriously challenged. CP 1273-1277. This decision was affirmed by the trial court. CP 1281-1288.

The trial court noted Chem-Safe's "broad based overall flagrant permit violation which regulates all aspects of solid waste . . . ." CP 1287. After holding Chem-Safe in contempt for failing to comply with a prior order requiring a sampling plan, the court reiterated its affirmation of the hearing examiner's findings. CP 1305-06; CP 1310-14. Chem-Safe appealed almost every substantive ruling of the trial court. CP 1290-1292; 1301-1303; 1307-1309. The Court of Appeals

affirmed, with one concurring judge finding that Chem-Safe invited error below because Chem-Safe admitted to the hearing examiner the very lack of a permit which it later seized upon as the theory of its appeal. *ABC Holdings, Inc.* 187 Wn. App. at 291.

This Court should draw two conclusions from the facts and procedure below. First, the litigation between Chem-Safe and the County was about the applicability of state moderate risk waste regulations that Chem-Safe always knew applied to it. This involved a complex regulatory field, and consumed substantial time and resources of the County and Ecology. *See* Ch. 79.50 RCW (solid waste management); Ch. 173-350 WAC (solid waste handling standards). The records at issue were exchanged between the County and Ecology in relation to actual or clearly anticipated litigation. Decision at 15, 16; CP 380.

Second, Mr. Allphin does not fairly describe the proceedings regarding his records request litigation. Delays in this litigation were the result of abusive tactics by Chem-Safe, such as filing multiple affidavits of prejudice in a two-judge county in order to promote delay, while later complaining of the delay that resulted. VRP 26, 63, 101. One judge perceived this for what it was and contrasted this with the

finding that the County moved "quickly and responsibly [to] resolve this issue without unnecessary delay." VRP 130. After Chem-Safe's mischief with the affidavits of prejudice was resolved, a different judge commented that the "case was properly brought by the County and all it has ever sought from the court was for the court to review certain records to determine whether they are exempt from disclosure" and that Chem-Safe had "attempted to thwart the Court's resolution of the County's request at every turn." CP 787-88.

No record citation supports Mr. Allphin's claim that the County lacked evidence of a spill; that the County sued Mr. Allphin for filing his records request; or that the County released records on a protracted basis to thwart Chem-Safe in its litigation over the NOVA. These claims are argumentative rather than factual. They have not been accepted by any court in a position to consider them.

IV. WHY REVIEW SHOULD BE DENIED

Mr. Allphin's petition relies on demonstrating a conflict in other precedent pursuant to RAP 13.4(b)(1) and (2). Mr. Allphin's petition fails in light of a cohesive series of decisions beginning in 1998 with *Limstrom*, through the denial of review in *Koenig*, and concluding most recently with the denial of review in *Block v. City of Gold Bar*, 189

Wn. App. 262, 279-80, 355 P.3d 266 (2015), *review denied*, 184 Wn.2d 1037 (2016).

A. The PRA's controversy exemption is coextensive with the civil rules on attorney work product.

Mr. Allphin mainly avoids discussing *Sanders*.[1] Mr. Allphin disputes how the Court of Appeals applied *Sanders*, but more is required to justify review pursuant to RAP 13.4(b)(1).

The evolution of the law leading to the unanimous decision in *Sanders* is important. In *Soter*, the Court built on its prior recognition that the PRA's controversy exemption is integrally related to the work product doctrine. *Soter*, 162 Wn.2d at 732-34. This view stemmed from the reasons that justify protection of work product material in the first place. *See Limstrom*, 136 Wn.2d at 609-10 (quoting *Hickman v. Taylor*, 329 U.S. 495 (1947)).

Soter cited the *Limstrom* lead opinion as the interpretation of the Court. *Soter*, 162 Wn.2d at 733, 740. In *Soter*, the Court emphasized that analysis of the controversy exemption necessarily linked the PRA to the Court's interpretation of "the civil discovery rule that applies to all cases." *Id.* at 743. Because of this linkage, any

[1] *Sanders* was discussed in only two sentences in Mr. Allphin's opening brief below. He has never even remotely attempted to distinguish *Sanders*. Appellant's Br. at 27-28.

variation in interpretation of work product in the PRA context must necessarily impact not only "attorneys representing government agencies, but [...] will impact *all* attorneys engaging in civil practice." *Id.* (emphasis in original).

By the time of *Sanders*, the notion that the controversy exemption might mean anything other than the inquiry dictated by CR 26(b)(4) was dead. The issue received no discussion and there was no dissent. *Sanders*, 169 Wn.2d at 854. The policy undergirding work product and CR 26(b)(4) for the controversy exemption was also confirmed through the denial of petitions for review arising out of *Koenig* in 2009 and *Block* in February 2016.

Mr. Allphin fails to identify any point of conflict with the foregoing arising from the decision below. This is a challenging problem for Mr. Allphin because the holding below is an almost unassailable implementation of *Sanders*.[2] Instead of arguing about the trajectory of the law of work product and the PRA, Mr. Allphin's petition mainly just re-phrases his losing points from below.

[2] *Compare,* "[t]he common interest doctrine applies in the PRA context" (Decision at 14); *with* "The State responds that the 'common interest' doctrine is merely a common law exception to waiver of privilege that applies when parties share a common interest in litigation. The trial court agreed. [citation omitted] So do we." *Sanders*, 169 Wn.2d at 853.

B. The common interest doctrine is part of work product common law and, by extension, the PRA's controversy exemption.

The petition's main argument is also the best illustration of Mr. Allphin's misguided view of the law. It is not even clear what Mr. Allphin would have this Court do -- other than overrule *Sanders* and *Soter*.

Mr. Allphin argues that the common interest doctrine is not an enumerated exemption under the PRA. He states that the PRA's exemptions must be strictly and narrowly construed. Petition at 9. But this does not give rise to a point of conflict between the decision below and *Sanders* or *Soter*. The common interest doctrine's role for the controversy exemption was addressed in *Sanders* and accepted as an exception to waiver of privilege. *Sanders*, 169 Wn.2d at 833-34. The petition says nothing about this aspect of *Sanders*. The decision below cited *Sanders* for precisely this point. Decision at 14.

It is unnecessary for the Court to decide whether the common interest doctrine operates as a non-waiver rule for attorney work product. This is settled. *Sanders*, 169 Wn.2d at 834. It is also unnecessary for the Court to decide whether the common interest doctrine has a recognized application to otherwise-confidential communications pertaining to common claims or defenses. This is also

settled. *Morgan v. City of Federal Way*, 166 Wn.2d 747, 757, 213 P.3d 596 (2009).

Mr. Allphin cannot defend his claim that the decision below erroneously implemented the common interest doctrine as an unlawful expansion of a PRA exemption. Petition at 8-10. It did no such thing, unless *Sanders* also did so. *Sanders*, 169 Wn.2d at 854. Every jurisprudential argument enlisted by Mr. Allphin to justify review has already been resolved.

C. Mr. Allphin's remaining arguments are variations on his claim that the decision below confused the common interest doctrine with an enumerated PRA exemption.

Mr. Allphin's petition drifts between allegations of jurisprudential conflict and mere complaints that the case below was wrongly decided. As to the former, Mr. Allphin does not show any conflict between the decision and *Sanders*, nor any split in the decisions of lower courts. In the latter category, Mr. Allphin's arguments are based on how the common interest doctrine was applied in this case, which is not a topic supporting review.

Mr. Allphin argues that review is nevertheless justified because the decision below accepted the adequacy of the County's exemption logs even though the common interest doctrine was not listed on the logs as an exemption. Petition at 10. Mr. Allphin also argues that the

decision below errs because it allowed the assertion of the common interest doctrine to encompass attorney work product communications between government agencies. Petition at 12. Neither of these issues rises to the level of a conflict warranting review pursuant to RAP 13.4(b)(1) or (2).

1. An exemption log must identify exemptions and need not anticipate defense theories that may later arise in litigation.

Mr. Allphin's criticism of the adequacy of the County's exemption logs can be easily rejected. As Mr. Allphin acknowledges, "[t]he common interest doctrine is not a listed exemption." Petition at 9. This statement of course follows *Sanders*. What this means, though, is apparently lost on Mr. Allphin, because he faults the County for failing to identify the common interest doctrine as an exemption. Petition at 9-10. Mr. Allphin's argument is nonsense. The common interest doctrine is not an exemption. It will generally arise in response to alleged waiver. There was no defect in the County's initial exemption log. It needed only to provide a brief explanation of how exemptions applied, not a comprehensive defense of those exemptions. RCW 42.56.210(3).

Consistent with *Sanders*, the County's logs contained an explanation of how the exemptions applied to each document withheld

or redacted. Decision at 24-26. An agency may make arguments in defense of its exemptions even when the arguments include reliance on other sources of authority that are not themselves PRA-recognized exemptions. Mr. Allphin's error is in claiming that this means that the County's exemptions improperly shifted.[3] A contrary rule would require an agency to anticipate the arguments that a requestor might make to attack an exemption. An agency would have to supply the defenses against the attack as part of the exemption log. This would be utterly unworkable. No court has adopted this rule.

Mr. Allphin asserted in a brief dated May 1, 2013, that the County's work product exemption was waived due to the exchanges with Ecology. CP 400. During this same period, the County was preparing and disclosing exemption logs. CP 1549-1567; 843-850; 644-653. The grounds for exemption did not change, but the later logs also included a heading ("CONFIDENTIAL COMMUNICATIONS BETWEEN COUNTY COUNSEL AND ECOLOGY STAFF") and a footer ("County Counsel to Ecology") that identified what later became the claim of common interest protection. CP 843-850; 644-653. No PRA policy is furthered by barring the County from raising the

[3] For that matter, the explanations for the exemptions were on-point because they cited, among other cases, *Soter* and *Limstrom* – the same cases that laid the foundation for acknowledgement of the common interest doctrine by *Sanders*.

common interest doctrine later during litigation. The doctrine may be raised whenever there is a litigation incentive to raise it – this is the whole point of the doctrine, after all.

The defensive use of the common interest doctrine as a non-waiver rule is the definitive account of this topic below and is consistent with *Sanders*. Perhaps Mr. Allphin is implying that the County waived its right to assert non-waiver under the common interest doctrine. This is a novel view of the law and was never argued below. Mr. Allphin cites no authority in support.[4]

2. The common interest doctrine may apply between agencies.

Mr. Allphin argues that waiver caused by sharing otherwise privileged work product between government agencies is in conflict with *Sanders*. Petition at 12-16. The decision below is not in conflict with *Sanders*. This is again because the issue raised by Mr. Allphin was expressly addressed in that case. *Id.* at 837-41.

In *Sanders* the shared communication of work product material between agencies was not waived but was still privileged pursuant to

[4] Such an argument would be doomed by *Sanders*. There, the common interest issue arose during litigation, not with the actual initial privilege log (the "entire document index" or "EDI"). *Sanders*, 169 Wn.2d at 850-54. The estoppel-type argument Mr. Allphin makes here is "exactly the outcome we wished to avoid in *PAWS II*." *Id.* at 847 (citing *Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 884 P.2d 592 (1994)).

the common interest doctrine. *Id.* at 842, 857. This was accurately perceived below. Decision at 14, n.5. Closer review of the record in *Sanders* shows that not only were the materials exchanged between different state government agencies, but also between state agencies and county officials including, like here, prosecuting attorneys. *See* Opening Brief of the Honorable Richard B. Sanders in *Sanders v. State*, Court of Appeals No. 35920-1-II, at Appendix II (June 30, 2008) (reproducing trial court opinion, Thurston County Superior Court No. 05-2-01439-1, at 13 (January 12, 2007)). Mr. Allphin offers no persuasive way to distinguish *Sanders* on this issue.

At least since *Soter*, and particularly in *Sanders*, this Court has not applied the work product doctrine differently in the government agency context than it would be applied in any other litigation under the civil discovery rules. *Soter*, 162 Wn.2d at 743 (in the PRA context "we are interpreting the civil discovery rule that applies to all civil cases."); *Sanders*, 169 Wn.2d at 854 ("documents that fall under the common interest doctrine 'are not discoverable in civil cases and so are exempt under the controversy exemption.'"). The common interest doctrine accordingly is also available to agency litigants.

Other sources of authority are in accord. *See, e.g., Modesto*

Irrigation Dist. v. Gutierrez, 2007 WL 763370 (E.D. Cal. 2007) (agencies shared common goals and responsibilities, common interest doctrine applied); *United States v. American Tel. & Tel. Co.*, 86 F.R.D. 603, 617 (D.D.C. 1980) (agencies with substantial identity of legal interest may exchange work product under common interest doctrine).

It does not suffice for Mr. Allphin to argue the absence of a written joint defense agreement between the County and Ecology. Petition at 14. It also does not advance Mr. Allphin's argument that Ecology was not "hired" by the County. Petition at 15. Neither of these factors was present in *Sanders*, and neither has been recognized as a required element of either the work product or common interest doctrines. *See, e.g., In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990) (summarizing cases). Parties seeking protection of the common interest doctrine need not have identical interests where it may be inferred that they are "allied in common legal cause [and] that disclosures are confidential." *United States v. Gonzales*, 669 F.3d 974, 979 (9th Cir. 2012). Other courts have held that these general principles do not vary even when the resulting effect relates to public records laws. *O'Boyle v. Borough of Long Port*, 218 N.J. 168, 199 (2014).

Here, the origins of the relationship between Ecology and the

County can be traced to Chem-Safe's solid waste violations. CP 1265. Representatives of the County and Ecology jointly worked to identify specific permit violations and develop a legal position that would support remedial action against Chem-Safe, including possible civil penalties and criminal charges. CP 2000-2012.

Chem-Safe's refusal to cooperate with voluntary compliance efforts provided a specific reasonable basis to anticipate litigation once the NOVA was issued (and possibly sooner). CP 2000-2012. This common interest and the creation of documents prepared in anticipation of litigation by parties or persons who were representatives of parties preceded and continued throughout litigation of the NOVA. CP 365. The earliest communications between the agencies at issue in this case date to February 2011 (CP 892) at a time when the County was consulting with Ecology over development of an operations plan for Chem-Safe (CP 915), and had already issued the NOVA. CP 1265-1269; 1270-1271. Chem-Safe appealed the NOVA on February 10, 2011. CP 2010.

The common interest doctrine's applicability to the subject records is particularly warranted in this case. A basic policy rationale for the work product doctrine is to protect the integrity of the legal

profession and the need of counsel to freely develop correct litigation strategy without risk that documents arising during this process might be preyed upon by their adversaries. *See* Lewis H. Orland, *Observations on the Work Product Rule*, 29 Gonz. L. Rev. 281, 282-84 (1994).

The invasion of this kind of material by a litigation opponent appears to have been the precise intent behind Mr. Allphin's records requests. CP 70-71. The requests did not inadvertently sweep too broadly and unintentionally extend to work product materials. Instead, the requests asked for materials encompassing attorneys' records of the prosecutor's office and its civil deputy and were targeted to reach the most sacrosanct category of all, attorney mental impressions. CP 70-71.

Rather than take responsibility for the consequences of this overreach, as by modifying the request, Mr. Allphin built this case on a flawed challenge to the foundations of the work product doctrine. In successive opinions, the trial court conducted in camera review of these records and found them to be work product. CP 782-789; 3006-3011. Performing its own in camera review, the Court of Appeals scrutinized the same records and also reviewed every communication found in 243

pages cited in Mr. Allphin's opening brief. Decision at 28. The Court of Appeals found that all of the emails were properly exempt with the exception of two pages comprised of a chain of six emails. Decision at 27-28. These emails were produced 98 days after the initial withholding. Decision at 28.

There is no reason under RAP 13.4(b)(1) or (2) for this Court to grant review to revisit the general parameters of the attorney work product or common interest doctrines. No new law was created below on either issue.

D. The unpublished part of the decision does not merit review.

Regarding the unpublished portion of the decision below, Mr. Allphin argues that the County failed to provide prompt and timely responses under the PRA's "fullest assistance" clause at RCW 42.56.100. Petition at 16-20. The petition cites an internet blog in a footnote on its last page as support for any claim based on RAP 13.4(b)(4). Petition at 20, n.8. These are makeweight theories.

In this section the petition completely loses track of RAP 13.4(b). Mr. Allphin literally cites no case with which he contends the unpublished decision is in conflict. On these points the decision is highly fact-specific. It relates to the conduct of two parties and particular records in circumstances unlikely to recur. Mr. Allphin has

no valid argument based on the presence of an issue of substantial public interest pursuant to RAP 13.4(b)(4). *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012).

In a footnote Mr. Allphin mentions additional emails that he contends were not addressed below and that he believes were silently withheld. Petition at 17, n.7. The only attention he drew to this issue before the Court of Appeals related to the claim that the records were the result of an intentionally delayed production effort. Appellant's brief at 47. He never developed any evidence on summary judgment that the County's search effort, spanning tens of thousands of potentially responsive records, was inadequate. CP 2884-2890. Under the standard of *Neighborhood Alliance of Spokane County v. Spokane County*, 172 Wn.2d 702, 719-21, 261 P.3d 119 (2011), the mere fact that certain records may have been overlooked and were later produced does not preclude summary judgment in the County's favor.

The adequacy of the search by the County was never a topic on which Mr. Allphin assigned error below or which Mr. Allphin now claims justifies review before this Court. Because this Court has more recently confirmed that an "adequate" search is not synonymous with a "perfect" search, and that mistakenly overlooked records are not per se

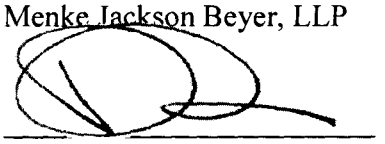
PRA violations, this Court need not revisit the issue. *Block v. City of Gold Bar*, 189 Wn. App. 262, 274-75, 355 P.3d 266 (2015), *review denied*, 184 Wn.2d 1037 (2016). Mr. Allphin provides no reason to believe that the lower courts are confused on this issue, or that a decision by this Court on these issues is needed to address an issue of substantial public interest. Neither Mr. Allphin nor any other person filed a motion to publish the portion of the decision upon which his grab-bag arguments rely. This belies Mr. Allphin's claim that the unpublished decision has statewide significance.

V. CONCLUSION

The petition does not present any issue that warrants review under RAP 13.4(b) and it should be denied.

Respectfully submitted this 4th day of October, 2016.

Menke Jackson Beyer, LLP



Kenneth W. Harper WSBA 25578
Attorneys for Plaintiff/Respondent
Kittitas County

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) ss.
County of Yakima)

COMES NOW Julie Kihn, being first duly sworn on oath, deposes and says:

That she is employed as a legal assistant by Menke Jackson Beyer, LLP, and makes this affidavit in that capacity.

I hereby certify that on the 4th day of October, 2016, a copy of the foregoing was delivered to Mr. Nicholas J. Lofing by email delivery to: nick@dadkp.com; and by depositing in the mail of the United States of America a properly stamped and addressed envelope to:

Mr. Nicholas J. Lofing
Davis Arneil Law Firm, LLP
617 Washington Street
Wenatchee, WA 98801.

Julie Kihn
JULIE KIHN

SIGNED and sworn to before me this 4th day of October, 2016.

KATHY S. LYCZEWSKI NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES APRIL 27, 2018

Kathy S Lyczewski
Notary public in and for the State of Washington, residing at Selah.
My appointment expires: 4/27/18

OFFICE RECEPTIONIST, CLERK

From: Julie Kihn <julie@mjbe.com>
Sent: Tuesday, October 04, 2016 9:52 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: nick@dadkp.com; Kenneth Harper
Subject: Sky Allphin, et al. v. Kittitas County - Case No. 93562-9
Attachments: 20161003_Answer to Petition for Review_v2.pdf

Dear Clerk of the Court:

Attached for filing please find Answer to Petition for Review.

Please contact our office if you have any questions.

Thanks,

Julie M. Kihn
Legal Assistant
Menke Jackson Beyer, LLP
807 North 39th Avenue
Yakima, WA 98902
509-575-0313
509-575-0351 fax
www.mjbe.com