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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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LLOYD HARA, an individual,

Appellant,

v.

KUNATH KARREN RINNE & ATKIN LLC., a Washington company

Respondent.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2023 SEP 23 PM 1:44

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**OPENING BRIEF OF APPELLANT**

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**A. INTRODUCTION**

Appellant, LLOYD HARA (hereinafter “Mr. Hara”) was an at will employee of Respondent KUNATH KARREN RINNE & ATKIN LLC. (hereinafter “KKRA”). Mr. Hara resigned in lieu of being terminated from the company and subsequently signed an agreement (“Agreement”) with KKRA. In consideration for his agreement not to accept employment at a competing firm, as well as his agreement to assume other legal detriments such as to not apply for unemployment, KKRA agreed to make a quarterly payment to Mr. Hara based on management fees earned on two of KKRA’s accounts. KKRA made the payments under the Agreement from 1998 until 2010. After payment stopped, Mr. Hara filed a breach of contract claim. Ultimately, KKRA chose to assert an illegality defense. KKRA alleged that the payments to Mr. Hara under the Agreement were illegal because prior to his departure from KKRA, Mr. Hara had received commissions for soliciting clients on behalf of KKRA without meeting certain registration requirements. KKRA argued at trial that the Agreement called for payments that were in violation of the Washington State Securities Act and Federal Securities Laws.

In this case, there is no dispute that KKRA is in breach of the contract if the contract is legal. Mr. Hara asserts the payments were in consideration of the performance set forth in the Agreement, not for

anything he did before his departure. KKRA also agreed that the payments were made according to the terms of the Agreement and for no other reason. The Court found that while the Agreement was supported by independent consideration, the consideration flowed from illegal activity that occurred prior to his departure from KKRA and prior to his entering into the Agreement. The trial court admitted parole evidence to re-characterize the nature of payments to Mr. Hara under the Agreement and held that he could not enforce the Agreement. This appeal asserts that the Agreement was legal, supported by independent consideration, and must be enforced as a matter of law. Furthermore, it asserts that the trial court erred when it admitted parole evidence to interpret a contract that was otherwise unambiguous, fully integrated, and legal. In any event, even if the parole evidence is considered by this appellate court, said evidence would not in any way impact the legality of the Agreement or Mr. Hara's right to enforce the terms therein.

## **B. ASSIGNMENTS OF ERROR**

1. The trial court erred when it denied Mr. Hara's Motion for Summary Judgment. Should the Court enforce the Agreement where the issues before the court were strictly legal, the Agreement was fully integrated, there was no finding that any term in Agreement was ambiguous, and the Agreement had only one single reasonable interpretation?

2. The trial court erred when it ruled at the conclusion of trial the Agreement was illegal. Is the Agreement enforceable where it

contained legal consideration, no illegal performance or consideration had to be given by either party after the Agreement was entered, and no compensation was owed to Mr. Hara after he left KKRA and before he entered the Agreement?

3. The trial erred when it found that Mr. Hara was being paid for illegal activity. Is there legally sufficient consideration within the terms of the Agreement?

4. The trial court erred when it admitted parol evidence that purportedly showed that Mr. Hara received commission payments during his employment at KKRA. Should parol evidence have been admitted to modify the Agreement and did the evidence support the findings?

## **C. STATEMENT OF THE CASE**

### **1. Testimony of Lloyd Hara**

Mr. Hara was hired by KKRA in 1996. CP 68 (¶3). No written employment agreement was signed by either party and it was Mr. Hara's understanding he was hired to establish a cash management consulting service within KKRA. RP 37:13-38:22. Mr. Hara was an accountant by profession and performed various political, educational, and consulting activities during his career. CP 68-69, RP 31:14-32:21. Mr. Hara had previously served in various accounting roles including as a municipal treasurer for the City of Seattle and had no absolutely no experience in sales. RP 30:18-24; 88:2-3. Mr. Hara's specific cash management services include reviewing banking contracts and analyzing banking expenses, improving cash receipting and billing practices, and examining controlled disbursements. CP 68-69 (¶4).

During his employment, Mr. Hara performed cash management consulting services for KKRA. RP 41:16-20; 80:3-4. He received a base salary with an opportunity for a bonus. RP 40:3-5. Mr. Hara marketed his services as Hara consulting, a division of KKRA and was designated Managing Director of the consulting division. RP 40:13-25. KKRA sent out a press release marketing Hara Consulting. RP 47:11-25; 48:1-8; Appendix B<sup>1</sup>. Mr. Hara billed for his consulting services through KKRA and KKRA collected the receipts. RP 39:3-25; 41:16-20. Mr. Hara did not recall entering into any agreement to receive commission payments. RP 40:6-12. At no time did KKRA advise Mr. Hara that they wanted him to register with the Securities Exchange Commission or the Washington State Department of Financial Institutions. RP 41:3-10.

Prior to joining KKRA, Mr. Hara had professional relationships with the Muckleshoot Indian Tribe (“MIT”) and Northwest Artic Borough (“NAB”). RP 36:12-23; 37: 5-12. Mr. Hara provided consulting services for these clients prior to and during his employment at KKRA. RP 36:12-23; 37: 5-12; 41: 11-22. Mr. Hara continued to consult with MIT and NAB subsequent to his departure from KKRA. RP 95:3-5.

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<sup>1</sup> The trial exhibits are designated in Appellant’s First Supplemental Designation of Clerk’s Papers and Exhibits but has not yet been received by this Court. However, Ex. 5 is a record of review and is attached as an appendix to this brief as a convenience for review of this brief. Ex. 1 and Ex. 13 are also attached.

KKRA began to ask Mr. Hara to make continued introductions between KKRA and his professional network. RP: 45:15-20. Ultimately, KKRA wanted Mr. Hara to become a full-time salesperson. Mr. Hara indicated he was better suited for consulting. *Id.*

In September of 1997, Mr. Hara was informed by KKRA that it wanted to terminate his employment. CP 69 (¶ 5), RP 45:15-20. Mr. Hara signed a letter of resignation dated September 5, 1997 with an effective date of September 19, 1997. RP 50:10-18; Appendix A. He met with an attorney to discuss his rights upon separation from the company. RP 46: 3-7. Mr. Hara had concerns about how his reputation would be treated by KKRA upon his departure in addition to his unemployment benefits and civil rights. RP 46:9-25-47:10. KKRA did not want to pay unemployment benefits. RP 46:21-25.

The parties met to discuss the terms of his departure and the possibility of a future business relationship. CP 69 (¶ 5), RP 53:9-17. KKRA did not want Mr. Hara to work at a competing firm. CP 69 (¶ 5), RP 52:12-18.

Mr. Hara testified that at the time of the negotiation of the Agreement, KKRA owed him no compensation or obligation arising from his employment. RP 51:7-10. Hara and KKRA subsequently entered into a contract (hereinafter “Agreement”) on January 15, 1998. CP 258.

## **2. Terms of the Agreement**

According to the terms of the Agreement, among other things, Mr. Hara agreed not to pursue unemployment benefits and not to seek employment with a competing firm. CP 258 (¶'s 4, 5). KKRA had sole discretion to determine what constituted a competing firm. *Id.* (¶ 5).

As consideration for the waiver of his employment rights KKRA agreed to pay Mr. Hara 3% of the NAB and MIT billings so long as the clients were retained. *Id.* The Agreement contemplated that Mr. Hara would receive the payments in perpetuity so long as he abided by the terms of the Agreement. *Id.*

The Agreement indicated KKRA would help Mr. Hara establish a consulting business by agreeing to have “KKRA pay Hara, upon execution of this agreement, Hara’s share of the collected management fees on those accounts listed in Exhibit “B” at percentages originally established...” *Id.* There was no evidence of any accounts existing under Exhibit B and no payments were made based on these non-existent accounts. RP 54:12-24.

The contract did contemplate a compensation arrangement for future business referrals made by Mr. Hara after he left the company; however he was not required to solicit any new business to receive payments under the agreement and it is undisputed that Mr. Hara did not

engage in any attempt to solicit clients after leaving KKRA. RP 53:18-23; 55:21-56:4.

The Agreement contained an integration clause. CP 260 (¶ 14).

### **3. Testimony of Ned Karren.**

Ned Karren, a partner at KKRA, was the sole witness for the defense. RP 109:17. KKRA is an investment advisor firm that manages approximately one billion dollars of client funds. RP 110:7-8. Mr. Karren testified that KKRA hired Mr. Hara early in 1996 to access his professional network and to secure new clients. RP 110: 17-20 No written employment agreement was executed and KKRA paid Mr. Hara a salary. RP 111:4-10. Mr. Karren believed that Mr. Hara had no relationship with either MIT or NAB prior to his employment at KKRA. RP 112:8-13. According to Mr. Karren, Mr. Hara had nothing to do with bringing in MIT as a client to KKRA but was given partial credit for bringing in NAB as a client. RP 116: 15-22.

At trial, Ned Karren testified that Mr. Hara was paid “commissions” while he was employed by KKRA. RP 113:2. Mr. Karren testified that Mr. Hara was paid a commission on the MIT account because KKRA was trying to be encouraging and supportive and especially helpful in the separation. RP 116:23-25. NAB left KKRA as a client in June of 2013 but MIT remained as a client. RP 117:5-8. Mr.

Karren set forth no details about the when the alleged oral agreement to pay commissions was made, who made it, or what the terms of the agreement were. No written agreement existed between Mr. Hara and KKRA for KKRA to pay Mr. Hara commissions. RP 122:1-6. Mr. Karren testified that if Mr. Hara ceased working for KKRA, the commission payments would no longer be paid and Mr. Hara would cease receiving any benefits or compensation whatsoever. RP 124:12-16. Mr. Karren testified that KKRA could not stand the expense of paying Mr. Hara a salary and benefits without accounts coming in. RP 126:20-24. KKRA generated approximately five million dollars in fees from the MIT account. RP 133:11-15. Mr. Karren testified that KKRA agreed to pay 3% of the NAB and MIT billings to Mr. Hara after he left to make the departure as smooth and helpful as possible. RP 114:10-16.

Mr. Karren testified that Mr. Hara did not bring in any clients to KKRA after he left the firm. RP 137: 5-6. Mr. Karren testified that in order to receive payment under the Agreement, Mr. Hara would have to refrain from employment with a competing firm and from disparaging KKRA. RP 138:5-25. Mr. Karren also testified that both Mr. Hara's waiver of unemployment benefits and his agreement to accept a non-compete clause had value to KKRA. RP 134:17-135: 16; 140:1-23.

During re-direct of Mr. Karren, KKRA's counsel moved to admit an exhibit purporting to document commission payments made to Mr. Hara during his employment at KKRA. The document had not been listed on the Joint Statement of Evidence but had allegedly been emailed to Mr. Hara's counsel. RP 142:23-25; 144:1-25; 144:1-25; 145:1-15. Mr. Hara's attorney objected to the admissibility of the exhibit. *Id.* The court admitted the documents as Ex. 13. RP 148:19-23.

Six weeks prior to trial at his deposition, Mr. Karren testified he did not recall Mr. Hara receiving commission payments from KKRA. RP 120:17-19; 124:3-7. Ex. 13 is what was relied upon by KKRA to suggest commission payments of type had been made.

#### **4. KKRA made payments until 2010.**

KKRA paid the amounts due to Mr. Hara under the agreement from January 1998 until 2010. CP 69 (¶ 7). After KKRA stopped making payments Mr. Hara contacted KKRA partner Mike Kunath to resolve the matter, but Mr. Kunath refused to pay Mr. Hara the arrearage unless Mr. Hara agreed to void the Agreement going forward. RP 60:21-25.

#### **5. Litigation begins**

Mr. Hara filed this breach of contract lawsuit on August 13, 2012. CP 1-3. At one point of the litigation KKRA included a letter sent to Mr. Hara on September 5, 2012 indicating it "did not want to litigate" and "get

its contract with Mr. Hara back into conformance.” CP 249-250. KKRA made a “full tender of all amounts due under the terms of the contract.” CP 249-250. Subsequently, KKRA revealed that this tender was based on inaccurate information and was insufficient. CP 46. KKRA, through its new counsel filed a Motion to Withdraw the Funds that it had previously deposited into the court registry however, the trial court denied the motion. CP 55.

KKRA did not report to either the SEC or the DFI that it believed it had made illegal payments to Mr. Hara. RP 131: 14-22.

#### **6. Trial proceedings and Court’s ruling.**

Mr. Hara moved to exclude parol evidence of the prior oral at will employment agreement between him and KKRA. CP 125-133; RP 9-12. At the time of the motion, KKRA had not presented evidence of any other agreement, including an agreement for a specific commission structure. The court denied the motion. RP 12:21-13:5. At the conclusion of the trial, the trial court issued an oral ruling finding that there was independent consideration to support the Agreement but that that it directly flowed from an illegal employment relationship. RP 200:22-25.

The court found that Mr. Hara did engage in legal employment as a consultant at KKRA but that he was also compensated to secure clients while at KKRA and thus worked as an unregistered investment advisor

under *RCW 21.20.005(9)*. The Court found that Mr. Hara was barred from enforcing the Agreement under *RCW 21.20.430(5)*. RP 197:20-25; 198:1-3, 21-23.

### C. ARGUMENT

#### 1. **THE AGREEMENT CONTAINED NO ILLEGAL CONSIDERATION AND CONTEMPLATED NO ILLEGAL CONDUCT AND IS ENFORCEABLE AS A MATTER OF LAW.**

Review of an order on summary judgment concerns the facts submitted and all reasonable inferences from those facts in a light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is proper if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *CR 56(c)*.

Review of a trial court's findings of fact and conclusions of law is a two part test. *Landmark Dev., Inc. v. City of Roy*, 138 Wash.2d 561, 573, 980 P.2d 1234 (1999).

The first test is whether the trial court's findings of fact were supported by substantial evidence in the record. If they are, the second test is whether those findings of fact support the trial court's conclusions of law. *Landmark Dev., Inc.*, at 573.

“‘Substantial evidence’ exists when there is a sufficient quantum of proof to support the trial court's findings of fact.” *Org. to Preserve*

*Agric. Lands v. Adams County*, 128 Wash.2d 869, 882, 913 P.2d 793 (1996) (citing *In re Sego*, 82 Wash.2d 736, 739–40, 513 P.2d 831 (1973)).

Contract interpretation is a matter of law when the interpretation does not depend on extrinsic evidence, or the extrinsic evidence permits only one reasonable interpretation. *TransAlta Centralia Generation, LLC v. Sickelsteel Cranes, Inc.*, 134 Wash.App. 819, 826–27, 142 P.3d 209 (2006).

The trial court erred initially in failing to grant Mr. Hara’s motion for summary judgment and again by entering judgment for KKRA following trial. The basic error in both instances was failing to find that the Agreement did not rely upon Mr. Hara’s term of employment for either consideration or performance. Even if the Court accepts the rulings by the trial court concerning the admission of parol evidence, in whole or in part, such evidence does not establish that the Agreement is illegal.

Mr. Hara reserves his discussion regarding the alleged oral employment agreement, solicitation activities, and alleged commission payments for Section 3 *infra* relating to the admission of evidence. For purposes of discussion here Mr. Hara will assume *arguendo* that the evidence was properly admitted.

**a. There is no dispute the Agreement was breached when KKRA stopped making payments to Mr. Hara.**

A contract is generally defined as a promise or a set of promises the breach of which the law provides a remedy, or the performance of which the law in some way recognizes as a duty. *St. John Medical Center v. State ex rel. Dept. of Social and Health Services*, 110 Wash. App. 51, 38 P.3d 383 (Div. 2 2002); *Restatement (Second) of Contracts § 1*. A contract may consist of a single promise by one person to another or of any number of other combinations of persons and promises in a single transaction. *Restatement (Second) of Contracts § 1, Comment a* (1981).

A contract requires offer, acceptance and consideration. *Citizens for Des Moines, Inc. v. Petersen*, 125 Wash. App. 760, 106 P.3d 290 (Div. 1 2005), reconsideration granted in part, (Oct. 13, 2005) and as corrected, (Oct. 13, 2005) and review denied, 157 Wash. 2d 1014, 139 P.3d 350 (2006) (trial court erroneously found contract where no consideration was exchanged). A contract claim is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. *Alpine Industries, Inc. v. Gohl*, 30 Wash. App. 750, 637 P.2d 998 (Div. 1 1981), opinion amended, 645 P.2d 737 (Wash. Ct. App. Div. 1 1982), review denied.

KKRA entered into the Agreement with Mr. Hara on January 15, 1998. The terms of the contract included a provision for payments to be made to Mr. Hara on an ongoing basis. In exchange, Mr. Hara agreed to waive certain legal rights as well as potential employment opportunities that would otherwise be available to him. It is undisputed that Mr. Hara has performed all the required obligations imposed upon him under the terms of the Agreement. Despite some initial claims that Mr. Hara was in breach of the Agreement, KKRA conceded that its sole defense was illegality.

**b. The agreement is fully integrated and employment had terminated ending any alleged prior obligations.**

The *quid pro quo* of the Agreement was an exchange of payments by KKRA for Mr. Hara's waiver of certain legal and economic rights. CP 258-261. These rights included seeking employment with a competing firm and granting KKRA sole discretion in determining what constitutes a competing firm. CP 258 (§ 5). Mr. Hara had already concluded his employment with KKRA by the time the Agreement was signed.

Washington is a "terminable-at-will" state, and such employment may be terminated by either the employer or the employee at any time, with or without cause. *Bulman v. Safeway, Inc.*, 144 Wash. 2d 335, 340, 27 P.3d 1172, 1174 (2001). An employer and employee in Washington

may modify an at-will employment relationship if they create an express contract. *Blinka v. Washington State Bar Ass'n*, 109 Wash. App. 575, 36 P.3d 1094 (Div. 1 2001). Oral assurances of continued employment do not create an express contract. *Roberts v. Atlantic Richfield Co.*, 88 Wash. 2d 887, 568 P.2d 764 (1977).

All of the testimony and evidence in the pleadings on summary judgment and at trial demonstrated that KKRA's obligation to pay Mr. Hara as an employee, including any commissions, had terminated on the effective date of his resignation. RP 50:10-51:10, 149:10-19. No contrary evidence was presented.

The parties agree that Mr. Hara no longer worked for KKRA effective September 19, 1997 per a letter of resignation and that any financial obligations arising from his employment previously owed to him had ceased following his resignation. CP 261; RP 75:21-76:24, 124:8-14. The Agreement was executed on January 15, 1998.

As an at-will employee with no governing employment contract, the uncontroverted evidence was that Mr. Hara's employment and KKRA's obligations to him as an employee had terminated, as demonstrated by the words of the written Agreement and the testimony of the parties. There are no grounds to conclude as the Court did that the independent consideration in the Agreement "flows directly" from the

alleged illegal employment that occurred prior to the execution of the Agreement. RP 200:20-201: 5. The Court's erroneous conclusion was not based on any evidence in the Agreement. The cornerstone of the decision was that the Agreement could not be severed from the oral employment Agreement and the Court used evidence from the previous employment arrangement to render the Agreement illegal.

**c. Independent consideration supports the Agreement.**

The Court's severability analysis was incorrect. An agreement will be enforced, even if it is incidentally or indirectly connected with an illegal transaction, provided it is supported by an independent consideration, or if the plaintiff will not require the aid of the illegal transaction to make out his case. *Sherwood & Roberts-Yakima, Inc. v. Leach*, 67 Wash. 2d 630, at 638, 409 P.2d 160, (1965).

The evidence, testimony, and factual findings of the trial court all establish that there was consideration distinct from the alleged misconduct during employment. As such, the undisputed evidence is that KKRA did not pay Mr. Hara for services as an investment adviser representative under the Agreement. No evidence was presented, nor did the defense assert, that Mr. Hara acted as an investment advisor representative after he left KKRA.

The Court in *Leach* reviewed a contract that it found to have arisen out of an illegal transaction, and refused to enforce the contract because it **failed for lack of consideration**. (Emphasis added) *Id.* The Agreement in this case is not a contract for a “mere naked promise” that the *Leach* court described as failing to provide an independent basis of consideration. To the contrary, according to the plain language of the contract, there was consideration separate and distinct from any consideration related to the oral employment agreement. Without question there is independent consideration in the Agreement. Alternatively, the Agreement requires no aid of an illegal transaction to be enforceable.

**d. The independent consideration is valid.**

The *Restatement (Second) of Contracts* states:

- (1) To constitute consideration, a performance or a return promise must be bargained for.
- (2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
- (3) The performance may consist of
  - (a) an act other than a promise, or
  - (b) a forbearance, or
  - (c) the creation, modification, or destruction of a legal relation.

*Restatement (Second) Of Contracts § 71(1)-(3)(1981).*

The parties engaged in negotiation following Mr. Hara's resignation. RP 48:9-22; 113:10-114:16. The plain language of the Agreement provides for performance (primarily forbearance on the part of Mr. Hara from seeking employment at a competing firm or unemployment benefits) and Mr. Karren acknowledged that the performance of Mr. Hara had value to KKRA. CP 258-261; RP 134:24-135:16. There is no legitimate factual dispute that the Agreement contains legally sufficient consideration for a valid contract under Washington law requiring absolutely no reliance upon any consideration arising from Mr. Hara's prior term of employment.

There are four circumstances in which a contract will fail for lack of consideration. First, a promise to make a gift lacks consideration. *Oman v. Yates*, 70 Wash. 2d 181, 422 P.2d 489 (1967). Second, nominal consideration is inadequate based on lack of bargaining, and unenforceable. *Rainier Nat. Bank v. Inland Machinery Co.*, 29 Wash. App. 725, 631 P.2d 389 (1981). Third, a moral obligation arising solely from ethical motives and unconnected with any legal obligation or with the receipt of material benefits is inadequate. *Orsborn v. Old Nat. Bank of Washington*, 10 Wash. App. 169, 516 P.2d 795 (1973). Fourth, a performance or a promise to perform a pre-existing duty does not

constitute consideration. *Huberdeau v. Desmarais*, 79 Wash. 2d 432, 486 P.2d 1074 (1971). Employment contracts are governed by the same rules as other contracts. *Kloss v. Honeywell, Inc.*, 77 Wash. App. 294, 890 P.2d 480 (1995). None of these principles apply to the facts of this case.

As for the consideration within the Agreement, Mr. Hara had various concerns about the propriety of his discharge, not among them was the continuation of commission payments. RP 46:8-47:4. Mr. Hara had economic value to KKRA prior to his employment so it is reasonable to surmise that he retained such value both to KKRA and potential competitors. The payments to be made under the Agreement are calculated by way of a price setting mechanism (three percent of billings) for this perceived value. The evidence was that the MIT account has generated \$5,000,000.00 in fees since its inception. RP 133:11-15. It is simply a rational and sensible choice that the parties would tie the payments to clients that Mr. Hara had an ongoing relationship with. MIT and NAB were the clients he was best positioned to persuade to leave KKRA should he take employment at a competing firm.

Mr. Hara had an established consulting relationship with both NAB and Muckleshoot. RP 36:9-17. Therefore, had he chosen to seek employment with a competing firm there existed the strong possibility that the clients could be lost by KKRA. For Mr. Hara, the contract on which he

sues is a contract of forbearance and he seeks compensation for actions after signing the Agreement and nothing from beforehand.

**e. Aid of the alleged misconduct is unnecessary to enforce the Agreement**

It is the contention of KKRA, and the decision of the trial court, that Mr. Hara's activities during his term of employment were illegal and provided the consideration in the written Agreement. However, there is simply no way to characterize these payments for anything besides what is evidenced in the Agreement. There was no testimony to support a finding that KKRA was making payments under the Agreement to Mr. Hara for securing clients regardless of what happened during his employment. It is undisputed that any payments owed by KKRA to Mr. Hara prior to his departure ceased after Mr. Hara left KKRA. KKRA never argued that the payments to Mr. Hara under the Agreement were for solicitation activities. Thus, KKRA asserted illegality while simultaneously never claiming that the payments were for illegal activity. As a matter of logic and ethics this position is untenable. Regardless, the Agreement is not illegal as the consideration found within is independent and does not rely on any prior misconduct. *Melton v. United Retail Merchants of Spokane*, 24 Wash.2d 145, 163 P.2d 619 (1945)(Court found contemporaneous and related illegal oral agreement did not make distinct written contract illegal.);

*Central Labor Council of Tacoma v. Young*, 136 Wash. 550, 240 P. 919 (1925)(suit to recover proceeds from illegal gambling allowed under new and independent contract); *Standard Furniture Co. v. Van Alstine*, 31 Wash. 499, 72 P. 119 (1903).

Washington courts have announced that Washington adheres to the United States Supreme Court's decision on illegal contracts contained in *Planters' Bank v. Union Bank*, 16 Wall. 483, 21 L. Ed. 473 (1872) a portion of which reads as follows:

'Such a contract would have been illegal. But when the illegal transaction has been consummated, when no court has been called upon to give aid to it, when the proceeds of the sale have been actually received, and received in that which the law recognizes as having had value, and when they have been carried to the credit of the plaintiffs, the case is different. The court is there not asked to enforce an illegal contract. The plaintiffs do not require the aid of any illegal transaction to establish their case. It is enough that the defendants have in hand a thing of value that belongs to them. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin.'

*Planters*, at 920-921.

Mr. Karren was asked on multiple occasions why the payments were made to Mr. Hara after he left KKRA. In no instance did he state that the payments made under the written Agreement were compensation

for Mr. Hara securing any clients or for the past performance of solicitation activity.

Interestingly, based on Mr. Karren's testimony it appears that his claims that KKRA paid Mr. Hara commissions while he worked at KKRA would fall within the category of a gift. No credit was given to Mr. Hara for bringing in MIT. RP 116: 15-22. According to Mr. Karren's testimony, Mr. Hara was to be paid commissions on clients he brought it in. RP 112:22-24. As a result he was owed nothing as commission per the terms of the alleged oral employment agreement. Mr. Karren also testified that any obligation to pay Mr. Hara had terminated upon his resignation. The parol evidence showed Mr. Hara never received any commissions from NAB while he was employed. Nevertheless, any payments made to Mr. Hara during his employment ceased after he left the firm and there is no evidence that any commission payment were made after he left.

Mr. Hara is not seeking to enforce payment for delivering clients to KKRA, instead he is seeking to enforce payments according to the terms of the Agreement, including forbearing from employment at another investment firm.

The trial court's rulings assume that some portion of the payments under the written Agreement related to the professional performance of Mr. Hara during his term of employment at KKRA. There was no

evidence suggesting anything other than that these payments were made in contemplation of future activity, none of which was by its terms unlawful. The *quid pro quo* of the written Agreement was that Mr. Hara would not seek employment at a competing firm and KKRA would make payment in exchange for the loss of this financial opportunity by Mr. Hara. During the prime period of his career, Mr. Hara agreed to forego accepting a position with a competing firm so that KKRA would have assurances that he would not participate in KKRA losing clients that ultimately generated in excess of at least five million dollars of fees. KKRA's attempts to revise the arrangement is a transparent attempt to avoid payment and nothing more, as evidenced by their lack of disclosure to relevant regulatory authorities. RP 131:14-19.

**f. The Agreement is not dependent upon or related to any illegal employment agreement or payment that preceded the Agreement. Nevertheless, under a severability analysis, the Agreement remains enforceable.**

Again, Mr. Hara is not suing for any event or occurrence during or arising his term of employment, he is suing on a contract signed in January of 1998 and his performance in the sixteen years following. The trial court was concerned about the allegations that Mr. Hara had improperly performed solicitation activities while employed with KKRA. However, though Mr. Hara objects to the use of this evidence on several grounds, the

ultimate resolution of these evidentiary issues does not impact the merits of his position.

This Court expanded upon *Leach* in the companion case *Sherwood & Roberts-Yakima, Inc. v. Cohan*, 2 Wash.App. 703, 469 P.2d 574 (1970)

stating the general rule of severability as follows:

Though variously stated, the authorities are in general agreement that if the promise sued upon is related to an illegal transaction, but is not illegal in and of itself, recovery should not be denied, notwithstanding the related illegal transaction, if the aid of the illegal transaction is not relied upon or required, **or** if the promise sued upon is remote from or collateral to the illegal transaction, **or** is supported by independent consideration. Considered together, these various tests form what may be termed the 'doctrine of severability.' This doctrine finds consistent support in the decisions of the Supreme Court of our state. Beginning with *McDonald v. Lund*, 13 Wash. 412, 414, 43 P. 348 (1896)...

*Cohan* at 710 (emphasis added).

At trial, KKRA placed great reliance upon the analogy that a contract founded upon gambling debts must be held illegal and unenforceable. However, while this is generally true, the analogy breaks down once it is realized that this is not an Agreement for unlicensed investment advisor representative activities or payment for such activities.

A contract between a gambler and bookmaker is illegal because it is solely concerned with gambling activity. *Cooper v. Baer*, 59 Wash.2d at 763, 370 P.2d 871 (1962)("It is conceded by the appellant that the contract

was in violation of RCW 9.47.010, making the operation of a gambling game illegal.”); *Waring v. Lobdell*, 63 Wash.2d 532, 387 P.2d 979 (1964) (remanded to determine whether activity under contract sued upon was illegal.). This was also the finding in *Leach*, where the conditional sales contract and referral agreement were construed to be a lottery in violation of RCW 9.59.010.<sup>2</sup>

The gambling analogy does not apply where the contract sued upon is not for illegal activity and is supported by an independent basis of consideration. *McDonald*, at 416 (“Again, this is not a case to enforce any illegal contract, but it is to assert title to money which was accumulated under such illegal contract. If the plaintiff here had brought an action against the defendant for not complying with his contract in running these games, of course it would fall within the rule claimed by the respondent; but here the real contract on which he sues, it seems to us, is a contract of deposit.”) The crucial point recognized by the Supreme Court of Washington in *McDonald*, and this Court in *Cohan*, is that once the prior illegal agreement had ceased then recovery is allowed provided there is new consideration to underlie a new agreement.

As the trial court acknowledged Mr. Hara proved that there was “independent consideration” in this matter, which the trial court then

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<sup>2</sup> This provision was subsequently repealed by the legislature.

found to be “insufficient” to allow enforcement. RP 200:23; RP 201:23-202:2. However, this is not the correct interpretation or application of *McDonald*, *Cohan*, or the other cases concerned with illegal contracts or an appropriate conclusion given the lack of evidence to support the consideration was anything other than what was written. *See e.g. Melton*; *Central Labor Council of Tacoma*; *Thomas v. Dower*, 162 Wash. 54, 57, 297 P. 1094 (1931)(“The cases of [*McDonald*], and [*Central Labor Council*], relied on by the appellant, present a different question, in that in each of those cases the illegal contract had been terminated, and the court was not called upon to decide an action based upon such a contract, but only to render a judgment against one for an amount which the parties had mutually agreed upon in a final settlement.”); *Standard Furniture Co.*, 31 Wash at 503(“If [appellant] wrongfully obtained the possession of the property from Lou Mehaffey and Emma Norton, the question as to how they came into possession of it, or the purposes for which they purchased it, can make no difference in this case. That transaction is closed.” at 503); *Daniel v. Daniel*, 116 Wash. 82, 86, 198 P. 728, 27 A.L.R. 177; *Wakefield v. Hughes*, 149 Wash. 135, 270 P. 299 (1928)(“Even though the first contract was void, the second was, nevertheless, a valid undertaking.” at 137.).

As in *Cohan* Mr. Hara is not basing his suit on his, or KKRA's, illegal conduct or agreements. The *Cohan* opinion described the basis of recovery in such circumstances:

Even though the money claimed by the plaintiff in *McDonald* constituted actual proceeds of an illegal contract, involving gambling, between the parties, the recovery was permitted on the ground that the action was not founded upon the illegal contract nor brought to enforce any of its conditions, but on a separate, independent contract.”

*Cohan*, at 711.

The *Cohan* court further provided the distinction between an unenforceable unlawful contract and an enforceable independently supported contract arose because “the fact that the conditional sale contract may not be lawfully performed does not make either the warranty or the guarantee agreements illegal. They stand on their own footing.” *Cohan*, at 717. The basic test then is whether the Agreement in this case stands on its own feet under the law of contract as containing adequate and legal consideration. As set forth above there was unquestionably ample consideration to support the Agreement. However, parol evidence was used to obscure this fact.

With regard to contract interpretation, if an agreement can be read so that either a legal or illegal meaning can be attributed to it, the interpretation giving the agreement a legal meaning will be preferred.

*Calamari & Perillo, Contracts* § 22-2, at 850 (5th ed. 2003). The trial court found that Mr. Hara had engaged in activities both legal and illegal during his term of employment with KKRA. RP 197:20-25; 198:1-3. Similarly, the evidence concerning commission payments to Mr. Hara does not show that the Agreement is illegal.<sup>3</sup> Neither party had any belief that the payments under the Agreement were for solicitation activities, making the fact of what each party called them irrelevant.<sup>4</sup> Even if a severability analysis were required of the prior oral agreement for commissions, if it existed,<sup>5</sup> for solicitation activities, Mr. Hara's claims do not rely or derive from such activities and the new Agreement was supported by new consideration. The Court held that the consideration flowed from the illegal activity. However, this particular ruling fails to acknowledge that the alleged oral agreement to pay illegal commissions had terminated and KKRA had no obligation to pay further commissions. It was only Mr. Hara's new consideration (which is indisputably legal) in the written Agreement that obligated KKRA to pay Mr. Hara.

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<sup>3</sup> Again, Mr. Hara maintains that this evidence was improperly before the trial court, however there is insufficient evidence that these payments were themselves illegal and *no evidence linking them to any prior agreement*, oral or otherwise, entered by the parties in violation of state or federal law aside from Mr. Karren's contradictory testimony.

<sup>4</sup> Mr. Hara only raises this issue because of KKRA's assertions regarding his Public Disclosure documents during trial and notes on checks. As stated by Mr. Hara his label had little to do with a legal conclusion and was simply parroting what was already written. RP 58:23-59-18, 75:17-20.

<sup>5</sup> Mr. Hara maintains there was no evidence of this prior agreement, however for the limited purpose of this discussion the existence of such an agreement will be taken as established.

**g. There are no improper performance conditions in the Agreement.**

The ruling of the trial court was based upon the premise that Mr. Hara was receiving compensation for activities during his employment and additionally that he could not legally solicit clients on behalf of KKRA in the future. Both of these premises are incorrect.

First, as discussed above Mr. Hara had no need to make any claim from his term of employment to support the Agreement. Second, there is nothing that would have precluded Mr. Hara from registering or otherwise soliciting clients in compliance with the law for KKRA or any other investment advisory firm in the future. As a result nothing contained within the Agreement, including the consideration underlying the Agreement, required resort to any illegal conduct.

Any instances of prior illegal conduct do not invalidate the written Agreement if it has no bearing on the conduct required under the Agreement. Finding to the contrary conflates the disputed pre-Agreement activities with Mr. Hara's undisputed post-Agreement activities under the Agreement. The simplest manner to demonstrate the flaw in this reasoning is the following hypothetical: If Mr. Hara had proceeded to gain employment with another investment advisory firm was KKRA entitled to terminate payments? The answer under the Agreement is

obviously “Yes” as KKRA had sole discretion to make this determination. The basis for the termination would be wholly dependent upon post-Agreement activities.

Additionally, the Court based its ruling upon the premise that “Mr. Hara agreed, for a percentage of the management fees to NAB and MIT, not to compete in activity it was illegal for him to be involved in at all as an investment security adviser.” RP, 200:25-201:4. This is an absolutely erroneous statement. While Mr. Hara was not registered when he worked at KKRA or at any time thereafter, nothing precluded him from registering at any point in the future if he elected to solicit clients, a fact that is not in dispute. The trial court’s assumption that the Agreement left open the possibility of Mr. Hara engaging in future in solicitation activities necessarily made the Agreement illegal is wrong. Nothing prohibited Mr. Hara from registering with the necessary authorities. Thus, under the written Agreement, there was nothing precluding Mr. Hara from lawfully seeking employment at another investment advisory firm and soliciting consulting clients for investment advisory services, except surrendering the payments from KKRA.

The only place in the Agreement where any referral activities are mentioned is in Paragraph 6, however the terms required an additional subsequent agreement to be created by the parties. CP 259 (¶6). Leaving

open the possibility of future business relationship and contemplating an additional written agreement is not illegal, especially where no performance is actually required. Furthermore, KKRA agreed at the conclusion of trial that this provision was not illegal. RP, 184:7-9.

Mr. Karren acknowledged that if Mr. Hara were registered any future referral resulting in payment would be legal. RP 137:10-21. The status of Mr. Hara's, or Hara Consulting's, registration is beyond the scope of the Agreement. In any event, Mr. Hara has not engaged in such activity and all he need do to receive payment is not compete with KKRA. RP 138:1-25. The trial court erroneously ruled that any future solicitation by Mr. Hara would have been illegal.

**2. THE EVIDENCE DID NOT SUPPORT ANY CONCLUSION OF LAW THAT THE AGREEMENT VIOLATED ANY STATE OR FEDERAL LAW.**

Pursuant to RAP 10.4(c) Mr. Hara assigns error the following Findings of Fact by the trial court on March 11, 2014:

5. Hara was employed by KKRA in 1996 and 1997. *The original employment contract was oral.*
6. *While employed by KKRA, Hara's work included both consulting, through Hara Consulting, and soliciting new clients for KKRA. While employed by KKRA, Hara was paid both a salary and commissions. The commissions were for clients that Hara participated in procuring for KKRA.*
7. *On behalf of KKRA, Hara successfully solicited the Northwest Arctic Borough and also had some*

*involvement with obtaining the Muckleshoot Nation as a client, although negotiations with the Muckleshoots were in progress by the time Hara joined the firm. As indicated in Exhibit 10, Hara also solicited a number of other entities on behalf of KKRA. These activities established that Hara was serving as an Investment Advisor Representative while employed by KKRA.*

*In addition to the above findings and conclusions, the court incorporates by references its oral findings and conclusions, entered on February 12, 2014.*

CP 312, 315. Italics indicate the language of the trial court in dispute.

Mr. Hara assigns error the following Conclusions of Law by the trial court on March 11, 2014:

3. *While employed by KKRA, Hara was an “investment adviser representative” as defined by RCW 21.20.005(9).*

6. *The oral employment contract violated RCW 21.20.040(3) because it required KKRA to pay Hara for services as an investment adviser representative, when he was not registered.*

7. *Although the Agreement recites consideration other than Hara’s work as an Investment Adviser Representative, the consideration was all tied to his solicitation activities with KKRA. Compensation under the Agreement was determined as a percentage of the commissions earned by KKRA in managing the funds of Northwest Arctic Borough and the Muckleshoot Nation. (Section 5) Significantly, Section Six of the Agreement provides for additional payments, if Hara successfully referred new management clients to KKRA-activities that very likely amount to solicitation activity under RCW 21.20.005(9)(d)-and hence illegal unless Hara first had registered. After considering the factors in *Sherwood & Roberts-Yakima, Inc. v. Cohan*, 2 Wash.App. 703, 712, 469 P.2d 574, 579 (1970), the Court*

*concludes that the percentage compensation provision in the Agreement is not severable from the original oral employment agreement.*

12. KKRA is subject to SEC Rule 206(4)-3, it would be unlawful for KKRA to “pay a cash fee, directly or indirectly, to [Hara] with respect to solicitation activities” unless the exceptions to the rule were satisfied. *No evidence was introduced at trial that the Agreement was exempt from the general rule. The payments under the Agreement were with respect to solicitation activities. Thus, continuing payments under the Agreement would result in KKRA being in violation of SEC Rule 206(4)-3.*

13. *The Agreement is unenforceable under both State and Federal law.*

14. *Judgment shall be entered dismissing Hara’s Complaint with prejudice.*

*In addition to the above findings and conclusions, the court incorporates by references its oral findings and conclusions, entered on February 12, 2014.*

CP 314-315. Italics indicate the language of the trial court in dispute.

The analysis under both state and federal law is in fact quite simple despite KKRA’s attempts to intentionally confuse the issues – the fact is there is not even an allegation of unlicensed activity as an investment advisor representative after September 1997 under Washington law nor is KKRA paying a fee for the “solicitation activities” covered by federal or state law.

**a. The Washington State Securities Act is inapplicable to the Agreement.**

The current definition<sup>6</sup> of investment adviser representative is the following:

- ...any partner, officer, director, or a person occupying similar status or performing similar functions, or other individual, **who is employed by or associated with an investment adviser, and** who does any of the following:
- (a) Makes any recommendations or otherwise renders advice regarding securities;
  - (b) Manages accounts or portfolios of clients;
  - (c) Determines which recommendation or advice regarding securities should be given;
  - (d) Solicits, offers, or negotiates for the sale of or sells investment advisory services; or
  - (e) Supervises employees who perform any of the functions under (a) through (d) of this subsection.

*RCW 21.20.005(9)* (Emphasis added).

When the Agreement was executed, Mr. Hara was not “retained or employed” or “employed by or associated with” KKRA, having resigned effective September 19, 1997. Thus, Mr. Hara did not meet either definition of Investment Adviser Representative. Any argument that he met the definition when the contract was executed is a nonstarter. The

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<sup>6</sup> *RCW 21.20.005* was amended subsequent to the signing of the Agreement by the parties. The code in effect at the time the Agreement was executed defined Investment Adviser Representative as follows:

“Investment adviser representative” means a person **retained or employed** by an investment adviser **to solicit clients or offer the services of the investment adviser or manage the accounts of said clients.**”

*RCW 21.20.005* as amended by *Laws 1994, ch.256, § 3* (emphasis added).

quarterly payments do not amount to an association as contemplated under the WSSA as Mr. Hara is not performing any covered activities.

The other parts of *RCW 21.20* cited by KKRA are similarly inapplicable. The basic reason is that the purpose of the WSSA is to “protect investors from speculative or fraudulent schemes of promoters.” *Brin v. Stutzman*, 89 Wn. App. 837-38, 951 P.2d 291, 306-07, (1998). For the WSSA to apply to Mr. Hara after January 1998, he must be engaged in some fashion in the business of advising others regarding securities.

The trial court’s reliance on two cases concerning *RCW 21.20* was grossly misplaced. One case concerned applications for cellular phone licenses and the lawsuit was based upon an agreement that was in fact a contract for the sale of securities. *Cellular Engineering, Ltd. v. O’Neill*, 118 Wash.2d 16, 820 P.2d 941 (1991). The other case concerned a corporate merger agreement entered in violation of *RCW 21.20* where the appeal concerned only applicability of certain equitable defenses. *Go2net, Inc. v. Freeyellow.Com, Inc.*, 158 Wash.2d 247, 143 P.3d 590 (2006).

Here the contention is that Mr. Hara and KKRA entered into an oral employment agreement, or commission agreement, that was in violation of *RCW 21.20*. However, the written Agreement sued upon is not any alleged oral agreement and the entire analysis comparing this matter to *O’Neill* (suit on an illegal securities contract) and *Go2net* (inducement

to contract was based upon law violation and equitable defenses were unavailable) collapses because neither case involves a second contract with distinct consideration.

Even if the receipt of payments alone was sufficient to establish that Mr. Hara is “associated with” KKRA, which is a dubious proposition given the requirements of *RCW 21.20.080*, there is no evidence of any of the additional conduct required under subsections (a)-(e) of *RCW 21.20.005(9)* to bring him within the definition of Investment Adviser Representative in the past 16 years, making *RCW 21.20.430(5)* moot.

**b. Federal law is not relevant or applicable.**

No allegation was made and no inference can be drawn based on the language of the Agreement that Mr. Hara is required to engage in solicitation or investment adviser representative activities upon signing the Agreement. Thus, Mr. Hara is not being paid commissions for engaging in solicitation activities. He is being paid in accordance with the terms and conditions found within the four corners of the Agreement.

KKRA’s federal illegality argument stems from *15 U.S.C.A. § 80b-6* which states in pertinent part:

It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly--  
(1) to employ any device, scheme, or artifice to defraud any client or prospective client;

(2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;

(3) acting as principal for his own account, knowingly to sell any security to or purchase any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction; or

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

*15 U.S.C.A. § 80b-6.*

As part of this legislation Congress delegated to the Securities Exchange Commission (“SEC”) authority to make rules conditionally or unconditionally exempting any person or transaction, or any class or classes of persons, or transactions, from any provision or provisions of this law. *15 U.S.C.A. § 80b-6a.* The SEC rule cited by KKRA (*17 CFR 275.206(4)-3*) was promulgated to create an exception to *15 U.S.C.A. § 80b-6*. The purpose of *80b-1* et seq. (“Investment Advisers Act”) is to protect the United States investing public from investment advisers who

engage in fraudulent and deceitful practices. *Securities and Exchange Commission v. Myers*, D.C.Md. 285 F.Supp. 743 (1968). The subchapter is intended to promote accurate as well as full disclosure of material facts by investment advisers with fiduciary duty to clients. *Sullivan v. Chase Inv. Services of Boston, Inc.*, N.D.Cal.1978, 79 F.R.D. 246. The Agreement does not require Mr. Hara to engage in “solicitation activities” as contemplated by the rule. Any conduct occurring during Mr. Hara’s term of employment is irrelevant to this analysis because the payments under the Agreement are not for “solicitation activities,” and even if it were relevant the language of the rule exempts employees. *17 CFR 275.206(4)-3(a)(2)(ii)*. The parol evidence put forth by KKRA at trial indicated that Mr. Hara was an employee of KKRA, meaning that the rule barring payments did not apply to Mr. Hara either during or after his employment.

### **3. THE TRIAL COURT IMPROPERLY ADMITTED PAROL EVIDENCE.**

#### **a. Admission of parol evidence prohibited in suits such as this case where the Agreement speaks for itself**

The trial court’s denial of Mr. Hara’s motion in limine was a matter within the trial court’s discretion. *Fenimore v. Donald M. Drake Const. Co.*, 87 Wash. 2d 85, 549 P.2d 483 (1976); *State v. Lough*, 70 Wash. App. 302, 853 P.2d 920 (1993)(an appellate court will reverse only

for abuse of discretion, but an incorrect application of the law will be deemed an abuse of discretion). However, the trial court's ruling that Mr. Hara's motion was too broad is faulty because substantial parol evidence entered the record without proper disclosure during trial and after the court ruled on Mr. Hara's motion.

It is unclear upon which piece of parol evidence the trial court relied upon for the conclusion that the Agreement was part of an ongoing enterprise in violation of the law. It is for precisely this reason that parol evidence is generally excluded by Washington courts.

Washington courts generally do not permit parol evidence. *5C Wash. Prac., Evidence Law and Practice § 1200.1* (5th ed.). Parol evidence is not admissible to add to, subtract from, vary, or contradict written instruments which are contractual in nature, and which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake. *Id.; Berg v. Hudesman*, 115 Wash.2d 657, 669, 801 P.2d 222 (1990).

Extrinsic evidence may be used to determine the meaning of specific words used, but not to show an intention independent of the instrument or to vary, contradict, or modify the words of the contract. *State v. R.J. Reynolds Tobacco Co.*, 151 Wash.App. 775, 783, 211 P.3d 448 (2009), *review denied*, 168 Wash.2d 1026, 228 P.3d 18 (2010). Contract terms are ambiguous only if they are fairly susceptible to two

different, reasonable interpretations. *Wm. Dickson Co. v. Pierce County*, 128 Wash.App. 488, 493–94, 116 P.3d 409 (2005).

Washington follows the objective manifestation theory of contracts. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262, 267 (2005). Under this approach, the court attempts to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties. *Id.*, (citing *Max L. Wells Trust v. Grand Cent. Sauna & Hot Tub Co. of Seattle*, 62 Wash.App. 593, 602, 815 P.2d 284 (1991)). The courts impute an intention corresponding to the reasonable meaning of the words used. *Id.* at 503-504, (citing *Lynott v. Nat' l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wash.2d 678, 684, 871 P.2d 146 (1994)). Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. *City of Everett v. Estate of Sumstad*, 95 Wash.2d 853, 855, 631 P.2d 366 (1981). The courts give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent. *Universal/Land Constr. Co. v. City of Spokane*, 49 Wash.App. 634, 637, 745 P.2d 53 (1987). Washington courts do not interpret what was intended to be written but what was written. *J.W. Seavey Hop Corp. of Portland v. Pollock*, 20 Wash.2d 337, 348–49, 147

P.2d 310 (1944), *cited with approval in Berg*, 115 Wash.2d at 669, 801 P.2d 222.

**b. Exceptions to bar parol evidence do not apply.**

Extrinsic evidence in a contract may be admitted to help the fact finder interpret a contract term and determine the contracting parties' intent. *Berg*, 667–69. However, the evidence at issue in this case does not fit within the limits of this exception because extrinsic evidence is not admissible to show intention independent of the contract. *Hollis v. Garwall, Inc.*, 137 Wash.2d 683, 695, 974 P.2d 836 (1999)(improper to admit evidence that would show an intention independent of the instrument). The *Hollis* Court described the exception arising from *Berg* to be subject to the following guidelines:

Under *Berg* and cases interpreting *Berg*, extrinsic evidence may be relevant in discerning that intent, where the evidence gives meaning to words used in the contract. *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wash.2d 178, 189, 840 P.2d 851 (1992) (extrinsic evidence illuminates what was written, not what was intended to be written). However, admissible extrinsic evidence does *not* include:

- Evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term;
- Evidence that would show an intention independent of the instrument; or
- Evidence that would vary, contradict or modify the written word.

*Hollis*, at 695.

The *Berg* decision called into question the application of the plain meaning rule of contractual interpretation. *Berg*, at 666-667. However, in its place the Court stated:

We adopt the Restatement (Second) of Contracts §§ 212, 214(c) (1981). Section 212 provides:

(1) The interpretation of an integrated agreement is directed to the meaning of the terms of the writing or writings in the light of the circumstances, in accordance with the rules stated in this Chapter.

(2) A question of interpretation of an integrated agreement is to be determined by the trier of fact if it depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence. Otherwise a question of interpretation of an integrated agreement is to be determined as a question of law.

*Berg*, at 667-668.

Only when a contract is ambiguous on its face will the court look to evidence of the parties' intent as shown by the contract as a whole, its subject matter and objective, the circumstances of its making, the subsequent conduct of the parties, and the reasonableness of their interpretations. *St. Yves v. Mid State Bank*, 111 Wash.2d 374, 378, 757 P.2d 1384 (1988); *Boeing Airplane Co. v. Firemen's Fund Indem. Co.*, 44 Wash.2d 488, 496, 268 P.2d 654, 45 A.L.R.2d 984 (1954).

In this case appropriate use of extrinsic evidence could be used to assist in interpreting terms within the agreement, however it is clearly not admissible to establish KKRA's claim of illegality in the absence of a specific application to a term within the agreement. The trial court ultimately used the parol evidence to modify the written Agreement by adding consideration (payment for solicitation activities) that was not contained in the Agreement.

Parol evidence is barred to add to the terms of a fully integrated written contract. *Brogan & Anensen LLC v. Lamphiear*, 165 Wash.2d 773, 775, 202 P.3d 960 (2009). The Agreement is fully integrated, containing an integration clause. CP 260 (¶14). The presence of an integration clause "strongly supports a conclusion that the parties' agreement was fully integrated." *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wn.2d 568, 579-80, 998 P.2d 305, 311 (2000).

Both KKRA's and Mr. Hara's respective subjective intent was not at issue. *Watkins v. Restorative Care Center, Inc.*, 66 Wash. App. 178, 831 P.2d 1085 (1992), as amended on denial of reconsideration, (June 29, 1992) (testimony of nursing home facility operator that he understood lease to obligate lessor to maintain facility at full licensed capacity was not competent, especially since view was not expressed until 16 years after lease was executed).

This Court ruled in *Denny's Restaurants, Inc. v. Security Union Title Ins. Co.*, 71 Wash.App. 194, 859 P.2d 619 (1993) that the trial court must make an initial inquiry as to “whether the agreement is integrated” before using extrinsic evidence to interpret an integrated agreement. *Denny's*, at 202. There is no evidence of additional consideration or negotiations suggesting that additional terms were excluded from the Agreement. The trial court failed to make this finding as a prerequisite to its consideration of the parol evidence.

The reasoning behind such rules is clear and well demonstrated by KKRA’s late coming assertions of an illegal employment agreement - to give written documents a preferred status so as to render them immune to the risk associated with the “slippery memory.” *Calamari & Perillo*, Contracts § 3-2, at 126 (5th ed. 2003). Mr. Karren’s contradictory testimony illustrates exactly this problem. While KKRA asserted, and the trial court accepted, that commission payments were established under an oral employment agreement, Mr. Karren did not actually recall any specific details of this alleged commission agreement during a deposition and relied upon parol evidence that had not been documented on the pretrial Joint Statement of Evidence List to create a memory. RP 114:2-9; 120:11-19. Further, Mr. Karren did not allege these past payments were a

part of the Agreement Mr. Hara sued upon and acknowledged the payments stopped after Mr. Hara left.

Specifically, Mr. Hara notes that following the conclusion of Mr. Karren's testimony it was possible to assemble the components of three distinct contracts: (1) the written Agreement upon which Mr. Hara brought suit; (2) the oral employment agreement over which Mr. Hara and Mr. Karren offered diverse interpretations (Mr. Hara stating that he was to perform the services for which he had professional experience; Mr. Karren stating that Mr. Hara was to embark on completely new career in marketing); and (3) the alleged oral agreement to provide Mr. Hara commissions on clients he brought to KKRA. Additionally, Ex. 13 was not specifically part of the pre-trial discussion of parol evidence because the material was not disclosed by KKRA on the Joint Statement of Evidence. Mr. Hara had no basis to move in limine to exclude evidence that was not disclosed properly in accordance with the rules. As discussed, the existence of Ex. 13 does nothing to invalidate the Agreement. However, the trial court's decision not only to admit parol evidence, especially parol evidence that was not improperly disclosed, was certainly an abuse of discretion.

KKRA has never alleged the Agreement is ambiguous. KKRA does not argue that Mr. Hara was paid under the Agreement for securing

clients. What KKRA does argue is that while it cannot pay Mr. Hara, it can keep the accounts that were allegedly gained as a result of the alleged illegal employment agreement. KKRA does so not by arguing that the Agreement itself is illegal, but that it is related to prior instances of misconduct even though Mr. Karren's testimony was that it is not actually a contract for illegal commissions. The parol evidence was used not to aid interpretation, but to create the appearance of a subterfuge for which there was no evidence.

Nothing within the agreement pertains to activity that is illegal absent hypotheticals and therefore it is improper to admit evidence of events that may or may not contravene a regulatory statute when such conduct is not required to be performed by either party under the Agreement. The key distinction that was ignored is that, under *Berg* and its progeny, extrinsic evidence is relevant for discerning intent, but only when that evidence gives meaning to words used in the contract not to create meaning where content is absent. *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wash.2d 178, 189, 840 P.2d 851 (1992); *Hollis*, at 695.

Under the facts of this case, there is no basis to do so. Not only does the Agreement include an integration clause, but KKRA has not alleged any terms of the contract are ambiguous. Absent meeting this initial requirement the context analysis created by the *Berg* decision is not

triggered. The trial court ignored the obvious and substantial value that Mr. Hara clearly had before and after his term of employment and instead substituted the consideration present in the alleged oral employment agreement that Mr. Karren did not recall, then recalled (without any supporting detail), and which Mr. Hara did not remember. This is well beyond the scope of even the most expansive bounds of contractual interpretation.

Mr. Karren provided no details surrounding this agreement. The only evidence Mr. Karren relied upon for this newfound memory was fifteen year old copies of check stubs and a spreadsheet. Despite his claim that this refreshed his memory about an illegal “oral employment agreement” (coincidentally a memory necessary as a first step in the illegality defense and found after being confronted with the absence of such evidence during a deposition), it did not prove that the payment of any commissions was for the alleged illegal activities.

At his deposition six weeks prior to trial, Mr. Karren had no recollection of any oral agreement between KKRA and Mr. Hara to pay commissions during his employment RP 120: 11-20. Mr. Karren acknowledged he used a document (*Trial Ex. 13*) after his deposition to surmise that commission payments were made to Mr. Hara. *Id.*, 141:17-148:24. There was not substantial evidence of an oral agreement

associated with *Trial Ex. 13* setting forth payments to be made to Mr. Hara, nor were any documents submitted concerning how the payments Mr. Karren identified were calculated. *Trial Ex. 13* was not listed on the Joint Statement of Evidence or any exhibit list produced by the Defendant. Mr. Karren did not prepare the document and no witness involved in the production of the document was called to testify. *Id.*, 147:9-148:5. Over Plaintiff's objections, *Trial Ex. 13* was admitted. *Id.*, 145:2-14, 148:19-23.

When asked point blank why Mr. Hara would be paid a commission on an account he never brought in (MIT), Mr. Karren testified "because we were trying to be encouraging and supportive and especially helpful in the separation." *Id.*, 116:23-25. Mr. Karren testified that Mr. Hara's waiver of unemployment benefits pursuant to his execution of the written Agreement represented a benefit to KKRA. Mr. Karren testified that the non-compete clause with regard to MIT and NAB had value to KKRA.

In order to successfully assert an illegality defense, KKRA needed to prove that Mr. Hara was receiving payment based on illegal conduct under terms of the Agreement. Even if dispositive, there was not substantial evidence that Mr. Hara received commissions in exchange for solicitation of any clients included in the written Agreement during or after employment.

There was no testimony before the trial court that the payments under the Agreement were made in exchange for the performance of any activities in violation of the law. When specifically asked, during both direct and cross examination, about the payments under the Agreement the KKRA's sole witness never testified they were for solicitation.

The Court stated that it could not sever the written Agreement from the alleged oral agreement to pay Mr. Hara commissions during his tenure at KKRA because the consideration in the written Agreement directly flowed from the first. While the Defendant presented evidence<sup>7</sup> purportedly showing that commission payments were made to Mr. Hara during his employment and prior to his departure, this evidence did not demonstrate those payments were made for solicitation of the clients at issue. On the contrary, such a conclusion is speculation unsupported by any evidence or testimony. Mr. Hara testified that he received consulting fees through KKRA from work for MIT. It strains credulity to accept that Mr. Karren recalled that the payments were commission for solicitation rather than consulting<sup>8</sup>. Thus, absent an agreement evidencing payments in

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<sup>7</sup> Plaintiff maintains his objection to the admission of *Trial Ex. 13* because it was omitted from the statement of evidence, lacked foundation, and did not meet any exception to the hearsay rule or the parol evidence rule.

<sup>8</sup> The trial court relied on Ex. 10 to conclude that Mr. Hara solicited. CP 312, ¶7. Ex. 10 was not admitted at trial. CP 309-310. Thus finding of fact number 7 was not supported by substantial evidence in the record.

exchange for solicitation, there is no illegal agreement necessitating an analysis under the doctrine of severability.

**4. THE CASE SHOULD BE REMANDED TO THE TRIAL COURT SO THAT ATTORNEY'S FEES AND COSTS CAN BE CALCULATED.**

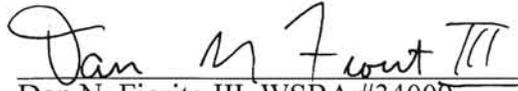
Finally, Mr. Hara is entitled to recover his attorneys' fees under the provisions of the Agreement and RAP 18.1. CP 259-260 (§ 12). When an agreement provides for payment of attorney fees, the prevailing party is entitled to reasonable fees and costs incurred at both trial and appeal. *Atlas Supply, Inc. v. Realm, Inc.* 170 Wn.App. 234, 287 P.3d 606 (2012).

**D. CONCLUSION**

There is nothing to refute that Mr. Hara resigned from KKRA effective September 19, 1997 and that on January 15, 1998, Mr. Hara and KKRA entered into the written Agreement. The Agreement did not require Mr. Hara or KKRA to perform any acts contrary to law or statute. Mr. Hara makes no claims related to events prior to January 15, 1998. His claims arise from the following 16 years of contractual performance.

For all of these reasons, the trial court's ruling denying Plaintiff's Motion for Summary Judgment must be reversed and judgment entered for the Plaintiff based on a *de novo* review. Furthermore, the matter must be remanded to the trial court for a hearing on calculating damages and attorneys' fees owed the KKRA under the Agreement.

**REPECTFULLY SUBMITTED** this 23<sup>rd</sup> day of September 2014



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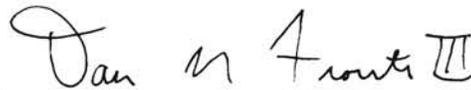
#### **DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on September 23, 2014 I served the foregoing Opening Brief of Appellant on the following parties:

Matthew Davis, WSBA #20939  
Attorney for Defendant  
Davis Leary  
2775 Harbor Ave SW Suite D  
Seattle, WA 98126  
206-347-8877  
[matt@davisleary.com](mailto:matt@davisleary.com)

E-mail per stipulation



Dan N. Fiorito III, WSBA #34009

# Appendix to Opening Brief of Appellant

Appendix A: Trial Exhibit #1

Appendix B: Trial Exhibit #5

Appendix C: Trial Exhibit #13

Appendix D: RCW 21.20.005

Appendix E: RCW 21.20.040

Appendix F: RCW 21.20.430

Appendix G: 15 U.S.C.A. § 80b-6

Appendix H: 17 CFR 275.206(4)-3

Appendix A  
Trial Exhibit #1  
Agreement

## SEVERANCE AND CONFIDENTIALITY AGREEMENT

This severance and confidentiality agreement is made this 22nd day of September 1997 between Kunath Karren Rinne & Atkin, Incorporated ("KKRA") and Lloyd Hara ("Hara").

Hara has resigned as a full time employee of KKRA. The purpose of this agreement is to set forth clearly the terms and conditions of Hara's departure from employment with KKRA. The parties agree as follows

1. Hara resigned as a full time employee on September 5, 1997. Hara's letter of resignation is attached to the agreement as Exhibit A. Hara has returned to KKRA all security cards and keys to KKRA this date.
2. KKRA has paid Hara two weeks salary, less all lawful and required deductions.
3. Hara has indicated his interest in pursuing his "Hara Consulting" business and KKRA offers to assist Hara through this period of transition.
4. KKRA and Hara further agree that KKRA will provide Hara with additional benefits upon execution of this agreement, and that Hara will not pursue unemployment benefits following his departure from KKRA. These KKRA benefits are:
  - A. Two weeks of vacation days, regardless of the amount of unused vacation Hara has accrued, less all lawful and required deductions.
  - B. Three weeks of additional salary less all lawful and required deductions.
  - C. Have printed, at no cost to Hara, an initial supply of new business cards and stationary, or at Hara's discretion, pay Hara \$500.00. *so: 4 of 1000*
  - D. Gift to Hara the computer system he has been using, to include CPU, monitor and keyboard.
  - E. Pay the cost of Hara's existing medical insurance through September 30, 1997, and explore the possibility of securing medical and dental benefits for Hara for an additional six months.
  - F. Bill the Muckleshoot Indians on Hara's behalf for any consulting services provided by Hara but not billed, and pay Hara 100% of such billings less all lawful and required deductions.
  - G. Pay Hara a percentage commission of new investment management business at the rate he has been paid in past periods, for the quarter ending September 30, 1997.
5. KKRA and Hara further agree that KKRA will assist Hara in establishing "Hara Consulting" by agreeing to have KKRA pay Hara, upon execution of this agreement, Hara's share of the collected management fees on those accounts listed in Exhibit "B" at percentages originally established (3-2-1%), for as long as KKRA retains the client, providing Hara does not accept employment with a competing firm. However it is agreed that Hara will receive 3% of the Muckleshoot billings, when received. It is Hara's responsibility to advise KKRA in writing of any changes in address or employment on a timely basis. KKRA has the sole discretion to determine what constitutes a competing firm.

*NWAIR and*

*(Handwritten mark)*

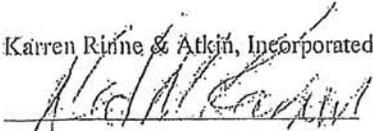
6. KKRA and Hara further agree that KKRA and "Hara Consulting" will enter into an agreement whereby "Hara Consulting" may from time to time refer new clients to KKRA for investment management, and that in such cases where referrals become clients, KKRA will pay "Hara Consulting" a fee at the rate of 20% of said annual investment management fee as received during the first year of management, 15% during the second year of management, and 10% of the management fee during the third year and thereafter so long as KKRA retains the client. KKRA and Hara agree that this relationship will be fully disclosed to any such new client on a timely basis.
7. Hara unconditionally releases KKRA, its agents, successors, assigns and affiliates from any and all claims, demands, rights or causes of action, known or unknown, arising from Hara's employment with KKRA. This release shall be deemed to include, without limitation, all claims in tort or breach of contract, and all claims under any and all federal, state, county, municipal statutes, laws or ordinances, including without limitation Title VII of the Civil Rights Act of 1964 and the Employee Retirement Income Security Act of 1974.
8. KKRA unconditionally releases Hara from any and all claims, demands, rights, or causes of action, known or unknown, except fraud and intentional misconduct. This release will also include, without limitation, all claims in tort or breach of contract, and all claims under any and all federal, state, county or municipal statutes, laws or ordinances, including without limitation Title VII of the Civil Rights Act of 1964 and the Employee Retirement Income Security Act of 1974.
9. Hara's waiver and release set forth in Section 7 is knowing and voluntary. Hara is not waiving any rights to claims that may arise after the date this agreement is executed. The considerations in Sections 4, 5 and 6 are in addition to anything that Hara is entitled.
10. Hara and KKRA state and covenant that each shall not and will not file any action, suit, complaint, charge, or other claim related to the claims released herein with any court, administrative agency, or other investigatory or adjudicative body except for fraud or intentional misconduct.
11. Hara and KKRA agree that the terms of this agreement shall be held confidential, except that the terms may be disclosed to attorneys and accountants of either party. It is further understood that KKRA, its directors, officers and employees shall refrain from any characterization of Hara which might be detrimental to his reputation. Hara agrees to refrain from any characterization of KKRA, its directors, officers and employees which might be detrimental to their individual or collective reputation. Notwithstanding the provisions of this paragraph, KKRA will adjust its regulatory documents and promotional materials to both reflect the departure of Hara, and ensure full disclosure of the future relationship between KKRA and "Hara Consulting". Additionally, KKRA may advise its clients, prospective clients and other professionals with whom it has, or may have, a business relationship of Hara's departure, and, if requested by Hara, will provide Hara with a letter of recommendation.
12. This agreement shall be governed by and construed in accordance with the laws of the state of Washington, except to the extent such law may be preempted by federal law. In the event

that action is necessary to enforce the provisions of this agreement, venue shall be had in King County, Washington. If it is necessary for either party or their authorized representative, successor or assign to institute suit in connection with this agreement or its breach, the prevailing party in such proceedings shall be entitled to reimbursement for its reasonable costs and attorneys' fees incurred.

13. If any provision of this agreement is held to be invalid or unenforceable, each of the remaining provisions shall continue to be fully valid and enforceable unless the essential purpose of such provision would no longer be accomplished.
14. This document, and the attached exhibits, contain the entire agreement of the parties on the matters set forth herein and supersedes all previous negotiations, discussions or agreements on the matters contained herein. It may not be changed orally, but only by an agreement in writing signed by the party against whom enforcement of any waiver, change, modification, extension or discharge is sought.

Kunath Karen Rinne & Atkin, Incorporated

By



Date

1-15-98

Lloyd Hara

  
1/15/98

A

LLOYD HARA  
466 SMITH STREET  
SEATTLE, WA 98109

September 5, 1997

KKRA  
1000 Second Avenue, Suite 4000  
Seattle, Washington 98104

Dear Partners:

This letter is to tender my resignation effective on September 19, 1997.

Very truly yours,



Lloyd Hara

Exhibit B

Appendix B  
Trial Exhibit #5  
Press Release

FOR IMMEDIATE RELEASE

*Former Seattle City Treasurer Forms New Consulting Business*

SEATTLE: Jan 16, 1996: Former Seattle City Treasurer and Queen Anne resident, Lloyd F. Hara, today announced the formation of **HARA CONSULTING**, specializing in investment policies, cash management practices, program evaluation, organizational development and training services for the public and non-profit sectors.

Hara pointed to the Orange County bankruptcy and other municipalities to include those in Washington State, that have not practiced sound investment and cash management. *"Initially, I began writing a book about Orange County, but soon decided it would be better to assist public entities and non-profit corporations avoid similar pitfalls."*

Commented Hara, *"Management is faced with reduced revenues and needs to become more efficient. There is a perception that governments, and some non-profit organizations, are poorly managed. Therefore, they should be interested in examining how consultants can assist them. Those public and private entities that recognize the need to employ new operating strategies will be the winners."*

Hara brings to his clients a wealth of experience and excellence. Prior to his appointment by President Clinton as one of ten Regional Directors, administering the Federal Emergency Management Agency, Hara was elected to four terms as Seattle City Treasurer, and was responsible for all cash receipts and disbursements, investments, banking services, and local tax assessments.

As Treasurer, he created an integrated cash receipt/investment system; served on many pension boards and commissions, and was consistently recognized for his integrity and leading edge management initiatives. *City and State Magazine* named Hara the nation's best municipal treasurer in 1987. He received the Government Finance Officers Association Award of Excellence for Cash Management (1987 & 1991) and the 1991 Municipal Treasurers' Association highest recognition, the Jackson R.E. Phillips Award.

George Khtaian, Finance Director for the City of Anacortes, Washington, and Past President of the national Municipal Treasurers Association stated that *"Lloyd Hara is an innovative, creative, problem solver. If you want to get something done right, with integrity, give it to Lloyd Hara. The best Treasurer I've ever known."*

Hara leads the Northwest Municipal Treasurer's Institute at the University of Washington, has previously taught at Seattle University and the Universities of Puget Sound, Maryland and Wisconsin, and is a frequent speaker and instructor at national conferences and seminars

Hara's publication topics include: *Seattle's No-Float Day*, *"BUCKS-Better Understanding of Cash Kontrol Systems"*, *"Performance Auditing"*, *"Government Auditing"*, *"Local Auditing in Transition - GAO Standards"*, *"Progressive Auditing in King County"*, and *"Economy, Effectiveness and Efficiency in Budgeting"*.

Earl Hoenes, President of Money Concept Financial Planning of Austin, Texas, former Austin City Treasurer and past national President of the Municipal Treasurers Association commented that *"Lloyd Hara for many years has been a leader on the cutting edge of treasury management. He is practical, highly ethical, understands politics, and gets the job done."*

Appendix C  
Trial Exhibit #13  
KKRA payment record

Totals

Qtr. End	Mil	Mite	Nwap	Other	Total Comm	Check #	Date Paid	Amount Pd	Highlighted commission e paid as part of payroll. All others as 1099
9/30/1996	76.18				76.18	16200	10/31/1996	391.07	
12/31/1996	314.89				314.89				
3/31/1997	375.37				375.37	16303	2/13/1997	375.37	
9/30/1996				52.38	52.38	16340	3/14/1997	182.06	
12/31/1996				53.98	53.98				
3/31/1997				55.69	55.69				
12/31/1996				25.67	25.67	16437	6/23/1997	619.67	
3/31/1997				67.72	67.72				
6/30/1997	404.63			121.85	526.49				
9/30/1997	585.82			869.07	1,454.88	16476	9/4/1997	1,454.88	
9/30/1997				37.90	37.90	16543	10/10/1997	37.90	
12/31/1997	370.64	66.17	15.06	306.25	778.12	14637	2/5/1998	1,280.89	
3/31/1998	361.69	60.00	15.25	45.22	502.77				
6/30/1998	392.33	66.98	15.46	147.07	641.86	15000	6/4/1998	641.86	
9/30/1998	420.10	66.03	15.67	70.63	592.33	15402	10/14/1998	1,156.68	
12/31/1998	433.02	74.32	18.60	38.41	564.35				
3/31/1999	430.93	63.07	19.48	43.43	578.91	16292	6/28/1999	1,154.93	
6/30/1999	432.21	63.54	19.44	42.83	578.02				
9/30/1999	423.83	68.05	19.60	44.80	576.28	16507	8/23/1999	576.28	
12/31/1999	499.06	84.28	19.81	42.32	645.47	16784	11/12/1999	645.47	
3/31/2000	415.44	100.38	20.24	20.27	556.33	17390	6/19/2000	1,159.36	
6/30/2000	484.31	113.30	0.00	5.42	603.03				
9/30/2000	614.32	109.28	38.37	36.80	798.77	17992	12/7/2000	1,700.27	
12/31/2000	750.32	111.76	39.40	0.00	901.50				
3/31/2001	913.65	100.67	60.70	0.00	1,065.02	18286	3/14/2001	1,065.02	
6/30/2001	1,071.59	90.18	50.43		1,212.20	18715	8/3/2001	2,556.73	
9/30/2001	1,193.23	98.44	51.88		1,343.55				
12/31/2001	1,354.76	65.03	47.08		1,486.87	19067	11/20/2001	1,486.87	
3/31/2002	1,337.77	93.00	49.26		1,480.02	19643	5/21/2002	2,893.26	
6/30/2002	1,267.04	96.83	49.38		1,413.23				
9/30/2002	1,241.18	76.13	46.91		1,366.22	19940	8/19/2002	1,366.22	
12/31/2002	1,366.63	272.24	45.35		1,684.21	20212	11/21/2002	1,684.22	
3/31/2003	1,356.37	330.06	46.21		1,732.64	20361	1/16/2003	1,732.64	
6/30/2003	1,350.41	676.23	46.29		2,072.93	23104	4/29/2003	2,072.93	
9/30/2003	1,359.63	920.49	48.38		2,328.50	23558	8/13/2003	2,328.50	
12/31/2003	1,370.96	953.23	49.02		2,373.21	23786	11/6/2003	2,373.21	
3/31/2004	1,336.58	46.43	50.57		1,433.58	24229	3/23/2004	1,433.58	
6/30/2004	1,407.42	57.23	57.23		1,521.88	24418	5/4/2004	1,521.88	
9/30/2004	1,306.42	1,434.65	57.48		2,798.55	24786	9/14/2004	2,798.55	
12/31/2004	1,388.29	1,393.42	56.12		2,837.83	25085	11/30/2004	2,837.83	
3/31/2005	1,365.55	1,485.97	57.36		2,908.88	25648	5/25/2005	5,954.09	
6/30/2005	1,495.76	1,492.19	57.26		3,045.21				
9/30/2005	1,582.49	1,529.09	58.19		3,160.77	26162	10/18/2005	6,562.68	
12/31/2005	1,804.00	1,539.17	56.74		3,401.91				
3/31/2006	1,856.64	1,657.97	59.62		3,574.23	26715	4/26/2006	3,574.23	
6/30/2006	2,443.65	1,707.30	60.54		4,211.49	27020	8/2/2006	4,211.49	
9/30/2006	2,517.03	1,687.87	60.45		4,265.35	27311	11/15/2006	4,265.35	
12/31/2006	2,523.29	1,666.18	61.31		4,260.78	27649	3/15/2007	4,260.78	
3/31/2007	2,736.22	1,680.48	61.95		4,478.65	27662	6/8/2007	4,478.65	
6/30/2007	3,022.89	1,688.99	62.22		4,774.10	28123	9/14/2007	4,774.10	
9/30/2007	2,637.67	1,734.41	63.52		4,435.80	28202	10/1/2007	6,790.91	
12/31/2007	2,793.42	1,803.99	66.56		4,663.97	28343		6,636.87	
3/31/2008	2,616.39	1,842.45	67.20		4,528.01				
6/30/2008	2,439.63	1,612.32	64.99		4,116.93	29006	11/24/2008	4,116.93	
9/30/2008	2,495.23	1,664.47	65.06		4,224.76	28954	10/26/2008	4,224.76	
12/31/2008	2,623.21	1,519.18	62.61		4,205.00	29318	5/22/2009	6,137.14	
3/31/2009	2,284.56	1,594.49	53.10		3,932.14				
6/30/2009	2,248.60	1,718.61	53.47		4,020.68	29434	7/1/2009	4,020.68	
9/30/2009	2,379.85	1,551.50	53.84		3,985.19	29568	10/7/2009	3,985.19	
12/31/2009	2,353.83	757.28	54.40		3,165.51	30218	5/28/2010	3,165.51	
3/31/2010	2,392.19	471.56	54.51		2,918.26	30219	5/28/2010	2,918.26	

Total

121,774.96

Appendix D  
RCW 21.20.005

## RCW 21.20.005 Definitions.

The definitions set forth in this section shall apply throughout this chapter, unless the context otherwise requires:

(1) "Broker-dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for that person's own account. "Broker-dealer" does not include (a) a salesperson, issuer, bank, savings institution, or trust company, (b) a person who has no place of business in this state if the person effects transactions in this state exclusively with or through the issuers of the securities involved in the transactions, other broker-dealers, or banks, savings institutions, trust companies, insurance companies, investment companies as defined in the investment company act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees, or (c) a person who has no place of business in this state if during any period of twelve consecutive months that person does not direct more than fifteen offers to sell or to buy into or make more than five sales in this state in any manner to persons other than those specified in (b) of this subsection.

(2) "Customer" means a person other than a broker-dealer or investment adviser.

(3) "Director" means the director of financial institutions of this state.

(4) "Federal covered adviser" means any person registered as an investment adviser under section 203 of the investment advisers act of 1940.

(5) "Federal covered security" means any security defined as a covered security in the securities act of 1933.

(6) "Full business day" means all calendar days, excluding therefrom Saturdays, Sundays, and all legal holidays, as defined by statute.

(7) "Guaranteed" means guaranteed as to payment of principal, interest, or dividends.

(8) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who, for compensation and as a part of a regular business, issues or promulgates analyses or reports concerning securities. "Investment adviser" also includes financial planners and other persons who, as an integral component of other financially related services, (a) provide the foregoing investment advisory services to others for compensation as part of a business or (b) hold themselves out as providing the foregoing investment advisory services to others for compensation. Investment adviser shall also include any person who holds himself or herself out as a financial planner.

"Investment adviser" does not include (a) a bank, savings institution, or trust company, (b) a lawyer, accountant, certified public accountant licensed under chapter 18.04 RCW, engineer, or teacher whose performance of these services is solely incidental to the practice of his or her profession, (c) a broker-dealer or its salesperson whose performance of these services is solely incidental to the conduct of its business as a broker-dealer and who receives no special compensation for them, (d) a publisher of any bona fide newspaper, news magazine, news column, newsletter, or business or financial publication or service, whether communicated in hard copy form, by electronic means, or otherwise, that does not consist of the rendering of advice on the basis of the specific investment situation of each client, (e) a radio or television station, (f) a person whose advice, analyses, or reports relate only to securities

exempted by RCW 21.20.310(1), (g) an investment adviser representative, or (h) such other persons not within the intent of this paragraph as the director may by rule or order designate.

(9) "Investment adviser representative" means any partner, officer, director, or a person occupying similar status or performing similar functions, or other individual, who is employed by or associated with an investment adviser, and who does any of the following:

- (a) Makes any recommendations or otherwise renders advice regarding securities;
- (b) Manages accounts or portfolios of clients;
- (c) Determines which recommendation or advice regarding securities should be given;
- (d) Solicits, offers, or negotiates for the sale of or sells investment advisory services; or
- (e) Supervises employees who perform any of the functions under (a) through (d) of this subsection.

(10) "Issuer" means any person who issues or proposes to issue any security, except that with respect to certificates of deposit, voting trust certificates, or collateral-trust certificates, or with respect to certificates of interest or shares in an unincorporated investment trust not having a board of directors (or persons performing similar functions) or of the fixed, restricted management, or unit type; the term "issuer" means the person or persons performing the acts and assuming the duties of depositor or manager pursuant to the provisions of the trust or other agreement or instrument under which the security is issued.

(11) "Nonissuer" means not directly or indirectly for the benefit of the issuer.

(12) "Person" means an individual, a corporation, a partnership, a limited liability company, a limited liability partnership, an association, a joint-stock company, a trust where the interest of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government.

(13) "Relatives," as used in RCW 21.20.310(11) includes:

- (a) A member's spouse;
- (b) Parents of the member or the member's spouse;
- (c) Grandparents of the member or the member's spouse;
- (d) Natural or adopted children of the member or the member's spouse;
- (e) Aunts and uncles of the member or the member's spouse; and
- (f) First cousins of the member or the member's spouse.

(14) "Sale" or "sell" includes every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value. "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing is considered to constitute part of the subject of the purchase and to have been offered and sold for value. A purported gift of assessable stock is considered to involve an offer and sale. Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as

well as every sale or offer of a security which gives the holder a present or future right or privilege to convert into another security of the same or another issuer, is considered to include an offer of the other security.

(15) "Salesperson" means any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect sales of securities. "Salesperson" does not include an individual who represents an issuer in (a) effecting a transaction in a security exempted by RCW 21.20.310 (1), (2), (3), (4), (9), (10), (11), (12), or (13), (b) effecting transactions exempted by RCW 21.20.320 unless otherwise expressly required by the terms of the exemption, or (c) effecting transactions with existing employees, partners, or directors of the issuer if no commission or other remuneration is paid or given directly or indirectly for soliciting any person in this state.

(16) "Securities act of 1933," "securities exchange act of 1934," "public utility holding company act of 1935," "investment company act of 1940," and "investment advisers act of 1940" means the federal statutes of those names as amended before or after June 10, 1959.

(17)(a) "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable share; investment contract; investment of money or other consideration in the risk capital of a venture with the expectation of some valuable benefit to the investor where the investor does not receive the right to exercise practical and actual control over the managerial decisions of the venture; voting-trust certificate; certificate of deposit for a security; fractional undivided interest in an oil, gas, or mineral lease or in payments out of production under a lease, right, or royalty; charitable gift annuity; any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities, including any interest therein or based on the value thereof; or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any security under this subsection. This subsection applies whether or not the security is evidenced by a written document.

(b) "Security" does not include: (i) Any insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed sum of money either in a lump sum or periodically for life or some other specified period; or (ii) an interest in a contributory or noncontributory pension or welfare plan subject to the employee retirement income security act of 1974.

(18) "State" means any state, territory, or possession of the United States, as well as the District of Columbia and Puerto Rico.

[2011 c 336 § 594; 2002 c 65 § 1; 1998 c 15 § 1; 1994 c 256 § 3. Prior: 1993 c 472 § 14; 1993 c 470 § 4; 1989 c 391 § 1; 1979 ex.s. c 68 § 1; 1979 c 130 § 3; 1977 ex.s. c 188 § 1; 1975 1st ex.s. c 84 § 1; 1967 c 199 § 1; 1961 c 37 § 1; 1959 c 282 § 60.]

#### Notes:

**Reviser's note:** The definitions in this section have been alphabetized pursuant to RCW 1.08.015(2)(k).

**Findings -- Construction -- 1994 c 256:** See RCW 43.320.007.

**Effective date -- Implementation--1993 c 472:** See RCW 43.320.900 and 43.320.901.

**Severability -- 1979 c 130:** See note following RCW 28B.10.485.

Appendix E  
RCW 21.20.080

## RCW 21.20.080

## Duration of registration — Association with issuer, broker-dealer, federal covered adviser, or investment adviser — Notice to director — Extension of licensing period.

Registration of a broker-dealer, salesperson, investment adviser representative, or investment adviser shall be effective for a one-year period unless the director by rule or order provides otherwise. The director by rule or order may schedule registration or renewal so that all registrations and renewals expire December 31st. The director may adjust the fee for registration or renewal proportionately. The registration of a salesperson or investment adviser representative is not effective during any period when the salesperson is not employed by or associated with an issuer or a registered broker-dealer or when the investment adviser representative is not employed by or associated with an investment adviser registered under this chapter or a federal covered adviser who has made a notice filing pursuant to RCW 21.20.050. To be employed by or associated with an issuer, broker-dealer, federal covered adviser, or investment adviser within the meaning of this section notice, either in writing or in some other format as the director may by rule or otherwise specify, must be given to the director. When a salesperson begins or terminates employment or association with an issuer or registered broker-dealer, the salesperson and the issuer or broker-dealer shall promptly notify the director. When an investment adviser representative registered under this chapter begins or terminates employment or association with an investment adviser registered under this chapter or a federal covered adviser required to make a notice filing pursuant to RCW 21.20.050, the investment adviser representative and investment adviser or federal covered adviser shall promptly notify the director.

Notwithstanding any provision of law to the contrary, the director may, from time to time, extend the duration of a licensing period for the purpose of staggering renewal periods. Such extension of a licensing period shall be by rule adopted in accordance with the provisions of chapter 34.05 RCW. Such rules may provide a method for imposing and collecting such additional proportional fee as may be required for the extended period.

[1998 c 15 § 7; 1994 c 256 § 8; 1981 c 272 § 3; 1979 ex.s. c 68 § 5; 1975 1st ex.s. c 84 § 5; 1959 c 282 § 8.]

## Notes:

**Findings -- Construction -- 1994 c 256:** See RCW 43.320.007.

Appendix F  
RCW 21.20.430

## RCW 21.20.430

## Civil liabilities — Survival, limitation of actions — Waiver of chapter void — Scienter.

(1) Any person, who offers or sells a security in violation of any provisions of RCW 21.20.010, 21.20.140 (1) or (2), or 21.20.180 through 21.20.230, is liable to the person buying the security from him or her, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at eight percent per annum from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he or she no longer owns the security. Damages are the amount that would be recoverable upon a tender less (a) the value of the security when the buyer disposed of it and (b) interest at eight percent per annum from the date of disposition.

(2) Any person who buys a security in violation of the provisions of RCW 21.20.010 is liable to the person selling the security to him or her, who may sue either at law or in equity to recover the security, together with any income received on the security, upon tender of the consideration received, costs, and reasonable attorneys' fees, or if the security cannot be recovered, for damages. Damages are the value of the security when the buyer disposed of it, and any income received on the security, less the consideration received for the security, plus interest at eight percent per annum from the date of disposition, costs, and reasonable attorneys' fees.

(3) Every person who directly or indirectly controls a seller or buyer liable under subsection (1) or (2) above, every partner, officer, director or person who occupies a similar status or performs a similar function of such seller or buyer, every employee of such a seller or buyer who materially aids in the transaction, and every broker-dealer, salesperson, or person exempt under the provisions of RCW 21.20.040 who materially aids in the transaction is also liable jointly and severally with and to the same extent as the seller or buyer, unless such person sustains the burden of proof that he or she did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

(4)(a) Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant.

(b) No person may sue under this section more than three years after the contract of sale for any violation of the provisions of RCW 21.20.140 (1) or (2) or 21.20.180 through 21.20.230, or more than three years after a violation of the provisions of RCW 21.20.010, either was discovered by such person or would have been discovered by him or her in the exercise of reasonable care. No person may sue under this section if the buyer or seller receives a written rescission offer, which has been passed upon by the director before suit and at a time when he or she owned the security, to refund the consideration paid together with interest at eight percent per annum from the date of payment, less the amount of any income received on the security in the case of a buyer, or plus the amount of income received on the security in the case of a seller.

(5) No person who has made or engaged in the performance of any contract in violation of any provision of this chapter or any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract. Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this chapter or any rule or order hereunder is void.

(6) Any tender specified in this section may be made at any time before entry of judgment.

(7) Notwithstanding subsections (1) through (6) of this section, if an initial offer or sale of securities that are exempt from registration under RCW 21.20.310 is made by this state or its agencies, political subdivisions, municipal or quasi-municipal corporations, or other instrumentality of one or more of the foregoing and is in violation of RCW 21.20.010(2), and any such issuer, member of the governing body, committee member, public officer, director, employee, or agent of such issuer acting on its behalf, or person in control of such issuer, member of the governing body, committee member, public officer, director, employee, or agent of such person acting on its behalf, materially aids in the offer or sale, such person is liable to the purchaser of the security only if the purchaser establishes scienter on the part of the defendant. The word "employee" or the word "agent," as such words are used in this subsection, do not include a bond counsel or an underwriter. Under no circumstances whatsoever shall this subsection be applied to require purchasers to establish scienter on the part of bond counsels or underwriters. The provisions of this subsection are retroactive and apply to any action commenced but not final before July 27, 1985. In addition, the provisions of this subsection apply to any action commenced on or after July 27, 1985.

[1998 c 15 § 20; 1986 c 304 § 1; 1985 c 171 § 1; 1981 c 272 § 9; 1979 ex.s. c 68 § 30; 1977 ex.s. c 172 § 4; 1975 1st ex.s. c 84 § 24; 1974 ex.s. c 77 § 11; 1967 c 199 § 2; 1959 c 282 § 43.]

Notes:

**Severability -- 1986 c 304:** "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1986 c 304 § 2.]

**Effective date -- 1974 ex.s. c 77:** See note following RCW 21.20.040.

Appendix G  
15 U.S.C.A. § 80b-6



any person or transaction, or any class or classes of persons or transactions, from subsection (a)(1) of this section, if and to the extent that the exemption relates to an investment advisory contract with any person that the Commission determines does not need the protections of subsection (a)(1) of this section, on the basis of such factors as financial sophistication, net worth, knowledge of and experience in financial matters, amount of assets under management, relationship with a registered investment adviser, and such other factors as the Commission determines are consistent with this section.

**(f) Authority to restrict mandatory pre-dispute arbitration**

The Commission, by rule, may prohibit, or impose conditions or limitations on the use of, agreements that require customers or clients of any investment adviser to arbitrate any future dispute between them arising under the Federal securities laws, the rules and regulations thereunder, or the rules of a self-regulatory organization if it finds that such prohibition, imposition of conditions, or limitations are in the public interest and for the protection of investors.

(Aug. 22, 1940, ch. 686, title II, §205, 54 Stat. 852; Pub. L. 86-750, §7, Sept. 13, 1960, 74 Stat. 887; Pub. L. 91-547, §25, Dec. 14, 1970, 84 Stat. 1432; Pub. L. 96-477, title II, §203, Oct. 21, 1980, 94 Stat. 2290; Pub. L. 100-181, title VII, §703, Dec. 4, 1987, 101 Stat. 1263; Pub. L. 104-290, title II, §210, Oct. 11, 1996, 110 Stat. 3436; Pub. L. 111-203, title IV, §418, title IX, §§921(b), 928, July 21, 2010, 124 Stat. 1579, 1841, 1852.)

AMENDMENT OF SUBSECTION (e)

*Pub. L. 111-203, title IV, §§418, 419, July 21, 2010, 124 Stat. 1579, 1580, provided that, effective 1 year after July 21, 2010, except that any investment adviser may, at the discretion of the investment adviser, register with the Commission under the Investment Advisers Act of 1940 during that 1-year period, subject to the rules of the Commission, and except as otherwise provided, subsection (e) of this section is amended by adding at the end the following: "With respect to any factor used in any rule or regulation by the Commission in making a determination under this subsection, if the Commission uses a dollar amount test in connection with such factor, such as a net asset threshold, the Commission shall, by order, not later than 1 year after July 21, 2010, and every 5 years thereafter, adjust for the effects of inflation on such test. Any such adjustment that is not a multiple of \$100,000 shall be rounded to the nearest multiple of \$100,000." See Effective Date of 2010 Amendment note below.*

AMENDMENTS

2010—Subsec. (a). Pub. L. 111-203, §928, in introductory provisions, substituted "registered or required to be registered with the Commission" for "unless exempt from registration pursuant to section 80b-3(b) of this title," and struck out "make use of the mails or any means or instrumentality of interstate commerce, directly or indirectly, to" after "shall" and "to" after "in any way".

Subsec. (f). Pub. L. 111-203, §921(b), added subsec. (f).  
1996—Subsec. (b)(4), (5). Pub. L. 104-290, §210(1), added pars. (4) and (5).

Subsec. (e). Pub. L. 104-290, §210(2), added subsec. (e).  
1987—Pub. L. 100-181 completely revised and expanded provisions on investment advisory contracts, changing structure of section from a single unlettered paragraph to one consisting of four subsections lettered (a) to (d).

1980—Pub. L. 96-477 provided that par. (1) of this section was not to apply with respect to any investment advisory contract between an investment adviser and a business development company so long as the compensation provided for in such contract did not exceed 20 per cent of the realized capital gains upon the funds of the business development company and such business development company did not have outstanding any option, warrant, or right issued pursuant to section 80a-60(a)(3)(B) of this title and did not have a profit-sharing plan.

1970—Pub. L. 91-547 substituted reference to section "80b-3(b)" for "80b-3" of this title in first sentence, redesignated as second sentence former third sentence, designating existing provisions as cl. (A) and adding cl. (B) and items (i) and (ii) and provision respecting compensation based on asset value of company or fund under management averaged over a specified period in relation to investment record of an index of securities or such other measure of investment performance specified by Commission rules, regulations, or orders, inserted third sentence provision respecting point from which compensation is to be measured, substituted in fourth, formerly third, sentence "paragraphs (2) and (3) of this section" for "this section" and in definition of "investment advisory contract" the words "account of another person other than an investment company registered under subchapter I of this chapter" for "account for a person other than an investment company".

1960—Pub. L. 86-750 substituted "unless exempt from registration pursuant to" for "registered under".

EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by sections 921(b) and 928 of Pub. L. 111-203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111-203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking.

Amendment by section 418 of Pub. L. 111-203 effective 1 year after July 21, 2010, except that any investment adviser may, at the discretion of the investment adviser, register with the Commission under the Investment Advisers Act of 1940 during that 1-year period, subject to the rules of the Commission, and except as otherwise provided, see section 419 of Pub. L. 111-203, set out as a note under section 80b-2 of this title.

EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-547 effective on expiration of one year after Dec. 14, 1970, see section 30(1) of Pub. L. 91-547, set out as a note under section 80a-52 of this title.

TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

**§ 80b-6. Prohibited transactions by investment advisers**

It shall be unlawful for any investment adviser by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly—

- (1) to employ any device, scheme, or artifice to defraud any client or prospective client;
- (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;
- (3) acting as principal for his own account, knowingly to sell any security to or purchase

any security from a client, or acting as broker for a person other than such client, knowingly to effect any sale or purchase of any security for the account of such client, without disclosing to such client in writing before the completion of such transaction the capacity in which he is acting and obtaining the consent of the client to such transaction. The prohibitions of this paragraph shall not apply to any transaction with a customer of a broker or dealer if such broker or dealer is not acting as an investment adviser in relation to such transaction; or

(4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative. The Commission shall, for the purposes of this paragraph (4) by rules and regulations define, and prescribe means reasonably designed to prevent, such acts, practices, and courses of business as are fraudulent, deceptive, or manipulative.

(Aug. 22, 1940, ch. 686, title II, §206, 54 Stat. 852; Pub. L. 86-750, §§8, 9, Sept. 13, 1960, 74 Stat. 887; Pub. L. 111-203, title IX, §985(e)(2), July 21, 2010, 124 Stat. 1935.)

#### AMENDMENTS

2010—Par. (3). Pub. L. 111-203 inserted "or" at end. 1960—Pub. L. 86-750, §8, struck out "registered under section 80b-3 of this title" from introductory text. Par. (4). Pub. L. 86-750, §9, added par. (4).

#### EFFECTIVE DATE OF 2010 AMENDMENT

Amendment by Pub. L. 111-203 effective 1 day after July 21, 2010, except as otherwise provided, see section 4 of Pub. L. 111-203, set out as an Effective Date note under section 5301 of Title 12, Banks and Banking.

### § 80b-6a. Exemptions

The Commission, by rules and regulations, upon its own motion, or by order upon application, may conditionally or unconditionally exempt any person or transaction, or any class or classes of persons, or transactions, from any provision or provisions of this subchapter or of any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this subchapter.

(Aug. 22, 1940, ch. 686, title II, §206A, as added Pub. L. 91-547, §26, Dec. 14, 1970, 84 Stat. 1433.)

#### EFFECTIVE DATE

Section effective Dec. 14, 1970, see section 30 of Pub. L. 91-547, set out as a note under section 80a-2 of this title.

### § 80b-7. Material misstatements

It shall be unlawful for any person willfully to make any untrue statement of a material fact in any registration application or report filed with the Commission under section 80b-3 or 80b-4 of this title, or willfully to omit to state in any such application or report any material fact which is required to be stated therein.

(Aug. 22, 1940, ch. 686, title II, §207, 54 Stat. 853.)

#### TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of

such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2, eff. May 24, 1950, 15 F.R. 3175, 64 Stat. 1265, set out under section 78d of this title.

### § 80b-8. General prohibitions

#### (a) Representations of sponsorship by United States or agency thereof

It shall be unlawful for any person registered under section 80b-3 of this title to represent or imply in any manner whatsoever that such person has been sponsored, recommended, or approved, or that his abilities or qualifications have in any respect been passed upon by the United States or any agency or any officer thereof.

#### (b) Statement of registration under Securities Exchange Act of 1934 provisions

No provision of subsection (a) of this section shall be construed to prohibit a statement that a person is registered under this subchapter or under the Securities Exchange Act of 1934 [15 U.S.C. 78a et seq.], if such statement is true in fact and if the effect of such registration is not misrepresented.

#### (c) Use of name "investment counsel" as descriptive of business

It shall be unlawful for any person registered under section 80b-3 of this title to represent that he is an investment counsel or to use the name "investment counsel" as descriptive of his business unless (1) his or its principal business consists of acting as investment adviser, and (2) a substantial part of his or its business consists of rendering investment supervisory services.

#### (d) Use of indirect means to do prohibited act

It shall be unlawful for any person indirectly, or through or by any other person, to do any act or thing which it would be unlawful for such person to do directly under the provisions of this subchapter or any rule or regulation thereunder.

(Aug. 22, 1940, ch. 686, title II, §208, 54 Stat. 853; Pub. L. 86-750, §§10, 11, Sept. 13, 1960, 74 Stat. 887.)

#### REFERENCES IN TEXT

The Securities Exchange Act of 1934, referred to in subsec. (b), is act June 6, 1934, ch. 404, 48 Stat. 881, which is classified principally to chapter 2B (§78a et seq.) of this title. For complete classification of this Act to the Code, see section 78a of this title and Tables.

#### AMENDMENTS

1960—Pub. L. 86-750, §10, substituted "General prohibitions" for "Unlawful representations" in section catchline.

Subsec. (c). Pub. L. 86-750, §11(a), authorized representation as an investment counsel if person's principal business consisted of acting as investment adviser, and a substantial part of the business was rendering investment supervisory services, and struck out the requirements that the person be primarily engaged in rendering investment supervisory services, or that his registration application state that the person is, or is about to become engaged primarily in rendering investment advisory services.

Subsec. (d). Pub. L. 86-750, §11(b), added subsec. (d).

#### TRANSFER OF FUNCTIONS

For transfer of functions of Securities and Exchange Commission, with certain exceptions, to Chairman of such Commission, see Reorg. Plan No. 10 of 1950, §§1, 2.

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the standards of independence described in rule 2-01(b) and (c) of Regulation S-X (17 CFR 210.2-01(b) and (c)).

(4) *Independent representative* means a person that:

(i) Acts as agent for an advisory client, including in the case of a pooled investment vehicle, for limited partners of a limited partnership (or members of a limited liability company, or other beneficial owners of another type of pooled investment vehicle) and by law or contract is obliged to act in the best interest of the advisory client or the limited partners (or members, or other beneficial owners);

(ii) Does not control, is not controlled by, and is not under common control with you; and

(iii) Does not have, and has not had within the past two years, a material business relationship with you.

(5) *Operationally independent*: for purposes of paragraph (b)(6) of this section, a related person is presumed not to be operationally independent unless each of the following conditions is met and no other circumstances can reasonably be expected to compromise the operational independence of the related person: (i) Client assets in the custody of the related person are not subject to claims of the adviser's creditors; (ii) advisory personnel do not have custody or possession of, or direct or indirect access to client assets of which the related person has custody, or the power to control the disposition of such client assets to third parties for the benefit of the adviser or its related persons, or otherwise have the opportunity to misappropriate such client assets; (iii) advisory personnel and personnel of the related person who have access to advisory client assets are not under common supervision; and (iv) advisory personnel do not hold any position with the related person or share premises with the related person.

(6) *Qualified custodian* means:

(i) A bank as defined in section 202(a)(2) of the Advisers Act (15 U.S.C. 80b-2(a)(2)) or a savings association as defined in section 3(b)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1813(b)(1)) that has deposits insured by the Federal Deposit Insurance Corporation under the Federal Deposit Insurance Act (12 U.S.C. 1811);

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(ii) A broker-dealer registered under section 15(b)(1) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(b)(1)), holding the client assets in customer accounts;

(iii) A futures commission merchant registered under section 4f(a) of the Commodity Exchange Act (7 U.S.C. 6f(a)), holding the client assets in customer accounts, but only with respect to clients' funds and security futures, or other securities incidental to transactions in contracts for the purchase or sale of a commodity for future delivery and options thereon; and

(iv) A foreign financial institution that customarily holds financial assets for its customers, provided that the foreign financial institution keeps the advisory clients' assets in customer accounts segregated from its proprietary assets.

(7) *Related person* means any person, directly or indirectly, controlling or controlled by you, and any person that is under common control with you.

[75 FR 1484, Jan. 11, 2010]

§ 275.206(4)-3 Cash payments for client solicitations.

(a) It shall be unlawful for any investment adviser required to be registered pursuant to section 203 of the Act to pay a cash fee, directly or indirectly, to a solicitor with respect to solicitation activities unless:

(1)(i) The investment adviser is registered under the Act;

(ii) The solicitor is not a person (A) subject to a Commission order issued under section 203(f) of the Act, or (B) convicted within the previous ten years of any felony or misdemeanor involving conduct described in section 203(e)(2)(A) through (D) of the Act, or (C) who has been found by the Commission to have engaged, or has been convicted of engaging, in any of the conduct specified in paragraphs (1), (5) or (6) of section 203(e) of the Act, or (D) is subject to an order, judgment or decree described in section 203(e)(4) of the Act; and

(iii) Such cash fee is paid pursuant to a written agreement to which the adviser is a party; and

NOTE: The investment adviser shall retain a copy of each written agreement required

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by this paragraph as part of the records required to be kept under §275.204-2(a)(10) of this chapter.

(2) Such cash fee is paid to a solicitor:

(i) With respect to solicitation activities for the provision of impersonal advisory services only; or

(ii) Who is (A) a partner, officer, director or employee of such investment adviser or (B) a partner, officer, director or employee of a person which controls, is controlled by, or is under common control with such investment adviser: *Provided*, That the status of such solicitor as a partner, officer, director or employee of such investment adviser or other person, and any affiliation between the investment adviser and such other person, is disclosed to the client at the time of the solicitation or referral; or

(iii) Other than a solicitor specified in paragraph (a)(2) (i) or (ii) of this section if all of the following conditions are met:

(A) The written agreement required by paragraph (a)(1)(iii) of this section:

- (1) Describes the solicitation activities to be engaged in by the solicitor on behalf of the investment adviser and the compensation to be received therefor;
- (2) contains an undertaking by the solicitor to perform his duties under the agreement in a manner consistent with the instructions of the investment adviser and the provisions of the Act and the rules thereunder;
- (3) requires that the solicitor, at the time of any solicitation activities for which compensation is paid or to be paid by the investment adviser, provide the client with a current copy of the investment adviser's written disclosure statement required by §275.204-3 of this chapter ("brochure rule") and a separate written disclosure document described in paragraph (b) of this rule.

(B) The investment adviser receives from the client, prior to, or at the time of, entering into any written or oral investment advisory contract with such client, a signed and dated acknowledgment of receipt of the investment adviser's written disclosure statement and the solicitor's written disclosure document.

NOTE: The investment adviser shall retain a copy of each such acknowledgment and so-

licitor disclosure document as part of the records required to be kept under §275.204-2(a)(15) of this chapter.

(C) The investment adviser makes a bona fide effort to ascertain whether the solicitor has complied with the agreement, and has a reasonable basis for believing that the solicitor has so complied.

(b) The separate written disclosure document required to be furnished by the solicitor to the client pursuant to this section shall contain the following information:

(1) The name of the solicitor;

(2) The name of the investment adviser;

(3) The nature of the relationship, including any affiliation, between the solicitor and the investment adviser;

(4) A statement that the solicitor will be compensated for his solicitation services by the investment adviser;

(5) The terms of such compensation arrangement, including a description of the compensation paid or to be paid to the solicitor; and

(6) The amount, if any, for the cost of obtaining his account the client will be charged in addition to the advisory fee, and the differential, if any, among clients with respect to the amount or level of advisory fees charged by the investment adviser if such differential is attributable to the existence of any arrangement pursuant to which the investment adviser has agreed to compensate the solicitor for soliciting clients for, or referring clients to, the investment adviser.

(c) Nothing in this section shall be deemed to relieve any person of any fiduciary or other obligation to which such person may be subject under any law.

(d) For purposes of this section,

(1) *Solicitor* means any person who, directly or indirectly, solicits any client for, or refers any client to, an investment adviser.

(2) *Client* includes any prospective client.

(3) *Impersonal advisory services* means investment advisory services provided solely by means of (i) written materials or oral statements which do not purport to meet the objectives or needs of the specific client, (ii) statistical information containing no expressions of

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opinions as to the investment merits of particular securities, or (iii) any combination of the foregoing services.

(e) *Special rule for solicitation of government entity clients.* Solicitation activities involving a government entity, as defined in § 275.206(4)-5, shall be subject to the additional limitations set forth in that section.

[44 FR 42130, July 18, 1979; 54 FR 32441, Aug. 8, 1989, as amended at 62 FR 28135, May 22, 1997; 63 FR 39716, July 24, 1998; 75 FR 41069, July 14, 2010]

§ 275.206(4)-4 [Reserved]

§ 275.206(4)-5 Political contributions by certain investment advisers.

(a) *Prohibitions.* As a means reasonably designed to prevent fraudulent, deceptive or manipulative acts, practices, or courses of business within the meaning of section 206(4) of the Act (15 U.S.C. 80b-6(4)), it shall be unlawful:

(1) For any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act (15 U.S.C. 80b-3(b)(3)), or that is an exempt reporting adviser, as defined in section 275.204-4(a), to provide investment advisory services for compensation to a government entity within two years after a contribution to an official of the government entity is made by the investment adviser or any covered associate of the investment adviser (including a person who becomes a covered associate within two years after the contribution is made); and

(2) For any investment adviser registered (or required to be registered) with the Commission, or unregistered in reliance on the exemption available under section 203(b)(3) of the Advisers Act (15 U.S.C. 80b-3(b)(3)), or that is an exempt reporting adviser, or any of the investment adviser's covered associates:

(i) To provide or agree to provide, directly or indirectly, payment to any person to solicit a government entity for investment advisory services on behalf of such investment adviser unless such person is:

(A) A regulated person; or

(B) An executive officer, general partner, managing member (or, in each

case, a person with a similar status or function), or employee of the investment adviser; and

(ii) To coordinate, or to solicit any person or political action committee to make, any:

(A) Contribution to an official of a government entity to which the investment adviser is providing or seeking to provide investment advisory services; or

(B) Payment to a political party of a State or locality where the investment adviser is providing or seeking to provide investment advisory services to a government entity.

(b) *Exceptions*—(1) *De minimis exception.* Paragraph (a)(1) of this section does not apply to contributions made by a covered associate, if a natural person, to officials for whom the covered associate was entitled to vote at the time of the contributions and which in the aggregate do not exceed \$350 to any one official, per election, or to officials for whom the covered associate was not entitled to vote at the time of the contributions and which in the aggregate do not exceed \$150 to any one official, per election.

(2) *Exception for certain new covered associates.* The prohibitions of paragraph (a)(1) of this section shall not apply to an investment adviser as a result of a contribution made by a natural person more than six months prior to becoming a covered associate of the investment adviser unless such person, after becoming a covered associate, solicits clients on behalf of the investment adviser.

(3) *Exception for certain returned contributions.* (i) An investment adviser that is prohibited from providing investment advisory services for compensation pursuant to paragraph (a)(1) of this section as a result of a contribution made by a covered associate of the investment adviser is excepted from such prohibition, subject to paragraphs (b)(3)(ii) and (b)(3)(iii) of this section, upon satisfaction of the following requirements:

(A) The investment adviser must have discovered the contribution which resulted in the prohibition within four months of the date of such contribution;