SUPREME COURT NO. 90351-4

COURT OF APPEALS NO. 42864-4-II

SUPREME COURT
OF THE STATE OF WASHINGTON

CLARK COUNTY FIRE DISTRICT NO. 5, and AMERICAN ALTERNATIVE INSURANCE CORPORATION,

Petitioners,

v.

BULLIVANT HOUSER BAILEY, P.C., and RICHARD G. MATSON,

Respondents.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

Appellants Clark County Fire District No. 5 ("the Fire District") and American Alternative Insurance Corporation ("AAIC") seek discretionary review by this Court of the Court of Appeals decision cited below.

II. CITATION TO COURT OF APPEALS DECISION

The Fire District and AAIC seek discretionary review of the Court of Appeals decision in *Clark County Fire District No. 5* v. *Bullivant Houser Bailey*, No. 42864-4-II, consolidated with No. 43970-1-II, which Division Two of the Court of Appeals filed on April 24, 2014. A copy of this decision is attached as Exhibit A to the appendix.

III. ISSUES PRESENTED FOR REVIEW

1. Under the summary judgment standard for appellate review, did the Court of Appeals err when it did not review the evidence, and all reasonable inferences therefrom, in the light most favorable to the Fire District and AAIC?

2. Under this Court's decisions in *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994), and *Stewart Title Guaranty Co. v. Sterling Savings Bank*, 178 Wn.2d 561, 311 P.3d 1 (2013), did the Court of Appeals err when it assumed that "there could be [no] circumstances under which the representation of an attorney retained to represent an insured would be for the benefit of the insurer"?

3. Under this Court's decisions in *Trask* and *Stewart Title*, did the Court of Appeals err when it concluded that "AAIC's arguments

are very similar to those rejected by our Supreme Court in *Stewart Title*," but nevertheless failed to evaluate the facts of this case under the modified multi-factor balancing test of *Trask*?

4. Under the summary judgment standard for appellate review and this Court's decisions in *Trask* and *Stewart Title*, did the Court of Appeals err when it held that "AAIC lacks standing to maintain its legal malpractice claim"?

5. Under RAP 13.4(b)(1) and (4), should this Court accept this petition for review?

IV. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS

In 2005, AAIC, through Glatfelter Claims Management, Inc. ("GCM),[1] retained Bullivant Houser Bailey, P.C. ("BHB"), and its attorney Richard G. Matson ("Matson") to defend the Fire District and its administrator against a lawsuit in which several women raised claims of: outrage; negligent supervision; negligent retention; negligent infliction of emotional distress; and violations of the Washington Law Against Discrimination (WLAD) under chapter 49.60 RCW. Clerk's Papers (CP) at 4, 24-27; *see also Collins v. Clark County Fire District No. 5*, 155 Wn. App. 48, 62-63, 231 P.3d 1211 (2010). Significantly, AAIC assumed this defense without a reservation of rights. CP at 61.

[1] GCM is a third-party administrator for Munich Reinsurance America, which wholly owns AAIC, an insurance provider. Clerk's Papers (CP) at 4-5, 19-20.

Brian McCormick, a claims specialist for Munich Reinsurance America, testified that "[f]or a sexual harassment type claim [AAIC] rel[ies] upon counsel, local counsel, for these type [of] claims, a lot." CP at 531. McCormick explained that AAIC relies on local counsel because of "the expertise, the ... boots on the ground, they know what's going on in that jurisdiction." CP at 531.

Matson, as local counsel, was purported to be experienced at trying sexual harassment cases in both state and federal courts. CP at 114-17. In reality, however, he had never tried a sexual harassment case in his career. CP at 78. In fact, Matson admitted at his deposition that he had tried only one other employment case before *Collins*. CP at 114-15. Despite his lack of experience, Matson failed to consult with others at BHB who were more experienced. CP at 131, 181-85.

Early on, Matson was on notice that the plaintiffs' allegations were serious, with the potential for a multi-million dollar verdict. CP at 84-86, 96-97, 101-02. Despite having "the resources of the entire firm, which would include senior lawyers, colleagues, written resources, [and] anything that would be of assistance to the lawyer," (CP at 164), Matson simply assumed that a jury would find the complained of conduct to be "lighthearted and banter." CP at 97.[2]

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[2] But as Robert Gould, Claire Cordon, and Anne Bremner, expert witnesses for the Fire District and AAIC, have concluded, Matson failed to recognize the magnitude of the underlying plaintiffs' case and, accordingly, failed to properly prepare the underlying case during all

Yet Matson specifically testified that he had "the authority to recommend strategy to my client *and also to the insurance company.*" CP at 134 (emphasis added). Matson admitted that, between him and the insurer, he was in the best position to determine the value of these types of cases and to determine liability and damages exposure in these types of cases in the Vancouver, Washington market. CP at 112. In fact, Matson even testified that he could not "recall" any time that AAIC did not follow his advice. CP at 134.[3]

Furthermore, Matson testified that he "knew" that AAIC was relying on his evaluations as "a factor" in setting its loss reserves. CP at 141. Matson also admitted that, from the beginning of the underlying case, "the big issue" was damages, not liability. CP at 140. Nevertheless, Matson was not diligent in determining a likely measure of damages for the four plaintiffs. CP at 99, 105-06, 131 143-44.

Egregiously, Matson did not provide an evaluation regarding the value of the plaintiffs' claims until just weeks before the mediation. CP at 50, 57. When Matson finally did provide his evaluation, he addressed it to GCM's insurance adjustor, *not* the Fire District. CP at 504-10. Matson summarily assigned the case a settlement value of $370,000.00. CP at 504-10. Unfortunately, his opinion that $370,000.00 was a fair

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phases of discovery and pre-trial preparation. CP at 799-807, 814-41, 848-49, 1043, 1045.

[3] Similarly, Matson testified that he could not "recall" any time that AAIC either denied him the authority to retain an expert or precluded him from using certain discovery tools. CP at 134-35.

and reasonable sum for purposes of settling the plaintiffs' multi-million dollar claims was not supported by any substantive research or analysis. CP at 68, 106-07, 504-10, 908, 945-47.

Nevertheless, Matson testified that "[i]t's true" that AAIC was entitled to rely upon him in making informed decisions about settlement. CP at 141-42. Thus, justifiably relying on Matson's evaluation and advice, AAIC (through its third-party administrator GCM) brought $400,000.00 in settlement authority for the mediation. CP at 49, 68.[4] But when the plaintiffs in the underlying case increased their settlement demand to more than *eight million* dollars, (CP at 51), GCM's insurance adjustor repeatedly asked Matson why his evaluation of the underlying case was so different. CP at 52-53, 68-69. Matson could not provide any answer, except to say that his evaluation of the plaintiff's claims was correct. CP at 54-56, 59, 69-71.

GCM's insurance adjustor testified, "What do I do at that point?" CP at 69. "If [Matson] doesn't tell me that it's worth more, then I have to believe him that the only value on that case is $370,000, and I have to believe him because that's his state, his territory, his expertise, not mine." CP at 71. When the mediation failed, the Fire District and AAIC reluctantly, and unfortunately, headed to trial. CP at 58, 68.

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[4] Matson begrudgingly testified that AAIC "apparently" followed his recommendation about the valuation of the case for settlement purposes. CP at 112.

After a lengthy trial, the jury returned a verdict in favor of the underlying plaintiffs, awarding them substantial judgments that totaled more than $3.5 million. *Collins*, 155 Wn. App. at 73-74. In addition, the trial court awarded the plaintiffs' attorney more than $750,000.00 in attorney fees and costs. CP at 284-87.[5]

B. PROCEDURAL FACTS

In 2009, after an unsuccessful appeal,[6] the Fire District and AAIC sued BHB and Matson for their professional negligence in defending the underlying case. CP at 295-302. The trial court dismissed the claims, among other things, agreeing with BHB and Matson that they owed no duty to AAIC as a third-party beneficiary. CP at 695-99, 1234-36. The Fire District and AAIC timely appealed. CP at 700-06, 1237-41.

During the pendency of this appeal, this Court issued its opinion in *Stewart Title*, explaining that the threshold question in determining an attorney's liability to third parties is whether that third party was an intended beneficiary of the transaction to which the advice pertained. *Stewart Title*, 178 Wn.2d at 566.

During the pendency of this appeal, this Court accepted direct review of *The Doctors Co. v. Bennett Bigelow & Leedom, P.S. et al.*, No. 89178-8, a case in which the insurer has raised similar issues for review,

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[5] Also, AAIC paid approximately $500,000.00 to BHB and Matson for their services. CP at 92.

[6] *See Collins*, 155 Wn. App. at 54.

among them: (1) whether the trial court erred in ruling that the insurer was not a third-party beneficiary and (2) whether the trial court erred in creating a class of protected defense attorneys who are insulated from their legal malpractice. (Br. of Appellant, No. 89178-8, at 2-3).

In ruling on this appeal, the Court of Appeals stated "we are constrained to hold that *Stewart Title* controls and that AAIC was not the intended beneficiary of Matson's representation. We hold that AAIC lacks standing to maintain its legal negligence claim against Matson and affirm the trial court's grant of summary judgment on this issue." *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey*, No. 42864-4-II, at *8 (2014).[7] Thereafter, the Fire District and AAIC timely filed this petition for review.

V. ARGUMENT

A. UNDER RAP 13.4(b)(1), THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISIONS IN *TRASK* AND *STEWART TITLE*

To date, no court has evaluated the facts of this case under the modified multi-factor balancing test of *Trask*. Despite counsel for the Fire District and AAIC pleading with the trial court to address the *Trask* factors, the trial court refused to do so. Report of Proceedings (RP) (October 14, 2011) at 18-19. Instead, the trial court simply stated, "I'm

[7] The Court of Appeals affirmed in part and reversed in part the trial court's grant of summary judgment on the Fire District's claims. *Clark County Fire Dist. No. 5*, at *9-24. The Fire District and AAIC do not seek review of any issues related to this holding.

not overruling *Trask*. I'm not doing anything more. I'm just letting it hang out there. But I'm going with the basic concept that an attorney's duty is to his client, not the client's insurance company. Okay? Does that make it easy?" RP (October 14, 2011) at 19. And on appeal, the Court of Appeals sidestepped the *Trask* factors, when it simply stated:

> [T]he same tripartite relationship that existed between the parties in *Stewart Title* is present here and AAIC's arguments are very similar to those rejected by our Supreme Court in *Stewart Title*. Our Supreme Court gave no indication in *Stewart Title* that there could be circumstances under which the representation of an attorney retained to represent an insured would be for the benefit of the insurer.

Clark County Fire District No. 5, at *8.

But the Court of Appeals decision conflicts with this Court's decisions in *Trask* and *Stewart Title*. In *Stewart Title*, this Court simply held that an alignment of interests and a duty to inform were insufficient to show that the attorney's representation of the insured was intended to benefit the insurer. *Stewart Title*, 178 Wn.2d at 566-69. Notably, this Court did not consider the sufficiency of any other "circumstances" to show that an attorney's representation of an insured was intended to benefit an insurer. *Stewart Title*, 178 Wn.2d at 566-67. While the Court of Appeals assumes, therefore, that *Stewart Title* foreclosed a finding that an insurer can be a third-party beneficiary under the *Trask* factors, *Clark County Fire District No. 5*, at *8, this Court did no such thing.

In fact, as this Court has explained, the "primary inquiry" in determining an attorney's liability to third-parties – even insurers – under

the *Trask* factors is "the extent to which the transaction was intended to benefit the plaintiff [that is, the third party suing the attorney]." *Stewart Title*, 178 Wn.2d at 565 (quoting *Trask*, 123 Wn.2d at 842-43).[8] As The Doctors Co. astutely notes in its briefing before this Court, "On its face, this test is not absolute: 'the extent to which' implies a scale." (Br. of Appellant, No. 89178-8, at 23). And significantly, this Court has been "silent on where the scale tips." (Br. of Appellant, No. 89178-8, at 23).

Thus, while the Court of Appeals may have felt "constrained" by *Stewart Title*, the primary inquiry nevertheless should have been the extent to which BHB and Matson intended AAIC to benefit from their representation of the Fire District. *See Stewart Title*, 178 Wn.2d at 567. In this case, unlike the insurer in *Stewart Title*, AAIC was more than just an incidental beneficiary. As previously noted, AAIC relied on Matson to be its "boots on the ground." CP at 531. Matson did not repudiate or disaffirm AAIC's reliance on him; in fact, Matson "knew" that AAIC was relying on his evaluations in setting its loss reserves. CP at 141. Matson testified that he had "the authority to recommend strategy to my client *and also to the insurance company*." CP at 134 (emphasis added). A priori, Matson testified that "[i]t's true" that AAIC was entitled to rely upon him in making informed decisions about settlement. CP at 141-42.

[8] A duty under the *Trask* factors is an evolution of negligence law, and runs directly from the alleged tortfeasors (i.e., BHB and Matson) to the injured party (i.e., AAIC). *Hetzel v. Parks*, 93 Wn. App. 929, 936-37, 971 P.2d (1999); *see also Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 307, 45 P.3d 1068 (2002).

Finally, Matson even testified that he could not "recall" any time that AAIC did not follow his advice. CP at 134.[9]

Whether a duty under the *Trask* factors is owed is a question of law. *Estate of Treadwell v. Wright*, 115 Wn. App. 238, 243, 61 P.3d 1214, *review denied*, 149 Wn.2d 1035 (2003); *see In re Guardianship of Karan*, 110 Wn. App. 76, 81, 38 P.3d 396 (2002). But that duty necessarily arises from the facts presented. *See Washburn v. City of Federal Way*, 169 Wn. App. 588, 610, 283 P.3d 567 (2012), *aff'd on other grounds*, 178 Wn.2d 732, 310 P.3d 1275 (2013); *see also Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992).[10]

Here, given the facts presented, it was error for the Court of Appeals to hold summarily that "AAIC was not the intended beneficiary of Matson's representation." *Clark County Fire District No. 5*, at *8. After all, the material facts were disputed, especially those regarding duty. *Cf. Martini v. Post*, 178 Wn. App. 153, 164, 313 P.3d 473 (2013). The Court of Appeals should have considered the evidence and all reasonable inferences therefrom in the light most favorable to the Fire

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[9] While BHB and Matson may argue that there was no express statement of intent to benefit, "conduct will be considered as circumstantial evidence of intent." *Grant v. Morris*, 7 Wn. App. 134, 137, 498 P.2d 336, *review denied*, 81 Wn.2d 1006 (1972). "And circumstantial evidence is as good as direct evidence." *Rogers Potato Service v. Countrywide Potato*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004).

[10] Where the issue of duty requires a determination of facts, it does not present a pure question of law. *Washburn*, 169 Wn. App. at 610-11.

District and AAIC. *See Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). The Court of Appeals should have applied the *Trask* factors and determined whether a duty existed as to the type of transaction put before it. *See Treadwell*, 115 Wn. App. at 247. And the Court of Appeals should have restrained itself from making a bright-line rule, as "[t]he lesson of *Trask* is that each case must be evaluated on its own facts." *In re Karan*, 110 Wn. App. at 83.[11]

Thus, the facts in this case are sufficient to find that BHB and Matson intended to benefit AAIC; and under *Stewart Title*, the Court of Appeals erred in not making a further inquiry into the *Trask* factors.

B. UNDER RAP 13.4(b)(4), THE DECISION OF THE COURT OF APPEALS INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST

1. A Direct Cause of Action Would Be an Empty Remedy

Despite the Court of Appeals decision in this case, and this Court's decision in *Stewart Title*, the issue still remains whether an insurer – which has shown that it was an intended beneficiary of the attorney's representation of the insured – can sue the attorney for legal malpractice. *See Stewart Title*, 178 Wn.2d at 570; *Clark County Fire Dist. No. 5*, at *8. This issue – at the core of the petition for review in this case and at the core of the appeal in *The Doctors Co.*, No. 89178-8 –

[11] If anything, the Court of Appeals' decision in this case also conflicts with the decisions in *Treadwell* and *In re Karan*. *See* RAP 13.4(b)(1).

remains one of first impression and substantial public interest in Washington.[12]

"The cornerstone of tort law is the assurance of full compensation to the injured party." *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 236, 588 P.2d 1308 (1978). "[A] plaintiff is entitled to that sum of money that will place him in as good a position as he would have been but for the defendant's tortious act." *Shoemake v. Ferrer*, 168 Wn.2d 193, 198, 225 P.3d 990 (2010) (quotations and citations omitted).

But were this Court to affirm the Court of Appeals decision, and agree with the arguments of BHB and Matson, this Court would have to brush aside this guiding principle. Significantly, this result would permit BHB and Matson to escape liability for their injuries to AAIC. And with an eye to the future, it would create a class of protected defense attorneys who could commit malpractice with impunity. This result cannot stand.

Before the Court of Appeals, BHB and Matson baldly argued that "in all cases involving questions of the attorney's duties ... the insured[] will always have potential recourse and access to a remedy for legal malpractice." (Br. of Resp't, No. 42864-4-II, at 23). But as the Arizona Supreme Court astutely noted, there are many problems with this logic:

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[12] As the Michigan Supreme Court astutely summarized, "The issue whether an attorney hired by an insurer to defend its insured *may be liable* for professional malpractice to the insurer cannot be adequately resolved without determining whether defense counsel *should* be held liable to the insurer." *Atlanta Int'l Ins. Co. v. Bell*, 438 Mich. 512, 475 N.W.2d 294, 297 (Mich. 1991).

> [I]f that lawyer's negligence damages the insurer only, the negligent lawyer fortuitously escapes liability. Or if the lawyer's negligence injures both insured and insurer in a case in which the insured is the only client but refuses to proceed against the lawyer, the insurer is helpless and has no remedy.

Paradigm Ins. Co. v. Langerman Law Offices, P.A., 200 Ariz. 146, 24 P.3d 593 (Ariz. 2001). Similarly, if the lawyer's negligence injures both insurer and insured in a case in which the insured is the only client but cannot proceed against the lawyer, the insurer is helpless and has no remedy. *Cf. Paradigm*, 24 P.3d at 599.

Here, BHB and Matson conceded that "AAIC was responsible to the Fire District for any amount assessed against the [Fire] District in settlement or by judgment at least up to the full value of AAIC's policy limits." (Br. of Resp't, No. 42864-4-II, at 38). And they conceded that AAIC alone actually paid the underlying judgment. (Br. of Resp't, No. 42864-4-II, at 39). Therefore, it is not hard to imagine BHB and Matson subsequently arguing on remand that the Fire District's exposure to liability was "theoretical, not actual." *See Meyer v. Dempcy*, 48 Wn. App. 798, 804,740 P.2d 383, *review denied*, 109 Wn.2d 1009 (1987).

And if the trial court agrees with BHB and Matson that the Fire District's exposure to liability was "theoretical, not actual," then how can the Fire District ever show that it would have (on a more probable than not basis) "fared better" but for the negligence of BHB and Matson? *See generally Daugert v. Pappas*, 104 Wn.2d 254, 257, 704 P.2d 600 (1985); *Nielson v. Eisenhower & Carlson*, 100 Wn. App. 584,

594, 999 P.2d 42, *review denied*, 141 Wn.2d 1016 (2000); *Halvorsen v. Ferguson*, 46 Wn. App. 708, 719, 735 P.2d 675 (1986), *review denied*, 108 Wn.2d 1008 (1987). After all, with or without the negligence of BHB and Matson, the Fire District *never* would have paid the costs of the defense and the underlying multi-million dollar judgment.

Furthermore, given that "collectability is essentially an extension of proximate cause analysis," *Tilly v. Doe*, 49 Wn. App. 727, 731-32, 746 P.2d 323 (1987), *review denied*, 110 Wn.2d 1022 (1988), it is extremely unlikely that the trial court would permit the Fire District to show that the above damages are "collectible" by it. *See Kim v. O'Sullivan*, 133 Wn. App. 557, 564, 137 P.3d 61 (2006) ("the burden is on the plaintiff to show that damages are collectible"), *review denied*, 159 Wn.2d 1018 (2007). After all, awarding damages to the Fire District, which would be measured by a judgment that it never paid, could inaccurately reflect actual losses and could give the Fire District "an unjustified windfall." *See, e.g., Kim*, 133 Wn. App. at 564-65; *see also Sterling Radio Stations v. Weinstine*, 328 Ill. App. 3d 58, 765 N.E.2d 56, 62 (Ill. App. Ct. 2002).

Thus, contrary to what BHB and Matson argued, a direct cause of action for the Fire District would be an empty remedy. *See generally Stangland v. Brock*, 109 Wn.2d 675, 681, 747 P.2d 464 (1987) (if third-party beneficiaries could not recover for an attorney's negligence, then no one could); *see also Trask*, 123 Wn.2d at 843-44. Assuming this Court affirms the Court of Appeals decision, AAIC would have no

remedy.[13] And "[t]he only winner produced by such an analysis precluding liability would be the malpracticing attorney." *See, e.g., Atlanta Int'l Ins. Co. v. Bell*, 438 Mich. 512, 475 N.W.2d 294, 298 (Mich. 1991). Incredibly, BHB and Matson would receive a multi-million dollar windfall from liability merely because AAIC paid the judgment (and paid for the attorneys' services). But such a result should not arise simply because the Fire District had the foresight to contract with AAIC for insurance coverage. *See, e.g., Am. Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 485 (Tex. 1992). It is inequitable and utterly contrary to the guiding principles of Washington law. *See Seattle First Nat'l Bank*, 91 Wn.2d at 236.

2. The Profession Would Not Be Unduly Burdened by a Finding of Liability

In *Stewart Title*, this Court was concerned that finding a duty of care to an *incidental* beneficiary would violate Rules of Professional Conduct (RPC) 5.4(c). *Stewart Title*, 178 Wn.2d at 568. But what about

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[13] In *Stewart Title*, this Court had the opportunity to approve the remedy of equitable subrogation as approved by the Michigan Supreme Court in *Atlanta International Insurance Co.*, 475 N.W.2d at 298, but this Court declined to do so. *Stewart Title*, 178 Wn.2d at 567 n.2 ("We recognize that other jurisdictions have come to a different conclusion."). In fact, several other states (including Indiana, whose law regarding assignment of legal malpractice claims this Court found to be "generally persuasive," *Kommavongsa v. Haskell*, 149 Wn.2d 288, 309, 67 P.3d 1068 (2003)) have held that subrogation amounts to an assignment, which is impermissible for a legal malpractice claim. *See Querry & Harrow, Ltd. v. Transcon. Ins. Co.*, 861 N.E.2d 719 (Ind. Ct. App. 2007), *aff'd*, 885 N.E.2d 1235 (Ind. 2008).

in this case, where an insurer, e.g., AAIC, is an *intended* beneficiary? Would finding a duty of care to AAIC violate RPC 1.8(f) and RPC 5.4(c)? The answer is, "No."

Under RPC 1.8(f) and RPC 5.4(c), the general concern is that an insurer, which is paying for the attorney's services, will interfere with or override the attorney's independent professional judgment in representing the insured's interests. *See, e.g.,* ABA Comm. On Prof'l Ethics and Grievances, Formal Op. 01-421 (2001). Typically, this concern arises with regard to an insurer's guidelines, which sometimes seek to restrict the attorney from using certain types of discovery or to preclude the attorney from performing legal research without prior approval. *See, e.g., Dynamic Concepts, Inc. v. Truck Ins. Exch.*, 61 Cal. App. 4th 999, 71 Cal Rptr. 2d 882, 889 n.9 (Cal. Ct. App. 1998).

But what if the insurer allows the attorney "full rein" to exercise his professional judgment? Then the interests of the insured will be adequately safeguarded. *See Finley v. Home Ins. Co.*, 90 Haw. 25, 975 P.2d 1145, 1154 (Haw. 1998). In fact, the American Bar Association has recognized, "In most cases, undivided loyalty to the insured thus would be fully consistent with undivided loyalty to the insurance company and its directives without regard to whether both insured and insurer are clients of the lawyer." ABA Comm. On Prof'l Ethics and Grievances, Formal Op. 01-421 (2001).

Despite the "parade of horribles" argument advanced by BHB and Matson, (Br. of Resp't, No. 42864-4-II, at 20-21, 35), they must

concede that in this case it did not occur. AAIC allowed BHB and Matson "full rein" to exercise their professional judgment, consistent with RPC 1.8(f) and RPC 5.4(c). For instance, Matson does not recall anything "inconsistent" between his obligations to the Fire District and to AAIC. CP at 127-28. Matson does not recall AAIC ever denying him the authority to retain an expert or precluding him from using certain discovery tools. CP at 134-35. As far as Matson knew, AAIC was not questioning the bills or the type of work he was doing. CP at 140. Matson even admitted, "I had the authority to recommend strategy to my client and also to the insurance company." CP at 134.

While BHB and Matson also argued that the relationship between the insured and the insurer is inherently adversarial, (Br. of Resp't, No. 42864-4-II, at 18-21, 23-24, 26-27, 31-36), they failed to acknowledge that, under Washington law, there is no presumption, even when an insurer is defending under a reservation of rights, that the relationship between the insurer and the insured creates an automatic conflict of interest. *See Johnson v. Cont'l Cas. Co.*, 57 Wn. App. 359, 361-63, 788 P.2d 598 (1990) ("no actual conflict of interest necessarily exists in a reservation of rights defense"); *see also Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 383, 715 P.2d 1133 (1986).[14]

[14] As The Doctors Co. notes in its briefing before this Court, "Of course, if that were true, the tripartite relationship could never function properly." (Br. of Appellant, No. 89178-8, at 27).

Moreover, BHB and Matson failed to appreciate the fundamental difference between a "possible" conflict of interest and a "potential" conflict of interest. "The mere possibility of subsequent harm does not itself require disclosure and consent." *See* RPC 1.7 and comment 8 thereto; *see also* William T. Barker, *Insurance Defense Ethics and the Liability Insurance Bargain*, 4 Conn. Ins. L.J. 75, 86 (1997-98) (the risk must be significant and plausible, rather than a mere possibility); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 121 cmt. c(iii) (2000) ("The standard requires more than a mere possibility of adverse effect."). Significantly, BHB and Matson could not cite to any facts in this case showing that either a breach of confidentiality under RPC 1.6 or a conflict of interest under RPC 1.7 ever materialized.[15]

Thus, in circumstances such as the underlying case, where there is no reservation of rights, there is no conflict of interest, and there is no interference with the attorney's professional judgment, the obligation to protect the interests of the insured *and* the insurer does not put attorneys in an ethical bind.[16] And the profession would not be unduly burdened by a finding of liability.

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[15] *See generally* Michael Quinn, *Do (Or, May) Insurance Defense Lawyers Also Represent the Defending Insureds?*, in Insurance Coverage 2009: Claim Trends and Litigation 87, 114 (PLI Litig. & Admin. Practice Course Handbook Series No. 18542, 2009) ("Lawyers often forget that in 99+ cases out of 100, or even more, there are no real conflicts.").

[16] Certainly, this Court can expect that prudent attorneys will comply with the existing rules of professional conduct, e.g., RPC 1.0(b), (e);

3. The Remaining *Trask* Factors Support a Finding of Liability

Because of its decision, the Court of Appeals made no further inquiry into the remaining *Trask* factors. *See Trask*, 123 Wn.2d at 843 ("no further inquiry need be made unless such an intent exists"). But as the Fire District and AAIC previously have shown, (Br. of Appellants, No. 42864-4-II, at 22-29; Reply Br. of Appellants, No. 42864-4-II, at 6-11; Additional Br. of Appellants, No. 42864-4-II, at 3-10), the facts in this case are sufficient to satisfy the remaining *Trask* factors.[17]

VI. CONCLUSION

Thus, under RAP 13.4(b)(1), the Court of Appeals erred when it summarily held that "AAIC lacks standing to maintain its legal malpractice claim." *Clark County Fire Dist. No. 5*, at *8. The Court of Appeals decision, which conflicts with this Court's decisions in *Trask* and *Stewart Title*, serves no one, except for BHB and Matson. And it permits a negligent attorney to escape liability by placing the loss for his misconduct on the insurer.

But such a result is at odds with the guiding principles of Washington tort law. *See, e.g., Shoemake*, 168 Wn.2d at 198. Public

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RPC 1.2(c); RPC 1.6(a); RPC 1.7; 1.8(f); and RPC 5.4(c). Thus, no new or additional burdens under the rules of professional conduct would be unduly imposed on attorneys.

[17] To the extent further briefing on these factors is requested by this Court, the Fire District and AAIC will file and serve a supplemental brief in accordance with RAP 13.7.

policy is best served by routing out negligent attorneys, not immunizing them. After all, "[t]he social costs of legal malpractice [are] best borne by the malpracticing attorneys." *See Nat'l Union Ins. Co. v. Dowd & Dowd, P.C.*, 2 F. Supp. 2d 1013, 1024 (N.D. Ill. 1998). And as a matter of substantial public interest under RAP 13.4(b)(4), this Court should not affirm the Court of Appeals decision, thereby creating a class of special, protected defense attorneys who could commit malpractice without impunity.

Therefore, for the reasons described above (and the reason that *The Doctors Co.*, No. 89178-8, currently is pending before this Court), the Fire District and AAIC respectfully request this Court to: (1) accept this petition for review; (2) reverse the Court of Appeals decision; (3) conclude as a matter of law that Matson and BHB owed a duty to AAIC, which creates standing for AAIC to sue for legal malpractice; and (4) remand the case for trial on the remaining elements of negligence.

RESPECTFULLY SUBMITTED this 23rd day of MAY, 2014.

PATTERSON BUCHANAN
FOBES & LEITCH, INC., P.S.

By: _____
Michael A. Patterson, WSBA No. 7976
Daniel P. Crowner, WSBA No. 37136
Of Attorneys for Petitioners Clark County Fire District No. 5 & American Alternative Insurance Corporation

APPENDIX

Exhibit A

- *Clark County Fire District No. 5 v. Bullivant Houser Bailey*, No. 42864-4-II, consolidated with No. 43970-1-II, which Division Two of the Court of Appeals filed on April 24, 2014

Exhibit B

- Rules of Professional Conduct 1.6

Exhibit C

- Rules of Professional Conduct 1.7

Exhibit D

- Rules of Professional Conduct 1.8

Exhibit E

- Rules of Professional Conduct 5.4

EXHIBIT A

FILED
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DIVISION II

2014 APR 24 AM 10:47

STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CLARK COUNTY FIRE DISTRICT NO. 5 and AMERICAN ALTERNATIVE INSURANCE CORPORATION, Appellants, v. BULLIVANT HOUSER BAILEY P.C. and RICHARD G. MATSON, Respondent.	No. 42864-4-II Consolidated with No. 43970-1-II PUBLISHED OPINION

MAXA, J. – Clark County Fire District No. 5 (Fire District) and its insurer American Alternative Insurance Corporation (AAIC) appeal the trial court's summary judgment dismissals of their legal negligence claims against the law firm Bullivant Houser Bailey PC and attorney Richard Matson (collectively, Matson). AAIC retained Matson to defend the Fire District and its employee, Martin James, in a gender discrimination and sexual harassment lawsuit. The trial of that lawsuit resulted in a jury verdict in excess of $3.2 million, which was increased to almost $4 million following the award of attorney fees. The Fire District and AAIC subsequently sued Matson, alleging that he was negligent in (1) failing to properly evaluate the case for settlement purposes,

(2) mishandling various pre-trial matters, and (3) failing to object to improper statements in closing argument and failing to preserve for appeal the ability to challenge these statements. The trial court dismissed AAIC's claims based on its ruling that AAIC had no standing to sue because it was not Matson's client, and later dismissed the Fire District's negligence claims based on its ruling that Matson could not be liable for his judgment decisions.

Initially, we hold that under *Stewart Title Guaranty Co. v. Sterling Savings Bank*, 178 Wn.2d 561, 569-70, 311 P.3d 1 (2013), the trial court correctly ruled that AAIC did not have standing to sue Matson because his representation of the Fire District was not intended for AAIC's benefit. Therefore, we affirm the trial court's dismissal of AAIC's claims. With regard to the Fire District's legal negligence claims, all of the conduct at issue involved the exercise of Matson's professional judgment. We apply the "attorney judgment rule" to hold that (1) the Fire District could avoid summary judgment only if it came forward with sufficient evidence to show that Matson's judgment decisions were not within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington or that decisions themselves resulted from negligent conduct; and (2) the opinions of the Fire District's experts created questions of fact regarding most of its allegations. Accordingly, we affirm the trial court's grant of summary judgment dismissal of AAIC's claims, but we reverse the trial court's grant of summary judgment in favor of Matson on all the Fire District's claims except for the failure to object to the improper closing argument and the failure to file an appropriate motion in limine regarding the subject of the improper argument.

FACTS

Underlying Lawsuit

In February 2005, Sue Collins, Valerie Larwick, Kristy Mason, and Helen Hayden sued their supervisor (James) and employer (Fire District) for gender discrimination and sexual harassment in violation of the Washington Law Against Discrimination, chapter 49.60 RCW, and for related claims. *Collins v. Clark County Fire Dist. No. 5*, 155 Wn. App. 48, 62-63, 231 P.3d 1211 (2010).

James admitted to making sexually inappropriate and discriminatory comments while supervising employees, but he also testified that the plaintiffs had not told him that his remarks were inappropriate. *Collins*, 155 Wn. App. at 67. From the Fire District's perspective, James's inappropriate comments and actions were part of ongoing banter between James and Collins, which Collins had initiated and encouraged. The Fire District disputed that James acted inappropriately with regard to the other plaintiffs and contended that they joined the lawsuit at Collins's urging.

Matson Case Evaluation and Mediation

In April 2005, AAIC retained Matson to defend its insureds (Fire District and James) in the Collins litigation. Apparently, there were lengthy delays in the discovery process. The plaintiffs did not depose James until February 8, 2007.

On February 26, 2007, Matson provided to AAIC a written evaluation of the plaintiffs' cases in preparation for a mediation. He valued each of the plaintiffs' claims based on past medical expenses, future medical expenses, back pay, front pay, prejudgment interest, general damages, and attorney fees. He also assigned a probability of prevailing for each plaintiff. Then Matson calculated a settlement value for each plaintiff based on the potential recoverable

damages and the probability of prevailing. Matson evaluated the combined settlement value of the plaintiffs' claims at $370,000.[1] However, he warned that his approach was conservative, and that potentially recoverable damages could be higher at trial and the settlement values of each case could be as much as 50 percent higher. Matson also advised that exposure to adverse prevailing party attorney fees was a significant issue and could drive the settlement value of the case. Finally, Matson advised that the plaintiffs also could recover an amount that represents their increased income tax exposure.

On March 2, Matson provided a detailed pre-mediation statement to the mediator. Matson explained the facts from the plaintiffs' and defendants' perspectives and set forth his analysis regarding the strengths and weaknesses of each of the plaintiffs' claims.

On the eve of mediation, plaintiffs increased their settlement demand from $6.6 million to approximately $8.5 million. Consistent with Matson's evaluation of the case, AAIC's representative had $400,000 in settlement authority at the mediation. According to AAIC's representative, the mediator indicated that from her perspective, $1.8 million possibly would be a reasonable demand, but not $8 million, and that the average settlement value was approximately $85,000 per plaintiff. The mediator spoke to the plaintiffs but reported back that their demands remained firm. After a full day of mediation, AAIC decided not make a settlement offer in any amount. The AAIC representative stated at mediation that "if the plaintiffs want these kind of numbers a jury is going to have to give it to them." Clerk's Papers (CP) at 546.

[1] Matson valued Collins's claims at $157,000, her prospect of prevailing at 35 percent, and the settlement value of her claims at $55,000. Matson valued Mason's claims at $130,000, her prospect of prevailing at 60 percent, and her settlement value at $78,000. Matson valued Hayden's claims at $249,000, her prospect of prevailing at 65 percent, and her settlement value at $162,000. Matson valued Larwick's claims at $205,000, her prospect of recovery between 35-60 percent, and her settlement value at $75,000.

Matson did not file any dispositive motions or a motion to bifurcate the cases. Matson also did not make an offer of judgment.

Trial and Appeal

The case proceeded to trial. The jury returned a verdict in favor of all four plaintiffs, awarding them substantial judgments that totaled more than $3.2 million. *Collins*, 155 Wn. App. at 73-74. The trial court also awarded the plaintiffs more than $750,000 in attorney fees and costs. *Collins*, 155 Wn. App. at 77-80.

The Fire District moved for a new trial, arguing that during closing arguments plaintiffs' counsel deliberately interjected evidence of liability insurance and improperly encouraged the jury to award punitive damages to send a message to the Fire District. *Collins*, 155 Wn. App. at 74, 93-94. The trial court denied the motion, ruling that "[t]aken together without objection, [the comment] is not so prejudicial to warrant the granting of a new trial." *Collins*, 155 Wn. App. at 95 (second alteration in original).

On appeal, we affirmed the trial court's denial of the Fire District's motion for a new trial in a published decision. *Collins*, 155 Wn. App. at 105. With regard to the closing argument issue, we held that "[a]lthough such remarks were improper, we agree with the trial court that they were not so prejudicial that a timely instruction could not have cured any prejudicial effect."[2] *Collins*, 155 Wn. App. at 95. This court also affirmed the trial court's attorney fees

[2] The Fire District also sought remittitur, arguing that the jury's damages award was excessive and that justice had not been done and substantial evidence failed to support the plaintiffs' awards for economic damages. *Collins*, 155 Wn. App. at 74. The trial court granted the motion for remitter in part by reducing Larwick's damages. *Collins*, 155 Wn. App. at 75. On cross appeal, we reversed the trial court's partial grant of the Fire District's motion to remit and remanded to the trial court to reinstate the jury verdict and damages award. *Collins*, 155 Wn. App. at 87-93, 105.

award and awarded $116,650.69 in attorney fees and costs on appeal to Collins and Larwick. *Collins*, 155 Wn. App. at 105.

The supplemental judgment, for which AAIC indemnified its insureds, totaled more than $4.8 million (not including interest).

Allegation of Legal Negligence

AAIC and the Fire District sued Matson, alleging that he was negligent in failing to properly evaluate the case for settlement purposes, in mishandling various pre-trial matters, and in failing to object to allegedly improper closing arguments. The trial court dismissed AAIC from the lawsuit for lack of standing because AAIC was not Matson's client. The trial court certified its order under CR 54(b) to facilitate immediate appellate review, and AAIC appealed.

Thereafter, the trial court dismissed the Fire District's negligence claims against Matson on summary judgment, holding as a matter of law that Matson could not be liable for his judgment decisions. The Fire District appealed. We consolidated both appeals.

ANALYSIS

A. STANDARD OF REVIEW

We review a trial court's order granting summary judgment de novo. *Loeffelholz v. Univ. of Wash.*, 175 Wn.2d 264, 271, 285 P.3d 854 (2012). "We review the evidence in the light most favorable to the nonmoving party and draw all reasonable inferences in that party's favor." *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 922, 296 P.3d 860 (2013). Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Loeffelholz*, 175 Wn.2d at 271. "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). If

reasonable minds can reach only one conclusion on an issue of fact, that issue may be determined on summary judgment. *M.A. Mortenson Co. v. Timberline Software Corp.*, 140 Wn.2d 568, 579, 998 P.2d 305 (2000).

Under CR 56, a defendant is entitled to summary judgment if (1) the defendant shows the absence of evidence to support the plaintiff's case and (2) the plaintiff fails to come forward with evidence creating a genuine issue of fact on an element essential to the plaintiff's case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). To avoid summary judgment in a negligence case, the plaintiff must show a genuine issue of material fact on each element of negligence – duty, breach, causation and damage. *Martini v. Post*, 178 Wn. App. 153, 164, 313 P.3d 473 (2013).

B. AAIC'S STANDING TO SUE

The parties agree that even though AAIC retained and paid Matson, AAIC was not Matson's client. Matson's only client was the Fire District. The trial court dismissed AAIC's legal negligence claim on this basis. AAIC argues that it does have standing to sue Matson under the facts of this case. We disagree based on our Supreme Court's decision in *Stewart Title*, 178 Wn.2d at 569-70.

In *Trask v. Butler*, 123 Wn.2d 835, 842-43, 872 P.2d 1080 (1994), our Supreme Court held that the threshold question for a nonclient's ability to sue an attorney for legal negligence is whether the attorney's representation was intended to benefit the nonclient.[3] In *Stewart Title*, our Supreme Court applied this rule in the insurance defense context, holding that a title insurer

[3] In *Trask*, our Supreme Court adopted a six-factor test to determine whether an attorney owes a duty of care to a nonclient third party. 123 Wn.2d at 842-43. Whether the representation was intended to benefit the nonclient is the first factor and primary inquiry. *Trask*, 123 Wn.2d at 842-43.

that hired an attorney to defend its insured was not an intended beneficiary of the attorney's representation. 178 Wn.2d at 563, 569-70. The court held that the alignment of interests between the insurer and the insured during the representation and the insured's attorney's duty to keep the insurer informed of the progress of the litigation were insufficient to establish that the insurer was an intended beneficiary of the representation and, therefore, the attorney did not owe a duty of care to the insurer. *Stewart Title*, 178 Wn.2d at 567-70.

AAIC argues that *Stewart Title* does not impose a rule that applies in all insurance defense situations and that the *Trask* intended beneficiary factor must be analyzed on a case-by-case basis. AAIC contends that the facts here support a finding that AAIC was an intended beneficiary of Matson's representation. However, the same tripartite relationship that existed between the parties in *Stewart Title* is present here and AAIC's arguments are very similar to those rejected by our Supreme Court in *Stewart Title*. Our Supreme Court gave no indication in *Stewart Title* that there could be circumstances under which the representation of an attorney retained to represent an insured would be for the benefit of the insurer. Accordingly, we are constrained to hold that *Stewart Title* controls and that AAIC was not the intended beneficiary of Matson's representation. We hold that that AAIC lacks standing to maintain its legal negligence claim against Matson and affirm the trial court's grant of summary judgment on this issue.

C. PRINCIPLES OF LEGAL NEGLIGENCE

The trial court granted summary judgment dismissal of the Fire District's legal negligence suit against Matson based on the doctrine of judgmental immunity. The Fire District argues that the trial court erred because questions of fact exist regarding Matson's negligence. We agree with the Fire District regarding most of its negligence claims.

1. Legal Negligence Elements

To establish a claim of legal negligence, the plaintiff must prove four elements:

> (1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred.

Hizey v. Carpenter, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992). "To comply with the duty of care, an attorney must exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law" in the state of Washington. *Hizey*, 119 Wn.2d at 261.

In the analysis of any legal negligence claim it is important to understand that an attorney is not a guarantor of success and is not responsible for a "bad result" unless the result was proximately caused by a breach of the attorney's duty of care. *See McLaughlin v. Cooke*, 112 Wn.2d 829, 839, 774 P.2d 1171 (1989) (regarding malpractice of a medical professional). Consequently, the ultimate result of a case generally is irrelevant in evaluating whether an attorney's conduct breached the duty of care.

Here, an attorney-client relationship existed between Matson and the Fire District that created a duty of care and the jury verdict damaged the Fire District. The issues in this case are whether Matson breached that duty and whether any breach was the proximate cause of the damage to the Fire District.

2. Breach of Duty – Attorney Judgment Rule

The Fire District's legal negligence claims all involve Matson's exercise of professional judgment: settlement evaluation, pre-trial case strategy decisions, and whether to object at trial. Matson argues – and the trial court agreed – that an attorney generally is immune from liability

for such judgment decisions. Although we decline to apply a rule of immunity, as discussed below we adopt an "attorney judgment rule" for determining when a judgment decision breaches an attorney's duty of care.

Other jurisdictions have recognized a "judgmental immunity" rule in various forms. 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 31:8, at 421-22 (2008); *see Sun Valley Potatoes, Inc. v. Rosholt, Robertson & Tucker*, 133 Idaho 1, 4 & n.1, 981 P.2d 236 (1999). This rule dictates that lawyers do not breach their duty to clients as a matter of law when they make informed, good-faith tactical decisions. *See, e.g., Woodruff v. Tomlin*, 616 F.2d 924, 930 (6th Cir. 1980); *Paul v. Smith, Gambrell & Russell*, 267 Ga. App. 107, 108-09, 599 S.E.2d 206 (2004); *Sun Valley Potatoes*, 133 Idaho at 4-5; *Clary v. Lite Machs. Corp.*, 850 N.E.2d 423, 431-32 (Ind. Ct. App. 2006); *McIntire v. Lee*, 149 N.H. 160, 168-69, 816 A.2d 993 (2003); *Rorrer v. Cooke*, 313 N.C. 338, 358, 329 S.E.2d 355 (1985). The label " 'judgmental immunity' " is something of a misnomer because it is not a true immunity rule. *Sun Valley Potatoes*, 133 Idaho at 5; *McIntire*, 149 N.H. at 169. "Rather than being a rule which grants some type of 'immunity' to attorneys, it appears to be nothing more than a recognition that if an attorney's actions could under no circumstances be held to be negligent, then a court may rule as a matter of law that there is no liability." *Sun Valley Potatoes*, 133 Idaho at 5.

Washington courts never have expressly adopted the judgmental immunity rule, but they have applied similar principles. In *Cook, Flanagan & Berst v. Clausing*, our Supreme Court addressed an error of judgment jury instruction, which stated, "An attorney is not liable for a mere error of judgment if he acts in good faith and in an honest belief that his acts and advice are well founded and in the best interest of his client." 73 Wn.2d 393, 394, 438 P.2d 865 (1968) (internal quotation marks omitted). The court did not disagree with this language, but held that

the instruction was erroneous because it did not also provide that the error of judgment "must itself fall short of negligence."[4] *Cook*, 73 Wn.2d at 394.

The court in *Cook* did not specifically address the standard for determining when an error of judgment involves negligence. However, the court stated that the following instruction "in essence" was correct:

> [A]n attorney is not to be held liable as for malpractice because of his choosing one of two or more methods of solution of a legal problem when the choosing is the exercise of honest judgment on his part, and the method so chosen is one recognized and approved by reasonably skilled attorneys practicing in the community as a proper method in the particular case, though it might not meet with the unanimous approval of such attorneys. It is enough if the method chosen has the approval of at least a respectable minority of such attorneys who recognize it as a proper method.

Cook, 73 Wn.2d at 396. The court stated that the instruction was "incomplete" because it failed to incorporate the necessary standard for the performance of professional services. *Cook*, 73 Wn.2d at 396. In other words, a court must evaluate the exercise of judgment from the perspective of a reasonable, careful and prudent attorney in Washington. *See Cook*, 73 Wn.2d at 395-96.

In *Halvorsen v. Ferguson*, Division One of this court stated, "In general, mere errors in judgment or in trial tactics do not subject an attorney to liability for legal malpractice." 46 Wn. App. 708, 717, 735 P.2d 675 (1986) (citing *Cook*, 73 Wn.2d at 394). The court noted that "[t]his rule has found virtually universal acceptance when the error involves an uncertain, unsettled, or

[4] This rule has been applied similarly in other jurisdictions. *See Sun Valley Potatoes*, 133 Idaho at 5 ("An attorney is still 'bound to exercise a reasonable degree of skill and care in all his professional undertakings.' " (quoting *Woodruff*, 616 F.2d at 930)); *Colucci v. Rosen, Goldberg, Slavet, Levenson & Wekstein, PC*, 25 Mass. App. Ct. 107, 111, 515 N.E.2d 891 (1987) (no liability for imperfect judgment or mistake if lawyer acted " 'to the best of his skill and knowledge' ", but only if he also acted " 'with a proper degree of attention[and] with reasonable care' " (quoting *Stevens v. Walker & Dexter*, 55 Ill. 151, 153 (1870))).

debatable proposition of law." *Halvorsen*, 46 Wn. App. at 717. Accordingly, the court concluded that a difference of opinion among experts regarding litigation strategy was not enough to impose liability on an attorney. *Halvorsen*, 46 Wn. App. at 718. But like the Supreme Court in *Cook*, the court also indicated that an attorney is protected from liability only if his or her exercise of judgment is free from negligence, "An attorney's immunity from judgmental liability is conditioned upon reasonable research undertaken to ascertain relevant legal principles and to make an informed judgment." *Halvorsen*, 46 Wn. App. at 718.

We read *Cook* and *Halvorsen* as establishing an "attorney judgment rule" for determining when an attorney's error in professional judgment breaches his or her duty of care. Under this rule, an attorney cannot be liable for making an allegedly erroneous decision involving honest, good faith judgment if (1) that decision was within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington; and (2) in making that judgment decision the attorney exercised reasonable care. Our Supreme Court's decision in *Cook* supports this rule because the court approved a jury instruction stating that an attorney cannot be held liable for malpractice if there is a difference of opinion among reasonably skilled attorneys regarding the attorney's course of action as long as the instruction incorporated the necessary standard of care. 73 Wn.2d at 396. Legal negligence commentators also support this rule: "The exercise of judgment often contemplates having to choose among other reasonable alternatives. Thus, picking the wrong alternative is not negligence." 4 MALLEN, LEGAL MALPRACTICE § 31:8, at 420 (footnote omitted).

The attorney judgment rule is consistent with a similar error in judgment rule applied in medical negligence cases. When a physician is "confronted with a choice among competing therapeutic techniques or among medical diagnoses" the physician will not be liable for an error

of judgment if, in arriving at that judgment, he or she exercised reasonable care and skill within the applicable standard of care. *Watson v. Hockett*, 107 Wn.2d 158, 164-65, 727 P.2d 669 (1986); *Fergen v. Sestero*, 174 Wn. App. 393, 397, 298 P.3d 782, *review granted*, 178 Wn.2d 1001 (2013).

3. Determining Breach of Duty on Summary Judgment

Matson argues that whether an attorney's error in judgment constitutes a breach of duty is a question of law for the court. We disagree.

The attorney judgment rule addresses whether an attorney's error in judgment has breached the duty of care to his or her client. In a negligence action, whether a defendant has breached the duty of care generally is a question of fact. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999); *Bowers v. Marzano*, 170 Wn. App. 498, 506, 290 P.3d 134 (2012). The attorney judgment rule may require the plaintiff to produce additional evidence regarding breach of duty not required when the attorney's error does not involve a judgment decision.[5] But no Washington case supports the proposition that an attorney cannot be liable for an error of judgment as a matter of law even when the plaintiff comes forward with evidence sufficient to create factual issues on breach of duty within the parameters of the attorney judgment rule. Whether an attorney has breached a duty of care remains a question for the jury.[6]

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[5] Further, as in any attorney negligence case, a plaintiff generally must present expert testimony that the attorney breached the standard of care. *See Geer v. Tonnon*, 137 Wn. App. 838, 851, 155 P.3d 163 (2007).

[6] An exception is when an attorney is charged with an error regarding a legal question. In this situation, whether the attorney erred in interpreting or applying the law is a legal issue reserved for the court. *Halvorsen*, 46 Wn. App. at 712-13, 18 (rejecting a malpractice claim as a matter of law, for an attorney's failure to present or emphasize a certain theory of apportionment of community property in a dissolution case).

Matson is correct that under certain circumstances, whether an error in judgment constitutes a breach of duty can be decided as a matter of law. But this is no different than in any other negligence case, where a defendant can obtain summary judgment on the issue of breach of duty if reasonable minds could reach only one conclusion. *Hertog*, 138 Wn.2d at 275; *Bowers*, 170 Wn. App. at 506.

Under the attorney judgment rule a plaintiff can avoid summary judgment on breach of duty for an error in judgment in one of two ways. First, the plaintiff can show that the attorney's exercise of judgment was not within the range of reasonable choices from the perspective of a reasonable, careful and prudent attorney in Washington. Merely providing an expert opinion that the judgment decision was erroneous or that the attorney should have made a different decision is not enough; the expert must do more than simply disagree with the attorney's decision. *Halvorsen*, 46 Wn. App. at 715-16, 718 (expert statements that they would have conducted litigation differently cannot as a matter of law support a legal negligence action). The plaintiff must submit evidence that no reasonable Washington attorney would have made the same decision as the defendant attorney. *See Cook*, 73 Wn.2d at 396 (attorney not liable for a judgment decision, even though it might not meet with unanimous approval). If there is a genuine issue as to whether the attorney's decision was within the range of reasonable choices, the jury must be allowed to decide the issue.

Second, the plaintiff can show that the attorney breached the standard of care in making the judgment decision. For instance, as the court stated in *Halvorsen*, to avoid liability under the attorney judgment rule the attorney's judgment must be an informed one. 46 Wn. App. at 718. In other words, even if the decision itself was within the reasonable range of choices, an attorney

can be liable if he or she was negligent based on how that decision was made. Again, if sufficient evidence of such negligence exists, the jury must decide the issue.

4. Proximate Cause

Causation in a legal negligence claim focuses on "cause in fact", the " 'but for' " consequences of an attorney's breach of duty. *Hipple v. McFadden*, 161 Wn. App. 550, 562, 255 P.3d 730 (2011) (quoting *Geer v. Tonnon*, 137 Wn. App. 838, 844, 155 P.3d 163 (2007)). A plaintiff must prove that but for the attorney's negligence, he or she would have prevailed or obtained a better result in the underlying litigation. *Schmidt v. Coogan*, 162 Wn.2d 488, 492, 173 P.3d 273 (2007); *Smith v. Preston Gates Ellis, LLP*, 135 Wn. App. 859, 864, 147 P.3d 600 (2006). Generally, the but for aspect of proximate cause is decided by the trier of fact. *Smith*, 135 Wn. App. at 864. However, proximate cause can be determined as a matter of law if reasonable minds could not differ. *Smith*, 135 Wn. App. at 864.

When an attorney makes an error that affects the outcome of the underlying case, proximate cause can be determined in a legal negligence case by retrying (or trying for the first time) the underlying case while omitting the alleged error. *See Daugert v. Pappas*, 104 Wn.2d 254, 257-58, 704 P.2d 600 (1985). The result of the second trial is then compared to the outcome of the underlying case. *See Daugert*, 104 Wn.2d at 257-58. This is referred to as a " 'trial within a trial.' " *Kommavongsa v. Haskell*, 149 Wn.2d 288, 300, 67 P.3d 1068 (2003) (quoting *Picadilly, Inc. v. Raikos*, 582 N.E.2d 338, 344 (Ind. 1991)). However, in order to avoid summary judgment and reach this stage, the plaintiff must produce evidence that the error in judgment did in fact affect the outcome.

Proximate cause may be difficult to prove for some of the judgment errors the Fire District alleges. But proximate cause issues were never before the trial court. AAIC and the Fire

District filed a summary judgment motion on the applicability of Matson's judgmental immunity affirmative defense. In its response, Matson asked for dismissal as a matter of law on judgmental immunity, and later renoted the issue for trial court consideration. Matson never generally moved for summary judgment on the Fire District's negligence claim or specifically challenged the existence of proximate cause. Accordingly, we will not address proximate cause in this appeal.

D. MATSON'S ALLEGED JUDGMENT ERRORS

The Fire District argues that questions of fact exist as to whether Matson was negligent in providing an inadequate settlement evaluation, in mishandling pre-trial litigation matters, and in failing to object to improper closing arguments and to preserve the issue for appeal.

1. Settlement Evaluation

Before mediation Matson provided his opinion that the settlement value of the four claims against the Fire District was approximately $370,000, which reflected a gross value of $741,000 (including attorney fees) discounted by various percentages for the different plaintiffs based on liability issues. The Fire District argues that Matson was negligent because his evaluation was inadequate and he underestimated the value of the case. The Fire District also argues that the erroneous evaluation resulted from Matson's negligence. We agree that the Fire District has presented sufficient evidence under both aspects of the attorney judgment rule to create a question of fact regarding whether Matson breached his duty of care in developing his settlement evaluation.

An attorney's opinion regarding the value of a particular case obviously involves the exercise of professional judgment. Determining case value necessarily results from a subjective assessment of a variety of case-specific liability and damages factors.

> The settlement process concerns the prospects of success and the value of the recovery or exposure. These considerations can be evaluated objectively but also involve subjective factors. These include the forum in which a case will be tried, the attitude of the trial judge, the likely nature of a jury and a variety of considerations that usually cannot be objectively tested, except by hindsight. For that reason, an informed judgmental decision should not be second-guessed.

4 MALLEN, LEGAL MALPRACTICE § 31:42, at 638. Accordingly, the attorney judgment rule applies, and the Fire District had the burden to come forward with evidence that Matson's settlement evaluation either (1) was not within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington or (2) resulted from Matson's negligent conduct.

The Fire District submitted similar opinions from three experts – Claire Cordon, Anne Bremner and Robert Gould – that Matson's evaluation was erroneous in that he underestimated the value of the plaintiffs' claims.[7] Further, all three expressly stated that Matson's settlement evaluation breached an attorney's standard of care.

None of the experts specifically stated that the amount of Matson's evaluation was not within the range of reasonable alternatives under the facts of this case or that no reasonable attorney would have made the same settlement evaluation. In fact, none of them gave an opinion regarding what they believed was the correct settlement range. Under *Halvorsen*, the mere statements of experts that a judgment decision is erroneous or that they would have evaluated the case differently are not enough to maintain an attorney negligence claim. 46 Wn. App. at 718. However, it can be inferred that the experts believed that no reasonably prudent attorney would have agreed with Matson's evaluation based on their opinions that Matson breached the standard

[7] Gould's opinions on this subject were set forth in an unsigned letter that was an exhibit to his deposition and was submitted in an attachment to an attorney's declaration. Because Matson did not object to the trial court's consideration of this letter, we also consider it here. Gould did provide a short declaration, but did not address this issue in that declaration.

of care. When evaluating a summary judgment order the nonmoving party is entitled to all reasonable inferences. *Lakey*, 176 Wn.2d at 922. Accordingly, we hold that the Fire District came forward with sufficient evidence to show that Matson's settlement evaluation was not within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington.

In addition, the Fire District produced sufficient evidence to create a question of fact as to whether Matson's evaluation resulted from his failure to exercise reasonable care. Cordon, Bremner, and Gould provided detailed opinions that Matson's evaluation resulted from his negligence in multiple respects: inexperience in handling discrimination cases, misunderstanding of the applicable law, failure to understand that the Fire District would be found liable, improperly assessing Collins's behavior as a mitigating factor, and failing to consult prior jury verdicts and other objective data in developing the evaluation. Using the words of the court in *Halvorsen*, these opinions create questions of fact as to whether Matson's evaluation was "conditioned upon reasonable research undertaken to ascertain relevant legal principles and to make an informed judgment." 46 Wn. App. at 718.

Accordingly, we hold that summary judgment was not proper on the issue of whether Matson's settlement evaluation constituted a breach of his duty of care.

2. Pre-Trial Handling

The Fire District argues that Matson was negligent in the handling of the case before trial in multiple respects. In its appellate briefing, the Fire District references the following alleged deficiencies: (1) adopting a strategy that assumed the jury would view James's conduct as light-hearted banter and blamed Collins for James's conduct; (2) failing to provide a settlement evaluation earlier in the case; (3) failing to pursue early settlement/mediation; (4) failing to make

individual settlement offers to the different plaintiffs; (5) failing to consult with other attorneys in his firm who were more experienced, (6) failing to arrange for a mock trial or consult with a jury consultant; (7) failing to file a motion to bifurcate; (8) failing to file dispositive motions, particularly on Collins's claim; and (9) failing to file an offer of judgment.[8] We hold that the Fire District has presented sufficient evidence under the attorney judgment rule to create questions of fact regarding Matson's negligence in the pre-trial handling of the case.

All of Matson's alleged deficiencies listed above related to pre-trial tactics and strategy and involved the exercise of professional judgment. Accordingly, the attorney judgment rule applies, and the Fire District had the burden to come forward with evidence that Matson's judgment decisions either (1) were not within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington or (2) resulted from Matson's failure to exercise reasonable care.

As with the settlement evaluation issue, the Fire District did not provide any expert testimony that no reasonable attorney would have handled the case like Matson did in these specific respects. The experts only generally asserted that Matson's pre-trial strategy decisions were negligent or breached the duty of care. The expert opinions on these issues are closer to merely stating that Matson should have made different decisions or that the experts would have made different decisions. Nevertheless, resolving all inferences in the Fire District's favor, we hold that the evidence is sufficient to create a question of fact regarding whether Matson's judgment decisions were not within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington.

[8] The Fire District's experts may have referenced other alleged deficiencies. However, because they were not argued or mentioned in the Fire District's appellate briefing we need not consider them.

In addition, the Fire District's experts stated opinions that Matson's alleged judgment errors resulted from his negligence – primarily, inexperience in handling discrimination cases and misunderstanding the applicable law. These opinions are sufficient to create questions of fact regarding whether Matson exercised *informed* judgment regarding pre-trial strategic decisions.

Accordingly, we hold that summary judgment was not proper on the issue of whether Matson's pre-trial judgment decisions constituted a breach of his duty of care.

3. Plaintiffs' Improper Closing Argument

During closing argument in the *Collins* case, plaintiffs' counsel made the following statements:

> The amount that's being sought will not in any way reduce fire services, hurt the department. It's not going to do anything that will hurt services in any way, or raise taxes, do any of the bogeys that might be mentioned. It will not happen. We know that.
>
> What you need to do, please, is put a value on their suffering that other departments will look up and say, "We can't do that." Put a value on what they have experienced and compensate them to a level that says, "If you do this, serious consequences flow, and we compensate people as they are injured." And in so doing, help let the commissioners know the answer to the question they felt had to go to you all to be decided. And in so doing, also let . . . [human resources] departments know that there's a better structure, there's a better way to do this.

Collins, 155 Wn. App. at 72-73 (emphasis omitted) (alteration in original). Matson did not object to this argument. *Collins*, 155 Wn. App. at 73. The Fire District alleges that the argument was improper[9] and that Matson was negligent in failing to object, failing to file a motion in

[9] The Fire District provides no explanation in this case as to why the argument was improper. On appeal in the underlying case, the Fire District argued that the statement amounted to a reference to insurance and urged the jury to send a message with its verdict. *Collins*, 155 Wn. App. at 95-97.

limine regarding improper closing arguments, and failing to object after the fact to preserve the issue for appeal.

We hold that the Fire District did not present sufficient evidence under either part of the attorney judgment rule to create questions of fact regarding Matson's breach of duty in failing to object and in failing to file an appropriate motion in limine. We hold that the Fire District presented sufficient evidence under the attorney judgment rule to create a question of fact regarding Matson's breach of duty in failing to preserve the closing argument issue for appellate review.

a. Failure To Object During Closing Argument

Whether to object to an improper statement in closing argument involves the exercise of the attorney's judgment. "The decision of when or whether to object is a classic example of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Accordingly, the attorney judgment rule applies and the Fire District had the burden to come forward with evidence that Matson's failure to object either (1) was not within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington or (2) resulted from Matson's failure to exercise reasonable care. We note that "allegations of negligence pertaining to trial tactics and procedure[are] matters frequently difficult to prove." *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979).

Although plaintiffs' counsel's comments may have been improper, they were fairly vague. Counsel did not expressly mention "insurance" or explicitly ask the jury to punish the defendants. *Collins*, 155 Wn. App. at 72-73. Matson explained that although he interpreted plaintiffs' closing as possibly objectionable in two respects, he did not object and did not want a curative instruction because he did not want to spotlight the issues in front of the jury. Counsel

legitimately may decide not to object to avoid the risk of emphasizing an objectionable statement. *See In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

Gould opined that Matson should have objected during closing argument and that in his opinion Matson's silence was "stupid, if not negligent." CP at 849. But Gould did not expressly state that Matson's failure to object during closing argument breached the standard of care. Moreover, even Gould acknowledged Matson's concern about objecting in the presence of the jury. And Bremner noted that Matson had "a difficult choice" about whether to object when opposing counsel made an improper argument. CP at 808. Neither expert stated that no reasonable attorney would have decided not to object during closing argument under these circumstances. Further, the Fire District does not argue, and its experts do not state, that the decision to not object itself resulted from Matson's negligence. Accordingly, we hold that the Fire District failed to raise a question of fact under either part of the attorney judgment rule that Matson's failure to object during closing argument constituted a breach of duty. Summary judgment was appropriate on this issue.

b. Failure To File Motion in Limine

The Fire District argues that although Matson may have been faced with a difficult decision as to whether or not to object during closing argument, he never would have been in that position if he had filed a motion in limine barring the plaintiffs' counsel from making improper arguments (or raised the issue right before closing argument). The Fire District argues that Matson was negligent in failing to file such a motion in limine. Because the decision whether to file a motion in limine involved the exercise of Matson's judgment, the attorney judgment rule applies.

Bremner was the only expert that opined about a motion in limine. Although Bremner did not render an opinion that no reasonable attorney would have failed to file the motion, she stated that the failure to file a motion in limine violated the standard of care. However, the trial court actually granted motions in limine excluding from the jury's consideration insurance, lack of insurance, or any direct or implied argument of any adverse financial effect of a judgment. Because Bremner's opinion was based on an incorrect assumption not supported by the record – that there was no order in limine that addressed the subject of the improper closing argument – it cannot create a question of fact on Matson's breach of duty.

c. Failure To Preserve Issue for Appeal

The Fire District argues that even if Matson did not want to object in front of the jury, he should have preserved the issue for review by objecting later or moving for a mistrial outside the presence of the jury. Gould stated that Matson breached the standard of care in failing to preserve obvious error for appellate review. He indicated that any reasonable attorney would have objected and requested a curative instruction. Gould also presented an opinion tailored to the attorney judgment rule, stating that "no reasonable Washington attorney would have done *nothing* to protect the client from the improper . . . closing arguments." CP at 1080 (emphasis in original). We hold that this opinion is sufficient to create a question of fact under the attorney judgment rule that Matson's failure to do more to preserve the issue for appeal was not within the range of reasonable alternatives from the perspective of a reasonable, careful and prudent attorney in Washington.[10]

[10] On remand the Fire District will have to show that Matson's failure to properly preserve the closing argument issue for appeal proximately caused harm. However, as noted above we do not address proximate cause because it was not addressed below.

We affirm the trial court's grant of summary judgment on Matson's failure to object to the improper closing argument and failure to file a motion in limine addressing the subject of the improper argument, but reverse on Matson's alleged failure to preserve the closing argument issue for appeal.

In conclusion, we affirm the trial court's grant of summary judgment in favor of Matson on AAIC's claims, but reverse the grant of summary judgment on all the Fire District's claims except for the failure to object to the improper closing argument and the failure to file an appropriate motion in limine on the subject of the closing argument. We remand for further proceedings consistent with this position.

MAXA, J.

We concur:

LEE, J.

PENOYAR, J.P.T.

EXHIBIT B

RULE 1.6
CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer to the extent the lawyer reasonably believes necessary:

(1) shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm;

(2) may reveal information relating to the representation of a client to prevent the client from committing a crime;

(3) may reveal information relating to the representation of a client to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) may reveal information relating to the representation of a client to secure legal advice about the lawyer's compliance with these Rules;

(5) may reveal information relating to the representation of a client to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) may reveal information relating to the representation of a client to comply with a court order; or

(7) may reveal information relating to the representation of a client to inform a tribunal about any breach of fiduciary responsibility when the client is serving as a court appointed fiduciary such as a guardian, personal representative, or receiver.

Comment

See also Washington Comment [19].

[1] [Washington revision] This Rule governs the disclosure by a lawyer of information relating to the representation of a client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients

come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct. See also Scope.

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] [Washington revision] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and requires disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply must reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] [Reserved.]

[8] [Reserved.]

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the

representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the services rendered in an action to collect it. This aspect of the Rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[12] [Reserved.]

[13] [Washington revision] A lawyer may be ordered to reveal information relating to the representation of a client by a court. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

See also Washington Comment [24].

[14] Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[15] [Washington revision] Paragraphs (b)(2) through (b)(7) permit but do not require the disclosure of information relating to a client's representation to accomplish the purposes specified in those paragraphs. In exercising the discretion conferred by those paragraphs, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 3.3, 4.1(b), and 8.1. See also Rule 1.13(c), which permits disclosure in some circumstances whether or not Rule 1.6 permits the disclosure.

See also Washington Comment [23].

Acting Competently to Preserve Confidentiality

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

Former Client

[18] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

Additional Washington Comments (19 - 26)

[19] The phrase "information relating to the representation" should be interpreted broadly. The "information" protected by this Rule includes, but is not necessarily limited to, confidences and secrets. "Confidence" refers to information protected by the attorney client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Disclosure Adverse to Client

[20] Washington's Rule 1.6(b)(2), which authorizes disclosure to prevent a client from committing a crime, is significantly broader than the corresponding exception in the Model Rule. While the Model Rule permits a lawyer to reveal information relating to the representation to prevent the client from "committing a crime . . . that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used the lawyer's services," Washington's Rule permits the lawyer to reveal such information to prevent the commission of any crime.

[21] [Reserved.]

[22] [Reserved.]

[23] The exceptions to the general rule prohibiting unauthorized disclosure of information relating to the representation "should not be carelessly invoked." In re Boelter, 139 Wn.2d 81, 91, 985 P.2d 328 (1999). A lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of avoidable disclosure.

[24] Washington has not adopted that portion of Model Rule 1.6(b)(6)

permitting a lawyer to reveal information related to the representation to comply with "other law." Washington's omission of this phrase arises from a concern that it would authorize the lawyer to decide whether a disclosure is required by "other law," even though the right to confidentiality and the right to waive confidentiality belong to the client. The decision to waive confidentiality should only be made by a fully informed client after consultation with the client's lawyer or by a court of competent jurisdiction. Limiting the exception to compliance with a court order protects the client's interest in maintaining confidentiality while insuring that any determination about the legal necessity of revealing confidential information will be made by a court. It is the need for a judicial resolution of such issues that necessitates the omission of "other law" from this Rule.

Withdrawal

[25] After withdrawal the lawyer is required to refrain from disclosing the client's confidences, except as otherwise permitted by Rules 1.6 or 1.9. A lawyer is not prohibited from giving notice of the fact of withdrawal by this Rule, Rule 1.8(b), or Rule 1.9(c). If the lawyer's services will be used by the client in furthering a course of criminal or fraudulent conduct, the lawyer must withdraw. See Rule 1.16(a)(1). Upon withdrawal from the representation in such circumstances, the lawyer may also disaffirm or withdraw any opinion, document, affirmation, or the like. If the client is an organization, the lawyer may be in doubt about whether contemplated conduct will actually be carried out by the organization. When a lawyer requires guidance about compliance with this Rule in connection with an organizational client, the lawyer may proceed under the provisions of Rule 1.13(b).

Other

[26] This Rule does not relieve a lawyer of his or her obligations under Rule 5.4(b) of the Rules for Enforcement of Lawyer Conduct.

[Amended effective September 1, 2006; September 1, 2011.]

EXHIBIT C

RPC RULE 1.7
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).

Comment

General Principles

[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).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer

relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer's ability to comply with duties owed to the former client and by the lawyer's ability to represent adequately the remaining client or clients, given the lawyer's duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

See also Washington Comment [36].

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each

might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

See also Washington Comment [37].

Lawyer's Responsibilities to Former Clients and Other Third Persons

[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.

Personal Interest Conflicts

[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).

[11] [Washington revision] When lawyers representing different clients in the same matter or in substantially related matters are related as parent, child, sibling, or spouse, or if the lawyers have some other close familial relationship or if the lawyers are in a personal intimate relationship with one another, there may be a significant risk that client confidences will be revealed and that the lawyer's family or other familial or intimate relationship will interfere with both loyalty and independent professional judgment. See Rule 1.8(l). As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer so related to another lawyer ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from such relationships is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rules 1.8(k) and 1.10.

[12] [Reserved.]

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting

the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.

See Rule 1.1 (Competence) and Rule 1.3 (Diligence).

[16] [Washington revision] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states other than Washington limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest. See Washington Comment [38].

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

See also Washington Comment [38].

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party

may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

See also Washington Comment [39].

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] [Reserved.]

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a

lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them. See also Washington Comment [40].

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same

matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16. See also Washington Comment [41].

Organizational Clients

[34] A lawyer who represents a corporation or other organization does

not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Additional Washington Comments (36 - 41)

General Principles

[36] Notwithstanding Comment [3], lawyers providing short-term limited legal services to a client under the auspices of a program sponsored by a nonprofit organization or court are not normally required to systematically screen for conflicts of interest before undertaking a representation. See Comment [1] to Rule 6.5. See Rule 1.2(c) for requirements applicable to the provision of limited legal services.

Identifying Conflicts of Interest: Material Limitation

[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."

Prohibited Representations

[38] In Washington, a governmental client is not prohibited from properly consenting to a representational conflict of interest.

Informed Consent

[39] Paragraph (b)(4) of the Rule differs slightly from the Model Rule in that it expressly requires authorization from the other client before any required disclosure of information relating to that client can be made. Authorization to make a disclosure of information relating to the representation requires the client's informed consent. See Rule 1.6(a).

Nonlitigation Conflicts

[40] Under Washington case law, in estate administration matters the

client is the personal representative of the estate.
Special Considerations in Common Representation

[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.

[Amended effective September 1, 2006.]

EXHIBIT D

RULE 1.8
CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, expect as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of the client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include spouse, child, grandchild, parent, grandparent or other relative or individual with who the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not, while representing a client in connection with contemplated or pending litigation, advance or guarantee financial assistance to a client, except that:

(1) a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses; and

(2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, confirmed in writing. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not:

(1) have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them at the time the client-lawyer relationship commenced; or

(2) have sexual relations with a representative of a current client if the sexual relations would, or would likely, damage or prejudice the client in the representation.

(3) For purposes of Rule 1.8(j), "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to anyone of them shall apply to all of them.

(l) A lawyer who is related to another lawyer as parent, child, sibling, or spouse, or who has any other close familial or intimate relationship with another lawyer, shall not represent a client in a matter directly adverse to a person who the lawyer knows is represented by the related lawyer unless:

(1) the client gives informed consent to the representation; and

(2) the representation is not otherwise prohibited by Rule 1.7

(m) A lawyer shall not:

(1) make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm:

(i) to bear the cost of providing conflict counsel; or

(ii) to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law firm personnel; or

(2) knowingly accept compensation for the delivery of indigent defense services from a lawyer who has entered into a current agreement in violation of paragraph (m)(1).

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that

the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Use of Information Related to Representation

[5] [Washington revision] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), and 8.1.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the

availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10] [Washington Revision] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. See Washington Comment [21].

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

Limiting Liability and Settling Malpractice Claims

[14] [Washington revision] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless permitted by law and the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] [Washington revision] When the client is an organization, paragraph (j) of this Rule applies to a lawyer for the organization (whether inside or outside counsel). For purposes of this Rule, "representative of a current client" will generally be a constituent of the organization who supervises, directs or regularly consults with that lawyer on the organization's legal matters. See Comment [1] to Rule 1.13 (identifying the constituents of an organizational client).

See also Washington Comments [22] and [23].

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

Additional Washington Comments (21-29)

Financial Assistance

[21] Paragraph (e) of Washington's Rule differs form the Model Rule. Paragraph (e) is based on former Washington RPC 1.8(e). The minor structural modifications to the general prohibition on providing financial assistance to a client do not represent a change in Washington law, and paragraph (e) is intended to preserve prior interpretations of the Rule and Washington practice.

Client-Lawyer Sexual Relationships

[22] Paragraph (j)(2) of Washington's Rule, which prohibits sexual relationships with a representative of an organizational client, differs from the Model Rule. Comment [19] to Model Rule 1.8 was revised to be consistent with the Washington Rule.

[23] Paragraph (j)(3) of the Rule specifies that the prohibition applies with equal force to any lawyer who assists in the representation of the client, but the prohibition expressly does not apply to other members of a firm who have not assisted in the representation.

Personal Relationships

[24] Model Rule 1.8 does not contain a provision equivalent to paragraph (l) of Washington's Rule. Paragraph (l) prohibits representations based on a lawyer's personal conflict arising from his or her relationship with another lawyer. Paragraph (l) is a revised version of former Washington RPC 1.8(i). See also Comment [11] to Rule 1.7.

Indigent Defense Contracts

[25] Model Rule 1.8 does not contain a provision equivalent to paragraph (m) of Washington's Rule. Paragraph (m) specifies that it is a conflict of interest for a lawyer to enter into or accept compensation under an indigent defense contract that does not provide for the payment of funds, outside of the contract, to compensate conflict counsel for fees and expenses.

[26] Where there is a right to a lawyer in court proceedings, the right extends to those who are financially unable to obtain one. This right is affected in some Washington counties and municipalities through indigent defense contracts, i.e., contracts entered into between lawyers or law firms willing to provide defense services to those financially unable to obtain them and the governmental entities obliged to pay for those services. When a lawyer or law firm providing indigent defense services determines that a disqualifying conflict of interest precludes representation of a particular client, the lawyer or law firm must withdraw and substitute counsel must be obtained for the client. See Rule 1.16. In these circumstances, substitute counsel is typically known as "conflict counsel."

[27] An indigent defense contract by which the contracting lawyer or law firm assumes the obligation to pay conflict counsel from the proceeds of the contract, without further payment from the governmental entity, creates an acute financial disincentive for the lawyer either to investigate or declare the existence of actual or potential conflicts of interest requiring the

employment of conflict counsel. For this reason, such contracts involve an inherent conflict between the interests of the client and the personal interests of the lawyer. These dangers warrant a prohibition on making such an agreement or accepting compensation for the delivery of indigent defense services from a lawyer that has done so. See ABA Standards for Criminal Justice, Std. 5-3.3(b)(vii) (3d ed. 1992) (elements of a contract for defense services should include "a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses"); People v. Barboza, 29 Cal.3d 375, 173 Cal. Rptr. 458, 627 P.2d 188 (Cal. 1981) (structuring public defense contract so that more money is available for operation of office if fewer outside attorneys are engaged creates "inherent and irreconcilable conflicts of interest").

[28] Similar conflict-of-interest considerations apply when indigent defense contracts require the contracting lawyer or law firm to pay for the costs and expenses of investigation and expert services from the general proceeds of the contract. Paragraph (m)(1)(ii) prohibits agreements that do not provide that such services are to be funded separately from the amounts designated as compensation to the contracting lawyer or law firm.

[29] Because indigent defense contracts involve accepting compensation for legal services from a third-party payer, the lawyer must also conform to the requirements of paragraph (f). See also Comments [11][12].

[Amended effective September 1, 2006; April 24, 2007; September 1, 2008; September 1, 2011.]

EXHIBIT E

RULE 5.4
PROFESSIONAL INDEPENDENCE OF A LAWYER

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who purchases the practice of a deceased, disabled, or disappeared lawyer may, pursuant to the provisions of Rule 1.17, pay to the estate or other representative of that lawyer the agreed-upon purchase price;

(3) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(4) [Reserved.]

(5) a lawyer authorized to complete unfinished legal business of a deceased lawyer may pay to the estate or other representative of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer (other than as secretary or treasurer) thereof or occupies the position of similar responsibility in any form of association other than a corporation; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Comment

[1] The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. Where someone other than the client pays the lawyer's fee or salary, or recommends employment of the lawyer, that arrangement does not modify the lawyer's obligation to the client. As stated in paragraph (c), such arrangements should not interfere with the lawyer's professional judgment.

[2] This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another. See also Rule 1.8(f) (lawyer may accept compensation from a third party as long as there is no interference with the lawyer's independent professional judgment and the client gives informed consent).

Additional Washington Comment (3)

[3] Paragraph (a)(5) was taken from former Washington RPC 5.4(a)(2).

[Amended effective September 1, 2006.]

CERTIFICATE OF SERVICE

I, Stacy Hughes, hereby certify that on this 23rd day of May, 2014, I served the foregoing Petition for Review with attachments on the Court of Appeals ***VIA ABC Legal Messenger*** and caused the same to be served upon each and every attorney of record as noted below:

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I certify under penalty of perjury under the laws of the State of Washington that the above is correct and true.

Executed in Seattle, Washington, on May 23, 2014

Stacy Hughes
Legal Assistant