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COURT OF APPEALS

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STATE OF WASHINGTON



**No: 40245-9-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

JAMES and DEBORAH SHARBONO, individually and the marital
community comprised thereof, CASSANDRA SHARBONO,
Respondents,

vs.

UNIVERSAL UNDERWRITERS INSURANCE COMPANY, a
foreign insurer; LEN VAN DE WEGE and "JANE DOE" VAN DE
WEGE, husband and wife and the marital community composed
thereof,

Respondents,

CLINTON L. TOMYN, individually and as Personal Representative of
the Estate of CYNTHIA L. TOMYN, deceased; and as
Parent/Guardian of NATHAN TOMYN, AARON TOMYN, and
CHRISTIAN TOMYN, minor children,
Appellants/Intervenors.

APPELLANTS/INTERVENORS' OPENING BRIEF

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ORIGINAL

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I. ASSIGNMENT OF ERROR

1. The Trial Court erred in failing to disqualify the Sharbonos' counsel due to conflict of interest.
2. The Trial Court erred by failing to disqualify Plaintiff's counsel, Tim Gosselin due to a conflict of interest between the Sharbonos and the Tomyns, who were also either a direct client of Mr. Gosselin, intended third-party beneficiary of his services, and/or under the "common interest privilege."
3. The Trial Court erred by ignoring Mr. Gosselin's conflict of interest and disregarding the expert's testimony presented by the Intervenor/Appellate Tomyn, when it refused to disqualify Mr. Gosselin from further representing the Sharbonos in this matter.

II. ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Did the Trial Court err on an issue of law by failing to recognize that the Sharbono's attorney, Tim Gosselin, had a conflict of interest under the RPC's which warranted his disqualification as counsel before the Trial Court?
2. Did the Trial Court abuse its discretion when determining that a conflict of interest existed due to the fact that the Tomyns were the intended third-party beneficiary of Mr. Gosselin's services and subject a tort claim for malpractice, but that he nevertheless was not subject to disqualification

when, at a minimum he had taken actions contrary to the interest of Intervenor Tomyns, who were an intended third-party beneficiary of his legal services as indicated by the contractual agreements between the parties and the representation which has actually occurred in this matter?

III. STATEMENT OF FACTS

A. Introduction.

The Appellate Court by this time, should be well versed in this case. The same matter has already been before this Court and has resulted in the published opinion set forth in *Sharbono v. Universal Underwriters*, 139 Wn.App. 383, 161 P.3d 406 (2007).

Since the issuance of that opinion, this matter has also been before this Court in appeal number 38425-6-II, which relates to the Trial Court's post Mandate calculation of post Judgment interest (such appeal has been limited by the previous Orders of this Court). Also, this matter is before this Court on a issue relating to the statutory "Mediation Privilege" under appeal number 39781-1-II. This appeal, and to some extent, while dealing with the foundation of the subject litigation, and events occurring from the issuance of the Mandate in August 2008, to the Orders at issue herein, in many respects, this matter simply continues the history of this case from that point addressed in appeal number 39781-1-II. Thus, it is suggested that to the extent possible, materials set forth within the other appeals before this Court, should be subject to notice and/or incorporated by this reference.

In any event, because much of these matters are already before the Appellate Court, while not exclusively, this appeal will emphasize the fact which occurred at or around the time of the events leading to the Orders subject to appeal number 39781-1-II and events which occurred thereafter.¹

B. Procedural and Factual History.

The basic factual background of this case is discussed in detail within the already published Court of Appeal Opinion in this matter. See *Sharbono v. Universal Underwriter's Insurance Company*, 139 Wn. App. 383, 161 P.3d 406 (2007) review denied, 163 Wn. 2d 1055, 187 P.3d 752 (2008). Although Universal previously had some success within that appeal, it is noted that with respect to all issues, that the Tomyns have an interest, the Trial Court was fully affirmed in that opinion. Specifically, the Court affirmed that portion of the Judgment entered by the Trial Court on May 20, 2005, which awarded presumptive damages to the Sharbonos, which were specifically to fund a confessed Judgment in an wrongful death suit brought

¹Appellant/Intervenors (Intervenors hereafter), is adamant this matter should have been consolidated with appeal number 39781-1-II, which was subject to an Order Granting Discretionary Review. It is Intervenor's firm position that the Grant of Discretionary Review in that appeal, simply was improvident in that it addresses an Order which was the first skirmish in ongoing Trial Court proceedings, which ultimately did not fully resolve until the Trial Court denied Intervenor's Motion for Reconsideration regarding the disqualification of Mr. Gosselin, which was not ripe for review until February 5, 2010, when Judge Buckner denied Intervenor's Motion for Reconsideration on that issue. (CP 823-825). (See transcript of 2/5/10 page 54).

by the Tomyns against the Sharbonos. The relevant portions of the Judgment which was affirmed by the Appellate Court were Paragraphs 1 and 7 of the May 20, 2005 Judgment. These two provisions provided the following:

1. *Judgment is hereby entered in favor of Plaintiffs and against Universal Underwriters Insurance Company in the amount of the unpaid balance of the Judgment by confession entered against Plaintiffs in the matter of Tonym v. Sharbono, Pierce County Cause Number 99-2-12800-7, to wit: \$3,275,000.00 **together with interest that has accrued thereon since the date of entry**, March 30, 2001, which as of May 13, 2005, (4 years, 43 days @ 12%/yr.) totals \$1,618,298.63, and together with interest that continues to accrue thereon as set forth in said Judgment until said Judgment is paid.*

7. *Amounts awarded pursuant to Paragraph 1 shall bear post-judgment interest pursuant to RCW 4.56.110(4) and RCW 19.52.020 at the rate of 12% per annum. Amounts awarded pursuant to Paragraph 2-6 [which were reversed] shall bear post-judgment interest pursuant to RCW 4.56.110(3) at the rate of 5.125% per annum.*

(Emphasis added: bracketed language added). (CP 330-336).

Before the issuance of the mandate by the Court of Appeals, which was filed in the Trial Court on or about August 29, 2008, the Sharbonos, on or about August 26, 2008, filed a Motion to Execute on the Appeal Bond. (CP 341-350). Within the Sharbonos' moving papers for the first time, it was contended that the Tomyns were entitled to only the judgment and interest generated from Paragraph 1 in the above-referenced Judgment, while the Sharbonos were entitled to the interest generated as "post-judgment interest" by Paragraph 7 of the Judgment, which totaled as of October 2,

2008, the amount of \$2,353,956.28. (CP 353). The Tomyns disputed the Sharbonos' entitlement to the Paragraph 7 interest, a position which ultimately on October 3, 2003, the Trial Court agreed with, when it entered an "Order Granting Motion to Execute on Appeal Bond." (CP 352-354). Within that Order, the Trial Court provided that both the Paragraph 1 amount and the Paragraph 7 amount, belonged to the Tomyns, who had earlier intervened through counsel. Universal filed a notice of appeal of that order and that appeal, in a limited fashion, is currently pending before the Court of Appeals under cause number 38425-6-II. *Id.*

Following the entry of the order on Plaintiff's Motion to Execute on Appeal Bond, Universal through motion practice before the Trial Court, made substantial efforts to try to undermine that portion of the Judgment which had previously been affirmed by the Court of Appeals. Such efforts were done by way of motions, allegedly pursuant to RAP 2.5 and CR 60, and contentions that the Trial Court had authority to go behind the face of Judgment already affirmed and re-adjudicate the issues. The Trial Court rejected such efforts.

Following the Trial Court's rejection of such efforts, the Universal once again filed another notice of appeal, which ultimately was consolidated with the one filed relating to the execution of the appeal bond and which in a consolidated form, is currently pending before the Court under Court of Appeals Cause Number 38425-6-II.

Over the course of the next several months, there continued to be proceedings before the Trial Court including issues relating to the bond, and Intervenor's continuing efforts to execute on the cash bond which was deposited within the registry with the Trial Court. Ultimately, on or about June 12, 2009, the Trial Court entered an Order permitting partial execution on the cash bond and entered an Order directing payment of \$4,893,298.63 to Intervenor Tomyns. (The face amount of Paragraph No. 1). That Order was not subject to appeal.

In the meantime, the Court of Appeals dismissed a substantial portion of Universal's post mandate efforts towards appellate reviews, rejecting the notion that the underlying Judgment in and of itself, could be subject to review. The only matters which are currently pending before the Appellate Court on that Appeal, are narrow issues regarding the calculation of "post-judgment interest".

Because the Sharbonos' individual claims, had been subject to reversal, the Sharbonos' portion of the case against Universal, was pending for retrial in September 2009. Given the pendency of a retrial on the issues which had earlier had generated a multi million dollar Judgment benefitting the Sharbonos against Universal, and the millions still owed to the Tomyns, as interest, the matter was subject to a mediation with the Honorable George Finkle (retired King County Superior Court Judge). At this mediation, both the Tomyns and the Sharbonos presented a common front with respect to the

propriety of settlement with Universal regarding the outstanding issues. Ultimately that mediation did not prove to be fruitful, and it terminated with impasse.(CP 317-318).

By way of additional background, it is noted that the genesis of the underlying lawsuit was a settlement agreement between the Tomyns and the Sharbonos regarding a wrongful death action relating to the untimely death of Cynthia Tomyn, the wife of Clinton Tomyn, and the mother of the other Tomyn Intervenors. (CP 324-328). The terms of the Sharbono/Tomyn Settlement Agreement, are significant, in that it placed an obligation onto the Sharbonos, and their selected counsel to pursue matters in this case for the benefit of the Tomyns. The Sharbono/Tomyn Settlement Agreement, which is before the Trial Court, provides in part:

2. ***Assignment of Rights: The Defendant [Sharbono's] assigned to Plaintiffs [Tomyn] all amounts awarded against or obtained from Universal from the following:***
 - a) ***the benefits payable under any liability insurance policy which the defendants have any interest for a covered loss that Universal has breached with respect to claims arising out of the December 11th, 1998, motor vehicle accident. [the Sharbono/Tomyn accident];***
 - b) ***the benefits payable under any liability insurance policy which, because of an act of bad faith, Universal is estopped to deny or deemed to have sold to defendants;***
 - c) ***if one or both insurers fail immediately to tender the undisputed liability coverage amounts, any and all cause of action against such insurers resulting from such failure to tender, including claims for the loss use of such monies, bad faith insurance practice, violates the Washington Consumer Protection Act, misrepresentation, fraud, breach of fiduciary duties, negligence, nonfeasance, misfeasance, malfeasance, or other similar causes of action. (Emphasis and bracketed material added).***

Section 2 of the Sharbono/Tomyn Settlement Agreement continues

on, and provides that:

Except as set forth in paragraph 2.A, 2.B, and 2.C above, defendants retain unto themselves and do not sign any other rights, claims, cause of actions or awards against Universal or any other person or entity, including but not limited to claims or awards for bad faith, Washington Consumer Protection Act, misrepresentation, fraud, breach of fiduciary duties, negligence, nonfeasance, misfeasance, malfeasance, or other similar causes of action.

Id.

Significantly, in order to further the assignment of rights from the Defendants to the Plaintiffs as part of the Sharbono/Tomyn Settlement Agreement, under subsection 3, the Sharbono's were contractually obligated to file this lawsuit, the primary purpose of which was to benefit the Tomyns and only secondarily and subordinately, it could also be used by the Sharbonos for recovery on their personal claims:

3. *Suits against **Universal**:*

- A) *The Defendants **will**, no later than April 30, 2001, initiate suit against Universal asserting such claims as are reasonable and prudent to salvage a right to recover the amounts assigned in paragraph 2.a and 2.b, and, if necessary, 2.c, above. Plaintiff, through their chosen counsel **may** participate and assist in the prosecution of those claims as they choose.*
- B) *The Defendants **may** assert claims against additional parties...with the exclusion of Plaintiff, their legal counsel, or the appointed Guardian Ad Litem - and assert addition claims against Universal as they deem prudent; and as set forth in paragraph 2 above, Defendants retain unto themselves all rights to*

recovery from such claims. (Emphasis added).²

(CP 326).

From this agreement, this lawsuit had its origination. As is set forth in the published appellate opinion in this case, the Judgment with respect to those claims which were assigned to the Tomyns under the terms of the subject agreement, were affirmed by the Appellate Court. Unfortunately, those claims asserted by the Sharbonos on their own behalf were subject to reversal.

As is self-evident from the language of the Sharbono/Tomyn settlement agreement **the primary purpose of this lawsuit was for a benefit of the Tomyns, i.e., through their assignment of rights from the Sharbonos, the Tomyns were to receive payment in this lawsuit for the amounts within the Confession of Judgment/Forbearance that had been entered into as part of the Sharbono/Tomyn settlement.**

It is noted in Paragraph 1 of the subject Judgement which specifically references to the cause number assigned to the Sharbono/Tomyn lawsuit, which was then subject of the Sharbono/Tomyn Settlement Agreement.

²Subsection 3 (C) provides that the claims assigned to the Tomyns can only be settled with the Tomyns' agreement. Subsection 3(D) provides for fee sharing between the Tomyns and Sharbonos should certain conditions occur. As such, not only was Mr. Gosselin representing both the interests of the Sharbonos and Tomyns during the vast majority of this litigation, but the Tomyns also had a conditional obligation to pay a pro rata share for his services.

As is self evident, the Sharbonos selected attorney Tim Gosselin to file this lawsuit on their behalf, in order to fulfill its obligation under the Sharbono/Tomyn Settlement Agreement. Mr. Gosselin, at the time of the Sharbono/Tomyn Settlement Agreement was entered into, was affiliated with the Burgess Fitzer firm of Tacoma, Washington, who represented the Sharbonos in the wrongful death suit, thus, he was intimately aware of the details and purposes of the Sharbono/Tomyn Settlement Agreement throughout his representation of “The Sharbonos” in this case. (CP 328).

The Trial Court was also intimately aware of the Sharbono/Tomyn Settlement Agreement in that it had been filed with the Trial Court by Universal within the pleadings relating to the Intervenors’ counsel’s Motion to Intervene, which was considered by the Trial Court in September, 2008, after the issuance of the Mandate. (Supp. Clerks Papers ____). Ironically, Universal, in response to Intervenors’ initial Motion to Intervene, resisted such intervention on the grounds that the Tomyns’ interests had been and were being adequately represented by Sharbonos counsel, Mr. Gosselin. In fact, Universal’s counsel at that time went so far as to indicate that intervention should be denied because the Tomyns’ interests were being adequately represented, “despite a lack voluminous authority, none is needed to argue that clearly, at any measure, the Tomyns interests are adequately are represented by the Sharbonos.” (*Id.*). (Supplemental Designation of Clerk’s Papers, Defendants’ Response to Motion for Intervention, p. 9).

It is emphasized that it was Universal who actually filed a copy of the Judgement by Confession and the Sharbono/Tomyn Settlement Agreement, in its response to the Intervenors Motion to Intervene. Id.

Unfortunately, by that time, a conflict had already developed between the Sharbonos and the Tomyns over who was entitled to the interest generate from paragraph 7 of the May 20, 2005, judgement. At that time, the Sharbonos had begun to take the rather fanciful position that it could separate part of the interest generated of the principal from the Tomyns assigned claims, and keep that interest as their own.³ (CP 343-344).

Nevertheless, because of Universal's behavior subsequent to the grant of Intervenors Motion to Intervene, the conflict between the Sharbonos and Tomyns was secondary to the need to address the post-Mandate antics of their common foe, Universal. As is well documented in Appeal No. 38425-6-II, Universal engaged in a variety of actions in the fall of 2008, specifically designed to try to undermine that portion of the May 20, 2005 Judgment, which had otherwise been affirmed within the first appeal. Such efforts ultimately did not and could not come to fruition due to the absence of the trial court's jurisdiction and/or the basic facts that what was at issue was a Judgment that had already been **affirmed** after a full panoply of

³It is noted that in the first appeal on this matter the Sharbonos had a substantial judgement from those claims which it had contractually retained reversed, thus apparently the Sharbonos were trying to snatch victory from defeat, at the expense of the Tomyns.

appeals. In fact, it was not until June of 2009, that the Intervenors, despite the fact that they had been assigned the affirmed portion of the Judgment, received any payment following the issuance of the Mandate.

Intervenors' counsel viewed such efforts as simply being part of a "divide and conquer" strategy by Universal, i.e., an effort by Universal to place a wedge between the Sharbonos and the Tomyns, who were otherwise were pursuing their common interests with respect to their mutual foe, Universal.

This sets the appropriate backdrop and explains what happened following the first unsuccessful mediation in this case, with The Honorable George Finkle. During the course of the mediation, the Sharbonos and the Tomyns generally mediated together, had strategy discussions and made joint demands. That mediation was unsuccessful. (CP 317-318).

To the shock of Intervenors' counsel, without notice to counsel for Tomyns, Mr. Gosselin and counsel for Universal scheduled a second mediation, apparently through Judge Finkle, with mediator Spearman. The first Intervenors' counsel learned of this second, **secret** mediation, was by way of an email from Tim Gosselin on August 21, 2009, which was addressed to Intervenors' counsel, and provided:

*I wanted to let you know the Sharbonos have reached a settlement of their claims against Universal. **I am not free (yet) to disclose the terms, and some details have not been finalized, but we have an agreement in principle.** The settlement only applies to claims retained by the Sharbonos,*

*and not anything assigned to the Tomyns. All the pending motions (spoliation, MSJ) have been stricken. Obviously, this means that trial is off. I will keep you posted. Tim.*⁴

(CP 403).

Thereafter, there was a rather frank email exchange between counsel for the Sharbonos and Tomyns that ultimately did not result in any revelation of the terms of the proposed Settlement Agreement between the Sharbonos and Universal. (CP 400-406). Thus, on or about August 27, 2009, the Tomyns filed a hastily prepared Motion to Compel Disclosure of Settlement Negotiation and Terms of Proposed Settlement with the Trial Court. Within that motion, the Intervenors set forth the gravity of their concerns:

*It is further relevant to note that during the course of proceedings, since the issuance of the Mandate, **there have been a number of instances where Universal, within the text of its pleadings, has attempted to make an effort to drive a wedge between the Tomyns and Sharbonos with respect to their respective interests. If it is recalled correctly, Universal has even on occasion questioned as to whether or not the Tomyns, under the terms of the Settlement Agreement filed herein, are entitled to the presumptive damages which were awarded (which the Sharbonos have never disputed are for the Tomyns' benefit). Further, it is noted the recently, Universal Underwriters has even gone so far as to suggest that payment of the amounts due and owing to the Tomyns***

⁴Again, it is emphasized that previously the Sharbonos had been contending that they were entitled to separate the Paragraph 7 interest from its source, i.e., Paragraph 1 of the Judgment, which the Sharbonos had conceded belonged to the Tomyns. Thus, when Mr. Gosselin was indicating “the settlement only applies to the claims retained by the Sharbonos...”, the Tomyns took little solace, and were gravely concerned that efforts had been made to undermine their positions and entitlements by way of this alleged, secret Settlement Agreement.

constitutes partial and/or full resolution of any claims brought by the Sharbonos. (Emphasis added).

The above provides the relevant background to the issues which Intervenors are now unfortunately forced to bring before the Court, in response to Universal's appeal on moot issues. As the Court is aware, throughout the history of this case, the Sharbonos and the Tomyns have been cooperative with one another, and have been pursuing what could be characterized as a "common cause."

That end, on August 11, 2009, the parties in this case, including Intervenors, engaged in the mediation as Judicial Dispute Resolution (JDR) with former King County Judge, George Finkle, as mediator. During the course of those discussions, which will not be disclosed in any great detail, the Tomyns and Sharbonos essentially negotiated together. During the course of those discussions, and at no time until very recently, was there any idea that the Sharbonos were contemplating engaging in a separate settlement, which would not fully resolve any and all claims, including the Tomyns' claims in this case.

Your Declarant says "recently" because on or about August 21, 2009, apparently based on negotiations to which the Tomyns, nor their counsel, were privy, the Sharbonos and Universal Underwriters have reached a tentative settlement. Intervenors' counsel first learned of the settlement by way of an email sent by Mr. Gosselin, which is part of an email stream, which is attached hereto as Exhibit "2." Id. (Supplemental Designation of Clerk's Papers ___).

The supporting Declaration went on to state why the Tomyns had concerns that the Settlement Agreement had the potential of undermining the Tomyns' well-established entitlement to funds in this case, and the need for the Court's intervention, to assuage the Tomyns' concerns, given the intertwined interests of the Sharbonos and Tomyns as it relates to this litigation.

In the response to this motion, Universal Underwriters, through counsel, filed an opposition generally alleging that RCW 7.07.030 (the mediation privilege statute), barred the release of the information that the Tomyns were requesting. It is noted that nowhere within such materials, was it ever asserted that mediator Spearman continued to be actively involved in the preparation of a final Settlement Agreement, or was having any input in that regard. (See, Supplemental Designation of Clerk's Papers, p. ___).

In other words, it appears that all that remained of the subject settlement, which allegedly was derived from the mediation, was an agreement as to the final written terms. Again, Universal asserted within that pleading that Universal did not owe the Tomyns money, even though the Trial Court had already entered an Order directing payment to the Tomyns of both Paragraphs 1 and 7 funds **and an actual payment had been disbursed from the Registry of the Court of the undisputed amount of funds, owed under Paragraph 1 of the May 20, 2005 Judgment.**

Thereafter, counsel for Universal engaged in a substantial amount of argument, regarding how Universal owed nothing to the Tomyns, despite the existence of Court orders directing payment directly to the Tomyns, from the cash bond that the Trial Court ordered had to be filed with the Registry of the Court. Id. Tellingly, counsel for Universal, indicated that Universal was

well-aware of the underlying contractual relationship between the Tomyns and the Sharbonos, and the terms thereof.

On September 4, 2009, following oral argument on the issue, the Trial Court entered an extremely limited Order that required “that Plaintiff Sharbonos and Defendant Universal Underwriters disclose the proposed settlement terms is hereby GRANTED. Plaintiff Sharbonos and Defendant Universal and VanDewege shall provide full disclosure forthwith. (CP 408-409). Following the entry of the Order, Mr. Gosselin provided an oral presentation on the record that generally disclosed the fact that the second mediation had occurred, and the terms of the proposed settlement. During the course of such presentation, Mr. Gosselin did not discuss the minutiae and/or intimate details of discussions with mediator Spearman, nor his suggestions or other matters which could be characterized as “mediation communications.”

Thereafter, Mr. Gosselin forwarded a copy of the proposed Settlement Agreement for review by Plaintiffs’ counsel. (CP 508-509). This proposed Settlement Agreement, despite a few minor alterations as to its language, was the exact same agreement that was ultimately entered into between the Sharbonos and Universal. (CP 543-550).

Instead of complying with the Court’s directive to provide disclosure regarding the proposed settlement, Universal filed this appeal. Thereafter, a final Settlement Agreement was entered into, the Sharbonos received

payment thereunder, and the only issues remaining in this lawsuit between the parties, are those matters encompassed by Appeal No. 38425-6-II, and this appeal.

Counsel for Intervenor first learned of the final confirmation of the Sharbono/Universal Settlement Agreement upon reviewing an appellate brief, filed by Universal's appellate counsel, Phil Talmadge, dated October 9, 2009. (CP 20, 535-536).

Upon reviewing the Settlement Agreement, it became apparent that the amount Sharbono had settled their alleged "retained claim," was for \$2,350,00.00, which was nearly the exact amount of the paragraph post-judgment interest as set forth within the Court's Order of October 3, 2008. (CP 352-353). On closer examination of the Agreement, it was noted that the Sharbono/Universal Settlement Agreement, in and of itself, makes reference to the Sharbono/Tomyn Settlement Agreement requirements, and attempts to circumvent the obligation of the Sharbono/Tomyn Settlement Agreement. In addition, the Agreement requires the Sharbonos refrain from any attempt to collect Paragraph 7 post-judgment interest from Universal, that the Sharbonos were obligated to collect as set forth within the Sharbono/Tomyn Settlement Agreement.

Thus, in that regard, Mr. Gosselin previously had filed an appellate brief, requesting that the Appellate Court uphold Paragraph 1 and 7 of the amounts of the May 20, 2005 Judgment, that the Court ruled to be disbursed

to the Tomyns, then argued that the Paragraph 7 post-judgment interest should instead be given to the Sharbonos. (See, CP 366-398, Sharbonos' Reply Brief and Brief on Cross Appeal in Court of Appeals Cause Number 38425-6-II). (CP 366-398).

Thereafter, both the Sharbonos and Universal refused to provide additional information regarding their secret negotiations which occurred without the Tomyns, and the Tomyns felt compelled, due to the insecurity created by the actions of Mr. Gosselin and the purported terms of the Sharbono/Universal Settlement Agreement, sought a TRO restraining disbursement of the funds that were to go to the Sharbonos under the terms of the Agreement. (CP 3-120). The Trial Court ultimately denied a preliminary injunction after a lengthy hearing, due to the Court's finding that the cash security on deposit with the Registry of the Court, was sufficient to give the Tomyns adequate security for the outstanding amounts owed, plus interest, on the May 20, 2005 Judgment (inclusive of the remaining interest generated from Paragraph 1 and the interest generated from Paragraph 7). (CP 321).

Nevertheless, at another Motion hearing, the Court found that there was a reasonable basis for the issuance of the TRO under the circumstances. (CP 321). During the course of the hearing on that issue on November 6, 2009, counsel for Universal indirectly indicated that now Mr. Gosselin was obligated to follow the directions of Universal. (CP 598-599):

The Court: So I think one big concern with the dismissal, even if it is agreed to.

Mr. Gosselin: I will tell you have I no dog in the fight of whether the claims are dismissed or not. I will leave that to Mr. Bridges. We agree in the Settlement Agreement to present an Order of Dismissal, and we are complying with that.

Mr. Bridges: I am a little surprised to hear you say that Mr. Gosselin. I think you do have a dog in the fight. (Emphasis added).

No doubt motivated by the fact that this case is currently before the Appellate Court in three separate appeals post-mandate, the Trial Court declined to enter a final Order of Dismissal until resolution of all Appellate Proceedings. (CP 598-607).

Troubled by Mr. Gosselin's actions, counsel for Intervenor, consulted with two well recognized, professional responsibility experts, the Honorable Professor David Boerner of Seattle University School of Law (CP 657-678) and Associate Professor John A. Strait. (CP 679-689). Upon new consultation on or about November 18, 2009, Intervenor filed a Motion to Disqualify Counsel for Plaintiff, Timothy R. Gosselin, based on conflict of interest. In that Motion, Plaintiff argued alternatively that Mr. Gosselin should be disqualified due to his representation of conflicting interest, based on either a direct attorney/client relationship with the Tomyns, predicated on the Sharbono/Tomyn Settlement Agreement, alternatively that he should be disqualified because the Tomyns were the intended third-party beneficiary of Mr. Gosselin's services and finally, due to the operation of the Common Interest Rule or "Joint Defense Privilege," he should be subject to

disqualification. Intervenor presented a detailed Declaration from Professor Boerner, (attached hereto as Appendix "1") which indicated that in his view, the Common Interest Representation principles, had direct application to the matter at hand. In addition, Professor Strait provided an exceptionally detailed Declaration (attached hereto as Appendix "2") analyzing in detail, the facts and circumstances of Mr. Gosselin's actions as an attorney in this matter. Professor Strait, after a thorough review of the file, and Professor Boerner's Declaration, provided the following opinions:

I agree with his opinions as expressed, and in addition, hold the following opinions. Mr. Gosselin, by undertaking the joint representation for eight years of both the Tomyns' claims and the Sharbonos' claims, under the terms of the Settlement Agreement, owe third-party beneficial duties to the Tomyns. The Sharbonos are required under the terms of the Agreement, to fully assert and protect the Tomyns' claims in the litigation with Universal. The Sharbonos retain the right to name their lawyer, who would accomplish both the obligations owed to the Tomyns and their own separate claims against Universal. When they chose Mr. Gosselin, he undertook the representation with duties to the Tomyns' claims (directly owed to the Tomyns) and third-party beneficiary of the Sharbono obligation under the Settlement Agreement with the Tomyns. Under those circumstances, Mr. Gosselin owed all the same ethical obligations to affirmatively represent the Sharbono claims in a manner consistent with the Sharbonos' obligations to the Tomyns. The Sharbonos and Mr. Gosselin's decision to assert on the Sharbonos' behalf, an adverse position to the Tomyns' rights to interest, is a violation of those third-party beneficial duties owed to the Tomyns by Mr. Gosselin and the direct duty owed by the Sharbonos. RPC 1.7(a)(1) therefore applies directly because of the third-party beneficial relationship Mr. Gosselin had with his legal representation of the Tomyns' claim, even if he is not directly counsel representing the Tomyns.

Professor Strait went on to opine that it was his opinion that independent of the third-party beneficial interest represented by Mr. Gosselin *visa vie* the Tomyns, Mr. Gosselin had a direct attorney/client relationship with the Tomyns, which required him not to take any action adverse to the Tomyns. According to Professor Strait, Mr. Gosselin had a mandatory obligation to withdraw from both representations, and advise the clients to seek independent counsel, once such interest became conflicting. (CP 679-689).

On or about December 22, 2009, the Honorable Rosanne Buckner, the Trial Judge presiding over proceedings in this case, over all these years, heard Plaintiff's Motion to Disqualify Mr. Gosselin. Fortunately on that date, due to a concern that Professor Strait's Declaration was filed, but not timely served, Judge Buckner did not consider Professor Strait's Declaration. (RP 12/22/09 pages 9-10). Ultimately Judge Buckner, while agreeing that although a third-party beneficiary theory did apply to Mr. Gosselin representation in the case, she found that the remedy was not disqualification, but simply a potential future cause of action for damages by the Tomyns against Mr. Gosselin. (Id. page 42-43).

Thereafter, Intervenor filed a timely Motion for Reconsideration, due to scheduling and Court congestion, could not be heard until February 5, 2010. (CP 770-790). At that time, Judge Buckner exercised discretion and made a determination to consider the Declaration of Professor Strait. (RP

2/5/10 p. 9). Ultimately the Trial Court denied the Plaintiff's Motion for Reconsideration, but ultimately denied reconsideration concluding, "[h]owever, I am going to have to deny the Motion for Reconsideration because I am just not persuaded that the remedy is withdrawal, as opposed to some sort of contractual claim. So for those reasons, I will be denying the Motion for Reconsideration." (Id. p. 21).

An appropriate order was entered denying Plaintiff's Motion for Reconsideration and Intervenors filed a timely Notice of Appeal. (CP 823-825) (CP 826-834).

IV. ARGUMENT SECTION

A. Standards of Review.

The standards of review applicable to attorney disqualification motions is set forth within *RWR Management, Inc., v. Citizen's Realty Company*, 133 Wn.App. 265, 279-80, 135 P.3d 955 (2006), which provides that whether circumstances demonstrate a conflict of interest under the ethical rules is a question of law subject to *de novo* review. *Id.* citing to *State v. Vicuna*, 119 Wn.App. 26, 30-31, 79 P.3d 1 (2003), review denied, 152 Wn.2d 108, 99 P.3d 896 (2004). The Trial Court's determination as to the proper resolutions, when addressing alleged conflicts of interest, is subject to review under an abusive discretion standard. Id. Further, it is noted that the RPC's are clear in that if a lawyer finds himself confronted with an actual conflict of interest, the lawyer has a mandatory obligation to

withdrawal. See, *In re: Carpenter*, 160 Wn.2d 16, 28, 155 P.3d 937 (2007), citing to *Gustafson v. City of Seattle*, 87 Wn.App. 298, 303, 941 P.2d 701 (1997).

When a conflict of interest develops, because an attorney is acting as an agent for the parties, the actions of the attorney, must be subjected to close scrutiny. *Van Dyke v. White*, 55 Wn. 2d 601, 349 P.2d 430 (1960).

In this case, it is humbly suggested that the Trial Court committed an error of law by failing to recognize under the unique facts of this case, that there was a direct attorney/client relationship existing between Mr. Gosselin and the Tomyns, as well as that of a third-party beneficiary relationship. Further, given the fact that the Trial Court did recognize the existence of a third-party beneficiary relationship between Mr. Gosselin's representation and the Tomyns, it was simply an abuse of discretion for the Trial Court not to force Mr. Gosselin to comply with his ethical obligations of withdrawal, by disqualifying him from further representing any interests in this case.

B. An Attorney-Client Relationship Exists Between the Tomyns and Mr. Gosselin.

As discussed in *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992), the essence of an attorney/client relationship is whether the attorney's advice or assistance is sought and received on a legal matter. The relationship need not be formalized in a written contract, but rather may be implied from the parties' conduct. *Id.* Further, whether fees are paid is not dispositive, and the existence of the relationship "turns largely on the

client's subjective belief that it exists." *Id.* quoting, *In Re McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). The client's subjective belief, however, does not control the issue unless it is reasonably formed based on the attendant circumstances, including the attorney's words or actions. *Id.*

In this case, Mr. Gosselin had an attorney/client relationship with both the Sharbonos and the Tomyns, even though the Sharbonos were the original named party to this suit. Under the terms of the Tomyn/Sharbono agreement, Mr. Gosselin, as the retained attorney, was obligated to pursue claims which were assigned to the Tomyns and as such provided assistance on a legal matter for the benefit of the Tomyns. The relationship in this instance is not formalized by a written attorney fee agreement, but rather the Tomyn/Sharbono settlement agreement, which delineates by its terms that not only are the Sharbonos' interests to be pursued in this case, but also the substantial interests of the Tomyns (payment of the remaining balance of a Confessed Judgment of \$3,275,000.00 is a substantial interest). By its terms, the agreement is indicative of joint representation, and even had contingent provisions for the Tomyn's payment of Mr. Gosselin's fees. (CP 326).

Thus, it can reasonably be said that any effort by Mr. Gosselin to act contrary to the Tomyns' interest or reasonable legal position created a conflict of interest violative of the attorney's duties to one client in favor of another. See, RPC 1.7 and RPC 1.9. (See, Declaration of Strait) (Appendix

“2”).

Further, even if it cannot be said that there is a direct attorney/client relationship between the Tomyns and Mr. Gosselin, nevertheless, a conflict exists because clearly the Tomyns were an intended third-party beneficiary of the attorney’s actions and representation. Given the assignment of claims, relating to coverage by estoppel and presumptive damages (which were successful), to the Tomyns, clearly they were intended third-party beneficiary of Mr. Gosselin’s representation in this matter. Thus, Mr. Gosselin not only owed a duty to the Sharbonos, but also to the Tomyns. In *Bohn v. Cody*, supra, and as further refined in the seminal case of *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994), where the Supreme Court set forth a multi-factor balancing test to determine whether or not an attorney owes a duty of care to a non-client which is an intended third-party beneficiary of the attorney’s representation. In making such a determination, the Court must balance such factors:

1. *The extent to which the transaction was intended to effect the plaintiffs;*
2. *The foreseeability of harm to the plaintiffs;*
3. *The degree of certainty that the plaintiffs 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.*⁵

⁶As a general proposition, the courts have an obligation to investigate potential attorney/client conflicts of interest if it knows or reasonably should know that a potential conflict exists. See generally, *State v. Regan*, 143 Wn.App 419, 425-26, 177 P.3d 783 (2008).

In the case of *Karan v. Topliff*, 110 Wn.App 176, 338 P.3d 396 (2002), the appellate court examined and applied the various factors set forth in *Trask*, and found that an attorney had breached his duty to an intended third-party beneficiary of his services. In that case, a minor child's guardian brought a malpractice action against the attorney who had been hired by the child's mother to create a guardianship order for the child's estate. In that case, the child's father died and left her \$50,000.00 of life insurance. The defendant attorney, James Topliff, petitioned the court that the child's mother should be made guardian of the child's estate, but neglected to place within the order granting the guardianship petition a requirement that a bond be posted, or that the life insurance proceeds be placed in a blocked account for the benefit of the minor. Even though it was the mother who hired the attorney, clearly the intended beneficiary of the services was the minor child for whom the guardianship was to be established. Unfortunately, the guardian mother embezzled a large portion of the funds, which should have been placed within a blocked account, as required by statute, and there was no recourse against the mother because there had been no requirement that a bond be posted. In finding the attorney liable to the minor under such circumstances, the court engaged in a detailed analysis of the *Trask* factors.

With respect to factor 1, i.e., who was the intended beneficiary, the court found that the primary reason for the establishment of the guardianship was to preserve the child's property and not for the benefit of others.

Similarly, if one examines the Tomyň/Sharbono agreement, the primary purpose of the agreement was to pay the Sharbonos' debts to the Tomyns for the tragic and wrongful death of Cynthia Tomyň. Secondly, during the course of such suit, the Sharbonos were permitted to pursue whatever claims they may have against Universal, which at the time of the Tomyň/Sharbono settlement agreement were unliquidated. To find otherwise would be to simply ignore the context and surrounding circumstances under which the Tomyň/Sharbono agreement was entered into. Obviously, the agreement would not have been entered without the untimely death of Cynthia Tomyň and the substantial need of the Sharbonos to retire their debt to the Tomyns. Further, if the Tomyns were not an intended beneficiary of the lawsuit to be filed, there would have been no purpose in assigning any claims to the Tomyns. On the second element: "the foreseeability of harm," it is noted that for the vast majority of the underlying litigation in this case, both the Tomyns' and Sharbonos' interests were being solely represented by Mr. Gosselin, who under the Tomyň/Sharbono agreement, was obligated to pursue the interests of both. It was only until the Sharbonos, based on a rather fanciful construction of the May 20, 2005 Judgment, attempted to usurp the Tomyns' entitlement to the interest generated from that portion of the Judgment reflective of their assigned claims did a conflict exist. The potential for damages are self-evident and are limited only by one's imagination. Some simply cannot be stated because of ongoing litigation

with Universal. The mischief by such conduct has further been compounded by the recent Sharbono/Universal settlement agreement, which essentially (through a not very camouflaged attempt at comprising the Tomyns' entitlement to paragraph 7 funds) provides the Sharbonos and their counsel an incentive to undercut the Tomyns' entitlement to paragraph 7 funds for the benefit of Universal, the Sharbonos' former nemesis. ⁶

With respect to the third element of "certainty plaintiff suffered injury," given the current posture of this case, "certainty" will not exist until resolution of the appeal. While the Tomyns are confident that ultimately they will prevail on all issues (including the cross-appeal, which they view as having **no merit**), the potential outcome of the Sharbonos' effort at cross-appeal would be extremely injurious to the Tomyns, who suffered the grievous loss, and whose interests were to be protected by Mr. Gosselin, who drafted the Judgment's language, which he now is attempting to use in a manner deleterious to the Tomyns' easily definable interests.

On the fourth element: "connection between lawyer's conduct and injury," obviously, if Mr. Gosselin is successful in his representation of the Sharbonos, he will have furthered the Sharbonos' interests (and now

⁷Throughout the course of pre-trial proceedings and trial, and the first appeal and thereafter, there were frank communications between the Tomyns' personal counsel and trial counsel, Gosselin, with respect to strategies, settlement postures and evaluations. It is unknown to what extent the Tomyns' confidences to Mr. Gosselin were compromised during the course of the recent (and secret to the Tomyns) Sharbono/Universal settlement negotiations. (CP 317-318).

Universal's) in a manner adverse to the Tomyns' interests on an issue worth well over \$2 million. Such an injury clearly would be direct and substantial.

The fifth element: "future harm," as discussed in the *Karan* case, at page 85, this element relates to whether or not the attorney's conduct at issue as a matter of policy should result in a finding of duty "in the interests of preventing future harm," presumptively to others similarly situated. Clearly, what has occurred in this case should not be repeated. While the Tomyn/Sharbono settlement agreement did not expressly state that it was a "joint representation agreement," it certainly has the elements of such an agreement, and public policy favors settlement of disputes. Clearly, public policy favors the proposition that victims of tortious wrongs should receive reasonable and full compensation.

As previously held by the Appellate Court, the method and manner in which the Tomyns and Sharbonos settling their initial dispute, was "reasonable" and was done in a method and manner in which public policy should favor. Further, the method and manner in which the settlement agreement was structured, at every level, was beneficial to the public policy of the State of Washington. First, it was an effort to ensure that the Tomyns received full compensation for their grievous loss. At the same time, it allowed the Sharbonos to economically survive by not holding them fully responsible for immediate payment of the substantial damages suffered by the Tomyns, and provided a mechanism for the Sharbonos to maintain

economic viability, maintain their status as tax payers, and did not reduce them to destitution. Further, the settlement agreement provided a mechanism in which both the Tomyns and Sharbonos, with common cause, could address the very real and serious injuries suffered by the bad faith misconduct of Universal, which is extremely important because matters involving insurance inherently involve significant matters of the public policy within the State of Washington.

Also, the method in which this controversy developed is disturbing and raises significant issues with respect to an attorney's duty once the interests of his joint clients, or client and/or intended third-party beneficiaries become conflicting. Public policy" under such circumstances should suggest that the attorney recognize such conflict, appropriately advise the client and/or client and beneficiaries as such, and afford an opportunity for a conflict of waiver or the retention of fully independent and unjudgment impaired counsel.

Finally, and similarly, with respect to the sixth element: "the burden on the profession," as noted in the *Karan* case, it is not a burden on the profession to preclude a lawyer from representing conflicting interests. As stated in that case, "a potential conflict of interest arises when the lawyer simultaneously represents clients with opposing interests."

Here, finding that Mr. Gosselin had a duty to the Tomyns would not unduly burden the profession because the rules of professional conduct

already would preclude a lawyer from pursuing the interests of a client once a conflict has developed.

This is not “rocket science.” The scenario involved here is simply nothing but the Plaintiffs’ side of the coin, analogous to where an insurance company hires a lawyer to represent a Defendant’s interest and the Defendant nevertheless retains personal counsel, and in this instance, under the terms of a contract Mr. Gosselin was hired to represent the Tomyns’ interests in this litigation. The mere fact that Mr. Tomyn also had personal counsel, who felt it ultimately was appropriate to intervene, given the conflict of interest in Mr. Gosselin’s continuing representation is simply of no moment. See, *Hamilton v. State Farm*, 9 Wn.App. 180, 511 P.2d 1020 (1973).

Further, a clear aggravating factor is that Universal, prior to entering into the Settlement Agreement with the Sharbonos, very well knew of the existence of the Tomyn/Sharbono Settlement Agreement and had to have understood that during the course of trial and the first appeal on this matter, Mr. Gosselin was representing those interests. RPC 8.4(a). Yet despite what should have been an indication that Mr. Gosselin was operating with an obvious conflict, Universal nevertheless engaged in secret settlement negotiations with the Sharbonos, and quite irregularly, indirectly retained Mr. Gosselin for the purposes of acquiring for the Sharbonos the amounts due under Paragraph 7, simply for the purposes of handing them back to

Universal as a *quid pro quo* for a substantial amount of money.

In addition, as pointed out in the Declaration of Professor Boerner; if the Court is not inclined to find that Mr. Gosselin had an attorney/client relationship or a third-party beneficiary of services relationship to the Tomyns, nevertheless, should be disqualified due to the operation of the “Common Interest Privilege” also known as the “Allied Lawyer Privilege”.

The “Common Interest Privilege” was first recognized in the State of Washington in 1899 in the case of *Hartness v. Brown*, 31 Wn. 655, 59 P 491 (1899). Its simplest formulation, provides that where two persons having a common interest in pending litigation have a conference with the attorney representing one of them, those communications between the attorney and the clients are privileged and cannot be used adversely or disclosed to a third-party by any of the participants. See *State v. Emanuelle*, 32 Wn. 2d 799, 814, 259 P2d 845 (1953). The Common Interest Privilege has also been characterized as being a “joint defense privilege”, which has long been recognized in Washington, and it also applies to communications amongst Plaintiff or potential Plaintiffs in civil actions. See *Miller, Anderson, Nash, Yerke, v. Wiener v. US Department of Energy*, 499 F. Supp. 757, 771, (D.C. - Or. 1980).

The “Common Interest Privilege” has long been recognized by the 9th Circuit and covers “communications by a client with his own lawyer, remains privileged when the lawyer subsequently shares them with co-

defendants for purposes of a common defense”. See *Waller v. Financial Corp. of America*, 828 F 2d 579, 583, n. 7 (9th Cir. 1987).

As explained by the 7th Circuit in *United States v. Evans*, 113 F.1457 (7th Cir. 1997), the Common Interest Privilege applies where co-parties to a litigation and their counsel are operating toward a common purpose. “The joint defense privilege, more properly identified as the ‘Common Interest Rule’ has been described as ‘an extension of the attorney/client privilege’. It serves to protect the confidentiality of communications passing from one party to the attorney for another party, where a joint defense effort or understanding has been decided upon and undertaken by the parties and their respective counsel. *Id.* Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise, are protected. *Id.*, quoting, *US v. Schwimmer*, 892 F2d 1237, 243-44 2nd Cir. (1989).

In the instant case, there is not a shred of doubt that the vast majority of the litigation in this case, the Tomyns, the Sharbonos and their respective counsel have operated with a common purpose and have pursued this matter as a common enterprise. As noted above, during this process, strategies were discussed, were decided upon and even undertaken. Concerns and confidences were shared, as were evaluations of the positions taken by Universal in this matter.

Now that it appears that a conflict has developed between the

Sharbonos and the Tomyns and there has been a parting of the ways, it is suggested that the only way to protect such privilege is to disqualify Mr. Gosselin from further representing the Sharbonos in this matter. (See, Declaration of Professor Boerner).

What is at issue here is millions of dollars in compensation owed to the Tomyns. What happened here is troubling. Clearly, Mr. Gosselin must be disqualified and the Sharbonos should be compelled to hire other counsel who is conflict-free.

C. The Appropriate Response of the Trial Court When Confronting a Lawyer Who Has a Conflict of Interest, is to Disqualify That Lawyer From Further Representing a Party.

In this matter, Mr. Gosselin's conflict is best analyzed under RPC 1.7, because despite the fact that he is now asserting that he solely represents the Sharbonos' interests, he still is advocating directly for the position supportive of the Tomyns and/or taking positions that are clearly designed to benefit the Tomyns as third-party beneficiaries of his services. For example, on November 16, 2009, Mr. Gosselin filed a Memorandum in Opposition to Universal's efforts to modify the amount of cash supersedeas on file with the Registry of the Court. Given the fact that the Sharbonos have now settled all of their claims with Universal and settlement funds have been paid to the Sharbonos, the only interests which are being served by such efforts within the Appellate Court are the interests of the Tomyns, who need the amount on file with the Registry of the Court in order for their

substantial Judgment to be secured. Otherwise, the Sharbonos, who have settled, have no remaining interest that would be in any way protected by the amount of money currently on deposit with the Registry of the Court.

As the Tomyns are the putative client of Mr. Gosselin (or who could be characterized to some degree as “former clients”), the Tomyns clearly had standing to seek Mr. Gosselin’s disqualification. See, *FMC Technologies, Inc. v. Edwards*, 420 F.Supp 2d 1153, 1156 (WD Wa 2006), (applying Washington law).

Further, even if the Tomyns were not raising this issue, it is noted that the Court, when dealing with “an unethical change of sides” which is manifest and glaring, in violation of ethical obligations, the Court has a “plain duty to act.” *Id.* Once a motion to disqualify has been filed, a Court has a duty to examine the charges of conflict of interest. *Id.*, at 1157. Ultimately, in determining whether or not a violation of the RPC requires disqualification, the burden of proof shifts to the law firm who is resisting disqualification to establish that no such grounds exist. *Id.*, at 1158, citing to *Amgen, Inc. v. Elanex Pharms., Inc.*, 160 FRD 134 (WD Wa 1994), (applying Washington law).

Further, to the extent that one could argue that this is a “former client” scenario, it is not incumbent upon the Tomyns in this instance to establish that Mr. Gosselin’s continuing representation in this matter has the hazard of resulting in the disclosure of confidential information, because

when a conflict exists it is presumed that confidential information has been disclosed. *Id.*, at 116, citing to *State v. Hunsaker*, 74 Wn.App 38, 873 P.2d 540 (1994). As noted by Professor Boerner, such a presumption also exists even if the “allied lawyers” principle is deemed to be the sole bases for disqualification.

For the purposes of disqualification and a conflict of interest analysis, the term “confidential” not only applies to matters communicated in confidence by the client, but also all information related to the representation, whatever its sources. Finally, even if by some stretch of the imagination, this matter could be characterized as involving a “former client” disqualification is still required when matters are “substantially related,” i.e., have a relevant interconnection, or which has a potential of revealing the client’s pattern of conduct. See, *Sanders v. Woods*, 121 Wn.App 593, 89 P.3d 312 (2004).

In this case, it should have been found that Mr. Gosselin had a direct attorney-client relationship, and/or that the Tomyns were a third-party beneficiary of his services, thus owed a duty by Mr. Gosselin, the conflict of interest is readily apparent. While on the one hand, Mr. Gosselin was representing the Tomyns’ interests, on the other, Mr. Gosselin is also representing the interests of the Sharbonos, which have been and continue to be adverse to the Tomyns. Given the fact that Mr. Gosselin continued to represent the Sharbonos’ interests, which have now been essentially given

to Universal with respect to the paragraph 7 post-judgment interest, it is suggested that his conflict not only has him representing opposing interests visa vie the Tomyns and Sharbonos, but now is de facto representing the interests of Universal versus the Tomyns on appeal. It is suggested that such “side switching” is outlandish.

The conflict under these circumstances is direct and adverse. There is no way to ameliorate this conflict or protect privileged communications beyond the disqualification of Mr. Gosselin from further representing the Sharbonos in this Court.

Under such circumstances, the Trial Court has an obligation to act, and it is humbly suggested that Mr. Gosselin’s conflicts of interest could not be ignored.

V. CONCLUSION

In this matter, the Intervenors presented the opinions of qualified experts indicating that Mr. Gosselin’s conflict of interest required his withdrawal. While the Trial Court recognized that the Tomyns were an intended third-party beneficiary of Mr. Gosselin’s services, it was an error of law for the Trial Court not to recognize that they were also directly his clients under the unique facts of this case. In addition, upon recognizing such a conflict, (i.e. that there was a third-party beneficiary relationship), the Trial Court not only committed error of law as to what remedies were available to it, but also abused its discretion by not taking appropriate action,

i.e. entering an Order Disqualifying Mr. Gosselin in this matter.

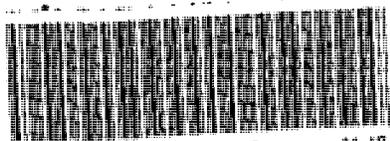
It is humbly requested that the Court's Order Denying the Disqualification of Mr. Gosselin and Reconsideration Thereof, be reversed and this matter be remanded with directions to the Trial Court to enter an appropriate Disqualification Order.

DATED this 30 of July, 2010.

A handwritten signature in black ink, appearing to read 'P. Lindenmuth', written over a horizontal line.

Paul A. Lindenmuth, WSBA#15817
Attorneys for Intervenors

Appendix 1



01-2-07954-4 33224220 DCLR 11-18-09

The Honorable Rosanne Buckner

Dept 6

November 25, 2009

FILED
CLERK'S OFFICE

A.M. NOV 18 2009 P.M.

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**SUPERIOR COURT OF WASHINGTON
FOR PIERCE COUNTY**

JAMES and DEBORAH SHARBONO,
individually and the marital community
comprised thereof,

Plaintiffs,

vs.

UNIVERSAL UNDERWRITERS
INSURANCE COMPANY, et al,

Defendants.

NO: 01-2-07954-4

**DECLARATION OF
PROFESSOR DAVID BOERNER**

CLINTON L. TOMYN, individually and as
Personal Representative of the Estate of
CYNTHIA L. TOMYN, deceased; and as
Parent/Guardian of NATHAN TOMYN,
AARON TOMYN, and CHRISTIAN TOMYN,
minor children as Intervenors.

I, David Boerner, being subject to the laws of perjury of the State of Washington, declare
as follows:

That I was admitted to the Washington State Bar in 1963. Since 1981, I have been a
member of the faculty of the Seattle University School of Law, and its predecessor the University
of Puget Sound School of Law, where I teach Professional Responsibility, among other courses.

A copy of my resume is attached hereto as Exhibit "1."

That from 1981 through 1988, from 1993 to 1996, and from 2000 to 2004, I have served
as a member of the Rules of Professional Conduct Committee of the Washington State Bar

**DECLARATION OF
PROFESSOR DAVID BOERNER - 1**

ORIGINAL
Appx 1

Law Offices Of Ben F. Barcus
4303 Ruston Way
Tacoma, Washington 98402
(206) 752-4444 • FAX 752-1035

1 Association and from 1982 through 1988, I was Chair of that committee. The Rules of
2 Professional Conduct Committee provides advice to Washington lawyers on their professional
3 responsibilities. I have made presentations and conducted seminars on the professional
4 responsibilities of lawyers at numerous continuing legal education seminars presented by the
5 Washington State Bar Association and by other legal organizations and law firms. I have
6 provided advice to many lawyers and law firms concerning the professional responsibilities of
7 lawyers and have testified as an expert witness on issues of the professional obligations of
8 lawyers in the Superior Courts of Clark, Grays Harbor, King, Pierce, Skagit and Snohomish
9 counties and in the United States District Courts for the Western and Eastern Districts of
10 Washington. From 1998 to 2003, I served as a member of the Character and Fitness Committee
11 of the Washington State Bar Association and I served as Chair of that committee during the
12 2000-2001 year. I served as a member of the Special Committee for the Evaluation of the Rules
13 of Professional Conduct (Ethics 2003) from 2003 to 2006.

14
15
16 That I have reviewed the Declaration of Paul A. Lindenmuth and all documents attached
17 as exhibits thereto.

18 That I understand that whether Timothy R. Gosselin formed an attorney-client relationship
19 with the Tomyns as well as with the Sharbonos in this matter is disputed. In my opinion, Mr.
20 Gosselin's obligations vary depending on how this issue is resolved, but in my opinion, either
21 resolution requires his disqualification under the standards of care applicable to lawyers in
22 Washington. *If an attorney-client relationship was formed between the Tomyns and Mr.*
23 *Gosselin, then the Sharbonos and the Tomyns were joint clients of Mr. Gosselin. When a*
24 *conflict develops between joint clients, the standard of care applicable to lawyers in Washington*
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requires that the lawyer withdraw from representing both clients. A lawyer cannot favor one client by withdrawing from representation of that client while continuing to represent the other. Thus, in my opinion, if an attorney-client relationship is determined to have existed between the Tomyns and Mr. Gosselin, the current conflict between the Tomyns and the Sharbonos requires Mr. Gosselin's disqualification from the representation of the Sharbonos in this matter.

If, on the other hand, it is determined that an attorney-client relationship did not exist between the Tomyns and Mr. Gosselin, then the relationship between the Tomyns and Sharbonos is that of clients with separate lawyers who have a common interest in pursuing claims against Universal Underwriters Insurance Company. In such a relationship, when confidential information is shared in pursuit of the common interest, the information so shared is protected by the attorney-client privilege and neither party, nor their lawyers, may disclose the information to third parties without the consent of the party who communicated the information. It is my understanding that the Sharbonos and Tomyns, and their attorneys communicated confidential information to Mr. Gosselin in pursuit of their common interest in pursuing claims against Universal. This information is thus privileged and may not be revealed to anyone except the Sharbonos and the Tomyns. To the extent that Mr. Gosselin reveals this information to Universal without permission of the Tomyns, he would breach the professional obligations he owes to the Tomyns. In such a situation as is presented here, the only effective remedy is to disqualify Mr. Gosselin from representing the Sharbonos in this matter. Revelation of the confidential information is presumed in these situations because requiring the party seeking to protect the privileged information to prove that the information was revealed would require disclosure of information and thus destroy the purpose of the privilege. In my opinion,

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protection of the privileged character of the communications of the Tomyns to their lawyers and to Mr. Gosselin can be assured only if Mr. Gosselin is disqualified from representing the Tomyns, Sharbonos, or any other party and/or interest, in this case, either at the trial or appellate levels.

DATED this 18th day of November, 2009 at Enumclaw, Washington.



David Boerner, WSBA #407

DAVID BOERNER
Seattle University School of Law
901 12th Avenue, P. O. Box 222000, Seattle, WA 98122-1090
Phone: 206.398.4016/Fax: 206.398.4077
Email: dboerner@seattleu.edu

- Education** LLB, University of Illinois, 1963
 B.S., University of Illinois, 1962
- Bar Memberships** State of Washington, 1963
 U.S. District Court, Western District of Washington, 1963
 U.S. Court of Appeals, Ninth Circuit, 1967; United States Supreme Court, 1973
- Professional Associations** American Bar Association
 Washington State Bar Association
 King County Bar Association
- Employment History** **2009 – Present** Professor of Law, Emeritus, Seattle University School of Law
- 1987 - 2009** Associate Professor of Law, Seattle University School of Law (formerly University of Puget Sound School of Law)
- 1981 - 1987** Associate Dean and Associate Professor of Law, University of Puget Sound School of Law
- 1971 – 1981** Chief Criminal Deputy, King County (Seattle), Prosecuting Attorney
- 1967 – 1970** Assistant Attorney General, State of Washington
- 1965 – 1967** Assistant United States Attorney, Western District of Washington
- 1963 - 1965** Associate, Johnson, Jonson and Inslee/Seattle
- Awards** Excellence in Diversity Award, 2008
 Washington State Bar Association
- Lifetime Achievement Award 2008
 Seattle University School of Law
- Award of Merit 2004
 Washington State Bar Association

Outstanding Lawyer King County Bar Association	2001
McGoldrick Fellow Seattle University	2001
Outstanding Achievement By A Scholar Washington Council on Crime and Delinquency	1991

Publications

Sentencing In Washington: A Legal Analysis of the Sentencing Reform Act of 1981 (Butterworths, 1985)

Confronting Violence: In The Act and In The Word, 15 Univ. of Puget Sound Law Review 525 (1992)

The Role of the Legislature in Guidelines Sentencing in "The Other Washington," 28 Wake Forest L. Rev. 381 (1993).

Bringing Law to Sentencing, 6 Federal Sentencing Reporter 174 (1993).

Sentencing Policy In Washington, 6 Overcrowded Times No. 3, p.1 (1995); reprinted in *Sentencing In Overcrowded Times: A Comparative Perspective* (M. Tonry, ed. Oxford University Press, 1997).

Sentencing Guidelines and Prosecutorial Discretion, 78 Judicature 196 (1995).

The Use of Offender Characteristics In Guideline Sentencing, 9 Federal Sentencing Reporter 136 (1996)

Appellate Review and The Allocation of Sentencing Discretion: A Report From The "Other" Washington, prepared for the Annual Conference of the National Association of Sentencing Commissions, Minneapolis, Minnesota (1998).

Sentencing Reform in the Other Washington, 28 Crime and Justice: An Annual Review of Research 71 (2001) (with Roxanne Lieb)

Professional Activities

Member, Trust Account Responsibilities and Retainers Task Force, Washington State Bar Association, 2006- 2007

Member, Governor's Task Force on Sex Offenders, State of Washington, 2007

Member, King County Sheriff's Blue Ribbon Panel, 2006 – 2008

Police Intelligence Auditor, City of Seattle, 2004 – Present

**Professional
Activities
(cont'd)**

Advisor, Model Penal Code: Sentencing 2004 – Present.

Member, King County Independent Task Force on Elections, 2005.

Rules of Professional Conduct Committee, Washington State Bar Association;
Member, 1981-88, 1993-1996, 2000 – 2004, Chair, 1982-1988.

Character and Fitness Committee, Washington State Bar Association,
Member 1998-2004, Chair 2000-2001.

Sentencing Guidelines Commission, State of Washington; Chair, 1999-
Present; Member, 1998-Present.

Member, Evaluation of The Rules of Professional Conduct Committee,
(Ethics 2003) Washington State Bar Association, 2002 – 2006.

Chair, Time For Trial Task Force, Washington Supreme Court, 2002.

Member, Joint Select Committee on the Drug Sentencing Grid, Washington
State Legislature, 2002.

Committee To Define The Practice of Law, Washington State Bar
Association, Member, 2000 –2001.

Future of the Legal Profession Study Group, Washington State Bar
Association, Member, 2001.

Chair, King County Inquest Procedures Review Committee, 2000-2001.

Member, Governor's Action Group on Domestic Violence, 1999.

Member, Lawyer's Assistance Program Committee, Washington State Bar
Association, 1998-2001.

Washington Pattern Jury Instructions Committee, Washington State
Supreme Court; Member, 1985-2009.

Board for Trial Court Education, Washington State Supreme Court; Member,
1984-2009, Vice-Chair and Chair, Curriculum Committee, 1985-1992, Chair
2002-2004.

Washington Supreme Court, Novak Commission on Attorney's Fees, 1987-
1989.

Governor's Task Force on Community Protection, Member, Chair,
Alternatives Subcommittee, 1989.

Professional Activities (cont'd)

Federal Public Defender Merit Screening Committee, Western District of Washington, Chair, 1989-90.

Executive Board, Criminal Law Section, Washington State Bar Association; Member, 1977-1987.

Board of Prosecutor Training Standards and Education, Washington Criminal Justice Training Commission; Member, 1984-86.

Board of Directors, Washington Council on Crime and Delinquency; Member, 1984-1990.

Judicial Merit Selection Committee, City of Seattle; 1983, 1985.

Independent Counsel, Select Committee on Campaign Practices, House of Representatives, December, 1984-January, 1985.

Governor's Emergency Commission on Prison Overcrowding; Member.

Pierce County Assigned Counsel Advisory Board; Member 1983-1992.

King County Public Defender Advisory Board; 1983-1985.

King County Executive Advisory Committee; Member, 1984-85.

King County Charter Review Commission; Chair; 1987-1988.

Boundry Review Board for King County; Member, 1986-1993.

Moderator, King County Regional Governance Summit, 1990.

Northwest Regional Institute, National Institute of Trial Advocacy; Instructor, 1981, 1982, 1983, 1984, 1985, 1987.

Seattle-King County Bar Association; Member, Board of Trustees, 1979-1982.

Professional Presentations

Legal and Judicial Ethics:

2009 How Legal Supervisors Are Affected By Changes to The RPC's, Seattle University School of Law CLE, March 25, 2009.

- 2008
- Speaker, Ethical Dilemmas for the Practicing Lawyer, Washington State Bar Association CLE, November 17, 2008.
 - Speaker, Ethical Implications of Hourly and Alternative Billing Practices, Seattle University School of Law CLE, November 14, 2008.
 - Speaker, Common Prosecution and Defense Ethics Issues, Washington State Bar Association Criminal Law Section CLE, Seattle, October 25, 2008, Spokane, November 1, 2008.
 - Speaker, High Profile Cases, Washington State Bar Association CLE, October 24, 2008.
 - Panelist, General Counsel: Are You The Arrow or The Bull's-Eye?, Federal Bar Association CLE, October 3, 2008.
 - Speaker, Ethics, the RPC's and Advertising, Washington State Bar Association, April 4, 2008.
- 2007
- Speaker, Ethics Workout, King County Bar Association, December 5, 2007.
 - Speaker, Amanda Kumar's Case, Seattle University School of Law CLE, November 17, 2007.
 - Speaker, Ethical Dilemmas for The Practicing Lawyer, WSBA CLE, November 5, 2007.
 - Speaker, Ethics and Land Use Lawyers, WSBA CLE, October 19, 2007.
 - Speaker, High Profile Cases, WSBA CLE, October 16, 2007.
 - Speaker, Ethics In Criminal Law, Criminal Law Section, WSBA, Spokane, WA, September 28, 2007; Seattle, WA, September 22, 2007.
 - Speaker, The New Rules of Professional Conduct and Access to Justice, Seattle University School of Law CLE, June 29, 2007.
- 2006
- Speaker, New Ethics Rule, ADR Section, King County Bar Association, December 14, 2006.
 - Speaker, Fourth Annual Conference on The Law of Lawyering, WSBA, December 13, 2006.
 - Speaker, Ethics in Defending DUI's, Washington Foundation for Criminal Justice, December 8, 2006.
 - Speaker, When Death and Divorce Collide, WSBA, November 29, 2006.
 - Speaker, Professional Ethics for International Lawyers, Washington State Bar Association, November 30, 2006.

Speaker, Ethics In Criminal Law, Criminal Law Section, WSBA, Spokane, WA, November 11, 2006; Seattle, WA, November 18, 2006.

Speaker, Ethical Dilemmas for The Practicing Lawyer, WSBA, November 13, 2006.

Speaker, Ethics for Corporate Counsel, November 1, 2006, Washington State Bar Association CLE.

Speaker, 50 Ways to Lose Your Client, WSBA, October 12, 2006.

Speaker, The New Rules of Professional Conduct, WSBA, September 18, 2006.

Washington's Proposed Rules of Professional Conduct, Tacoma Inn of Court, Tacoma, WA, March 20, 2006.

Ethical Issues for Corporate Counsel, Law Seminars International, Seattle, WA, March 14, 2006.

2005

Non-Conflict Ethics, Washington State Bar Association Annual Conference on The Laws of Lawyering, December 15, 2005.

Ethics In Family Law and Estate Planning, Washington State Bar Association, December 1, 2005.

Ethical Dilemmas for the Practicing Lawyer, Washington State Bar Association CLE, November 14, 2005.

Ethics In Criminal Law, Criminal Law Section, Washington State Bar Association, Seattle, WA, November 19, 2005, Yakima, WA, November 12, 2005.

Speaker, Ethical Issues, Seattle University School of Law CLE, Amanda Kumar's Case, October 28, 2005.

Speaker, Ethical Issues Before Administrative Tribunals, Washington State Bar Association CLE, Friday, October 28, 2005.

Ethics Before Hearing Boards, October 26, 2005.

Ethics In Sexual Assault Cases, Washington Association of Prosecuting Attorneys CLE, Leavenworth, WA, September 15, 2005.

Speaker, Ethical Issues In Special Assault Prosecutions, Washington Association of Prosecuting Attorneys Training Program, September 15, 2005.

Panelist, Ethics, National Institute of Trial Advocacy, June 21, 2005.

Speaker, Ethics In Criminal Law, Criminal Law Section, Washington State Bar Association CLE, May 20, 2005.

Speaker, Ethics, Washington State Trial Lawyers Association CLE, April 21, 2005.

Speaker, Ethics for Prosecutors, King County Prosecuting Attorney's Office CLE, April 18, 2005.

Speaker Revisions To The Rules of Professional Conduct, J. Reuben Clark Law Society CLE, March 18, 2005.

Speaker, Revisions TO The Rules of Professional Conduct, Seattle University School of Law CLE, March 11, 2005.

2004

Speaker, Revisions To The Rules of Professional Conduct, Washington State Bar Association CLE, Seattle, December 17, 2004.

Speaker, Revisions To The Rules of Professional Conduct, Microsoft Corporation, CLE, Redmond, WA, December 9, 2004.

Speaker, Revisions To The Rules of Professional Conduct, Washington Association of Criminal Defense Lawyers, Seattle, WA, December 3, 2004.

Speaker, Ethics In Criminal Law, Washington State Bar Association, CLE, Seattle, November 12, 2004; Spokane, November 13, 2004.

Speaker, Ethical Dilemmas, Seattle University School of Law, CLE, October 15, 2004.

Speaker, Dealing with Ethical Issues Involving Land Use/Environmental Law Matters, Washington State Bar Association CLE, October 7, 2004.

Speaker, Ethics, Tacoma-Pierce County Bar Association Annual Meeting, September 26, 2004.

Speaker, Ethics On The Criminal Side, Washington Association of Prosecuting Attorneys, June 25, 2004.

Speaker, Ethics On The Civil Side, Washington Association of Prosecuting Attorneys, June 24, 2004.

Speaker, Ethical Dilemmas, Seattle University School of Law CLE, April 16, 2004

Speaker, Unauthorized Practice and the Technology Bill of Rights, Access to Justice/University of Washington School of Law Conference, January 6, 2004.

2003

Speaker, Ethics, King County Bar Association CLE, December 19, 2003.

Speaker, Ethics In Litigation, Washington Trial Lawyers Association CLE, December 17, 2003.

Moderator, Criticism of Judges, Washington Bench/Bar/Press Committee Annual Meeting, November 21, 2003.

- Speaker, Ethical Dilemmas, Washington State Bar Association CLE, November 20, 2003.
- Speaker, Prosecutorial Ethics, Washington Association of Prosecuting Attorneys Annual Meeting, June 20, 2003.
- Speaker, Ethics In Mental Health Proceedings, King County Bar Association CLE, March 26, 2003.
- Panelist, Ethical Consideration In Public Sector Law, American Bar Association CLE, February 7, 2003.
- Speaker, Ethical Dilemmas, Seattle University School of Law CLE, February 1, 2003.
- 2002 Speaker, Confidentiality, Washington State Bar Association CLE, December 19, 2002.
- Panelist, Response To Criticism, Bench-Bar-Press Committee of Washington Annual Meeting, November 15, 2002.
- 2001 Speaker, Legal Ethics In Criminal Law, Washington State Bar Association CLE, December 15, 2001.
- Speaker, Legal Ethics, King County Bar Association CLE, December 13, 2001.
- Speaker, Ethical Dilemmas in the Practice of Law, Washington State Bar Association, October 17, 2001.
- Speaker, Legal Ethics, Washington Defense Trial Lawyers, Yakima, Washington, April 26, 2001.
- Speaker, "The Ethics of Deception", Labor and Employment Law Section, King County Bar Association, January 18, 2001.
- 2000 Panelist, Legal Ethics, Federal Bar Association, December 6, 2000.
- Speaker, Ethical Dilemmas in the Price of Law, Washington State Bar Association, October 27, 2000.
- 1999 Moderator, Conflicts of Interest In Litigation, King County Bar Association, December 16, 1999.
- Speaker, Judicial Independence, Bench/Bar/Government Conference, King County Bar Association, November 11, 1999.
- Speaker, Ethical Dilemmas In Health Care Practice, Washington Association of Health Care Lawyers, November 5, 1999.
- Speaker, Ethics For Patent, Trademark & Copyright Lawyers, March 17, 1999.

1998

Speaker, "Current Dilemmas In Litigation Ethics," University of Washington CLE, December 12, 1998.

Speaker, "Ethical Dilemmas In DUI Defense," Cowan, Hayne & Fox CLE, December 1, 1998.

Speaker, "Ethics In Criminal Law," Washington State Bar Association Criminal Law Section CLE, November 21, 1998.

Ethical Dilemmas For The Practicing Lawyer, Washington State Bar Association, November 18, 1998.

Moderator, "Ethical Dilemmas For The Practicing Lawyer," Washington State Bar Association CLE, October 16, 1998.

Speaker, "Ethics Jeopardy," Washington Criminal Justice Institute, September 24, 1998.

Moderator, "Is The Civil Justice Broken," District Conference of the United States District Court for the Western District of Washington, September 18, 1998.

Speaker, "Ethical Considerations For Prosecutors," Annual Meeting, Washington Association of Prosecuting Attorneys, June 24, 1998.

Moderator, "Ethical Dilemmas: Problems Puzzles, Pitfalls," Seattle University School of Law CLE, May 29, 1998.

Speaker, Ethical Issues In Representing The Growing or Maturing Closely Hold Business, Washington State Bar Association, February 6, 1988.

Speaker, "Ethics In Criminal Law," Washington State Bar Association Criminal Law Section CLE, May 16, 1998.

1997

Speaker, "Ethical Dilemmas In Litigation," Fourth Annual Litigation Update CLE, King County Bar Association and University of Washington Law School, December 20, 1997.

Moderator, Professionalism and Ethics In Federal Criminal Practice, Federal Bar Association of Western Washington CLE, December 10, 1997.

Moderator, Conflicts of Interest In Litigation, King County Bar Association CLE, December 3, 1997.

Speaker, Ethics, Kitsap County Bar CLE, October 10, 1997.

Moderator, Ethical Dilemmas For The Practicing Lawyer, Washington State Bar Association CLE, October 3, 1997.

- Speaker, Ethics For Prosecutors and Defense Counsel, Washington State Bar Association Criminal Law Section CLE, August 16, 1997.
- Speaker, Ethical Dilemmas, King County Bar Association CLE, August 14, 1997.
- Speaker, Ethics For Prosecutors, King County Prosecuting Attorney's Office, May 16, 1997.
- Speaker, Ethical Dilemmas In Land Use Practice, Washington State Bar Association CLE, May 10, 1997.
- Speaker, Ethics In Judicial Campaigns, Washington State Bar Association CLE, May 9, 1997.
- 1996 Speaker, "The Client Billing Dilemma", King County Bar Association CLE, December 12, 1996.
- Panelist "Ethical Dilemmas For The Practicing Lawyer, Washington State Bar Assn. CLE, Tacoma, October 24, 1996.
- Speaker, "Ethical Issues in Promoting Diversity and Eliminating Bias in the Legal Profession, Washington State Bar Assn. CLE, Seattle, September 12, 1996; repeated via video, December 3, 1997.
- Speaker, "Ethical Issues In Fees," Seattle University School of Law CLE, Seattle, Washington, June 14, 1996; Tacoma, November 22, 1996.
- Speaker, "Ethics and The Office", Continuing Legal Education Symposium, Sebury and Smith, Spokane, March 28, 1996.
- Speaker, "Avoiding Legal Malpractice and Bar Discipline," Washington Trial Lawyers Association CLE, February 29, 1996.
- 1995 Speaker, "The Ethics of Deception," King County Bar Association CLE, November 9, 1995.
- 1994 Speaker, "Conflicts In A Business Setting," Advising The Small Business Continuing Legal Education Seminar, Washington State Bar Association, August 12, 1994.
- Speaker, "Ethics" Environmental Land Use Law Seminar, Washington State Bar Association, May 14, 1994.
- 1993 Speaker, "Ethical Screens, Cones of Silence and the Problem of the Mobile Lawyer," Federal Bar Association, December 8, 1993.

- Speaker, "Ethics for Paralegals," Office of Attorney General, December 1, 1993.
- Moderator, "Judicial Selection in the Clinton Era," Federalist Society, April 14, 1993.
- Speaker, "Ethics in Judicial Campaigns," Conference on Pursuit of a Judicial Career for Attorneys of Color, February 27, 1993.
- 1992
- Speaker, Ethics In Government, Growth Management Continuing Legal Education Seminar, Washington State Bar Association, October 30, 1992.
- Speaker, Ethics For Paralegals, Washington State Trial Lawyers Association, July 31, 1992.
- Speaker, Ethics In The Practice of Law, Schwabe, Williamson, Ferguson & Burdell, Firm Retreat, June 10, 1992.
- 1991
- Speaker, "Legal Ethics," Continuing Legal Education Seminar, Seabury & Smith, November 26, 1991.
- Speaker, "Your Ethics Are Not My Ethics," Annual Bench/Bar/Press Conference, Washington State Bar Association, November 21, 1991.
- Speaker, "Ethics In Prosecution," Annual Conference, Office of United States Attorney, Western District of Washington, September 25, 1991.
- Panelist, "Ethics In Judicial Campaigns," Annual Convention, American Judges Association, August 28, 1991.
- Speaker, "Judicial Ethics For Administrative Law Judges, Annual Conference, Washington Administrative Law Judges Association, August 2, 1991.
- Panelist, "Ethics and Sanctions In Discovery," Ethics In The Practice of Law CLE, Washington Women Lawyers, June 12, 1991.
- 1990
- Speaker, Ethics of Trial Advocacy, Northwest Regional, National Institute of Trial Advocacy, June 20, 1990.
- Moderator, "Futures and the Washington Courts, Washington Administrator For The Courts, December 14, 1990.
- 1989
- Speaker, "Ethics", Washington Superior Court Administrators Association, October 27, 1989, April 12, 1991.
- Speaker, "Ethics for Judicial Educators", National Association of State Judicial Educators, October 9, 1989.

Speaker, "Prosecutorial Ethics," Washington Association of Prosecuting Attorneys, June 23, 1989.

Speaker, "Ethics and The County Clerk," Washington Association of County Clerks, April 5, 1989.

Speaker, "Ethics In Criminal Defense," Washington Association of Criminal Defense Lawyers, March 31, 1989.

1988

Speaker, Judicial Faculty Development Seminar, Administrator for the Courts, November 11-12, 1988.

Speaker, "Conflicts of Interest", Seminar on Representation of Corporations and Employees Under Criminal Investigation, American Bar Assn. Complex Crimes Committee and Washington Assn. of Criminal Defense Lawyers, November 14, 1988.

Speaker, "Ethical Concerns In Settlement Negotiations Involving Fee Shifting Statutes", Attorney Fees CLE, Washington State Bar Assn., November 3, 10 and 17, 1988.

Speaker, "Ethics For Municipal Attorneys", Fall Conference, Washington Assn. of Municipal Attorneys, October 27, 1988.

Speaker, "Prosecutorial Ethics", Annual Meeting, Oregon District Attorney Association, August 4, 1988.

Speaker, "Racial Discrimination In The Criminal Justice System, Seminar sponsored by Community Relations Service, United States Dept. of Justice, May 7, 1988.

Invited Commentator, Regional Hearing on Proposed Changes In Rules Regulating Lawyer Advertising, American Bar Assn., March 25, 1988.

Speaker, "Ethics In Land Use Practice", Environmental and Land Use Section, Washington State Bar Assn., February 26, 1988.

Coordinator and Discussion Leader, "Discretionary Power of the Judge," Superior Court Judges Regional Seminar, April 4, 1987.

Speaker, "Elections and the Canons of Judicial Ethics, National Association of Women Judges, October 9, 1987.

1986

Speaker, "Ethics and The Court Employee", Court Support Personnel Orientation, Administrator For The Courts, March 26, 1986, March 11, 1988, March 10, 1989, March 23, 1990, April 5, 1991, December 5, 1991.

- Speaker, "Ethics for Government Attorneys," Attorney General's Conference, August 21, 1986.
- Speaker, "Washington's Rules of Professional Conduct," Garvey, Schubert, Adams and Barer, Seattle, August 16, 1986.
- Speaker, "Washington's Rules of Professional Conduct," Perkins, Coie, Seattle, March 24, 26, April 7, 9, 1986.
- 1985 Speaker, "Rules of Professional Conduct and the Public Attorney," Continuing Legal Education Seminar, Office of Attorney General, Olympia, December 3, 1985.
- Moderator, "Image of the Law," panel discussion, National Association of Bar Executives, Seattle, September 30, 1985.
- Speaker, "The Elected Judge and the Judicial Role," Washington Appellate Judges Conference, Seattle, July 2, 1985.
- Speaker, "Prosecutors and the Rules of Professional Conduct," Continuing Legal Education Seminar, King County Prosecuting Attorney, June 28, 1985.
- Speaker, "The Regulation of Speech in Judicial Election Campaigns," Spring Conference, Washington Superior Court Judges Association, Pasco, April 7, 1985.
- Speaker, "Conflicts of Interest," Continuing Legal Education Seminar, Litigation Section, Washington State Bar Association, Yakima, Bellevue, Spokane, and Seattle, April 12, 13, 19, 26, and May 3, 1985.
- Speaker, "Knowing the Rules: The Code of Professional Responsibility and Lawyer's Speech -- What Lawyer's May Say," Continuing Legal Education Seminar, American Civil Liberties Union of Washington, Seattle, February 15, 1985.
- 1984 Speaker, "Bench-Bar-Press Seminar, Administrator for the Courts, Tacoma, June 16, 1984.
- 1983 "Ethics in Public Practice, Selected Situations for Discussions," Ethics Workshop, Attorney General's Conference, August 11, 1983.
- 1982 "Courts and the News Media: Access to Judicial Records: A Constitutional Perspective," presented at the University of Washington School of Law, October 23, 1982.

CRIMINAL LAW:

- 2007 Speaker, Sentencing and The Political Process, National Association of Sentencing Commissions, Oklahoma City, OK, August 7, 2007.
- 2006 Speaker, Blakely v. Washington In The State Supreme Courts, Annual Conference, Chief Judges of State Court of Appeals, Washington, D.C., November 16, 2006.
- Speaker, Blakely Fix, Washington Appellate Judges Judicial Conference, April 11, 2006.
- 2004 Moderator, Impact of Blakely v. Washington, State-Federal Judicial Council, Tacoma, WA, November 5, 2004.
- Speaker, Implications of Blakeley, Moderator, Moral Basis of Sentencing, National Association of Sentencing Commissions, Santa Fe, New Mexico, August 16, 2004.
- 2002 Speaker, Speedy Trial, Washington Judicial College, September 30, 2002.
- 2000 Keynote Speaker, Seventh Annual Washington Criminal Justice Institute, Washington State Bar Association, September 23, 2000.
- 1999 Speaker, The Future of Corrections, Washington Correctional Association, September 15, 1999.
- 1998 Panelist, Locating The Boundaries of Legal Mental Illness: The Implications of Hendricks, Section on Law and Mental Disability, American Association of Law School's Annual Meeting, San Francisco, January 9, 1998.
- 1997 Speaker, Civil Commitment of Sexually Violent Predators After Hendricks, Washington Criminal Justice Institute, September 19, 1997.
- 1996 Speaker, "Prosecutorial Guidelines," Seattle City Attorney's Office, April 15, 1996.
- 1995 Speaker, "Sentencing Guidelines and Prosecutors," Oklahoma District Attorneys Seminar, Austin, Texas, October 16, 1995.
- 1994 Speaker, "The Future of Sentencing Guidelines," Washington Criminal Justice Institute, September 16, 1994.
- Speaker, "Sentencing Guidelines Over The Past Decade," National Conference of Sentencing Guidelines Commission, July 29, 1994.

- 1993
- Speaker, "Misdemeanor Sentencing," Washington Association of Criminal Defense Lawyers, CLE, October 21, 1993.
- Speaker, "Drafting and Politics," National Conference of State Legislators, October 10, 1993.
- Speaker, "The Effect of Washington's Sentencing Guidelines on Racial Disparity In Sentencing," Law and Society Association Annual Meeting, May 28, 1993.
- Speaker, "Sentencing," King County Prosecuting Attorney's Office, March 20, 1993.
- 1992
- Member, Transition Task Force on Criminal Justice, Governor-Elect Mike Lowry, 1992-93.
- Speaker, Sentencing, Washington State Bar Association Annual Convention, September 16, 1992.
- Speaker, Civil Commitment A Social Control, Law and Society Assn., Annual Convention, Philadelphia, PA, May 31, 1992.
- 1991
- Speaker, "The Evolving Common Law of Sentencing" Washington Judicial Conference, August 26, 1991.
- Speaker, "Common Law of Sentencing," Annual Conference, Washington Association of Prosecuting Attorneys, June 21, 1991.
- Consultant, Alaska Sentencing Commission, May 2-4, 1991.
- 1990
- Speaker, Sentencing Guidelines For Misdemeanors, Oregon Criminal Justice Council, Portland, Oregon, February 23, 1990.
- Speaker, Sentencing, Judicial Orientation, Washington Superior Court Judges Association, February 8, 1990.
- 1989
- Speaker, State and Federal Sentencing, Washington Association of Criminal Defense Attorneys, December 1, 1989.
- Speaker, Sentencing The Sexual Offender, Washington Defender Association, Seattle, November 17, 1989, Spokane, November 18, 1989.
- Moderator and Speaker, Indeterminate Sentence Review Board, Conference on Parole For Inmates Convicted of Murder In The First Degree, October, 1989.

- Speaker, Financial Obligations and Sanctions, Conference on Offenders In The Community, Washington Council on Crime and Delinquency, August 3, 1989.
- Speaker, Sentencing Developments, Washington Association of Prosecuting Attorneys, June 23, 1989.
- Speaker, Sentencing Reform In Washington, Wisconsin Prison Capacity Task Force, February 6, 1989.
- 1988 Debate Moderator, Candidate for Attorney General, sponsored by Washington Council on Crime and Delinquency, September 14, 1988.
- Invited Participant, Society For The Reform of the Criminal Law, Ottawa, Canada, August 1-3, 1988.
- Panelist, "Alternative Sentences", Conference of Washington Sentencing Guidelines Commission, May 25, 1988.
- Speaker, "Decisions and Reasons" Washington Indeterminate Sentence Review Board, April 15, 1988.
- Speaker "Sentencing Reform Act", Lower Columbia Community College, Longview, Washington, February 16, 1988.
- 1987 Moderator, "From Confinement To Community," Workshop on Crime and Correctional Policy, Washington Council on Crime and Delinquency, October 20, 1987.
- Speaker, "History of Sentencing Reform," Washington Sentencing Guidelines Commission, August 22, 1987.
- Speaker, "The Sentencing Reform Act: On Appeal," Washington Judicial Conference, August 27, 1987.
- 1986 Speaker, "Developments in Sentencing," Tacoma/Pierce County Bar Association, December 5, 1986.
- 1985 Speaker, "Sentencing in Washington -- Today and Tomorrow," Annual Conference, Washington Council on Crime and Delinquency, November 15, 1985.
- Moderator, "Commentary on State Constitutional Law Regarding Privacy and Searches," Honorable James M. Dolliver, Chief Justice, Washington Supreme Court and Honorable Carolyn R. Dimmick, United States District Court, Western District of Washington, Washington State Bar Convention, Seattle, September 13, 1985.

1984

Speaker, "Exceptional Sentences and Appellate Review," Fall Judicial Conference, Tacoma, August 6, 1985.

Speaker, "The Sentencing Reform Act," Superior Court Judges Regional Seminar, Everett, November 10, 1984.

Speaker, "The Sentencing Reform Act," Continuing Legal Education Seminar, Criminal Law Section, Seattle-King County Bar Association, Seattle, October 31, 1984.

Speaker, "The Constitutionality of the Sentencing Reform Act," Continuing Legal Education Seminar, University of Washington School of Law, Seattle, October 27, 1984.

Speaker, "The Process of Reform," Leadership Tomorrow Forum on Criminal Justice, Sponsored by Greater Seattle Chamber of Commerce and United Way of King County, Seattle, October 18, 19____.

Speaker, "Introduction, Calculations and Possible Problems Under the Sentencing Reform Act," Continuing Legal Education Seminar, Pierce County Bar Association, Tacoma, October 12, 1984.

Speaker, "Determinate Sentencing: Legal Impacts," Fall Judicial Conference, Spokane, August 27, 1984.

Speaker, "Sentencing Under the New Act," Spring Conference, Washington Superior Court Judges Association, Lake Chelan, April 18, 1984.

Debate Moderator, "Roadblocks and The Constitution," sponsored by Washington Commission for the Humanities and Metrocenter YMCA, Seattle, April 11, 1984.

Speaker, "An Orwellian Analysis of the Sentencing Reform Act," at 1984 "Was Orwell Right?" Continuing Legal Education Seminar, Criminal Law Section, Washington State Bar Association, Seattle, March 30, 1984.

Presenter, Regulation of Prosecutorial Discretion in Washington, National Conference on Sentencing, National Institute of Justice, Baltimore, Maryland, January 18-20, 1984.

1983

"The Early Morning Line: A Preliminary Analysis of What Process is Due Under the Sentencing Reform Act," Continuing Legal Education Seminar, University of Washington School of Law, October 8, 1983.

"An Overview of the Sentencing Reform Act of 1981," Washington State Bar Association Annual Convention, September 15, 1983.

Appendix 2

December 17 2009 1:43 PM

KEVIN STOCK
COUNTY CLERK
NO: 01-2-07954-4

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7 SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY
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9 JAMES and DEBORAH SHARBONO,
10 individually and the marital community
11 comprised thereof,

12 Plaintiffs,

13 vs.

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15 UNIVERSAL UNDERWRITERS
16 INSURANCE COMPANY, et al,
17 Defendants.
18

19 CLINTON L. TOMYN, individually and as
20 Personal Representative of the Estate of
21 CYNTHIA L. TOMYN, deceased; and as
22 Parent/Guardian of NATHAN TOMYN,
23 AARON TOMYN, and CHRISTIAN TOMYN,
24 minor children as Intervenors.

Case No.: 01-2-07954-4

**DECLARATION OF ASSOCIATE
PROFESSOR JOHN A. STRAIT**

25 DECLARATION OF ASSOCIATE PROFESSOR
26 JOHN A. STRAIT - 1

Ben F. Barcus & Associates
4303 Ruston Way
Tacoma, WA 98402
253-752-4444 telephone
253-752-1035 facsimile

Appendix 2

1
2 I, John Strait, am competent to testify to the matters set forth herein and hereby declare as
3 follows:

4 **I. CREDENTIALS**

5 1. I am an Associate Professor of Law at the Seattle University School of Law with
6 teaching responsibilities in the fields of legal ethics and legal malpractice since 1976.

7 2. Summaries of my background and experience in the field of legal ethics and legal
8 malpractice are attached as Exhibits A, B, and C.

9 3. I have been in the private practice of law in the states of California and Oregon since
10 1970 and Washington since 1972. I am currently on inactive status in Oregon and California.

11 4. My private practice includes representation of attorneys in both disciplinary and legal-
12 malpractice-related issues. My practice also includes consulting, counseling and representing
13 attorneys on issues of conflict of interests. I have represented attorneys both in defending and
14 prosecuting claims arising from conflicts of interest. I have consulted on a weekly basis since the
15 late 1970s on such issues.

16 5. In addition to my fee-based representation and consulting, I consult on a pro bono
17 basis an average of once or twice a day with various lawyers throughout the Northwest, the
18 Washington State Bar Office or Disciplinary Counsel, and others on a variety of ethical and
19 malpractice issues. My consulting practice includes giving advice on conflicts of interest. My
20 consulting practice also includes the minimum standards of care for attorneys with regard to the
21 ethical responsibilities of attorneys and/or duties to their clients.

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24 DECLARATION OF ASSOCIATE PROFESSOR
25 JOHN A. STRAIT - 2

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1 6. I have lectured throughout the United States on the subject of legal ethics and
2 discipline for attorneys. To date, I have lectured in some fifteen (15) states, as well as participated in
3 more than three-hundred (300) CLE presentations on the law of ethics and standards for legal
4 malpractice in Washington. I average at least thirty-five (35) CLE presentations per year, many of
5 which include material on conflicts of interest. I have averaged at least three CLE presentations per
6 month over the last ten or more years.

7 7. I have testified in court as an expert witness or appeared by declaration or affidavit
8 and have been qualified as an expert witness in the fields of legal ethics and legal malpractice in
9 sixteen (16) different counties, including King County, in the State of Washington, and in the Federal
10 District Courts located in Washington, Oregon, Wyoming California, Alaska, Hawaii, Idaho, New
11 Mexico, and others. I have testified on the conflict of interest duties owed by attorneys in law firms
12 to their clients in most of these jurisdictions. I have also appeared by declaration and/or testified in
13 more than one hundred (100) conflict-of-interest-disqualification motions applying the Washington
14 Rules of Professional Conduct and the standards of care for Washington attorneys to avoid conflicts
15 of interest.

16 8. I have published articles, performed professional research and written in this field as
17 reflected (in part) in the attached curriculum vitae. I am a co-author of The Washington Legal Ethics
18 Deskbook published by the WSBA. I have served on the Rules of Professional Conduct Committee
19 for the Washington State Bar Association on and off for more than twenty (20) years.

20 9. I have directed a clinical program in legal discipline through Seattle University
21 School of Law from 1991 through 2005. In this clinical program, law students investigated bar
22 complaints under my direction and made recommendations to the Washington State Bar Office of
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1 Legal Discipline on probable cause. The program was awarded the 1995 Gambell Award by the
2 American Bar Association (ABA) for service to the profession.

3 10. I have served as Adjunct Investigative Counsel investigating bar complaints for the
4 Washington State Bar Association for more than twenty (20) years. As Adjunct Investigative
5 Counsel, I have investigated bar grievances involving RPC 1.7 and RPC 1.9 in more than twenty
6 (20) investigations.

7 **II. MATERIALS REVIEWED**

8 I have reviewed the following in order to render my opinion in this declaration:

- 9 a. Declaration of Paul A. Lindenmuth Re: Declaration of Intervenor's
10 Motion to Disqualify Counsel for the Plaintiff, Timothy R. Gosselin;
11 b. Memorandum and Points of Authority in Support of Intervenor's Motion
12 to Disqualify Counsel for the Plaintiff, Timothy R. Gosselin;
13 c. Declaration of Professor David Boerner;
14 d. Response Opposing Intervenor's Motion to Disqualify Counsel for the
15 Plaintiff, Timothy R. Gosselin; and
16 e. Declaration of Plaintiff's Counsel Gosselin, Opposing Motion to
17 Disqualify.

18 11. I also rely upon my teaching experience, practice experience, research, and writing in
19 the field of professional duties owed by attorneys under the Washington Rules of Professional
20 Conduct and the obligations of Washington lawyers with regard to conflicts of interest.

21 **II. FACTS ASSUMED IN ORDER TO RENDER OPINIONS**

22 12. This case involves the death of Cynthia Tomy, who was killed in automobile
23 collision when Cassandra Sharbono crossed the center line of Highway 7, near Eatonville,
24 Washington. Ms. Tomy was survived by her husband and three sons.

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1 13. Claims were made against the at-fault driver, the driver's parents who were insured
2 through State Farm with excess coverage through Universal Underwriters Insurance Company. The
3 Sharbonos retained individual counsel, Timothy R. Gosselin, to assist in pre-filing negotiations in an
4 attempt to resolve the claims of the Tomyns. Two mediations were held which were unsuccessful
5 when it was revealed that the Sharbonos believed they had purchased \$3 million in excess umbrella
6 liability coverage through Universal Underwriters Insurance Company. Universal denied the
7 allegation of the Sharbonos and claimed the Sharbonos only carried a \$1 million in excess liability
8 coverage.

9 14. The Sharbonos' and Tomyns' counsel requested disclosure of Underwriting files,
10 including the applications for coverage, etc. Universal refused to produce the documentation of what
11 the coverage in fact was, even though the Sharbonos, absent such disclosure, would be subject to a
12 wrongful death suit.

13 15. Tomyns filed suit against the Sharbonos following Universal's refusal to disclose,
14 although discovery Motions and Subpoena were issued to Universal by the Court requiring
15 production of the insurance documentation, Universal filed a Motion for Discretionary Review to the
16 State Court of Appeals. In the interim, the Tomyns and Sharbonos reached a settlement and
17 eventually judgment was entered on March 28, 2001.

18 16. Under the terms of the settlement, the Sharbonos were obligated to bring a suit against
19 their insurer, Universal and under the same Settlement Agreement, pursue the unsatisfied claims of
20 the Tomyns. The Sharbonos elected to use Mr. Gosselin in the suit against Universal to satisfy the
21 requirements in the settlement agreement. Mr. Gosselin therefore was representing both the
22 underlying claims of the Tomyns and separate claims of the Sharbonos. The Settlement Agreement
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1 also potentially required the sharing of attorney's fees (if certain conditions were met) should the
2 Tomyns and Sharbonos obtain a recovery against Universal.

3 17. Mr. Gosselin pursued the claims against Universal and filed suit. Extensive Motion
4 practice resulted in a trial court ruling on summary judgment that Universal acted in bad faith as a
5 matter of law. The bad faith trial resulted in entry of a judgment against Universal on May 20, 2005.
6 Universal appealed that Judgment. Ultimately the appeal was denied as it related to the claims for
7 the benefit of the Tomyns, but resulted in a reversal for the remaining separate claims of the
8 Sharbonos. The Court of Appeals rejected the appeal of the Tomyns' claims on the grounds that
9 counsel for Universal failed to assign error to those portions of the Judgment. The Judgment was to
10 the benefits of the Tomyns and therefore confirmed together with accruing interest. Universal
11 petitioned for Review to the Washington State Supreme Court which was denied. Mandate was
12 entered August 21, 2008.

13 18. After Mandate, Gosselin filed a Motion to Execute against the appeal bond which had
14 been secured to the outstanding Judgment against Universal. For the first time in his joint
15 representation of the interest of the Sharbonos and the Tomyns during eight years of litigation,
16 Gosselin contended that the Sharbonos were entitled to post-judgment interest which had been
17 accruing. The amount claimed by Mr. Gosselin on behalf of the Sharbonos was in excess of \$2.35
18 million dollars. The Tomyns then moved for an Order Allowing Intervention in this matter, which
19 was granted by the Court for purposes of protecting the Tomyns' Judgment interests. The Trial
20 Court also ordered that the May 20, 2005 Judgment for the Tomyn values were to be disbursed.

21 19. Mr. Gosselin asserted on behalf of the Sharbonos, an entitlement to the post-Judgment
22 interest which was directly adverse to his joint representation of the Tomyns' interests. Universal
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1 appealed the Disbursement Order and Mr. Gosselin cross appealed, claiming on behalf of the
2 Sharbonos, the post-Judgment interest amounts directly adverse to the award to the Tomyns which
3 he had obtained. Extensive discretionary review applications were made by Universal following the
4 order of disbursal. Mr. Gosselin continued to assert the Sharbonos' claim adverse to the Tomyns, for
5 the post-Judgment interest. An attempt at mediation failed with a joint presentation by the Tomyns'
6 separate counsel who had been allowed to intervene, Mr. Barcus and Mr. Lindenmuth, and Mr.
7 Gosselin sharing strategies, conferences, confidences, etc.

8 20. Without notice to the Tomyns, Gosselin then entered into a secret agreement to re-
9 mediate the matter in the second mediation following the first failed mediation before a new
10 Mediator. Without notice to the Tomyns, Gosselin on behalf of the Sharbonos, engaged in the
11 second mediation in August of 2009 with Universal and entered into a purported Settlement
12 Agreement. Only at this point, did Mr. Gosselin notify the Tomyns' counsel of a pending settlement
13 and that the pending trial date and pre-trial Motions against Universal had been canceled. Following
14 Motions to the Trial Court, and the objections of the Tomyns to finalizing the purported
15 Sharbono/Universal Settlement, Universal appealed the disclosure of the Settlement Agreement by
16 application for Discretionary Review. The Tomyns' counsel objected to Mr. Gosselin's role and
17 complained of a conflict of interest. Mr. Gosselin stated that he intended to resign but then changed
18 his mind, saying that the Sharbonos requested that he continue representing them. Mr. Gosselin
19 continues to represent adversely to the Tomyns with regard to the interest calculation issue, leading
20 to the current Motion to Disqualify.

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III. OPINIONS

21. I have reviewed the Declaration of Professor David Broener. I agree with his opinions as expressed and in addition, hold the following opinions. Mr. Gosselin, by undertaking the joint representation for eight years of both the Tomyn claims and the Sharbono claims, under the terms of the Settlement Agreement, owe third party beneficial duties to the Tomyns. The Sharbonos are required under the terms of the Agreement to fully assert and protect the Tomyns' claims in the litigation with Universal. The Sharbonos retained the right to name their lawyer who would accomplish both the obligations they owed to the Tomyns and their own separate claims against Universal. When they chose Mr. Gosselin, he undertook the representation with duties of the Tomyns' claims (directly owed to the Tomyns) as third party beneficiaries of the Sharbonos' obligations under the Settlement Agreement with the Tomyns. Under those circumstances, Mr. Gosselin owed all the same ethical obligations to affirmatively represent the Sharbonos' claims in a manner consistent with the Sharbonos' obligations to the Tomyns. The Sharbonos and Mr. Gosselin's decision to assert on the Sharbonos' behalf, an adverse position to the Tomyns' rights to interest, is a violation of those third party beneficial duties owed to the Tomyns by Mr. Gosselin and the direct duties owed by the Sharbonos. RPC 1.7(a)(1) therefore applies directly because of the third party beneficial relationship Mr. Gosselin had with his legal representation of the Tomyns' claims, even if he is not directly counsel representing the Tomyns.

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1 22. In my opinion, independent of third party beneficial claims, on this fact pattern Mr.
2 Gosselin owed duties as an attorney directly to the Tomyns, which required him not to take actions
3 adverse to the Tomyns under RPC 1.7 (a)(1) to the benefit of his other clients, the Sharbonos. When
4 such a conflict arises between jointly represented clients, Washington lawyers have a **mandatory**
5 **obligation** to withdraw from both representations and advise each of their clients to seek
6 independent counsel, so that their conflicting interests may be properly represented without
7 exploitation of the previous loyalty obligations under RPC 1.7 (a)(1), confidentiality obligations
8 under RCP 1.6 at 1.9, and under the mandatory withdrawal rules for continued representation of
9 either party which result in violation of these rules under RPC 1.16.

10 23. The mandatory obligation to withdraw once the joint representation becomes adverse,
11 is known as the "hot potato rule" and is well recognized within Washington ethics and standard of
12 care obligations to avoid conflicts of interest.

13 24. To the extent that Mr. Gosselin is relying on this Settlement Agreement as
14 establishing only an attorney/client relationship, on his part with the Sharbonos and with no duties
15 owed to the Tomyns, the contractual Settlement Agreement provisions which provide for the
16 Sharbonos to select counsel in order to assert the Tomyns' claims. Mr. Gosselin apparently argues
17 that the Tomyns are not clients and that he owed no duties to them because of the Settlement
18 Agreement. In my opinion the Settlement Agreement, if interpreted as Mr. Gosselin claims, would
19 be void as against public policy because it would violate the requirement to properly represent the
20 Tomyns' claims if they became adverse to the Sharbonos, Mr. Gosselin would have conflicts under
21 RCP 1.6, 1.7 and/or 1.9, that I described *supra*. In other words, the Settlement Agreement cannot
22 contract away Mr. Gosselin's obligations when asserting the Tomyns' claims under the Settlement
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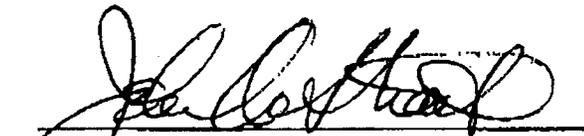
1 Agreement from the obligations of conflict of interest mandatory rules on all Washington lawyers. A
2 contract which is in violation of the Washington Rules of Professional Conduct, is void as against
3 public policy. To the extent that it is in violation of that public policy, the contract cannot be
4 enforced. Mr. Gosselin cannot hide behind the Settlement Agreement in order to avoid the conflict
5 of interest obligations he has in simultaneously representing the Tomyns' claims under the terms of
6 the Settlement Agreement against Universal, while at the same time, negotiating with Universal and
7 litigating a position on behalf of the Sharbonos adverse to the Tomyns' claims. The void as against
8 Public Policy Doctrine is well recognized in Washington Law. See for example: *Ward v. Richards*
9 *Enzono, Inc.*, 51 Wn. App. 423 (1988), *Perez v. Pappa*, 98 Wn. 2d 835 (1983), etc.

10 25. In addition to the grounds of disqualification, I concur with Professor Boerner's view
11 that the joint representation of the Tomyns' claims and the Sharbonos' claims with complete sharing
12 of confidentiality and information by Mr. Gosselin created a joint claim which the Tomyns could
13 rely upon. The joint plaintiff agreement with the Tomyns without an informed consent of the
14 consequences to confidentiality, if he did not represent them, is a form of misrepresentation to the
15 Tomyns. That misrepresentation has resulted in his access to the Tomyns' confidential information
16 and claims, which he is now exploiting to the advantage of the Sharbonos. Under these
17 circumstances, Mr. Gosselin should also be disqualified even if he did not have a direct
18 attorney/client relationship with the Tomyns because of his failure to clarify the actual
19 representational and confidentiality relationships as he now claims them to be.
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John A. Strait

Executed this 16th day of December, 2009
at Seattle, Washington.

DECLARATION OF ASSOCIATE PROFESSOR

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FILED
COURT OF APPEALS

10 JUL 30 PM 2:54

STATE OF WASHINGTON

BY _____
CLERK

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

JAMES and DEBORAH SHARBONO,
individually and the marital community
comprised thereof, CASSANDRA
SHARBONO,

Respondents/Appellants,

vs.

UNIVERSAL UNDERWRITERS
INSURANCE COMPANY, a foreign
insurer; LEN VAN DE WEGE and
“JANE DOE” VAN DE WEGE,
husband and wife and the marital
community composed thereof,

Appellant,

CLINTON L. TOMYN, individually
and as Personal Representative of the
Estate of CYNTHIA L. TOMYN,
deceased; and as Parent/Guardian of
NATHAN TOMYN, AARON
TOMYN, and CHRISTIAN TOMYN,
minor children,

Respondents/Intervenors.

No: 40245-9-II

**DECLARATION OF
SERVICE**

On July 30, 2010, a true and correct copy of
APPELLANTS/INTERVENORS' OPENING BRIEF, Court of Appeals,
Division II Cause No: 40245-9-II, was served on the following by Hand
Delivery and courtesy copy via e-mail:

Timothy R. Gosselin, Esq.
Gosselin Law Office PLLC
1901 Jefferson Ave, Suite 304
Tacoma, WA 98402-1611

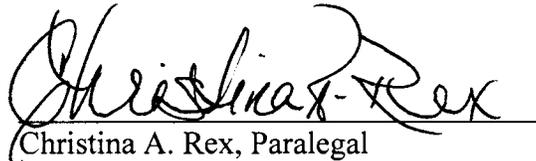
Philip A. Talmadge
Talmadge Fitzpatrick
18010 Southcenter Pkwy
Tukwila, WA 98188

Original filed via hand delivery:

Court of Appeals, Division II
Clerk's Office
950 Broadway, Suite 300
Tacoma, WA 98402-4427

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

DATED this 30th day of July, 2010.

A handwritten signature in black ink that reads "Christina A. Rex". The signature is written in a cursive style and is positioned above a horizontal line.

Christina A. Rex, Paralegal
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& Associates, P.L.L.C.
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