

No. 39672-6-II
Consolidated w/ No. 41009-5-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

ELINOR JEAN TATHAM,

Respondent,

v.

JAMES CRAMPTON ROGERS,

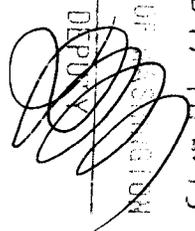
Appellant.

BRIEF OF APPELLANT

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

1. Appellant assigns error to the trial judge's decision not to recuse himself from deciding the appellant's CR 60(b) motion.
2. Appellant assigns error to the trial court's denial of his CR 60(b) motion for relief from judgment.
3. Appellant assigns error to the trial court's denial of his motion for reconsideration of his order denying the motion for relief from judgment.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Would a judge's ability to be impartial "reasonably be questioned" in a case where it is undisputed that one of the parties is represented by an attorney who:
 - (a) describes the judge as part of a group of lawyers that she typically met at a local pub for drinks;
 - (b) was present in the judge's vehicle when he was arrested for drunk driving;
 - (c) made an offer (which was declined) to the police officer to drive the judge home herself;
 - (d) was herself over the legal limit at the time the offer was made;
 - (e) posted the judge's bail to get him out of jail;
 - (f) named the judge as her alternate attorney-in-fact in a durable power of attorney which gives the judge the power to manage all of her property and all of her accounts at financial institutions, and recorded that power of attorney in the County Recorder's office;
 - (g) Practiced law with the judge for seventeen months;
 - (h) Served as the judge's campaign manager;
 - (i) was appointed by the judge to serve as a county court commissioner; and

- (j) who wrote to a local newspaper to dispel the implication that she would ever appear before the judge in indigent criminal cases and thereby derive some financial benefit from a decision to award the county's indigent defense contract to a nonprofit organization on whose board of directors she served.

2. Under these circumstances, did the judge violate the appellant's due process right to a judge with the appearance of impartiality when he failed to disqualify himself from hearing the appellant's case and also failed to inform the appellant of his many associations with opposing counsel?

3. Does a trial judge have an obligation to disclose to a party, on the record, his many associations with the other party's attorney before undertaking to serve as the judge in the case?

4. Is the due process standard for disqualification of a judge due to the appearance of partiality different in a small rural county where there is only one judge, than it is in a larger county with multiple judges and a larger population of attorneys?

5. Should the judge have heard and decided the post-trial motion for relief from judgment given that deciding this motion required him to decide whether his own conduct had violated appellant Rogers' due process rights?

6. When a judge is presented with a motion to recuse himself on the ground that there is an appearance of bias problem, does it compound that problem for the judge to rely on technical noncompliance with a court rule as a basis for refusing to consider some or all of the motion?

C. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY OF POST-JUDGMENT MOTIONS

On July 15, 2009, the trial judge in this case entered findings of fact and conclusions of law and a judgment dividing the property of the parties. CP 8-12, 13-15. The procedural history of that case which occurred prior to July 15, 2009 is set forth in the previous opening brief of appellant filed on March 4, 2010 under COA No. 39672-6-II.

On May 20, 2010, appellant Rogers filed a motion for relief from judgment pursuant to CR 60(b) in which he asserted that the trial judge, the Honorable Craddock Verser, should have disqualified himself from hearing and deciding this case due to his associations with attorney Peggy Ann Bierbaum, counsel for the opposing party Elinor Tatham. CP 16-29, 32-36, 37-80. Rogers also filed a companion motion asking Judge Verser to recuse himself from deciding the CR 60(b) motion and requesting assignment of a visiting judge to decide the merits of that motion. CP 30-31. These motions were noted for hearing at 2 p.m. on June 18, 2010, a date roughly one month after filing.

On June 16, 2010, the Court Administrator advised the parties' counsel by email that the Court was moving the hearing to the end of the motions calendar to a 3 p.m. time slot. CP 216, 219. Also on the 16th, counsel for Tatham filed a response to the CR 60(b) motion with 55 pages of supporting declarations and numerous attachments. CP 83-102, 103-104,

105-160.

On June 17, 2010, Rogers' counsel filed a reply brief and a supporting declaration with the Court, and these materials were filed by fax.¹ CP 217. The Court stated on the record that they were stamped filed by the Court Clerk at 12:12 p.m. CP 217, ¶ 4; RP 6/18/10, at 10.² Attorney Bierbaum later stated in open Court that she received her copies of these pleadings by fax at 1:35 p.m. on June 17, 2010. CP 217, ¶ 4; RP 6/18/10, at 8.

The parties appeared before the Superior Court on June 18, 2010. They first argued the motion seeking to have Judge Verser recuse himself thereby allowing a visiting judge to decide the merits of the CR 60(b) motion. Judge Verser denied that motion. RP 6/18/10, at 7.

Then, before they argued the CR 60(b) motion, attorney Bierbaum moved to strike Rogers' reply brief materials because she did not receive them until 1:35 p.m. and under the court rules she was supposed to receive them by noon. RP 6/18/10, at 7-8. Rogers' counsel explained that it had been exceptionally difficult to respond to Tatham's lengthy response materials in a one day period,³ and suggested that if attorney Bierbaum felt

¹ Bierbaum's law office is in Port Townsend. The law office of Rogers' attorney is in Seattle. Given the one day turn around between receipt of Tatham's response on the 16th and the due date of June 17th for the reply brief, and the distance between Seattle and Port Townsend, Rogers' counsel served Tatham's counsel by fax. She later claimed she had never consented to fax service.

² According to GR 17(b)(3) a fax filing shall be deemed received at the time the clerk's fax machine electronically registers the transmission of the first page, regardless of when the final printing of the document occurs . . ." In this case the fax machine began to register receipt at 11:58 a.m. RP 6/18/10, at 8-9. Thus, the fact that the Clerk may not have affixed a filed stamp to the complete document until fourteen minutes later is irrelevant.

³ He explained that he had been in federal court all day on June 16th and thus was not able to review Tatham's response brief and material until he returned to his office at 4 p.m.

she was prejudiced by having received the materials roughly 90 minutes late, the appropriate remedy was to simply continue the hearing to a later date to give her additional time to read the reply materials. RP 6/18/10, at 9. Judge Verser rejected that suggestion and ruled that he was not going to consider the reply materials because they had not been timely filed and served by noon on the preceding day. RP 6/18/10, at 10.⁴

The parties then argued the merits of Rogers' CR 60(b) motion and Judge Verser denied that motion as well. RP 6/18/10, at 41; CP 190.

On June 28, 2010, Mr. Kurt Bulmer, new additional counsel for Rogers, filed a motion for reconsideration of the Superior Court's rulings of June 18th. CP 194-215, 216-218.

On July 6, 2010, Rogers filed a timely notice of appeal from the Superior Court's June 18th denial of his CR 60(b) motion. CP 220-223.

On July 14, 2010, the Superior Court denied Rogers' motion for reconsideration. CP 224-235. On August 4, 2010, Rogers filed an amended notice of appeal, appealing from the June 18th denial of reconsideration. CP 252.

RP 6/18/10, at 8. He worked all night and most of the next morning to complete Rogers' reply brief and it was filed by fax by his assistant at 11:58 a.m. on June 17th. RP 6/18/10, at 8-9.

⁴ Judge Verser also stated on the record that he had not received any bench copies of Rogers' reply brief materials. RP 6/18/10, at 10. Jefferson County Superior Court Local Rule 7.4 provides that bench copies of pleadings for the judge shall be provided. It further provides: "If the matter is to be heard before a visiting judge, it shall be the responsibility of counsel or the party to deliver any bench copies to that visiting judge. If counsel requests the court administrator to forward the documents via email the fee will be .25¢ per page." Since the rule assigns delivery responsibility to the party *only* when the judge is a visiting judge, it appears to acknowledge that service of bench copies to the regular Jefferson County Superior Court judge is the responsibility of the court administrator. See also Jefferson County Superior Court Local Rule 7.12.3.2(c).

2. STATEMENT OF THE FACTS

a. Rogers' Post Trial Decision to Hire A Private Investigator To Determine if There was Some Kind of Undisclosed Relationship Between the Trial Judge and Tatham's Attorney Peggy Ann Bierbaum.

After judgment was entered on July 15, 2009, on August 25, 2009 appellant Rogers hired private investigator Rose Winquist. CP 32, ¶ 4; 37, ¶ 2. Rogers explained to Winquist that he felt the judge had acted in a biased manner towards him during his trial; that the judge had awarded 75% of the parties' property to Tatham; and that the judge seemed to favor Tatham's attorney Peggy Ann Bierbaum. CP 32, ¶ 4; 37 ¶ 3. Winquist then conducted an investigation which revealed the following facts.

b. Law Partnership

Winquist discovered that during the years 2002-2004 the judge and attorney Bierbaum had been partners in the law firm of Verser and Bierbaum. CP 38, ¶ 5; CP 43. They were the two partners in the firm and they had one associate working with them. *Id.*

c. DUI Arrest of Verser, Bierbaum's Presence as Passenger in the Vehicle, Bierbaum's Reference to Verser as her "Client" and The Posting of Bail for Verser by Bierbaum.

Winquist also discovered that on February 2, 2003, Judge Verser (then a public defender and not yet a judge) was arrested by State Patrol Trooper Chad Kinder for Driving Under the Influence, and that attorney Bierbaum was riding in the car with him as his sole passenger at that time. CP 38, ¶ 6; CP 46. She obtained a copy of the arrest report. CP 38, ¶ 6; CP 46.

Trooper Kinder's DUI narrative report states that Bierbaum told the arresting officer that she "had only one glass of Champaign [sic] and if you think he is not right to drive than I will." CP 38, ¶ 7; CP 49. Kinder's report also refers to the assistance he received from Deputy Sheriff Brett Anglin. CP 49. Kinder says Anglin contacted Bierbaum and that Anglin later advised him "that he had PBTED the female passenger and she was over the legal limit." CP 49. At the county jail Kinder administered a breath test to Judge Verser and the two breath samples that were tested provided readings of .137 and .132. CP 50.

Winqvist also located the report of Deputy Sheriff Brett Anglin. CP 38, ¶ 8. Anglin's report states that when he spoke to Bierbaum she stated that she had consumed "a few drinks at the Seven Cedars Casino." CP 38, ¶ 8; CP 52. Anglin administered a PBT to Bierbaum and the test result was .119. CP 52. Anglin's report states that after Kinder arrested Verser, Anglin followed Kinder back to the sheriff's office:

Later that night I spoke with Ms. Bierbaum regarding her "Client" Mr. Verser. I informed her that she would be allowed to speak with Mr. Verser after the booking process (at that time the Trooper was finished with the BAC and was involved with the booking process).

CP 38, ¶ 9; CP 52.

Winqvist obtained the court records for the DUI case and discovered that Bierbaum had posted bail for Verser on the night of his DUI arrest. CP 38, ¶ 10; CP 54.

d. Bierbaum's Position as Verser's Campaign Manager and Her Promise Not to Appear Before Him As a Public Defender.

Winquist also found newspaper articles which said that Bierbaum had served as the judge's campaign manager. CP 39.

An article in the June 1, 2005 issue of the *Port Townsend Leader* identified Bierbaum as the judge's campaign manager for the 2004 election. (Attached as Exhibit F). The Public Disclosure Commission (PDC) Registration Candidates/Candidate Committee Form shows Bierbaum listed as Verser's treasurer. (Attached as Exhibit G). In a letter attorney Bierbaum wrote to the *Leader* which was published on October 27, 2009, she identified herself as the judge's campaign manager for his second election in 2008 in which he was unopposed. (Exhibit H). In addition, in May 2004 Bierbaum donated \$1000 to Verser's campaign fund. (Exhibit I).

CP 39, ¶ 11; CP 58; CP 60; CP 62; CP 64.⁵

In an October 2009 letter to a local newspaper, attorney Bierbaum wrote to complain that a newspaper article had omitted important factual information about Judge Verser's request that the county reconsider a recommendation to award the public defender contract to the highest bidder. CP 62. In her letter Bierbaum stated:

The omission may have left the reader with the impression that I, Judge Verser's former law partner, would receive a financial benefit from a county contract administered through Superior Court just weeks after having served as his campaign manager.

The truth is that I simply agreed, as a favor to a highly respected colleague Ben Critchlow, to serve as an uncompensated member of the board overseeing the nonprofit organization he is forming to provide indigent defense services in this county. I have no experience in public defense and would not act as provider of indigent

⁵ Winquist read the articles to say Bierbaum served as Verser's campaign manager twice. Bierbaum said she only served as his campaign manager once.

defense services. *I would never appear before Judge Verser as a public defender.* I would not receive a penny of county money as a board member.

CP 62 (emphasis added).

e. Verser's Possession of Alternate Power of Attorney Authorizing Him to Manage Bierbaum's Property.

In 2009, Winquist also discovered a durable power of attorney dated April 5, 2005 on file in the Jefferson County Recorder's Office:

In the Recorder's Office for Jefferson County I discovered that attorney Bierbaum had recorded the alternate durable power of attorney which she had executed and given to the judge which authorized him to manage her property in the event that the person she had designated as her primary choice to serve was unable to do so. (Exhibit J).

CP 39; ¶ 12; CP 67. The power of attorney states that if Bierbaum's husband is for any reason unable or unwilling to serve, Bierbaum designates Craddock Davis Verser as her alternate attorney-in-fact. CP 67. Bierbaum's signature on the durable power of attorney making Verser her alternate attorney-in-fact was notarized by Verser. CP 70.

Bierbaum gave her attorney-in-fact "all of the powers of an absolute owner over the assets and liabilities" belonging to her, including "without limitation, the power and authority" to purchase, sell, lease, convey, exchange, mortgage, release and encumber any real or personal property, and the power to manage any financial accounts maintained by Bierbaum at any bank, savings and loan, credit union or securities dealer. CP 67. The durable power of attorney also authorizes Bierbaum's attorney-in-fact to participate in any legal action involving Bierbaum, to enter her safety deposit box, to sign all written documents on her behalf, to settle any

claims against her, and to receive any kind of payments, gifts, or bequests made to her. CP 68.

f. Verser's Appointment of Bierbaum to be a Court Commissioner.

Winquist learned that Judge Verser had appointed Bierbaum to a position as a Court Commissioner for Jefferson County in 2008 and administered the oath of office to her. CP 40, ¶ 17; CP 78-79; CP 81.

g. Plaque On Display in Judge Verser's Courtroom.

Winquist also found Ethics Advisory Opinion No. 90-14, and provided a copy of that opinion to Rogers. CP 39, ¶ 13. That opinion states in part:

*A judge is required to disclose to the parties on the record any known past association with a law firm or attorney which would lead a reasonable person to infer that the judge is partial or that there is a potential for a conflict of interest. Absent such circumstances, the fact that at some earlier time the judge was affiliated with the law firm or office, or that a member of the firm is or was affiliated with a law firm or office in which the judge formerly practiced, does not require disclosure on the record. **The judge is required to disclose on the record when an attorney appearing in court or who has signed pleadings worked directly with the judge before the judge assumed the bench.** The judge should also disclose the former association when the judge knows that the client was represented by the law firm while the judge was associated with it.*

CP 39, ¶ 13; CP 72 (emphasis added).

Winquist learned that on the wall of Judge Verser's courtroom there was a plaque which contained a list of attorneys with whom the judge had had various kinds of relationships. CP 39, ¶ 14. She took pictures of the plaque. CP 39, ¶ 14; CP 74, 76. She estimated it to be "about the size of a normal piece of paper (8 by 11 inches) and described it as "relatively

small.” CP 40, ¶ 15. The plaque reads as follows:

I, Judge Craddock D. Verser declare that the following lawyers have practiced law with me, served on my election committee, or had a business relationship with me.

CP 40, ¶ 16; CP 76. The plaque then sets forth 15 names in alphabetical order; Bierbaum’s name is second on the list. CP 40, ¶ 16; CP 76.

h. Rogers’ Lack of Knowledge of The Facts Related Above

Until she informed him, Rogers was unaware of the facts Winquist discovered about associations between Bierbaum and Verser. Rogers had also been unaware of the plaque in Judge Verser’s courtroom:

I had never read that plaque and had not even noticed it.

After my investigator told me about the plaque, I had occasion to be in the courtroom again and I noticed where the plaque was placed. The plaque is on the left side of the courtroom as you enter. I recall that attorney Bierbaum always sits in the pew on the left hand side right next to this plaque. Thus, attorney Bierbaum always sat very close to this plaque and I never had any occasion to go over to that left wall and never read that plaque.

CP 33; ¶ ¶ 6-7.

Rogers said that had he read the plaque at the outset of the case he would have made an effort to learn exactly what kind of relationship the judge had with Bierbaum. CP 33, ¶ 9. Rogers asserted that if he had known the things which Winquist’s investigation revealed when Tatham first filed suit against him he would have exercised his right to affidavit Judge Verser:

Had I known these things when Elinor Tatham first filed this suit against me in January of 2007, I would have exercised my legal right to get a different judge to hear my case.

If the judge had disclosed these things to me when Tatham first filed suit against me, I would have exercised my legal rights to get a different judge to hear my case.

CP 33-34, ¶¶ 12-13.

i. Other Litigants Who Had Made Similar Motions

As part of her investigation, Winquist found statements signed by litigants in other cases. CP 279. Those litigants had also complained that they did not know the extent of the relationships between Judge Verser and attorney Bierbaum and both said they had not been aware of the plaque on the courtroom wall.⁶ One of them reported to Winquist that Bierbaum had been observed shouting at Judge Verser and threatening to turn him in to the bar association unless the judge did what she wanted him to do in a pending case. CP 179. Winquist provided Rogers with a transcript of a hearing in one of those cases in which the litigant made a statement to Judge Verser in open court regarding his belief about the close relationship between Verser and Bierbaum. CP 179. Two other Port Townsend attorneys spoke to investigator Winquist and related their personal observations about the relationship. CP 179.

j. Tatham's Response to Factual Allegations

Serving as the Judge's Campaign Manager

In response to Rogers' motion, Tatham's attorney Bierbaum disputed a few of the factual allegations which stemmed from Winquist's investigation. Bierbaum said she had not served as Verser's election

⁶ When counsel identified these litigants at the hearing held on June 18, 2010 the Court stated he did not recall either of these litigants. RP 6/18/10, at 19.

campaign manager on *two* occasions; she had only served in that capacity *once*. CP 84. She said Verser ran for election the same year that he was appointed in 2004. CP 108. She acknowledges that in 2004 she helped form his campaign committee and that she held the title of Treasurer. CP 108. Bierbaum said that her husband went all over Jefferson County putting up signs for Judge Verser's campaign and she filed all of the required Public Disclosure Commission forms. CP 108-109. She acknowledged that she had donated over \$2,000 in cash and in-kind contributions to his campaign fund. CP 109.

The DUI Arrest and Posting of Bail

Bierbaum said that after she moved to Jefferson County in November of 1999 she "began to meet and socialize with some of the members of the legal community. We often met after work on Friday for drinks at a local pub and attended other social events together." CP 105. She identified Verser as "one of the lawyers who typically joined us for drinks" on Friday nights. CP 106.

She said that on February 3, 2003 she and another unidentified friend went to the Seven Cedars Casino, where they ran into Verser. CP 106. Bierbaum, Verser, and the friend, had dinner there. CP 106. Bierbaum acknowledged that she and Verser had been drinking and stated that she decided to drive Verser's car because that was the "safest way," but then they switched positions and Verser drove the car:

We decided to leave the casino not long after midnight. There was little question that Crad had been drinking. I too had been drinking but I honestly believed that I was okay to

drive. My friend is a nondrinker so we knew that his driving would be no problem. After elaborate discussions about the matter, we decided that the safest way to handle the situation was to have me drive Crad's car to Fat Smitty's (about half way to Port Townsend), leave the car there, and have my friend drive Crad to his house and me to my house. We left the casino with me driving Crad's car and my friend in his truck in front of us. A few miles from the casino, my contact lens started to bother me and the visibility on the road was poor. I decided to pull over and wait for my friend to come back and get us. After a while, it became clear that my friend wasn't coming back and was probably waiting for us a few miles up the road at Fat Smitty's. So we made a really bad decision – that Crad would drive the car to Fat Smitty's to meet up with our friend.

The rest is history. Not more than a few hundred feet from Fat Smitty's, Crad was pulled over by a State Trooper for going 54 in a 45 mph. My friend was there waiting for us. Soon thereafter, a Jefferson County Sheriff's Deputy, Brett Anglin, arrived on the scene. He knew both Crad and me. I suggested to Deputy Anglin that I drive the car. He asked whether I would voluntarily agree to a PBT – which I did because I believed I was below the legal limit. I was not. We suggested that our friend, the non-drinker, drive us home. But the officers did what they had to do. They asked Crad whether he would perform voluntary sobriety tests – which he declined. I never indicated to the arresting officer that I was Crad's lawyer, nor did Crad suggest that I was his lawyer. I did not provide him with any legal advice (which would have been absurd since Crad was an experienced DUI attorney and I had zero experience in DUI). They arrested him and transported him to Jefferson County Jail.

CP 106-107.

Bierbaum acknowledged that she posted bail for Verser that evening.

CP 107. She hypothesized that the reason Deputy Anglin's report refers to Verser as her "client" is that she had a conversation with Anglin about whether she could talk to Verser during the booking process and during that conversation she believes she "said something like, 'come on Brett, I'm a lawyer.'" CP 107.

Sitting Near the Plaque

Bierbaum's client, Elinor Tatham, disputed Rogers' assertion that Bierbaum always sat on the left side of the courtroom right next to the plaque that contained the names of the 15 names with whom the judge had had relationships. CP 103-104.

Length of Law Partnership

Winquist had found that the judge's official bio posted on the county's website identified the period of time that he practiced law with Bierbaum as "2002 – 2004." CP 43. Bierbaum said that she had not been his partner for "two years" and that their partnership only lasted for 17 months, from November 2002 until March of 2004. CP 84; 106, 108.

Durable Power of Attorney

Bierbaum acknowledged that in 2005 she had named Judge Verser as her alternate attorney-in-fact in her durable power of attorney, but stated that he had never actually exercised any of those powers:

In February 2005, my husband and I decided to purchase the forty-acre parcel adjacent to our existing forty-acre parcel. We signed a Purchase and Sale Agreement and were eager for the transaction to close. My husband, Brent, is a tugboat captain and is away at sea for weeks at a time. I was planning to go on a cruise with my four sisters. We were concerned that one of us might not be in Jefferson County when the transaction was ready to close. So I drafted Durable Powers of Attorney for me and for Brent. I was nominated as his Attorney-in-Fact and he was nominated as my Attorney-in-Fact. Brent named his mother as his alternate attorney-in-fact (if I was unable or unwilling to serve) and *I named Judge Verser as my alternate attorney-in-fact* (if Brent were unable or unwilling to serve). *Judge Verser notarized both documents, as well as a Community Property Agreement between me and my husband* executed on the same date.

CP 109-110 (emphasis added).

Bierbaum said that since she and her husband were both in town to sign the closing documents for the purchase of the 40 acre parcel, Judge Verser never exercised his powers as her alternate attorney-in-fact. CP 110. She did not directly address the fact that her power of attorney was on file with the Jefferson County Recorder's Office and had not been revealed, but she did say that after the real estate transaction closed neither she nor her husband ever thought about the durable power of attorney again. CP 110.

k. New Disclosure That Judge Verser Lobbied for Withdrawal of An Ethics Opinion So As To Remove A Ban On Bierbaum Appearing Before Him.

In her response to the CR 60(b) motion, in the course of acknowledging that Judge Verser had appointed her to the position of Court Commissioner, Bierbaum disclosed that Judge Verser had lobbied for an ethics opinion change that enabled Bierbaum to continue to appear as counsel in cases before him. Bierbaum noted that almost immediately after Verser appointed her to the Court Commissioner position, another local attorney, Steve Olsen, raised an objection based upon Ethics Advisory Opinion 03-14. CP 111. That opinion provided "that in all cases a part-time court commissioner may not appear before the bench on which they sit when they are representing clients in the same type of matters over which they preside." CP 158-159. The effect of former Ethics Advisory Opinion 03-14 was to prohibit Bierbaum from appearing before Judge Verser in many types of cases. Since Jefferson County is a

one judge county, this meant that whenever Bierbaum could not appear and represent a client before Judge Verser in Superior Court, a visiting judge had to be brought in to hear the case.

Bierbaum disclosed that Judge Verser successfully lobbied to get Ethics Advisory Opinion 03-14 withdrawn so that she would no longer be categorically barred from appearing before him. CP 111. That prior opinion was replaced with Opinion 09-02 which opines that the Canons of Judicial Conduct “do not require a blanket prohibition” against part-time court commissioners appearing before the bench on which they sit in cases of the same type which the court commissioner handles when acting as a commissioner. CP 159. Instead, the new opinion provides that whether the part-time court commissioner can appear before a Superior Court judge in that county “should be examined on a case by case basis.” CP 159.⁷

The new Ethics Advisory Opinion, No. 09-02, was not issued, and did not replace former Ethics Advisory Opinion No. 03-14, until June 30, 2009. CP 158. Included in Bierbaum’s response to the CR 60(b) motion were emails disclosing that Judge Verser lobbied for withdrawal of No. 03-14 in May of 2009. CP 156. But the present case was filed by Elinor Tatham in 2007, and Bierbaum continuously appeared as Tatham’s counsel. Bierbaum represented Tatham throughout the trial of this case,

⁷ For example, the new opinion suggests that part time court commissioners who serve “only sporadically” as commissioners, or who serve as a pro tem commissioner, should not be prohibited from appearing before another judicial officer in the same court. CP 159.

and trial occurred in April of 2009. Trial ended on April 20, 2009. It was not until two months later that Ethics Advisory Opinion No. 03-14 was replaced with Advisory Opinion No. 09-02. CP 156. So as Rogers noted in his brief on file in the Court below, at the time Bierbaum appeared before Judge Verser as Tatham's trial counsel, the former Ethics Opinion categorically barred her from appearing before Judge Verser. CP 170.

I. Judge Verser's Ruling: The Observation That In a Small Town A Judge Socializes With Many Attorneys and Everybody Knows That.

Judge Verser ruled orally that he was denying the CR 60(b) motion and signed a brief written order formally denying the motion at the end of the hearing. CP 190. In his oral remarks the judge commented at length on his relationship with Mr. Rogers' trial attorney Mr. Steve Olsen:

I first met Mr. Olsen in 1979. We were neighbors in a little community called Diamond Shores. Diamond Shores Lounge. At that point, I was applying for the bar to take the bar exam. At that time you could not be a Rule 9 intern and then take the bar exam; you had to be doing something else. So I was tending bar at the Diamond Shores Lounge where Mr. Olsen frequented – small community, he'd come in all the time. That's where I first met him. Then I passed the bar. And Mr. Olsen was the deputy prosecuting attorney for Pend Oreille County. And we developed a friendship. I became a deputy public defender in Pend Oreille County, and I tried my first jury trial with Mr. Olsen. And, at that point – And, during my first jury trial, I kind of cross-examined jurors in voir dire, I was kind of rough on 'em. And Mr. Olsen passed me a note that said don't cross examine the jurors in voir dire. A friendship developed between Mr. Olsen and I, and that was 1979, 1980, somewhere 30 years ago.

Was Ms. Tatham denied due process because I didn't tell her about that? I certainly should have, according to you Mr. Lobsenz, and Mr. Rogers' position; I certainly should have told her about that, 'cause she might feel wronged in this too.

Then – with Mr. Olsen – I moved over here, Mr. Olsen was the deputy prosecuting attorney here in Jefferson County. And we became friends. When I came into town in 1986 – and we kept in touch between '83 I think he left Pend Oreille County and the time I came over here in '86. I – I came into town broke. And I rented a house, and I – we got to the house with my wife, my one child, pregnant wife, Mr. Olsen helped me move in. And we get in there and there was no refrigerator in the house. I didn't have the money to buy a refrigerator; I didn't know how I was going to get a refrigerator. Well, Mr. Olsen took me up to Jim's appliances and introduced me to the fellow who owned Jim's Appliance and says, 'this is the new public defender in town, I'll vouch for him, give him a refrigerator, he'll pay you when he gets paid.' I still have that refrigerator. That was the only refrigerator I had for a long time; now it's in my garage. But I still have that.

I wonder if Dr. Tatham was denied due process because I didn't tell her that I obviously owed Mr. Olsen for this favor that he did for me back in 1986. And he was representing Mr. Rogers. That's probably why Mr. Rogers got what he got. Was Dr. Tatham denied due process?

RP 6/18/10, at 33-35.

Judge Verser went on to observe that in 1988 someone had sent a letter to him which said that he knew that Steve Olsen and the judge used cocaine together. RP 6/18/10, at 35. "It's a small town is my point," the judge said, "and people say things and people do things." RP 6/18/10, at 37. The Court stated that Rogers' attorney, Mr. Olsen, "knew everything" that the CR 60(b) motion was based upon, except possibly the power of attorney. RP 6/18/10, at 40. Neither Mr. Olsen, nor any of the other attorneys who represented Rogers before Mr. Olsen, made a motion seeking to have Judge Verser recuse himself. RP 6/18/10, at 37-38. The Court concluded that the motion was "incredibly untimely," and he denied it, noting that Mr. Rogers had appealed and "if there are problems with it,

I'm sure the Court of Appeals will let him know.” RP 6/18/10, at 41. \

D. DE NOVO STANDARD OF APPELLATE REVIEW

Questions as to whether the facts show a violation of due process or the appearance of fairness by the trier of fact are legal and are reviewed *de novo*. *In re Disciplinary Hearing of King*, 168 Wn.2d 888, 899, 232 P.3d 1095 (2010) (reviewing *de novo* contentions that hearing officer should have disqualified himself).

E. ARGUMENT

1. A JUDGMENT WHICH IS VOID MUST BE SET ASIDE.

When a judgment is void, the Court has a nondiscretionary duty under CR 60(b) to grant relief by vacating it. *In re Marriage of Markowsky*, 50 Wn. App. 633, 635, 749 P.2d 754 (1988); *In re Marriage of Maxfield*, 47 Wn. App. 699, 703, 737 P.2d 631 (1987).

“Civil rule 60(b)(5) focuses on the court’s jurisdiction over the parties, subject matter, or whether the court lacked the inherent power to enter the order involved.” *Summers v. Department of Revenue*, 104 Wn. App. 87, 90, 14 P.3d 902, *rev. denied*, 144 Wn.2d 1004 (2001). A court which lacks such power and proceeds to enter a judgment has entered a judgment which is simply void, and “[a] void judgment must be vacated.” *Id.*

When a trial court lacks jurisdiction to proceed, or when due process rights are violated, the judgment entered by the trial court is void and is properly set aside pursuant to CR 60(b)(5).⁸

⁸ *See, e.g., State v. Santos*, 104 Wn.2d 142, 145, 702 P.2d 1179 (1985)(trial court lacked jurisdiction over paternity case because it failed to appoint a guardian ad litem for the child, thereby denying child’s due process rights); *In re Marriage of Leslie*, 112 Wn.2d

In the present case, the judgment entered violated due process because absent a knowing and intelligent waiver, the judge who presided over the trial was obligated by the requirements of procedural due process to disqualify himself from participating in any way in the case so long as the plaintiff was represented by attorney Peggy Bierbaum.

2. DUE PROCESS IS VIOLATED WHENEVER AN OBJECTIVELY REASONABLE PERSON WOULD HAVE DOUBTS ABOUT THE IMPARTIALITY OF THE JUDGE AND THE JUDGE FAILS TO DISQUALIFY HIMSELF.

“The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.” *Marshall v. Jerricho, Inc.*, 446 U.S. 238, 242 (1980). This neutrality requirement “preserves both the appearance and reality of fairness, ‘generating the feeling, so important to a popular government, that justice has been done,’ [citation] by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.” *Id.*

Indeed, “justice must satisfy the appearance of justice,” *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954), and this stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.” *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955).

Marshall, 446 U.S. at 243.

More than fifty years ago the Washington Supreme Court affirmed

612, 617, 772 P.2d 1013 (1989)(court has no jurisdiction to grant relief beyond that requested in the complaint, judgment set aside for violation of due process).

the granting of a new trial to the plaintiff on the grounds that the actions of the trial judge's former law partner made it impossible for the judge to preside over the trial and to satisfy the constitutional requirement of maintaining the appearance of fairness. The issue in that case was who owned certain property situated on a river which had changed its course. The judge heard the case and entered a decision in favor of the plaintiff. But then the defendant moved for a new trial on the grounds that the judge's former law partner had given a legal opinion to the plaintiff which was favorable to the plaintiff. The judge never saw the letter until after the trial was over and after he had ruled in favor of the plaintiff. Nevertheless, the defendant argued that due to the prior legal opinion given by his former law partner, there was an appearance of fairness problem. The trial judge agreed, and granted a new trial to be held before a different judge. The trial judge's order stated:

Notwithstanding the fact that the Court has no independent recollection of the letter or the contents thereof and has no prior knowledge of the facts involved in said action, nevertheless the integrity of the Court is made an issue, and the plaintiff may justifiably feel that he has been denied a fair trial.

Dimmel v. Campbell, 68 Wn.2d 697, 699, 414 P.2d 1022 (1966).

The plaintiff appealed and the Supreme Court affirmed the decision to grant a new trial on appearance of fairness grounds:

We are in complete agreement with the observation made by appellants that the record does not give the slightest hint that the forthright trial judge gave other than open mind and impartial ear to the cause tried before him. Even so, we are not disposed to hold that the trial court abused his discretion in granting a new trial. While we are of the opinion that the

cause was impartially decided, the conclusion cannot be escaped that the very existence of the letter beclouded the entire proceeding. ***It is incumbent upon members of the judiciary to avoid even a cause for suspicion of irregularity in the discharge of their duties.*** Why the nature of the letter was not disclosed to the court prior to trial eludes out speculation. ***We have no doubt that, had the letter been presented at the proper time, the trial judge would have removed himself from the case.***

Dimmel, 68 Wn.2d at 699 (bold italics added). *Accord State v. Madry*, 8 Wn. App. 61, 69-70, 504 P.2d 1156 (1972) (“The law goes farther than requiring an impartial judge, it also requires that the judge appear to be impartial.”); *State v. Romano*, 34 Wn. App. 567, 569, 662 P.2d 406 (1983) (“Next in importance to rendering a righteous judgment, is that it be accomplished in such a manner that no reasonable question as to impartiality or fairness can be raised.”).

The *Dimmel* case is part of an unbroken line of authority that traces back to Washington’s earliest days beginning with *State ex rel. Barnard v. Board of Education*, 19 Wash. 8, 17-18, 52 P. 317 (1898):

The principle of impartiality, disinterestedness, and fairness is as old as the history of courts; in fact the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running through and pervading the whole system of judicature, and it is the popular acknowledgment of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. ***Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice, and their proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest.*** The learned and observant Lord Bacon well said that the virtue of a judge is seen in making inequality equal, that he may plant his judgment as upon even ground. ***Caesar demanded that his wife should not only be virtuous, but beyond suspicion; and the state should not be any less exacting with its judicial officers,*** in whose keeping are

placed not only the financial interests, but the honor, the liberty, and the lives of its citizens, and it should see to it that the scales in which the rights of the citizen are weighed should be nicely balanced, for, as was well said by Judge Bronson in *People v. Suffolk Common Please*, 18 Wend. 550, “**Next in importance to the duty of rendering a righteous judgment, is that of doing it in a manner that will beget no suspicion of the fairness and integrity of the judge.**”

(Emphasis added).⁹

Throughout our state’s history down to the present day, Washington courts have repeatedly reaffirmed this principle:

[I]n deciding recusal matters, actual prejudice is not the standard. The CJC recognizes that where a trial judge’s decisions are tainted by even a mere suspicion of partiality, the effect on the public’s confidence in our judicial system can be debilitating. \

Sherman v. State, 128 Wn.2d 164, 205-06, 905 P.2d 355 (1995). *Accord In re Discipline of Sanders*, 159 Wn.2d 517, 524-25, 145 P.3d 1208 (2006) (“The canons of judicial conduct should be viewed in broad fashion, and judges should err on the side of caution.”; since there was substantial basis to believe “that the Justice would be in contact with possible litigants who had pending litigation before the court, and that this contact would be viewed as improper,” the Court agreed with Commission’s finding “that it was clearly reasonable to question the impartiality of the justice. . . .”); *State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010) (“[A] judicial proceeding is valid only if a reasonably

⁹ The *Barnard* rule recognizing a trial judge’s responsibility to disqualify himself when his impartiality would reasonably be questioned is now codified in CJC (3)(D)(1) which provides in part: “Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which: (a) the judge has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding.”

prudent disinterested observer would conclude that the parties received a fair, impartial and neutral hearing. . . Under the Code of Judicial Conduct, designed to provide guidance for judges, ‘[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.’”).

This rule is an objective rule which focuses on the reasonable perceptions of litigants; it is *not* a subjective rule which focuses on the judge’s actual state of mind. As the Supreme Court recently noted, a rule requiring proof of actual bias would not be workable and would not be constitutionally adequate:

The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge’s own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge’s determination respecting actual bias, *the Due Process Clause has been implemented by objective standards that do not require proof of actual bias.*

Capperton v. A. T. Massey Coal Co., 129 S.Ct. 2252, 2263 (2009) (emphasis added).

3. AN OBJECTIVELY REASONABLE PERSON WOULD QUESTION JUDGE VERSER’S ABILITY TO BE IMPARTIAL IN A CASE WHERE ONE OF THE PARTIES WAS REPRESENTED BY ATTORNEY BIERBAUM.

In the present case, applying the objective standard to the undisputed facts, there clearly has been a due process violation. The following facts,

all admitted or uncontested, about the trial judge's relationship with Tatham's attorney Peggy Ann Bierbaum, would cause an objectively reasonable person to have doubts about the trial judge's ability to be impartial in this case:

- (1) the judge and attorney Bierbaum were law partners from November of 2002 until mid March of 2004 (CP 43);
- (2) the judge had been arrested in 2003 for Driving Under the Influence with Bierbaum in the passenger seat (CP 46);
- (3) Bierbaum acknowledged that for several years she had been in the habit of meeting for drinks at a local pub with a group of lawyers, and that Verser was a regular member of this group (CP 105-106);
- (4) Bierbaum acknowledged that on the evening of his DUI arrest she believed that Verser's condition was such that it was unsafe for him to drive, and that therefore for a short distance she drive the judge's car (CP 106-107);
- (5) Bierbaum acknowledged that she was also intoxicated and, according to the PBT test she took, was over the legal limit CP 106-107);
- (6) Bierbaum told the arresting officer that she would drive Verser's car home if the arresting officer felt that he was not fit to drive, saying that she had consumed a few drinks at a nearby casino (CP 107);
- (7) Regardless of what the exact words were that Bierbaum spoke to the arresting officer, Trooper Kinder got the impression that Bierbaum was acting as Verser's attorney and that he was her "client" (CP 52);
- (8) Bierbaum posted bail for Verser's release on the DUI charge (CP 54, 107);
- (9) Bierbaum served as the judge's campaign manager, identified herself to the PDC as his campaign treasurer, and contributed over \$2,000 to the judge's election campaign (CP 84, 109);
- (10) Bierbaum's husband drove all over Jefferson County putting up campaign signs for Judge Verser (CP 108-109);

- (11) After his election to the bench, Bierbaum gave the judge an alternate durable power of attorney giving him the power to manage her property and to access all her bank accounts (CP 67, 109-110);
- (12) Someone (presumably either Bierbaum or Judge Verser) recorded this durable power of attorney in the Jefferson County Recorder's Office (CP 67);
- (13) Judge Verser appointed Bierbaum as a Jefferson County Court Commissioner (CP 78-79, 81);
- (14) Bierbaum appeared before Judge Verser as trial counsel in this case at a time when Ethics Advisory Opinion 03-14 prohibited her from doing so (CP 170);
- (15) Judge Verser lobbied for withdrawal of Ethics Advisory Opinion 03-14 so that Bierbaum could both serve as a regular Court Commissioner and routinely appear before him (CP 111).

None of these facts were disclosed by the trial judge to defendant Rogers. In his declaration Rogers attested to the fact that had he known these things he would have exercised his legal right to affidavit Judge Verser and get an out of county judge. CP 33.

4. AS THE CARLSON COURT NOTED, MOTIONS TO DISQUALIFY AN APPELLATE JUDGE ARE NOT ANALOGOUS TO MOTIONS TO DISQUALIFY A TRIAL COURT JUDGE.

In the Court below Tatham's counsel argued that the decision in *State v. Carlson*, 66 Wn. App. 909, 833 P.2d 463 (1992) supports the conclusion that Rogers' due process rights were not violated by Judge Verser's failure to disqualify himself, or to disclose the particulars of his associations with attorney Bierbaum. In *Carlson* a convicted defendant asserted that Judge Susan Agid, one of three judges on a Court of Appeals panel which affirmed the defendant's conviction, should have disqualified herself from participating in the appeal because the county prosecutor, Norm Maleng,

served as the Honorary Co-Chair of her re-election campaign. *Id.* at 913.

The Court of Appeals rejected Carlson's contention.

But the *Carlson* case is obviously distinguishable for two independent reasons. First, as the opinion itself plainly states:

[W]e note that there is a vast difference between the role of a trial judge and the role of an appellate judge insofar as the possibility of a personal relationship such as a campaign chairmanship improperly influencing a judge. That difference is relevant to whether a reasonable person would perceive an appearance of impropriety.

Carlson, 66 Wn. App. at 919.

The *Carlson* court noted that “[a]t least two policy considerations are significant in this context.”

First, in the appellate system ***no one judge controls the three judge panel***. When, as in this case, the panel is unanimous, a litigant is protected by the fact that two other judges have agreed with the decision. The ***second*** is that ***decisions in the Court of Appeals almost exclusively involve legal issues with very little room for the exercise of discretion***. Appellate judges are required to issue written opinions which are subject to objective examination and review. ***In contrast, there is vast discretion vested in a trial judge and often no reasons need be given for the exercise of such discretion***. Accordingly, it might often be difficult to tell whether any improper motive entered into a trial court's decision.

Carlson, 66 Wn. App. at 919-920 (emphasis added).

In the present case, since the motion does involve a trial judge, the holding of *Carlson* regarding the failure of an appellate judge to recuse herself is obviously inapplicable. The *Carlson* opinion explicitly recognizes the fact that trial court judges -- like Judge Verser who in this case was deciding how to divide the parties' property -- have vast amounts

of discretion. Judge Verser exercised that discretion by awarding Tatham 75% of the property at issue and Rogers only 25%. This property division has been challenged on appeal, and Rogers has argued that while the scope of this discretion is very broad, it is restrained somewhat by a presumption that normally the trial court should not award one party more than two-thirds of the property. *See COA No. 39672-6-II, Brief of Appellant*, at 31-34. Tatham, in response, has argued that there is no such presumption, and that the trial judge is free to exercise his discretion by making grossly disparate divisions of the property. *COA No. 39672-6-II, Brief of Respondent*, at 5-7.

Regardless of whether or not this Court eventually holds that such a presumption does exist, it will remain true that because trial judges have such an enormous amount of discretion in cases of this type, it will “often be difficult to tell whether any improper motive entered into a trial court’s decision.” *Carlson*, 66 Wn. App. at 920. That is precisely why trial judges must disqualify themselves when their impartiality can reasonably be called into question.

Second, in *Carlson*, King County Prosecutor Norm Maleng, the lawyer who was the Honorary co-chair of the appellate judge’s campaign committee, did *not* personally appear and argue the case before the appellate panel. In the present case, Bierbaum, the lawyer who was the manager of the judge’s election campaign, *did* personally appear before the trial judge and argue the case. The *Carlson* opinion stresses this distinction:

Clearly, if the prosecuting attorney himself were arguing the case, ***a legitimate question would arise***. EAC opinion 88-7, heavily relied upon by Carlson, places the duty to disclose all active participation in a judicial campaign only on the lawyer *actually appearing in court*. The opinion thus emphasizes the overriding significance of the personal presence in the courtroom of the lawyer associated with the judge's campaign. ***That, of course, is not the case before us.***

Carlson, 66 Wn. App. at 920 (bold italics added).¹⁰

But that *is* this case. The “overriding significance of the personal presence in the courtroom of” plaintiff’s attorney, “the lawyer associated with the judge’s campaign,” makes this an entirely different case from *Carlson*, where there were “over 100 criminal deputies” in the King County Prosecutor’s office and one of them, *not* the Honorary co-chair of the judge’s campaign, personally appeared in court to argue the case.

Whereas Judge Verser seemed to believe that a judge did *not* need to disclose personal relationships with attorneys in a small rural county, the *Carlson* opinion actually holds that the *reverse* is true. The smaller the county, the *more* important it is that a judge disclose such relationships to the parties in order to preserve the appearance of impartiality and public confidence in the integrity of the judicial system.

In a small county where the prosecuting attorney’s office may consist of three or four deputies, the prosecuting attorney would likely be familiar with each of the criminal cases pending in his or her office, and

¹⁰ EAC 88-7 provides: “A lawyer who has formed a campaign committee for the judge’s candidacy for the court of appeals, may practice before a superior court judge only if there is a full disclosure of the campaign relationship and the lawyer and the parties, independently of the judge’s participation, all agree in writing that the campaign relationship is immaterial.” The approach dictated by EAC 88-7 was not followed in this case. There was no full disclosure and there was no agreement in writing.

might frequently participate in discussion and preparation of cases which he does not personally try. *In such a case, a close question could arise as to whether it would be incumbent upon the judge to ascertain whether the defense had any objection to the judge hearing the trial.*

However, a county such as King County, with over 100 criminal deputies trying thousands of criminal cases per year, presents a totally different situation. In such a county, the prosecuting attorney would generally have no direct participation in or knowledge of any individual case, nor any particular concern about the outcome other than that the State's case was fairly and competently presented. . .

Carlson, 66 Wn. App. at 921.

But Tatham's attorney did personally try this case. Moreover, because Jefferson County is so small it has only one Superior Court judge. Thus, it is much *more* likely that there will be close relationships between that one judge and a particular local attorney, and there is much *more* of an opportunity for both actual bias, and the appearance of bias, to thrive. In sum, both of the reasons given in *Carlson* as to why there was *not* an appearance of bias problem in that case actually demonstrate why there *was* an obvious appearance of bias problem in this case.

5. THE FLORIDA CASE OF *CALEFFE v. VITALE*, WHICH WAS CITED WITH APPROVAL IN *CARLSON*, IS DIRECTLY ON POINT.

Finally, the *Carlson* opinion discussed and distinguished the case of *Caleffe v. Vitale*, 488 So. 2d 627, 65 A.L.R.4th 67 (Fla. Dist. Ct. App. 1986):

In *Caleffe*, the husband in a dissolution proceeding made a motion for disqualification of the judge on the basis that *the wife's lawyer was running the judge's re-election campaign*. The reviewing court granted a writ of prohibition directing the trial court to step down.

Caleffe, 488 So.2d at 629.

Carlson, 66 Wn. App. at 922-23 (emphasis added). In the present case, as in *Caleffe*, the lawyer running the judge's campaign was personally trying the case and representing the woman in the relationship. Thus *Caleffe* is extremely similar to this case, and the outcome in this case – disqualification – should be the same as it was in *Caleffe*. The *Carlson* Court specifically approved of the result in *Caleffe*:

The *Caleffe* case specifically notes that “[i]t is impossible to make a flat, unequivocal rule governing every conceivable factual situation. The case at hand is a good example, in many cases the lawyer’s role in a judicial campaign would clearly not raise any question as to the appearance of fairness. On the other hand, ***unquestionably there can be such a relationship between the judge and the lawyer that the judge should clearly recuse.*** See e.g., *Caleffe v. Vitale*, 488 So.2d 627, 65 A.L.R. 4th 67 (Fla. Dist. Ct. App. 1986), discussed infra.

Carlson, 66 Wn. App. at 918-19 (bold italics added).

6. BIERBAUM’S ACT OF NAMING THE JUDGE AS HER ALTERNATE ATTORNEY-IN-FACT, AUTHORIZED TO MANAGE HER PROPERTY AND ACCESS HER ACCOUNTS, SHOWS A VERY CLOSE RELATIONSHIP. SIMILARLY, THE JUDGE’S ACCEPTANCE OF THAT POSITION OF TRUST CONFIRMS THE EXISTENCE OF A VERY CLOSE RELATIONSHIP.

The fact that Bierbaum made the judge her alternate attorney-in-fact and gave him the power to manage her affairs is something that does not fit neatly within the plaque’s category of a “business relationship.” It smacks of a far more personal relationship than just a “business” relationship. It demonstrates an extraordinary amount of personal trust that the judge will be looking after attorney Bierbaum’s personal best interests. In the present

case, the judge's power of attorney even gives him the right to make gifts of Bierbaum's property to her relatives in the event that Bierbaum becomes incapacitated. CP 68.

The Code of Judicial Conduct provides:

A judge *shall not accept appointment to serve in a fiduciary position, such as* executor, administrator, trustee, guardian, *attorney in fact*, or other personal representative, except for a member of the judge's family, and then only if such service will not interfere with the proper performance of judicial duties.

CJC, Rule 3.8(A) (emphasis added). In this case, well after his appointment, and well after his confirming election to a four year term on the bench, Judge Verser violated this rule and knowingly accepted Bierbaum's appointment as her alternate attorney-in-fact.

An attorney has a fiduciary relationship to his client. "The attorney-client relationship is a fiduciary one as a matter of law and thus the attorney owes the highest duty to the client." *Kelly v. Foster*, 62 Wn. App. 150, 155, 813 P.2d 598 (1991). *Accord Perez v. Pappas*, 98 Wn. 2d 835, 840-841, 659 P.2d 475 (1983). A business relationship – such as that between a buyer and a seller – imposes no duties on the one party to the other. The *duty* to look after the property of an incapacitated person, on the other hand, is a personal duty of the highest order.

Here, the fact that Bierbaum chose Judge Verser to serve her in this role shows the existence of an extremely close relationship. She chose him as the person to authorize to enter her safety deposit box and to access her financial accounts. While local attorneys may occasionally socialize with

a sitting judge, they do not usually select a judge before whom they regularly appear to manage their affairs in this way.

Similarly, the fact that Judge Verser was willing to undertake the role of alternate attorney-in-fact for Bierbaum shows that he too felt his relationship with her was a close one. Canon 5(F) of the Code of Judicial Conduct states, “Judges shall not practice law.” It goes on to state that a judge “may act pro se and may, without compensation give legal advice to and draft or review documents for “members of their families.” Bierbaum is not a member of the judge’s family, and yet he was willing to act as her attorney-in-fact. This willingness to serve again shows that the judge considered Bierbaum to be a very close friend, akin to a family member. These signs of closeness serve only to increase and aggravate the appearance of bias in favor of Bierbaum and her clients.

7. THE FACT THAT THE JUDGE PUT UP A PLAQUE ON HIS COURTROOM WALL ANNOUNCING THAT HE HAD RELATIONSHIPS WITH SEVERAL ATTORNEYS, INCLUDING ATTORNEY BIERBAUM, DEMONSTRATES THAT THE JUDGE HIMSELF BELIEVED THAT LITIGANTS SHOULD BE AT LEAST PARTIALLY AWARE OF THESE RELATIONSHIPS.

Opinion 90-14 of the State’s Advisory Ethics Board states:

A judge is required to disclose to the parties on the record any known past association with a law firm or attorney which would lead a reasonable person to infer that the judge is partial or that there is a potential for a conflict of interest.

(Emphasis added). In the present case, Judge Verser did not disclose any of the facts regarding his past associations with attorney Bierbaum “to the part[y]” – James Rogers – nor did he make any disclosure “on the record.”

Although there was no disclosure of anything “on the record,” Judge Verser’s plaque on one wall of his courtroom did say that “the following lawyers have practiced law with me, served on my election committee, or had a business relationship with me.” CP 76. Attorney Bierbaum’s name is the second name on the alphabetically ordered list of 15 names that follows this statement. *Id.*

The mere fact that Judge Verser had this plaque made and displayed on the wall of his courtroom constitutes an admission on his part that litigants appearing before him are entitled to know about these types of relationships that he has had with some of the attorneys who appear before him. In a case involving a suit against a corporation, a Florida appellate court made the same observation that the judge’s own conduct demonstrated that a reasonable person would have doubts about his ability to be impartial, and therefore he should have disqualified himself. In that case, the trial judge disclosed the fact that parents of the president of the corporate defendant “and the judge’s parents had been close, and that both the judge and the judge’s sister had known [the corporate president] ten years ago.” *Pool Water Products Inc. v. Pools By L.S. Rule*, 612 So.2d 705, 706 (1993). The corporate defendant then made a motion that the judge disqualify himself, but the judge denied the motion. The Florida appellate court noted that the judge’s own disclosure was a tacit admission that his impartiality could be reasonably questioned:

In this proceeding, the judge felt compelled to announce on the record his close family connection with the principal of the appellant corporation. . . . We think that if the matter

known to the judge is of such concern that the *judge* believes that it should be revealed to the parties, then the necessary implication is that the judge feels that it is a matter on which the parties may reasonably question his impartiality. Therefore, having revealed the matter, if the party then requests disqualification based upon what the judge has revealed, we think he is duty bound to recuse himself. In other words, ***the legally sufficient reason for recusal is that the judge himself thought it was a matter by which his impartiality might reasonably be questioned.***

Pool Products, 612 So.2d at 706-07 (bold italics added). The same is true in the present case. Since his relationships with attorney Bierbaum was a matter “of such concern that the *judge* believe[d] that it should be revealed to the parties,” by means of the plaque posted on the wall, “then the necessary implication is that the judge feels that it is a matter on which the parties may reasonably question his impartiality.” *Id.* at 706.

But once the judge acknowledges that litigants in his courtroom are entitled to know the facts about his relationship with Bierbaum (and the other 14 listed attorneys), the question then arises: “Why leave it to *chance* whether the litigants will ever see the plaque, read it, and notice that the name of the attorney representing their adversary is on the list?” Particularly since the Ethics Advisory Opinion requires that these types of disclosures be made “to the parties on the record,” why rely on an off the record written notice that may or may not ever be seen, read and understood?¹¹

¹¹ Canon 3(E) specifically states that in some cases where a judge is disqualified by the terms of Canon 3(D)(1), he “may, instead of withdrawing from a proceeding, ***disclose on the record*** the basis of the disqualification” and if all parties consent in writing to his participation in the case, then he need not disqualify himself. (Emphasis added)

8. NO STEPS WERE TAKEN TO MAKE SURE THAT ROGERS READ THE PLAQUE ON THE WALL. THERE IS NO REASON TO ASSUME THAT EVERY LITIGANT COMING BEFORE THE JUDGE WOULD READ EVERYTHING POSTED ON EVERY WALL OF THE COURTROOM.

The trial judge did not advise Rogers that the plaque existed. He never told Rogers he should read what was posted on the wall of his courtroom. He never informed him that he had posted information regarding his past associations with attorneys in Jefferson County. Instead, the judge left it to chance whether Rogers would read the plaque.

During the CR 60(b) motion hearing, counsel reminded the Court that “previous litigants have advised the court that they didn’t read the plaque” on the wall and they had not been aware of the judge’s associations with the named attorneys. RP 6/18/10, at 18. The Court said it had no recollection of this.¹²

Moreover, it cannot be assumed that every local attorney will know all the facts regarding the judge’s relationships with each of the 15 listed attorneys. Nor can it be assumed that every local attorney will inform his or her client of whatever it is he or she knows about these relationships and their significance. That is why Ethics Opinion 90-14 requires that disclosure be made to the parties and on the record.

And finally, even if a litigant does learn from his lawyer whatever it is that his lawyer knows about the judge’s relationship with opposing

¹² “MR. LOBSENZ: I believe a Mr. McGuire and Clements, Mr. Clements previously made motions asking the court to set aside or – to step aside on the grounds that they didn’t know about these things either and they didn’t read the plaque.”

“THE COURT: I don’t remember either one of those.” RP 6/18/10, at 19.

counsel, there is no guarantee that the litigant will be told these facts at the outset of their case before any discretionary ruling has been made, thus leaving his or her client with the opportunity to file an affidavit of prejudice.

9. EVEN IF THE JUDGE HAD READ THE STATEMENT ON THE PLAQUE TO ROGERS BEFORE MAKING ANY RULING IN HIS CASE, THE DISCLOSURE STILL WOULD HAVE BEEN INADEQUATE GIVEN THE FAILURE TO IDENTIFY WITH SPECIFICITY THE MANY TYPES OF ASSOCIATIONS THE JUDGE HAD WITH ATTORNEY BIERBAUM.

Even if the trial judge had made sure that Rogers was aware of the plaque on the wall and had directed him to read it before proceeding to hear the case, such action *still* would not have been adequate to deal with the problem of the perception of judicial partiality in favor of Bierbaum, and thus in favor of her client. Recusal would still have been constitutionally required.

A host of problems arises from the summary way in which different types of relationships were all lumped together on the plaque in one sentence which uses the disjunctive word “or.” The language of the plaque conveys the information that a person on the list has either practiced law with the judge, or served on the judge’s election committee, or had a business relationship with the judge. Moreover, by listing fifteen names together, the plaque conveys the notion that all fifteen attorneys should be viewed as equally associated with the judge. The fact that attorney Bierbaum has had *all three types of relationships* with the judge is concealed. She is treated the same as an attorney who has, for example,

merely had one business transaction with the judge, such as selling the judge a set of law books.

Another set of problems arises from the fact that additional past associations which are simply not disclosed at all. The most disturbing pre-judicial past association between the judge and attorney Bierbaum is the past DUI and their long history of getting together for drinks. Bierbaum acknowledged that starting in late 1999 she often met with a group “for drinks at a local pub” and Verser was “one of the lawyers who typically” was there. CP 106. In 2003 Bierbaum was drinking with the judge at a casino until sometime after midnight. CP 106. These undisclosed facts imply a close personal kind of relationship which is nowhere mentioned on the plaque. The fact that the officer who arrested Verser believed that Bierbaum was acting as the judge’s attorney during the booking process, coupled with the fact that she posted his bail to secure his release, again demonstrates an association which does not fit neatly within the category of a “business relationship.” Moreover, since Bierbaum was a witness to both the judge’s drinking and his driving on the evening in question, she was in a position to be a witness for the prosecution *against* the judge. The fact that she did not serve as a prosecution witness against him, and the additional fact that she posted his bail on the night of his arrest, both give the judge extremely powerful reasons to be very grateful to her.¹³ A reasonably objective citizen would

¹³ As noted earlier, another litigant said he witnesses Bierbaum threaten to turn the judge into the bar association unless he did what she wanted him to do. CP 179.

have very good reason to think that for years afterwards this judge would want to assist attorney Bierbaum whenever the opportunity to do so arose. The motive to favor attorney Bierbaum, and therefore to favor any client that Bierbaum is representing, would be very strong, not only because Bierbaum *had* assisted him in the past, but also because at virtually any time Bierbaum could potentially harm the judge's professional reputation by disclosing to the electorate, to newspapers, to other attorneys, whatever embarrassing facts about the judge's conduct that she was privy to.

The fact that the judge appointed Bierbaum to her position as a court commissioner is also something which does *not* fit within any of the categories mentioned on the plaque. The fact that she was his judicial appointee does not mean that they had a "business" relationship. Moreover, the fact that he appointed her to a government position after she tried to persuade a police officer to let her drive his car after he had been stopped for DUI, and after she had bailed him out of jail, strongly supports the inference that the judge *did* feel beholden to her for what she had done. It supports the reasonableness of the inference that he would continue to favor her when he could, and obviously one of the easiest ways to favor her was to rule in favor of her clients when she appeared before him.

Finally, and most conclusively, the fact that after his election to the bench he accepted Bierbaum's appointment to serve as her alternate attorney-in-fact, with the power to manage her affairs is, once again, something that does not fit neatly within the plaque's category of a "business relationship." It smacks of a far more deeply personal

relationship than just a “business” relationship. As noted above, it demonstrates an extraordinary amount of personal trust that the judge, in his role as Bierbaum’s attorney, will be looking after her personal best interests.¹⁴

For all of these reasons, an objective observer would conclude that the judge had *many* reasons to be partial in this case – to favor Bierbaum’s client Eleanor Tatham simply because she was represented by the one person who had been consistently looking out for the judge. Bierbaum had a record of doing whatever she could to assist the judge, and the judge had a reciprocal record of doing what he could to assist her. And yet defendant Rogers knew *none* of these facts when his case was assigned to Judge Verser. Judge Verser could have disclosed these facts on the record to Mr. Rogers. He could have disclosed these facts “off” the record to Rogers or to Rogers’ attorney. Had he done so, Rogers would have asked the judge to disqualify himself and he would have been obligated to do so. Alternatively, the trial judge could have simply disqualified himself from hearing the case, in which case he would not have been required to disclose all of these facts, including the potentially embarrassing facts about Bierbaum’s assistance with his DUI arrest. Instead, the trial judge neither disclosed the facts nor disqualified himself.

¹⁴ An attorney has a fiduciary relationship to his client. “The attorney-client relationship is a fiduciary one as a matter of law and thus the attorney owes the highest duty to the client.” *Kelly v. Foster*, 62 Wn. App. 150, 155, 813 P.2d 598 (1991). *Accord Perez v. Pappas*, 98 Wn. 2d 835, 840-841, 659 P.2d 475 (1983). A business relationship – such as that between a buyer and a seller – imposes no duties on the one party to the other. The *duty* to look after the property of an incapacitated person, on the other hand, is a personal duty of the highest order.

10. THE FAILURE TO DISCLOSE THE FACTS PERTAINING TO HIS MANY RELATIONSHIPS WITH OPPOSING COUNSEL VIOLATED DUE PROCESS AND THEREFORE THE JUDGMENT BELOW IS VOID AND SHOULD BE SET ASIDE.

By proceeding to hear and resolve the case without disclosing these associations and without disqualifying himself, the judge violated Rogers' procedural due process right to a judge who was impartial both in substance and in appearance. *Jerricho, Inc.*, 446 U.S. at 242. In this case the trial court entered a judgment markedly in favor of Bierbaum's client Tatham – she was awarded 75% of the property at issue and Rogers was awarded 25%. It is painfully evident that a reasonably objective observer would consider it quite plausible that it was the court's bias in favor of Bierbaum that caused the court to enter that judgment in favor of her client Tatham. There is a plethora of reasons to doubt the impartiality of the magistrate that decided this case, and thus there was a due process violation.

“If procedural safeguards are inadequate, a court lacks jurisdiction over the defendant and cannot enter a valid order against him.” *In re Maxfield*, 47 Wn. App. at 704. *Accord Ware v. Phillips*, 77 Wn.2d 879, 883, 468 P.2d 444 (1970) (the “judgment against them . . . was void because they [litigants] were not accorded due process of law.”) “There is no question of discretion when a judgment is void. Unlike attacks on judgments based on other grounds specified in CR 60(b), the Court has a nondiscretionary duty to grant relief.” *Maxfield*, 47 Wn. App. at 703. *Accord Markowsky*, 50 Wn. App. at 635. Accordingly, since the judgment

entered below is void, it must be vacated pursuant to CR 60(b)(5).

11. THE TRIAL COURT JUDGE SHOULD NEVER HAVE RULED ON THE CR 60(b) MOTION. GIVEN THE DIFFICULTY OF PASSING JUDGMENT UPON HIMSELF, HE SHOULD HAVE DISQUALIFIED HIMSELF AND LET ANOTHER JUDGE FROM ANOTHER COUNTY DECIDE THE POST-TRIAL MOTION.

It is well established that “no man can be the judge in his own case.” *In re Murchison*, 349 U.S. 133, 136 (1955). *Accord State v. Madry*, 8 Wn. App. 61, 68, 504 P.2d 1156 (1972); *State ex rel Beam v. Fulwiler*, 76 Wash.2d 313, 416 P.2d 322 (1969). “Every procedure which would offer a possible temptation to the average man as a judge, . . . not to hold the balance [between the parties] nice, clear and true . . .” violates due process.

Most recusal motions are based on the contention that *if* the judge proceeds to hear the case then there will be a future violation of Canon 3(D)(1). In the present case, however, the contention was that because Judge Verser had *already* heard the case, there has *already* been a violation of Canon 3(D)(1), and a violation of the defendant’s due process rights. In a case where no judicial action has yet been taken, the judge who is asked to recuse himself is not in a position of having to rule that own past conduct was improper. In a case such as this one, however, where the Court has already heard the case without either disclosing or disqualifying himself, a decision to grant the CR 60(b) motion necessarily requires the judge to find that he violated the Judicial Canon and due process. Obviously, a reasonably objective person would have “reason to

doubt” that any judge could act impartially in such a situation. Thus, Judge Verser should have disqualified himself from deciding the CR 60(b) motion.

State v. Chamberlain, 161 Wn.2d 30, 162 P.3d 389 (2007), a case cited below by Tatham, actually supports Rogers’ position on this point. There, the court cited with approval to *Russell v. Lane*, 890 F.2d 947 (7th Cir. 1989) and *Rice v. McKenzie*, 581 F.2d 1114 (4th Cir. 1978), and said:

Both *Russell* and *Rice* involve instances where the judge essentially sat on the appeal of his own case. This practice is clearly banned by federal law and practice. “[I]t is considered improper -- indeed is an express ground for recusal, see 28 U.S.C. § 47 -- in modern American law for a judge to sit on the appeal from his own case.” *Russell*, 890 F.2d at 948 (citing *Rice*).

Chamberlin, 161 Wn.2d at 38.

Once a trial judge has acted, if he continues to sit to retrospectively determine whether he has already violated the judicial canons and the due process clause, he “essentially s[i]t[s] on the appeal of his own case,” a practice which is “clearly banned” and “considered improper.” *Id.*

Because of the extreme difficulty that any judge would have deciding the issue of his own disqualification for bias, some jurisdictions have simply adopted a *per se* rule that a judge may never decide such motions. Florida, for example, has such a rule. In *Bundy v. Rudd*, 366 So.2d 440, 442 (1978), the Florida Supreme Court stated:

[O]ur rules clearly provide and we have repeatedly held, that a judge who is presented with a motion for his disqualification “shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification.” [Citations.] When a judge has looked beyond the mere

legal sufficiency of a suggestion of prejudice and attempted to refute the charges of prejudice, he has then exceeded the proper scope of his inquiry and on that basis alone established grounds for his disqualification. Our disqualification rule, which limits the trial judge to a bare determination of legal sufficiency, was expressly designed to prevent what occurred in this case, the creation of “an intolerable adversary atmosphere” between the trial judge and the litigant.

While no Washington case precedent establishes a comparable *per se* rule, the logic of the Florida approach combined with the facts of this case show the wisdom of such a rule. In a case where the judge is not only put in the position of asserting his own impartiality, but also of defending his past failure to disclose the circumstances which call his impartiality into question, there are extremely strong grounds for the judge to step aside and to let some other judicial officer decide whether he should have previously disqualified himself.

Finally, when a judge fails to disqualify himself from deciding this type of disqualification motion, the temptation to provide testimony and to act as a witness is practically irresistible. In the present case, the trial judge did not refrain from testifying about his relationships with local attorneys. On the contrary, although he did not offer any testimony about the extent of his relationship with attorney Bierbaum, he essentially testified at great length regarding his friendly social relationship with Rogers’ trial attorney Steve Olsen. This put Rogers’ counsel in the impossible situation of not being able to cross-examine the trial judge, and thus being unable to elicit other facts regarding the judge’s relationship with Mr. Olsen. For example, had the judge been actually testifying as a

witness, counsel would have questioned him specifically about the advice Mr. Olsen had consistently given the judge about the wisdom of continuing to hear cases where one of the parties was represented by Peggy Ann Bierbaum. And counsel would have asked the judge to confirm that while he was once quite friendly with attorney Olsen in the distant past, in the more recent years that friendship had deteriorated, and in fact attorney Olsen was no longer a close friend. By refusing to recuse himself and let another judge decide the CR 60(b) motion, the Judge created exactly the kind of “intolerable adversary atmosphere” between himself and Rogers which the Florida Supreme Court recognized is to be avoided by the simple mechanism of disqualification.

12. HERE, AS IN *CALEFFE v. VITALE*, THE TRIAL COURT ERRED IN RELYING UPON NONCOMPLIANCE WITH A TECHNICAL RULE AS A BASIS FOR REFUSING TO CONSIDER SOME OF APPELLANT ROGERS’ ARGUMENTS.

The trial judge refused to consider Rogers’ reply brief in support of his CR 60(b) motion because it was not served upon attorney Bierbaum until 1:35 p.m. on June 17th, which was 95 minutes past the noon deadline. RP 6/18/10, at 8. As a practical matter, the trial court’s refusal to read that brief was undoubtedly not outcome determinative. The trial judge’s comments on the record make it clear that he would have denied the motion even if he had read that brief.¹⁵

¹⁵ Moreover, in his order denying Rogers’ reconsideration motion the Court specifically states that it had now considered the reply memorandum and the declaration which accompanied it and that those materials “do not change the oral opinion of the court.” CP 235.

But the trial court's reliance on such technical noncompliance is further evidence of the trial court's bias. Once again, the case of *Caleffe v. Vitale*, supra, is instructive. There the party making the motion for disqualification failed to attach a certificate, required by Florida law, that the motion was made in good faith. Despite this failure to comply with this requirement, the Florida appellate court held that consideration of the merits of the motion was proper and that it would have been "inappropriate for the court below to deny the appellant's recusal motion "simply because the technical requirements of section 38.10 were not satisfied." *Caleffe*, 488 So.2d at 628. "[T]echnical non-compliance with the statute will not bar a claim which otherwise states sufficient facts to warrant a party's fear that he or she will not receive a fair trial by the assigned judge." *Id.* The same is true in the present case.¹⁶

Washington case law is in accord with *Caleffe*. See, e.g., *Buckley v. Snapper Power Equipment Co.*, 61 Wn. App. 932, 940, 813 P.2d 125 (1991) (Denying "motion to strike appellant's reply brief because it was filed over 2 months late and contains serious format violations"); *Curtis Lumber v. Sortor*, 83 Wn.2d 764, 767, 522 P.2d 822 (1974) (rejecting "the sporting theory of justice," declining to decide case "on a procedural technicality," and holding that it was error to dismiss suit even though service of process did not occur within eight month period after filing

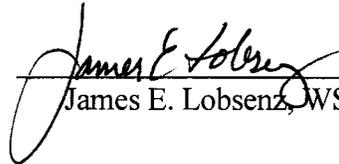
¹⁶ Indeed, noncompliance with a requirement that an attorney certify that such a motion was being made in good faith seems clearly more potentially serious than simply serving a brief 95 minutes late, especially when the brief is one to which no further responsive pleading is permitted.

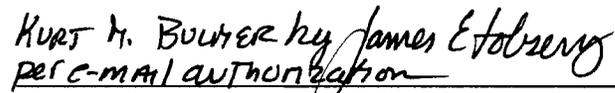
mechanics lien).

F. CONCLUSION

For the reasons stated above, appellant Rogers asks this Court to hold that the trial judge's failure to recuse himself in this case, coupled with his failure to inform Rogers on the record of his many past associations with the attorney representing the opposing party, violated Rogers' due process right to a judge who could act with the appearance of impartiality. Therefore, Rogers asks this Court to hold that the judgment entered in this case by this particular trial judge was void, that the CR 60(b) motion should have been granted, and that Rogers is entitled to a new trial of this matter before a different judge.

DATED this 17th day of February, 2011.


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NO. 39672-6-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION TWO

ELINOR JEAN TATHAM,

Respondent,

vs.

JAMES CRAMPTON ROGERS,

Appellant.

CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury, hereby declares as follows:

1. I am a Citizen of the United States and over the age of 18 years and am not a party to the within cause.

2. I am employed by the law firm of Carney Badley Spellman, P.S. My business and mailing address is 701 Fifth Avenue, Suite 3600, Seattle WA 98104.

3. On Febraury 17, 2011, I served the following document

BRIEF OF APPELLANT

on the following attorney VIA US MAIL:

Peggy Ann Bierbaum
800 Polk Street Suite B
Port Townsend, WA 98368-6557

DATED: February 17, 2011.


Lily T. Laemmle

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