

Dec 02, 2016, 3:42 pm

No. 93207-7

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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ROFF ARDEN and BOBBI ARDEN,

Plaintiffs/Petitioners,

v.

FORSBERG & UMLAUF, P.S., et al.,

Defendants/Respondents.

FILED  
DEC 13 2016  
WASHINGTON STATE  
SUPREME COURT

by h

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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Valerie D. McOmie  
WSBA No. 33240  
4549 NW Aspen Street  
Camas, WA 98607  
(360) 852-3332

Daniel E. Huntington  
WSBA No. 8277  
422 W. Riverside, Ste. 1300  
Spokane, WA 99201  
(509) 455-4201

On Behalf of  
Washington State Association  
for Justice Foundation

 ORIGINAL

## TABLE OF CONTENTS

	<b>Page</b>
I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. INTRODUCTION AND STATEMENT OF THE CASE	1
III. ISSUES PRESENTED	5
IV. SUMMARY OF ARGUMENT	5
V. ARGUMENT	6
A. Overview Of The Potential Conflicts Arising Under A Reservation Of Rights Context, And The Duties On Insurers Emanating Therefrom.	7
B. Retained Defense Counsel In A Reservation of Rights Has A Duty To Disclose To The Insured The Existence Of A Long-Standing Relationship With The Insurer.	9
C. Under <u>Tank</u> , Retained Defense Counsel In An ROR Has A Duty To Apprise The Insured Of All Settlement Options And To Give The Insured The Ultimate Choice Regarding Settlement, And The Court Of Appeals Erred In Concluding That Forsberg Is Not Liable For Breach Of This Duty As A Matter Of Law.	18
VI. CONCLUSION	20
Appendix	

## TABLE OF AUTHORITIES

### Cases

<u>Arden v. Forsberg &amp; Umlauf, P.S.</u> , 193 Wn. App. 731, 373 P.3d 320, <i>review granted</i> , 186 Wn.2d 1009, 380 P.3d 484 (2016)	passim
<u>Besel v. Viking Ins. Co.</u> , 146 Wn.2d 730, 49 P.3d 887 (2002)	8
<u>Cogan v. Kidder, Mathews &amp; Segner, Inc.</u> , 97 Wn.2d 658, 648 P.2d 875 (1982)	11
<u>Cotton v. Kronenberg</u> , 111 Wn.App. 258, 44 P.3d 878 (2002)	11
<u>Eriks v. Denver</u> , 118 Wn.2d 451, 824 P.2d 1207 (1992)	10, 16
<u>Esmieu v. Schrag</u> , 88 Wash.2d 490, 563 P.2d 203 (1977)	10
<u>Evans v. Continental Cas. Co.</u> , 40 Wn.2d 614, 245 P.2d 470 (1978)	6
<u>Gustafson v. City of Seattle</u> , 87 Wn. App. 298, 941 P.2d 701 (1997)	11, 12, 17
<u>Hizey v. Carpenter</u> , 119 Wn.2d 251, 830 P.2d 646 (1992)	11
<u>In re Estate of Larson</u> , 103 Wn.2d 517, 694 P.2d 1051 (1985)	10
<u>In re Marriage of Wixom</u> , 182 Wn. App. 881, 332 P.3d 1063 (2014) <i>review denied</i> , 182 Wn.2d 1022, 353 P.3d 632 (2015)	15-16

<u>Johnson v. Continental Casualty Co.,</u> 57 Wn. App. 359, 788 P.2d 598 (1990)	14
<u>Liebergessell v. Evans,</u> 93 Wash.2d 881, 613 P.2d 1170 (1980)	10
<u>Mersky v. Multiple Listing Bureau,</u> 73 Wn.2d 225, 437 P.2d 897 (1968)	16, 17
<u>Miller v. U.S. Bank of Washington, N.A.,</u> 72 Wn. App. 416, 865 P.2d 536 (1994)	10
<u>Nat'l Sur. Corp. v. Immunex Corp.,</u> 176 Wn.2d 872, 297 P.3d 688 (2013)	6, 7, 14
<u>Safeco Ins. Co. v. Butler,</u> 118 Wn.2d 383, 823 P.2d 499 (1992)	8, 9, 10, 20
<u>Tank v. State Farm Fire &amp; Cas. Co.,</u> 105 Wn.2d 381, 715 P.2d 1133 (1986)	passim
<u>Weber v. Biddle,</u> 4 Wn. App. 519, 483 P.2d 155 (1971)	9
<u>Woo v. Fireman's Fund Ins. Co.,</u> 161 Wn.2d 43, 164 P.3d 454 (2007)	7
 <b>Statutes and Regulations</b>	
Ch. 19.86 RCW	8
RCW 19.86.090	8
RCW 48.30.010 - .015	8
RCW 48.30.015(2)	8
WAC §§ 284-30-330 - 284-30-380	8

### **Other Authorities**

RPC Preamble and Scope - [20]	11
RPC 1.7	12, 13, 14, 16
RPC 1.7(a)	12
RPC 1.7(a)(2)	14
RPC 1.7(b)	15
RPC 1.7 & 1.8	11
RPC 1.8(f)	12
RPC 5.4(c)	11, 12
Thomas V. Harris, Washington Insurance Law §17.07 at 17-20 (3rd ed. 2010)	7, 19
WPI 107.10 (Comment)	11
WPI 320.03 & 320.05	8

## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice (WSAJ). WSAJ Foundation operates an amicus curiae program and has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the scope of the fiduciary duties owed to an insured by defense counsel who is retained by an insurer to represent the insured under a reservation of rights (ROR).

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

This appeal presents the Court with the opportunity to further define the duties owed to insureds by defense counsel retained by insurers to represent their insureds under an ROR.<sup>1</sup> In this case, the insureds, Roff and Bobbi Arden (Ardens), sued their retained defense counsel, Forsberg & Umlauf, P.S., and attorneys John Hayes (Hayes) and William Gibson (Gibson; together, Forsberg), for breach of fiduciary duty and legal malpractice. This brief focuses on Ardens' fiduciary duty claims, which allege: 1) Forsberg breached its fiduciary duty to the Ardens by failing to disclose its long-standing relationship with the insurer (Hartford), and 2) Forsberg failed to apprise the Ardens of all settlement options, and to give the Ardens the ultimate choice over settlement. The facts are drawn from

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<sup>1</sup> This brief refers to counsel retained by the insurer to represent an insured in an ROR as "retained defense counsel," and to counsel retained by the insured as "personal counsel."

the Court of Appeals opinion and the briefing of the parties. See Arden v. Forsberg & Umlauf, 193 Wn. App. 731, 373 P.3d 320, *review granted*, 186 Wn.2d 1009, 380 P.3d 484 (2016); Arden Br. at 3-11; Forsberg Br. at 2-21; Arden Reply Br. at 1-6; Arden Pet. for Rev. at 2-8; Forsberg Ans. Pet. for Rev. at 2-4; Arden Supp. Br. at 3-4; Forsberg Supp. Br. at 2-4.

For purposes of this brief, the following facts are relevant. Mr. Arden shot the Duffys' dog when it entered his property. The Duffys sued the Ardens, alleging willful conversion, malicious injury, intentional infliction of emotional distress, and gross negligence. Ardens then sought liability coverage under their homeowners' policy with Hartford, which initially denied defense and coverage based on the policy's "intentional act" exclusion. Ardens hired Jon E. Cushman (Cushman) to act as personal counsel, who demanded that Hartford defend and indemnify the Ardens based on the negligence allegations in the complaint. Hartford agreed to defend, but informed Cushman that its defense would be under an ROR.

Hartford retained Forsberg to serve as Ardens' defense counsel, and Forsberg appointed attorneys Hayes and Gibson to conduct Ardens' defense. While there is apparently no evidence in the record that either Hayes or Gibson simultaneously represented Hartford and Ardens, it is undisputed that both Hayes and Gibson had a long-standing relationship with Hartford.<sup>2</sup> Approximately 30-35% of Hayes' practice involved

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<sup>2</sup> Consistent with the Court of Appeals opinion, this brief refers to Hartford's relationship with Forsberg as a "long-standing relationship." See Arden, 193 Wn. App. at 745-50.

defending Hartford's insureds, and he also represented Hartford in coverage matters. Gibson represented Hartford's insureds as well. Neither Hayes nor Gibson informed Ardens of their relationships with Hartford.

Gibson did explain the nature of an ROR, informing the Ardens that Forsberg was retained solely to defend them in the underlying action. He indicated that Forsberg did not represent them in coverage matters, but that it would nevertheless attempt to secure full indemnity from Hartford.

Duffys then commenced settlement negotiations, making an initial demand of \$55,000 to both Hayes and Cushman. Because the Ardens were concerned about criminal exposure, Cushman informed Forsberg that Ardens wished to resolve the case quickly and accept the offer, and wanted Hartford to fully indemnify. However, Hartford apparently requested that Forsberg conduct further discovery regarding valuation. Notwithstanding Ardens' desire for a quick settlement, Forsberg sought an extension from Duffys to respond to the settlement offer. Duffys granted the extension. After discovery, based on Forsberg's review, Hartford valued the claim at a maximum of \$35,000. At Hartford's request, Forsberg presented a counteroffer of \$18,000 to Duffys, which they rejected outright. Cushman contacted Duffys and requested a counteroffer. Duffys' attorney responded with a \$40,000 counteroffer and indicated it was their final offer. Without consulting with Ardens about the option of

contributing their own funds to settlement, Forsberg countered with a \$25,000 offer. Duffys rejected the offer and terminated negotiations.

Following this unsuccessful attempt at settlement, Ardens sued Hartford for bad faith, and later amended their complaint to add claims against Forsberg & Umlauf, as well as Hayes and Gibson. All parties then participated in a global mediation. Hartford funded a settlement of \$75,000 to the Duffys, and all claims against Hartford were dismissed. Roff Arden also obtained a diversion in lieu of criminal prosecution.

The only claims not resolved in the mediation were Ardens' claims against Forsberg. Ardens argued that Forsberg breached its fiduciary duties of loyalty and disclosure by failing to disclose its long-standing relationship with Hartford and failing to communicate and seek consent from Ardens during settlement negotiations.<sup>3</sup> On cross motions for summary judgment, the trial court granted Forsberg's motions and denied Ardens' motions with respect to all claims.

The Court of Appeals affirmed. It held, *inter alia*, that retained defense counsel in an ROR who has a long-standing relationship with the insurer is not automatically prohibited from representing the insured, and has no duty to disclose the relationship to its insured. With respect to settlement, the court held that there were disputed facts as to whether Forsberg breached its duty to consult with the Ardens. However, the court

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<sup>3</sup> Ardens advanced additional theories of recovery, including breach of trust and legal negligence, that are not recounted here. See Arden Br. at 34, 41-43.

concluded that because the Ardens could not prove they would have been willing to contribute funds to the settlement if they had been fully advised of that option, there was no proof of causation or injury as a matter of law. On June 16, 2016, the Ardens submitted their Petition for Review. This Court granted review on September 28, 2016.

**IV. ISSUES PRESENTED:**

- 1.) Does defense counsel retained for an insured under an ROR have a duty to disclose to the insured the existence of a long-standing relationship between retained defense counsel and the insurer?
- 2.) Does retained defense counsel in an ROR have a duty to disclose to the insured all information regarding settlement, including all settlement options, and to give the insured the ultimate choice regarding settlement, and if so, did the Court of Appeals err in concluding that Forsberg is not liable for breach of this duty as a matter of law?

**IV. SUMMARY OF ARGUMENT**

Insureds obtain liability insurance for security and peace of mind. Because the interests of the insurer and insured often diverge in this context, to protect insureds, the law imposes substantial duties on insurers. In an ROR, the insurer reserves the right to dispute coverage, making conflicts between the insurer and the insured nearly inevitable. In this setting, an insurer's duties are thus "enhanced."

Defense counsel retained under an ROR represents the insured only. As a true fiduciary, it must place the interests of the insured above its own. Counsel's fiduciary duty encompasses duties of loyalty and

disclosure, and requires the fiduciary to disclose all facts that would aid the client in protecting its interests. Given the potential conflicts between an insurer and an insured inherent in an ROR, a long-standing relationship between retained defense counsel and the insurer can create an incentive for counsel to favor the interests of itself or the insurer over those of the insured, resulting in a potential conflict that counsel must disclose.

During negotiations, retained defense counsel in an ROR is required to apprise the insured of all settlement options and to give the insured the ultimate choice regarding settlement. If counsel fails to advise the insured of its options, the insured should not be required to prove they would have acted on options of which they were not apprised.

## V. ARGUMENT

### *Introduction*

It is well-settled that insurance contracts are “unique,” and are imbued with public policy considerations. “Because security and peace of mind are principal benefits of insurance, insurers must fulfill their contractual obligations in good faith, giving equal consideration in all matters to the insured’s interests.” Nat’l Sur. Corp. v. Immunex Corp., 176 Wn.2d 872, 878, 297 P.3d 688 (2013) (citations omitted). In a third party insurance relationship, the interests of the insurer and the insured often diverge. See e.g., Evans v. Continental Cas. Co., 40 Wn.2d 614, 245 P.2d 470 (1978) (failure to settle within policy limits). From an insured’s

perspective, perhaps the most perilous of these “conflict” situations is that presented by an ROR. This brief focuses on the conflicts between insurers and insureds inherent in an ROR setting, and the fiduciary duties owed by retained defense counsel arising in that context.

**A. Overview Of The Potential Conflicts Between Insurers and Insureds Arising Under A Reservation Of Rights, And The Duties On Insurers Emanating Therefrom.**

When an insurer reserves the right to dispute coverage, it may “defend under a reservation of rights and seek a declaratory judgment that it has no duty to defend.” Woo v. Fireman’s Fund Ins. Co., 161 Wn.2d 43, 54, 164 P.3d 454 (2007). “An insured, who is being defended subject to a reservation, faces a grave financial risk.” See Thomas V. Harris, Washington Insurance Law §17.07, at 17-21 (3rd ed. 2010). “Because a reservation of rights defense is fraught with potential conflicts, it implicates an enhanced duty of good faith toward the insured.” Immunex, 176 Wn.2d at 879 (citations omitted).

The seminal case defining insurers’ duties in an ROR is Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 386, 715 P.2d 1133 (1986). There, this Court held that due to “potential conflicts of interest between insurer and insured . . . an insurance company must fulfill an enhanced obligation to its insured as part of its duty of good faith.” Id. at 387. This “quasi-fiduciary duty” requires insurers to give “equal consideration to the insured’s interests.” Id. Tank enumerated insurers’ specific duties:

First, the company must thoroughly investigate the cause of the insured's accident and the nature and severity of the plaintiff's injuries. Second, it must retain competent defense counsel for the insured. Both retained defense counsel and the insurer must understand that only the *insured* is the client. Third, the company has the responsibility for fully informing the insured not only of the reservation-of-rights defense itself, but of *all* developments relevant to his policy coverage and the progress of his lawsuit. Information regarding progress of the lawsuit includes disclosure of all settlement offers made by the company. Finally, an insurance company must refrain from engaging in any action which would demonstrate a greater concern for the insurer's monetary interest than for the insured's financial risk.

Id. at 388.

These duties are bolstered by statutory duties under the Consumer Protection Act, Ch. 19.86 RCW and the Insurance Fair Conduct Act, RCW 48.30.010-.015; administrative duties in the Washington Administrative Code (WACs) §§ 284-30-330 - 284-30-380; and common law bad faith claims. The Washington Pattern Jury Instructions also provide guidance regarding insurers' duties. See WPI 320.03 & 320.05. These settled authorities create a broad framework that is highly protective of insureds, imposing substantial duties on the insurers that are *enhanced* in an ROR. An insurer's breach may give rise to substantial remedies, such as treble damages, see RCW 19.86.090 & RCW 48.30.015(2), coverage by estoppel, see Safeco Ins. Co. v. Butler, 118 Wn.2d 383, 392, 823 P.2d 499 (1992), or execution of a covenant judgment, see Besel v. Viking Ins. Co., 146 Wn.2d 730, 738, 49 P.3d 887 (2002).

In sum, the perils faced by insureds in the ROR context are significant, and the law has imposed substantial duties on insurers, *enhanced* in the ROR setting. Insureds also have powerful remedies in the event of breach. It is against this backdrop that retained defense counsel's duties to its insureds in an ROR must be examined.

**B. Retained Defense Counsel In A Reservation of Rights Has A Duty To Disclose To The Insured The Existence Of A Long-Standing Relationship With The Insurer.**

This Court has recognized that “[t]he insurer's duty to defend the insured is one of the main benefits of the insurance contract.” Butler, 118 Wn.2d at 392 (citations omitted). When an insurer issues an ROR, its obligations to the insured “remain in effect,” and “[a] reservation of rights agreement is not a license for an insurer to conduct the defense of an action in a manner other than [the manner in which] it would normally be required to defend.” Tank, 105 Wn.2d at 387 (quoting Weber v. Biddle, 4 Wn. App. 519, 524, 483 P.2d 155 (1971)). Accordingly, counsel retained in an ROR must provide the *same defense* it would provide in any other context, which includes informing its client of the insurer's duties and the remedies available in the event of a breach. Because counsel that has a long-standing relationship with the insurer arguably has an incentive to maintain its relationship, it may be inclined to temper its representation of the insured where it may harm the insurer. A conflict thus exists between retained defense counsel and the insured that triggers the duty to disclose.

1. **As a true fiduciary, an attorney has a duty to disclose to its client all potential conflicts and to give the client the choice as to whether to proceed with the representation.**

Under Washington law, a fiduciary includes “any person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former.” Liebergesell v. Evans, 93 Wn.2d 881, 890-91, 613 P.2d 1170 (1980). “A fiduciary relationship exists as a matter of law between an attorney and client, and the attorney owes the highest duty of fidelity and good faith to the client.” In re Estate of Larson, 103 Wn.2d 517, 520, 694 P.2d 1051 (1985). A fiduciary must place the interests of the client above its own.<sup>4</sup> See Butler, 118 Wn.2d at 389.

A claim for breach of fiduciary duty sounds in tort, and requires proof of (1) a duty, (2) breach, (3) injury, and (4) proximate cause. Miller v. U.S. Bank of Wash., 72 Wn. App. 416, 426, 865 P.2d 536 (1994). Whether an attorney has breached his or her fiduciary duty is a question of law. See Eriks v. Denver, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992). At common law, a fiduciary owes duties of loyalty and disclosure, which demand “the highest degree of good faith, care, loyalty and integrity.” Esmieu v. Schrag, 88 Wash.2d 490, 498, 563 P.2d 203 (1977). This “includes the responsibility to inform the [client] fully of all facts which would aid them in protecting their interests” Id. (brackets added).

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<sup>4</sup> In contrast, the “quasi-fiduciary” duty owed by an insurer requires it to give “equal consideration” to the insured. See Tank, 105 Wn.2d at 386.

The “duty of disclosure” is a critical aspect of the fiduciary relationship. In Cogan v. Kidder, Mathews & Signer, Inc., 97 Wn.2d 658, 648 P.2d 875 (1982), the Court stated this duty requires an agent to use “reasonable efforts to give his principal information which is relevant to affairs entrusted to him, which the principal would desire to have.” Id. at 663 (citations omitted). The Court concluded this “disclosure rule” reflects “a prophylactic concern for maintaining unmitigated loyalty in the principal-agent relationship. It guards against the possibility of compromising an agent’s absolute duty to his principal.” Id.

In addition to common law principles governing fiduciary relationships generally, the Rules of Professional Conduct (RPCs) clarify the scope of the fiduciary duty in the attorney-client context.<sup>5</sup> The RPCs relevant here include rules governing conflicts of interest, see RPC 1.7 & 1.8, and duties of loyalty, see RPC 5.4(c). The RPCs “should be construed broadly to protect the public from attorney misconduct.” Gustafson v. City of Seattle, 87 Wn. App. 298, 302-03, 941 P.2d 701 (1997).

An attorney breaches his or her duties under RPC 1.7(a) if a potential conflict is reasonably foreseeable and the attorney fails to advise

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<sup>5</sup> Generally, violation of an RPC “should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.” See RPC Preamble and Scope at 20. When the claimant alleges malpractice, the Court has concurred that an RPC violation is not relevant as evidence and does not give rise to a cause of action. See Hizey v. Carpenter, 119 Wn.2d 251, 259-60, 830 P.2d 646 (1992). Violation of an RPC may be relevant, however, to determine whether an attorney breached a *fiduciary* duty. See Eriks, 118 Wn.2d at 457-58; Cotton v. Kronenberg, 111 Wn. App. 258, 264-66, 44 P.3d 878 (2002); see also Comment, WPI 107.10.

the client of the conflict. Gustafson, 87 Wn. App. at 302-03. RPC 1.7(a) provides that a conflict exists if either “(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.”<sup>6</sup> Thus, a conflict triggering the duty to disclose exists when the representation is “directly adverse,” or when there is a “significant risk” the attorney’s representation may be “materially limited” by a third person or the attorney’s own personal interest. See also RPC 1.8(f) (regarding compensation from third parties); RPC 5.4(c) (influence by third parties).

2. **Given the potential conflicts in an ROR, retained defense counsel who has a long-standing relationship with the insurer has a duty to disclose to the insured its relationship with the insurer.**

The Court of Appeals concluded that retained defense counsel in an ROR has no duty to disclose the existence of a long-standing relationship with the insurer. The court first turned to this Court’s opinion in Tank, reasoning that “nothing in Tank requires a defense attorney to disclose his or her relationship with the insurer to the insured.” Arden, 193 Wn. App. at 750–51. The court appeared to treat Tank like a shield, concluding that “as long as the defense attorney follows the criteria outlined in Tank, there is not a significant risk that the attorney’s

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<sup>6</sup> The full text of the current version of RPC 1.7 is reproduced in the Appendix.

representation of the insured will be materially limited by the attorney's representation of the insurer in other cases." Arden, 193 Wn. App. at 747.

While Tank did not squarely address whether retained defense counsel is obligated to disclose the existence of a long-standing relationship with the insurer, several aspects of the opinion indicate the Court contemplated that potential conflicts may arise where such a relationship exists. First, Tank emphasized that retained defense counsel has a broad duty of "full and ongoing disclosure." See Tank, 105 Wn.2d at 388. Tank also recognized "the potential conflicts of interest between insurer and insured inherent in this type of defense," see 105 Wn.2d at 387, and warned that connections between the insurer and retained defense counsel could compromise the insured's interests: "If the outcome of the trial would determine whether coverage exists, and an attorney hired by the insurer conducts a defense while in close communication with the insurer, the defense itself should be closely scrutinized." Id. at 390–91.

Finally, Tank expressly incorporated RPC 1.7 into its criteria for evaluating the conduct of retained defense counsel, suggesting that in some instances — instances not enumerated in Tank — potential conflicts in an ROR may implicate retained defense counsel's duties under RPC 1.7. Thus, while Tank did not *hold* that counsel under these circumstances has a duty to disclose its relationship, it instructed that the "dictates of

RPC 1.7 . . . must be strictly followed,” and *left open* the question of *which* potential conflicts in an ROR might trigger the duty to disclose.<sup>7</sup>

The Court of Appeals also looked to the RPCs, purporting to limit the reach of its holding to “automatic” conflicts under those rules:

Our holding applies only to the argument that a conflict of interest *automatically* exists when an attorney defending under a reservation of rights also represents an insurer. A defense attorney is still subject to liability for breach of fiduciary duty under RPC 1.7(a)(2) if the facts actually show that the attorney’s representation of the insured will be materially limited by the attorney’s responsibilities to or relationship with the insurer.”

Arden, 193 Wn. App. at 748 n.5 (italics in original).

The Court of Appeals mischaracterizes the thrust of RPC 1.7(a)(2). That provision inquires whether 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.” (Italics added). The Court of Appeals fails to address the import of the phrase “significant risk,” inquiring only whether “the *facts actually show* that the attorney’s representation of the insured will be materially limited.” Id. (italics added). Given the ROR setting is “fraught with conflicts,” see Immunex,

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<sup>7</sup> The Court of Appeals also relies on Johnson v. Continental Casualty Co., 57 Wn. App. 359, 361, 788 P.2d 598 (1990), to conclude that no conflict “automatically arises” in an ROR. However, the argument here does not require a finding that such conflicts are “automatic.” The fact that an ROR is “fraught with conflicts,” see Immunex, 176 Wn.2d at 879, is sufficient to trigger retained defense counsel’s duty to disclose a long-standing relationship with the insurer. Additionally, the Johnson opinion addressed the duties of *insurers*, not counsel, and specifically noted there “was no showing that the attorney hired for Johnson did not inform or disclose as required.” Id. at 363.

176 Wn.2d at 879, there is undoubtedly a “significant risk” that counsel with a long-standing relationship with the insurer may be “materially limited” in their ability to represent solely the interests of the insured.

Where potential conflicts exist, RPC 1.7(b) establishes that counsel may nevertheless proceed with representation, if *two* steps are satisfied. First, the attorney must (1) “reasonably believe [the lawyer] will be able to provide competent and diligent representation . . .” and (4) “*each affected client gives informed consent, confirmed in writing . . .*” (italics added). Thus, the rule *presupposes* counsel is satisfied they can prevent potential conflicts from materializing, but *the client must nevertheless consent to the representation*. The Court of Appeals opinion effectively eliminates the requirement of client consent in this context, when there is a potential conflict the lawyer believes will not impair representation. Yet the rule clearly places this decision in the hands of the *client*, not the attorney.

The relevance of the phrase “significant risk” underscores that this inquiry does not require the presence of a fully materialized conflict, but rather looks to the potential for conflicts, and must be made *prior* to undertaking the representation. “Prior consent is important because the client may deem himself without options once the conflict arises and the attorney may not fully explain the ramifications of the conflict because of personal interests.” In re Marriage of Wixom, 182 Wn. App. 881, 903, 332

P.3d 1063 (2014) *review denied*, 182 Wn.2d 1022, 353 P.3d 632 (2015);  
see also Eriks, 118 Wn.2d at 461.<sup>8</sup>

Forsberg makes several claims that miscast the argument presented here. First, it asserts “[t]he Ardens’ position is implicitly based upon a proposition that insurance defense counsel have independent duties to the carrier.” Forsberg Supp. Br. at 14-15. However, the claim here is not that Forsberg had an “independent duty” to serve Hartford’s interests, but rather, that it had a personal interest in maintaining its relationship with Hartford that may influence its representation, thus triggering the duty to disclose. Neither Tank nor the RPCs limit the duties of disclosure to situations involving competing *legal* duties. Indeed, RPC 1.7 explicitly references situations in which representation of one client may be compromised by “responsibilities to another client, a former client *or a third person or by a personal interest of the lawyer.*” (Italics added).

Forsberg also hypothesizes that “[i]f it is the Ardens’ position that they are entitled to an ‘independent counsel’ they select to represent them...and insurers like Hartford must simply pay for such representation, that position is unsupported in Washington.” Forsberg Supp. Br. at 14. Yet

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<sup>8</sup> Mersky v. Multiple Listing Bureau, 73 Wn.2d 225, 437 P.2d 897 (1968) is illustrative for its common law analysis of the duty to disclose owed by a fiduciary. There, the seller of a residence sued the listing agent for breach of fiduciary duty when the agent arranged to sell the property to his sister. The Court held: “It is of no consequence . . . that the breach of [the] duty of full disclosure and undivided loyalty did not involve intentional or deliberate fraud, or did not result in injury to the principal, or did not materially affect the principal’s ultimate decision in the transaction.” *Id.* at 231. The Court warned that under such circumstances, “the temptation and the opportunity to compromise or temper the agent’s obligation to obtain the best and most advantageous bargain for his principal is inescapably and incalculably present, and may be too easily seized upon.” *Id.* at 230.

that argument is not before the Court and is not presented here, and any conclusion reached by the Court to that issue would arguably be dicta. This brief addresses only whether retained defense counsel has a duty to disclose to the insured a long-standing relationship with the insurer.

Forsberg also argues there is no principled way to draw a clear line to determine which relationships must be disclosed, and urges the Court to reject what it terms an “absolute rule” that retained defense counsel in an ROR must disclose a long-standing relationship with the insured. See Forsberg Supp. Br at 11 n.7. Preliminarily, it is worth noting that on the undisputed facts in this case, which include 30-35% of Hayes’ practice involving work from Hartford, the “long-standing” relationship between Forsberg and Hartford appears to be clearly sufficient to trigger the duty. It admittedly may be conceivable, as Forsberg suggests, that others may be *so minimal* as to *not* present a “significant risk” that representation may be “materially impaired.” However, given the critical importance of disclosing potential conflicts, attorneys’ duties “should be construed broadly to protect the public from attorney misconduct.” See Gustafson, 87 Wn. App. at 302-03. In close cases, the “*sheer simplicity* of disclosing the intervening kinship interest to the principal renders the inherent risk (that the agent’s objectivity may be distorted) an unwarranted and unnecessary one for the principal to assume.” Mersky, 73 Wn.2d at 231 (italics added).

Finally, Forsberg warns that the rule presented here may “deprive insurers of the ability to appoint the most highly qualified, experienced defense counsel to represent insureds, something highly desirable from the *insureds’ standpoint*.” Forsberg Supp. Br. at 11 (italics in original). Yet this argument overlooks that the duty to disclose simply places the ultimate decision where it belongs: with the *client*. An insured may opt, for a variety of reasons, to proceed with the representation, but this decision must rest with the *insured* — after *full disclosure*.

**C. Under Tank, Retained Defense Counsel In An ROR Has A Duty To Apprise The Insured Of All Settlement Options And To Give The Insured The Ultimate Choice Regarding Settlement, And The Court Of Appeals Erred In Concluding That Forsberg Is Not Liable For Breach Of This Duty As A Matter Of Law.**

Tank established retained defense counsel’s duties of disclosure regarding settlement matters in the ROR setting:

[A]ll offers of settlement must be disclosed to the insured as those offers are presented. In a reservation-of-rights defense, it is the insured who may pay any judgment or settlement. Therefore, *it is the insured who must make the ultimate choice regarding settlement*. In order to make an informed decision in this regard, the insured must be fully apprised of all activity involving settlement, whether the settlement offers or rejections come from the injured party or the insurance company.

Tank, 105 Wn.2d at 389 (italics added).

The Court of Appeals opinion does not take issue with the rule regarding disclosure of settlement matters announced in Tank. See Arden, 193 Wn. App. at 755. The court also acknowledges that “Forsberg did not

expressly consult with the Ardens or Cushman before rejecting the Duffys' two settlement demands. Forsberg notified Cushman that it would reject the demands, but Forsberg never inquired whether the Ardens were interested in settling the case without Hartford's involvement." Id. at 756. The court nonetheless concludes that "[t]here is no evidence in the record suggesting that if Forsberg had consulted with the Ardens, they would have been willing to fund the settlement themselves," and that "as a matter of law, Forsberg cannot be liable for its failure to confer with the Ardens before rejecting the settlement demands." Id.

In this case, the Ardens' argument rests on the claim that Forsberg *never informed them of their legal options*. In an ROR, an insured may have at their disposal a variety of options, including contributing to settlement or executing a covenant judgment. See also Harris, §17.07 at 17-20 (observing that "[b]y issuing a reservation, an insurer empowers its insured to settle the claim independently, immediately, and without any direct notice to the insurer"). Under Tank, retained defense counsel *must* inform the insured of its options, who then has "the ultimate choice regarding settlement." 105 Wn.2d at 389.

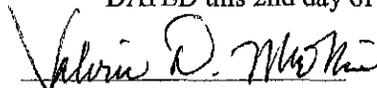
There is simply no way for insureds to rewind the clock and prove what they might have done had counsel fully apprised them of their legal options. Here, the difference between Hartford's maximum valuation of \$35,000 and Duffys' lowest offer of \$40,000 was \$5,000. Ardens allege

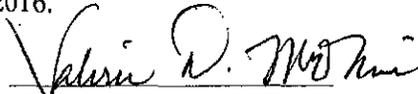
that instead of consulting with them regarding their option to pay the difference and effectuate a settlement, Forsberg complied with Hartford's settlement directions and submitted a counteroffer of \$25,000 (\$10,000 below Hartford's maximum valuation). Such facts, if proven, would constitute a violation of Tank, which requires retained defense counsel to fully advise insureds of their legal options, including the option to contribute to settlement, and instructs that in matters of settlement, insureds have the "ultimate choice." Retained defense counsel should not be able to breach its duty to apprise its clients of their legal options, and then avoid liability by arguing the clients failed to prove they would have acted on legal options of which they were not apprised.<sup>9</sup>

## VI. CONCLUSION

This Court should adopt the arguments advanced in this brief in the course of resolving this appeal.

DATED this 2nd day of December, 2016.

  
VALERIE D. MCOMIE

  
For DANIEL E. HUNTINGTON,

On Behalf of WSAJ Foundation

with authority

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<sup>9</sup> A similar principle is reflected in the rebuttable presumption of harm analysis established in the context of an insurer's bad faith breach of the duty to defend. As the Court recognized in Butler, "[t]he course cannot be rerun, no amount of evidence will prove what might have occurred if a different route had been taken," and "[t]he insured should not have the almost impossible burden of proving that he or she is demonstrably worse off because of [the insurer's actions]." 118 Wn.2d at 390 & 91 (citations omitted). On this reasoning, the Court concluded that "[i]mposing a rebuttable presumption of prejudice relieves the insured of that almost impossible burden." Id. at 390. Significantly, the Court noted that "[t]his reflects the *fiduciary aspects* of the insured/insurer relationship." Id. (italics added). Similar analysis appears to underlie Ardens' disgorgement of fees argument. See Ardens Supp. Br. at 14-16.

# Appendix

West's Revised Code of Washington Annotated  
Part I Rules of General Application  
Rules of Professional Conduct (Rpc)  
Title 1. Client-Lawyer Relationship

Rules Of Professional Conduct, RPC 1.7

RULE 1.7. CONFLICT OF INTEREST: CURRENT CLIENTS

Currentness

(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).

**Credits**

[Amended effective September 1, 1995; September 1, 2006.]

**Editors' Notes**

**COMMENT**

*General Principles*

[1] **[Washington revision]** 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 1.0A(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(1). 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] [Washington revision] 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 1.0A(m)), such representation may be precluded by paragraph (b)(1). See also Washington Comment [38].

*Informed Consent*

[18] **[Washington revision]** 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 1.0A(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] **[Washington revision]** 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 1.0A(b). See also Rule 1.0A(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 1.0A(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.

[Comment adopted effective September 1, 2006; amended effective April 14, 2015.]

Notes of Decisions (87)

RPC 1.7, WA R RPC 1.7

Annotated Superior Court Criminal Rules, including the Special Proceedings Rules -- Criminal, Criminal Rules for Courts of Limited Jurisdiction, and the Washington Child Support Schedule Appendix are current with amendments received through 9/1/16. Notes of decisions annotating these court rules are current through current cases available on Westlaw. Other state rules are current with amendments received through 9/1/16.

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**Cc:** Kevin Hochhalter <KevinHochhalter@cushmanlaw.com>; Jon Cushman <joncushman@cushmanlaw.com>; Phil Talmadge <phil@tal-fitzlaw.com>; Sidney Tribe <Sidney@tal-fitzlaw.com>; Stewart A. Estes <sestes@kbmlawyers.com>; Melissa White <MWhite@cozen.com>; Dan Gunter <dgunter@riddellwilliams.com>; Dan Huntington' <danhuntington@richter-wimberley.com>  
**Subject:** Arden v. Forsberg & Umlauf, P.S. (S.C. # 93207-7)

Dear Ms. Carlson:

On behalf of WSAJ Foundation, a letter request to file an Amicus Curiae Brief and accompanying Amicus Curiae Brief (with Appendix) are attached to this email. Counsel for the parties and other Amicus Curiae are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

Valerie McOmie  
Amicus Co-Coordinator  
WSAJ Foundation  
4549 NW Aspen Street  
Camas, WA 98607  
Tel. (360) 852-3332  
[valeriemcomie@gmail.com](mailto:valeriemcomie@gmail.com)

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