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No. 89178-8

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE DOCTORS COMPANY, a California Interinsurance Exchange,

Appellant,

v.

BENNETT BIGELOW & LEEDOM, P.S., a Washington professional services corporation; AMY THOMPSON FORBIS and JOHN DOE FORBIS, her husband, and the marital community comprised thereof; and JENNIFER LYNN MOORE and JOHN DOE MOORE, her husband, and the marital community comprised thereof,

Respondents.

BRIEF OF APPELLANT

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INTRODUCTION

To defend a medical malpractice action against its three insureds, The Doctors Company (TDC) approached Bennett Bigelow & Leedom (BBL). At the outset, TDC asked BBL whether it could represent all three insureds. BBL assured TDC that it could, disclosing no potential conflicts, and obtaining no conflict waivers. TDC accepted and followed BBL's legal advice.

BBL later told TDC that a testifying expert BBL retained supported all three defendants. That was false. The expert had told BBL months earlier – and in no uncertain terms – that he could not support one of the doctors. BBL *never* disclosed this actual conflict.

When the conflicts came to light, TDC retained new counsel for each of its insureds. It then learned – on the cusp of trial – that BBL was too busy with another case to meet this case's schedule. The plaintiffs moved to strike defense experts. They also accused TDC of "bad faith" in the conflict of interest situation. The other defendant settled, threatening to seek contribution from the insureds.

TDC settled the case for $7 million above policy limits – fully protecting its insureds – then sued BBL. The trial court entered summary judgment that BBL owed TDC no duty. This Court should reverse and remand for trial.

ASSIGNMENTS OF ERROR

1. The trial court erred as a matter of law in ruling that insurance defense counsel owe no duty of care to an insurance carrier who retains them, where (as here) counsel gave negligent legal advice directly to the carrier. CP 2460-78.

2. The trial court also erred as a matter of law in ruling that insurance defense counsel are insulated from liability where (as here) they affirmatively misrepresent an actual conflict of interest to the clients and to the carrier. *Id.*

3. Alternatively, the trial court erred as a matter of law in ruling that an insurance carrier is not an intended third-party beneficiary of the insurance contract under which defense counsel is retained to represent the carrier's insured, where (as here) counsel's duties to the insured (as client) align perfectly with – indeed, are identical to – the duties owed to the carrier, and no reservation of rights exists. *Id.*

4. The trial court erred as a matter of law in ruling that insurance defense counsel are insulated from legal liability for malpractice where (as here) they negligently fail to comply with a case schedule, exposing their clients (the insureds) to liability, and where the insurance carrier indemnifies and holds harmless the insureds, suffering all of the harm caused by counsel's legal malpractice. *Id.*

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where, as here, an insurance carrier seeks and relies upon legal advice from retained insurance defense counsel regarding conflicts of interest in defending three insureds in one action, but counsel ignore potential conflicts to the sole detriment of the carrier, may the carrier sue counsel for legal malpractice? What if counsel also affirmatively misrepresent an existing conflict to the carrier and the insureds, but only the carrier is harmed by the misrepresentation?

2. In addition, should this Court adopt the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51, where (as here) (a) the interests of the insurer and its insureds wholly align, (b) counsel and clients knew that one of the primary objectives of the representation was that counsel's services would benefit the insurer, (c) imposing such a duty would not significantly impair counsel's performance of obligations to their clients, and (d) the absence of such a duty would make enforcement of those obligations to the client highly unlikely?

3. In the alternative, and under the above facts, is the carrier a third-party beneficiary of the insurance contract, particularly in light of the indisputable fact that if the carrier cannot recover for the attorneys' malpractice, no one can?

STATEMENT OF THE CASE

A. The underlying matter.

1. Gabarra brought a medical malpractice suit against Dr. Moore, Dr. Nudelman, and their clinic, all of whom were insured by appellant TDC.

Jean Gabarra consulted with Dr. Heather Moore, OBGYN, during her pregnancy. CP 230, 1391.[1] In November 2006, Gabarra was admitted to Overlake Hospital & Medical Center for the birth. CP 230. After her shift ended, Dr. Moore went home, transferring Ms. Gabarra's care to her colleague and fellow shareholder in Bellgrove Ob-Gyn Inc. P.S, Dr. Mitchell Nudelman. CP 230, 1391.

Dr. Nudelman was busy that evening and into the next morning, delivering several babies. CP 356-57. He left Gabarra in second-stage labor for eight hours. *Id.* At some point, he called Dr. Moore back in to assist with a C-section on Gabarra. CP 230. The child was essentially stillborn. *Id.* Delayed resuscitation efforts were successful, but the child was severely injured. CP 28, 230.

The Gabarras sued the doctors, their clinic, and Overlake, primarily alleging that they breached the standard of care by not

[1] An article written by counsel for the Gabarras in the underlying action, Paul Luvera, provides helpful background on that action. CP 28-29.

delivering the child earlier. CP 230, 1391. The doctors and their clinic were all insured by The Doctors Company (TDC). CP 230.

2. TDC accepted the defense without a reservation of rights, and the attorneys assured TDC that they had no conflicts of interest and could represent all three insureds.

TDC accepted its insureds' defense without a reservation of rights. CP 2235. But its Claims Supervisor, Nancy Nucci, was concerned about potential conflicts of interest among the defendants. CP 613-14, 801, 1838-39, 1846. Nucci contacted attorney Elizabeth Leedom at Bennett Bigelow & Leedom (BBL), who declined the representation because she was a personal friend of one of plaintiffs' counsel. CP 614. TDC turned to Amy Forbis, one of Leedom's partners at BBL. CP 237-39. BBL attorney Jennifer Moore also worked on the case. CP 230.

The BBL attorneys interviewed the two doctor defendants separately. CP 463. The BBL attorneys then told TDC that they could represent all three insureds without a present – or even a potential – conflict of interest. CP 1117-18, 1851. BBL did not disclose any potential or actual conflicts, or seek a written waiver. CP 38, 1391. TDC relied upon BBL's legal advice. CP 1851.

3. Dr. Nudelman asked BBL to retain a top expert, and BBL informed TDC that he supported both doctors – a blatant falsehood.

Dr. Nudelman asked his BBL counsel to retain Dr. Frank Manning, a top expert in his field. CP 521, 1768. By July 20, 2010, attorney Moore had informed TDC's Nucci that "Dr. Manning believes the care provided by all was within the standard of care." CP 526. She further stated that Dr. Manning "is not critical at all of the way Dr. Nudelman managed the delivery." *Id.* BBL disclosed Dr. Manning as an expert witness for both doctors. CP 1761.

These representations were false. In an April 2010 call with attorney Jennifer Moore, expert Manning had stated unequivocally that while Dr. Moore adhered to the standard of care, Dr. Nudelman did not. CP 1156-57, 1163, 1165,[2] 1758, 1784-85. Dr. Manning was emphatic he told attorney Moore in no uncertain terms that he could not support Dr. Nudelman (CP 1784-85, emphasis added):

> I am mortified to read Ms. [Jennifer] Moore's report in which she suggests I was 'not critical of the way Dr. Nudelman managed the delivery.' To offer such a position would require that I accept a 5 or more hours of second stage including picotin augmentation to be within the standard – I simply could never adopt such a position. **I am quite certain Ms. Moore knew I could not serve as an expert for Dr. Nudelman.**

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[2] These are Dr. Manning's notes of his conversation with attorney Moore (Ex 200 to his deposition). At the bottom he wrote, "Moore Okay | Can't defend Nudelman." CP 1155, 1165.

4. Dr. Moore sought separate counsel – and with a trial looming – TDC hired separate counsel for all defendants.

After a continuance, the jury trial was to begin on November 15, 2010. CP 262. The discovery cutoff was September 27, 2010. *Id.* In the weeks before this cutoff, BBL attorneys Forbis and Moore were much more involved in a different medical malpractice trial, ***Costales v. Univ. of Wash. Med. Cntr.***, King County Superior Court No. 08-2-183526-5 SEA. CP 2137, 2142-45, 2210-14, 2247.

On September 6, 2010, BBL informed Dr. Moore for the first time that she could not be dismissed from the case on summary judgment. CP 366. Dr. Moore contacted her sister-in-law, who was in-house counsel for a Minnesota insurance company. CP 1481, 1840. Dr. Moore learned from her sister-in-law that she should ask for separate counsel. CP 1840, 1848. Dr. Moore called Nucci, who in turn called BBL, which said it would assess the issue. *Id.*

Unbeknownst to Nucci, BBL was consulting with its outside ethics counsel, Peter Jarvis of Portland. CP 1257, 1841. He concluded that BBL could, at best, continue representing one of the defendants, but it would have to obtain a written waiver from the other two defendants. CP 715, 1257. At the same time, TDC independently concluded that potential conflicts existed, and their

insureds needed three separate attorneys. CP 441, 1840-41. It hired James King for Dr. Nudelman, Mick Hoffman for Dr. Moore, and Steve Fitzer for Bellgrove Ob-Gyn Inc. P.S. CP 1852.

5. Successor counsel unsuccessfully sought a continuance, plaintiffs threatened a "bad faith" claim, the hospital settled, and TDC (after hiring yet more counsel) also settled – paying $7 million above policy limits.

Successor counsel sought a continuance. CP 520, 1734, 1759. Attorney Forbis told the judge she had an undisclosed conflict of interest, albeit while maintaining that she was able to "ethically and effectively" represent all three defendants until "recently." CP 1678-79, 1685-87. The requested continuance was denied. CP 520.

The Gabarras asserted that all of this motions practice was just a TDC ploy. CP 1292-97, 1777. They threatened to take covenant judgments from the insureds, and sue TDC for "bad faith." *Id.* TDC therefore hired attorney Dan Mullin to defend itself. CP 518.

The Gabarras moved to strike many of the defendants' expert witnesses because the BBL lawyers had failed to comply with the case schedule. CP 1668-76. The trial judge took this motion under advisement on November 5, 2010. CP 1692, 1697-99, 1728-29.

Co-defendant Overlake Hospital settled with the plaintiffs, paying nearly $10 million. CP 1696. Overlake threatened to seek

contribution from the insureds (CP 1318-19); TDC hired private counsel for each defendant, Will Smart for Dr. Nudelman, Pat Sheldon for Dr. Moore, and Jeff Tilden for the Clinic. CP 1852. The insureds – through counsel – all agreed in writing to allow TDC to attempt a global settlement. CP 532-37. But Dr. Moore made it clear that settlement could take place only if she did not admit liability and TDC made no payment on her behalf. CP 457-58, 492, 534-35.[3]

Attorney Mullin succeeded. TDC paid over $10 million. CP 216, 523. Since Dr. Moore's policy could not be accessed, TDC paid $7,150,000 above applicable policy limits. CP 444, 532-37.

B. Procedural history.

TDC sued BBL on February 22, 2012. CP 1. TDC's claims were for legal malpractice, breach of implied contract, breach of fiduciary duty, and violation of the Washington State Consumer Protection Act. CP 1-14. The parties brought five summary judgment motions. CP 80-82, 101-26, 1096-1104, 1170-90, 1966-88. The trial court ruled that BBL owed TDC no duties. CP 1957-62, 2377-79. TDC timely appealed. CP 2428-49, 2456-78.

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[3] Unlike most medical malpractice carriers, TDC (a mutual insurance company owned by its insureds) has no "hammer clause" in its policy. CP 383-84, 458. This means that although TDC cannot settle without the insured's written consent, it is not relieved of liability above its recommended settlement amount when an insured declines to settle. *Id.*

ARGUMENT

A. Standard of Review.

Summary judgments are reviewed *de novo*. ***Stewart Title Guar. Co. v. Sterling Sav. Bank***, 178 Wn.2d 561, 565, 311 P.3d 1 (2013). "Summary judgment is appropriate if 'there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law. CR 56(c).'" *Id.* The question here is whether BBL owed TDC a duty. *Cf. generally* ***Trask v. Butler***, 123 Wn.2d 835, 872 P.2d 1080 (1994). "Determining whether an attorney/client relationship exists necessarily involves questions of fact." ***Bohn v. Cody***, 119 Wn.2d 357, 363, 832 P.2d 71 (1992).

B. Under very well established Washington law, BBL gave TDC legal advice, so it owed TDC a duty of care.

TDC was BBL's client: it is undisputed that TDC sought and relied upon BBL's legal advice that it could properly accept the representation of all three defendants. CP 1117-18, 1851. There is no doubt that telling someone whether a conflict of interest exists is giving them legal advice. *See, e.g.*, ***Eriks v. Denver***, 118 Wn.2d 451, 824 P.2d 1207 (1992). There should be no doubt that failing to reveal an actual conflict for months, and even lying about it, is malpractice. Yet the trial court found no duty running from BBL to TDC. This Court should reverse and remand for trial.

The elements of a Washington legal malpractice claim are

> (1) an attorney-client relationship imposing a duty of care from attorney to client;
>
> (2) the attorney's act or omission breaching that duty;
>
> (3) damage to the client; and
>
> (4) proximate cause.

Hizey v. Carpenter, 119 Wn.2d 251, 260-61, 830 P.2d 646 (1992) (citing ***Hansen v. Wightman***, 14 Wn. App. 78, 88, 538 P.2d 1238 (1975); ***Sherry v. Diercks***, 29 Wn. App. 433, 437, 628 P.2d 1336, *rev. denied*, 96 Wn.2d 1003 (1981); *see also* **Bowman v. John Doe**, 104 Wn.2d 181, 185, 704 P.2d 140 (1985) (once an attorney-client relationship is established, the elements for legal malpractice are the same as for negligence)). The trial court apparently dismissed this case for lack of the first element – an attorney-client relationship imposing a duty of care from BBL to TDC. CP 1957-62.

Whether an attorney-client relationship exists primarily turns on "whether the attorney's advice or assistance is sought and received on legal matters." ***Bohn***, 119 Wn.2d at 363. ***Bohn*** also articulates a two-part inquiry (*id.*):

> (1) subjectively, does the client believe that an attorney-client relationship has been formed?; and
>
> (2) objectively, is the client's subjective belief reasonable under the circumstances?

Whether the relationship exists is a question of fact. *See, e.g.*, ***Teja v. Saran***, 68 Wn. App. 793, 795, 846 P.2d 1375 (1993). It is a question for the jury unless all material facts are undisputed. ***Stiley v. Block***, 130 Wn.2d 486, 501-02, 925 P.2d 194 (1996).

Under ***Bohn***, the trial court erred as a matter of law in finding no duty. Simply put, TDC sought legal advice from BBL about conflicts of interest. *Supra*, Statement of the Case, § A2. Subjectively, TDC believed that when BBL denied any potential or actual conflicts, TDC was receiving competent legal advice that could and should be relied upon. *Id.* Objectively, TDC reasonably asked BBL about conflicts of interest and relied upon its advice. *Id.* Indeed, BBL unquestionably has ethical and legal duties to disclose potential and actual conflicts of interest. *See, e.g.*, ***Eriks***, *supra*; RPC 1.7; CP 538-56, 2233-43. As in ***Bohn***, once BBL undertook "to tell part of the story," it had a duty to take "reasonable steps to tell the whole story, not just the self-serving portions of it." 119 Wn.2 at 367. BBL and TDC had an attorney-client relationship on this issue.

While not essential to answering the pure duty question, the remaining legal-malpractice elements are also met, or at the very least, they raise genuine issues of material fact not appropriate for summary judgment. On breach, BBL breached the standard of care

by (a) telling client TDC that no potential conflicts existed; (b) failing to tell client TDC promptly when the actual conflict arose; and (c) lying to client TDC about the expert's refusal to support Dr. Nudelman, which manifested an actual conflict. *See* Statement of the Case, §§ A2 & 3. These are clear conflicts under RPC 1.7(a)(2):

> A concurrent conflict of interest exists if: there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibility to another client . . . .

Yet BBL never obtained "informed consent, confirmed in writing (following authorization from the other client to make any required disclosures)." RPC 1.7(4); *see also* CP 538-556 (Declaration of Thomas M. Fitzpatrick). Regrettably, the trial court never addressed these breaches, or even the fact that BBL gave TDC legal advice. A jury could reasonably find breach here.

On damages, when an insurance company pays for defense counsel's negligence, it has fully satisfied its primary duty to indemnify its insureds. As a result, the insureds suffer no monetary damages, and they thus have no right to sue counsel because they cannot establish damages flowing as a direct and proximate result of counsel's negligence. Only the insurer suffers the damages in these circumstances. A jury easily could find damage to TDC here.

On proximate cause – commonly a jury question – failing to disclose and avoid potential conflicts of interest at the outset inexorably led to difficulties for the clients. But failing to immediately disclose the conflict – and even lying about it – left TDC and its insureds perilously close to trial with no prepared and capable counsel. It also exposed TDC to claims of bad faith. A jury could find that BBL's breaches caused TDC's damages.

In sum, the trial court erroneously failed to recognize the direct attorney-client relationship between BBL and TDC. At the very least, genuine issues of material fact remain. This Court should reverse and remand for trial.

In a recent lawyer malpractice case, this Court restated the fundamental principle militating in favor of a reversal here:

> The guiding principle of tort law is to make the injured party as whole as possible through pecuniary compensation.

Shoemake v. Ferrer, 168 Wn.2d 193, 198, 225 P.3d 990 (2010) (citing 16 DeWolf & Keller, WASH. PRAC.: TORT LAW & PRACTICE § 5.1, at 172). Contrary to this bedrock principle, allowing this decision to stand leaves an injured party – the insurance company who unwaveringly defended, indemnified, and held harmless its insureds, up to and well beyond its policy limits – without a remedy.

C. In addition, this Court should adopt the RESTATEMENT (THIRD) approach, recognizing a duty running from insurance defense counsel to the insurer where, as here, no conflict exists between the insurer and its insureds, under the three-part § 51 test.

In addition, this Court should hold that where, as here, no conflict of interest exists between insurer and insured, the injured carrier may sue for legal malpractice (perhaps refocusing ***Stewart Title*** because this case – with its far more egregious malpractice – is a much better lens through which to view that determination).[4] Indeed, this Court should now join the majority of other states in finding that a duty runs from insurance defense counsel to the insurer, at least in some cases. *See generally* Mallen & Smith, LEGAL MALPRACTICE § 30:12 (2013) (citing numerous cases). Courts reach this result under either a direct duty owed by defense counsel to the carrier, or under the doctrine of equitable subrogation. *Id.*

Here, TDC accepted its insureds' defense without a reservation of rights, and no conflict of interests existed between them and TDC at any point in the underlying litigation. BBL breached its duty of care by failing to discover potential conflicts among its

[4] As discussed infra, It is unclear whether the Court actually rejected the RESTATEMENT (THIRD) OF THE LAW OF GOVERNING LAWYERS § 51 analysis in ***Stewart Title***.

clients, lying to both TDC and its clients about actual conflicts, and failing to follow the case schedule (exposing both TDC and its insureds to a dangerous motion to strike expert witnesses). *Id.* On the cusp of trial, BBL's negligence created a great risk of leaving TDC and its insureds without essential expert testimony – and without thoroughly prepared trial counsel – forcing a settlement far in excess of policy limits. *Id.* TDC should be permitted to sue BBL.

Section 51 of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ("§ 51") recognizes such a duty, but under a three-part test that this Court did not discuss in ***Stewart Title***:

> For purposes of liability under § 48,[5] a lawyer owes a duty to use care within the meaning of § 52[6] in each of the following circumstances:
>
> . . .
>
> (3) to a nonclient when and to the extent that:
>
> > (a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;
> >
> > (b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and
> >
> > (c) the absence of such a duty would make enforcement of those obligations to the client unlikely.

[5] RESTATEMENT (THIRD) § 48 generally address malpractice liability.

[6] RESTATEMENT (THIRD) § 52 addresses the standard of care.

And Comment *g* to § 51 specifically addresses insurer's claims:

> *A liability insurer's claim for professional negligence.* Under Subsection (3), a lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and insured are not in conflict, whether or not the insurer is held to be a co-client of the lawyer (see § 134, Comment *f*).[7]

Of course, this Court very recently rejected a different analysis. *See* ***Stewart Title***, 178 Wn.2d at 567 n.2. The Court noted that "other jurisdictions have come to a different conclusion," including a "*see also*" cite to § 51, but did not expressly address § 51. *Id.*[8] ***Stewart Title***'s two stated reasons for not following other jurisdictions were (1) ***Trask*** requires a showing that the "'transaction

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[7] RESTATEMENT (THIRD) § 134 addresses conflicts due to third-party compensation. Comment *f* specifically addresses representing insureds (*e.g.*, "Because and to the extent that the insurer is directly concerned in the matter financially, the insurer should be accorded standing to assert a claim for appropriate relief from the lawyer for financial loss proximately caused by professional negligence or other wrongful act of the lawyer").

[8] The Court cited "***Paradigm Ins. Co. v. Langerman Law Offices, PA***, 200 Ariz. 146, 155, 24 P.3d 593 (2001) (holding that a 'lawyer's services are ordinarily intended to benefit both insurer and insured when their interests coincide'); ***Atlanta Int'l Ins. Co. v. Bell***, 438 Mich. 512, 523, 475 N.W.2d 294 (1991) (permitting insurer to bring malpractice action where 'the interests of the insurer and the insured generally merge'); ***Unigard Ins. Grp. v. O'Flaherty & Belgum***, 38 Cal. App. 4th 1229, 1236-37, 45 Cal. Rptr. 2d 565 (1995) (permitting malpractice action 'where there is otherwise no actual or apparent conflict of interest between the insurer and the insured' (emphasis omitted)); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 51 cmt. g (2000) (stating, regarding a test with an intended beneficiary factor similar to Washington's, that 'a lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and insured are not in conflict')."

was *intended* to benefit' a third party," and alignment between insurer's and insured's interests is insufficient to meet this test; and (2) the other jurisdictions' approach conflicts with ***Trask*** and RPC 5.4(c). *Id.* at 567-68. Neither stated reason applies to § 51.

First, as quoted above, § 51 does not say that when the insurer's and insured's interests "happen to align," *ipso facto* the insurer may sue the insured's lawyer. Rather, § 51 sets forth a three-part test. Application of that test here shows both that it is substantively sound and that TDC meets the test.

The first § 51 element is met, where BBL knew that its clients intended as one of the primary objectives of the representation that BBL's services would benefit TDC. This conclusion is inescapable because the insureds plainly knew that the only way TDC could meet its contractual obligation to provide them with a defense was to hire insurance defense counsel. Such contractual fulfilment unquestionably benefits both TDC and the clients.

The second § 51 element also is met, where no reservation of rights and no other conflict of interests existed between TDC and its insureds, so no impairment of BBL's obligations to the insureds occurred. On the contrary, the malpractice alleged here – failing to follow the case schedule, and withdrawing on the cusp of trial due to

conflicts of interest that should have been discovered and disclosed long ago, and even lying about it – would have severely harmed the insureds, had TDC failed in its additional obligation to indemnify and hold them harmless. In short, the interests of TDC and its insureds were entirely harmonious.

The third § 51 element is also met, where the absence of a duty running from BBL to TDC would render enforcement of BBL's obligations to the client unlikely. Again, because TDC protected its insureds from suffering damage, enforcement of BBL's obligations to disclose conflicts and meet case schedules is highly unlikely. TDC suffered millions of dollars in damages due to BBL's failure to meet its obligations. TDC should be entitled to sue under § 51.

The Court's second reason for not following the other jurisdictions was that their "interests happen to align" approach conflicts with ***Trask*** and RPC 5.4(c). As noted, however, alignment of interests is only one element of the § 51 approach.[9] And § 51's requirement that a "primary objective" of the representation is to

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[9] For instance, RPC 5.4(c) requires that lawyers "not permit a person who ... employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment. . . ." Consistent with this RPC, under § 51(3)(b) the duty must not significantly impair the lawyer's services to the client.

benefit the insurer is wholly consistent with ***Trask***'s "intended to benefit" requirement – indeed, it is likely more protective.

But § 51's additional requirements of both no significant impairment to the lawyer's services, and also the unlikeliness of the client being able to enforce the lawyer's obligations, make the § 51 test – which is specifically designed to address this particular relationship – more apt than ***Trask***'s general multifactor balancing test. The Court should adopt the § 51 analysis in this limited arena.

Stewart Title suggests that this Court is not inclined to apply anything but the ***Trask*** factors, even though a test specifically tailored to the tripartite relationship among attorney, client, and insurer exists, and even though that test is more consistent with other jurisdictions' approaches. 178 Wn.2d at 568. This may be true even though the Court itself noted that until ***Stewart Title***, it had addressed the ***Trask*** factors only once (*id.* at 566) so no significant precedent militates against adopting a new, more calibrated test.[10]

And all of this stands despite the Court confronting numerous other precedents (cited *supra*, n.8) including the following cogent and

[10] The Court's reticence is presumably also despite the concerns about the meaning of ***Trask*** expressed in other appellate decisions, whether published or unpublished. *See, e.g.*, ***Strait v. Kennedy***, 103 Wn. App. 626, 630 n.2, 13 P.3d 671 (2000).

salient analyses from the Arizona Supreme Court in ***Paradigm***, 200 Ariz. at 154:

> [The attorney] argues that . . . every insurer has both the freedom and financial ability to hire separate counsel to protect the insurer's own interests. This, of course, must be done in cases in which a conflict exists or is imminent, but we certainly need not impose such an expense on every insurer in every case just to provide the insurer with protection against malpractice by the lawyer it has chosen to handle the defense.
>
> When the interests of insurer and insured coincide, as they often do, it makes neither economic nor practical sense for an insurer to hire another attorney to monitor the actions and decisions of the attorney assigned to an insured.
>
> More important, we believe that a special relationship exists between the insurer and the counsel it assigns to represent its insured. The insurer is "in some way dependent upon" the lawyer it hires on behalf of its insureds. For instance, the insurer depends on the lawyer to represent the insured zealously so as to honor its contractual agreement to provide the defense when liability allegations are leveled at the insured. In addition, the insurer depends on the lawyer to thwart claims of liability and, in the event liability is found, to minimize the damages it must pay.
>
> Thus, the lawyer's duties to the insured are often discharged for the full or partial benefit of the nonclient.
>
> [Citations omitted; paragraphing altered.]

As the ***Paradigm*** court also noted, there is no legal basis for holding that nonclients may sue design professionals, but they may not sue lawyers (*id.*):

> If design professionals cannot escape liability to foreseeably injured third parties who, although lacking privity, are harmed

> by a designer's negligence, we cannot see why lawyers should not likewise be held to a similar standard.

Comparing the trial court's rulings in this case to this Court's recent jurisprudence regarding design professionals raises similar concerns.[11] The same rules that apply to other professions should also apply to lawyers.

In sum, this Court should – to the extent necessary – recalibrate ***Stewart Title*** in light of the egregious facts presented here. It should instead adopt the § 51 analysis in the limited context of the unique tripartite insurer/defense counsel/insured relationship. It should then reverse and remand for trial.

D. In the alternative, TDC is a third-party beneficiary of the insurance contract under Washington law.

If the Court will not find a duty under both of the arguments discussed above, then it should find one under ***Trask***. Beginning with ***Bowman***, 104 Wn.2d 181, continuing through ***Stangland v. Brock***, 109 Wn.2d 675, 747 P.2d 464 (1987), ***Bohn***, ***Trask***, and

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[11] *See, e.g.*, ***Donatelli v. D.R. Strong Consulting Eng'rs, Inc.***, 179 Wn.2d 84, 92, 312 P.2d 620 (2013) ("Under the independent duty doctrine, '[a]n injury is remediable in tort if it traces back to the breach of a tort duty arising independently of the terms of the contract'" (citing ***Eastwood v. Horse Harbor Found., Inc.***, 170 Wn.2d 380, 389, 241 P.3d 1256 (2010))); ***Michaels v. CH2M Hill, Inc.***, 171 Wn.2d 587, 257 P.3d 587 (2011) (avoiding statutory immunity for design professionals based on foreseeability).

Stewart Title, this Court has extended legal malpractice claims to nonclients for nearly 30 years. *See generally* Tom Andrews *et al.*, THE LAW OF LAWYERING IN WASHINGTON, Ch. 15, § I.A.2, at 15-4 (WSBA 2012). As discussed above, the expansion for other professionals has been more rapid, but the trend is clear. This Court should find a duty here under ***Trask***.

Trask establishes the following multi-factor balancing test to determine whether an attorney owes a duty to a nonclient:

> (1) the extent to which the transaction was intended to benefit the [nonclient] plaintiff;
>
> (2) the foreseeability of harm to the plaintiff;
>
> (3) the degree of certainty that the plaintiff suffered injury;
>
> (4) the closeness of the connection between the defendant's conduct and the injury;
>
> (5) the policy of preventing future harm; and
>
> (6) the extent to which the profession would be unduly burdened by a finding of liability.

123 Wn.2d at 843. Analysis of these factors necessarily involves an individualized factual determination in each case. *See id.* at 845.

The first factor asks "the extent to which the transaction was intended to benefit" the nonclient. *Id.* at 843. On its face, this test is not absolute: "the extent to which" implies a scale. But ***Trask*** is silent on where the scale tips. It should tip in TDC's favor here.

The unique tripartite relationship among insurer, insurance defense counsel, and insured, requires a mutual benefit to all:

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

RCW 48.01.030 (emphases added). The retention of insurance defense counsel is thus intended to benefit all of the parties to the tripartite relationship. The "transaction" – retaining defense counsel and representing the insured client – is intended to benefit the insurer directly, fulfilling its contractual obligation to provide a defense to its insured. This must and does directly benefit the insurer.[12]

This is not a mere "incidental" benefit: the lawyer is retained to fulfill the insurer's contractual obligation to the insured client. The very essence of the engagement is to benefit both the insurer and the insured. When insurance defense counsel fail in their duties to the client, the damage redounds directly – not incidentally – to the insurer, which pays the consequences. The transaction is intended to benefit the insurer to the fullest possible extent.

[12] The Court will note that this analysis is no different under § 51.

On the second element, the damages to the insurer resulting from legal malpractice are easily foreseen. Plaintiff's counsel in the underlying action is duty-bound to take every legitimate advantage of insurance defense counsel's negligence. As here, it permitted plaintiff to recover manifold damages. The insurer is contractually bound to pay them. The damage is foreseeable.[13]

Similarly on the third element, the damage to the insurer is certain. It must pay the damages up to its policy limits. And where, as here, the legal malpractice exposes the client to contribution, and the insurer to a "bad faith" claim, the damage is all the more certain.[14]

The fourth element is the "legal cause" aspect of § 51's proximate cause, writ small: the closeness of the connection between the malpractice and the damages. Here too, the connection is direct: BBL's failures to disclose potential and actual conflicts of interest, its failures to properly prepare and litigate the case, and its affirmative misstatements, all led directly to the plaintiff's claims against TDC and the need to settle. Again, a jury could conclude that BBL's malpractice caused TDC's damages.

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[13] Under § 51, this analysis subsumed under the "cause in fact" aspect of the proximate cause element.

[14] Frankly, the second and third elements of the ***Trask*** test add little or nothing to the analysis. The three-part § 51 test is more direct and relevant.

Factor five is the policy of preventing future harm. In adopting the ***Trask*** factors, this Court noted ***Stangland's*** holding that, in the context of an attorney's errors in drafting a will, if the beneficiaries could not recover for the attorney's alleged negligence, then no one could. ***Trask***, 123 Wn.2d at 843 (citing ***Stangland***, 109 Wn.2d at 681); *see also* ***In re Estate of Treadwell v. Wright***, 115 Wn. App. 238, 245-46, 61 P.3d 1214 (2003) (citing ***In re Guardianship of Karan***, 110 Wn. App. 76, 85-86, 38 P.3d 396 (2002) (discussing availability of meaningful remedy under the fifth ***Trask*** factor)).

The same is true here: if TDC cannot recover for BBL's malpractice, no one can. TDC fully protected its insureds from liability – and from the harm arising out of BBL's malpractice – by paying more than $7 million above its policy limits. Since the insureds suffered no damages, they cannot sue BBL. To prevent this harm to TDC, and similar harms in the future, this Court should recognize the duty of care running from BBL to TDC.

Finally, the sixth ***Trask*** factor asks whether imposing a duty here will unduly burden the profession. It cannot: it literally places no additional burden on the profession simply to enforce lawyers' compliance with the professional and ethical duties intrinsic to practicing law, as reflected (for instance) in the RPCs. Lawyers

always bear the burden of providing competent representation and are always subject to the possibility of a malpractice action seeking damages for failures to meet their standard of care. Malpractice actions cannot *unduly* burden the profession.

BBL will no doubt argue that an undue burden arises for a different reason: an allegedly inherent conflict between loyalty to the insured and loyalty to the insurer. Of course, if that were true, the tripartite relationship could never function properly. And where, as here, no conflict of interest existed between TDC and its insureds – they were both seeking competent representation for the insureds – there is no undue burden placed on the profession by recognizing that the consequences for legal malpractice should fall on the lawyer, not the client's insurer.

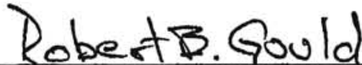
BBL will also likely argue that ***Stewart Title*** precludes finding a duty here. Suffice it to say that ***Stewart Title*** unequivocally and repeatedly states that the insurer in that case did not show enough to meet the first ***Trask*** factor, not that an insurer never could meet all of them. *See* ***Stewart Title***, 178 Wn.2d at 567 (mere alignment of interests insufficient to show intent to benefit); 569 (retention letter with limited duty to inform insufficient to show intent to benefit). ***Stewart Title*** does not dictate the result here.

CONCLUSION

For the reasons stated above, this Court should recognize a duty running from BBL to TDC, both because TDC was BBL's client, and also under § 51. In the alternative, the Court should recognize BBL's duty to TDC under a ***Trask*** analysis. Either way, the court should reverse and remand for trial.

RESPECTFULLY SUBMITTED this 24th day of February, 2014.

Law Office of Robert B. Gould



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CERTIFICATE OF SERVICE BY MAIL

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RCW 48.01.030
Public interest.

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

[1995 c 285 § 16; 1947 c 79 § .01.03; Rem. Supp. 1947 § 45.01.03.]

Restat 3d of the Law Governing Lawyers, § 51
§ 51 Duty of Care to Certain Nonclients

For purposes of liability under § 48, a lawyer owes a duty to use care within the meaning of § 52 in each of the following circumstances:

(1) to a prospective client, as stated in § 15;

(2) to a nonclient when and to the extent that:

(a) the lawyer or (with the lawyer's acquiescence) the lawyer's client invites the nonclient to rely on the lawyer's opinion or provision of other legal services, and the nonclient so relies; and

(b) the nonclient is not, under applicable tort law, too remote from the lawyer to be entitled to protection;

(3) to a nonclient when and to the extent that:

(a) the lawyer knows that a client intends as one of the primary objectives of the representation that the lawyer's services benefit the nonclient;

(b) such a duty would not significantly impair the lawyer's performance of obligations to the client; and

(c) the absence of such a duty would make enforcement of those obligations to the client unlikely; and

(4) to a nonclient when and to the extent that:

(a) the lawyer's client is a trustee, guardian, executor, or fiduciary acting primarily to perform similar functions for the nonclient;

(b) the lawyer knows that appropriate action by the lawyer is necessary with respect to a matter within the scope of the representation to prevent or rectify the breach of a fiduciary duty owed by the client to the nonclient, where (i) the breach is a crime or fraud or (ii) the lawyer has assisted or is assisting the breach;

(c) the nonclient is not reasonably able to protect its rights; and

(d) such a duty would not significantly impair the performance of the lawyer's obligations to the client.

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope and cross-references. This Section sets forth the limited circumstances in which a lawyer owes a duty of care to a nonclient. Compare § 14, describing when one becomes a client, and § 50, which sets forth a lawyer's duty to a client. On the meaning of the term "duty," see § 50, Comment a. Even when a duty exists, a lawyer is liable for negligence only if the lawyer violates the duty (see § 52), the violation is the legal cause of damages (see § 53), and no defense is established (see § 54).

As stated in § 54(1), a lawyer is not liable under this Section for any action or inaction the lawyer reasonably believed to be required by law, including a professional rule. As stated in §§ 66(3) and 67(4), a lawyer who takes action or decides not to take action permitted under those Sections is not, solely by reason of such action or inaction, liable for damages.

In appropriate circumstances, a lawyer is also subject to liability to a nonclient on grounds other than negligence (see §§ 48 & 56), for litigation sanctions (see § 110), and for acting without authority (see § 30). On indemnity and contribution, see § 53, Comment i. This Section does not consider those liabilities, such as liabilities arising under securities or similar legislation. Nor does the Section consider when a lawyer found liable to a nonclient may recover from a client under such theories as indemnity, contribution, or subrogation. On a client's liability to a nonclient arising out of a lawyer's conduct, see § 26, Comment d.

b. Rationale. Lawyers regularly act in disputes and transactions involving nonclients who will foreseeably be harmed by inappropriate acts of the lawyers. Holding lawyers liable for such harm is sometimes warranted. Yet it is often difficult to distinguish between harm resulting from inappropriate lawyer conduct on the one hand and, on the other hand, detriment to a nonclient resulting from a lawyer's fulfilling the proper function of helping a client through lawful means. Making lawyers liable to nonclients, moreover, could tend to discourage lawyers from vigorous representation. Hence, a duty of care to nonclients arises only in the limited circumstances described in the Section. Such a duty must be applied in light of those conflicting concerns.

c. Opposing parties. A lawyer representing a party in litigation has no duty of care to the opposing party under this Section, and hence no liability for lack of care, except in unusual situations such as when a litigant is provided an opinion letter from opposing counsel as part of a settlement (see Subsection (2) and Comment e hereto). Imposing such a duty could discourage vigorous representation of the lawyer's own client through fear of liability to the opponent. Moreover, the opposing party is protected by the rules and procedures of the adversary system and, usually, by counsel. In some circumstances, a lawyer's negligence will entitle an opposing party to relief other than damages, such as vacating a settlement induced by negligent misrepresentation. For a lawyer's liability to sanctions, which may include payments to an opposing party, based on certain litigation misconduct, see § 110. See also § 56, on liability for intentional torts.

Similarly, a lawyer representing a client in an arm's-length business transaction does not owe a duty of care to opposing nonclients, except in the exceptional circumstances described in this Section. On liability for aiding a client's unlawful conduct, see § 56.

Illustration:

1. Lawyer represents Plaintiff in a personal-injury action against Defendant. Because Lawyer fails to conduct an appropriate factual investigation, Lawyer includes a groundless claim in the complaint. Defendant incurs legal expenses in obtaining dismissal of this claim. Lawyer is not liable for negligence to Defendant. Lawyer may, however, be subject to litigation sanctions for having asserted a claim without proper investigation (see § 110). On claims against lawyers for wrongful use of civil proceedings and the like, see § 57(2) and Comment d thereto.

d. Prospective clients (Subsection (1)). When a person discusses with a lawyer the possibility of their forming a client-lawyer relationship, and even if no such relationship arises, the lawyer may be liable for failure to use reasonable care to the extent the lawyer advises or provides other legal services for the person (see § 15(2) and the Comments thereto). On duties to a former client, see § 50, Comment c.

e. Inviting reliance of a nonclient (Subsection (2)). When a lawyer or that lawyer's client (with the lawyer's acquiescence) invites a nonclient to rely on the lawyer's opinion or other legal services, and the nonclient reasonably does so, the lawyer owes a duty to the nonclient to use care (see § 52), unless the jurisdiction's general tort law excludes liability on the ground of remoteness. Accordingly, the nonclient has a claim against the lawyer if the lawyer's negligence with respect to the opinion or other legal services causes injury to the nonclient (see § 95). The lawyer's client typically benefits from the nonclient's reliance, for example, when providing the opinion was called for as a condition to closing under a loan agreement, and recognition of such a claim does not conflict with duties the lawyer properly owed to the client. Allowing the claim tends to benefit future clients in similar situations by giving nonclients reason to rely on similar invitations. See Restatement Second, Torts § 552. If a client is injured by a lawyer's negligence in providing opinions or services to a nonclient, for example because that renders the client liable to the nonclient as the lawyer's principal, the lawyer may have corresponding liability to the client (see § 50).

Clients or lawyers may invite nonclients to rely on a lawyer's legal opinion or services in various circumstances (see § 95). For example, a sales contract for personal property may provide that as a condition to closing the seller's lawyer will provide the buyer with an opinion letter regarding the absence of liens on the property being sold (see id., Illustrations 1 & 2; § 52, Illustration 2). A nonclient may require such an opinion letter as a condition for engaging in a transaction with a lawyer's client. A lawyer's opinion may state the results of a lawyer's investigation and analysis of facts as well as the lawyer's

legal conclusions (see § 95). On when a lawyer may properly decline to provide an opinion and on a lawyer's duty when a client insists on nondisclosure, see § 95, Comment d. A lawyer's acquiescence in use of the lawyer's opinion may be manifested either before or after the lawyer renders it.

In some circumstances, reliance by unspecified persons may be expected, as when a lawyer for a borrower writes an opinion letter to the original lender in a bank credit transaction knowing that the letter will be used to solicit other lenders to become participants in syndication of the loan. Whether a subsequent syndication participant can recover for the lawyer's negligence in providing such an opinion letter depends on what, if anything, the letter says about reliance and whether the jurisdiction in question, as a matter of general tort law, adheres to the limitations on duty of Restatement Second, Torts § 552(2) or those of Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y.1931), or has rejected such limitations. To account for such differences in general tort law, Subsection (2) refers to applicable law excluding liability to persons too remote from the lawyer.

When a lawyer owes a duty to a nonclient under this Section, whether the nonclient's cause of action may be asserted in contract or in tort should be determined by reference to the applicable law of professional liability generally. The cause of action ordinarily is in substance identical to a claim for negligent misrepresentation and is subject to rules such as those concerning proof of materiality and reliance (see Restatement Second, Torts §§ 552-554). For liability under securities legislation, see § 56, Comment i. Whether the representations are actionable may be affected by the duties of disclosure, if any, that the client owes the nonclient (see § 98, Comment e). In the absence of such duties of disclosure, the duty of a lawyer providing an opinion is ordinarily limited to using care to avoid making or adopting misrepresentations. On a lawyer's obligations in furnishing an opinion, see § 95, Comment c. On intentionally making or assisting misrepresentations, see § 56, Comment f, and § 98.

A lawyer may avoid liability to nonclients under Subsection (2) by making clear that an opinion or representation is directed only to a client and should not be relied on by others. Likewise, a lawyer may limit or avoid liability under Subsection (2) by qualifying a representation, for example by making clear through limiting or disclaiming language in an opinion letter that the lawyer is relying on facts provided by the client without independent investigation by the lawyer (assuming that the lawyer does not know the facts provided by the client to be false, in which case the lawyer would be liable for misrepresentation). The effectiveness of a limitation or disclaimer depends on whether it was reasonable in the circumstances to conclude that those provided with the opinion would receive the limitation or disclaimer and understand its import. The relevant circumstances include customary practices known to the recipient concerning the construction of opinions and whether the recipient is represented by counsel or a similarly experienced agent.

When a nonclient is invited to rely on a lawyer's legal services, other than the lawyer's opinion, the analysis is similar. For example, if the seller's lawyer at a real-estate closing

offers to record the deed for the buyer, the lawyer is subject to liability to the buyer for negligence in doing so, even if the buyer did not thereby become a client of the lawyer. When a nonclient is invited to rely on a lawyer's nonlegal services, the lawyer's duty of care is determined by the law applicable to providers of the services in question.

f. A nonclient enforcing a lawyer's duties to a client (Subsection (3)). When a lawyer knows (see Comment h hereto) that a client intends a lawyer's services to benefit a third person who is not a client, allowing the nonclient to recover from the lawyer for negligence in performing those services may promote the lawyer's loyal and effective pursuit of the client's objectives. The nonclient, moreover, may be the only person likely to enforce the lawyer's duty to the client, for example because the client has died.

A nonclient's claim under Subsection (3) is recognized only when doing so will both implement the client's intent and serve to fulfill the lawyer's obligations to the client without impairing performance of those obligations in the circumstances of the representation. A duty to a third person hence exists only when the client intends to benefit the third person as one of the primary objectives of the representation, as in the Illustrations below and in Comment g hereto. Without adequate evidence of such an intent, upholding a third person's claim could expose lawyers to liability for following a client's instructions in circumstances where it would be difficult to prove what those instructions had been. Threat of such liability would tend to discourage lawyers from following client instructions adversely affecting third persons. When the claim is that the lawyer failed to exercise care in preparing a document, such as a will, for which the law imposes formal or evidentiary requirements, the third person must prove the client's intent by evidence that would satisfy the burden of proof applicable to construction or reformation (as the case may be) of the document. See Restatement Third, Property (Donative Transfers) §§ 11.2 and 12.1 (Tentative Draft No. 1, 1995) (preponderance of evidence to resolve ambiguity in donative instruments; clear and convincing evidence to reform such instruments).

Subsections (3) and (4), although related in their justifications, differ in application. In situations falling under Subsection (3), the client need not owe any preexisting duty to the intended beneficiary. The scope of the intended benefit depends on the client's intent and the lawyer's undertaking. On the other hand, the duty under Subsection (4) typically arises when a lawyer helps a client-fiduciary to carry out a duty of the fiduciary to a beneficiary recognized and defined by trust or other law.

Illustrations:

2. Client retains Lawyer to prepare and help in the drafting and execution of a will leaving Client's estate to Nonclient. Lawyer prepares the will naming Nonclient as the sole beneficiary, but negligently arranges for Client to sign it before an inadequate number of witnesses. Client's intent to benefit Nonclient thus appears on the face of the will executed by Client. After Client dies, the will is held ineffective due to the lack of witnesses, and Nonclient is thereby harmed. Lawyer is subject to liability to Nonclient for

negligence in drafting and supervising execution of the will.

3. Same facts as in Illustration 2, except that Lawyer arranges for Client to sign the will before the proper number of witnesses, but Nonclient later alleges that Lawyer negligently wrote the will to name someone other than Nonclient as the legatee. Client's intent to benefit Nonclient thus does not appear on the face of the will. Nonclient can establish the existence of a duty from Lawyer to Nonclient only by producing clear and convincing evidence that Client communicated to Lawyer Client's intent that Nonclient be the legatee. If Lawyer is held liable to Nonclient in situations such as this and the preceding Illustration, applicable principles of law may provide that Lawyer may recover from their unintended recipients the estate assets that should have gone to Nonclient.

4. Same facts as in Illustration 2, except that Lawyer arranges for Client to sign the will before the proper number of witnesses. After Client's death, Heir has the will set aside on the ground that Client was incompetent and then sues Lawyer for expenses imposed on Heir by the will, alleging that Lawyer negligently assisted Client to execute a will despite Client's incompetence. Lawyer is not subject to liability to Heir for negligence. Recognizing a duty by lawyers to heirs to use care in not assisting incompetent clients to execute wills would impair performance of lawyers' duty to assist clients even when the clients' competence might later be challenged. Whether Lawyer is liable to Client's estate or personal representative (due to privity with the lawyer) is beyond the scope of this Restatement. On a lawyer's obligations to a client with diminished capacity, see § 24.

g. A liability insurer's claim for professional negligence. Under Subsection (3), a lawyer designated by an insurer to defend an insured owes a duty of care to the insurer with respect to matters as to which the interests of the insurer and insured are not in conflict, whether or not the insurer is held to be a co-client of the lawyer (see § 134, Comment f). For example, if the lawyer negligently fails to oppose a motion for summary judgment against the insured and the insurer must pay the resulting adverse judgment, the insurer has a claim against the lawyer for any proximately caused loss. In such circumstances, the insured and insurer, under the insurance contract, both have a reasonable expectation that the lawyer's services will benefit both insured and insurer. Recognizing that the lawyer owes a duty to the insurer promotes enforcement of the lawyer's obligations to the insured. However, such a duty does not arise when it would significantly impair, in the circumstances of the representation, the lawyer's performance of obligations to the insured. For example, if the lawyer recommends acceptance of a settlement offer just below the policy limits and the insurer accepts the offer, the insurer may not later seek to recover from the lawyer on a claim that a competent lawyer in the circumstances would have advised that the offer be rejected. Allowing recovery in such circumstances would give the lawyer an interest in recommending rejection of a settlement offer beneficial to the insured in order to escape possible liability to the insurer.

h. Duty based on knowledge of a breach of fiduciary duty owed by a client (Subsection

(4)). A lawyer representing a client in the client's capacity as a fiduciary (as opposed to the client's personal capacity) may in some circumstances be liable to a beneficiary for a failure to use care to protect the beneficiary. The duty should be recognized only when the requirements of Subsection (4) are met and when action by the lawyer would not violate applicable professional rules (see § 54(1)). The duty arises from the fact that a fiduciary has obligations to the beneficiary that go beyond fair dealing at arm's length. A lawyer is usually so situated as to have special opportunity to observe whether the fiduciary is complying with those obligations. Because fiduciaries are generally obliged to pursue the interests of their beneficiaries, the duty does not subject the lawyer to conflicting or inconsistent duties. A lawyer who knowingly assists a client to violate the client's fiduciary duties is civilly liable, as would be a nonlawyer (see Restatement Second, Trusts § 326). Moreover, to the extent that the lawyer has assisted in creating a risk of injury, it is appropriate to impose a preventive and corrective duty on the lawyer (cf. Restatement Second, Torts § 321).

The duty recognized by Subsection (4) is limited to lawyers representing only a limited category of the persons described as fiduciaries--trustees, executors, guardians, and other fiduciaries acting primarily to fulfill similar functions. Fiduciary responsibility, imposing strict duties to protect specific property for the benefit of specific, designated persons, is the chief end of such relationships. The lawyer is hence less likely to encounter conflicting considerations arising from other responsibilities of the fiduciary-client than are entailed in other relationships in which fiduciary duty is only a part of a broader role. Thus, Subsection (4) does not apply when the client is a partner in a business partnership, a corporate officer or director, or a controlling stockholder.

The scope of a client's fiduciary duties is delimited by the law governing the relationship in question (see, e.g., Restatement Second, Trusts §§ 169-185). Whether and when such law allows a beneficiary to assert derivatively the claim of a trust or other entity against a lawyer is beyond the scope of this Restatement (see Restatement Second, Trusts § 282). Even when a relationship is fiduciary, not all the attendant duties are fiduciary. Thus, violations of duties of loyalty by a fiduciary are ordinarily considered breaches of fiduciary duty, while violations of duties of care are not.

Sometimes a lawyer represents both a fiduciary and the fiduciary's beneficiary and thus may be liable to the beneficiary as a client under § 50 and may incur obligations concerning conflict of interests (see §§ 130-131). A lawyer who represents only the fiduciary may avoid such liability by making clear to the beneficiary that the lawyer represents the fiduciary rather than the beneficiary (compare § 103, Comment e).

The duty recognized by Subsection (4) arises only when the lawyer knows that appropriate action by the lawyer is necessary to prevent or mitigate a breach of the client's fiduciary duty. As used in this Subsection and Subsection (3) (see Comment f), "know" is the equivalent of the same term defined in ABA Model Rules of Professional Conduct, Terminology P [5] (1983) (". . . 'Knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."). The concept is functionally the same as the terminology "has reason to know" as defined in

Restatement Second, Torts § 12(1) (actor has reason to know when actor "has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such facts exists."). The "know" terminology should not be confused with "should know" (see id. § 12(2)). As used in Subsection (3) and (4) "knows" neither assumes nor requires a duty of inquiry.

Generally, a lawyer must follow instruction of the client-fiduciary (see § 21(2) hereto) and may assume in the absence of contrary information that the fiduciary is complying with the law. The duty stated in Subsection (4) applies only to breaches constituting crime or fraud, as determined by applicable law and subject to the limitations set out in § 67, Comment d, and § 82, Comment d, or those in which the lawyer has assisted or is assisting the fiduciary. A lawyer assists fiduciary breaches, for example, by preparing documents needed to accomplish the fiduciary's wrongful conduct or assisting the fiduciary to conceal such conduct. On the other hand, a lawyer subsequently consulted by a fiduciary to deal with the consequences of a breach of fiduciary duty committed before the consultation began is under no duty to inform the beneficiary of the breach or otherwise to act to rectify it. Such a duty would prevent a person serving as fiduciary from obtaining the effective assistance of counsel with respect to such a past breach.

Liability under Subsection (4) exists only when the beneficiary of the client's fiduciary duty is not reasonably able to protect its rights. That would be so, for example, when the fiduciary client is a guardian for a beneficiary unable (for reasons of youth or incapacity) to manage his or her own affairs. By contrast, for example, a beneficiary of a family voting trust who is in business and has access to the relevant information has no similar need of protection by the trustee's lawyer. In any event, whether or not there is liability under this Section, a lawyer may be liable to a nonclient as stated in § 56.

A lawyer owes no duty to a beneficiary if recognizing such duty would create conflicting or inconsistent duties that might significantly impair the lawyer's performance of obligations to the lawyer's client in the circumstances of the representation. Such impairment might occur, for example, if the lawyer were subject to liability for assisting the fiduciary in an open dispute with a beneficiary or for assisting the fiduciary in exercise of its judgment that would benefit one beneficiary at the expense of another. For similar reasons, a lawyer is not subject to liability to a beneficiary under Subsection (4) for representing the fiduciary in a dispute or negotiation with the beneficiary with respect to a matter affecting the fiduciary's interests.

Under Subsection (4) a lawyer is not liable for failing to take action that the lawyer reasonably believes to be forbidden by professional rules (see § 54(1)). Thus, a lawyer is not liable for failing to disclose confidences when the lawyer reasonably believes that disclosure is forbidden. For example, a lawyer is under no duty to disclose a prospective breach in a jurisdiction that allows disclosure only regarding a crime or fraud threatening imminent death or substantial bodily harm. However, liability could result from failing to attempt to prevent the breach of fiduciary duty through means that do not entail disclosure. In any event, a lawyer's duty under this Section requires only the care set

forth in § 52.

Illustrations:

5. Lawyer represents Client in Client's capacity as trustee of an express trust for the benefit of Beneficiary. Client tells Lawyer that Client proposes to transfer trust funds into Client's own account, in circumstances that would constitute embezzlement. Lawyer informs Client that the transfer would be criminal, but Client nevertheless makes the transfer, as Lawyer then knows. Lawyer takes no steps to prevent or rectify the consequences, for example by warning Beneficiary or informing the court to which Client as trustee must make an annual accounting. The jurisdiction's professional rules do not forbid such disclosures (see § 67). Client likewise makes no disclosure. The funds are lost, to the harm of Beneficiary. Lawyer is subject to liability to Beneficiary under this Section.

6. Same facts as in Illustration 5, except that Client asserts to Lawyer that the account to which Client proposes to transfer trust funds is the trust's account. Even though lawyer could have exercised diligence and thereby discovered this to be false, Lawyer does not do so. Lawyer is not liable to the harmed Beneficiary. Lawyer did not owe Beneficiary a duty to use care because Lawyer did not know (although further investigation would have revealed) that appropriate action was necessary to prevent a breach of fiduciary duty by Client.

7. Same facts as in Illustration 5, except that Client proposes to invest trust funds in a way that would be unlawful, but would not constitute a crime or fraud under applicable law. Lawyer's services are not used in consummating the investment. Lawyer does nothing to discourage the investment. Lawyer is not subject to liability to Beneficiary under this Section.

RPC RULE 1.7
CONFLICT OF INTEREST; CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

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

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule 1.18. For definitions of "informed consent" and "confirmed in writing," see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires

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

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer's violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

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

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

See also Washington Comment [36].

Identifying Conflicts of Interest: Directly Adverse

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

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

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

See also Washington Comment [37].

Lawyer's Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer's duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer's responsibilities to other persons, such as fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

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

[12] [Reserved.]

Interest of Person Paying for a Lawyer's Service

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

Prohibited Representations

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

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

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

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

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the

same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

See also Washington Comment [38].

Informed Consent

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

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client in determining whether common representation is in the client's interests.

See also Washington Comment [39].

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a

reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

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

Consent to Future Conflict

[22] [Reserved.]

Conflicts in Litigation

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

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the

lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include: where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

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

Nonlitigation Conflicts

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

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

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

Special Considerations in Common Representation

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

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

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

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

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

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the

lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

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

Additional Washington Comments (36 - 41)

General Principles

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

Identifying Conflicts of Interest: Material Limitation

[37] Use of the term "significant risk" in paragraph (a)(2) is not intended to be a substantive change or diminishment in the standard required under former Washington RPC 1.7(b), i.e., that "the representation of the client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests."

Prohibited Representations

[38] In Washington, a governmental client is not prohibited from

properly consenting to a representational conflict of interest.

Informed Consent

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

Nonlitigation Conflicts

[40] Under Washington case law, in estate administration matters the client is the personal representative of the estate.

Special Considerations in Common Representation

[41] Various legal provisions, including constitutional, statutory and common law, may define the duties of government lawyers in representing public officers, employees, and agencies and should be considered in evaluating the nature and propriety of common representation.

[Amended effective September 1, 2006.]

RULE 5.4
PROFESSIONAL INDEPENDENCE OF A LAWYER

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

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

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

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

(4) [Reserved.]

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

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

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

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

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

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

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

Comment

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

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

Additional Washington Comment (3)

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

[Amended effective September 1, 2006.]

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BRIEF OF APPELLANT

Case: *The Doctor's Company v. Bennett Bigelow & Leedom*

Case Number: 89178-8

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THANK YOU.

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