

NO. 81003-6

SUPREME COURT OF THE STATE OF WASHINGTON

CAMBRIDGE TOWNHOMES, LLC, a Washington limited liability company;
and POLYGON NORTHWEST COMPANY, a Washington general partnership;
Respondents,

v.

4 Bees Siding, et al.

PACIFIC STAR ROOFING, INC., a Washington corporation;
P.J. INTERPRISE, INC., a Washington corporation;
Petitioners;

and

GERALD UTLEY dba PJ INTERPRIZE, a sole proprietorship,
Proposed Intervenor/Co-Petitioner

RECEIVED
STATE COURT
JUL 25 11
206 119 28 P-273
BY 4

**SUPPLEMENTAL BRIEF OF INTERVENOR/PETITIONER
GERALD UTLEY**

Mark A. Clausen, WSBA # 15693
CLAUSEN LAW FIRM, PLLC
701 Fifth Avenue, Suite 7230
Seattle, WA 98104
(206) 223-0335
(206) 223-0337 Fax
mclausen@clausenlawfirm.com
Attorney for GERALD UTLEY d/b/a
PJ INTERPRIZE, a sole proprietorship

TABLE OF CONTENTS

	<u>Page</u>
<u>A. INTRODUCTION</u>	1
<u>B. STATEMENT OF FACTS</u>	1
<u>C. ARGUMENT</u>	2
1. MR. UTLEY AND THE CORPORATION EACH MUST BE ACCORDED THEIR OWN RESPECTIVE DUE PROCESS RIGHTS.....	2
2. THE COURT OF APPEALS ENGAGED IN AN IMPROPER ADVISORY OPINION CONCERNING NON- JUSTICIABLE CLAIMS.....	10
<u>C. CONCLUSION</u>	12

TABLE OF AUTHORITIES

	<u>Page</u>
Federal Cases	
<i>Armstrong v. Manzo</i> , 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S.Ct. 1187 (1965)	8
<i>Baldwin v. Hale</i> , 68 U.S. (1 Wall.) 223, 233 (1864)	8
<i>Boddie v. Connecticut</i> , 431 U.S. 371, 377, 28 L. Ed. 2d 113, 91 S.Ct. 780 (1971)	9
<i>Boddie v. Connecticut</i> , 401 U.S. 371, 378, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971)	10
<i>Grannis v. Ordean</i> , 234 U.S. 385, 394, 58 L.Ed. 1363, 34 S.Ct. 779 (1914)	8
<i>Mathews v. Eldridge</i> , 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)	2
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)	8, 9
Washington Cases	
<i>Alejandre v. Bull</i> , 159 Wn.2d 674, 153 P.3d 864 (2007)	6
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 801 P.2d 222 (1990)	6
<i>Branson v. Port of Seattle</i> , 152 Wn.2d 862, 867, 101 P.3d 67 (2004)	11
<i>Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.</i> , No. 57328-4-I, filed on June 11, 2007;	13
<i>Dickens v. Alliance Analytical Labs.</i> , 127 Wn. App. 433, 437, 111 P.3d 889 (2008)	11

<i>Donahue v. Central Washington University</i> , 140 Wn. App. 17, 28, 163 P.3d 801 (2007).....	11
<i>Duskin v. Carlson</i> , 136 Wn.2d 550, 965 P.2d 611 (1998).....	9
<i>Ecology v. Acquavella</i> , 100 Wn.2d 651, 674 P.2d 160 (1983).....	9
<i>Grayson v. Nordic Constr. Co.</i> , 92 Wn.2d 548, 599 P.2d 1271 (1979).....	3
<i>Grayson v. Nordic Constr. Co.</i> , 92 Wn.2d at 553.....	4
<i>In re Marriage of T.</i> , 68 Wn. App. 329, 842 P.2d 1010 (1993).....	2
<i>Nursing Home Bldg. Corp. v. DeHart</i> , 13 Wn. App. 489, 535 P.2d 137 (1975).....	4
<i>Olympic Forest Prods., Inc. v. Chaussee Corp.</i> , 82 Wn.2d 418, 424, 511 P.2d 1002 (1973).....	2, 9
<i>Olympic Forest Prods., Inc. v. Chaussee Corp.</i> , supra at 424.....	10
<i>Rabon v. City of Seattle</i> , 107 Wn. App. 734, - P.3d - (2001).....	2
<i>Sabey v. Howard Johnson & Co.</i> , 101 Wn. App. 575, 5 P.3d 730 (2000).....	2
<i>State v. Northwest Magnesite Co.</i> , 28 Wn.2d 1, 182 P.2d 643 (1947).....	3
<i>State v. Northwest Magnesite Co.</i> , 28 Wn.2d at 41.....	4
<i>State v. Rogers</i> , 127 Wn.2d 270, 898 P.2d 294 (1995).....	9
<i>Vovos v. Grant</i> , 87 Wn.2d 697, 555 P.2d 1343 (1976).....	2
<i>Walker v. Munro</i> , 124 Wn.2d 402, 411-12, 879 P.2d 920 (1994).....	11

Walker v. Munro, 124 Wn.2d at 411-12 (citing 4-part test)..... 11

Rules

RAP 1.72, 3, 5

RPC 1.7, Comment, General Principles, 5

Other Authorities

U.S. Const., amend.. XIV, § 1; *Washington Const.*,
art. 1, § 3 3

A. INTRODUCTION.

Intervenor/Petitioner GERALD UTLEY d/b/a PJ INTERPRIZE, a Washington sole proprietorship ("Mr. Utley" or "Sole Proprietorship"), hereby submits the following Supplemental Brief in support of and in addition to his arguments in his Petition for Review. In Cambridge's response to the Petition for Review, it argues for limitations on Mr. Utley's due process rights that extend beyond even the Court of Appeals' rationale. Its extreme position re-casts the issue of due process for the Court to consider: whether a person can be denied due process as defined by state and federal constitutional law because of the presence in litigation of a corporation in which he owned shares when the two parties have different rights, defenses and interests. This brief also addresses an additional problem with the Court of Appeals opinion: the decision of issues pertaining to Mr. Utley that were never before the trial court. This supplemental brief is particularly appropriate here, where Mr. Utley has not had the opportunity to prepare a brief in the Court of Appeals.

B. STATEMENT OF FACTS.

The Statement of Facts in the Petition for Review constitutes the Statement of Facts for this Supplemental Brief. Any additional facts pertinent to the discussion are referenced in the Argument section.

C. ARGUMENT.

1. **Mr. Utley and the Corporation Each Must Be Accorded Their Own Respective Due Process Rights.**

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); *Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 424, 511 P.2d 1002 (1973); *Rabon v. City of Seattle*, 107 Wn. App. 734, 34 P.3d 821 (2001). Cambridge fails to cite authority that a person or entity can be denied the right to participate in litigation when he/she has a personal stake in the outcome. *See, e.g., Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 5 P.3d 730 (2000). Any party with a protectable interest that could be adversely affected by the result is allowed to participate in a case. *See, e.g., Vovos v. Grant*, 87 Wn.2d 697, 555 P.2d 1343 (1976); *In re Marriage of T.*, 68 Wn. App. 329, 842 P.2d 1010 (1993). Cambridge now appears to argue that, so long as a corporation has a common owner with an earlier sole proprietorship, due process for the corporation is due process for the individual sole proprietor. Answer of Cambridge at 11.

In this regard Cambridge argues for a more radical rule than the Court of Appeals applied in its erroneous decision below. The Court of Appeals, although deciding Mr. Utley's defenses without him being a

party, still implicitly recognized that Mr. Utley should be a party on remand for his interests to be adjudicated. Cambridge's position here is that Mr. Utley is not entitled to reversal; he received the process to which he was due because his positions overlap with those of the Corporation. It cites no authority for this novel proposition.

Due process obviously is a significant, fundamental constitutional right, protected both under the U. S. Constitution and the Washington State Constitution. *U.S. Const.*, amend.. XIV, § 1; *Washington Const.*, art. 1, § 3. Cambridge's argument that due process for the corporation is due process for the sole proprietorship is legally flawed. Not only does it ignore relevant law on the separateness of the corporation; it ignores the fact that Mr. Utley and his corporation are not similarly situated. They have separate and exclusive rights and defenses. In fact, they can defend Cambridge's claim by proving the claimed damages are the responsibility of the other.

a. Separate Entities Possess Separate Rights.

A corporation exists as an organization distinct from the personality of its shareholders. *State v. Northwest Magnesite Co.*, 28 Wn.2d 1, 182 P.2d 643 (1947); *Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 599 P.2d 1271 (1979). A corporation's separate legal identity is not lost merely because all of its stock is held by members of a single family

or by one person. This Court has long recognized this principle, and stated the following:

The principle upon which we proceed is that a corporation exists as an organization distinct from the personality of its shareholders. This separate organization, with its distinctive privileges and liabilities, is a legal fact, and not a fiction to be disregarded when convenient. The concentration of its ownership in the hands of one or two principal shareholders does not, *ipso jure*, dispel those corporate characteristics of the organization.

State v. Northwest Magnesite Co., 28 Wn.2d at 41. *Accord*, *Grayson v. Nordic Constr. Co.*, 92 Wn.2d at 553; *Nursing Home Bldg. Corp. v. DeHart*, 13 Wn. App. 489, 535 P.2d 137 (1975).

Distinct legal entities have distinct legal rights, and are required to be treated separately. In the present case, the sole proprietorship was the siding subcontractor for Phase 2 under a particular contract. (CP 98-101). The corporation, PJ Interprize, Inc., was the siding subcontractor for Phase 3, under a different contract with different terms. (CP 98-111). Significantly, in its Brief on Appeal to the Court of Appeals, Cambridge admits that the trial court never considered or determined the question of whether the corporation was a "mere continuation" of the sole proprietorship. Brief of Appellant, Court of Appeals, at p. 32. As a result, the Court of Appeals lacked a lower-court record on which to base any such assumption.

The Court of Appeals' decision determined Mr. Utley's rights and defenses without his participation. It did not formally state that Mr. Utley had no right to participate in later proceedings. In this regard, Cambridge asks this Court to deny Mr. Utley his right to be heard based solely on the assertion that another party, the Corporation, made or could make similar arguments.

b. Mr. Utley and the Corporation Do Not Have an Identity of Interests in this Appeal.

Cambridge argues that, because Mr. Utley and the Corporation have raised similar arguments, the Corporation can be relied upon to protect Mr. Utley's interests. Again, it cites no authority for its novel proposition. In fact, Washington law requires attorneys to pay close attention to the differences in interests among clients with potential conflicts of interest. Further, Washington contract law prevents the parties from treating the separate contracts as having overlapping obligations.

RPC 1.7 prevents attorneys from representing current clients with potentially conflicting claims and defenses, except in specific circumstances. The obvious intent is to prevent the attorneys from having divided loyalty that would prevent or limit effective advocacy. *See, e.g.,* Comment to RPC 1.7, *General Principles*, at [1] and [6], reproduced in the Appendix. In this appeal, Mr. Utley and the Corporation each have

separate counsel. This is evidence of the essential separation of interests in this appeal.

Further, Mr. Utley's and the Corporation's interests conflict. Mr. Utley performed work on the Phase 2 contract. The Corporation performed work on Phase 3. Under the Court of Appeals decision, Cambridge would claim damages for the cost of repair to both Phases in one action. Cambridge cannot, however, recover economic losses from a party with which it was not in privity, as they are a purely contractual remedy. *See, e.g., Alexandre v. Bull*, 159 Wn.2d 674, 153 P.3d 864 (2007); *Berschauer/Phillips v. Seattle Sch. Dist.*, 124 Wn.2d 816, 826, 881 P.2d 986 (1994). Cambridge can only recover alleged Phase 2 damages against Mr. Utley, and alleged Phase 3 damages against the Corporation. Mr. Utley and the Corporation can cooperate to minimize the damages that Cambridge claims. They could raise defenses common to both contracts. But as in any contract, a claim or defense may be present or absent based on the circumstances in which the agreement was reached. *See, e.g., Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222 (1990). So Mr. Utley and the Corporation may not raise identical defenses to the claim.

For example, Mr. Utley's earlier-performed contract gives him earlier dates for statute of limitations and statute of repose calculations. This Court's consideration of those issues could differ depending on the

independent dates of substantial completion and time of filing between Mr. Utley and the Corporation.¹ A decision against the Corporation could still hold in favor of Mr. Utley. Similarly, the Corporation could obtain a reversal that would not address the Court of Appeals' extensive treatment of Mr. Utley's defenses. Under both Washington law and the facts of this appeal, Mr. Utley and the Corporation have different interests, issues and arguments.

Further, even assuming the Court of Appeals' rationale, Mr. Utley and the Corporation's interests conflict. Mr. Utley could seek to reduce his damages by arguing that Cambridge's alleged damages should be assessed against the Corporation. The Corporation could do the same thing.

Mr. Utley and Cambridge also have different positions in this appeal. Mr. Utley did not participate in the lower court levels. His lack of participation gives rise to arguments relating to the Court of Appeals decision in which the Corporation has no interest. The Corporation has had due process notice and opportunity to be heard. In light of this, the Corporation has neither the independent interest nor the ability to protect Mr. Utley's interests.

c. Mr. Utley Was Denied Process He Was Due.

¹ The applicability of the relation-back doctrine is one exclusively available to Mr. Utley. So is the effect of the bankruptcy filing.

For over a century it has been recognized that "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864). The fundamental requisites of due process are "the opportunity to be heard," *Grannis v. Ordean*, 234 U.S. 385, 394, 58 L.Ed. 1363, 34 S.Ct. 779 (1914), and "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections," *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L.Ed. 865, 70 S.Ct. 652 (1950). Thus, *at a minimum* the due process clause of the Fourteenth Amendment demands that a deprivation of life, liberty or property be preceded by "notice and opportunity for hearing appropriate to the nature of the case." *Mullane* at 313. Moreover, this opportunity "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552, 14 L. Ed. 2d 62, 85 S.Ct. 1187 (1965).

The United States Supreme Court has refined over one hundred years of these fundamental requirements of procedural due process into the following standard:

[D]ue process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a

meaningful opportunity to be heard. *Boddie v. Connecticut*, 431 U.S. 371, 377, 28 L. Ed. 2d 113, 91 S.Ct. 780 (1971).

The constitutional guaranty of due process of law in its essence requires notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950); *State v. Rogers*, 127 Wn.2d 270, 898 P.2d 294 (1995). Due process requires "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. at 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950); *Duskin v. Carlson*, 136 Wn.2d 550, 965 P.2d 611 (1998); *Ecology v. Acquavella*, 100 Wn.2d 651, 674 P.2d 160 (1983).

The basic due process requirement of a prior hearing was adopted by this court in *Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 424, 511 P.2d 1002 (1973), where the court held that prejudgment garnishment without a prior hearing violates due process. This court said in that case:

This elasticity in the *form* of the hearing demanded by due process in different contexts should not, however, be confused with the basic *right* to a prior hearing of some sort.

. . . That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property

interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.

Olympic Forest Prods., Inc. v. Chaussee Corp., supra at 424, quoting *Boddie v. Connecticut*, 401 U.S. 371, 378, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971).

Proper due process in this case would have required (1) adequate notice to Mr. Utley that his defenses were being adjudicated; (2) an opportunity for him to present evidence related to those defenses *prior* to their adjudication, and to present other available defenses; (3) an opportunity for counsel to brief and argue the legal theories *prior* to their adjudication; and (4) the opportunity to appeal or respond to an appeal based on the decision of a trier of fact. In the Court of Appeals, Mr. Utley was denied all of these fundamental rights. The Corporation's receiving those rights does not limit Mr. Utley's rights or the damage he will suffer if not given the opportunity to be heard.

2. The Court of Appeals Engaged in an Improper Advisory Opinion Concerning Non-Justiciable Claims.

In addition to violating constitutional requirements, the Court of Appeals departed from the basic principles governing the exercise of judicial decision-making. This is apparent under both the prohibition of the issuance of advisory opinions, and the requirement that the appellate

court decide only justiciable controversies. Under either theory, the Court of Appeals decision must be reversed.

Except in extraordinary circumstances, Courts are prohibited from issuing advisory opinions. *E.g.*, *Branson v. Port of Seattle*, 152 Wn.2d 862, 867, 101 P.3d 67 (2004); *Walker v. Munro*, 124 Wn.2d 402, 411-12, 879 P.2d 920 (1994); *Dickens v. Alliance Analytical Labs.*, 127 Wn. App. 433, 437, 111 P.3d 889 (2008); *Donahue v. Central Washington University*, 140 Wn. App. 17, 28, 163 P.3d 801 (2007). If an issue is not properly before the appellate court, or if such review would require a remand for creation of a record, the court should not entertain the question.

Similarly, if a party is not before the Court, or if the issue is not properly presented in the trial court, that issue or claim is not justiciable, *e.g.*, ripe for resolution. A dispute is not justiciable on appeal if it would decide an issue that is not ready for consideration, or where circumstances elsewhere could change that could obviate or modify the need for review. *See, e.g.*, *Walker v. Munro*, 124 Wn.2d at 411-12 (citing 4-part test).

In this case, the trial court exercised its discretion to deny Cambridge's motion to amend its complaint to add Mr. Utley. The Court of Appeals' scope of review, therefore, was limited to whether the trial court abused its discretion by denying the motion. The proposed amended

complaint was never filed or served in accordance with the Civil Rules. There were no facts presented as to whether such amended complaint would relate back to the date of the original complaint. Mr. Utley never needed to appear or file an answer. As a result, the Court of Appeals had no affirmative defenses to review and no facts on which to determine if the complaint related back. In short, the Court of Appeals lacked a record to make any decision on Mr. Utley's defenses.

If this Court elects to issue an advisory opinion in its review the Court of Appeals' decision on the substantive defenses, it should reverse the Court of Appeals on those grounds as a matter of law. But before considering the substantive arguments, this Court must determine whether an advisory opinion is appropriate. It should be noted that the procedural setting before the trial court meant that the normal pleadings and motions were never filed, and evidence never presented. Cambridge has sued Mr. Utley in a separate action, which is still pending. Unless this Court reverses the Court of Appeals on the substantive issues, the pending Cambridge-Utley action is the proper place for determination of the validity of Mr. Utley's defenses to the Cambridge claims.

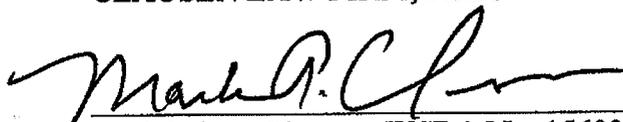
C. CONCLUSION.

For the above reasons, Mr. Utley seeks a reversal of the Court of Appeals' unpublished decision in *Cambridge Townhomes, LLC v. Pacific*

Star Roofing, Inc., No. 57328-4-I, filed on June 11, 2007; the Court of Appeals' Order Granting Cambridge's Motion to Strike the Appendixes to the Corporation's brief, filed on June 11, 2007; and the Court of Appeals' Order Denying P.J. Interprize, Inc.'s Motion for Reconsideration, filed on October 25, 2007.

Respectfully submitted this 25th day of August, 2008.

CLAUSEN LAW FIRM, PLLC

A handwritten signature in black ink, appearing to read "Mark A. Clausen", written over a horizontal line.

By: Mark A. Clausen, WSBA No. 15693
Attorney for Gerald Utley, et ux.
701 Fifth Avenue, Suite 7230
Seattle, WA 98104
(206) 223-0335

APPENDIX

RULE 1.7

State Court Rules

RULES OF PROFESSIONAL CONDUCT

TITLE 1 CLIENT-LAWYER RELATIONSHIP

RULE 1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

RULE 1.7 CONFLICT OF INTEREST; CURRENT CLIENTS

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

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

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

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

Comment

General Principles

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

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

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

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

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

See also Washington Comment [36].

Identifying Conflicts of Interest: Directly Adverse

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

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

Identifying Conflicts of Interest: Material Limitation

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

See also Washington Comment [37].

Lawyer's Responsibilities to Former Clients and Other Third Persons

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

Personal Interest Conflicts

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

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

[12] [Reserved.]

Interest of Person Paying for a Lawyer's Service

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

Prohibited Representations

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

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

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

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

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

See also Washington Comment [38].

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a

single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

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

See also Washington Comment [39].

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

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

Consent to Future Conflict

[22] [Reserved.]

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in

relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

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

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

Nonlitigation Conflicts

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

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

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial

reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

See also Washington Comment [40].

Special Considerations in Common Representation

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

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

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

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

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

See also Washington Comment [41].

Organizational Clients

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

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

Additional Washington Comments (36 - 41)

General Principles

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

Identifying Conflicts of Interest: Material Limitation

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

Prohibited Representations

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

representational conflict of interest.

Informed Consent

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

Nonlitigation Conflicts

[40] Under Washington case law, in estate administration matters the client is the personal representative of the estate. **Special Considerations in Common Representation**

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

[Amended effective September 1, 2006.]

© Lawriter Corporation. All rights reserved.

The Casemaker™ Online database is a compilation exclusively owned by Lawriter Corporation. The database is provided for use under the terms, notices and conditions as expressly stated under the online end user license agreement to which all users assent in order to access the database.

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

I am employed by the law firm of: Clausen Law Firm PLLC.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witness herein.

On the date set forth below, I served in the manner noted **Utley's**

Supplemental Brief on the following person(s):

Counsel for Cambridge Townhomes and Polygon Northwest Company

Mark F. O'Donnell, Esq.
Jeffrey W. Daley, Esq.
Preg O'Donnell & Gillett PLLC
1800 9th Avenue
Suite 1500
Seattle, WA 98101-1340

Jerret E. Sale, Esq.
Deborah Lynn Carstens, Esq.
Bullivant Houser Bailey PC
1601 5th Ave Ste 2300
Seattle, WA 98101-1618

Counsel for Pacific Star Roofing

Gregory Paul Turner, Esq.
Lee Smart P.S., Inc.
701 Pike Street Suite 1800
Seattle, WA 98101-3929

Counsel for PJ Interprize

Eileen I. McKillop, Esq.
Oles Morrison Rinker & Baker
LLP
701 Pike Street, Suite 1700
Seattle, WA 98101-3930

SIGNED in Seattle, Washington this 25 August, 2008

A handwritten signature in cursive script, appearing to read "Lisa Vulin". The signature is written in black ink and is positioned above a horizontal line.

Lisa Vulin