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Supreme Court No. 93207-7
Court of Appeals No. 46991-0-II

**Supreme Court
of the State of Washington**

Roff Arden and Bobbi Arden,

Petitioners,

v.

Forsberg Umlauf, P.S., et al.,

Respondents.

Petitioners' Answer to Briefs of Amici Curiae

Kevin Hochhalter
Attorney for Petitioners

Cushman Law Offices, P.S.
924 Capitol Way South
Olympia, WA 98501
360-534-9183
WSBA # 43124

Table of Contents

| | |
|--|----|
| 1. Answer to Amici..... | 1 |
| 1.1 Ardens seek to vindicate <i>Tank</i> 's rules of disclosure, not to create a new rule of automatic disqualification. | 2 |
| 1.2 Contrary to WDTL's argument, Forsberg breached its <i>Tank</i> duties..... | 5 |
| 1.3 Contrary to WDTL's argument, Ardens were harmed by Forsberg's misconduct. | 12 |
| 1.4 Contrary to WDTL's argument, the presence of personal counsel for Ardens did not change Forsberg's duties. | 14 |
| 1.5 FDCC incorrectly conflates the analysis of significant risk under RPC 1.7(a) with the analysis of ability to provide competent and diligent representation under RPC 1.7(b)..... | 16 |
| 1.6 AGC's analysis of RPC 1.7 suggests that an automatic disclosure rule is appropriate. | 18 |
| 1.7 <i>Tank</i> 's rules of disclosure place the ultimate decision on a conflict of interest where it belongs: with the client..... | 19 |
| 2. Conclusion | 20 |

Table of Authorities

Table of Cases

| | |
|---|-----------------------|
| <i>Eriks v. Denver</i> , 118 Wn.2d 451, 824 P.2d 1207 (1992) | 13 |
| <i>Gillespie v. Seattle-First Nat'l Bank</i> , 70 Wn.App. 150, 855 P.2d 680 (1993)..... | 13 |
| <i>Mazon v. Krafchick</i> , 158 Wn.2d 440, 144 P.3d 1168 (2006)..... | 15 |
| <i>Mut. Of Enumclaw Ins. Co v. Dan Paulson Constr., Inc.</i> , 161 Wn.2d 903, 169 P.3d 1 (2007)..... | 11, 13 |
| <i>Rx.com v. Hartford Fire Ins. Co.</i> , 426 F. Supp. 2d 546 (S.D. Tex., 2006) | 6 |
| <i>Safeco Ins. Co. v. Butler</i> , 118 Wn.2d 383, 823 P.2d 499 (1992)..... | 13 |
| <i>Tank v. State Farm Fire & Cas. Co.</i> , 105 Wn.2d 381, 715 P.2d 1133 (1986) | 1, 3, 4-9, 11, 12, 19 |

Statutes/Rules

| | |
|-------------------------------------|----------------------------|
| Restatement 2d of Torts § 205 | 13 |
| RPC 1.2 | 9 |
| RPC 1.4 | 9 |
| RPC 1.7 | 1, 2, 5, 8, 16, 17, 18, 19 |

1. Answer to Amici

Ardens' Court of Appeals briefs, Petition for Review, and Supplemental Brief ask the Court to find that Forsberg breached its fiduciary duties under *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986), and the RPCs, by failing to disclose potential conflicts of interest and failing to keep Ardens apprised of all activity regarding settlement. The Amicus Briefs of Washington Defense Trial Lawyers (WDTL) and Federation of Defense and Corporate Counsel (FDCC) ignore these issues and argue, instead, that there is no automatic, disqualifying conflict of interest where an insurer retains counsel to defend its insured under a reservation of rights. These briefs do little more than attack a straw man of their own construction. In fact, Ardens do not seek a rule of automatic disqualification. Ardens seek vindication of the rules of disclosure and timely information already set forth in *Tank*.

Ardens agree with the Amicus Briefs of Washington State Association for Justice Foundation (WSAJ Foundation) and Associated General Contractors of Washington (AGC). WSAJ Foundation analyzes the RPCs in the insurance defense context to show that full disclosure is required in order to place the ultimate decision on these issues where it belongs: with the insured client. AGC also analyzes RPC 1.7 and concludes that a lawyer representing both an insurance company and the company's insured under a reservation of rights has a concurrent conflict of interest because the two clients' interests are directly adverse.

This Answer will address issues raised by all of these briefs. First, Part 1.1 will clarify that this case is about disclosure, not disqualification. Part 1.2 will show that, contrary to WDTL's arguments, Forsberg did, in fact, breach its duties to Ardens. Part 1.3 will show that Forsberg's breach caused Ardens remediable harm. Part 1.4 will show that the involvement of personal counsel is irrelevant to the analysis of Forsberg's duties and breach. Part 1.5 will correct FDCC's flawed analysis of RPC 1.7. Part 1.6 supports AGC's analysis of RPC 1.7(a)(1) and suggests an automatic disclosure rule for attorneys who represent insurers in coverage matters. Part 1.7 supports WSAJ Foundation's conclusion that *Tank's* rules of disclosure place the ultimate decision where it belongs: with the client.

1.1 Ardens seek to vindicate *Tank's* rules of disclosure, not to create a new rule of automatic disqualification.

Forsberg and its supporting amici, WDTL and FDCC, attempt to transform this case into something it has never been. WDTL and FDCC see the case as a dispute over whether defense counsel with a prior relationship with an insurer is **automatically disqualified** from representing the company's insured under a reservation of rights. The proposition is most explicitly stated by FDCC: "This brief addresses only the Ardens' argument that this Court should create new law that uniformly prohibits law firms and attorneys from representing insurers in coverage matters while representing the insurance companies' insureds in unrelated defense matters." Brief of FDCC at 3. Automatic disqualification is also the theme running through

WDTL's brief. *E.g.*, Brief of WDTL at 3 (“Neither this Court nor any other appellate court in Washington has ever required lawyers to disqualify themselves in such circumstances.”). WDTL and FDCC appear to have taken this cue from Forsberg. *See* Supp. Br. of Resp. at 9-11 (arguing that Ardens imply that an automatic, disqualifying conflict of interest exists). This entire line of argument is a straw man. Ardens do not seek a rule of automatic disqualification.

Ardens seek to vindicate the rules of disclosure already set forth in *Tank* and the RPCs. *Tank* requires full and ongoing disclosure of potential conflicts of interest and resolution of those conflicts in favor of the client. *Tank*, 105 Wn.2d at 388-89. *Tank* also requires defense counsel to keep the client apprised of all activity involving settlement. *Tank*, 105 Wn.2d at 388. The first issue presented by Ardens for review in this Court asked if Forsberg breached its fiduciary duties **by failing to disclose** or resolve the potential conflict of interest created by Forsberg's long-standing relationship with Hartford. Pet. for Rev. at 1. The second issue presented by Ardens asked if Forsberg breached its duties by **failing to consult** with Ardens regarding Hartford's settlement decisions and not giving Ardens the opportunity to react to those decisions. Pet. for Rev. at 1. Ardens have not asked this Court to adopt a rule of automatic disqualification. Ardens have remained focused on Forsberg's failure to live up to its **disclosure** obligations under *Tank*.

WDTL and FDCC are likely, like Forsberg, latching on to the expert testimony of John Strait. *See* Supp. Br. of Resp. at 9 n. 4. Professor Strait

opined, based on the facts of this case, that Forsberg's long-standing relationship with Hartford as both panel counsel and coverage counsel created a conflict of interest that was so great that it was not waivable under RPC 1.7(b). CP 422. That is, given the extent of the relationship and the fact that Hartford was contesting coverage, Forsberg could not have **“reasonably believe[d] that the lawyer will be able to provide competent and diligent representation to each affected client.”** RPC 1.7(b)(1) (emphasis added). Professor Strait's opinion was based on the specific facts of the case, not on an automatic disqualification rule. *See* CP 422. Ardens' arguments have remained focused on the requirement of disclosure. The seriousness of the conflict should inform the Court's analysis of the appropriate remedies.

The likely reason for the construction of this straw man by WDTL and FDCC is a misguided attempt to frame Forsberg as the defenders of *Tank*, in hopes of gaining the favor of the Court. WDTL and FDCC repeatedly ask the Court to “decline to overrule *Tank* and ... continue to adhere to its principles” by declining to create a rule of automatic disqualification. *E.g.*, Brief of WDTL at 11. The request is ironic, to say the least. Ardens, not Forsberg, have come to this Court seeking to vindicate and preserve the principles set forth in *Tank*. Forsberg breached its *Tank* duties. The Court of Appeals excused Forsberg's breach. This Court accepted **Ardens'** petition, based on the argument that the Court of Appeals' decision undermined *Tank*. This Court should not be deceived by WDTL and FDCC's attempt to re-cast the positions of the parties in this case. This case is about disclosure, not disqualification.

1.2 Contrary to WDTL's argument, Forsberg breached its *Tank* duties.

The record in this case establishes that Forsberg breached its duties of disclosure under *Tank*. WDTL argues that Forsberg “fully met and even exceeded their *Tank* obligations,” but WDTL can only do so by ignoring material facts and misinterpreting the scope of Forsberg’s duties.

Any time there is a foreseeable, significant risk that the representation of one client will be materially limited by the lawyer’s duties to another client, a third person, or a personal interest of the lawyer, the lawyer has a potential conflict of interest and cannot represent the client without the client’s informed consent, confirmed in writing, RPC 1.7. The lawyer can only obtain the client’s informed consent, first, if the lawyer can reasonably provide competent and diligent representation to the client, and second, after fully disclosing the potential conflict. RPC 1.7(b).

Under *Tank*, defense counsel has an “enhanced obligation,” which requires that “the dictates of RPC 1.7 ... must be **strictly** followed.” *Tank*, 105 Wn.2d at 387-88 (emphasis added). As a practical matter, this should mean that any doubt should be resolved in favor of disclosure. As noted by WSAJ Foundation, the insured client should not be forced to bear the risk of an undisclosed conflict. *E.g.*, Brief of WSAJ Foundation at 17-18. Where a potential conflict exists—that is, where there is a foreseeable risk that the lawyer may be faced with a choice between the interests of the client and the lawyer’s own personal interests or the interests of another client—defense counsel must disclose the conflict, even if defense counsel reasonably

believes that he or she will be able to make the ethically correct choice. *See* RPC 1.7; Brief of WSAJ Foundation at 15.

While *Tank* reminds defense counsel that its only client is the insured, *Tank* also requires full disclosure of all potential conflicts of interest and resolution of those conflicts in favor of the client. *Tank*, 105 Wn.2d at 388. *Tank* assumes that, with this reminder, defense counsel will be able to live up to its duty of loyalty to the client even in the face of the conflicts of interest inherent in a reservation of rights defense. Despite this assumption, *Tank* **still requires disclosure** of all of those potential conflicts and an opportunity for the client to decide whether to give informed consent.

Forsberg failed to disclose potential conflicts of interest. There was a potential conflict of interest arising from the reservation of rights. Duffys alleged negligence or malicious intent. Negligent acts would be covered by insurance; intentional acts would not. The manner in which Forsberg conducted the defense could have controlled whether the claims were covered or not. WDTL admits that this is a conflict. Brief of WDTL at 12 (“That is precisely the conflict scenario faced by any attorney hired by an insurer to represent an insured under a reservation of rights.”). *Tank* strongly suggests that this is a conflict. *Tank*, 105 Wn.2d at 390-91 (“if the outcome of the trial would determine whether coverage exists ... the defense itself should be closely scrutinized”). Other courts have also recognized this conflict. *E.g., Rx.com, Inc. v. Hartford Fire Ins. Co.*, 426 F. Supp. 2d 546, (S.D. Tex., 2006) (recognizing a conflict where the facts to be adjudicated in the defense are the same facts upon which coverage depends). WDTL admits

that *Tank* provides the rule for defense counsel to follow in that situation. *Id.* What WDTL fails to recognize is that *Tank* requires full disclosure of the conflict and resolution in favor of the client.

Forsberg never disclosed this conflict. WDTL argues, with a wave of the hand, that there was no conflict to disclose because it is no different from any other reservation of rights case. That is not the rule established in *Tank*. *Tank* does not allow defense counsel to ignore conflicts of interest because they are common to the reservation of rights context. On the contrary, *Tank* specifically requires full disclosure **because** such conflicts are common, even “inherent,” in the reservation of rights context. *Tank*, 105 Wn.2d at 387-88.

There was a potential conflict arising from Ardens’ secondary interests in the defense. Roff Arden suffered from PTSD and was facing potential criminal charges, creating a strong interest in swift resolution of the Duffy litigation. *See* CP 857. Insurance-appointed defense counsel must represent the insured client in the same manner as any other client. *See Tank*, 105 Wn.2d at 387; Brief of WSAJ Foundation at 9. This means considering **all** of the client’s interests, not just the interest in minimizing the client’s financial exposure. Such consideration of the client as a whole is a part of the ordinary duty of loyalty that every attorney owes to his or her client.

Forsberg did not even recognize this duty. Gibson testified he had no duty to consider Arden’s exposure to criminal jeopardy:

Q. Do you think that you as their lawyer have any duty to craft your defense strategy toward minimizing their criminal exposure?
[Objection]

A. [by Chris Gibson] I don't think I have that duty, to be honest with you.

Q. Okay. All right. So, if one strategy might increase their exposure to criminal jeopardy and another strategy might reduce their exposure to criminal jeopardy, you do not believe you have a duty to craft the strategy that reduces their exposure to criminal jeopardy?

[Objection]

A. I think my clients have a responsibility to themselves to get a criminal defense attorney involved...

CP 170.

These potential conflicts were heightened by the additional conflict of Forsberg's long-standing relationship with Hartford. A lawyer's personal interest in pleasing the insurer in hopes of generating future business can create a conflict of interest just the same as a duty of loyalty would. *See* RPC 1.7, Comment [13]. In such a situation, "the lawyer must comply with the requirements of [RPC 1.7](b) ... including determining whether the conflict is consentable, and, if so, that the client has adequate information about the material risks of the representation." *Id.* As noted above, even if the lawyer reasonably believes that he or she can provide competent and diligent representation despite the conflict, the lawyer must disclose and obtain the client's informed consent.

Forsberg never disclosed to Ardens its long-standing relationship with Hartford or the material risks of the potential conflict of interest. CP 227, 229, 430. Forsberg never sought or obtained Ardens' informed consent. Again, WDTL waves its hand and disregards this conflict, arguing either that it does not exist or that it does not need to be disclosed because it

is so common. *Tank* does not allow defense counsel to ignore conflicts. *Tank* requires disclosure and informed consent.

Actual conflicts arose, twice, when Ardens' settlement instructions conflicted with the Hartford's instructions. When instructions from the insurer conflict with the expressed desires of the insured client, RPC 1.2 and RPC 1.4 require consultation with the client before defense counsel may take action. The client must give consent before defense counsel can act on the conflicting instruction. This conflict also implicates defense counsel's *Tank* duty to keep the client fully apprised of all information regarding settlement. *See Tank*, 105 Wn.2d at 389. In order to enable the client to make informed decisions regarding settlement, including exercising the client's right to settle without the insurer's participation, defense counsel must fully inform the client of all developments and advise the client of their legal options. *See Id.*; Brief of WSAJ Foundation at 19.

Forsberg did not even recognize this duty:

Q. The Ardens never told you to engage in that strategy, did they?

[Objection]

A. [by John Hayes] They don't have to tell me.

Q. They don't have to tell you?

A. No.

Q. Okay.

A. What they told me was to get it settled at fifty-five and Hartford pay it. That was rejected [by Hartford].

Q. But –

A. Now we're back to a clean slate and Hartford says, "By the way, we don't agree with the fifty, fifty-five, make this offer." So, we made the offer.

CP 214.

WD'IL argues that Forsberg met its duty by simply communicating every step of the negotiations, but this is not all that is required. Loyalty to the client requires that defense counsel equip the client with sufficient and timely information for the client to make an independent decision regarding settlement, including making sure the client knows all of its options at any given stage. Forsberg not only failed to inform Ardens of their options, but actively defeated Ardens' ability to attempt their own settlement.

For example, when the second settlement demand of \$40,000 came in, Ardens immediately instructed Forsberg to settle with Hartford funds. CP 883. Hartford notified Cushman and Hayes that it would not fund the settlement at \$40,000 and instructed Forsberg to let the offer expire, then make a counteroffer at \$25,000. CP 767. Cushman objected, warning Hartford and Hayes that their proposed course was bad faith and indicating that Ardens might exercise their right to settle. CP 770. Not 25 minutes later, Hayes rejected the \$40,000 offer and made Hartford's counteroffer, defeating Ardens' ability to attempt their own settlement. CP 267. Neither Hayes nor Gibson had consulted with Ardens or sought their approval before making the counteroffer. CP 198, 219.

Forsberg did not explain the situation to Ardens. Forsberg did not consult with Ardens regarding their options. Forsberg did not ask Ardens to consent to Hartford's plan of letting the offer expire and making a counteroffer. Forsberg did not ask Cushman to consult with Ardens, to explain the situation to Ardens, or to ask Ardens for their consent to the

Hartford's proposed courses of action. Forsberg did not even allow Cushman the time to independently consult with Ardens to help them react to the developing situations. Hartford instructed, and Forsberg followed, without a single thought for the interests of Ardens, the insured client.

WD'IL argues that Forsberg could not ethically accept the \$40,000 settlement without Hartford funding. But Forsberg also could not ethically reject the settlement when Ardens had instructed that it be accepted. Forsberg's only ethical option was to consult with Ardens and obtain their consent to a course of action. Forsberg's failure to do so was a serious breach of Forsberg's duty of loyalty.

WD'IL argues that Forsberg cannot be held responsible for Hartford's settlement strategy. But Forsberg can and should be held responsible for its own failure to explain the situation to Ardens, its own failure to equip Ardens with the knowledge to make an informed decision, and its own, active fault in cutting off Ardens' opportunity to attempt their own settlement after Cushman expressed Ardens' desire to do so. Forsberg breached its duty of loyalty to Ardens and its enhanced duties of disclosure under *Tank*. This Court should appropriately hold Forsberg accountable.

Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc., 161 Wn.2d 903, 169 P.3d 1 (2007), provides an informative illustration of the kind of loyalty that is required of insurance-appointed defense counsel toward the insured client, in stark contrast to Forsberg's disloyal conduct here. Mutual of Enumclaw (MOE) appointed defense counsel under a reservation of rights. *Id.*, 161 Wn.2d at 909. When the plaintiffs offered to settle for an amount

within policy limits but above the settlement authority given by MOE, defense counsel advocated to MOE to fund the settlement. *Id.* at 909. When the case went to arbitration, defense counsel agreed that the arbitrator would make a lump sum award, which would have the effect of depriving MOE of an itemized award from which it could deny coverage of some items. *See Id.* at 909-10. When MOE requested to intervene or at least be present at the arbitration, defense counsel denied the requests. *See Id.* at 910. When MOE issued a subpoena to the arbitrator for information related to coverage issues, defense counsel “promptly demanded that MOE withdraw the subpoena.” *Id.* at 911. At every step of the defense, assigned counsel was loyal to the interests of the insured client, even when it meant standing up against the insurer. This is the kind of “undeviating fidelity of the lawyer to his client” that is required by *Tank. Tank*, 105 Wn.2d at 388. “No exceptions can be tolerated.” *Id.* WDTL and FDCC argue that Forsberg should be an exception. This Court should not tolerate it.

1.3 Contrary to WDTL’s argument, Ardens were harmed by Forsberg’s misconduct.

WDTL argues that Ardens suffered no harm from Forsberg’s misconduct. Brief of WDTL at 14. Forsberg’s breaches of its duties were so severe that Ardens were left effectively unrepresented in the defense of the Duffy action. Forsberg was disloyal and did not represent Ardens’ interests. This was, in itself, a serious harm and grounds for disgorgement of any fees collected by Forsberg for the defense. *See Eriks v. Denver*, 118 Wn.2d 451,

462-63, 824 P.2d 1207 (1992). No further showing of causation or damages is required. *Id.*

In insurance bad faith cases, once the plaintiff demonstrates bad faith, harm is presumed. *MOE*, 161 Wn.2d at 920. This Court adopted the presumption of harm in *Safeco Ins. Co. v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992). The court reasoned that the insured should not have the impossible burden of proving that he or she is demonstrably worse off because of the insurer's misconduct. *Id.* at 390. The court noted that loss of control of the case, which the insured would have had but for the insurer's misconduct, is in itself harmful to the insured. *Id.* at 391. The presumption of harm, shifting the burden to the insurer to prove that there was no harm, recognizes the inherent harm, relieves the insured of an unreasonable burden, and protects the competing social interests by creating a disincentive for bad faith conduct by insurers. *Id.* at 392.

This same reasoning applies in this case, where Ardens were harmed by the breach of insurance-appointed defense counsel's true fiduciary duties (as opposed to an insurer's breach of only quasi-fiduciary duties). Fiduciaries in other contexts are subject to broad equitable remedies that not only make plaintiffs whole but also prevent the fiduciary from benefiting from the breach and deter future misconduct. *Gillespie v. Seattle-First Nat'l Bank*, 70 Wn. App. 150, 173, 855 P.2d 680 (1993); Restatement 2d of Trusts, § 205.

Defense counsel's "enhanced" duties under *Tank* are meaningless unless breach comes at a price. The price should be presumed harm,

disgorgement of fees, and other equitable remedies to not only make the insured client whole but also to deter future misconduct.

WDTL argues that Forsberg's misconduct could not have caused Roff Arden to be charged with a crime. However, Forsberg knew from early on that Arden was facing possible charges. Forsberg had a duty to craft its defense in a manner that would protect Arden from those potential charges to whatever extent possible. Ardens submitted evidence that if the Duffy case had settled sooner, the prosecutor could have been informed and more likely than not would have considered the settlement in making the charging decision and would have reduced the charges, placed Roff Arden in a diversion program, or not have charged him at all. *See* CP 417-18, 424-25, 924-25. This evidence is sufficient to raise a material issue of fact on whether Forsberg's misconduct was a proximate cause of the criminal charges.

1.4 Contrary to WDTL's argument, the presence of personal counsel for Ardens did not change Forsberg's duties.

WDTL argues that Ardens already had independent counsel in the person of Mr. Cushman. Brief of WDTL at 18-19. WDTL argues that because Cushman was involved, any harm could not have been caused by Forsberg. *Id.* WDTL argues that Cushman's involvement somehow "explodes the Ardens' claims about Forsberg's duties." *Id.* But Cushman's involvement as personal counsel can have no effect on Forsberg's duties to Ardens.

WDTL admits that Cushman was not co-counsel in the defense, but served only as "coverage and counterclaim counsel" for Ardens. Brief of

WD'IL at 2 n. 2. But even if Cushman was co-counsel with Forsberg, Forsberg's duties to Ardens are not reduced in the slightest. "As cocounsel, both attorneys owe an undivided duty of loyalty to the client. ... The undivided duty of loyalty means that each attorney owes a duty to pursue the case in the client's best interest." *Mazon v. Krafchick*, 158 Wn.2d 440, 448-49, 144 P.3d 1168 (2006). "Each cocounsel is entirely responsible for diligently representing the client." *Id.* at 450.

Defense counsel cannot pawn off its duties to personal counsel when those duties require action that frustrate the insurer. Defense counsel's duties remain the same whether there is personal counsel or not. Again, *Mutual of Enumclaw* illustrates the standard for defense counsel. Despite the presence of personal counsel for the insured client, appointed counsel initiated or joined personal counsel in actions that frustrated MOE. Appointed counsel did not leave the "dirty work" to personal counsel in order to save face with MOE. Appointed counsel was loyal to the insured client.

In contrast, Forsberg failed to take any action that would have harmed its relationship with Hartford. Forsberg cannot escape the consequences by blaming Cushman. It was Forsberg's duty to disclose its own potential conflicts of interest. Forsberg cannot escape the consequences of its breach by arguing that Cushman should have said something. It was Forsberg's duty to consult with Ardens about their options in the face of Hartford's refusal to fund the settlement. Forsberg cannot escape the consequences of its breach by arguing that Cushman should have done it, particularly where the first settlement demand had expired before Cushman

was informed of Hartford's decision and the second settlement demand was rejected by Forsberg without giving Cushman time to consult with Ardens—even after Cushman told Forsberg that Ardens might exercise their right to settle without Hartford. Cushman's involvement does not change Forsberg's duties, does not excuse Forsberg's breach, and does not shield Forsberg from liability for the harm it caused.

1.5 FDCC incorrectly conflates the analysis of significant risk under RPC 1.7(a) with the analysis of ability to provide competent and diligent representation under RPC 1.7(b).

As noted above, any conflict analysis under RPC 1.7 has two steps. *Cf.* RPC 1.7, Comment [2] (separating the determination of whether a conflict exists from the determination of whether the conflict is consentable). First, the lawyer must determine whether there is a potential concurrent conflict under RPC 1.7(a). This involves determining (1) whether the interests of two or more clients are directly adverse; or (2) whether there is a significant risk that representation of a client will be materially limited by the lawyer's other duties or personal interests. RPC 1.7(a).

Only after a conflict is identified does the analysis shift to RPC 1.7(b) to determine whether the representation is permissible despite the conflict. Under this second step, the lawyer must determine whether the lawyer can provide competent and diligent representation despite the conflict. RPC 1.7(b)(1). If the lawyer reasonably believes this is true (and the representation is not prohibited under RPC 1.7(b)(2) or (3)), the lawyer may

proceed to represent the client after obtaining the client's informed consent, confirmed in writing. RPC 1.7(b)(4).

The first inquiry—whether a conflict exists—focuses on whether the lawyer's professional judgment in representing the client may be influenced by the existence of conflicting interests. In other words, the question for identifying a potential conflict is whether the lawyer might foreseeably be tempted to be less than fully loyal. If the temptation is foreseeable, there is a potential conflict.

Having identified the conflict, the lawyer then asks, "Will I be able to resist this temptation and fulfill my duties to my client?" If the answer is yes—that is, if the lawyer understands that the ethical rules require absolute loyalty to the client and the lawyer reasonably believes that he will act ethically when faced with temptation—then the lawyer must disclose the conflict and obtain the client's informed consent. Thus the rule provides—and requires—two levels of protection: first, the lawyer must reasonably believe that he will act properly; second, after full disclosure, the client must give consent, signaling that the client also believes that the lawyer will act properly. The ultimate decision is in the hands of the client.

FDCC argues that Forsberg had no duty to disclose its conflicts of interest because Forsberg understood it was only representing Ardens, not Hartford, and therefore there was no significant risk that the representation would be materially limited. Brief of FDCC at 8. This improperly conflates the "significant risk" analysis under RPC 1.7(a) with the "competent and diligent representation" analysis under RPC 1.7(b). It also removes the

client's right to judge for themselves whether the lawyer will be able provide competent and diligent representation despite the conflicting interests.

The lawyer's understanding that under *Tank* the lawyer owes duties of loyalty only to the insured client may enable the lawyer to reasonably believe that the lawyer will be able to overcome temptations and provide competent and diligent representation under RPC 1.7(b), but it cannot change the range of influences and interests that will act upon the lawyer over the course of the representation. The conflict of interest still exists. Knowledge of who the client is helps the lawyer overcome the conflict, but RPC 1.7(b) and *Tank* still require the lawyer to fully disclose the conflict and obtain the client's informed consent. *See* Brief of WSAJ Foundation at 15.

1.6 AGC's analysis of RPC 1.7 suggests that an automatic disclosure rule is appropriate.

AGC argues that a lawyer who represents the insurer in coverage matters will always have a "directly adverse" conflict of interest when appointed to represent the company's insured under a reservation of rights. Brief of AGC at 3-7. Ardens agree that Ardens' and Hartford's interests were directly adverse because Hartford was contesting coverage. The fact that Forsberg had a long-standing attorney-client relationship with Hartford in coverage matters meant that Forsberg was attempting to represent two clients with directly adverse interests. This is a conflict of interest even when the matters in which the lawyer represents the two clients are wholly unrelated. RPC 1.7, Comment [6]. Forsberg should have known that Ardens were "likely to feel betrayed, and the resulting damage to the client-lawyer

relationship is likely to impair the lawyer's ability to represent the client effectively." *Id.* Forsberg should have known that Ardens "reasonably may fear that the lawyer will pursue [Arden's] case less effectively out of deference to [Hartford]." *Id.* In fact, that is exactly how Ardens felt when they found out about Forsberg's relationship with Hartford. CP 227-30.

The implication of AGC's argument is that any lawyer who represents an insurer in coverage matters cannot represent that company's insured without resolving the conflict of interest in favor of the insured client. This is not a rule of automatic disqualification, but it might appropriately be termed a rule of automatic **disclosure**. Under RPC 1.7(b), the would-be defense counsel would first have to determine whether they could provide competent and diligent representation to the insured client, and would then have to fully disclose the conflict and seek the insured client's informed consent. Such a rule protects insured clients as intended by *Tank*.

1.7 *Tank's* rules of disclosure place the ultimate decision on a conflict of interest where it belongs: with the client.

As noted by WSAJ Foundation, the ultimate decision on whether to accept the risk of a conflict of interest should belong to the client. *Tank* and RPC 1.7 keep that decision with the client by requiring full disclosure of all potential conflicts of interest—even those that a lawyer thinks can be overcome.

The client should not be forced to bear the risk of an undisclosed conflict of interest. If the lawyer turns out to be wrong about his ability to

provide competent and diligent representation, the client should have already had the opportunity to be fully informed and decide for themselves whether to bear that risk. *Tank*'s disclosure rule protects the client's right to decide.

2. Conclusion

This case is about disclosure, not disqualification. Forsberg breached its duties of disclosure, leaving Ardens effectively unrepresented. This is a harm that deserves a remedy. The presence of personal counsel for Ardens did not change Forsberg's duties or excuse Forsberg from liability for its misconduct. *Tank* requires full disclosure of all potential conflicts, even those that can be overcome by defense counsel's understanding of who its client is. Lawyers who represent insurers in coverage matters should always disclose that relationship before representing the company's insured under a reservation of rights. The client should always have the ultimate decision of whether to bear the risk of a conflict of interest.

Tank was designed to protect insured clients by establishing a rule of full disclosure of conflicts of interest and information regarding settlement. Forsberg failed to disclose multiple conflicts of interest and not only failed to advise Ardens about settlement, but actively defeated Ardens' ability to settle on their own. Forsberg should be subject to broad equitable remedies to both make Ardens whole and deter future misconduct. This Court should clarify the duties of defense counsel and the remedies available for breach, reverse the trial court and Court of Appeals, and remand for trial.

Respectfully submitted this 4th day of January, 2017.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Petitioners

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on January 4, 2017 I filed the foregoing document with the Supreme Court and provided a copy to counsel in the manner indicated below:

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DATED this 4th day of January, 2017.

/s/ Rhonda Davidson
 Rhonda Davidson, Legal Assistant
 Cushman Law Offices, P.S.
rdavidson@cushmanlaw.com