

CLERK OF COURT
COUNTY OF KING
CO. FILED 2011-03-03
STATE OF WASHINGTON
BY  DEPUTY

NO. 38858-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

PETRONILO CIFUENTES VICENTE,

Defendant;

Matter of April Boutillette Brinkman,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that it properly informed Brinkman her conduct was impermissible.
2. The trial court erred in concluding that Brinkman's words and behaviors were disrespectful of the court's authority and an affront to its dignity.
3. The trial court erred in concluding that Brinkman's actions were likely violations of the Rules of Professional Conduct.
4. The trial court erred in concluding that Brinkman's conduct was willful and intentional beyond a reasonable doubt.
5. The trial court erred in proceeding under its inherent authority, even though it found the statutory contempt scheme adequate.
6. The trial court erred in concluding that sanctions in this case are appropriate.
7. In making the assignments of error numbers 1, 2, 3, 4, 5, and 6, Appellant takes exception to the Findings of Fact # 4. CP 109.
8. In making the assignment of error number 7, the Appellant takes exception to the Findings of Fact # 5. CP 109.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Were sanctions appropriate under the inherent and / or statutory contempt authority of the trial court?
- B. Does the trial court have the appropriate authority to make a finding of fact and / or conclusion of law about an attorney's violation of the Rules of Professional Conduct?

III. STATEMENT OF FACTS

On August 28th, 2008, there was a hearing during which the trial court granted the following motions in limine: exclusion of witnesses not testifying, RP 69, 101, no discussion of the victim's sexual history and the victim's father's abusive behavior unless he opened the door and for impeachment purposes, RP 72-74, exclusion of information about Internet activities and / or alcohol and / or drug usage and / or criminal record, RP 81-82, 89-90, no mentioning of specific punishment in front of the jury, RP 82, no eliciting testimony about prior bad acts of the victim and self-serving hearsay, RP 84-85, no opinion(s) as to honesty of any witness, RP 89, not to violate ER 402, ER 403, and / or ER 607, RP 91, not to impeach after witness admitted the relevant information, RP 92, and no interpreting of Spanish to English, RP 95-97.

The trial court also granted the motion in limine that objections be relatively quick and then followed by the basis. RP 79. In terms of what the trial court would consider a proper objection followed by the basis, Brinkman stated on the record that her understanding was this matter would be decided case-by-case per objection. RP 79. The trial court did not contradict this understanding. RP 79-80.

The following motions in limine were explicitly reserved by the trial court: to prohibit question(s) exploring motive or bias when there is not a witness to rebut it, RP 77-79, to prohibit question(s) of the defendant about lack of criminal background, RP 80-81, and to prohibit question(s) about prior bad acts of any witness, RP 84-85. Then, there was a partial reserving of the following motion in limine in that the trial court only granted it preliminarily: to elicit testimony that the defendant had not committed any bad act(s). RP 87-89.

Meanwhile, the following motions in limine did not get a direct ruling to grant or deny by the trial court at the time of the motion in limine hearing: the exclusion of reputation or character evidence, RP 69-72, and any direct so-called blaming someone else for the abuse of the victim and how that may pertain to issues of character evidence, RP 73-75. Also, the trial court specified that if

any unanticipated finger pointing came up by one witness toward another the matter would simply be heard outside the presence of the jury. RP 75. Similarly, the trial court at once granted and also reserved the eliciting of testimony having to do with issues of domestic violence of any witness. RP 92-95. Finally, the trial court at first granted and then reserved on a motion in limine about so-called witch-hunt language during opening or closing. RP 99-100.

The trial court on September 2nd, 2009 made a ruling about character evidence. This ruling was in direct response to the memorandum presented by the Defense, and filed with the court. CP 61. The trial court ruled against the particular motion, and, therefore, that any evidence as to the defendant's reputation for truthfulness, or any such general character evidence be excluded. RP 150-151. The trial court also specifically ruled that there would be no mention of any lack of criminal history of the defendant. RP 153.

On September 2nd, 3rd, 4th, 8th, and 9th, 2008, Brinkman served as defense counsel for Petronilo Cifuentes Vicente in his felony criminal trial before Judge Diane Woolard in the Clark County Superior Court. The trial court warned the Defense on September 2nd, 2008 that it not make comments considered unprofessional by the court, such as "why don't you just take some duck [*sic*] tape and put

it over my mouth right now.” RP 158. The trial court did not provide notice to Brinkman that any such comment amounted to contempt of court and / or sanctionable conduct. RP 158.

The next warning from the trial court to Brinkman was with respect to speaking objections, and this occurred on September 3rd, 2009. The court made a general warning to Brinkman that no editorial comments be made. RP 285. Brinkman stated on the record that according to her understanding she had not been making speaking objections. RP 285-286. The trial court stated that Brinkman probably did not realize she had been preceding objections with “I feel.” RP 286. The trial court did not provide any notice to Brinkman about contempt and / or sanctionable conduct with respect to this warning. RP 285.

The next warning by the trial court occurred on September 3rd, 2009, when Ms. Brinkman asked the court to instruct her on appropriate procedure in terms of allowing the interpreters enough time to perform their translations. RP 289-290. The trial court removed the jury and stated that questions to the court should be “short and simple,” and that “any issues that we have are going to be taken outside the presence of the jury.” RP 290. The trial court did not give notice that any such question to the court by Brinkman even

in the presence in the jury was to be accompanied by a finding of contempt of court and / or sanctions. RP 290-292.

The next discussion about speaking objections occurred on September 3rd, 2009, when the trial court removed the jury and stated to Brinkman that she had made a speaking objection when she said the following:

“I object, Your Honor. Because I’m giving her a chance to defend herself before I impeach her.”

RP 304.

The trial court did not give any warning or notice to Brinkman that any such speaking objection was contemptuous and / or sanctionable conduct. RP 304-307. The trial court did not specifically state that if Brinkman made a speaking objection again, that this act was to result in a finding of contempt of court and / or sanctions. RP 304-307.

On September 3rd, 2009, there was also a warning by the trial court to Brinkman that she had violated a motion in limine. RP 313-315. The trial court stated that Ms. Brinkman could not ask about abuse by another in the home. RP 314-315. The trial court did not provide Brinkman any warning or notice that such a violation of a motion in limine was to be accompanied by a finding of contempt of court and / or sanctions. RP 313-315.

On September 3rd, 2009, the trial court also advised defense counsel that the following objection was a speaking objection:

“Because, Your Honor, I object again, I think this has been asked and answered, just the same with me, and now it’s become argumentative, badgering the witness.”

RP 328.

The trial court instructed Brinkman that “same as me” was improper to say. RP 328. The trial court did not provide notice or warning to Brinkman that these words by defense counsel if they were said again were to be accompanied by a finding of contempt and / or sanctions by the court. RP 328.

The first time the trial court mentioned the word contempt and / or sanctions such as fines being issued by the court was on September 4th, 2009. This occurred during a discussion outside the presence of the jury, among the Prosecution, the Defense, and the trial court. RP 519-530. The Prosecution talked about moving for a mistrial. RP 522. The Defense said that it wanted to move for a mistrial if certain evidence were not allowed to be presented. RP 529. The trial court stated “--now. I’m not going to tolerate it.” RP 529. The Defense stated that it was “not going to tolerate not being able to fulfill the duties for my client.” RP 529.

The trial court responded to the request for a mistrial and statement by the Defense about fulfilling its duties as follows:

“Ms. Brinkman, if the Prosecutor did that, I’d hold him in contempt and they’d be going to jail. Now, you will not make an outburst like that again and make any accusations to the Court. If you are in any way unprofessional or lack respect for the Court, I’m going to start with fines.”

RP 529.

There is a further admonishment by the trial court to the Defense on September 4th, 2008 with respect to what the trial court stated was a violation of a motion in limine. This occurred when Brinkman asked the defendant the following question: “And why did he not like you?” RP 608. This question referred to the victim’s father. The Prosecution objected, and the trial court overruled the objection. RP 608. The defendant answered the question in a manner that the trial court stated was in violation of a motion in limine. RP 608-609. “That’s probably the fifth violation of motions in limine and is inexcusable,” stated the court. RP 609. The trial court then stated that it was not a motion in limine; rather, it had been discussed earlier and “struck” by the court. RP 612.

The trial court did not state that what it considered to be a violation of a motion in limine in this situation also reflected a lack

of professionalism and / or lack of respect for the court. RP 608-612. Brinkman stated that the answer by the defendant had not been anticipated, and that the trial court had overruled the State's objection. RP 609-610. The trial court did not state that the question as presented by the Defense to its client was contemptuous and / or sanctionable conduct, nor did the court make any finding for contempt sanctions. RP 608-612.

Defense in closing argument on September 8th, 2009, made the following two statements:

“Now, what evidence does the State have that he ever lived there? He has – talk about bias – accusers who are all with their own motivations and interests, and not all of them that we could bring out to you, to be quite honest, because of the rules of this court.”

RP 810.

and

“██████ talked about various types of underlying motivations her family may have that we couldn't bring out to you entirely, different kind of stresses that she has, as well.”

RP 813.

No objection was made by the State to either of these statements, nor did the trial court inform the Defense that it considered either of such statements to be inappropriate in any manner. RP 810-813. The trial

court also did not give any notice that either of such statements rose to the level of contempt and / or sanctions. RP 810-815.

Prosecutor Kim Farr on September 9th, 2008 moved the court to have a sanctions hearing and hold Brinkman in contempt of court. RP 821. Prosecutor Farr moved for the sanctions hearing before the jury had given its verdict, based on the closing argument by defense counsel. RP 821. Judge Woolard made no findings at the time, but she did state as follows:

“And I’ll review the tape, and we’ll come back Again. You know, there were some real difficulties with following the rules of professional conduct throughout this trial. And we’ll deal with all of that at a later time.”

RP 823.

On December 30th, 2008, Judge Woolard found for contempt sanctions. The trial court proceeded under its inherent contempt authority. CP 109. Judge Woolard listed behaviors in Findings of Fact # 4 for which she decided contempt sanctions were appropriate:

4. During the actual trial the defense attorney repeatedly violated instructions from the court to such an extent that the trial court on several occasions had to withdraw the jury to warn Brinkman about her specific violations. The violations included, but are not limited to, violating motions in limine, not adhering to the court’s instructions of making objections as well [*sic*] inappropriate comments at closing

argument. The court observed the long pattern of behavior over the course of the entire trial and that Brinkman was unable to conform her behavior to the court's instructions.

CP 109.

Judge Woolard also stated in Findings of Fact # 5:

“After the jury gave its verdict, the State brought its motion for sanctions as a result of closing argument statements by Defense.”

CP 109.

In the Conclusions of Law, Judge Woolard does not specify any sanctionable behavior having to do with statements made by defense counsel during closing argument. CP 109.

Judge Woolard found Brinkman in contempt of court and ordered \$500.00 sanctions. CP 109. The trial court made a Conclusion of Law # 1 that the summary contempt statute is adequate, and the trial court also decided to proceed under its inherent authority rather than the statutory scheme. CP 109. The Appellant filed a Notice of Appeal in the Court of Appeals-Division II. The Appellant moved the Court of Appeals for a hearing to determine specific instances on the record that support the Findings of Fact and Conclusions of Law entered in the matter. The motion for remand was denied and the Appellant's Brief was due by July 27th, 2009.

IV. ARGUMENT AND AUTHORITIES

A. Sanctions were not appropriate under the inherent and / or statutory contempt authority of the trial court.

1. The trial court erred in concluding that it properly informed Brinkman her conduct was impermissible.

In *State v. Berty*, 136 Wn. App. 74 (2006), the Superior Court of Kitsap County imposed contempt sanctions against the defense counsel for conduct during closing argument and the Court of Appeals-Division II upheld the trial court. In *Berty*, the trial court did not impose immediate sanctions. 136 Wn. App. 74 at 85. The Court of Appeals-Division II held that the trial court properly exercised its contempt powers in summarily finding the defense counsel in contempt, even if the actual sanctions were imposed at the end of the proceeding. 136 Wn. App. 74 at 85.

In *Berty*, the appellate court emphasized the plain language of the contempt statute in upholding the imposition of sanctions:

“The judge summarily imposed punitive sanctions on Grissom due to his contempt within the courtroom. The judge certified that he saw the contempt when he notified Grissom during closing argument that his (Grissom’s) comments were sanctionable. The judge was permitted to wait to impose sanctions until the end of the proceeding.”

136 Wn. App. 74 at 85.

The appellate court upheld the trial court's actions as correct under authority of the summary contempt statute. 136 Wn. App. 74 at 85.

The Court of Appeals-Division II decided the summary contempt sanctions in *Berty* were appropriate, because the judge notified the defense counsel directly that the statements made during closing argument were sanctionable. The appellate court looked to the construction of the summary contempt legislation RCW 7.21.010 and RCW 7.21.050 as the basis for its reasoning:

“The judge may impose such contempt sanctions at the end of the proceeding, and sanctions are only permitted ‘for the purpose of preserving order in the court and protecting the authority and dignity of the court.’ RCW 7.21.050(1).”

136 Wn. App. 74 at 85.

It is due to the fact that the trial court provided notice to the defense counsel directly that it thereby properly preserved the summary contempt authority to maintain the order in the court and protect the dignity of the court.

Specifically in *Berty*, the trial court at the actual time the statements by defense counsel were made provided notice to him that his comments were sanctionable and that a sanctions hearing was to be held. 136 Wn. App. 74 at 81. This was done after the State directly objected to the specific statements made by defense counsel

and the trial court sustained the objection. 136 Wn. App. 74 at 80. The trial court then took the time to at least briefly review the record with respect to the sanctionable conduct. 136 Wn. App. 74 at 81.

According to the record, Grissom was directly warned by the trial court that he had at least crossed the line to sanctionable conduct when he said in front of the jury about Symphony that “the witness has now lied under oath.” 136 Wn. App. 74 at 79. The sanctionable conduct then occurred when Grissom said the same substantive thing during closing about Symphony; that “I even had to go so far as to say she wasn’t telling the truth.” 136 Wn. App. 74 at 80. The defense counsel repeated this same substantive thing about a particular witness not telling the truth after he had been warned by the trial court not to say this specific thing, and because it was sanctionable.

Here, Brinkman received no similar warning from the trial court. There is nothing in the record that documents the Defense committed any specific act the trial court had said was sanctionable. The first time the trial court even mentioned contempt sanctions, it was in reference to statements made by defense counsel asking about a mistrial and declaring that she would not tolerate not being able to fulfill the duty to defend her client. No such statements were ever made again by defense counsel during the course of the entire trial.

Even when Farr brought his motion for contempt sanctions, which first occurred before the jury delivered its verdict, the trial court was still not definite about any specific sanctionable act(s) having occurred. In fact, Judge Woolard wanted time to be able to review the record, although she did have concerns about the defense counsel violating the RPCs. The trial court said that the matter would be dealt with at a later time.

The case before us then is quite distinct from *Berty*. In that precedential case there was an objection by the State and a sustaining of the objection by the trial court with respect to specific statements made by the Defense during closing. And this occurred after the trial court had already made a direct warning to the defense counsel about such specific conduct being sanctionable, and the trial court then actually reviewed the record to confirm that the defense counsel had in fact been warned about the specific conduct and that he had disobeyed the particular court order in question. Here, the defense counsel simply never committed any specific act(s) of which she had been similarly warned and / or provided any notice about in terms of contempt sanctions. In the case at hand, moreover, there was never any objection during closing by the State and / or a summary order by the court to preserve the authority and dignity of the court.

2. The trial court erred in concluding that Brinkman's words and behaviors were disrespectful of the court's authority and an affront to its dignity.

The Court of Appeals-Division II in *Berty* defines behavior that constitutes misconduct as a matter of law:

“‘Contempt of court’ includes (1) intentional ‘disorderly, contemptuous, or insolent behavior toward the judge..., tending to impair its authority...’ or (2) intentional ‘disobedience of any lawful judgment, decree, order, or process of the court.’ RCW 7.21.010(1)(a)-(b). Repeated violations of court rules can rise to contumacious conduct, especially when an attorney violates a court’s instructions not to pursue a particular line of questioning. *See Pounders v. Watson*, 521 U.S. 982, 989-91, 117 S.Ct. 2359, 138 L.Ed.2d 976 (1997).”

136 Wn. App. 74 at 86.

In *Berty*, the trial court cited very specific instances of violations of court rules. These instances served as “clear examples” of violation of a trial court’s order and “unequivocally flouting its authority.” 136 Wn. App. 74 at 86. Therefore, the Court of Appeals-Division II affirmed the trial court in finding that defense counsel’s behavior amounted to contempt of court. 136 Wn. App. 74 at 86.

The Court of Appeals-Division II also emphasized the fact that in *Berty*, the Defense was specifically limited in the statements it made during closing by a motion in limine:

“Before trial, the State filed motions in limine to prohibit references to any counseling, mental health or otherwise, sought by any of the witnesses and to prohibit references to Symphony’s or Berty’s childhood. The defense, through attorney Stenberg, argued that Symphony’s history was relevant to her motive or bias. The court granted the State’s motions but said it would revisit the issue if the defense presented a memorandum with authority showing the testimony was admissible. The State later claimed in its motions for sanctions that defense counsel never provided any such authority, and none is apparent in the record on appeal. Grissom responded that he did cite an authority during sidebar, but the sidebar is not included in the record.”

136 Wn. App. 74 at 76-77.

In the case before us, there has not been a showing of the five violations of motions in limine, as the trial court stated on the record had occurred. Nor has there been a documentation on the record of one violation of a motion in limine that was contemptuous and / or sanctionable.

In *Berty*, moreover, there was a very specific substance to the comments made by the defense counsel during closing argument that the trial court took issue with ~ and which Grissom had been specifically warned about during his questioning of that very witness. Grissom actually stated about the witness Symphony that “I even had to go so far as to say she wasn’t telling the truth,” at which time the State objected and the trial court sustained the objection. 136 Wn.

App. 74 at 80. Here, Brinkman neither directly stated that a witness did not tell the truth, nor did defense counsel make a statement she had been directly and specifically warned not to make.

Also in contrast to *Berty*, in the case before us the trial court did not cite specific instances where Brinkman intentionally disobeyed a direct court ruling not to use certain words or make a particular substantive statement. Nor did the trial court cite specific instances where Brinkman acted with disorderly, contemptuous, or insolent behavior toward the judge. The trial court did find general violations of court rules, and Appellant argues the record does not reflect an intentional general violation of rules by Brinkman. Appellant also argues the record does not reflect specific instances including violation(s) of motion(s) in limine where Brinkman intentionally and willfully disobeyed any order(s) of the court.

3. The trial court erred in concluding that Brinkman's conduct was willful and intentional beyond a reasonable doubt.

The facts of the case at hand are simply very different from *Berty* with respect to any direct showing of intent to commit contempt by defense counsel. First of all, Grissom was directly warned that a specific substantive statement about Symphony not telling the truth

was sanctionable. Then, even after being warned specifically by the trial court that the substance of his statement about Symphony not telling the truth was sanctionable, Grissom went on during closing to say the same exact thing about that particular witness.

By comparison, Brinkman never directly repeated what she had been warned was contemptuous and / or sanctionable conduct. Brinkman had been warned by the trial court about contempt sanctions after asking for a mistrial and then saying in effect that she would not tolerate not being able to fulfill her duties in representing her client. After this warning happened, however, Brinkman did not repeat any same or even similar conduct. Even with respect to the question asked by Brinkman of her client, and for which Judge Woolard admonished her, the trial court had overruled the State's very objection to that question.

The two comments made by Brinkman during closing argument did not directly violate any motion in limine that had been granted by the trial court. Moreover, no one objected to the statements either at the time that they were made or even directly following the closing argument by the Defense. Brinkman was never warned by the trial court that the substance of either or both of the statements amounted to contemptuous and / or sanctionable conduct.

4. The trial court erred in concluding that even though the summary contempt statute is adequate, it proceeded under its inherent authority.

A court cannot resort to inherent power to punish or remedy contempt unless the statutory remedies are not adequate in any given case. *State ex rel. Herron v. Browet, Inc.*, 103 Wn.2d 215, 218 (1984). Here, the trial court decided the summary contempt statute is adequate, yet it proceeded under its inherent authority.

5. The trial court erred in concluding that sanctions in this case are appropriate.

The appellate court reviews a trial court's authority to impose sanctions for contempt de novo. *In the Matter of the Interest of Estevan Silva, Jr.*, 166 Wn.2d 133, 140 (2009). The finding of contempt and sanctions will be upheld on appeal, if a proper basis can be found. *State v. Hobble*, 126 Wn.2d 283, 292 (1995). Here, there is no proper basis for a finding of contempt sanctions by the trial court, and the trial court erred in finding and / or concluding that sanctions in this case are appropriate. There was no proper warning by the trial court of contempt sanctions with respect to any specific act(s) committed by defense counsel, nor has there been a citing by the trial court of any specific instance(s) of sanctionable conduct.

B. The trial court did not have the appropriate authority to make a finding of fact and / or conclusion of law about an attorney's violation(s) of the Rules of Professional Conduct.

The Washington State Bar Association (WSBA) Disciplinary Board is the authority to find under the law any violation(s) of the RPCs, and such decision can be appealed for de novo review by the Supreme Court of the State of Washington. *In re Disciplinary Proceeding Against Guarnero*, 152 Wn.2d 51, 60 (2004). Sanctions including ethical duties violated by lawyers are governed by the WSBA in accordance with the *Standards for Imposing Lawyer Sanctions* of the American Bar Association (ABA). *In re Disciplinary Proceeding Against Cohen*, 150 Wn.2d 744, 758 (2004).

The ABA does encourage that judges report what they consider to be unethical conduct to the appropriate authority. *Standards for Imposing Lawyer Sanctions*, p. 5. The 2007 ABA *Model Code of Judicial Conduct* states under Rule 2.15(B):

A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority.

2007 ABA Model Code of Judicial Conduct, p. 34

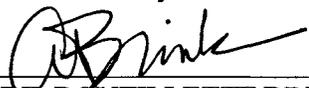
The WSBA Disciplinary Board is vested with the power to find under the law whether or not any of the RPCs have been violated, and a reporting to the WSBA Board by Judge Woolard would allow the appropriate authority to decide the matter.

In the case at hand, Judge Woolard does not state in the trial court record which RPCs Brinkman may have violated, although she does state it was likely Brinkman violated RPCs in general. Judge Woolard also does not state specifically the duty that Brinkman violated so that there is a violation of the RPCs. Nor does Judge Woolard explain how she has the authority to make such a conclusion of law about a likely violation of the RPCs by Brinkman.

V. CONCLUSION

Based upon the foregoing argument and authorities, the trial court's ruling finding and / or concluding that contempt sanctions and / or any other sanctions in this case are appropriate should be reversed. Any sanctions imposed by the trial court should be dismissed.

Respectfully submitted this 28th of July 2009



APRIL BOUTILLETTE BRINKMAN,
Attorney at Law
WSBA # 36760

COURT OF APPEALS
DIVISION II
09 JUL 29 11:49
STATE OF WASHINGTON
BY  DEPUTY

NO. 38858-8-II

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

STATE OF WASHINGTON,)	
)	
Respondent,)	Court of Appeals No.
)	38858-8-II
)	
vs.)	AFFIDAVIT OF SERVICE
)	OF BRIEF OF THE
PETRONILO CIFUENTES-)	APPELLANT
VICENTE)	
)	
Defendant;)	
)	
Matter of April Boutillette)	
Brinkman,)	
)	
Appellant)	
)	

APRIL BOUTILLETTE BRINKMAN, being sworn on oath, states that on the 28th of July 2009, affiant deposited in the mails of the United States of America, a properly stamped envelope directed to the following persons:

David Ponzoha, Clerk
Washington State Court of Appeals
Division Two
950 Broadway, Suite 300
Tacoma, Washington 98402-4454

Michael C. Kinnie, Attorney
Clark County Prosecutor's Office
1013 Franklin Street
Vancouver, WA 98660-5000

and that said envelope contained the following:

1. The Brief of Appellant.
2. Affidavit of Service of the Brief of Appellant.

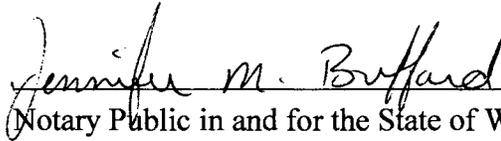
DATED this 28th of July 2009



April Boutillette Brinkman, WSBA #36760

Attorney at Law

SUBSCRIBED AND SWORN to before me on July 28, 2009.



Notary Public in and for the State of Washington

Residing at Vancouver, Washington

My commission expires on February 1, 2012

