IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 94445-8

(Court of Appeals No. 483751-1-II)

TORI KRUGER-WILLIS,

Appellant,

v.

HEATHER HOFFENBURG AND JOHN DOE HOFFENBURG,

Respondent.

PETITION FOR REVIEW

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I. INTRODUCTION

In every insurance defense case, the first question a defense attorney should ask is: "Who is the client?" In Washington, "it is clear that *legally* and *ethically* the client of the lawyer is the insured (emphasis added)." WSBA Advisory Opinion 195 (1999) (citing *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986) and *Van Dyke v. White,* 55 Wn.2d 601, 349 P.2d (1960)). Appendix at A3. Under *Tank,* the relationship between the insured and the defense attorney is that of attorney and client (emphasis added). *Tank v. State Farm,* 105 Wn.2d at 388.[1]

The foregoing *was* the law until recently when the Court of Appeals issued its opinion in this case on March 28, 2017. In the published part of its opinion, the court abolished the requirement for the formation of an attorney-client relationship between an insurance defense attorney and the insurer's insured.

This case involves the authority of an insurance defense attorney to represent an insurer's insured under a duty to defend provision in a liability insurance contract when the defense attorney has never had contact with the insured and it illustrates the unique nature of the tripartite

[1] States vary in their treatment of whether the insurance defense attorney represents only the insured or both the insured and the insurer. In Oregon and in Nevada, by contrast, in the absence of a conflict, the insurance defense attorney represents both the insured and the insurer. OSB Formal Ethics Opinions 2005-30, 2005-77, and 2005-121 (Appendix at B1, B5-B8, B9-B12 respectively); *Nevada Yellow Cab Corp., v. Eighth Judicial District Court*, 152 P.3d 737 (Nev. 2007). Appendix at C4.

relationship that is created among an insurer, its insured, and the insurance defense attorney when an insurer hires an attorney to represent its insured.

In a tripartite relationship, legal and ethical lapses arise when an insurance defense attorney fails to determine whom he or she represents and where his or her loyalties lie. As this case also illustrates, courts can become confused when distinguishing between the contractual duties owed to an insured by an insurer from the legal and ethical duties owed to an insured-client by an insurance defense attorney.

II. IDENTITY OF PETITIONER

The Petitioner is Tori Kruger-Willis ("Kruger-Willis"), the Appellant in the Court of Appeals and the Plaintiff in the trial court. Kruger-Willis asks this Court to accept review of the Court of Appeals' opinion terminating review designated in Part III of this Petition.

III. CITATION TO THE COURT OF APPEALS' DECISION

Kruger-Willis seeks review in its entirety of the part published opinion and the part unpublished opinion filed by Division II of the Court of Appeals on March 28, 2017, and its denial of her motion for reconsideration filed on April 18, 2017.

A copy of the Court of Appeals' opinion is included in the Appendix at pages D1 through D12. A copy of Appellant's motion for reconsideration is included in the Appendix at pages E1 through E26. A copy of the court's order requesting an answer from Respondent to Appellant's motion for reconsideration is included in the Appendix at page

F1. A copy of the order denying Kruger-Willis's motion for reconsideration is included in the Appendix at page G1.

IV. ISSUES PRESENTED FOR REVIEW

A. Whether an insurer's duty to defend provision in an insurance contract grants implied authority on an insurance defense attorney to represent an insurer's insured when the defense attorney has never had contact with the insured;

B. Whether the Appellant received a fair hearing when the trial court and the appellate court failed to consider Appellant's claims of defense attorney misconduct; and

C. Whether the Court of Appeals erred in awarding the Respondent attorney fees on appeal and for responding to Appellant's motion for reconsideration when the Respondent failed to comply with the provisions of RAP 18.1(b).

V. STATEMENT OF THE CASE RELEVANT TO THIS PETITION

The crux of this case stems from the defense attorney's inability to negotiate a check made payable to Respondent Heather Hofferbert ("Hofferbert") tendered to him in satisfaction of prevailing party fees and costs under RCW 4.84.250 awarded by the trial court because the defense attorney has never had contact with her. Appendix at E24.

Thereafter, the defense attorney moved the trial court to compel Kruger-Willis to make payment under the prevailing party statute, RCW 4.84.250, to non-parties to this case: GEICO; Mary E. Owen &

Associates; Hofferbert and Mary E. Owen & Associates; Mary E. Owen & Associates (again); and finally, Lockner & Crowley, Inc., P.S.[2] Appendix at E24; Appellant's Opening Br. ("AOB") at 56.

Kruger-Willis's primary issue on review[3] giving rise to this Petition was whether the trial court erred when it denied her motion under RCW 2.44.030 for the defense attorney to prove his authority to appear on behalf of Hofferbert when he has never had contact with her. AOB at 6.[4] The court held in the published part of its opinion "that when an insurer has a contractual obligation to defend its insured, that insurer has the implied right to authorize defense counsel to represent its insured even in the absence of the insured's express authority." Appendix at D5-D6. Additionally, the court held in the published part of its opinion "that under RPC 1.2(f), defense counsel retained by an insurer is authorized by contract law to represent that insurer's insured." Appendix at D8.

Kruger-Willis's primary issue on review in the second appeal was whether the trial court erred when it denied her motion under RCW 2.44.030 for the defense attorney to prove his authority to appear on behalf of Hofferbert when he has never had contact with her. AOB at 12. The court held that "[w]here civil defense counsel admitted that he never had any contact with his purported client, the trial court abused its discretion

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[2] Thereby creating a conflict of interest under RPC 1.7 between the insurer and its insured.

[3] The third appeal in this case.

[4] There were two insurance defense attorneys that appeared in this case, both of whom have had no contact with Hofferbert. For clarity, Kruger-Willis refers to the attorneys in the singular.

by denying the motion." Appendix at H1. The court reversed the trial court and remanded for further proceedings. *Id.*

Kruger-Willis's primary issue on review in the first appeal was that the trial court erred in awarding Hofferbert prevailing party fees and costs under RCW 4.84.250 because the defense attorney was, in fact, representing GEICO and not Hofferbert; GEICO was not an aggrieved party under mandatory arbitration rules, therefore, it lacked standing to file a request for a trial de novo; and similarly, it could not be considered the prevailing party under RCW 4.84.250 as it was not a real party in interest in this case. AOB at 8-9, 40. The defense attorney denied the foregoing claims by Kruger-Willis to the trial court and to the appellate court and he failed to disclose to Kruger-Willis, to the trial court, and to the appellate court that he never had contact with Hofferbert. AOB at 40-41. The court found no error and affirmed the trial court. Appendix at I1.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS BY THE WASHINGTON STATE SUPREME COURT.

This case warrants review by the Supreme Court because the decision of the court is in conflict with a number of decisions of this Court. RAP 13.4(b)(1), (2). RAP 13.4(b) provides in pertinent part:

> A petition for review will be accepted by the Supreme Court only...:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals.

The Court of Appeals' decision conflicts with this Court's decisions in *Tank v. State Farm Fire & Cas. Co,* 105 Wn.2d 381, 715 P.2d 1133 (1986); in *Van Dyke v. White,* 55 Wn.2d 601, 349 P.2d (1960); in *Dep't of Ecology v. Campbell & Gwinn, LLC,* 146 Wn.2d 1, 43 P.3d 4 (2002); in *Hewson Const., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 823, 685 P.2d 1062 (1984); in *Washington Imaging Services, LLC v. Washington State Dept. of Revenue*, 171 Wn.2d 548, 252 P.3d 885 (2011); in *Woo v. Fireman's Fund Ins. Co.,* 161 Wn.2d 43, 164 P.3d 454 (2007), in *Nat'l Sur. Corp. v. Immunex Corp.,* 176 Wn.2d 872, 297 P.3d 688 (2013); in *Dietz v. Doe*, 131 Wn.2d 835, 935 P.2d 611 (1997); in *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992); and in *Hudson v. Hapner*, 170 Wn.2d 22, 33, 239 P.3d 579 (2010). Additionally, the court's decision conflicts with the provisions of RCW 2.44; RCW 2.44.010(1), (2); RPC 1.2; 1.2(f); RPC 5.4(c); and RAP 18.1(b).

This case does not involve a reservation of rights by the insurer, however, the line of cases cited by the court in its opinion occur in the context of a reservation of rights, so the court appears to extend the duties of an insurer and the obligations of an insurance defense attorney under a reservation of rights to a duty to defend provision in a liability insurance contract.[5] Appendix at D6-D7, E10.

[5] Although most standard liability insurance policies impose upon the insurer the duty to defend. *United Services Automobile Ass'n v. Speed,* 179 Wn. App. 184, 194, 317 P.3d 532 (2014).

In analyzing the issues presented in this case, it is important that a court keep in mind the maxim "it is clear that *legally* and *ethically* the client of the lawyer is the insured (emphasis added)." WSBA Advisory Opinion 195 (1999) (citing *Tank v. State Farm,* 105 Wn.2d 381 and *Van Dyke v. White,* 55 Wn.2d 601). Appendix at A3.

As previously stated, the primary issue before the court was whether the trial court erred when it denied Kruger-Willis's motion under RCW 2.44.030 for the defense attorney to prove his authority to appear on behalf of Hofferbert when he has never had contact with her. AOB at 6.

1. RCW 2.44.030

The authority of an attorney to represent a client may be challenged under RCW 2.44.030 by the opposing party. RCW 2.44.030 provides:

> **Production of authority to act.**
>
> The court, or a judge, may, on motion of either party, and on showing reasonable grounds therefor, require the attorney for the adverse party, or for any one of several adverse parties, to produce or prove the authority under which he or she appears, and until he or she does so, may stay all proceedings by him or her on behalf of the party for whom he or she assumes to appear.

In affirming the trial court, the court held in the published part of its opinion "that when an insurer has a contractual obligation to defend its insured, that insurer has the implied right to authorize defense counsel to represent its insured even in the absence of the insured's express authority." Appendix at D5-D6. The court appears to implicitly hold that under RCW 2.44.030, the defense attorney has authority to appear in this

case *and to represent*[6] Hofferbert absent any contact with her by virtue of the duty to defend provision in a liability insurance contract.

However, in interpreting RCW 2.44.030, the court failed to ascertain or to give effect to the legislature's intent by considering the text of the provision, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole (emphasis added). *See Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 10-11, 43 P.3d 4 (2002).

The statute in question, RCW 2.44.030, is governed by Washington's attorneys-at-law act, Chapter 2.44 RCW, which addresses the authority of an attorney in legal proceedings. The act provides in relevant part that an attorney has authority to bind his or her client in any legal proceedings (emphasis added). RCW 2.44.010(1); *Turner v. Stime,* 153 Wn. App. 581, 594, 222 P.3d 1243 (2009). Appendix at E4-E5. Furthermore, the act provides in relevant part that an attorney has authority to receive money claimed by his or her client in any legal proceedings (emphasis added). RCW 2.44.010(2). Appendix at E4-E5.

Based upon the act's express use of the term "client," it is clear and unambiguous that the act requires the formation of an attorney-client relationship between an attorney and the person he or she purports to represent.[7] However, the court's holding "that when an insurer has a

[6] Thereby raising the issue as to whether an attorney-client relationship exists between the defense attorney and Hofferbert.

[7] Kruger-Willis addresses the formation of an attorney-client relationship in ¶2 below and the significance of such a relationship in the insurance defense context in §B below.

contractual obligation to defend its insured, that insurer has the implied right to authorize defense counsel to represent its insured even in the absence of the insured's express authority[,]"[8] abolishes the act's requirement of the formation of an attorney-client relationship between a defense attorney and an insurer's insured.[9]

Essentially, from the foregoing, the court has created an agency relationship based upon contract law principles between the insurer and the defense attorney without regard to the formation of an attorney-client relationship between the defense attorney and the insurer's insured. The problem with the court's holding, however, is that it is inherently flawed under the laws of agency, under *Tank v. State Farm*, and under the Rules of Professional Conduct ("RPC").

An attorney-client relationship is generally a type of principal-agent relationship. *West v. Thurston County*, 168 Wn. App. 162, 183, 275 P.3d 1200 (2012). *See Fite v. Lee*, 11 Wn. App. 21, 28, 521 P.2d 964 (1974); *see also Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978). An agency relationship may exist, either expressly or by implication, when one party acts at the instance of and, in some material degree, under the direction and control of another. *Hewson Const., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 823, 685 P.2d 1062 (1984). Both the principal and agent must consent to the relationship. *Id.* The burden of

[8] Appendix at D5-D6 (emphasis added).

[9] As well as the formation of an attorney-client relationship under RPC 1.2, 1.2(f), and *Tank v. State Farm*, 105 Wn.2d at 388.

establishing the agency relationship rests upon the party asserting its existence. *Id.*

The crucial factor which must exist to prove agency is the right of control. *Washington Imaging Services, LLC v. Washington State Dept. of Revenue*, 171 Wn.2d 548, 562, 252 P.3d 885 (2011); *O'Brien v. Hafer*, 122 Wn. App. 279, 283, 93 P.3d 930 (2004). Control is not established if the asserted principal retains the right to supervise the asserted agent merely to determine if the agent performs in conformity with the contract. *Bloedel Timberlands Development, Inc. v. Timber Industries, Inc.*, 28 Wn. App. 669, 674, 626 P.2d 30 (1981). Instead, control establishes agency only if the principal controls the manner of performance. *Id.*

When it comes to agency, particularly when an attorney is involved, the first question should be: "Who is the principal?" In this case, under RPC 5.4(c) and *Tank v. State Farm*, the principle is the insured-client and it *cannot* be the insurer.

"The RPCs contain two rules addressing the duty of loyalty that potentially apply when an insurer retains an attorney to defend its insured[,]" which are RPC 1.7 (conflict of interest)[10] and RPC 5.4(c). *Arden v. Forsberg & Umlauf PS*, 193 Wn. App. 731, 743-44, 373 P.3d 320 (2016). Of relevance to this issue is RPC 5.4(c), which provides:

[10] While a conflict of interest between the insurer and Hofferbert arose when the defense attorney sought to compel Kruger-Willis to issue payment under the provisions of RCW 4.84.250 from Hofferbert to the insurer and then to the law firms purportedly representing her, RPC 1.7 is not relevant to the issue concerning a principal's control over an agent.

> 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.

Under *Tank v. State Farm*, a defense attorney owes a duty of loyalty to the insured-client, not to the insurer, consistent with RPC 5.4(c). *Arden v. Forsberg & Umlauf PS*, 193 Wn. App. at 744; *Tank v. State Farm*, 105 Wn.2d at 388. "RPC 5.4(c) demands that counsel understand that he or she represents only the insured, not the company...'[T]he standards of the legal profession require undeviating fidelity of the lawyer to his client. No exceptions can be tolerated.'" *Arden v. Forsberg & Umlauf PS*, 193 Wn. App. at 744-45 (quoting *Van Dyke v. White*, 55 Wn.2d at 613).

On point with the foregoing principles, the Washington State Bar Association ("WSBA") issued an advisory opinion with respect to an insurance defense attorney's rendering of legal services. "[A] lawyer representing an insured client must follow the instructions of the client, and not the insurance carrier." WSBA Advisory Opinion 974 (1986). Appendix at J1.

From the foregoing authorities, it is clear that the defense attorney performs under the direction and control of the insured-client and not the insurer. *See Washington Imaging Services, LLC v. Washington State Dept. of Revenue*, 171 Wn.2d at 562; *Hewson Const., Inc. v. Reintree Corp.*, 101 Wn.2d at 823. *See also Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey PC*, 180 Wn. App. 689, 694, 324 P.3d 743 (2014) (insurer lacked

standing to sue insurance defense attorney because it was not defense attorney's client) and *Stewart Title Guaranty Co. v. Sterling Savings Bank*, 178 Wn.2d 561, 569-70, 311 P.3d 1 (2013) (a title insurer that hired an attorney to defend its insured was not an intended beneficiary of the attorney's representation).

Therefore, under the laws of agency, the insured-client is the principal and the agent is the defense attorney. Furthermore, to create an expressed or an implied agency, both the principal and the agent must consent to the relationship. *Hewson Const., Inc. v. Reintree Corp.*, 101 Wn.2d at 823. In this case, Hofferbert has not consented to the formation of an agency relationship because the defense attorney has never had contact with her to obtain such consent.

The Court of Appeals' part published opinion is disquieting. On the one hand, the court acknowledges that under *Tank v. State Farm* "the law is clear that the insurer-retained defense counsel's client is the insured, and not the insurer (emphasis added)." Appendix at D7. Yet, on the other hand, the court goes on to eviscerate the law by holding "that when an insurer has a contractual obligation to defend its insured, that insurer has the implied right to authorize defense counsel to represent its insured even in the absence of the insured's express authority[,]" because it completely disregards the necessity of the formation of an attorney-client relationship between an insurance defense attorney and an insured. Appendix at D5-D6.

2. RPC 1.2(f)

In the published part of its opinion, the court held "that under RPC 1.2(f), defense counsel retained by an insurer is authorized by contract law to represent that insurer's insured." Appendix at D8. In so holding, the court appears to carve out a public policy exception to the "client" requirement found in RPC 1.2 and RPC 1.2(f) (discussed further below), as well as in RCW 2.44 and in *Tank v. State Farm.* Appendix at E15-E16.

Under the Rules of Professional Conduct 1.2 RPC, which provides for the scope of representation and allocation of authority between client and lawyer, "[a] lawyer shall not purport to act as a lawyer for any person or organization if the lawyer knows or reasonably should know that the lawyer is acting without the authority of that person or organization, unless the lawyer is authorized or required to so act by law or a court order (emphasis added)." RPC 1.2, 1.2(f). Appendix at E4.

On point with the subject issue, the WSBA issued an advisory opinion with respect to the formation of an attorney-client relationship when the defense attorney had no contact with the insurer's insured. When it comes to the formation of an attorney-client relationship between an insurance defense attorney and an insurer's insured, no attorney-client relationship is formed when a defense attorney has had no contact with the insured, thus, the defense attorney lacks authority to act as lawyer for the insured. WSBA Advisory Opinion 928 (1985). Appendix at K1.

Whether an attorney-client relationship exists is a question of fact. *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). The foundation of an attorney-client relationship is whether the attorney's advice or assistance was sought and received. *Id.* The relationship may be implied from the parties' conduct and need not be formalized in a written contract. *Id.* The existence of an attorney-client relationship depends largely on the clients' subjective belief, but this belief must be reasonably formed based on attending circumstances, including the attorney's words and actions. *Id.* Appendix at D6-D7. *See also* WSBA Advisory Opinion 1821 (1998) at Appendix L1 (formation of attorney-client relationship).

Notably, the court acknowledged in its opinion that under *Tank v. State Farm*, "the law is clear that the insurer-retained defense counsel's client is the insured, and not the insurer (emphasis added)." Appendix at D7. Moreover, in its opinion, the court appeared to recognize that RPC 1.2(f) contemplates the existence of an attorney-client relationship by its reasoning that "RPC 1.2(f) does not always require express authorization from the client. An attorney can represent a client if authorized 'by law.' RPC 1.2(f) (emphasis added)." Appendix at D8, E4.

The trial court and the Court of Appeals, however, have not resolved the issue as to whether an attorney-client relationship existed between the defense attorney and Hofferbert by the courts' failure to make explicit findings of fact or conclusions of law regarding the existence of an attorney-client relationship between the defense attorney and Hofferbert.

See *Dietz v. Doe*, 131 Wn.2d 835, 844, 935 P.2d 611 (1997). Appendix at E5-E6.

Based upon what actually occurred between the defense attorney and Hofferbert, which is no contact whatsoever between them, there is an absence of any competent evidence to support the existence of an attorney-client relationship. *See Dietz v. Doe*, 131 Wn.2d at 845. Appendix at E7. An attorney-client relationship simply does not exist between the defense attorney and Hofferbert because she did not seek advice from the defense attorney and she did not receive advice from defense attorney in that there has been no contact whatsoever between her and the defense attorney. *See Bohn v. Cody*, 119 Wn.2d at 363. Appendix at E7.

Despite the court's passing references to "client" in the published part of its opinion, the court nevertheless held "that under RPC 1.2(f), defense counsel retained by an insurer is authorized by contract law to represent that insurer's insured[,]" without regard to determining whether an insured is the defense attorney's client under *Bohn v. Cody* and *Dietz v. Doe*. In so holding, the court has improperly adopted an implied agency relationship between a defense attorney and an insured[11] based upon an insurer's contractual duties to its insured and the court has rejected the factual queries to determine the existence of an attorney-client relationship between the defense attorney and the insured as expressed by this Court in

[11] Discussed *supra*.

Bohn v. Cody, 119 Wn.2d at 363 and in *Dietz v. Doe*, 131 Wn.2d at 844-45. Appendix at E5-E7.

2. Fair Hearing

To conserve space with respect to a Petition's page limits, Kruger-Willis refers the Court to the factual summary of her claims of misconduct against the defense attorney and her argument regarding the resulting prejudice to her recounted in Appellant's motion for reconsideration. Appendix at E19-E21.

3. Attorney Fees under RCW 4.84.250 and RAP 18.1(b)

Again, to conserve space with respect to a Petition's page limits, Kruger-Willis refers the Court to her argument and authorities regarding this issue recounted in Appellant's motion for reconsideration. Appendix at E24-E25.

B. THIS PETITION INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE SUPREME COURT.

This case presents an issue of substantial public interest. RAP 13.4(b)(4). RAP 13.4(b) provides in pertinent part:

> A petition for review will be accepted by the Supreme Court only...:
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The court held in the published part of its opinion "that when an insurer has a contractual obligation to defend its insured, that insurer has the implied right to authorize defense counsel to represent its insured even

in the absence of the insured's express authority." Appendix at D5-D6. Additionally, the court held in the published part of its opinion "that under RPC 1.2(f), defense counsel retained by an insurer is authorized by contract law to represent that insurer's insured." Appendix at D8.

In so holding, the court failed to consider the unintended consequences of the published part of its opinion when it conferred authority on an insurance defense attorney to represent an insurer's insured based upon the insurer's contractual duty to defend without regard to the formation of an attorney-client relationship between the defense attorney and the insured. Under the court's holding, while an insurance defense attorney is authorized to represent the insured under the insurer's duty to defend provision of the insurance contract, absent the formation of an attorney-client relationship, the defense attorney's authority is only illusory, such as:

1. The defense attorney has no authority to bind the insured in any legal proceedings, such as enforcement of settlement agreements under CR 2A. RCW 2.44.010(1); *Lavigne v. Green*, 106 Wn. App. 12, 16, 23 P.3d 515 (2001); and

2. The defense attorney has no authority to receive money claimed by the insured in any legal proceedings. RCW 2.44.010(2).[12]

[12] In this case, absent a finding by a court that an attorney-client relationship exists between the attorney and Hofferbert under *Bohn v. Cody*, the defense attorney lacks authority under RCW 2.44.010(2) to claim the funds currently deposited in the court's registry. *See Bohn v. Cody*, 119 Wn.2d at 363.

Likewise, absent an attorney-client relationship between the defense attorney and the insured, the legal and ethical obligations owed to the insured by the defense attorney are merely illusory, such as:

1. The defense attorney does not owe fiduciary duties to the insured. An attorney owes fiduciary duties to his or her client. *Arden v. Forsberg & Umlauf PS*, 193 Wn. App. at 743; *VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 333, 111 P.3d 866 (2005);

2. The defense attorney does not owe a duty of care to the insured. In a claim for 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 (emphasis added). *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey PC*, 180 Wn. App. at 701;

3. The defense attorney does not owe a duty of confidentiality to the insured. "An attorney or counselor shall not, without the consent of his or her client, be examined as to any communications made by the client to him or her, or his or her advice given thereon in the course of professional employment (emphasis added)." RCW 5.60.050(2). The initial inquiry for purposes of RCW 5.60.060(2) is whether an attorney-client relationship or other protected relationship exists. *Dietz v. Doe*, 131 Wn.2d at 843; and

4. The defense attorney does not owe a duty of full and ongoing disclosure to the insured under *Tank v. State Farm* (client of lawyer is insured). This duty of disclosure has three aspects:

> First, potential conflicts of interest between insurer and insured must be fully disclosed and resolved in favor of the insured. The dictates of RPC 1.7, which address conflicts of interest such as this, must be strictly followed. Second, all information relevant to the insured's defense, including a realistic and periodic assessment of the insured's chances to win or lose the pending lawsuit, *must be communicated to the insured* (emphasis added). Finally, all offers of settlement must be disclosed to the insured as those offers are presented.

Tank v. State Farm, 105 Wn.2d at 388-89.

When an insurer or its defense counsel is unable to contact the insured regarding defense of the case against him or her, there are provisions that exist in current law to prevent a default judgment from being entered against the insured while also protecting the insurer from liability for breach of contract, bad faith, and violation of the CPA. Appendix at D7, E15-E16.

Under existing law, the insurer or defense counsel could first defend under a reservation of rights by serving the insured with a notice of its reservation of rights due to the insured's breach of the cooperation clause under the terms of the policy. *See Van Dyke v. White*, 55 Wn.2d at 604. "[W]hen the insured cannot be located, is uncooperative, or temporarily unavailable[,][13] then the insurer may defend under a reservation of rights and seek a declaratory judgment that it has no duty to

[13] Appendix at D8.

defend. *See Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d at 54; *see also Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d at 879.

Based upon this Court's decisions in *Woo,* in *Immunex,* and in *Van Dyke*, there was no need for the court in its opinion to carve out a public policy exception to the formation of an attorney-client relationship requirement between an insurance defense attorney and an insurer's insured found in RPC 1.2, RPC 1.2(f), RCW 2.44, and in *Tank v. State Farm.*

VII. CONCLUSION

Based on the foregoing, Kruger-Willis requests that this Court accept review; find that no attorney-client relationship existed between the defense attorney and Hofferbert, thus, the defense attorney did not have authority to appear on her behalf under RCW 2.44.030; and reverse the Court of Appeals.

RESPECTFULLY SUBMITTED this 28th day of April, 2017.

ALANA BULLIS, PS

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CERTIFICATE OF SERVICE

Pursuant to RAP 13.4(a), the undersigned certifies that an original of this Petition for Review was filed, and the statutory filing fee paid, this date with the Court of Appeals of the State of Washington, Division II. Further, the undersigned certifies that a copy of this Petition for Review was served on the following by legal messenger to:

Counsel for Respondent:

Paul L. Crowley
Lockner & Crowley, Inc., P.S.
524 Tacoma Avenue South
Tacoma, WA 98402

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

DATED this 28th day of April, 2017.

Alana K. Bullis

Alana Bullis

IN THE SUPREME COURT
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APPENDIX TO PETITION FOR REVIEW

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APPENDIX A

WSBA

Advisory Opinion: 195
Year Issued: 1999
RPC(s): RPC 1.6, 1.7, FO 183, 1.8(f), 5.4(c), 1.16
Subject: Disclosure of Client Confidential Information in Detailed Billing Statements To Persons Other Than the Client

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- Consent of the Client to Insurer's Review of Billing Statements by Outside Auditor

- Ethical Compliance with "Billing Guidelines" of a Person Other Than the Client

Issue 1:
May an attorney whose professional services are paid by a person other than the client, disclose to the person paying the bill, or to third parties such as an insurer's outside auditing service, information relating to the representation of the client in detailed, narrative billing statements which describe the professional services rendered?

Answer 1:
An attorney cannot disclose to an insurer, without the client's informed consent, confidential information protected by RPC 1.6, except for disclosures that are impliedly authorized to carry out the representation. The exception for disclosures that are impliedly authorized is to be narrowly construed, and does not allow the attorney's disclosure, without specific client consent, of confidential client information to a third party hired by the insurance company.

Issue 2:
May an attorney ethically comply with a requirement of a person other than the client who pays the attorney's billings, to seek or obtain the client's informed consent to the attorney disclosing information relating to the representation of the client in billing statements to be submitted to an outside audit service?

Answer 2:
No. Such a requirement would put the attorney in an ethical dilemma, precluding the attorney from representing the client under RPC 1.7(a)(2) and (b)(1).

Issue 3:
May an attorney whose professional services are paid by a person other than the client, ethically comply with detailed, narrative billing guidelines of the person paying the billing?

Answer 3:
An attorney whose professional services are paid by a person other than the client can

ethically comply with "Billing Guidelines" of the person paying the billing, provided the billing guidelines do not: (1) require disclosure of information relating to the representation of the client, without the client's informed consent; (2) interfere with the attorney's independent professional judgment or with the attorney-client relationship; or (3) direct or regulate the attorney's independent professional judgment in rendering legal services to the client.

BACKGROUND FACTS

Historically, insurance defense attorneys have sent their bills to the insurance company for payment. These bills are quite detailed and typically include the name of the client, information about the nature of the legal services performed, information about specific research conducted by the attorney, and information which would tend to disclose strategic decisions made with regard to the case. In some instances, legal bills include information which would be embarrassing to the client.

Many insurers have issued "Billing Guidelines" to defense counsel. Recently, some insurers have begun a process of retaining independent auditing firms to review bills submitted by their defense lawyers. Some insurers have requested that lawyers directly send their bills to the outside auditing service, either by hard copy or computer disk.

One such national auditing service company that reviews the bills of Washington defense lawyers, enters into contracts with insurance companies on a fixed-price basis in annual increments, generally one year, subject to renewal. Although it maintains records of cost savings, its fee does not change during the annual increment and its employees are salaried and not paid any incentive bonus or contingency for cost savings to the customer. About one half of its employees are attorneys and its contract with each of its insurance company customers contains a "confidentiality" provision, agreeing to treat confidential information of the insured according to the same fiduciary standards that the law imposes on the insurer.

The outside auditing service reviews and makes recommendations for payment or nonpayment of defense counsel's billings based on compliance or noncompliance with certain "Billing Procedures" and "Billing Guidelines" which have been adopted by the particular insurance company in coordination with the planned outsourcing of billing reviews to be performed by the audit company.

Payment for professional services is based on "adequate descriptions" contained in the billing statement. "Adequate descriptions" often require the identity of all participants in, and the purpose of, a conference, letter, call or meeting; the specific issue involved; and specific information about the nature of what has been discussed, reviewed or decided which may require disclosure of specific tactical and strategic information about the defense of litigation irrespective of whether the information is otherwise privileged, embarrassing to the client, or may involve matters of dispute between the client and the insurer ultimately responsible for paying the attorney's fees. None of the activities of the auditing service involves the direct investigation or defense of the claim.

"Inadequate description" of communications with the clients (insureds) and their personal

attorneys, has been the basis for denial of payment by an auditing service where defense counsel, in "reservation of rights" cases (as well as in cases not involving reservation of rights), did not specifically explain what was discussed in the conversations, which led to the insured's personal attorney writing letters objecting to the auditing service's recommendation that the insurer not pay for those activities. That auditing service, in "reservation of rights" cases, applies the same "adequate description" standards and requirements as it does in cases not involving coverage questions, deferring to the insurance carrier for resolution, any issue involving "inadequate description."

As a result of informal opinion #1758 (release of information to third party impermissible absent informed consent of client), one inquirer seeks guidance as to whether assigned defense counsel can ethically obtain informed consent of the insured client to produce copies of the lawyer`s bill to a third-party auditor.

DISCUSSION

Issue 1
The relationship between the insurance company, the insured and defense counsel is a tripartite relationship wherein the insurer, pursuant to an insurance contract, pays the costs of defense including the lawyer's fee. However, in Washington it is clear that legally and ethically the client of the lawyer is the insured. Tank v. State Farm, 105 Wn.2d 381, 715 P.2d 1133 (1986); Van Dyke v. White, 55 Wn.2d 601, 349 P.2d (1960).

RPC 1.6(a) provides:

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent ...

Formal Opinion 183, Disclosure of Information Relating to the Representation of a Client by a Legal Service Office to the Legal Service Corporation or Other Third Party (1990), noted that a legal service office could not disclose to the federally funded national corporation which provided financial support to the local legal service office, or to other third parties, information which would disclose or lead to disclosure of confidential client information, without the informed consent of the client pursuant to RPC 1.6. In prohibiting disclosure of confidential client information, FO 183 recognized that the rule of confidentiality in the ethics rules is considerably broader than communications falling within the attorney-client privilege.

RPC 1.6(a) and FO 183 are instructive. Except for disclosures that are impliedly authorized to carry out the representation, appointed defense counsel cannot disclose to an insurer confidential information provided by the client without the client's consent, such as information that might be prejudicial to the client's right to coverage. Nor can the lawyer disclose information that might be embarrassing to the client such as the insured's insolvency or inability to pay the policy deductible.

The exception for disclosures that are impliedly authorized is to be narrowly construed, and

does not allow disclosure of confidential client information to a third party hired by the insurance company without specific client consent. In some circumstances, absent consent of the client, even the identity of the client, the fact of the representation and the nature of the case may involve extremely sensitive information prohibiting disclosure of confidential information to an outside auditor, such as pre-litigation representation and confidential settlement of a threatened lawsuit.

Issue 2
RPC 1.7(a)(2) provides:

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 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.

RPC 1.7(b) provides in relevant part:

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; . . . and

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

RPC 1.8(f) provides:

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.

Where confidential client information is not revealed in billings of defense counsel, conveying the insurer's request that the insured consent to billings being reviewed by an outside audit service would not interfere with the attorney's independent professional judgment or with the attorney-client relationship, proscribed in RPC 1.7(a)(2) and (b), and RPC 1.8(f).

Conversely, a requirement that defense counsel seek or obtain the informed consent of the insured to disclose confidential client information in billings to be submitted to the insurer or its outside auditing service, would invoke the prohibitions in RPC 1.7(a)(2) and (b), and

RPC 1.8(f), and place defense counsel in an impossible situation, requiring withdrawal from the representation. This is because it is almost inconceivable that it would ever be in the client's best interests to disclose information relating to the representation to a third party.

The issue is not, "what does it matter", or "does the client care." Rather, the question must be, "under what circumstances, if any, would independent counsel for the client recommend that the client consent to disclosure of confidential client information to third persons?" If there is the slightest risk of embarrassment to the client or waiver of privileged information, independent counsel would have an affirmative duty to recommend against disclosure.

Silence in the face of an affirmative duty to recommend against disclosure would be as egregious as a recommendation to consent to disclosure. Defense counsel who was required to seek or to obtain the insured's consent to disclosure would proceed to do so only by advancing counsel's own self-interests or the interests of a third party, the insurer, in contravention of RPC 1.7(a)(2) and (b), and RPC 1.8(f). Thus, a "requirement" to seek or obtain the client's consent to disclosure would put defense counsel in an ethical dilemma requiring withdrawal from the representation.

Issue 3
While "Billing Guidelines" are normally a matter of contract between an attorney and client, the billing guidelines at issue are not those of the client, but rather are those of the person paying the bill for the client. Because the person paying the lawyer`s bills is not the client, the billing guidelines at issue here are not merely a matter of contract between attorney and client, but rather touch directly upon the relationship between attorney and client and therefore trigger special ethical responsibilities of the lawyer.

The Rules of Professional Conduct address any scenario, civil or criminal, litigation or non-litigation, where an attorney is paid by a person other than the client, such as a family member, friend or insurer. The RPC apply equally and consistently regardless of the scenario.

RPC 1.6(a) prevents disclosure of information relating to the representation of the client to persons other than the client without the client's informed consent.

RPC 1.7(a)(2) and (b) prohibit a lawyer from representing a client if there is a significant risk that the representation of that client will be materially limited by the lawyer's responsibilities to a third person or by the lawyer's own interests, unless the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client, and each affected client provides informed consent, confirmed in writing.

RPC 1.8(f) prohibits acceptance of compensation for representing a client from one other than the client unless the client gives informed consent, there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship, and information relating to representation of the client is protected as required by rule 1.6.

RPC 5.4(c) requires that a lawyer shall not permit a person who pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

A billing guideline of a person other than the client that compels or requires disclosure of information relating to the representation of the client in detailed, narrative descriptions of legal services rendered, absent client informed consent, requires conduct in violation of RPC 1.6(a) and 1.8(f).

A billing guideline that arbitrarily and unreasonably limits or restricts compensation for the time spent by counsel performing services which counsel considers necessary to adequate representation, such as periodic review of pleadings, conducting depositions, or in preparing or defending against a summary judgment motion, endeavors to direct or regulate the lawyer's professional judgment in violation of RPC 5.4(c).

A billing guideline that imposes "de facto" or arbitrary rates for certain services performed by a lawyer, such as compensating a lawyer at prevailing paralegal rates when the firm does not employ paralegals, operates as a disincentive to performance of those services in violation of RPC 5.4(c).

Absent client informed consent, an attorney cannot disclose information relating to the representation of the client or produce case files or other materials containing such information, to an insurer or its outside auditor pursuant to billing guidelines that allow an insurer to require production of a lawyer's case files to support billing entries for services performed for the client.

An attorney may ethically comply with the billing guidelines of a person other than the client who pays the lawyer's bill, where the billing guidelines do not endeavor to direct or regulate the lawyer's independent professional judgment and permit defense counsel to provide a degree of detail and narrative description in billings that meets the test for nondisclosure of confidential information.

However, because the lawyer is being paid pursuant to billing guidelines of a person other than the client, the lawyer must initially consult with the client at the outset of the representation, and consult with the client periodically thereafter as circumstances may require, and obtain the client's informed consent to any limitations imposed on the lawyer's representation.

Where a lawyer reasonably believes that representation of the client will be materially affected by any limitations in billing guidelines of the person paying the billings, the lawyer must withdraw, subject to the requirements of RPC 1.16, and notify the client of the basis for the withdrawal.

[amended 2009]

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the

Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.

APPENDIX B

FORMAL OPINION NO 2005-30

[REVISED 2016]

Conflicts of Interest, Current Clients: Simultaneous Representation of Insurer and Insured

Facts:

Insured has a property-damage insurance policy with Insurer. When Insured's property is damaged by the negligent conduct of a third party, Insurer pays Insured to the extent required by the policy, minus the applicable deductible. The policy provides that, to the extent that Insurer pays Insured, Insurer is subrogated to Insured's claims against third parties.

Insurer now proposes to pay Lawyer to represent both Insurer and Insured in an action against a third party to recover damages not reimbursed by Insurer to Insured as well as the sums that Insurer paid to Insured. At the time that Insurer makes this request, it does not appear that the interests of Insurer and Insured do or may diverge.

Question:

May Lawyer undertake to represent both Insurer and Insured in an action against the third party?

Conclusion:

Yes, qualified.

Discussion:

In undertaking this representation, Lawyer would have both Insurer and Insured as clients, even though the action may be prosecuted

solely in Insured's name.[1] *See, e.g.*, ABA Informal Ethics Op No 1476 (1981); ABA Formal Ethics Op No 282 (1950); 1 *Insurance* ch 14 (Oregon CLE 1996 & Supp 2003). Since Insurer would be paying Lawyer's fee, Lawyer must comply with the requirements of Oregon RPC 1.8(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 not interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
>
> (3) information related to the representation of a client is protected as required by Rule 1.6.

Oregon RPC 5.4(c) is also relevant:

> 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.

As long as Lawyer does not permit improper influence within the meaning of Oregon RPC 5.4(c) and obtains informed consent from Insured pursuant to Oregon RPC 1.8(f)(1) and Oregon RPC 1.0(g),[2] the

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[1] Any assumption that a tripartite relationship exists can be overcome by the specific facts and circumstances in a particular matter. *See In re Weidner*, 310 Or 757, 801 P2d 828 (1990) (articulating the test for an attorney-client relationship); *Evraz Inc., N.A., v. Continental Ins. Co.*, Civ No 3:08-cv-00447-AC, 2013 WL 6174839 (D Or, Nov 21, 2013) (finding no tripartite relationship when insurer did not hire lawyer and when lawyer had made it clear to insurer that she only represented insured).

[2] Oregon RPC 1.0(g) provides:

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall

simultaneous representation would not be prohibited. There also is no reason this representation should be prohibited by Oregon RPC 1.7.[3] As discussed in OSB Formal Ethics Op No 2005-27, a lawyer may represent multiple clients without special disclosure and consent if it does not reasonably appear that a conflict is present. *Cf. In re Stauffer*, 327 Or 44,

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give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

[3] Oregon RPC 1.7 provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client;
>
> (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; or
>
> (3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.
>
> (b) Notwithstanding the existence of a current 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 obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
>
> (4) each affected client gives informed consent, confirmed in writing.

48 n 2, 956 P2d 967 (1998) (citing *In re Samuels & Weiner*, 296 Or 224, 230, 674 P2d 1166 (1983)).

Approved by Board of Governors, February 2016.

COMMENT: For more information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 3.5-3 (payment of fees by nonclients), § 10.2-2(e)(5) (insurer-insured conflicts) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 134 (2000) (supplemented periodically); and ABA Model RPC 1.8(f). See also OSB Formal Ethics Op No 2005-166 (rev 2016) (insurance defense lawyer may not agree to comply with insurer's billing guidelines if to do so requires lawyer to materially compromise his or her ability to exercise independent judgment on behalf of client in violation of RPCs); OSB Formal Ethics Op No 2005-115 (rev 2014) (lawyer may not ethically permit representation of client to be controlled by others); OSB Formal Ethics Op No 2005-98 (lawyer may ethically agree with insurer to handle number of cases for insurer at flat rate per case regardless of amount of work required as long as overall fee is not clearly excessive and as long as lawyer does not permit existence of agreement to limit work that lawyer would otherwise do for particular client).

FORMAL OPINION NO 2005-77

[REVISED 2016]

Conflicts of Interest, Current Clients: Representation of Insured after Investigation of Matter for Insurer

Facts:

Lawyer is retained by Insurer to review an insurance policy issued to Insured because of a complaint filed by a third party against Insured. Lawyer advises Insurer that Insurer has a duty to defend Insured but may well not have a duty to pay any ultimate judgment. After that work is completed, Insurer asks Lawyer to represent Insurer and Insured in defense of the underlying litigation subject to a reservation of rights.

Question:

May Lawyer represent Insurer and Insured in defense of the underlying litigation?

Conclusion:

See discussion.

Discussion:

As discussed in OSB Formal Ethics Op No 2005-30 (rev 2016), both Insured and Insurer would be Lawyer's clients in the defense of the underlying action.[1] Simultaneous representation in insurance defense cases is generally permissible: a conflict that falls within Oregon RPC 1.7 generally will not exist because the clients have common interest in

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[1] Any assumption that a tripartite relationship exists can be overcome by the specific facts and circumstances in a particular matter. *See In re Weidner*, 310 Or 757, 801 P2d 828 (1990) (articulating the test for an attorney-client relationship); *Evraz Inc., N.A., v. Continental Ins. Co.*, Civ No 3:08-cv-00447-AC, 2013 WL 6174839 (D Or, Nov 21, 2013) (finding no tripartite relationship when insurer did not hire lawyer and when lawyer had made it clear to insurer that she only represented insured).

defeating the claim.[2] *See also* OSB Formal Ethics Op No 2005-121 (rev 2016).

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[2] If the representation of one client will be directly adverse to the other client, the proposed representation would be impermissible even if both Insurer and Insured consented. *See In re Holmes*, 290 Or 173, 619 P2d 1284 (1980) (under *former* DR 5-105, consent would not have cured actual conflict of interest between lawyer's two clients). If there a significant risk that the representation of one client will be materially limited by the lawyer's responsibilities to the other client, the representation would be permissible, but only if Lawyer reasonably believes that he or she is able to competently represent both clients, and Insurer and Insured give informed consent, confirmed in writing. *Cf. In re Barber*, 322 Or 194, 904 P2d 620 (1995).

Oregon RPC 1.7 provides:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client;
>
> (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; or
>
> (3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.
>
> (b) Notwithstanding the existence of a current 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 obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
>
> (4) each affected client gives informed consent, confirmed in writing.

In this situation, however, the fact of Lawyer's recently completed work for Insurer on the coverage question must also be considered. Because of that work, if there is a significant risk that Lawyer's representation of Insured in defense of the underlying claim will be materially limited by Lawyer's responsibilities to Insurer, a conflict will be present under Oregon RPC 1.7(a). Consequently, Lawyer could not represent both Insurer and Insured in the underlying action without a reasonable belief that Lawyer could competently represent both clients, and only after receiving informed consent, confirmed in writing, from both Insurer and Insured pursuant to Oregon RPC 1.7(b), Oregon RPC 1.0(b), and (g). The disclosure to Insured must include a discussion of the fact of the prior representation of Insurer on the coverage question and its potential significance. *Cf. In re Germundson*, 301 Or 656, 661, 724 P2d 793 (1986); *In re Montgomery*, 292 Or 796, 802–04, 643 P2d 338 (1982); *In re Benson*, 12 DB Rptr 167 (1998); *In re Rich*, 13 DB Rptr 67 (1999).

Oregon RPC 1.0(b) and (g) provide:

> (b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
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> . . . .
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> (g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

Oregon RPC 1.8(f) and Oregon RPC 5.4(c) also apply to this situation.[3] On the present facts, however, these rules do not create any additional requirements beyond those created by Oregon RPC 1.7.

Approved by Board of Governors, February 2016.

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[3] Oregon RPC 1.8(f) provides:

> (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 related to the representation of a client is protected as required by Rule 1.6.

Oregon RPC 5.4(c) provides:

> (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.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 3.5-3 (payment of fees by nonclients), § 10.2 (multiple-client conflicts rules), § 10.2-2 to § 10.2-2(b) (conflicts between current clients), § 10.2-2(e)(1) (creative lawyering to limit conflicts), § 10.2-2(e)(5) (insurer-insured conflicts), chapter 20 (conflicts-waiver letters) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* §§ 121–122, 128, 130, 134 (2000) (supplemented periodically); ABA Model RPC 1.0(b) and (e); ABA Model RPC 1.7; ABA Model RPC 1.8(f); and ABA Model RPC 5.4(c). *See also* OSB Formal Ethics Op No 2005-157 (rev 2016); Washington Advisory Op No 943 (1985) (available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>).

FORMAL OPINION NO 2005-121

[REVISED 2016]

Conflicts of Interest, Current Clients: Insurance Defense

Facts:

Plaintiff files a complaint against Insured that includes two claims for relief. Insured has an insurance policy pursuant to which Insurer owes a duty to defend against, and a duty to pay damages on, the first claim for relief. Insurer would have no such duties, however, if Plaintiff had sued only on the second claim for relief. The amount of damages sought on the second claim exceeds policy limits.

Insured tenders the defense of the entire action to Insurer. Insurer accepts the tender of defense of both claims subject to a reservation of rights with respect to the second claim. Insurer then hires Lawyer to represent Insured in the case brought by Plaintiff.

After reviewing the pleadings and investigating the facts, Lawyer concludes that the first claim for relief may be subject to a motion to dismiss or a summary judgment motion or that it may be possible, for a sum that Insurer would be willing to pay, to settle the first claim only. The second claim, however, is not potentially subject to such motions and cannot be settled. Lawyer also knows that Insured does not want Lawyer to bring such a motion or effect such a partial settlement because doing so would leave Insured without an Insurer-paid defense on the second claim for relief and would diminish the ability of Insured to get funds from Insurer to help settle the case as a whole.

Question:

May Lawyer file a motion against the first claim or settle it?

Conclusion:

No.

Discussion:

As a general proposition, a lawyer who represents an insured in an insurance defense case has two clients: the insurer and the insured.[1] OSB Formal Ethics Op No 2005-77 (rev 2016); OSB Formal Ethics Op No 2005-30 (rev 2016). Consequently, a lawyer in such a situation must be mindful of the restrictions in Oregon RPC 1.7 on current-client conflicts of interest:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client;
>
> (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; or
>
> (3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.
>
> (b) Notwithstanding the existence of a current 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;

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[1] Any assumption that a tripartite relationship exists can be overcome by the specific facts and circumstances in a particular matter. *See In re Weidner*, 310 Or 757, 801 P2d 828 (1990) (articulating the test for an attorney-client relationship); *Evraz Inc., N.A., v. Continental Ins. Co.*, Civ No 3:08-cv-00447-AC, 2013 WL 6174839 (D Or, Nov 21, 2013) (finding no tripartite relationship when insurer did not hire lawyer and when lawyer had made it clear to insurer that she only represented insured).

(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

(4) each affected client gives informed consent, confirmed in writing.

For the definitions of *informed consent* and *confirmed in writing*, see Oregon RPC 1.0(b) and (g).[2]

The relationship between Lawyer, Insured, and Insurer is both created and limited by the insurance policy. As the court stated in *Nielsen v. St. Paul Companies*, 283 Or 277, 280, 583 P2d 545 (1978), for example:

> When a complaint is filed against the insured which alleges, without amendment, that the insured is liable for conduct covered by the policy, the insurer has the duty to defend the insured, even though other conduct is also alleged which is not within the coverage. . . . The insurer owes a duty to defend if the claimant can recover against the insured under the allegations of the complaint *upon any basis* for which the insurer affords coverage. [Emphasis in original; citations omitted.]

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[2] Oregon RPC 1.0(b) and (g) provide:

> (b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.
>
> . . . .
>
> (g) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.

See also ABA Formal Ethics Op No 282 (1950), which notes that simultaneous representation of insurers and insureds in actions brought by third parties generally does not raise conflict problems because of the "community of interest" growing out of the insurance contract.

When an insurer defends an insured without any reservation of rights (by which the insured reserves its right to deny coverage), there is little or no opportunity for a conflict of interest because the community of interest between the insurer and insured should be complete. When an insurer defends subject to a reservation or rights, however, a risk of conflict is present. To minimize this risk and to permit joint representation in such cases, both the ethics rules and insurance law require that a lawyer hired by the insurer to defend an insured must treat the insured as "the primary client" whose protection must be the lawyer's "dominant" concern. *See, e.g.*, ABA Informal Ethics Op No 1476 (1981); 1 *Insurance* chs 6, 14 (Oregon CLE 1996 & Supp 2003).[3] Consequently, a lawyer who is hired to defend the insured in a situation such as the one described in this opinion cannot file a motion that would adversely affect the insured's right to a defense or to coverage but must instead act in a manner that is consistent with the interests of the insured.[4] *See* 1 *Insurance*, chs 6, 14. *See also Barmat v. John & Jane Doe Partners A-D*, 155 Ariz 519, 747 P2d 1218, 1219 (1987).

Approved by Board of Governors, February 2016.

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[3] The law also provides that if there is a potential conflict between the insurer and the insured, the facts found by the court in the action by the third party against the insured will not be given collateral estoppel effect as to either the insurer or the insured in a subsequent coverage dispute. *See, e.g., Ferguson v. Birmingham Fire Ins. Co.*, 254 Or 496, 509–11, 460 P2d 342 (1969).

[4] The insurer is free to hire other counsel to litigate the coverage issue.

COMMENT: For additional information on this general topic and other related subjects, see *The Ethical Oregon Lawyer* § 10.2-2(e)(5) (insurer-insured conflicts) (OSB Legal Pubs 2015); *Restatement (Third) of the Law Governing Lawyers* § 134 (2000); ABA Model RPC 1.0(b), (e); and ABA Model RPC 1.7.

APPENDIX C

123 Nev. 44 (Nev. 2007), 46579, Nevada Yellow Cab Corp. v. Eighth Judicial District Court of Nevada /**/ div.c1 {text-align: center} /**/

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123 Nev. 44 (Nev. 2007)

152 P.3d 737

NEVADA YELLOW CAB CORPORATION; ROBERT D. VANNAH; AND VANNAH COSTELLO VANNAH & GANZ, Petitioners,

v.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE VALERIE ADAIR, DISTRICT JUDGE, Respondents, and INSURANCE COMPANY OF THE WEST, Real Party in Interest

No. 46579

Supreme Court of Nevada

March 8, 2007

Original petition for a writ of mandamus challenging a district court order disqualifying an attorney and his firm as counsel in an insurance bad faith action.

Vannah & Vannah and Kristina R. Americo and Robert D. Vannah, Las Vegas, for Petitioners.

Phillips, Spallas & Angstadt, LLC, and John W. Kirk, Las Vegas; Hayes, Davis, Ellingson, McLay & Scott, LLP, and Steven Hayes, Robert McLay, and Cherie Sutherland, Sacramento, California, for Real Party in Interest.

MAUPIN, C.J., concurring.

OPINION

[152 P.3d 738]

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BEFORE THE COURT EN BANC. [1]

PER CURIAM:

This original petition for a writ of mandamus challenges a district court order disqualifying counsel for petitioner Nevada Yellow Cab Corporation in an insurance bad faith action against Insurance Company of the West (ICW). ICW had previously retained the firm Vannah Costello Canepa Riedy & Rubino (VCCRR) to represent its insureds in tort actions brought by third parties. In one such case, VCCRR was retained by ICW to represent Yellow Cab. VCCRR was subsequently replaced by new counsel, and the case settled in the middle of trial for more than double the policy limits, with Yellow Cab required to contribute a substantial amount toward the settlement.

Petitioner Robert Vannah was a VCCRR partner at the time that VCCRR represented Yellow Cab, although he did not personally work on the case. After ICW terminated VCCRR, the firm dissolved. Vannah and others formed a new firm, and an associate who had performed substantial work on Yellow **[152 P.3d 739]** Cab's representation in the tort action joined Vannah at his new firm.

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Yellow Cab subsequently hired Vannah and his new firm, petitioner Vannah Costello Vannah & Ganz (VCVG), [2] to sue ICW for bad faith based on ICW's pretrial rejection of a policy-limits offer. ICW moved to disqualify Vannah and his new firm, and the district court granted its motion.

In concluding that writ relief is not warranted in this case, we expressly adopt the majority rule that counsel retained by an insurer to represent its insured represents both the insurer and the insured in the absence of a conflict. Thus, an attorney-client relationship existed between ICW and the associate who had previously defended Yellow Cab, who was now employed by Vannah's new firm. As the district court did not manifestly abuse its discretion in determining that disqualification was warranted, based upon this former representation, the substantial relationship between the two representations, and the adversity of Yellow Cab's and ICW's positions in the bad faith case, we deny this petition.

FACTS

From 1998 to 2001, the law firm of Vannah Costello Canepa Riedy & Rubino (VCCRR) was one of the Southern Nevada firms retained by real party in interest Insurance Company of the West (ICW), primarily to defend its insureds in civil lawsuits filed by third parties. Almost all of VCCRR's work on these matters was performed by partner Michael Rubino and associate Denise Cooper Osmond. VCCRR also apparently represented ICW in two first-party matters, one an underinsured motorist coverage claim by an insured, handled by Rubino and Osmond, and one an uninsured motorist coverage claim that later generated a bad faith claim, handled only by Rubino. Notably, after the bad faith allegation was made in the latter case, ICW reassigned the case to new counsel.

In 1999, ICW retained VCCRR to defend its insured, Yellow Cab, in a personal injury lawsuit stemming from an accident between one of Yellow Cab's drivers and the plaintiff, Heather Nash. Yellow Cab had an ICW liability policy with limits of $ 500,000 and a self-insured reserve of $ 50,000. From January 1999 to November 2002, Rubino and Osmond defended Yellow Cab in the matter and regularly updated ICW on the litigation's status. Apparently, during this time period, the complaint and an answer were filed, the NRCP 16.1 conference was held, and some discovery, including document production and several depositions, occurred.

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In November 2002, without Yellow Cab's consent, ICW terminated VCCRR and retained a different law firm to assume Yellow Cab's representation. Shortly before trial, the plaintiff offered to settle for the policy limits; ICW instructed counsel to reject the offer. In March 2003, after the first few days of trial went poorly for Yellow Cab, the case settled for $ 1.3 million, $ 800,000 more than Yellow Cab's $ 500,000 policy limit. Yellow Cab was required to pay $ 500,000 toward the settlement.

In 2003, VCCRR split into two firms, Vannah Costello Vannah & Ganz (VCVG), and Canepa Riedy & Rubino; Vannah and Osmond stayed with the former firm, and Rubino went with the latter firm. Also, in June 2003, Yellow Cab retained Vannah to file a bad faith action against ICW based on the *Nash* lawsuit, particularly its failure to accept the plaintiff's policy-limits offer shortly before

trial and its subsequent settlement for more than double the policy limits after trial commenced. Since the firm split, VCVG represents Yellow Cab on a regular basis in all of its legal matters.

After ICW retained counsel to defend the bad faith action, its counsel notified Vannah of a perceived conflict of interest. ICW's counsel asked Vannah to research the issue and requested that Vannah's firm withdraw. About a month later, ICW's counsel spoke with Vannah, who explained that he did not **[152 P.3d 740]** believe a conflict existed and that he would not withdraw unless ordered to do so.

Shortly thereafter, ICW and Yellow Cab discussed mediation and agreed in principle to the idea. In its correspondence on this matter, ICW reiterated its belief that a conflict existed and specifically stated that its consent to mediation did not waive its right to seek disqualification of Vannah's firm if mediation failed. Deciding on a mediator and scheduling took almost a year, and the mediation was not held until July 2005.

After the mediation failed, ICW filed the underlying motion to disqualify Vannah and VCVG. Yellow Cab, Vannah, and the firm opposed the motion. At the hearing, the district court judge concluded that the " potential conflict" was too great and granted the motion. This writ petition followed. An answer was ordered and has been timely filed, and oral argument was held.

DISCUSSION

In deciding this petition, we first resolve the threshold issue of whether ICW waived any conflict by waiting until two years after the complaint was filed to seek disqualification. We then consider whether the district court appropriately determined that a conflict existed under the applicable ethical rule's three-part analysis: first, whether ICW is a former client; second, if so, whether the former representation of ICW is substantially related to VCVG's current

representation of Yellow Cab; and third, whether the two representations are adverse. Finally, we determine whether the district court manifestly abused its discretion in concluding that disqualification was warranted. Because ICW did not waive any conflict and the district court's disqualification decision was well within its discretion, we deny the petition in this case.

Standard for writ relief

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. [3] But mandamus is an extraordinary remedy, and a petition for a writ of mandamus is addressed to this court's sole discretion. [4] This court has consistently held that mandamus is the appropriate vehicle for challenging orders that disqualify counsel. [5] Accordingly, this writ petition is properly before us.

Waiver

A threshold issue that must be addressed is whether ICW waived any conflict by waiting over two years into the litigation before filing its motion to disqualify counsel. Waiver requires the intentional relinquishment of a known right. [6] If intent is to be inferred from conduct, the conduct must clearly indicate the party's intention. [7] Thus, the waiver of a right may be inferred when a party engages in conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished. [8] However, delay alone is insufficient to establish a waiver. [9]

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Here, ICW identified VCVG's potential conflict almost immediately and asked Vannah to withdraw. He refused. When ICW and Yellow Cab decided to try mediation, ICW postponed any motion for disqualification, while stating that it reserved its right to file such a motion if mediation failed. When mediation failed, ICW

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promptly filed its motion. Thus, ICW's conduct does not demonstrate, as required for waiver, a clear intent to relinquish its right to challenge Vannah **[152 P.3d 741]** and his firm. The district court therefore properly determined that a waiver was not shown. Accordingly, we turn to the district court's disposition of ICW's disqualification motion.

Existence of a conflict

The issue of whether Vannah and his firm have a conflict of interest in representing Yellow Cab in the bad faith action is primarily resolved by our rules of professional conduct governing conflicts with former clients and imputed disqualification of law firms. At the time of the underlying proceedings, these rules were identified as SCR 159 and 160; following comprehensive amendments to the rules of professional conduct after this petition was filed, they are now Nevada Rules of Professional Conduct 1.9 and 1.10. For ease of reference, and since the former version of the rules apply to this case, [10] we use the older terminology.

Under SCR 159, which governs conflicts based on former representation, a lawyer may be disqualified from representing a client against a former client if the current representation is substantially related to the former representation. Thus, for a potentially disqualifying conflict to exist, the party seeking disqualification must establish three elements: (1) that it had an attorney-client relationship with the lawyer, (2) that the former matter and the current matter are substantially related, and (3) that the current representation is adverse to the party seeking disqualification. Under SCR 160, the disqualification of a lawyer practicing in a firm is generally imputed to other lawyers in the firm.

The parties do not dispute that the third element is satisfied-that Vannah's current representation of Yellow Cab in the bad faith action is adverse to ICW. Thus, the existence of a conflict turns on the first and second elements: whether ICW is a former client and whether the current and former representations are substantially related.

Whether ICW is a former client

With respect to the relationship between an insurer and counsel the insurer retains to defend its insured, the majority rule is that counsel represents both the insurer and the insured in the absence

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of a conflict. [11] This rule requires that the primary client remains the insured, but counsel in this situation has duties to the insurer as well. [12] Courts adopting this rule note that, while the insured is the primary client, counsel generally learns confidential information from both the insured and the insurer and thus owes both of them a duty to maintain this confidentiality; [13] and, since counsel generally offers legal advice to both the insured and the insurer, counsel owes a duty of care to both. [14] Finally, as most states, including Nevada, have a rule that permits joint representation when no actual conflict is present, [15] courts that have adopted a dual-

representation principle in insurance defense cases reason that joint representation is permissible as long as any conflict remains speculative. [16]

[152 P.3d 742] While we have not directly addressed this issue in our prior opinions, we have implicitly recognized that an attorney-client relationship exists between a medical malpractice insurer and the lawyer it retains to defend its insured doctor. [17] Also, in considering whether the insurer can assert an attorney-client or work product privilege for documents prepared during the representation of an insured, we have presumed that an attorney-client relationship exists between the insurer and counsel it retained for its insured. [18]

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We now expressly adopt the majority rule concerning the relationship between an insurer and counsel retained by the insurer to defend its insured. In the absence of a conflict, counsel represents both the insured and the insurer. Thus, the first element in this matter's conflict analysis-requiring an attorney-client relationship-is met.

Substantial relationship between former and current matters

Determining whether a conflict exists, then, depends upon whether the second element of the conflict analysis is met, that is, whether Vannah's prior representation of ICW is substantially related to the underlying bad faith case. In *Waid v. District Court*, [19] we recently adopted a three-part test to determine whether two representations are substantially related. A district court presented with a disqualification motion based on a former representation should (1) make a factual determination concerning the scope of the former representation, (2) evaluate whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters, and (3) determine whether that information is relevant to the issues raised in the present litigation. [20]

We noted in *Waid* that a superficial resemblance between the matters is not sufficient; " rather, the focus is properly on the precise relationship between the present and former representation." [21]

Yellow Cab, Vannah and VCVG contend that no substantial relationship exists between the current bad faith action and any prior representation of ICW because the *Nash* settlement was completely handled by another firm, after Vannah's former firm was terminated. The district court disagreed, and we conclude that it did not manifestly abuse its discretion in doing so.

With respect to the *Waid* test's first prong, concerning the scope of the prior representation, the documents before us support a finding that Vannah's former firm was responsible for defending the *Nash* litigation from its inception in January 1999 until November 2002, only four to five months before trial, and that associate Denise Osmond participated extensively in this representation. Considering the second prong, the district court could have reasonably inferred that Osmond obtained confidential information concerning ICW's handling of Nash's claim during this three-year

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period. Finally, the way that ICW handled Nash's claim against Yellow Cab is the precise subject of the underlying litigation. Thus, the district court did not abuse its discretion in concluding that the two matters are substantially related, that Osmond has a conflict under SCR 159, and that this

conflict is imputed under SCR 160 to Vannah and the rest of the firm, VCVG. [22]

Whether disqualification was warranted

We have previously recognized that a district court must undertake a balancing test in determining whether disqualification **[152 P.3d 743]** is warranted in a particular situation and should weigh the prejudices that the parties will suffer based on the district court's decision, consider the public interest in the administration of justice, and discourage the use of such motions for purposes of harassment and delay:

Courts deciding attorney disqualification motions are faced with the delicate and sometimes difficult task of balancing competing interests: the individual right to be represented by counsel of one's choice, each party's right to be free from the risk of even inadvertent disclosure of confidential information, and the public's interest in the scrupulous administration of justice. While doubts should generally be resolved in favor of disqualification, parties should not be allowed to misuse motions for disqualification as instruments of harassment or delay. [23]

One purpose of disqualification is to prevent disclosure of confidential information that could be used to a former client's disadvantage. [24] Here, ICW perceived a conflict almost immediately after the complaint was filed, but then it waited two years to seek disqualification, thus providing ample opportunity for disclosure of the information it ostensibly sought to protect. ICW's apparent acquiescence in VCVG's representation of Yellow Cab for two years, with no protection for its assertedly confidential information, arguably detracts from its current insistence that this information be held inviolate.

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But the district court is more familiar with this case than we are, and it had the best opportunity to evaluate whether disqualification was warranted. We have repeatedly pointed out that a district court's discretion in such matters is broad and that its decision will not be set aside absent a manifest abuse of that discretion. [25] We are not persuaded that the district court manifestly abused its broad discretion in disqualifying Vannah and his firm in this case, and thus, we deny the petition. [26]

CONCLUSION

Having considered the petition, the answer, the documentation submitted by the parties, and the oral argument held in this matter, we are not persuaded that the district court manifestly abused its discretion in disqualifying Vannah and his firm. [27] Accordingly, we deny the petition. [28]

CONCUR

MAUPIN, C.J., concurring:

This is indeed a close case. As noted by the majority, Insurance Company of the West (ICW) waited two years after appreciating the perceived conflict before formally seeking disqualification. One can understand the firm's intransigence in refusing to voluntarily withdraw based upon a good faith belief that it held no confidential information that could compromise ICW's defense in the bad faith litigation. But, because the issue is close, and because the district court could reasonably conclude that ICW's former insurance defense counsel gained some knowledge generally about

ICW's internal claims policies, I cannot conclude that the district court manifestly abused its discretion in its ruling of disqualification.

Notes:

[1]This matter was submitted for decision before January 1, 2007. Thus, only those justices remaining on the court who previously heard this matter participated in the decision. The Honorable Michael A. Cherry, Justice, and the Honorable Nancy M. Saitta, Justice, did not participate.

[2]When this petition was filed, Vannah's firm was called Vannah Costello Vannah & Ganz. While this petition was pending, Vannah's firm name changed to Vannah & Vannah. Since petitioners did not file a motion to substitute parties, however, *see* NRAP 43, we have not changed the caption.

[3] *See* NRS 34.160; *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981).

[4] *Poulos v. District Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982) .

[5] *Waid v. Dist. Ct.*, 121 Nev. 605, 121 Nev. 605, 119 P.3d 1219 (2005); *Cronin v. District Court*, 105 Nev. 635, 781 P.2d 1150 (1989).

[6] *Mahban v. MGM Grand Hotels*, 100 Nev. 593, 596, 691 P.2d 421, 423 (1984).

[7] *Host Int'l, Inc. v. Summa Corp.*, 94 Nev. 572, 583 P.2d 1080 (1978).

[8] *Hudson v. Horseshoe Club Operating Co.*, 112 Nev. 446, 457, 916 P.2d 786, 792 (1996).

[9] *Mackintosh v. California Fed. Sav.*, 113 Nev. 393, 403, 935 P.2d 1154, 1161 (1997).

[10] *See Nevada Pay TV v. District Court*, 102 Nev. 203, 205 n.2, 719 P.2d 797, 798 n.2 (1986).

[11] *See Home Indem. Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322, 1330-31 (9th Cir. 1995) (applying Alaska law); *State Farm v. Federal Ins. Co.*, 72 Cal.App.4th 1422, 86 Cal.Rptr.2d 20, 24 (Ct.App. 1999); *Unigard Ins. Group v. O'Flaherty & Belgum*, 38 Cal.App.4th 1229, 45 Cal.Rptr.2d 565, 568-69 (Ct.App. 1995); *Nandorf, Inc. v. CNA Ins. Companies*, 134 Ill.App.3d 134, 479 N.E.2d 988, 991, 88 Ill.Dec. 968 (Ill.App.Ct. 1985); *McCourt Co., Inc. v. FPC Properties, Inc.*, 386 Mass. 145, 434 N.E.2d 1234, 1235 (Mass. 1982); *Gray v. Commercial Union Ins. Co.*, 191 N.J.Super. 590, 468 A.2d 721, 725 (N.J. S.Ct. A.D. 1983); *Spratley v. State Farm Mut. Auto. Ins. Co.*, 2003 UT 39, 78 P.3d 603, 607 (Utah 2003).

[12] *See* cases cited *supra* note 11.

[13] *Gray*, 468 A.2d at 725.

[14] *See Home Indem. Co.*, 43 F.3d at 1330; *Unigard Ins. Group*, 45 Cal.Rptr.2d at 568-69; *Nandorf*, 479 N.E.2d at 991.

[15] *See* RPC 1.7 (formerly SCR 157(2)) (permitting joint representations unless conflict is present); RPC 1.8(g) (formerly SCR 158(7)) (regulating settlement when multiple clients are represented).

[16] *See Home Indem. Co.*, 43 F.3d at 1330-31; *Unigard Ins. Group*, 45 Cal.Rptr.2d at 568-69; *Nandorf*, 479 N.E.2d at 992; *McCourt*, 434 N.E.2d at 1235-36; *Gray*, 468 A.2d at 725.

[17] *Semenza v. Nevada Med. Liability Ins. Co.*, 104 Nev. 666, 765 P.2d 184 (1988) (permitting an insurer to sue a lawyer retained to defend its insured physician, although concluding that the legal malpractice action in that case was premature).

[18] *See C.S.A.A. v. District Court*, 106 Nev. 197, 788 P.2d 1367 (1990); *Ballard v. District Court*,

106 Nev. 83, 787 P.2d 406 (1990).

[19] 121 Nev. 605, 121 Nev. 605, 119 P.3d 1219 (2005).

[20] *Id.* at 610, 119 P.3d at 1223.

[21] *Id.*

[22] We therefore need not consider whether any of the other matters handled for ICW by Vannah's former firm are substantially related to the current action.

[23] *Brown v. Dist. Ct.*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269-70 (2000) (citations omitted).

[24] *Ciaffone v. District Court*, 113 Nev. 1165, 1169, 945 P.2d 950, 953 (1997), *overruled on other grounds by Leibowitz v. Dist. Ct.*, 119 Nev. 523, 78 P.3d 515 (2003).

[25] *Waid*, 121 Nev. at 609, 613, 119 P.3d at 1222, 1225.

[26] Our prior cases have not been completely consistent in applying the mandamus standard of manifest abuse of discretion to our consideration of disqualification orders. To the extent that these cases required simply an abuse of discretion to warrant writ relief, they are disavowed. *See Cronin*, 105 Nev. at 640, 781 P.2d at 1153; *Boyd v. Second Judicial District Court*, 51 Nev. 264, 270, 274 P. 7, 9 (1929).

[27] *See Waid*, 121 Nev. at 609, 119 P.3d at 1222.

[28] *See Smith v. District Court*, 107 Nev. 674, 818 P.2d 849 (1991).

APPENDIX D

Filed
Washington State
Court of Appeals
Division Two

March 28, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TORI KRUGER-WILLIS, Appellant, v. HEATHER HOFFENBURG and JOHN DOE HOFFENBURG, Respondents.	No. 48375-1-II PART PUBLISHED OPINION

SUTTON, J. — This is the third time this case is before us on appeal. This appeal addresses whether defense counsel for Heather Hofferbert[1] had authority to appear and act on her behalf regarding a vehicle damage claim filed against her by Tori Kruger-Willis. Kruger-Willis appeals the trial court's decision denying her RCW 2.44.030 motion and ruling that defense counsel had the authority to represent Hofferbert, entering judgment against Kruger-Willis, and denying her motion to reconsider. In the published portion of this opinion, we hold that the trial court did not err in holding that defense counsel had authority to represent Hofferbert, and we affirm the trial court's decision. In the unpublished portion, we hold that the trial court did not err in its entry of judgment and affirming its order. We also hold that Kruger-Willis was not denied the right to a fair hearing and that Hofferbert is entitled to attorney fees as the prevailing party in this appeal.

[1] Respondent spells her name "Hofferbert," although it is spelled incorrectly as "Hoffenburg" throughout the record and in prior opinions. Br. of App. at 1 n.1

D1

FACTS

This action arose out of a motor vehicle collision that occurred in 2008. Hofferbert drove a truck that struck and damaged Kruger-Willis's parked vehicle. GEICO, Hofferbert's insurance company, paid to repair Kruger-Willis's vehicle. Kruger-Willis then sued Hofferbert to recover the diminished value of her repaired vehicle. GEICO hired defense counsel and paid the costs of Hofferbert's defense pursuant to its contractual duty to defend her.[2]

The insurance contract required that GEICO "will defend any suit for damages payable under the terms of this policy." Clerk's Papers (CP) at 694. The contract further specified that GEICO will pay "damages which an ***insured*** becomes legally obligated to pay because of . . . [d]amage to or destruction of property," so long as the damage arose from the ownership, maintenance, or use of a covered vehicle. CP at 693-94. The contract defined an "insured" to include "[a]ny other person using the auto with ***your*** permission." CP at 695.

Following a three-day trial, the jury rendered a verdict in Hofferbert's favor.[3] The trial court awarded Hofferbert $11,490 in costs and attorney fees.[4] Kruger-Willis appealed the trial court's award of attorney fees and costs. In an unpublished opinion, we held that Hofferbert had standing to recover fees and costs as the aggrieved party in the underlying action and was the

[2] Although Hofferbert was not the named insured on the insurance contract with GEICO, she is an insured person under the terms of the contract because she drove the insured's vehicle with permission from the named insured.

[3] Prior to trial, GEICO conceded liability and the trial was on damages only.

[4] The trial court awarded Hofferbert costs and reasonable attorney fees because she was the prevailing party under RCW 4.84.250. It is referred to herein as the "2011 order."

D2

prevailing party entitled to fees and costs, regardless of the fact that GEICO was defending her. *Kruger-Willis v. Hoffenburg*, noted at 173 Wn. App. 1024, slip op. at *5 (2013) (*Kruger-Willis* I).

Following our decision, Kruger-Willis's counsel executed a check for $11,490 payable to Hofferbert despite defense counsel's request that the check be made payable to Hofferbert's insurer, GEICO. Defense counsel asked Kruger-Willis's counsel to reissue the check payable to GEICO, but Kruger-Willis's counsel refused because GEICO was not a party to the suit. Defense counsel filed a motion to enforce the trial court's award of costs and attorney fees. In support of his motion, defense counsel stated that Hofferbert had never been involved in the defense of the case against her and that he (defense counsel) worked for GEICO. The trial court granted this motion, but named Hofferbert and not GEICO as the judgment creditor.

Kruger-Willis then filed a motion for defense counsel to produce or prove the authority under which he appeared and to stay all proceedings until such authority was produced or provided. *See* RCW 2.44.030. During argument on this motion, defense counsel admitted that he had "not had contact with the named defendant in this lawsuit." CP at 640. However, defense counsel asserted that he had authority to appear for Hofferbert under the terms of the insurance contract. The trial court denied Kruger-Willis's motion. Kruger-Willis appealed.

In that appeal, we held that where civil defense counsel admitted that he never had any contact with his client, the trial court abused its discretion by denying opposing counsel's motion to require counsel to prove the authority under which he appears. *Kruger-Willis v. Hoffenburg*, noted at 187 Wn. App. 1010, slip op. at *4 (2015) (*Kruger-Willis* II). We reversed and remanded to the trial court to determine whether defense counsel had the authority to appear for Hofferbert in this case. *Kruger-Willis* II, slip op. at *5.

D3

On remand, Kruger-Willis renewed her motion under RCW 2.44.030. After a hearing, the trial court ruled that defense counsel had authority to represent Hofferbert under the omnibus clause in the insurance policy; an omnibus clause was required to be present in the policy under RCW 46.29.490(2)(b); defense counsel did not surrender any of Hofferbert's substantial rights; and Hofferbert ratified defense counsel's actions after the fact. Kruger-Willis moved to reconsider, and the trial court denied the motion. Kruger-Willis appeals the trial court's ruling.

While the second appeal was pending, Hofferbert made a motion in the trial court for a judgment on sum certain based on the trial court's 2011 order. After a hearing, the trial court found that the 2011 order contained a scrivener's error by stating that payment shall be made to Hofferbert's attorney, Mary E. Owen & Associates, rather than to Hofferbert. The trial court also found that Kruger-Willis's tender of the check in 2013, payable to Heather Hofferbert and delivered to Mary E. Owen & Associates, did not constitute an accord and satisfaction. Finally, the trial court held that judgment would be entered in favor of Hofferbert against Kruger-Willis in the amount of $11,490 with interest accruing from the date of the 2011 order. The next day, Kruger-Willis filed a bond supersedeas with the county clerk to cover the judgment and costs on appeal, including interest. Kruger-Willis amended her pending appeal and now also appeals the judgment.

ANALYSIS

I. STANDARDS OF REVIEW

Following a mandate for further proceedings, a trial court must comply with that mandate, and we review the trial court's compliance for an abuse of discretion. *See Bank of Am., N.A. v. Owens*, 177 Wn. App. 181, 189, 311 P.3d 594 (2013). A trial court abuses its discretion when its

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decision is manifestly unreasonable or based on untenable grounds or reasons. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

We uphold a trial court's findings of fact if those findings are supported by substantial evidence. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 555, 132 P.3d 789 (2006). Substantial evidence is that which is sufficient to persuade a fair-minded individual of the truth of the matter asserted. *Hegwine*, 132 Wn. App. at 555-56.

II. AUTHORITY TO APPEAR

Kruger-Willis argues that the trial court erred in finding that GEICO's retained defense counsel had the authority to represent Hofferbert. Kruger-Willis claims that defense counsel lacked the authority to represent Hofferbert because counsel had no contact with her throughout the course of the litigation, and therefore, Hofferbert could not have provided such authority.[5] We hold that when an insurer has a contractual obligation to defend its insured, that insurer has the

[5] Kruger-Willis also argues that GEICO's counsel surrendered a substantial right of Hofferbert by conceding liability. Hofferbert argues that GEICO's counsel's decision to concede liability advanced Hofferbert's interests. We agree with Hofferbert. Kruger-Willis further argues that GEICO's counsel surrendered a substantial right of Hofferbert when Hofferbert was listed as a judgment debtor on the second appeal, as Kruger-Willis was the prevailing party and entitled to attorney fees under RCW 4.84.250. Kruger-Willis does not cite any authority for this argument, so we decline to reach this issue. RAP 10.3(6).

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implied right to authorize defense counsel to represent its insured even in the absence of the insured's express authority.

A. DUTY TO DEFEND

GEICO's policy stated, "We will defend any suit for damages payable under the terms of this policy." CP at 694. In Washington, an insurer's contractual duty to defend its insured is extremely broad. *See, e.g., Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 878-79, 297 P.3d 688 (2013). An insurer must defend a lawsuit against its insured not only for claims that are actually covered, but also for claims that are potentially covered. *Immunex*, 176 Wn.2d at 879. An insurer must provide a defense whenever the applicable insurance policy "*conceivably covers*" the allegations in a complaint against the insured. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53, 164 P.3d 454 (2007) (alteration in original). And the duty to defend arises as soon as the complaint is filed. *Immunex*, 176 Wn.2d at 889.

Once the insurer's duty to defend is triggered, the consequences of failing to provide a defense are severe. An insurer that wrongfully breaches its duty to defend is liable for breach of contract, and may also be liable for bad faith and violation of the Consumer Protection Act (CPA).[6] *See Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 394, 715 P.2d 1133 (1986). In addition to being liable for contract damages, the insurer may be estopped from denying coverage for any judgment or settlement. *United Servs. Auto. Ass'n v. Speed*, 179 Wn. App. 184, 203, 317 P.3d 532 (2014).

Here, Hofferbert was entitled to coverage under GEICO's policy because she was driving the insured's vehicle with the named insured's permission. As noted above, GEICO had an

[6] Ch. 19.86 RCW.

obligation to defend Hofferbert for "any suit for damages payable under the terms of this policy." CP at 694. It is undisputed that Kruger-Willis's lawsuit against Hofferbert alleged damages payable under the terms of GEICO's policy. Therefore, GEICO had a contractual, legal duty to defend Hofferbert against Kruger-Willis's lawsuit. And if GEICO failed to defend Hofferbert, it would be subject to liability for breach of contract, bad faith, and violation of the CPA.

B. DEFENSE COUNSEL'S AUTHORITY

To fulfill its duty to defend, an insurer generally has the right to select the defense counsel who will represent its insured. *See Johnson v. Cont'l Cas. Co.*, 57 Wn. App. 359, 362-63, 788 P.2d 598 (1990) (holding that an insurer had no obligation to pay for counsel the insured retained). But the law is clear that the insurer-retained defense counsel's client is the insured, not the insurer. *Tank*, 105 Wn.2d at 388.

The Rules of Professional Conduct (RPC) 1.2(f) provides for an attorney's authorization to represent a client:

> A lawyer shall not purport to act as a lawyer for any person or organization if the lawyer knows or reasonably should know that the lawyer is acting without the authority of that person or organization, unless the lawyer is authorized or required to so act by law or a court order.

Here, it is undisputed that Hofferbert did not expressly authorize defense counsel retained by GEICO to represent her. Therefore, Kruger-Willis argues that defense counsel had no authority to represent Hofferbert under RPC 1.2(f).[7]

[7] Kruger-Willis also asserts that our opinion in the second appeal established the law of the case because Kruger-Willis interprets that opinion as holding that the key to authority is some form of communication between attorney and client. In that opinion, we expressly stated that we did not decide the issue of counsel's authority to appear. *Kruger-Willis* II, slip op. at *4.

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However, RPC 1.2(f) does not always require express authorization from the client. An attorney can represent a client if authorized "by law." RPC 1.2(f). An insurer necessarily has implicit authority under its contractual duty to defend—to authorize defense counsel to represent its insured. Otherwise, the insurer would have no way of fulfilling its broad duty to defend when the insured cannot be located, is uncooperative, or temporarily unavailable.

Under Kruger-Willis's position, if the insurer or defense counsel could not contact the insured to obtain express authority to represent him or her, the insurer and defense counsel would not even be able to file a notice of appearance and would be forced to allow a default judgment to be entered against the insured. Such a result would be harmful to the insured, the beneficiary of the insurer's contractual duty to defend. In addition, "insurance contracts are imbued with public policy concerns." *Immunex*, 176 Wn.2d at 878. Such a result would be inconsistent with public policy. We hold that under RPC 1.2(f), defense counsel retained by an insurer is authorized by contract law to represent that insurer's insured.[8] Therefore, we hold that the trial court did not err in holding that defense counsel had authority to represent Hofferbert, and we affirm the trial court's decision.

A majority of the panel having determined that only the foregoing portion of this opinion will be published in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

[8] Here, there was no indication that Hofferbert objected to defense counsel's representation of her. We do not address the situation where the insured objects to the representation of insurer-retained counsel or expressly withdraws defense counsel's authority.

III. ENTRY OF JUDGMENT

Kruger-Willis argues that it was error to grant defense's motion for entry of judgment when defense counsel never considered Hofferbert to be the prevailing party under RCW 4.84.250. Kruger-Willis also argues that the trial court erred by granting relief in its 2011 order that Hofferbert did not request.

RCW 4.84.250 provides,

> [I]n any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is [$10,000] or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees.

We decided this issue in the first appeal:

> The fact that GEICO is defending [Hofferbert] does not render the insurance company a party or somehow diminish [Hofferbert]'s standing as either the aggrieved party in the underlying action or the prevailing party entitled to fees and costs under RCW 4.84.250.

Kruger-Willis I, slip op at *3. Thus, Hofferbert is the prevailing party under RCW 4.84.250, and therefore, is entitled to an entry of judgment for attorney fees and costs.

Hofferbert moved the court to order an entry of judgment based on the trial court's 2011 order that granted costs, attorney fees, and interest at 12 percent per year to Hofferbert as the prevailing party. The trial court entered judgment in favor of Hofferbert against Kruger-Willis in the amount of $11,490 with interest accruing from the date of the 2011 order. Accordingly, the trial court's ruling is not inconsistent with Hofferbert's request for relief. Therefore, we hold that the trial could did not err in its entry of judgment.

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IV. RIGHT TO A FAIR HEARING

Kruger-Willis also argues that she was denied a fair, impartial, or neutral proceeding due to the trial court's errors and the misconduct of opposing counsel. Specifically, Kruger-Willis argues that the trial court's finding, that the 2011 order contained a scrivener's error as to the payee of judgment, resulted in a financial detriment to Kruger-Willis in interest and attorney fees over the three years that Kruger-Willis disputed this designation of payee; she also argues that the trial court's finding of fact is not supported by the record. Kruger-Willis also notes the trial court's extended proceedings.

The trial court is presumed to perform its functions regularly and properly without bias or prejudice. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841, 14 P.3d 877 (2000). A judicial proceeding is valid only if it has an appearance of impartiality, that is, that a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995). A violation of the appearance of fairness doctrine requires evidence of a judge's actual or potential bias. *State v. Carter*, 77 Wn. App. 8, 11, 888 P.2d 1230 (1995).

Here, Kruger-Willis fails to provide evidence of the trial judge's actual or potential bias. By Kruger-Willis's own admission, the trial court never intended for the payee to be anyone other than Hofferbert. Therefore, the trial court's finding that the payee on its 2011 order was a scrivener's error is supported by substantial evidence.

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Kruger-Willis argues that the procedural history in this case is "long and convoluted because the [defense attorneys] never communicated with [Hofferbert]" and "the trial court prolonged the litigation," but Kruger-Willis admits that the lawsuit was a "straight-forward, low-value vehicle property damage claim." Br. of Appellant at 1. Had she filed a bond supersedeas in 2011 (as she did five years later prior to this appeal) and payable according to the trial court's order, she would have met accord and satisfaction.

Therefore, we hold that Kruger-Willis was not denied the right to a fair hearing because the alleged errors and misconduct by the trial court are unfounded.

ATTORNEY FEES

Kruger-Willis requests attorney fees on appeal under RCW 2.44.020, which provides:

> If it be alleged by a party for whom an attorney appears, that he or she does so without authority, the court may, at any stage of the proceedings, relieve the party for whom the attorney has assumed to appear from the consequences of his or her act; it may also summarily, upon motion, compel the attorney to repair the injury to either party consequent upon his or her assumption of authority.

Here, Kruger-Willis is not successful in her challenge of authority; as such, she is not entitled to attorney fees.

Hofferbert also requests attorney fees under RCW 4.84.250 and RAP 18.1. As provided above, we have already decided that Hofferbert is entitled to attorney fees under RCW 4.84.250. Therefore, Hofferbert is entitled to attorney fees as the prevailing party in this appeal.

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CONCLUSION

We hold that the trial court did not err in its entry of judgment and Kruger-Willis was not denied the right to a fair hearing. Finally, we hold that Hofferbert is entitled to attorney fees as the prevailing party in this appeal.

Sutton, J.

SUTTON, J.

We concur:

Worswick, J.

WORSWICK, J.

Maxa, A.C.J.

MAXA, A.C.J.

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APPENDIX E

No. 48375-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TORI KRUGER-WILLIS,

Appellant,

v.

HEATHER HOFFENBURG AND JOHN DOE HOFFENBURG,

Respondent.

APPELLANT'S MOTION FOR RECONSIDERATION

ALANA BULLIS, PS
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WSBA No. 30554
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Appellant

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I. IDENTITY OF MOVING PARTY

The moving party is the Appellant, Tori Kruger-Willis (Kruger-Willis).

II. STATEMENT OF RELIEF SOUGHT

For the reasons stated below, Kruger-Willis respectfully moves for reconsideration under RAP 12.4 of this Court's March 28, 2017, decision.

III. FACTS RELEVANT TO MOTION

In affirming the superior court, the Court's opinion overlooks or misapprehended points of fact and law which warrant reconsideration. RAP 12.4(c).

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. THE COURT'S PUBLISHED OPINION CONFLICTS WITH DECISIONS BY THE WASHINGTON STATE SUPREME COURT

Kruger-Willis argued on appeal that defense counsel lacked the authority under RCW 2.44.030 to appear and to act on behalf of Hofferbert when defense counsel had no contact whatsoever with her throughout the course of litigation. Appellant's Opening Br. at 17-25.

In response to Kruger-Willis's aforementioned issue on review, the Court held in the published part of its opinion "that when an insurer has a contractual obligation to defend its insured, that insurer has the implied right to authorize defense counsel to represent its insured even in the absence of the insured's express authority." Opinion at 5-6. Moreover, the

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Court held "that under RPC 1.2(f), defense counsel retained by an insurer is authorized by contract law to represent that insurer's insured." Opinion at 8.

The foregoing holdings by the Court are in conflict with the Washington State Supreme Court's decisions in *Tank v. State Farm Fire & Cas. Co,* 105 Wn.2d 381, 715 P.2d 1133 (1986), in *Van Dyke v. White,* 55 Wn.2d 601, 349 P.2d (1960), in *Woo v. Fireman's Fund Ins. Co.,* 161 Wn.2d 43, 164 P.3d 454 (2007), in *Nat'l Sur. Corp. v. Immunex Corp.,* 176 Wn.2d 872, 297 P.3d 688 (2013), in *Dietz v. Doe*, 131 Wn.2d 835, 935 P.2d 611 (1997), and in *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992). Additionally, the Court's holdings conflict with the provisions of RCW 2.44, RCW 2.44.010(1), (2), RPC 1.2, 1.2(f), and RPC 5.4(c).

1. DEFENSE COUNSEL'S AUTHORITY

In support of its position that under an insurer's contractual duty to defend, the insurer "generally has the right to select the defense counsel who will represent its insured[,]" the Court relies upon *Johnson v. Cont'l Cas. Co.,* 57 Wn. App. 359, 788 P.2d 598 (1990) (holding that an insurer had no obligation to pay for counsel the insured retained). Opinion at 7.

The facts in *Johnson* are distinguishable from the facts in this case. In *Johnson,* there had been actual contact between the insured and the insurer and between defense counsel and the insured. In this case, there

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has been no contact between the insured and the insurer and between defense counsel and the insured.

In *Johnson v. Cont'l Cas. Co.*, the insured (Johnson) tendered the defense of a lawsuit against him to the insurer (Continental). *Johnson v. Cont'l Cas. Co.*, 57 Wn. App. at 360. The insurer defended under a reservation of rights, but suggested in a letter to the insured that he may want to retain counsel at his own expense in the event of non-covered losses. *Id.* Thereafter, the insurer selected defense counsel to represent the insured. *Id.* The insurer-retained defense counsel stayed fully in touch with the insured, cooperated with and provided materials to the insured's independent attorney, and ultimately settled the underlying claim with the insured's knowledge and consent. *Id.* at 363. In this case, the insurer-retained defense counsel has not stayed fully in touch with Hofferbert as defense counsel has had no contact whatsoever with her.

Kruger-Willis has never disputed that under an insurer's contractual duty to defend, the insurer has the right to select defense counsel. What Kruger-Willis consistently argues is that without any contact whatsoever between the insurer-retained defense counsel and Hofferbert, defense counsel does not have the authority to appear and to act on her behalf. Opening Br. of Appellant at 17. Simply put, without some form of contact or communication between defense counsel and

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Hofferbert, the parties never formed an attorney-client relationship. CP 746, 780, 793-94.

In its opinion, the Court acknowledges that under *Tank v. State Farm*, "the law is clear that the insurer-retained defense counsel's *client* is the insured, and not the insurer (emphasis added)." Opinion at 7. Under *Tank,* the relationship between the insured and defense counsel is that of attorney and *client* (emphasis added). *Tank v. State Farm,* 105 Wn.2d at 388.

Similarly, the provisions of RPC 1.2 pertain to the scope of representation and allocation of authority between *client* and lawyer. The Court appears to recognize that RPC 1.2(f) contemplates the existence of an attorney-client relationship by its reasoning that "RPC 1.2(f) does not always require express authorization from the *client.* An attorney can represent a *client* if authorized 'by law.' RPC 1.2(f) (emphasis added)." Opinion at 8.

Based upon the aforementioned reasoning by the Court, defense counsel is authorized by contract law to represent Hofferbert under RPC 1.2(f) if she is a *client* of defense counsel. See also *Tank v. State Farm,* 105 Wn.2d at 388 (the relationship between the insured and defense counsel is that of attorney and *client*) (emphasis added) and RCW 2.44.010(1), (2) – Authority of Attorney (an attorney has authority to bind his or her *client*; to receive money claimed by his or her *client*) (emphasis

added). Thus, whether defense counsel has the authority to appear and to act on Hofferbert's behalf under RPC 1.2(f), *Tank*, and/or RCW 2.44 is dependent upon resolving the issue as to whether Hofferbert is a client of defense counsel.

Kruger-Willis has long-questioned the existence of an attorney-client relationship between Hofferbert and defense counsel when there has been no contact between the parties and based upon defense counsel's words and actions. *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992) (an attorney-client relationship may be implied from the parties' conduct, which includes the attorney's words or actions). Opening Br. of Appellant at 3-4, 36 fn 12, 46-50; RP 7-9, 48, 54-55; CP 745, 890-91, 978, 1013-14, 1016. The trial court and this Court, however, have not addressed whether Hofferbert is a client of defense counsel.

Whether Hofferbert is a client of defense counsel is similar to the issue before the Washington State Supreme Court in *Dietz v. Doe*, 131 Wn.2d 835, 935 P.2d 611 (1997). In *Dietz,* the trial court did not address the question of whether the defendant was the attorney's client; "the trial court assumed it, and made no explicit findings of fact or conclusions of law... regarding the existence of an attorney-client relationship" between the defendant and the attorney. *Dietz v. Doe*, 131 Wn.2d at 844. Additionally, and like the facts in this case, "the Court of Appeals did not address the question" of whether the defendant (Doe) was the attorney's

client. *Id.* Therefore, and again like the situation in *Dietz*, the existence of an attorney-client relationship in this case is an unresolved issue. *Id.*

Under the court's decision in *Dietz*, it is Hofferbert's burden to make a factual showing to support the existence of an attorney-client relationship. *Dietz v. Doe*, 131 Wn.2d at 844. There are no facts in the record to support a finding that Hofferbert is defense counsel's client. All we have on the record is defense counsel's word for the existence of a relationship. See *Dietz v. Doe*, 131 Wn.2d at 844. Opening Br. of Appellant at 2; CP 983-84, 1036.

In this case, the trier of fact on the issue of the existence of an attorney-client relationship between the insured and defense counsel may not simply accept defense counsel's legal conclusion that the insured is his client. The trial court needed the facts of what actually occurred between the insured and defense counsel to decide the legal question of whether the insured is defense counsel's client. See *Dietz v. Doe*, 131 Wn.2d at 845.

The question of whether an attorney-client relationship exists is a question of fact. *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). The foundation of an attorney-client relationship is whether the attorney's advice or assistance was sought and received. *Id.* The relationship may be implied from the parties' conduct and need not be formalized in a written contract. *Id.* The existence of an attorney-client relationship depends largely on the clients' subjective belief, but this belief must be reasonably

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formed based on attending circumstances, including the attorney's words and actions. *Id.*

Since there has been no contact between Hofferbert and defense counsel, her subjective belief that an attorney-client relationship exists is not applicable, so whether such a relationship exists may be implied from the parties' conduct, which includes the attorney's words or actions. *Bohn v. Cody*, 119 Wn.2d at 363.

As Kruger-Willis argued to the Court, defense counsel's words and actions are inconsistent with the formation of an attorney-client relationship between defense counsel and Hofferbert. Opening Br. of Appellant at 3-4, 46-50; RP 7-9, 48, 54-55; CP 745, 890-91, 978, 1013-14, 1016.

Based upon what actually occurred between Hofferbert and defense counsel, which is no contact whatsoever between Hofferbert and defense counsel, there is an absence of any competent evidence to support the existence of an attorney-client relationship. See *Dietz v. Doe*, 131 Wn.2d at 845. An attorney-client relationship simply does not exist between defense counsel and Hofferbert because she did not seek advice from defense counsel and she did not receive advice from defense counsel in that there has been no contact or communication whatsoever between her and defense counsel. See *Bohn v. Cody*, 119 Wn.2d at 363.

2. DUTY TO DEFEND

The Court held that "GEICO had a contractual, legal duty to defend Hofferbert against Kruger-Willis's lawsuit." Opinion at 6. Otherwise, GEICO "would be subject to liability for breach of contract, bad faith, and violation of the CPA" if it failed to defend Hofferbert. *Id.*

In support of its holding that "when an insurer has a contractual obligation to defend its insured, that insurer has the implied right to authorize defense counsel to represent its insured even in the absence of the insured's express authority[,]"[1] the Court relies on the insurer's contractual duty to defend the insured in *Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 297 P.3d 688 (2013); *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 164 P.3d 454 (2007); *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986); and *United Servs. Auto. Ass'n v. Speed,* 179 Wn. App. 184, 317 P.3d 532 (2014).

The facts in this case, however, are distinguishable from all of the foregoing cases in that where the issue regarding an insurer's duty to defend is addressed in the cases cited by the Court, there had been actual contact between the insured and the insurer, either by tender of the defense of a lawsuit by the insured to the insurer or by a request for coverage of an incident by the insured to the insurer. In this case, there has been no

[1] Opinion at 5-6.

contact whatsoever between the insured and the insurer or between the insured and defense counsel.

In *Nat'l Sur. Corp. v. Immunex Corp.*, the insured (Immunex) notified its insurer (National Security) that it was the subject of state and federal investigations. *Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d at 875. The insurer acknowledged the notice and requested copies of any complaints the insured may receive. *Id.* Thereafter, the insured tendered the defense of a number of lawsuits to the insured and in response, the insurer issued a reservation of rights letter to its insured.

In *Woo v. Fireman's Fund Ins. Co.*, the insured (Woo) was sued for a practical joke he performed on an employee while he performed a dental procedure on the employee. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d at 48. The insured tendered the defense to his insurer (Fireman's Fund), which refused to defend the insured.

In *Tank v. State Farm Fire & Cas. Co.*, the insured (Tank) was sued for assault. *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d at 384. Tank tendered the defense to his insurer (State Farm) through a personal attorney he retained. *Id.* State Farm accepted the defense under a reservation of rights. *Id.* The insurer-retained defense counsel "maintained contact with the insured, the insured's personal attorney, and the insurer, providing a written evaluation of the case to all parties prior to trial." *Id.*

In *United Servs. Auto. Ass'n v. Speed,* the insured (Geyer) notified his insurer (USAA) of an altercation he was involved in with Speed (assignee of the insured). *United Servs. Auto. Ass'n v. Speed,* 179 Wn. App. at 189. The insured requested coverage under both his homeowners and auto policies. *Id.* at 190. The insurer informed the insured in a letter that it was investigating the incident under a reservation of rights. *Id.*

All of the aforementioned cases relied upon by the Court in support of its holding that "when an insurer has a contractual obligation to defend its insured, that insurer has the implied right to authorize defense counsel to represent its insured even in the absence of the insured's express authority"[2] involve situations where the insurer acted under a reservation of rights.[3] While this case does not involve a reservation of rights by GEICO, since the line of cases cited by the Court in its opinion with respect to this issue occur in the context of a reservation of rights,[4] the Court overlooked the Washington State Supreme Court's decision in *Tank v. State Farm.*

In Washington, the seminal case that defines the ethical obligations of an insurance defense counsel is *Tank v. State Farm.* In *Tank*, the Washington State Supreme Court held that:

[2] Opinion at 5-6.
[3] With the exception of *Woo v. Fireman's Fund Ins. Co.* where the insurer refused to defend the insured after the insured tendered defense of the suit to the insurer.
[4] Although most standard liability insurance policies impose upon the insurer the duty to defend. *United Services Automobile Ass'n v. Speed,* 179 Wn. App. at 194.

> First, it is evident that such attorneys owe a duty of loyalty to their clients. Rules of Professional Conduct 5.4(c) prohibits a lawyer, employed by a party to represent a third party, from allowing the employer to influence his or her professional judgment. In a reservation-of-rights defense, RPC 5.4(c) demands that counsel understand that he or she represents only the insured, not the company. As stated by the court in *Van Dyke v. White*, 55 Wash.2d 601, 613, 349 P.2d 430 (1960), "[t]he standards of the legal profession require undeviating fidelity of the lawyer to his client. No exceptions can be tolerated."
>
> Second, defense counsel owes a duty of full and ongoing disclosure to the insured. This duty of disclosure has three aspects. First, potential conflicts of interest between insurer and insured must be fully disclosed and resolved in favor of the insured. The dictates of RPC 1.7, which address conflicts of interest such as this, must be strictly followed. Second, all information relevant to the insured's defense, including a realistic and periodic assessment of the insured's chances to win or lose the pending lawsuit, *must be communicated to the insured* (emphasis added). Finally, all offers of settlement must be disclosed to the insured as those offers are presented. In a reservation-of-rights defense, it is the insured who may pay any judgment or settlement. Therefore, it is the insured who must make the ultimate choice regarding settlement. In order to make an informed decision in this regard, the insured must be fully apprised of all activity involving settlement, whether the settlement offers or rejections come from the injured party or the insurance company.

Tank v. State Farm Fire & Cas. Co., 105 Wn.2d at 388-89.

Applying the first prong of the ethical obligations of an insurance defense counsel from *Tank* to the facts of this case, Kruger-Willis has consistently argued that defense counsel's conduct demonstrates that defense counsel represents GEICO and not Hofferbert. Opening Br. of Appellant at 1, 46 fn 17, 18, 47-48.

With respect to *Tank's* second prong of the ethical obligations of an insurance defense counsel, there has been no full and ongoing

disclosure to Hofferbert because defense counsel has had no contact whatsoever with her. Defense counsel did not communicate to Hofferbert any potential conflict of interest between defense counsel's representation of its insured, Derek Lebeda, and Hofferbert, a beneficiary under Lebeda's insurance contract;[5] defense counsel did not disclose to Hofferbert all information relevant to her defense; and defense counsel did not disclose to Hofferbert all offers of settlement. Opening Br. of Appellant at 7-8, CP 845-46, 906-08.

3. GEICO'S INTERESTS

The Court's reasoning that "if GEICO failed to defend Hofferbert, it would be subject to liability for breach of contract, bad faith, and violation of the CPA"[6] is contrary to the Supreme Court's holding in *Tank* in that it puts GEICO's interests in protecting itself from the foregoing potential claims by its insured above its duty to fully inform Hofferbert "of all developments relevant to [her] policy coverage and *progress of [her] lawsuit*" by defending this case without any contact whatsoever with her (emphasis added). *Tank v. State Farm,* 105 Wn.2d at 388. An important provision relevant to coverage under the terms of GEICO's policy is that it cannot be sued unless the insured has fully complied with all the policy terms, which include notice and *cooperation* from the insured (emphasis). CP 26-28.

[5] Representation of multiple clients under RPC 1.7.
[6] Opinion at 7.

With respect to informing the insured regarding the progress of his or her lawsuit, the Washington State Supreme Court holds that:

> [T]he [insurance] company has the responsibility for fully informing the insured not only of the reservation-of-rights defense itself, *but of all developments relevant to his policy coverage and the progress of his lawsuit*. Information regarding progress of the lawsuit includes disclosure of all settlement offers made by the company (emphasis added).

Tank v. State Farm, 105 Wn.2d at 388.

In this case, GEICO failed to disclose to Hofferbert the progress of her lawsuit and all settlement offers made by it to Kruger-Willis because there has been no contact between GEICO and Hofferbert. Opening Br. of Appellant at 7-8, CP 845-46, 906-08.

Additionally, the Court criticized Kruger-Willis's position with respect to the insurer or defense counsel's inability to make contact with the insured:

> [I]f the insurer or defense counsel could not contact the insured to obtain express authority to represent him or her, the insurer and defense counsel would not even be able to file a notice of appearance and would be forced to allow a default judgment to be entered against the insured.

Opinion at 8.

Kruger-Willis's response to the aforementioned criticism is that her position was based upon the WSBA's Advisory Opinion 928 (1985) (insurance defense attorney had no contact with client; thus, no authority to act as lawyer for client). Opening Br. of Appellant at 24; CP 738. Kruger-Willis focused on the WSBA's position with regard to the

authority of an insurance defense attorney and when such authority is triggered, which, according to WSBA's Advisory Opinion 928, is when there has been contact between defense counsel and the *client*.

In its opinion, the Court reasoned that without contact with the insured, "the insurer and the defense counsel would not even be able to file a notice of appearance and would be forced to allow a default judgment to be entered against the insured."[7] Opinion at 8. However, the Court failed to consider that a default judgment against the insured is not the only remedy available when there has been no contact with an insured:

> If the insurer is uncertain of its duty to defend, it may defend under a reservation of rights and seek a declaratory judgment that it has no duty to defend. *Truck Ins.*, 147 Wash.2d at 761, 58 P.3d 276 (citing *Grange Ins. Co. v. Brosseau*, 113 Wash.2d 91, 93-94, 776 P.2d 123 (1989)).

Woo v. Fireman's Fund Ins. Co., 161 Wn.2d at 54; see also *Nat'l Sur. Corp. v. Immunex Corp.,* 176 Wn.2d at 879.

The same principle from *Woo* and *Immunex* can be found in a long-standing Washington state case regarding the duties of a liability insurer. In *Van Dyke,* 55 Wn.2d 601, 349 P.2d 430 (1960), the insured breached the cooperation clause under the terms of the insurance policy. *Van Dyke v. White*, 55 Wn.2d at 604. The court found that there was no evidence that after discovering that the insured declined to cooperate under the terms of the policy, the insurer notified the insured that it would

[7] It is defense counsel and not the insurance company who would file a notice of appearance on behalf of the insured.

continue to defend the action under a reservation of rights because of the insured's breach of the cooperation clause. *Id.* at 607-08. Since the court found no evidence that the insurer informed the insured that it would continue to defend the action under a reservation of rights, the insurer was estopped from denying liability for the insured's breach of the cooperation clause. *Id.* at 608-09.

The GEICO policy in this case is similar to the insurance policy in *Van Dyke v. White*. GEICO's policy contains the standard provisions requiring notice to the company as soon as possible after an accident; cooperation with the insurer in the defense of all actions; and a provision requiring the insurer to defend any suit for damages. CP 24, 26-28. Additionally, GEICO's policy expressly bars action against it "unless the insured has fully complied with all the policy terms." CP 28.

When an insurer or its defense counsel is unable to contact the insured regarding defense of the case against him or her, there are provisions that exist in current law to prevent a default judgment from being entered against the insured while also protecting the insurer from liability for breach of contract, bad faith, and violation of the CPA. See Opinion at 7. Based upon the Washington State Supreme Court's decisions in *Woo,* in *Immunex,* and in *Van Dyke*, there was no need for the Court to carve out a public policy exception to the "client" requirement

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found in RPC 1.2, RPC 1.2(f), RCW 2.44, and in *Tank v. State Farm.* ("Under RPC 1.2(f), defense counsel retained by an insurer is authorized by contract law to represent that 'insured's insured").[8]

Under existing law, the insurer or defense counsel could first defend under a reservation of rights by serving the insured with a notice of its reservation of rights due to the insured's breach of the cooperation clause under the terms of the policy. See *Van Dyke v. White*, 55 Wn.2d at 604. "[W]hen the insured cannot be located, is uncooperative, or temporarily unavailable[,][9] then the insurer may defend under a reservation of rights and seek a declaratory judgment that it has no duty to defend. See *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d at 54; see also *Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d at 879.

Or, the insurer may do what GEICO did in this case – place a provision in the insurance policy that it cannot be sued unless the insured has fully complied with all the policy terms, which include notice and cooperation from the insured. CP 26-28. Interpretation of an insurance policy is a question of law and "[w]here the language in a contract for insurance is clear and unambiguous, the court should enforce the policy as

[8] Opinion at 8. Which raises the question whether a court has the authority to modify and/or amend the Rules of Professional Conduct's Allocation of Authority Between "Client" and Lawyer to Allocation of Authority Between "Insured's Insured" and Lawyer. Revisions and amendments to the Rules of Professional Conduct are submitted to the Washington State Supreme Court and it is that court that approves proposed amendments for publication. *See In re Disciplinary Proceeding Against Greenlee*, 158 Wn.2d 259, 268, 143 P.3d 807 (2006).

[9] Opinion at 8.

written." *Matthews v. Penn-America Ins. Co.*, 106 Wn. App. 745, 747-48, 25 P.3d 451 (2001). GEICO's provision in its policy that it cannot be sued unless the insured has fully complied with all policy terms is clear and unambiguous. Opening Br. of Appellant at 20.

B. FAIR HEARING

In the unpublished part of its opinion, the Court held that Kruger-Willis was not denied the right to a fair hearing by the trial court because "it never intended for the payee to be anyone other than Hofferbert." Opinion at 10. The Court either misapprehended or overlooked Kruger-Willis's argument regarding the payee.

Due to defense counsel's continually changing position as to whether Hoffenburg, GEICO, or Mary E. Owen & Associates was the party entitled to the award of costs and fees under RCW 4.84.250, and due to the misconduct of defense counsel on June 3, 2013, when he improperly added Mary E. Owen & Associates as a judgment creditor to a judgment order he presented to the trial court for its signature, defense counsel was successful in obtaining a written ruling from the trial court which modified its order of June 27, 2011, changing the payee from Hofferbert to Mary E. Owen & Associates.[10] Opening Br. of Appellant at 50; CP 67, 656-58, 987, 1016-17; RP 56-59.

[10] Despite its oral ruling on May 17, 2013, denying defense counsel's motion to change the payee from Hofferbert to GEICO and then to Mary E. Owen & Associates. Opening Br. of Appellant at 4, 9-10; CP 67, 977-78, 1000, 1016-17.

In an October 21, 2013, letter to the parties, the trial court held that "Plaintiff shall make payment to Defendant's Counsel, Mary E. Owen & Associates, a check in the amount of $11,490.00 not later than 14 days from the date of this order. Opening Br. of Appellant at 12, 50; CP 656-58.

As a result, for nearly three years, Kruger-Willis vigorously disputed that Mary E. Owen & Associates was entitled to the prevailing party costs and fees under the trial court's order of June 27, 2011. Opening Br. of Appellant at 51; CP 986. Then, on February 1, 2016, the trial court found that its order of June 27, 2011, contained a "scrivener's error" where it stated that payment shall be made to "Defendant's counsel, Mary E. Owen & Associates." Opening Br. of Appellant at 51; CP 986; RP 61. During that period, interest accrued to Kruger-Willis's detriment[11] while she disputed the trial court's ruling in its October 21, 2013, letter awarding Mary E. Owens & Associates the prevailing party costs and fees which it later attributed to a "scrivener's error." Opening Br. of Appellant at 51; CP 986.

C. PUBLIC POLICY INTERESTS OF INSURANCE

In its opinion, the Court noted that "insurance contracts are imbued with public policy." Opinion at 8. In *Tank v. State Farm,* the court acknowledged that "the duty of good faith has been imposed on the insurance industry in this state by a long line of judicial decisions." *Tank*

[11] Addressed further in Section C of this brief.

v. State Farm, 105 Wn.2d at 386. The court further noted that not "only have courts imposed on insurers a duty of good faith, the Legislature has imposed it as well"[12] under RCW 48.01.030, which provides:

> The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

Based upon the foregoing legislative declaration, the insurer-retained defense counsel has a statutory duty to abstain from deception and to practice honesty in all insurance matters. Defense counsel violated his duty under the insurance code[13] in the following material ways:

1. Defense counsel actively deceived Kruger-Willis and her counsel that he was in contact with Hofferbert for several years into this case when he never had contact with her and he did not know her location.[14] Opening Br. of Appellant at 40; CP 400-07, 453.

2. Defense counsel conceded liability only when Kruger-Willis notified him that she intended to call Hofferbert at trial. Even after he conceded liability, defense counsel moved for a directed verdict at trial on the basis that Kruger-Willis could not prove liability, which forced Kruger-Willis's counsel to scramble and to have Kruger-Willis rush to court for less than five minutes of testimony regarding liability. Opening Br. of Appellant at 40; CP 417, 454; RP 80.

3. When Kruger-Willis argued to the trial court and to the Court in the first appeal that defense counsel was defending this case on behalf of GEICO and not on behalf of Hofferbert, defense counsel consistently denied the claim, knowing full well he never had contact with Hofferbert. Opening Br. of Appellant at 2, 40; CP 420, 455, 778.

[12] *Tank v. State Farm* at 386.
[13] As well as the Rules of Professional Conduct.
[14] From June 14, 2010, to August 9, 2013.

4. When defense counsel could not negotiate payment of the court-awarded fees and costs to Hofferbert under RCW 4.84.250, he finally concede that Hofferbert "had never been involved in defense of the case against her;" that he never had contact with her; and that in the absence of contact with Hofferbert, he defended the case under the duty to defend provision of the insurance policy.[15] By this time, the parties had already engaged in pre-trial proceedings, discovery, deposition, arbitration, a trial de novo, post-trial proceedings, and an appeal. Opening Br. of Appellant at 3, 8-11; CP 890-91.

5. Defense counsel abused the legal process by continually advancing conflicting arguments as to which party he considered the prevailing party entitled to costs and fees. Prior to the first appeal, the prevailing party was Hofferbert. Post-mandate from the first appeal, the prevailing party was GEICO. When the trial court would not enter judgment for GEICO, the prevailing party became the law firms that purportedly represented Hofferbert. Opening Br. of Appellant at 2-4.

6. The trial court heard defense counsel's motion to enter judgment for GEICO on May 17, 2013. During the hearing, the trial court remarked that "information subsequent to that tells me that...payment wasn't made." Defense counsel intentionally failed to inform the trial court that payment in the amount of $11,490.00 had indeed been tendered to him 71 days before the hearing date. Opening Br. of Appellant at 10; CP 977, 1016.

7. During the May 17, 2013, hearing, the trial court would not enter judgment for GEICO or for Mary E. Owen & Associates as defense counsel requested. The trial court ruled that judgment would be in favor of only Hoffenburg and the attorney for the judgment creditor would be the Mary E. Owens law firm. The trial court then continued the matter to June 3, 2013, for presentation of the judgment. The judgment presented to the trial court for its signature on June 3, 2013, by defense counsel (which he believed was going to be presented *ex parte*), failed to comply with the trial court's oral rulings from the May 17, 2013, hearing. On defense counsel's renewed judgment order, which he pre-signed, he listed the judgment creditor(s) as "Heather Hoffenburg *and* her attorneys Mary E. Owen & Associates (emphasis added)" instead of Heather Hoffenburg as the trial court had ruled. For the attorney for the judgment creditor, he listed his name instead of the "Mary E. Owens law firm" as the trial court had ruled. Opening Br. of Appellant at 4, 9-10; CP 67, 977-78, 1000, 1016-17.

[15] The first time he asserted the defense after defending the case for four years.

8. During the June 3, 2013, judgment presentation, defense counsel misrepresented to the trial court and to Kruger-Willis's counsel that the only change he made to the renewed judgment order from the May 17, 2013, hearing was to its format instead of the addition of Mary E. Owen & Associates as a judgment debtor, contrary to the trial court's previous ruling, by stating:

> This [motion hearing] was set following the motion hearing which was held the 17th of May where I appeared live before you [the trial court] and you had essentially stated that you had no problem signing the order given that it was affirmed by the Court of Appeals, but it was in the wrong format at the time and it wasn't – didn't have a judgment summary on the top as is required. So, I reformatted things such that it would comply with a judgment, and so the Court then set it for today's presentation, which originally I thought was going to be just done *ex parte*.

Opening Br. of Appellant at 4-5; CP 987-88, 1000.

9. Defense counsel argued to the trial court during Kruger-Willis's initial motion under RCW 2.44.030 that he was diligent in his efforts to accomplish communication with "that person" (his client, Hofferbert) lacked candor. As Kruger-Willis provided to the trial court in various pleadings, Hofferbert had numerous court activities in Mason County during the pendency of this case. Opening Br. of Appellant at 41; CP 423-25, 455-56.

This case is not a matter where Kruger-Willis "rolled the dice" in an attempt to better her position at trial over the offer of judgment extended to her by defense counsel, only to complain later to the courts when the trial de novo resulted in a defense verdict and the trial court awarded prevailing party fees under RCW 4.84.250. As stated above, there is substantial evidence in the record to show that defense counsel was deceptive and dishonest with the courts and with the opposing party regarding the nature of his representation of Hofferbert.

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Moreover, this case is not a matter where Kruger-Willis seeks to "shirk" her obligation under the trial court's order with respect to the award of prevailing party fees and costs under RCW 4.84.250. After the Court issued its opinion in the first appeal, defense counsel made demand for payment in the amount of $11,490.00, stating that the check should be made payable to GEICO. Opening Br. of Appellant at 9; CP 734-35, 742. A check was promptly tendered to Mary E. Owen & Associates made payable to the prevailing party in this case, Heather Hofferbert, in the full amount of $11,490.00 demanded in writing by defense counsel. Opening Br. of Appellant at 9; CP 731-33, 742; RP 53. Defense counsel received payment on March 8, 2013. CP 883-885.

Kruger-Willis argued to the Court that due to defense counsel's continually changing position as to whether Hoffenburg, GEICO, or Mary E. Owen & Associates was the party entitled to the award of costs and fees under RCW 4.84.250, and due to the misconduct of defense counsel on June 3, 2013, when he improperly added Mary E. Owen & Associates as a judgment creditor to a judgment order he presented to the trial court for its signature, defense counsel was successful in obtaining a written ruling from the trial court which modified its order of June 27, 2011, changing the payee from Hofferbert to Mary E. Owen & Associates.[16] Opening Br.

[16] Despite its oral ruling on May 17, 2013, denying defense counsel's motion to change the payee from Hofferbert to GEICO and then to Mary E. Owen & Associates. Opening Br. of Appellant at 4, 9-10; CP 67, 977-78, 1000, 1016-17.

of Appellant at 50; CP 67, 656-58, 987, 1016-17; RP 56-59. Based on the foregoing, Kruger-Willis argued to the Court that during the nearly three year period she disputed the trial court's modification of its order, interest accrued to her detriment. Opening Br. of Appellant at 51; CP 986.

In response, the Court noted that Kruger-Willis could have filed a bond supersedeas. Opinion at 11. However, defense counsel was in possession of a check in the amount of $11,490.00 made payable to Hofferbert since March 8, 2013. CP 883-885. It was not until August 9, 2013, that defense counsel finally conceded he was not able to negotiate the check because he never had contact with Hofferbert. Opening Br. of Appellant at 11; CP 583. Defense counsel never returned the check and he indicated that he was actively searching for Hofferbert to have her sign the appropriate documents so that Kruger-Willis could satisfy the trial court's order of June 27, 2011.

While it is commendable that in its holding, the Court seeks to prevent harm to the insured,[17] the Court should also have an equal interest in ensuring that an insurance defense counsel abide by his or her statutory duties under RCW 48.01.030 to abstain from deception and to practice honesty and equity in all insurance matters. All of Kruger-Willis's claims of misconduct against defense counsel are not merely allegations; they are supported by the record.

[17] Opinion at 8.

The Court correctly noted that Kruger-Willis admitted that this lawsuit began as a "straight-forward, low-value vehicle property damage claim." Opinion at 11. Where this case derailed into the "twilight zone"[18] of litigation was on March 8, 2013, when defense counsel received a check for the prevailing party attorney fees and costs and discovered that he could not negotiate the check because he never had contact with Hofferbert.[19] As a result, litigation was prolonged when defense counsel attempted to bypass the settled matter from the first appeal that Hofferbert was the prevailing party under the provisions of RCW 4.84.250 by abusing the legal process to change the payee from Hofferbert, to GEICO, to Mary E. Owen & Associates, to Hofferbert and Mary E. Owen & Associates, to Mary E. Owen & Associates (again), and finally to Lockner & Crowley, Inc., P.S. Opening Br. of Appellant at 56; CP 135, 458.

D. AWARD OF ATTORNEY FEES ON APPEAL

As Kruger-Willis argued in her reply brief, the Court should deny the defense's request for attorney fees under RAP 18.1 and RCW 4.84.250 because it failed to provide argument as to how it is entitled to such fees under the foregoing authorities. See RAP 18.1(b). Reply Br. of Appellant at 23.

[18] Opening Br. of Appellant at 24.

[19] If a dispute existed between the parties regarding payment, it would have been to the amount of accrued interest, which would have been promptly remedied, thereby ending this case in 2013. Opening Br. of Appellant at 53; CP 988, 1002-03.

The Washington State Supreme Court has held RAP 18.1(b) requires "[a]rgument and citation to authority" as necessary to inform the court of grounds for an award, not merely "a bald request for attorney fees." *Hudson v. Hapner*, 170 Wn.2d 22, 33, 239 P.3d 579 (2010) (citing *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.,* 134 Wn.2d 692, 710 n. 4, 952 P.2d 590 (1998)). A party's request for attorney fees and costs must include a separate section in its brief devoted to the fees issue as required by RAP 18.1(b). This requirement is mandatory. *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996). As the defense failed to meet the requirements under RAP 18.1(b), the Court should reconsider its award of attorney fees on appeal.

V. CONCLUSION

For the foregoing reasons, Kruger-Willis respectfully requests that the Court reconsider its opinion in this case.

RESPECTFULLY submitted this 30th day of March, 2017.

ALANA BULLIS, PS

/s/ Alana K. Bullis
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CERTIFICATE OF SERVICE

I certify that on March 30, 2017, I caused a true and correct copy of Appellant's Motion for Reconsideration to be served on the following by U.S. Mail, postage prepaid, and by email to:

Counsel for Respondent:

Paul L. Crowley
Lockner & Crowley, Inc., P.S.
524 Tacoma Avenue South
Tacoma, WA 98402

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

/s/ Alana K. Bullis
Alana K. Bullis

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APPENDIX F

Filed
Washington State
Court of Appeals
Division Two

April 6, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TORI KRUGER-WILLIS, Appellant, v. HEATHER HOFFENBURG and JOHN DOE HOFFENBURG, Respondents.	No. 48375-1-II ORDER REQUESTING AN ANSWER TO MOTION FOR RECONSIDERATION

Appellant filed a motion for reconsideration of this court's part publish opinion filed March 28, 2017, in the above entitled matter. As the motion appears to raise substantial issues and an answer would assist the court in resolving the motion, the court requests that the Respondents file an answer to the motion for reconsideration within ten (10) days of this order. Accordingly, it is

SO ORDERED.

FOR THE COURT:

Sutton, J.

SUTTON, JUDGE

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APPENDIX G

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TORI KRUGER-WILLIS, Appellant, v. HEATHER HOFFENBURG and JOHN DOE HOFFENBURG, Respondents.	No. 48375-1-II ORDER DENYING MOTION FOR RECONSIDERATION AND ORDER AWARDING ATTORNEY FEES

Appellant filed a motion for reconsideration of this court's part publish opinion filed March 28, 2017, in the above entitled matter. In response, Respondent reserved the right to recover costs and attorney's fees associated with responding to this motion. After consideration of the motion, it is hereby

ORDERED that the motion to reconsider is denied.

IT IS FURTHER ORDERED that under RAP 18.1 and RCW 4.84.250, Respondents are awarded their reasonable attorney fees and costs incurred in responding to the motion for reconsideration. Within ten days from the date of this order, Respondents shall file an affidavit of those fees and costs. A ruling on fees and costs shall be made by the commissioner at a later date. Accordingly, it is

SO ORDERED.

PANEL: Jj. Worswick; Maxa, Sutton

FOR THE COURT:

Sutton, J.

SUTTON, JUDGE

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APPENDIX H

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TORI KRUGER-WILLIS, individually and on behalf of her marital community, Appellant, v. HEATHER HOFFENBURG and JOHN DOE HOFFENBURG, and the marital community comprised thereof, Respondents, and DEREK S. LEBEDA and JANE DOE LEBEDA, and the marital community comprised thereof, Defendants.	No. 45593-5-II UNPUBLSIHED OPINION

MELNICK, J. — Tori Kruger-Willis appeals from the trial court's denial of her motion to require Heather Hoffenburg's attorney (defense counsel) to prove the authority under which he appeared. Where civil defense counsel admitted that he never had any contact with his purported client, the trial court abused its discretion by denying the motion. Accordingly, we reverse the trial court ruling and remand for further proceedings consistent with this opinion.

FACTS

This action arose out of a motor vehicle collision that occurred in 2008. Hoffenburg drove a truck that struck and damaged Kruger-Willis's parked vehicle. GEICO, Hoffenburg's insurance company, paid to repair Kruger-Willis's vehicle. Kruger-Willis then sued Hoffenburg to recover

the diminished value of her repaired vehicle. GEICO hired defense counsel and paid the costs of Hoffenburg's defense pursuant to its contractual duty to defend her.[1]

Following a three-day trial, the jury rendered a verdict in Hoffenburg's favor. The trial court awarded Hoffenburg $11,490 in costs and attorney fees.[2] Kruger-Willis appealed the trial court's award of attorney fees and costs. In an unpublished opinion, we held that Hoffenburg had standing to recover fees and costs as the aggrieved party in the underlying action and was the prevailing party entitled to fees and costs, regardless of the fact that GEICO was defending her. *Kruger-Willis v. Hoffenburg*, noted at 173 Wn. App. 1024, slip op. at 5 (2013).

Following our decision, Kruger-Willis's counsel executed a check for $11,490 payable to Heather Hoffenburg despite defense counsel's request that the check be made out to Hoffenburg's insurer, GEICO. Defense counsel asked Kruger-Willis's counsel to reissue the check payable to GEICO, but Kruger-Willis's counsel refused, stating that GEICO was not a party to the suit. Defense counsel filed a motion to enforce the trial court's award of costs and attorney fees. In support of his motion, defense counsel stated that Hoffenburg had never been involved in the defense of the case against her, and that he (defense counsel) worked for GEICO. The trial court granted this motion, but named Hoffenburg and not GEICO as the judgment creditor.[3]

Kruger-Willis then filed a motion for defense counsel to produce or prove the authority under which he appeared, and to stay all proceedings until such authority was produced or

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[1] Although Hoffenburg is not the named insured on the insurance contract with GEICO, she is an insured person under the terms of the contract because she drove the insured vehicle with permission of the named insured.

[2] The trial court awarded Hoffenburg costs and reasonable attorney fees because she was the prevailing party under RCW 4.84.250.

[3] The parties do not appeal this order.

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provided. *See* RCW 2.44.030. During argument on this motion, defense counsel admitted that he had "not had contact with the named defendant in this lawsuit." Report of Proceedings (Aug. 9, 2013) at 25. However, defense counsel asserted that he had authority to appear for Hoffenburg under the terms of the insurance contract. The trial court denied Kruger-Willis's motion. Kruger-Willis appeals.

ANALYSIS

I. STANDARD OF REVIEW

This case involves the application of RCW 2.44.030:

> The court, or a judge, may, on motion of either party, and on showing reasonable grounds therefor, require the attorney for the adverse party . . . to produce or prove the authority under which he or she appears.

This statute expressly states that the trial court "may" require an attorney to prove his or her authority. RCW 2.44.030. In other words, RCW 2.44.030 vests authority in the trial court to require a showing of authority by an attorney, but nothing in the statute purports to *require* the court to do anything.

We typically interpret the word "may" as a permissive word that confers discretion on the trial court. *See Angelo Property Co. v. Hafiz*, 167 Wn. App. 789, 817 n.49, 274 P.3d 1075 (2012); *In re Guardianship of Johnson*, 112 Wn. App. 384, 387-88, 48 P.3d 1029 (2002). Therefore, we will review the trial court's denial of Kruger-Willis's motion to prove the authority under which defense counsel appears for abuse of discretion. "'A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.'" *In re Marriage of Valente*, 179 Wn. App. 817, 822, 320 P.3d 115 (2014) (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)).

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II. TRIAL COURT RULING

Kruger-Willis assigned error to the trial court's denial of her motion under RCW 2.44.030 to require defense counsel to prove the authority under which he appears. We agree with Kruger-Willis that under the circumstances the trial court abused its discretion by denying the motion.

Defense counsel's admission that his purported client has never been involved in her own defense, that he has not had contact with the client, and that he works for her insurance company are reasonable grounds for the opposing party's motion to require counsel to prove the authority under which he appears. We hold that when, as here, a civil defense attorney states that he has never communicated with his client, it is manifestly unreasonable for the trial court to deny opposing counsel's motion to require counsel to prove the authority under which he appears.

The parties appear to invite us to decide whether defense counsel had authority to appear for Hoffenburg in this case. Because the trial court did not require defense counsel to prove the authority under which he appears, defense counsel has not had the opportunity to provide the requisite proof and the trial court has not had an opportunity to consider it. Therefore, we decline the parties' invitation to decide whether defense counsel had authority to appear for Hoffenburg in this case.

III. ATTORNEY FEES

Hoffenburg requests costs and attorney fees in connection with this appeal pursuant to RAP 14.1. Because Hoffenburg is not the prevailing party on appeal, she is not entitled to an award under RAP 14.1.

We reverse the trial court ruling and remand for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Maxa, P.J.

Lee, J.

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APPENDIX I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TORI A. KRUGER-WILLIS, individually and on behalf of her marital community, Appellant, v. HEATHER HOFFENBURG and JOHN DOE HOFFENBURG, and the marital community comprised thereof, Respondents, DEREK S. LEBEDA and JANE DOE LEBEDA, and the marital community comprised thereof, Defendants.	No. 42417-7-II UNPUBLISHED OPINION

QUINN-BRINTNALL, J. — Tori Kruger-Willis appeals the trial court's award of attorney fees and costs following a trial de novo, arguing that Heather Hoffenburg's motion for fees and costs was untimely, that Hoffenburg's insurance company lacked standing to request fees and costs, and that the trial court erred in awarding fees incurred before Hoffenburg requested the trial de novo. Finding no error, we affirm.

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FACTS

This action arises out of a motor vehicle collision that occurred on February 21, 2008. Hoffenburg was driving a truck that struck and damaged Kruger-Willis's parked vehicle. GEICO, Hoffenburg's insurance company, paid to repair Kruger-Willis's vehicle. Kruger-Willis then sued Hoffenburg to recover the diminished value of her repaired vehicle. Counsel for GEICO represented Hoffenburg throughout the proceedings that followed.

Kruger-Willis responded to Hoffenburg's request for a statement of damages by listing her damages as $6,353. The case proceeded to mandatory arbitration, and the arbitrator made an award of $5,044 in favor of Kruger-Willis. Hoffenburg filed a request for a trial de novo and a demand for a jury trial. She then provided Kruger-Willis with an offer of judgment for $1,000 that Kruger-Willis declined. On April 28, 2011, following a three-day trial, the jury rendered a zero dollar verdict in Hoffenburg's favor.

On May 27, 2011, Hoffenburg moved for statutory costs and reasonable attorney fees. At the June 6 hearing, and upon Hoffenburg's further motion, the trial court entered judgment upon the jury's verdict in her favor and set the matter over for further detail regarding her request for attorney fees.

On June 16, Hoffenburg filed a second motion for costs and attorney fees. At the June 27 hearing on that motion, the trial court awarded her $11,490 in costs and fees. This amount included $500 in costs, which included the jury demand and trial de novo filing fees, and $10,990 in attorney fees based on 62.8 hours multiplied by a rate of $175 per hour.

Kruger-Willis appeals this award.

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DISCUSSION

We review de novo a trial court's determination as to whether a particular statutory or contractual provision authorizes an award of attorney fees. *Gray v. Pierce County Housing Auth.*, 123 Wn. App. 744, 760, 97 P.3d 26 (2004). Hoffenburg sought attorney fees under RCW 4.84.250 and RCW 4.84.270 and costs under RCW 4.84.010. RCW 4.84.250 provides,

> [I]n any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is [$10,000] or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees.

The plaintiff is the prevailing party if the plaintiff's recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff. RCW 4.84.260. The defendant is the prevailing party if the recovery is as much or less than the amount offered in settlement by the defendant. RCW 4.84.270. The prevailing party may recover filing fees under RCW 4.84.010(1).

TIMELINESS

Kruger-Willis argues initially that Hoffenburg's motion for fees and costs pursuant to these statutes was untimely because it followed an untimely presentation of the judgment. Kruger-Willis contends that under CR 54(e), Hoffenburg's attorney was required to present a proposed form or order of judgment no later than 15 days after the entry of the verdict. The pertinent provision of the rule provides,

> The attorney of record for the prevailing party shall prepare and present a proposed form of order or judgment not later than 15 days after the entry of the verdict or decision, or at any other time as the court may direct.

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CR 54(e). While acknowledging that this provision grants a trial court discretion to enlarge the 15-day time period, Kruger-Willis contends that the court's discretion is limited by the following provisions of CR 6(b):

> **Enlargement**. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or, (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 50(b), 52(b), 59(b), 59(d), and 60(b).

Kruger-Willis cites no authority for her assertion that a trial court may exercise its discretion to direct entry of judgment under CR 54(e) "at any other time" only where the prevailing party's failure to act within 15 days of the verdict is the result of excusable neglect, and we reject this reading of the rules. CR 54(e) expressly grants trial courts the discretion to extend the 15-day period for presenting a proposed judgment, and that discretion is not limited by the conditions on time enlargement in CR 6(b). *See State v. Kone*, 165 Wn. App. 420, 435, 266 P.3d 916 (2011) (where a court rule's meaning is unambiguous, we need look no further), *review denied*, 173 Wn.2d 1034 (2012).

Because Hoffenburg's presentation of the order of judgment was timely under CR 54(e), her motion for costs and fees was timely under CR 54(d), which provides that unless otherwise provided by statute or court order, claims and motions for costs and fees must be filed no later than 10 days after entry of judgment. CR 54(d)(1), (2); 4 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE CR 54, at 41 (supp. 2012). Hoffenburg complied with this temporal requirement by filing her second motion for fees and costs 10 days after entry of the judgment. *See Corey v. Pierce County*, 154 Wn. App. 752, 774, 225 P.3d 367 (timeliness requirement of

CR 54(d) applies only after the underlying claim is reduced to judgment in court), *review denied*, 170 Wn.2d 1016 (2010).

STANDING

Kruger-Willis next contends that GEICO lacked standing to move for an award of fees and costs. This contention is based on her allegation that GEICO was not an aggrieved party that could file a request for trial de novo under MAR 7.1. Under this rule, any aggrieved party that has not waived the right to appeal may request a trial de novo within 20 days after the arbitrator's award is filed. MAR 7.1; 4A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE MAR 7.1, at 54 (7th ed. 2008). The party seeking review must be named in the notice for trial de novo. *Wiley v. Rehak*, 143 Wn.2d 339, 345, 20 P.3d 404 (2001).

The record shows, however, that Hoffenburg was the aggrieved party named in the notice for trial de novo and that Hoffenburg filed the motion for fees and costs. The fact that GEICO is defending Hoffenburg does not render the insurance company a party or somehow diminish Hoffenburg's standing as either the aggrieved party in the underlying action or the prevailing party entitled to fees and costs under RCW 4.84.250.

MAR 7.3

Finally, Kruger-Willis contends that the trial court erred in compensating Hoffenburg for attorney fees incurred before the trial de novo. As support, she cites MAR 7.3, which provides,

> The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo. . . . Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule.

This rule does not apply for two reasons. First, Kruger-Willis did not appeal the arbitration award. Second, Hoffenburg requested fees pursuant to RCW 4.84.250, which does

not contain MAR 7.3's limitation on an award of fees. The trial court properly awarded reasonable attorney fees under RCW 4.84.250 where the amount pleaded by Kruger-Willis in response to Hoffenburg's request for a statement of damages was less than $10,000. *See Pierson v. Hernandez*, 149 Wn. App. 297, 303, 202 P.3d 1014 (2009) (request for damages triggers pleading of damages required under RCW 4.84.250). Kruger-Willis does not succeed in showing that the trial court erred in awarding Hoffenburg reasonable attorney fees and costs.

In the final sentence of her brief, Hoffenburg asserts that "[c]osts and reasonable attorney's fees associated with this appeal should also be awarded." Br. of Resp't at 15. Because she fails to include supporting argument or authority for her request for attorney fees on appeal, we deny it. *In re Marriage of Taddeo-Smith*, 127 Wn. App. 400, 407, 110 P.3d 1192 (2005); *see also* RAP 18.1(b) (party must devote section of opening brief to request for fees). Hoffenburg is entitled to costs upon compliance with RAP 14.4.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Quinn-Brintnall, J.
QUINN-BRINTNALL, J.

We concur:

Van Deren, J.
VAN DEREN, J.

Worswick, C.J.
WORSWICK, C.J.

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APPENDIX J

WSBA

Advisory Opinion: 974
Year Issued: 1986
RPC(s): RPC 5.4(c)
Subject: Independent judgment; lawyer retained by insurance company to represent insured

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The Committee was of the opinion that a lawyer representing an insured client must follow the instructions of the client, and not the insurance carrier. Therefore, a lawyer could bring a motion for summary judgment at the request of the insurance carrier only if it was in the client's interest to do so and the client consented after full disclosure. The Committee based its opinion upon Rule 5.4(c) of the Rules of Professional Conduct.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.

APPENDIX K

WSBA

Advisory Opinion: 928
Year Issued: 1985
RPC(s):
Subject: Formation of attorney-client relationship

[The lawyer was retained by an insurance company to represent an employee of the insured company. The employee was covered under the terms of the insurance policy but was no longer employed by the insured.] In reviewing your inquiry, the Committee understood the facts to be that the employee you had been requested to represent had had no contact with you, and that in fact no attorney-client relationship had ever been formed. Based upon that understanding of the facts, the Committee was of the opinion that you had no authority to act as lawyer for the employee, and therefore should not enter a general denial on his behalf.

APPENDIX L

WSBA

Advisory Opinion: 1821
Year Issued: 1998
RPC(s): RPC 1.4; 1.6; 1.7(b); 1.15; 4.3
Subject: Formation of attorney-client relationship; conflict of interest; adverse party leaves lawyer detailed voice mail message about potential lawsuit against current client

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The Committee researched and reviewed your inquiry concerning the responsibility of a lawyer to his own client and to a caller who leaves a detailed message about the caller's possible law suit against the lawyer's client on lawyer's answering machine when seeking to hire the lawyer and determined the following:

As you point out in your letter, answering your question requires first a determination whether a client-lawyer relationship exists. That is a legal question and this Committee is prohibited from giving opinions on legal questions.

To resolve this question for yourself, you may want to read the Preamble to the ABA Model Rules of Professional Conduct and In re McGlothlen, 99 Wn.2d 515, 663 P.2d 1330 (1983); Bohn v. Cody, 119 Wn.2d 712, 862 P.2d 117 (1992); and State v. Hansen, 122 Wn.2d 712, 862 P.2d 117 (1993).

If you conclude that you have no client-lawyer relationship with the caller, then your obligation to the caller is prescribed by RPC 4.3 and it is the Committee's opinion that your secretary's call to the caller satisfied that requirement. Your obligation to your own client, the company, would be prescribed by RPC 1.4 and you would be required to inform the company of the pending lawsuit.

If you conclude that you do have a client-lawyer relationship with the caller, then your obligations are prescribed by RPC 1.6, 1.7(b) and 1.15(a)(i). You will have to keep the content of the call confidential and you will have to decline to represent the company in the caller's lawsuit.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or

opine about any other applicable law other than the meaning of the Rules of Professional Conduct.
