

**FILED**

**MAY 30 2012**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**

**Case No. 304159**

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KELLY COVEY,

RESPONDENT

v.

NEHEMIAH COVEY,

APPELLANT

and

CRAIG MASON (appealing on his own behalf and as counsel for Mr.  
Covey)

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**BRIEF OF APPELLANT**

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Craig Mason, WSBA#32962  
Attorney for Appellant (and on his own behalf)  
Gaia Law  
W. 1408 Broadway  
Spokane, WA 99201  
509-327-2560

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<b>TABLE OF CONTENTS</b>	Page
<b>Table of Cases</b>	iv
<b>Table of Rules</b>	v
<b>I. Introduction</b>	1
<b>II. ASSIGNMENTS OF ERROR</b>	3
<b>Assignments of Error</b>	
<b>No. 1:</b> It was error not to remove the GAL or to require her to more completely investigate.	3
<b>No. 2:</b> It was error to sanction the father for submitting his prior counsel's email regarding the GAL's reputation for incomplete performance, as one of many emails showing the context of fundamental unfairness of the GAL.	3
<b>No. 3:</b> It was error to sanction new counsel for allowing the father to submit this email.	3
<b>Issues Pertaining to Assignments of Error</b>	3
<b>No. 1:</b> Was the GAL report substantively fair? No. The report was not fair in it was too thin on facts, and failed to contact or interview the father's witnesses. (Assignment of Error No. 1)	3
<b>No. 2:</b> Did the GAL maintain the appearance of fairness? No. The GAL appeared to be biased against the father. (Assignment of Error No. 1)	3
<b>No. 3:</b> Was it reasonable for the father to express his sense of the lack of the appearance of fairness by sharing with the court what his former counsel told him about the GAL, both as to counsel's opinion and as to the GAL's reputation? Yes. The father experienced profound bias from the GAL in her refusing to investigate and in her refusing to facilitate less-restrictive visits. It was reasonable of Mr. Covey to want	3

**Table of Contents, continued.**

Page

the court to take the reputation of the GAL into account in Mr. Covey's understanding of her bias and to understand her motives, and his motives, in the process that lacked the appearance of fairness. (Assignment of Error No. 2)

**No. 4:** Should the father have been sanctioned for filing this email with the court as the father strove to express the bases, including those from his prior counsel, for his sense of the lack of fairness, the lack of the appearance of fairness, and lack of complete investigation by the GAL by attaching the email to the father's declaration? No. The father had a story to tell about his experience of bias, and it was reasonable that these emails from prior counsel were part of his story of injustice. (Assignment of Error No. 2) 4

**No. 5:** Should the father's counsel have been sanctioned for allowing the father to include this email with his declaration? No. The reputation of the GAL was relevant under an ER 608 argument, and the systemic experience of the general public should be relevant to the court as it regulates and administers the guardians ad litem who often determine the outcome of the case by shaping how the words of the children come to the court. (Assignment of Error No. 3) 4

**No. 6:** Was the GAL's refusal to facilitate less-restrictive visits, in the six months prior to trial, a substantial sign of bias that warranted judicial remedy, when the parenting plan that was signed by the GAL as a final order allowed the father three weekends per month without any relevant restrictions? Yes. The GAL showed material bias against Mr. Covey. (Assignment of Error No. 1) 5

**No. 7:** Should the GAL be removed prior to the determination being made in Section 4.3 of the 9/13/11 parenting plan? Yes. Even though the parenting plan visitation and placement terms Mr. Covey accepts as a status quo he does not intend to disturb, the restrictions on joint decision-making are to be removed in conjunction with a finding by a GAL that the father has not 5

<b>Table of Contents, continued.</b>	<b>Page</b>
disparaged the mother. Mr. Covey requests a new GAL on the case to make this determination. (Assignment of Error No. 1)	
<b>No. 8:</b> Should the restrictions be waived, given the lack of factual foundation for them? Yes. The restrictions in the agreed parenting order should be voided because the normal contract laws of duress and unconscionability should be applied to make a settlement agreement voidable as to “agreed” findings under RCW 26.09.191 (Sections. 2.1 and 2.2 of the Parenting Plan form, tied to Section 4.3 as to disparagement), and this duress and unconscionability analysis should serve as the basis to vacate the findings and restrictions in the coerced agreed order if the court determines that it was error for the GAL not to be removed or not to be required to investigate further. (Assignment of Error No. 1)	6
<b>III. STATEMENT OF THE CASE</b>	6
<b>IV. SUMMARY OF THE ARGUMENT</b>	7
<b>V. ARGUMENT</b>	11
<b>A. Sanctions: Trial Court Abused Its Discretion</b>	11
<b>B. Rules of Professional Conduct Do Not Create Causes of Action</b>	15
<b>C. The <i>Bobbit</i> Case and the GALRs</b>	15
<b>D. ER 608: Reputation under the GALRs = Credibility</b>	19
<b>E. Mr. Covey’s State of Mind is Relevant to Duress</b>	20
<b>F. Is Remedy on the Parenting Plan Legally Possible?</b>	21
<b>VI. CONCLUSION</b>	24
<b>VII. APPENDIX</b>	26

<b>ER 608:</b>	26
<b>ER 801:</b>	27
<b>CR 11:</b>	28
<b>GALR 2:</b>	29

**TABLE OF CASES** -- page cited

*Adler v. Fred Lind Manor*, 153 Wash.2d 331, 345-47, 103 P.3d 773 (2004)  
-- Page 23.

*Betts v. Betts*, 3 Wn.App. 53, 62, 473, P.2d 403 (1970). *review denied*, 78  
Wash.2d 994 (1970) -- Page 20.

*Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 218-21, 829 P.2d 1099  
(1992) -- Page 11-14.

*Dutch Village Mall v. Pelletti*, 162 Wn.App. 531, 256 P.3d 1251 (2011)  
--- Page 11.

*Hanson v. City of Snohomish*, 121 Wn.2d 552, 556, 852 P.2d 295 (1993)  
--- Page 11.

*Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992) – Page 15.

*Housing Authority of City of Everett v. Kirby*, 154 Wn.App. 842, 858, fn  
40, 226 P.3d 222 (2010) -- Page 18.

*In re Marriage of Bobbitt*, 135 Wn.App. 8, 25-27, 144 P.3d 306 (2006) –  
Page 15 -17.

*Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn.App. 409, 417, 157  
P.3d 431 (2007) – Page 15.

*In re Marriage of Bobbitt*, 135 Wn.App. 8, 25-27, 144 P.3d 306 (2006)  
(judgment on fees vacated and remanded).

*State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) – Page 18.

*Loc Thien Truong v. Allstate Prop. & Cas. Ins. Co.*, 151 Wn.App. 195, 208, 211 P.3d 430 (2009) – Page 11.

*Lopez-Stayer v. Pitts*, 122 Wn.App. 45, 51, 93 P.3d 904 (2004) – Page 18.

*Noble v. Safe Harbor Family Pres. Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009). ---- Page 11.

*Skimming v. Boxer*, 119 Wn. App. 748, 755, 82 P.3d 707 (2004) – Page 14.

*State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) – Page 15.

*State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006) – Page 19.

*State v. Spencer*, 111 Wn.App. 401, 407-09, 45 P.3d 209 (2002) -- Page 20.

*Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). --- Page 11 & 18.

<b>TABLE OF RULES:</b>	Pages cited
<b>ER 608:</b>	16
<b>ER 801:</b>	17
<b>CR 11:</b>	7, 8, 15 & 22
<b>GALR 2:</b>	12-14, & 21

## **I. INTRODUCTION**

After a cursory and incomplete investigation, the Guardian ad Litem in this case, issued a report that was very negative against the father, and did so without sufficient investigation. The GAL, Karen Vache, did not interview the father's witnesses, and her report was substantively incomplete, and her report lacked the appearance of fairness. The GAL also failed to follow a March, 2011, court order that would have allowed the father visits under less restrictive conditions during the six months prior to trial, set for September, 2011.

Upon engaging new counsel in July, 2011, the father, Nehemiah Covey, sought to have the GAL removed, or compelled to complete her investigation properly by interviewing his witnesses. In support of this motion, the father submitted his own critiques of the GAL report, and Mr. Covey appended emails from his former attorney, Mr. Hughes, regarding the reputation of the GAL and regarding prior incomplete performances of the GAL, as well as regarding the GAL's refusal to undertake the steps for less-restrictive visitation for Mr. Covey. Mr. Covey submitted these emails to show the entire context of the non-performance of the GAL, especially in regards to the visits and lack of investigation.

Mr. Covey was sanctioned by the trial court for one of the several

emails that he attached to his declaration, and Mr. Covey's attorney, Mr. Mason, was sanctioned for allowing Mr. Covey to submit this one email from Mr. Hughes to Mr. Covey. As already noted, the sanctioned email was one of many attached to Mr. Covey's declaration that protested the lack of fair investigation by the GAL.

The GAL was not removed nor ordered to engage in further investigation by the trial court, and so Mr. Covey felt compelled to settle the parenting plan before trial to assure immediate and generous visitation with his children. The only restriction against the father in the final parenting plan of 9/13/11 was to not disparage the mother for a period of six months, to be verified by the GAL

This minimal restriction, signed off by the GAL, further shows that the father was at a unique disadvantage in this case to have been treated as if severe restrictions would be appropriate, when no substantive restrictions were ultimately required, except in a minor and contingent way (see citations to the record, below). It is a real threat to Mr. Covey to still be dependent upon further investigations by Ms. Vache to restore joint-decision-making, and removal of the GAL is sought on appeal.

Appellate guidance is appropriate for the court to provide to this case and guidelines are of public interest, given the paucity of precedent.

Additionally, the sanctions against Mr. Covey and Mr. Mason

should be reversed as lacking proper legal and factual foundation.

## **II. ASSIGNMENTS OF ERROR**

### **Assignments of Error**

No. 1: It was error not to remove the GAL or to require her to more completely investigate.

No. 2: It was error to sanction the father, Nehemiah Covey, for submitting his prior counsel's email regarding the GAL's reputation for incomplete performance.

No. 3: It was error to sanction new counsel, Mr. Mason, for allowing the father to submit this email.

### **Issues Pertaining to Assignments of Error**

No. 1: Was the GAL report substantively fair? No. The report was not fair in it was too thin on facts, and failed to contact or interview the father's witnesses. (Assignment of Error No. 1)

No. 2: Did the GAL maintain the appearance of fairness? No. The GAL appeared to be biased against the father, and appeared to make inaccurate representations that Mr. Covey's witnesses did not get back to her, when they had not been contacted. (Assignment of Error No. 1)

No. 3: Was it reasonable for the father to express his sense of the lack of the appearance of fairness, and the duress he experienced, by

sharing with the court what his former counsel told him about the GAL, both as to former counsel's opinion and as to the GAL's reputation? Yes. The father experienced profound bias from the GAL in her refusing to investigate, and in her refusing to facilitate less-restrictive visits. It was reasonable of Mr. Covey to want the court to take the reputation of the GAL into account in Mr. Covey's understanding of her bias and to understand her motives, and it was reasonable of Mr. Covey to want the court to understand his experience, and his motives, in a process that lacked the appearance of fairness and which compelled his settlement from duress. (Assignment of Error No. 2)

No. 4: Should the father have been sanctioned for sharing this email with the court as the father strove to express the bases, including those from his prior counsel, for his sense of the lack of fairness, the lack of the appearance of fairness, and lack of complete investigation by the GAL by attaching the email to the father's declaration? No. The father had a story to tell about his experience of bias on the part of Ms. Vache, and it was reasonable that these emails from prior counsel were part of his story of injustice, given the confirmation Mr. Hughes had given him as to the reasonableness of his views. (Assignment of Error No. 2)

No. 5: Should the father's counsel have been sanctioned for allowing the father to include this email with his declaration? No. Mr.

Covey was explaining to the court how his state of mind was reached, and how unfair the process appeared to him, and the duress he was under. Additionally, the reputation of the GAL was relevant under an ER 608 argument, and the systemic experience of the family law community should be relevant to the court as it regulates and administers the guardians ad litem who often determine the outcome of the case by shaping how the words of the children come to the court. (Assignment of Error No. 3)

No. 6: Was the GAL's refusal to facilitate less-restrictive visits, in the six months prior to trial, a substantial sign of bias that warranted judicial remedy, when the parenting plan that was signed by the GAL as a final order allowed the father three weekends per month without any relevant restrictions? Yes. The GAL showed material bias against Mr. Covey. (Assignment of Error No. 1)

No. 7: Should the GAL be removed prior to the determination being made in Section 4.3 of the 9/13/11 parenting plan? Yes. Even though the parenting plan visitation and placement terms Mr. Covey accepts as a status quo he does not intend to disturb, the restrictions on joint decision-making are to be removed in conjunction with a finding by a GAL that the father has not disparaged the mother. Mr. Covey requests a new GAL on the case to make this determination. (Assignment of Error No. 1)

No. 8: Should the restrictions be waived, given the lack of factual foundation for them? Yes. The restrictions in the agreed parenting order should be voided because the normal contract laws of duress and unconscionability should be applied to make a settlement agreement voidable as to “agreed” findings under RCW 26.09.191 (Sections. 2.1 and 2.2 of the Parenting Plan form, tied to Section 4.3 as to disparagement), and this duress and unconscionability analysis should serve as the basis to vacate the findings and restrictions in the coerced agreed order if the court determines that it was error for the GAL not to be removed or not to be required to investigate further. (Assignment of Error No. 1)

### **III. STATEMENT OF THE CASE**

The dissolution at issue was filed on 5/18/10. CP: 156-67. The GAL, Karen Vache, was appointed on 6/29/10. CP: 168-77.

On 1/14/11, the Respondent filed for a restraining order, which was granted, and the final variant of this restraining order was entered on 3/18/11. CP: 1-2. This order severely limited Mr. Covey’s visitation. Id.

The restraining order of 3/18/11 stated that while the prior order of 2/21/11 would remain in effect (which required supervised visits at Fulcrum Institute) that the court would like to see visits in a “less formal setting” once Mr. Covey showed that he did not disparage the mother to

the children (disparagement was the main accusation underlying the restraints) and once the GAL agreed. CP: 2.

The record shows no additional disparagement issues after this were raised to Mr. Covey in early 2011.

The GAL never took the steps to reduce the burdens and expense of the visitations for the father, Mr. Covey. CP: 87-90, 93, 117, and see sealed CP: 3-11.

The GAL did not interview Mr. Covey's witnesses. CP: 3-11. See also the Declarations of Hannah Prevost, CP: 14-15, Kimberly Covey, CP: 16-17, Amelia Summers, CP: 18-19, Michelle Covey, CP: 20-21, Marnie Macrae, 22-23, Angele Willms, CP: 26-27, and see the Declaration of Paul M. Anderson rebutting that Ms. Vache did not receive any questionnaires back from Mr. Covey's witnesses, CP: 24-25. (Note, the others, supra, could not "return" questionnaires they never received, as they were never contacted by the GAL.) Some of the substance of the testimony of these witnesses can be found at CP: 94-107.

The GAL did one home visit, for only 20 to 30 minutes. CP: 40. This visit was in late summer of 2010. CP: 96. The GAL report was grossly flawed. CP: 125-51 (GAL Report) For examples of flaws, see above, and see, e.g., CP: 43-56 & 77-78.

When Mr. Covey's motion of early July, 2011, to remove the GAL

was finally heard, the trial court refused to remove the GAL and refused to order further investigation by the GAL, on 8/19/11. CP: 79.

For nine months (January, 2011 to September, 2011), Mr. Covey had been reduced to a couple of hours a week of supervised visits in the essentially “institutionalized day care” conditions of the Fulcrum Institute. (See CP: 31-32) These visits were very inconvenient for the children, and made it difficult for Mr. Covey to retain his bond with his children.

The GAL refused to facilitate less restrictive visits, and the trial court, in July, 2011, refused to address any interim parenting plan issues. CP: 60. The order of 7/21/11 states “Respondent may not move the court to alter the current temporary order in any fashion.” CP: 59-60. Trial was set for 9/12/11. Id.

Then, on 10/28/11, the trial court sanctioned Mr. Covey for one of several emails that he attached to his declaration of 7/12/11 (CP: 3-11), and the court sanctioned Mr. Mason for allowing Mr. Covey to enter this email. CP: 80-81.

The RPCs were used as a basis for sanction. CP: 81.

A request for reconsideration followed. CP: 84-121, and CP: 122-24. An order denying reconsideration was entered on 3/21/12. CP: 152-55. The order of 3/21/12 abandons the RPCs as a basis of sanctions, and appears to shift the basis of the sanction from the RPCs to CR 11.

Under the duress of facing trial with a biased GAL, Mr. Covey entered an agreed parenting plan on 9/13/11, which allowed him to immediately have his children three weekends per month, with no relevant restrictions except that Mr. Covey not disparage the mother. The parenting plan of 9/13/11 also kept Ms. Vache on the case for a subsequent hearing to restore joint-decision-making to Mr. Covey. CP: 178-86. This appeal followed.

#### **IV. SUMMARY OF THE ARGUMENT**

The sanction against Mr. Covey (and against Mr. Mason) did not rest upon proper law. A sanction is reviewed as an abuse of discretion, and an error of law is always an abuse of discretion. Rules of Professional Conduct do not create causes of action, and any CR 11 sanctions require careful findings with a specificity that was not present in this case. These are errors of law. On the facts, as well as on the law, these sanctions issued on unreasonable and untenable grounds.

As to the GAL, it was an abuse of discretion not to remove her, or to at least compel her to investigate more thoroughly. Mr. Covey's subsequent settlement was compelled by the GAL's bias. Given that the only pathway for the child hearsay into court was through the GAL, Mr. Covey settled so he could immediately again see his children.

However, the remedy Mr. Covey would seek would be to have the

GAL, Karen Vache, removed, prospectively, and to void any findings under 2.1 and 2.2 of the Parenting Plan, and to void restrictions in Section 4.3 of the Parenting Plan.

Although ordering a new trial might be a remedy some would seek on these same facts, Mr. Covey does not want to disrupt the current parenting arrangement, which has been successful for the children, and he only wishes to void the restrictions against him in the Parenting Plan of 9/13/11, or, alternatively, Mr. Covey wishes to have Karen Vache removed from the case before he proceeds with the motion for the remedies described in Section 4.3 of the Parenting Plan of 9/13/11. CP: 184-85.

Any trial was pointless for Mr. Covey, once the trial court refused to remove the GAL or to have the GAL complete her investigation. Not only was trial hopeless with a biased GAL, and no other remedy was reasonably available as Mr. Covey was under extreme duress to begin seeing his children immediately under suitable conditions (not at Fulcrum).

The GAL signed off on a liberal visitation parenting plan which contradicted the negative conclusions her report drew about Mr. Covey.

This irregularity should justify a new trial at the option of Mr. Covey; however, as noted, the narrow relief he requests is that the court void any restrictions upon him, or, alternatively, he asks that the court remove Ms. Vache and order her replacement prior to the hearing under

Section 4.3 of the 9/13/11 parenting plan.

## V. ARGUMENT

### A. Sanctions: Trial Court Abused Its Discretion

An order on sanctions is reviewed for an abuse of discretion. "A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons." *Noble v. Safe Harbor Family Pres. Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009). An error of law constitutes an untenable reason. *Id.*; *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). Issues of law are reviewed de novo. *Hanson v. City of Snohomish*, 121 Wn.2d 552, 556, 852 P.2d 295 (1993).

In reversing CR 11 sanctions as an abuse of discretion, the *Dutch Village* court cited the long-standing principle that CR 11 sanctions should not "chill" representation. *Dutch Village Mall v. Pelletti*, 162 Wn.App. 531, 256 P.3d 1251 (2011), citing *Loc Thien Truong v. Allstate Prop. & Cas. Ins. Co.*, 151 Wn.App. 195, 208, 211 P.3d 430 (2009).

The most thorough and classic case for exploring sanctions is *Bryant v. Joseph Tree, Inc*, which laid out in detail that a sanction should not issue unless the court makes an explicit finding that the pleading was (a) not well-grounded in fact, and (b) that the attorney failed to conduct a reasonable investigation. See below for details (emphasis added):

The petitioners first argue that the Court of Appeals erred in determining that a complaint may not be the subject of CR 11 sanctions without a finding that the complaint lacked a factual or legal basis. The petitioners maintain that CR 11 sanctions may be imposed against an attorney<sup>[2]</sup> regardless of whether or not the attorney's complaint has a factual and legal basis. The text of CR 11 does not explicitly require a finding that a pleading lack a factual or legal basis. Before the court may impose CR 11 sanctions. We must therefore look to the purpose behind CR 11 to determine if such a finding is required.

The present CR 11 was modeled after and is substantially similar to the present Federal Rule of Civil Procedure 11 (Rule 11). See *Miller v. Badgley*, 51 Wash.App. 285, 299, 753 P.2d 530, review denied, 111 Wash.2d 1007 (1988). We may thus look to federal decisions interpreting Rule 11 for [219] guidance in construing CR 11. *In re Lasky*, 54 Wash.App. 841, 851, 776 P.2d 695 (1989); see also *American Discount Corp. v. Saratoga West, Inc.*, 81 Wash.2d 34, 37, 499 P.2d 869 (1972) (construing CR 24 in light of Fed.R.Civ.P. 24).

The purpose behind CR 11 is to deter baseless filings and to curb abuses of the judicial system. See *Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, --- U.S. ---, ---, 111 S.Ct. 922, 934, 112 L.Ed.2d 1140 (1991). Both the federal rule and CR 11 were designed to reduce "delaying tactics, procedural harassment, and mounting legal costs." 3A L. Orland, Wash.Prac., Rules Practice § 5141 (3d ed. Supp.1991). CR 11 requires attorneys to "stop, think and investigate more carefully before serving and filing papers." See Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. 165, 192 (1983). "[R]ule 11 has raised the consciousness of lawyers to the need for a careful pre-filing investigation of the facts and inquiry into the law." Commentary, Rule 11 Revisited, 101 Harv.L.Rev. 1013, 1014 (1988).

However, the rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. at 199. The Ninth Circuit has observed that:

Were vigorous advocacy to be chilled by the excessive use of sanctions, wrongs would go uncompensated. Attorneys, because

of fear of sanctions, might turn down cases on behalf of individuals seeking to have the courts recognize new rights. They might also refuse to represent persons whose rights have been violated but whose claims are not likely to produce large damage awards. This is because attorneys would have to figure into their costs of doing business the risk of unjustified awards of sanctions.

*Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1363-64 (9th Cir.1990). Our interpretation of CR 11 thus requires consideration of both CR 11's purpose of deterring baseless claims as well as the potential chilling effect CR 11 may have on those seeking to advance meritorious claims.

Complaints which are "grounded in fact" and "warranted by existing law or a good faith argument for the [220] extension, modification, or reversal of existing law" are not "baseless" claims, and are therefore not the proper subject of CR 11 sanctions. The purpose behind the rule is to [829 P.2d 1105] deter baseless filings, not filings which may have merit. The Court of Appeals therefore correctly determined that a complaint must lack a factual or legal basis Before it can become the proper subject of CR 11 sanctions.

If a complaint lacks a factual or legal basis, the court cannot impose CR 11 sanctions unless it also finds that the attorney who signed and filed the complaint failed to conduct a reasonable inquiry into the factual and legal basis of the claim. See *Townsend* at 1362 (a filing may be subject to Rule 11 sanctions where it is both baseless and made without a reasonable and competent inquiry). The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions. CR 11 is not a mechanism for providing attorney's fees to a prevailing party where such fees would otherwise be unavailable. *John Doe v. Spokane & Inland Empire Blood Bank*, 55 Wash.App. 106, 111, 780 P.2d 853 (1989).

The reasonableness of an attorney's inquiry is evaluated by an objective standard. *Miller*, 51 Wash.App. at 299-300, 753 P.2d 530. CR 11 imposes a standard of "reasonableness under the circumstances". Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. at 198; see also *Miller* at 301, 753 P.2d 530. The court is

expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion or legal memorandum was submitted. See Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. at 199. The court should inquire whether a reasonable attorney in like circumstances could believe his or her actions to be factually and legally justified. *Spokane & Inland Empire Blood Bank*, 55 Wash.App. at 111, 780 P.2d 853 (quoting *Cabell v. Petty*, 810 F.2d 463, 466 (4th Cir.1987)). In making this determination, the court may consider such factors as:

the time that was available to the signer, the extent of the attorney's reliance upon the client for factual support, whether [221] a signing attorney accepted a case from another member of the bar or forwarding attorney, the complexity of the factual and legal issues, and the need for discovery to develop factual circumstances underlying a claim.

*Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 218-21, 829 P.2d 1099

(1992).

**Applying *Bryant v. Joseph Tree*:** There is no proper legal or factual basis to sanction Mr. Covey or Mr. Mason. This abuse of discretion should be reversed. *See also, Skimming v. Boxer*, 119 Wn. App. 748, 755, 82 P.3d 707 (2004) (Trial courts should only impose CR 11 sanctions if an attorney makes a baseless filing and "it is patently clear that [the] claim has absolutely no chance of success"). The entirety of Mr. Covey's facts could have led the trial court to dismiss the GAL, or to require Ms. Vache to further investigate the case. Success by Mr. Covey was possible, even though such relief was not forth-coming from the trial court.

## **B. Rules of Professional Conduct Do Not Create Causes of**

### **Action**

The order of 10/28/11 uses the Rules of Professional Conduct to create a cause of action (CP: 81), contrary to long-established precedent.

*Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992).

As the court wrote in the *Just Dirt* case:

The RPCs cannot be proper grounds for the trial court to base a fee award because a "breach of an ethics rule provides only a public, e.g., disciplinary, remedy and not a private remedy." *Hizey v. Carpenter*, 119 Wash.2d 251, 259, 830 P.2d 646 (1992). On remand, *Just Dirt* is not entitled to attorney fees on this ground.

*Just Dirt, Inc. v. Knight Excavating, Inc.*, 138 Wn.App. 409, 417, 157 P.3d 431 (2007). This law had been presented to the trial court. E.g., CP: 37-38. (Also, no CR 11 warning letter or discussion was provided by the GAL prior to her motion for sanctions -- but then CR 11 appeared in the order on reconsideration, when then initial basis of the sanction was the RPCs.)

**Application of *Just Dirt*:** The trial court committed clear error of law in the order of 10/28/12, in using the RPCs as a basis of a cause of action. CP: 80-83, esp. 81. The order on sanctions should be reversed in regards to both Mr. Covey and Mr. Mason.

## **C. The *Bobbit* Case and the GALRs**

The *Bobbit* case covers these issues, where there is otherwise a lack

of authority. The case is quoted at length, below (emphasis added):

Following public outcry about perceived unfair and improper practices involving GALs, the legislature adopted RCW 26.12.175 to govern the interactions of courts and GALs and our Supreme Court adopted the GALR. These measures are intended to assure that the welfare of the children whose parents are involved in litigation concerning them remains the focus of any investigation and report, and that acrimony and accusations made by the parties are not taken up by an investigator whose only job is to report to the court after an impartial review of the parties and issues.

¶35 To that end, GALR 2 articulates the general responsibilities of GALs. As relevant here, it states:

{I}n every case in which a guardian ad litem is appointed, the guardian ad litem shall perform the responsibilities set forth below{:}.

**(b) Maintain independence.** A guardian ad litem shall maintain independence, objectivity and the appearance of fairness in dealings with parties and professionals, both in and out of the courtroom.

**(f) Treat parties with respect.** A guardian ad litem is an officer of the court and as such shall at all times treat the parties with respect, courtesy, fairness and good faith.

**(g) Become informed about case.** A guardian ad litem shall make reasonable efforts to become informed about the facts of the case and to contact all parties. A guardian ad litem shall examine material information and sources of information, taking into account the positions of the parties.

**(o) Perform duties in a timely manner.** A guardian ad litem shall perform responsibilities in a prompt and timely manner, and, if necessary, request timely court reviews and judicial intervention in writing with notice to parties or affected agencies.

GALR 2 (emphasis added).

[page 26] ¶36 The evidence shows that Esser's attorney wrote a letter to the GAL asking her to conceal information from Bobbitt

about an upcoming motion. The GAL's [144 P.3d 315] failure to share this information with Bobbitt violates the appearance of fairness and she failed to treat Bobbitt with the respect due him as K.B.'s interested parent. GALR 2(b), (f). In addition, the GAL refused to meet with Bobbitt or to interview his references despite continuing the investigation and contact with other witnesses and despite knowing that he wanted to engage in the investigatory process well before trial. The GAL continually focused on payment of her bill rather than an investigation that would allow her to hear both sides of the story about K.B.'s parenting issues. In a letter to Bobbitt in December 2003, she states that she is not 'clear on why it is {her} responsibility to call {Bobbitt} to set up an interview.' CP at 194. The GAL also wrote that Bobbitt must 'bring {his} bill current prior to the interview.' CP at 194. This and subsequent letters recited the amount due from Bobbitt for his half of the investigation despite her refusal to interview him or his witnesses. She refused to be deposed by Bobbitt's counsel until Bobbitt paid an outstanding fee of \$1,200 plus \$450 for a deposition. According to the GAL's letters, the amount Bobbitt owed increased from a little over \$600 to over \$1,200 between January 16 and February 4, 2004.

¶37 The GAL's refusal to interview Bobbitt violated GALR 2(b), (f), (g), and (o), resulting in Bobbitt's well-founded concerns which he brought to the trial court's attention in his February, 2004 motion. But when the trial court learned of the nature of Ferguson's investigation it reminded the parties that its decision would not depend on the GAL's report but on its considered opinion of what was in K.B.'s best interests after hearing the evidence at trial. The court dismissed Bobbitt's complaints as typical dissatisfaction with a GAL who disagrees with one parent's position. The trial court also imposed CR 11 sanctions of \$750 against Bobbitt for bringing the motion.

*In re Marriage of Bobbitt*, 135 Wn.App. 8, 25-27, 144 P.3d 306 (2006)

(judgment on fees vacated and remanded).

The *Bobbitt* court made clear that a review of a trial court's decision regarding the GAL is under an abuse of discretion standard. *Id.* at 23-24.

Abuse of discretion occurs when the trial court's discretion is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

An error of law is an abuse of discretion. *Lopez-Stayer v. Pitts*, 122 Wn.App. 45, 51, 93 P.3d 904 (2004) ( "[A] discretionary ruling based on error of law is an abuse of discretion." (citing *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 339, 858 P.2d 1054 (1993), cited in *Housing Authority of City of Everett v. Kirby*, 154 Wn.App. 842, 858, fn 40, 226 P.3d 222 (2010)).

**Application of Bobbit:** The GAL had grossly violated the GALRs, and the trial court used the RPCs to enter a sanction, in clear error of law, and then subsequently applied CR 11, without making proper findings. In the present case, the behavior of the GAL was so egregious that the GAL should have been removed, or at least ordered to engage in further investigation. The trial court abused its discretion in not correcting the deficiencies of the GAL.

As to the sanction issue, Mr. Covey was trying to inform the court of the overall context of unfairness and duress he was experiencing, including his prior counsel informing him of the GAL's general reputation for a lack of fairness or appearance of fairness under the GALRs, and his prior counsel was also recounting, in those emails, the difficulties in

getting less restrictive visitation for Mr. Covey as a further sign of Ms. Vache not following a court order, also probative of credibility and bias.

**D. ER 608: Reputation under GALRs = Credibility**

An independent basis of the admissibility of the email from Mr. Hughes (prior counsel) to Mr. Covey, regarding Ms. Vache (GAL) is ER 608. In *State v. Gregory* the court wrote:

Evidence Rule 608 provides that the credibility of a witness may be attacked by evidence of the witness's reputation for untruthfulness in the community.

[147 P.3d 1226] "To establish a valid community, the party seeking to admit the reputation evidence must show that the community is both neutral and general." *State v. Land*, 121 Wash.2d 494, 500, 851 P.2d 678 (1993). Relevant factors include "the frequency of contact between members of the community, the amount of time a person is known in the community, the role a person plays in the community, and the number of people in the community." *Id.* Whether a party has established [p. 805] proper foundation for reputation testimony is within the trial court's discretion. *Id.*

*State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006).

The trial court forbade reference to the emails at issue before this could be developed by Mr. Covey, but the "credibility" of a GAL would be tied to her conformity to the GALRs, and Mr. Covey should have been allowed to proceed on these issues, and not have them precluded from hearing and trial. Obviously, being absolutely precluded from this line of

enquiry was another factor compelling Mr. Covey to settle the case in order to begin to see his children.

#### **E. Mr. Covey's State of Mind is Relevant to Duress**

Mr. Covey's state of mind is very relevant to the hopelessness and duress he felt after the behavior of the GAL in refusing to help him gain less-restrictive visits and in refusing to interview, or even contact, his witnesses. As the *Betts* court put it:

We conclude that the rule, that out-of-court non-hearsay statements may be admitted which circumstantially indicate a state of mind regardless of the truth of the statement, is especially applicable in child custody proceedings.

*Betts v. Betts*, 3 Wn.App. 53, 62, 473, P.2d 403 (1970). *review denied*, 78 Wash.2d 994 (1970). See also *State v. Spencer*, 111 Wn.App. 401, 407-09, 45 P.3d 209 (2002) (citing *Betts* that state of mind is not hearsay under ER 801(c); also, *Spencer* discusses latitude in showing witness bias, generally).

Mr. Covey felt bias and duress from Ms. Vache's performance as a GAL, and Mr. Hughes' emails reveal that bias and its basis. Also, those emails show the rational and objective basis for Mr. Covey's subjective experiences of unfairness and duress.

The GAL report was full of conclusions hostile to Mr. Covey based upon hearsay, and the GAL was the sole gate-keeper to this hearsay and to

presenting the hearsay of the children. Trial would have been futile for Mr. Covey once the GAL was not removed or ordered to complete her investigation and once her credibility could not be usefully attacked at trial.

**F. Is Remedy on the Parenting Plan Legally Possible?**

Mr. Covey has provided the legal authority that sanctions based upon the RPCs are clear errors of law. And Mr. Covey has shown that the email of Mr. Hughes he submitted was properly within the context of his general challenge to the professionalism of the GAL, and the email was admissible on several bases, and even if ultimately not admissible, then certainly presenting that email should not have been sanctioned.

For nine months (January, 2011 to September, 2011), Mr. Covey had been reduced to a couple of hours a week of supervised visits in the expensive and essentially “institutionalized day care” conditions of the Fulcrum Institute. (See CP: 31-32) These visits were very inconvenient for the children, and made it difficult for Mr. Covey to retain his bond with his children.

The GAL refused to facilitate less restrictive visits, and the trial court, in July, 2011, refused to visit any parenting plan issues. CP: 60. The order of 7/21/11 states “Respondent may not move the court to alter the current temporary order in any fashion.” CP: 59-60. Trial was set for

9/12/11. Id.

A decision on compelling the GAL to be removed or to complete her investigation was postponed by the court for a month later to August 19, 2011 (CP: 79), and then at that hearing motion to remove Ms. Vache, or to compel further investigation, was denied by the trial court (CP: 79).

Mr. Covey was trapped by these decisions. Any long-shot appellate motion for an interlocutory review and stay would mean that he could not see his children because of the order of 7/21/11 denying interim relief on visitation. On these facts, Mr. Covey felt enormous duress to simply settle the case and begin to see his children.

The parenting plan, that was signed on September 13, 2011, allowed Mr. Covey substantial visits (three weekends per month), and the only restriction was that Mr. Covey not disparage the mother. CP: 178-86.

The GAL had been fundamentally unfair in keeping Mr. Covey from his children. As typically only the GAL can present child hearsay and its equivalents, Mr. Covey was at a gross disadvantage once the trial court refused to remove, or control, Ms. Vache. Mr. Covey felt coerced by this legal error to settle the case to at least get three weekends per month, even though Mr. Covey originally had hoped to receive placement of the children.

When a fit and loving parent such as Mr. Covey is suddenly

deprived of nearly all meaningful contact with his children, any settlement agreement that occurs is signed under extreme duress. Furthermore, as the GAL was not obeying prior orders to improve the visitation conditions, duress on Mr. Covey was heightened. Additionally, as the GAL was not obeying the GALRs on fairness and appearance of fairness, Mr. Covey was deprived of both procedural and substantive due process.

On those conditions, then the settlement agreement underlying the parenting plan should be deemed unconscionable, and voidable at Mr. Covey's discretion.

Procedural unconscionability is the lack of a meaningful choice. *Adler v. Fred Lind Manor*, 153 Wash.2d 331, 345-47, 103 P.3d 773 (2004). Substantive unconscionability exists where an agreement is too "one-sided" or "overly harsh." *Id.*, esp. 344-45.

Mr. Covey believes that the conditions under which he had to settle the case were overly harsh or one-sided. Mr. Covey does concede that the appellate court might find that three weekends per month of visitation are not "harsh," but it is a harsh result compared to having placement of his children, and the pressure that preceded such an agreement was based in wrongful behavior by the GAL.

Even though Mr. Covey only requests narrow relief for himself – the prospective removal of Ms. Vache as the GAL in his case -- Mr. Covey

asks the court to establish the broad rule that the parenting plan should be voidable at the wronged party's discretion when a GAL who is clearly biased is not removed by the trial court, or when a GAL whose investigation is clearly insufficient is not ordered to complete the investigation.

For his own narrow relief, Mr. Covey simply requests that Sections 2.1 and 2.2 be struck from the Parenting Plan of 9/13/12, and that be done to Section 4.3, immediately restoring his joint decision-making.

Alternatively, Mr. Covey asks that Ms. Vache be ordered removed from the case, and that Mr. Covey be given the prospective relief of a new GAL before he brings his motion under Section 4.3 of the Parenting Plan of 9/13/12.

## **VI. CONCLUSION**

To take the last problem first, Mr. Covey understands that interim orders regarding guardians at litem rarely are matters of interlocutory appeal, and, hence, there is a lack of precedent on these issues, since, as with this case, settlement or trial usually, seemingly, closes the door to review.

This case is unique in that Ms. Vache remains on the case, through Section 4.3 of the 9/13/11 parenting plan, and the appeal is not moot.

Mr. Covey asks that the door not be closed to appeal the trial court's

refusal to remove Ms. Vache, especially as Ms. Vache remains situated to do him further harm under the Parenting Plan of 9/13/12, Section 4.3.

Mr. Covey asks the court to understand that when a father who has been the primary caregiver of his children is deprived of contact with his children (or reduced to a couple of institutionalized hours per week of expensive oversight), then that enormous pressure to see his children can quickly become an unconscionable duress. Because of this, Mr. Covey asks the court to review the trial court's failure to remove the GAL, or require her to complete her report, to provide relief in his case, and to provide guidelines for the trial court in these situations (which could recur in Mr. Covey's case, and remains a real controversy).

As noted, Mr. Covey's requested relief is that Sections 2.1, 2.2, and 4.3 of the Parenting Plan of 9/13/11 be voided, and rendered "not applicable," given the substantial time he was given in the Parenting Plan (logically inconsistent with him being abusive). With Section 4.3 moot, Ms. Vache would be implicitly discharged from the case, joint decision-making would be restored, and no further relief would be necessary.

Alternatively, Mr. Covey requests that Ms. Vache be dismissed prospectively. Mr. Covey requests a general rule that when a GAL effectively coerces a settlement through violations of the GALRs, that an agreed order can be made voidable upon motion to vacate by the aggrieved

party.

Regarding the sanctions, Mr. Covey asks that the sanctions against him be dismissed as having no proper basis in law or fact, and Mr. Mason asks that the sanctions against him be dismissed as having an insufficient factual or legal basis. The sanctions should be found to be erroneously issued, as having been first based upon the RPCS as a private cause of action, and then later (in the order on reconsideration) as having been based on CR 11, when no warning letter issued, and where no proper findings were made to support the sanction under governing case law.

This relief is respectfully requested.

Respectfully submitted,

  
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Craig Mason, WSBA#32962  
Attorney for Petitioner

5/29/12

## VII. APPENDIX

### **ER 608: EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS**

(a) Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.

(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

**ER 801: DEFINITIONS**

The following definitions apply under this article:

(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements Which Are Not Hearsay. A statement is not hearsay if--

(1) Prior Statement by Witness. The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; or

(2) Admission by Party-Opponent. The statement is offered against a party and is (i) the party's own statement, in either

an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

#### **CR 11: SIGNING OF PLEADINGS, MOTIONS, AND LEGAL MEMORANDA: SANCTIONS**

(a) Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit. The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact; (2) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal

memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

(b) In helping to draft a pleading, motion or document filed by the otherwise self-represented person, the attorney certifies that the attorney has read the pleading, motion, or legal memorandum, and that to the best of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact, (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. The attorney in providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.

## **GUARDIAN AD LITEM RULE 2: GENERAL RESPONSIBILITIES OF GUARDIAN AD LITEM**

Consistent with the responsibilities set forth in Titles 11, 13, and 26 of the Revised Code of Washington and other applicable statutes and rules of court, in every case in which a guardian ad litem is appointed, the guardian ad litem shall perform the responsibilities set forth below. For purposes of these rules, a guardian ad litem is any person who is appointed by the court to represent the best interest of the child(ren), an adjudicated incapacitated person, or an alleged incapacitated person or to assist the court in determining the best interest of the child(ren), an adjudicated incapacitated person, or an alleged

incapacitated person, regardless of that person's title, except a person appointed pursuant to rule 6.

(a) Represent best interests. A guardian ad litem shall represent the best interests of the person for whom he or she is appointed. Representation of best interests may be inconsistent with the wishes of the person whose interest the guardian ad litem represents. The guardian ad litem shall not advocate on behalf of or advise any party so as to create in the mind of a reasonable person the appearance of representing that party as an attorney.

(b) Maintain independence. A guardian ad litem shall maintain independence, objectivity and the appearance of fairness in dealings with parties and professionals, both in and out of the courtroom.

(c) Professional conduct. A guardian ad litem shall maintain the ethical principles of the rules of conduct set forth in these rules and is subject to discipline under local rules established pursuant to rule 7 for violation.

(d) Remain qualified for the registry. Unless excepted by statute or court rule, a guardian ad litem shall satisfy all training requirements and continuing education requirements developed for Titles 13 and 26 RCW guardians ad litem by the administrator of the courts and for Title 11 RCW guardians ad litem as required by statute and maintain qualifications to serve as guardian ad litem in every county where the guardian ad litem is listed on the registry for that county and in which the guardian ad litem serves and shall promptly advise each such court of any grounds for disqualification or unavailability to serve.

(e) Avoid conflicts of interests. A guardian ad litem shall avoid any actual or apparent conflict of interest or impropriety in the performance of guardian ad litem responsibilities. A guardian ad litem shall avoid self-dealing or association from which a guardian ad litem might directly or indirectly benefit, other than for compensation as guardian ad litem. A guardian ad litem shall take action immediately to resolve any potential

conflict or impropriety. A guardian ad litem shall advise the court and the parties of action taken, resign from the matter, or seek court direction as may be necessary to resolve the conflict or impropriety. A guardian ad litem shall not accept or maintain appointment if the performance of the duties of guardian ad litem may be materially limited by the guardian ad litem's responsibilities to another client or a third person, or by the guardian ad litem's own interests.

(f) Treat parties with respect. A guardian ad litem is an officer of the court and as such shall at all times treat the parties with respect, courtesy, fairness and good faith.

(g) Become informed about case. A guardian ad litem shall make reasonable efforts to become informed about the facts of the case and to contact all parties. A guardian ad litem shall examine material information and sources of information, taking into account the positions of the parties.

(h) Make requests for evaluations to court. A guardian ad litem shall not require any evaluations or tests of the parties except as authorized by statute or court order issued following notice and opportunity to be heard.

(i) Timely inform the court of relevant information. A guardian ad litem shall file a written report with the court and the parties as required by law or court order or in any event not later than 10 days prior to a hearing for which a report is required. The report shall be accompanied by a written list of documents considered or called to the attention of the guardian ad litem and persons interviewed during the course of the investigation.

(j) Limit duties to those ordered by court. A guardian ad litem shall comply with the court's instructions as set out in the order appointing a guardian ad litem, and shall not provide or require services beyond the scope of the court's instruction unless by motion and on adequate notice to the parties, a guardian ad litem obtains additional instruction, clarification or expansion of the scope of such appointment.

(k) Inform individuals about role in case. A guardian ad litem shall identify himself or herself as a guardian ad litem when contacting individuals in the course of a particular case and inform individuals contacted in a particular case about the role of a guardian ad litem in the case at the earliest practicable time. A guardian ad litem shall advise information sources that the documents and information obtained may become part of court proceedings.

(l) Appear at hearings. The guardian ad litem shall be given notice of all hearings and proceedings. A guardian ad litem shall appear at any hearing for which the duties of a guardian ad litem or any issues substantially within a guardian ad litem's duties and scope of appointment are to be addressed. In Title 11 RCW proceedings, the guardian ad litem shall appear at all hearings unless excused by court order.

(m) Ex parte communication. A guardian ad litem shall not have ex parte communications concerning the case with the judge(s) and commissioner(s) involved in the matter except as permitted by court rule or by statute.

(n) Maintain privacy of parties. As an officer of the court, a guardian ad litem shall make no disclosures about the case or the investigation except in reports to the court or as necessary to perform the duties of a guardian ad litem. A guardian ad litem shall maintain the confidential nature of identifiers or addresses where there are allegations of domestic violence or risk to a party's or child's safety. The guardian ad litem may recommend that the court seal the report or a portion of the report of the guardian ad litem to preserve the privacy, confidentiality, or safety of the parties or the person for whom the guardian ad litem was appointed. The court may, upon application, and under such conditions as may be necessary to protect the witnesses from potential harm, order disclosure or discovery that addresses the need to challenge the truth of the information received from the confidential source.

(o) Perform duties in timely manner. A guardian ad litem shall perform responsibilities in a prompt and timely manner, and, if necessary, request timely court reviews and judicial

intervention in writing with notice to parties or affected agencies.

(p) Maintain documentation. A guardian ad litem shall maintain documentation to substantiate recommendations and conclusions and shall keep records of actions taken by the guardian ad litem. Except as prohibited or protected by law, and consistent with rule 2(n), this information shall be made available for review on written request of a party or the court on request. Costs may be imposed for such requests.

(q) Keep records of time and expenses. A guardian ad litem shall keep accurate records of the time spent, services rendered, and expenses incurred in each case and file an itemized statement and accounting with the court and provide a copy to each party or other entity responsible for payment. The court shall make provisions for fees and expenses pursuant to statute in the Order Appointing Guardian ad Litem or in any subsequent order.