

Ethical Issues in the Practice of Real Property Law

Friday, December 16, 2016, Seattle, WA

*Presented by WSBA CLE
in partnership with the Real Property Probate and Trust Section*

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Summary of Contents

	Program Schedule.....	iii
	Co-Chair Biographies.....	v
1	Distressed Home Conveyance..... <i>Scott E. Hildebrand</i>	1-1
2	Family Law/ Real Property Crossover..... <i>Sue Stepp Tamblyn</i>	2-1
3	Marijuana and Ethics..... <i>Philip J. Buri</i>	3-1
4	Foreclosures and Lockouts..... <i>Clay M. Gatens</i> <i>Jody M. McCormick</i>	4-1
5	Judges Panel..... <i>Judge John P. Erlick</i> <i>Judge J. Richard Creatura</i>	5-1
6	Rules of Professional Conduct (Table of Rules).....	6-1

Program Schedule

Ethical Issues in the Practice of Real Property Law

Friday, December 16, 2016

8:00 a.m. **Check-in • Walk-in Registration • Coffee and Pastry Service**

8:25 a.m. **Welcome and Introductions by Program Co-Chair**
Scott E. Hildebrand, Scott Hildebrand Attorney at Law PLLC, Seattle

8:30 a.m. **Distressed Home Conveyance**
RCW 61.34, the Distressed Property Conveyance Act, has introduced pitfalls and traps into the law for investors and others looking to acquire homes in danger of foreclosure. This presentation will analyze the law, summarize judicial guidance and generally give a deeper understanding of how you should be advising your clients who are engaging in the acquisition of distressed homes.
Scott E. Hildebrand, Scott Hildebrand Attorney at Law PLLC, Seattle

9:30 a.m. **Family Law/ Real Property Crossover**
When family and real property law intersect, practitioners are often at a loss as to what it takes to make sure property is properly conveyed pursuant to family law adjudications. In this presentation, you'll learn about some of the tricks and traps that go along with satisfying judgments relative to real property in the family law realm, including identification of real property during dissolution, courts' jurisdiction over out-of-state and foreign real estate, the ethics and efficacy of taking or giving security interests during dissolution, and warnings to be aware of restraining orders.
Sue Stepp Tamblyn, Somers Tamblyn King Isenhour Bleck PLLC, Seattle and Mercer Island

10:30 a.m. **BREAK**

10:45 a.m. **Marijuana and Ethics**
This session will explore the ethics around marijuana law including what to do when your client wants to sell marijuana and your gut tells you to run. It will also cover what to do when you are representing landlords, tenants and/or government agencies and state law tells you to do one thing while the federal law tells you to do another. Philip will offer insight into these ethical issues and provide hypotheticals and real-life examples of what to do and even more importantly, what not to do.
Philip J. Buri, Buri Funston Mumford PLLC, Bellingham

Schedule continued on next page

*Program Schedule (cont.)***11:45 a.m. LUNCH on your own**

There is a mentorship luncheon for New Lawyers provided by the RPPT section. For those who pre-registered for this event, this lunch will be held in the Mountain Rooms.

12:45 p.m. Foreclosures and Lockouts

Clay Gatens and Jody McCormick will host a live panel discussion regarding the impact on Washington borrowers and lenders from the recent Washington State Supreme Court decision in *Jordan v. Nationstar Mortgage, LLC* (No. 92081-8). Clay is lead Plaintiffs' counsel in the Zamora Jordan case, representing a certified class of over 5,600 homeowners and presented oral argument on behalf of Plaintiffs to the Court. Jody is corporate counsel at Washington Trust Bank. Clay will discuss how the case clarified the law. Jody will provide some practical guidance on how lenders can protect their collateral and comply with their servicing requirements. *Clay M. Gatens, Jeffers Danielson Sonn and Aylward, Wenatchee*
Jody M. McCormick, Washington Trust Bank, Spokane

2:00 p.m. Judges Panel – Part I

Hear from Superior Court Judges who have to listen to arguments, read pleadings and keep calendars on target in their court rooms. They have heard and seen it all from the bench when it comes to ethics. This presentation will give you a flavor of the good, the bad and the ugly when it comes to ethical (and non-ethical) behavior by counsel in the eyes of these esteemed jurists.

Judge John P. Erlick, King County Superior Court, Seattle
Judge J. Richard Creatura, Federal District Court, Tacoma

3:00 p.m. BREAK**3:15 p.m. Judges Panel – Part II****4:15 p.m. Adjourn • Complete Evaluation Forms**

Co-Chair Biographies

Danielle Flatt

Danielle Flatt is an attorney at Dimension Law Group, PLLC in Renton, Washington. She practices real estate law, business law, and estate planning. She regularly counsels landlords and investors in a variety of real estate transactional and litigation matters. She earned her J.D. at Seattle University School of Law, and her Bachelors of Science in Business Administration from the University of Southern California Marshall School of Business. She is the Real Property Fellow to the WSBA's Real Property Probate and Trust Section. She was admitted to the Washington State Bar in 2013.

Rhys W. Hefta

Rhys Hefta is a partner in the Seattle office of K&L Gates LLP, where he practices in the Real Estate Investment, Development and Finance practice group. He is a member of the Real Property Council of the Executive Committee of the Real Property Probate and Trust Section. He Graduated from Columbia Law School in 2005 and practiced in New York until 2010. He was admitted to the Washington State Bar in 2011.

Scott E. Hildebrand

Scott Hildebrand is a solo practitioner in Sammamish, WA. His practice consists of real estate transactional law as well as contract writing and review, and corporate formation. Scott is a member of the Executive Committee of the Real Estate Probate and Trust Section of the Washington Bar. He is past chair of the American Bar Association's Committee on Multifamily Housing and serves on the American Society of Association Executives' Legal Committee. Scott also served as Association Counsel of the Master Builders Association of King and Snohomish Counties. He is licensed to practice in Washington and California.

Under MCLE Rules, we report hours of course attendance. Our report is based on you confirming your attendance with our CLE representative as you arrive, and the receipt of the form below from anyone who chooses to attend only part of the seminar.

We ask that you complete this form and turn-in to our representative if you leave before the end of the program.
Thank you, WSBA-CLE

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<http://www.wsba.org/Licensing-and-Lawyer-Conduct/MCLE/Members/Member-Online-MCLE-FAQs> - questions@wsba.org

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Seminar Name:	Ethical Issues in the Practice of Real Property Law (17702SEA/WEB)									
Seminar Date:	December 16, 2016									
Approved Credits:	<u>6.25</u> CLE Credits for Washington Attorneys (<u>3.25</u> Law & Legal Procedure, <u>3.0</u> Ethics and <u>0.0</u> Other)									
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I hereby certify that I have earned the number of L&LP/Ethics/Other credits inserted above on the Credits Earned line.										
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CHAPTER ONE

DISTRESSED HOME CONVEYANCE

December 2016

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SCOTT E. HILDEBRAND is a solo practitioner in Sammamish, WA. His practice consists of real estate transactional law as well as contract writing and review, and corporate formation. Scott is a member of the Executive Committee of the Real Estate Probate and Trust Section of the Washington Bar. He is past chair of the American Bar Association's Committee on Multifamily Housing and serves on the American Society of Association Executives' Legal Committee. Scott also served as Association Counsel of the Master Builders Association of King and Snohomish Counties. He is licensed to practice in Washington and California.

RCW 61.34: GUIDANCE FOR THOSE REPRESENTING REAL ESTATE
INVESTORS AND REAL ESTATE PROFESSIONALS

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INTRODUCTION

The Distressed Property Conveyance Act, codified at RCW 61.34, was passed in three parts: Senate Bill 6096 in the 1988 legislative session (equity skimming); House Bill 2791 in the 2008 legislative session; and Senate Bill 5221 in the 2009 legislative session (both addressed distressed home conveyances outside of the definition of “equity skimming.”

The original bill arose out of reports that a number of “real estate entrepreneurs” were inducing homeowners around the state with equity but little ability to maintain mortgages. The pattern was typically that a homeowner would show up on a notice of default list, whereupon an enterprising entrepreneur would offer to save the home from the auction block by having the property conveyed away, leased back by the seller (former owner) and finally taken back by the buyer if the seller was guilty of being five minutes late with a payment or other such egregious actions. The result would leave the entrepreneur with a pocket full of equity and the former owner with little or nothing in their pocket.

The two latter bills were justified in the wake of the real estate boom and crash of the late 2000’s where enterprising real estate entrepreneurs engaged in similar tactics as begat the equity skimming activity in the late ‘80s. Notices of default were often followed by knocks on doors and direct mail offering to forestall auction dates, repair credit and the like.

All three bills were meant to stem the tide of amateurs contacting and engaging homeowners with promises to make their lives easier if only homeowners trusted the many promises of the Svengalis.

CONSTRUCTION OF THE STATUTE

RCW 61.34 is a relatively short bill, just 13 sections, including definitions and legislative findings.

The Act provides a criminal penalty for a pattern of equity skimming, allows Consumer Protection Act remedies for violations, prescribes procedures for certain transactions, and delineates rights and duties for those engaging in those transactions.

DEFINITIONS, CLASSIFICATIONS AND TRANSACTIONS OF NOTE

1. Distressed Home Consultant:

- (1) Solicits or contacts distressed homeowner in writing, in person, or through electronic communications and offers to do one of 13 things ranging from delaying an auction to improving credit.
- (2) OR systematically contacts owners of property that are shown to be in foreclosure.
- (3) Distressed home consultant is not a member of a number of professions including real estate professionals, attorneys, mortgage brokers, etc.

2. Distressed Home Consulting Transaction:

- (1) Agreement between distressed home consultant and distressed homeowner,
- (2) Where, distressed home consultant promises to do one of the 13 things referred to in the definition of distressed home consultant.

3. Distressed Home Conveyance:

- (1) Transfer from distressed homeowner to distressed home purchaser.
- (2) Homeowner allowed to stay in home AND
- (3) Homeowner is given an ownership interest or an option on the home.

4. Distressed Home Purchaser:

- (1) Acquires an interest in a home under a distressed home conveyance.
- (2) Includes one operating in a joint venture.
- (3) Financial institution not part of the definition.

5. Fiduciary Duties of Distressed Home Consultant

- (1) Act in the distressed homeowners' best interest and in utmost good faith.
- (2) Disclose all material facts...that might reasonably affect the distressed homeowner's rights, interests, etc.
- (3) Use reasonable care.
- (4) Provide accounting to the distressed homeowner.

6. Distressed Home Reconveyance.

- (1) Between distressed home purchaser and distressed home owner.
- (2) Not otherwise defined in the statute.

JUDICIARY AND REGULATORY GUIDANCE

Jametsky v Olsen.

Judiciary guidance with regard to RCW 61.34 has been scarce. The leading case addressing the statute is *Jametsky v Olsen* (300 P3d 415, 177 Wn2d 1001). In *Jametsky*, the Washington Supreme Court addressed a case where a homeowner faced significant personal and financial issues. He agreed to a loan document which deeded his house to someone else with a lease buy-back option.

The question addressed in *Jametsky* was primarily what it meant for a home to be distressed and, whether the definition was met when a certificate of delinquency was issued (this case specifically addressed delinquent taxes).

The Court made several comments that are dispositive to the questions presented in this case.

The Court found that the "DPCA's protections are reserved for desparate circumstances that may induce homeowners into unscrupulous deals."

Further the Court recommended that courts exercise case-by-case analysis of whether transactions protected by the DPCA's would fit the category of distressed homes. The Court suggested a balancing between total amount owed, total number of payments delinquent, financial ability to meet the obligation and discrepancy between sale price and fair market value of the property.

Jametsky's relevant conclusions are that "distressed" or "in jeopardy" do not necessarily mean either term is pursuant to a government notice, nor is there a bright line as to what is meant by the terms.

Attorney General's Guidance

Likewise, regulatory guidance has been few and far between as well. In October of 2008, after the passage of House Bill 2791, then-Reps. Roger Goodman and Rodney Tom asked several questions of Attorney General Rob McKenna pertaining to the law's effect. Although some answers are straightforward, the hypothetical fact patterns presented in the Attorney General's answers are somewhat inconclusive.

Because the answers given by the attorney General are in response to HB 2791 and not the remedial bill passed in 2009, some of the answers are not accurate given the current state of the law.

Distressed home Consultant

The Attorney General said that someone offering to purchase a distressed home and nothing more is not a distressed home consultant.

The hypothetical was presented in which a prospective buyer sees a sign advertising a home for sale and inquires, offering to buy the home and promise nothing in the way of distressed home consultant services.

Another hypothetical fact pattern was presented where a prospective buyer sees that a house is for sale and inquires. The homeowner tells the prospective buyer that they are in distress, behind in payments and are at risk of foreclosure. In this scenario, even though the homeowner is clearly in distress, the prospective buyer has promised to undertake none of the duties enumerated in 61.34 that would make him/her a distressed property consultant.

QUESTIONS, ANSWERS AND GREY AREAS IN THE LAW

1. It is a somewhat common practice among real estate investors to solicit interest in the sale of real property among a targeted segment of owners. If an investor mails to a list, not comprised of distressed owners, but receives responses from distressed homeowners who want to sell, can he or she pursue the transaction without danger of being a distressed property consultant?

It depends on the meaning of systematic contact in the definition of distressed property consultant. If the Attorney General's hypothetical holds, this activity is not likely to trigger the distressed property consultant label.

2. Does an investor have to worry about having to comply with the requirements of a distressed home consulting transaction if he or she solicits distressed homeowners, thereby becoming a distressed property consultant?

No because a distressed home consulting transaction is created only when a consultant is promising something in the list of 13 items in the definition of distressed property consultant.

3. Does an investor buying a home from a distressed homeowner have to worry about being classified a distressed home purchaser and following the specifications for a distressed home conveyance?

A distressed home purchaser must not perform any of the prohibited functions in the definition of the act, but a distressed home purchaser is one who acquires a home under a distressed home conveyance, which is defined as an agreement where the owner is allowed to stay in the home or the owner is given an opportunity to take an ownership interest in the home. It appears as though straight sales are not performed by distressed home purchasers, nor are they subject to distressed home conveyances.

4. What exactly are the fiduciary duties of a distressed property consultant?

Good question. You must act in the best interests of the distressed homeowner as to all others, including yourself. It is not clear as to how this aspect of the law should play out as there has been no litigation reported on this issue in this context. At the very least, all aspects of the transaction should be reported including conflicts. A complete financial accounting should be provided as well. So far as compliance guidance with any real specificity, it is hard to say what would qualify in a litigation environment.

OVERVIEW OF 61.34

DISTRESSED PROPERTY CONVEYANCE ACT

61.34.010

Legislative findings.

The legislature finds that persons are engaging in patterns of conduct which defraud innocent homeowners of their equity interest or other value in residential dwellings under the guise of a purchase of the owner's residence but which is in fact a device to convert the owner's equity interest or other value in the residence to an equity skimmer, who fails to make payments, diverts the equity or other value to the skimmer's benefit, and leaves the innocent homeowner with a resulting financial loss or debt.

The legislature further finds this activity of equity skimming to be contrary to the public policy of this state and therefore establishes the crime of equity skimming to address this form of real estate fraud and abuse.

*Comment: This finding is consistent with the overall intent of the legislation. Examples of fact patterns appear in caselaw, particularly *Jemetsky v Olson*, (179 Wash 2d 878) and *Fraser v Mayberry* (Not reported in 170 Wash App 643). Typically, homeowners who faced foreclosure would enter into agreements with those who would "help" them and find themselves without a house and without equity.*

61.34.020

Definitions.

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) An "act of equity skimming" occurs when:

(a)(i) A person purchases a dwelling with the representation that the purchaser will pay for the dwelling by assuming the obligation to make payments on existing mortgages, deeds of trust, or real estate contracts secured by and pertaining to the dwelling, or by representing that such obligation will be assumed; and

(ii) The person fails to make payments on such mortgages, deeds of trust, or real estate contracts as the payments become due, within two years subsequent to the purchase; and

(iii) The person diverts value from the dwelling by either (A) applying or authorizing the application of rents from the dwelling for the person's own benefit or use, or (B) obtaining anything of value from the sale or lease with option to purchase of the dwelling for the person's own benefit or use, or (C) removing or obtaining appliances, fixtures, furnishings, or parts of such dwellings or appurtenances for the person's own benefit or use without replacing the removed items with items of equal or greater value; or

(b)(i) The person purchases a dwelling in a transaction in which all or part of the purchase price is financed by the seller and is (A) secured by a lien which is inferior in priority or subordinated to a lien placed on the dwelling by the purchaser, or (B) secured by a lien on other real or personal property, or (C) without any security; and

(ii) The person obtains a superior priority loan which either (A) is secured by a lien on the dwelling which is superior in priority to the lien of the seller, but not including a bona fide assumption by the purchaser of a loan existing prior to the time of purchase, or (B) creating any lien or encumbrance on the dwelling when the seller does not hold a lien on the dwelling; and

(iii) The person fails to make payments or defaults on the superior priority loan within two years subsequent to the purchase; and

(iv) The person diverts value from the dwelling by applying or authorizing any part of the proceeds from such superior priority loan for the person's own benefit or use.

(2) "Distressed home" means either:

(a) A dwelling that is in danger of foreclosure or at risk of loss due to nonpayment of taxes; or

(b) A dwelling that is in danger of foreclosure or that is in the process of being foreclosed due to a default under the terms of a mortgage.

(3) "Distressed home consultant" means a person who:

(a) Solicits or contacts a distressed homeowner in writing, in person, or through any electronic or telecommunications medium and makes a representation or offer to perform any service that the person represents will:

(i) Stop, enjoin, delay, void, set aside, annul, stay, or postpone a foreclosure sale;

(ii) Obtain forbearance from any servicer, beneficiary, or mortgagee;

(iii) Assist the distressed homeowner to exercise a right of reinstatement provided in the loan documents or to refinance a loan that is in foreclosure or is in danger of foreclosure;

(iv) Obtain an extension of the period within which the distressed homeowner may reinstate the distressed homeowner's obligation or extend the deadline to object to a ratification;

(v) Obtain a waiver of an acceleration clause contained in any promissory note or contract secured by a mortgage on a distressed home or contained in the mortgage;

(vi) Assist the distressed homeowner to obtain a loan or advance of funds;

(vii) Save the distressed homeowner's residence from foreclosure;

(viii) Avoid or ameliorate the impairment of the distressed homeowner's credit resulting from the recording of a notice of trustee sale, the filing of a petition to foreclose, or the conduct of a foreclosure sale;

(ix) Cause a contract to purchase an interest in the distressed home to be executed or closed within twenty days of an advertised or docketed foreclosure sale, unless the distressed homeowner is represented in the transaction by an attorney or a person licensed under chapter [18.85](#) RCW;

(x) Arrange for the distressed homeowner to become a lessee or tenant entitled to continue to reside in the distressed homeowner's residence, unless (A) the continued residence is for a period of no more than twenty days after closing, (B) the purpose of the continued residence is to arrange for and relocate to a new residence, and (C) the

distressed homeowner is represented in the transaction by an attorney or a person licensed and subject to chapter [18.85](#) RCW;

(xi) Arrange for the distressed homeowner to have an option to repurchase the distressed homeowner's residence; or

(xii) Engage in any documentation, grant, conveyance, sale, lease, trust, or gift by which the distressed homeowner clogs the distressed homeowner's equity of redemption in the distressed homeowner's residence; or

(b) Systematically contacts owners of property that court records, newspaper advertisements, or any other source demonstrate are in foreclosure or are in danger of foreclosure.

"Distressed home consultant" does not include: A financial institution; a nonprofit credit counseling service; a licensed attorney, or a person subject to chapter [19.148](#) RCW; a licensed mortgage broker who, pursuant to lawful activities under chapter [19.146](#) RCW, procures a nonpurchase mortgage loan for the distressed homeowner from a financial institution; or a person licensed as a real estate broker or salesperson under chapter [18.85](#) RCW, when rendering real estate brokerage services under chapter [18.86](#) RCW, regardless of whether the person renders additional services that would otherwise constitute the services of a distressed home consultant, and if the person is not engaged in activities designed to, or represented to, result in a distressed home conveyance.

(4) "Distressed home consulting transaction" means an agreement between a distressed homeowner and a distressed home consultant in which the distressed home consultant represents or offers to perform any of the services enumerated in subsection (3)(a) of this section.

(5) "Distressed home conveyance" means a transaction in which:

(a) A distressed homeowner transfers an interest in the distressed home to a distressed home purchaser;

(b) The distressed home purchaser allows the distressed homeowner to occupy the distressed home; and

(c) The distressed home purchaser or a person acting in participation with the distressed home purchaser conveys or promises to convey the distressed home to the distressed homeowner, provides the distressed homeowner with an option to purchase the distressed home at a later date, or promises the distressed homeowner an interest in, or portion of, the proceeds of any resale of the distressed home.

(6) "Distressed home purchaser" means any person who acquires an interest in a distressed home under a distressed home conveyance. "Distressed home purchaser" includes a person who acts in joint venture or joint enterprise with one or more distressed home purchasers in a distressed home conveyance. A financial institution is not a distressed home purchaser.

(7) "Distressed homeowner" means an owner of a distressed home.

(8) "Dwelling" means a one-to-four family residence, condominium unit, residential cooperative unit, residential unit in any other type of planned unit development, or manufactured home whether or not title has been eliminated pursuant to [RCW 65.20.040](#).

(9) "Financial institution" means (a) any bank or trust company, mutual savings bank, savings and loan association, credit union, or a lender making federally related

mortgage loans, (b) a holder in the business of acquiring federally related mortgage loans as defined in the real estate settlement procedures act (RESPA) (12 U.S.C. Sec. 2602), insurance company, insurance producer, title insurance company, escrow company, or lender subject to auditing by the federal national mortgage association or the federal home loan mortgage corporation, which is organized or doing business pursuant to the laws of any state, federal law, or the laws of a foreign country, if also authorized to conduct business in Washington state pursuant to the laws of this state or federal law, (c) any affiliate or subsidiary of any of the entities listed in (a) or (b) of this subsection, or (d) an employee or agent acting on behalf of any of the entities listed in (a) or (b) of this subsection. "Financial institution" also means a licensee under chapter [31.04](#) RCW, provided that the licensee does not include a licensed mortgage broker, unless the mortgage broker is engaged in lawful activities under chapter [19.146](#) RCW and procures a nonpurchase mortgage loan for the distressed homeowner from a financial institution.

(10) "Homeowner" means a person who owns and has occupied a dwelling as his or her primary residence within one hundred eighty days of the latter of conveyance or mutual acceptance of an agreement to convey an interest in the dwelling, whether or not his or her ownership interest is encumbered by a mortgage, deed of trust, or other lien.

(11) "In danger of foreclosure" means any of the following:

(a) The homeowner has defaulted on the mortgage and, under the terms of the mortgage, the mortgagee has the right to accelerate full payment of the mortgage and repossess, sell, or cause to be sold, the property;

(b) The homeowner is at least thirty days delinquent on any loan that is secured by the property; or

(c) The homeowner has a good faith belief that he or she is likely to default on the mortgage within the upcoming four months due to a lack of funds, and the homeowner has reported this belief to:

(i) The mortgagee;

(ii) A person licensed or required to be licensed under chapter [19.134](#) RCW;

(iii) A person licensed or required to be licensed under chapter [19.146](#) RCW;

(iv) A person licensed or required to be licensed under chapter [18.85](#) RCW;

(v) An attorney-at-law;

(vi) A mortgage counselor or other credit counselor licensed or certified by any federal, state, or local agency; or

(vii) Any other party to a distressed home consulting transaction.

(12) "Mortgage" means a mortgage, mortgage deed, deed of trust, security agreement, or other instrument securing a mortgage loan and constituting a lien on or security interest in housing.

(13) "Nonprofit credit counseling service" means a nonprofit organization described under section 501(c)(3) of the internal revenue code, or similar successor provisions, that is licensed or certified by any federal, state, or local agency.

(14) "Pattern of equity skimming" means engaging in at least three acts of equity skimming within any three-year period, with at least one of the acts occurring after June 9, 1988.

(15) "Person" includes any natural person, corporation, joint stock association, or unincorporated association.

(16) "Resale" means a bona fide market sale of the distressed home subject to the distressed home conveyance by the distressed home purchaser to an unaffiliated third party.

(17) "Resale price" means the gross sale price of the distressed home on resale.

61.34.030

Criminal penalty.

Any person who wilfully engages in a pattern of equity skimming is guilty of a class B felony under RCW [9A.20.021](#). Equity skimming shall be classified as a level II offense under chapter [9.94A](#) RCW, and each act of equity skimming found beyond a reasonable doubt or admitted by the defendant upon a plea of guilty to be included in the pattern of equity skimming, shall be a separate current offense for the purpose of determining the sentence range for each current offense pursuant to RCW [9.94A.589](#)(1)(a).

Comment: This is a somewhat straightforward presentation of the possible penalties for violation of the Act, although the willingness standard has not been tested.

61.34.040

Application of consumer protection act—Remedies are cumulative.

(1) In addition to the criminal penalties provided in RCW [61.34.030](#), the legislature finds that the practices covered by this chapter are matters vitally affecting the public interest for the purpose of applying chapter [19.86](#) RCW. A violation of this chapter is not reasonable in relation to the development and preservation of business and is an unfair method of competition for the purpose of applying chapter [19.86](#) RCW.

(2) In a private right of action under chapter [19.86](#) RCW for a violation of this chapter, the court may double or triple the award of damages pursuant to RCW [19.86.090](#), subject to the statutory limit. If, however, the court determines that the defendant acted in bad faith, the limit for doubling or tripling the award of damages may be increased, but shall not exceed one hundred thousand dollars. Any claim for damages brought under this chapter must be commenced within four years after the date of the alleged violation.

(3) The remedies provided in this chapter are cumulative and do not restrict any remedy that is otherwise available. The provisions of this chapter are not exclusive and are in addition to any other requirements, rights, remedies, and penalties provided by law. An action under this chapter shall not affect the rights in the distressed home held by a distressed home purchaser for value under this chapter or other applicable law.

Comment: This section associates violations of the Act with the Consumer Protection Act.

61.34.045

Arbitration not required.

(1) Any provision in a contract that attempts or purports to require arbitration of any dispute arising under this chapter is void at the option of the distressed homeowner.

(2) This section applies to any contract entered into on or after June 12, 2008.

61.34.050

Distressed home consulting transaction—Requirements—Notice.

(1) A distressed home consulting transaction must:

(a) Be in writing in at least twelve-point font;

(b) Be in the same language as principally used by the distressed home consultant to describe his or her services to the distressed homeowner. If the agreement is written in a language other than English, the distressed home consultant shall cause the agreement to be translated into English and shall deliver copies of both the original and English language versions to the distressed homeowner at the time of execution and shall keep copies of both versions on file in accordance with subsection (2) of this section. Any ambiguities or inconsistencies between the English language and the original language versions of the written agreement must be strictly construed in favor of the distressed homeowner;

(c) Fully disclose the exact nature of the distressed home consulting services to be provided, including any distressed home conveyance that may be involved and the total amount and terms of any compensation to be received by the distressed home consultant or anyone working in association with the distressed home consultant;

(d) Be dated and signed by the distressed homeowner and the distressed home consultant;

(e) Contain the complete legal name, address, telephone number, fax number, email address, and internet address if any, of the distressed home consultant, and if the distressed home consultant is serving as an agent for any other person, the complete legal name, address, telephone number, fax number, email address, and internet address if any, of the principal; and

(f) Contain the following notice, which must be initialed by the distressed homeowner, in bold face type and in at least fourteen-point font:

"NOTICE REQUIRED BY WASHINGTON LAW

THIS IS AN IMPORTANT LEGAL CONTRACT AND COULD RESULT IN THE LOSS OF YOUR HOME.

. . . Name of distressed home consultant . . . or anyone working for him or her **CANNOT** guarantee you that he or she will be able to refinance your home or arrange for you to keep your home. Continue making mortgage payments until refinancing, if applicable, is approved. You should consult with an attorney before signing this contract.

If you sign a promissory note, lien, mortgage, deed of trust, or deed, you could lose your home and be unable to get it back."

(2) At the time of execution, the distressed home consultant shall provide the distressed homeowner with a copy of the written agreement, and the distressed home consultant shall keep a separate copy of the written agreement on file for at least five years following the completion or other termination of the agreement.

(3) This section does not relieve any duty or obligation imposed upon a distressed home consultant by any other law including, but not limited to, the duties of a credit service organization under chapter [19.134](#) RCW or a person required to be licensed under chapter [19.146](#) RCW.

Comment: This section is clearly intended to standardize the language of transactions between distressed homeowners and those purporting to help such individuals.

Remember that a distressed home consulting transaction is between distressed homeowner and distressed home consultant where the consultant makes promises enumerated in RCW 61.34.020(3)(a). This provision apparently does not apply to straight sales.

61.34.060

Distressed home consultant—Fiduciary duties.

A distressed home consultant has a fiduciary relationship with the distressed homeowner, and each distressed home consultant is subject to all requirements for fiduciaries otherwise applicable under state law. A distressed home consultant's fiduciary duties include, but are not limited to, the following:

(1) To act in the distressed homeowner's best interest and in utmost good faith toward the distressed homeowner, and not compromise a distressed homeowner's right or interest in favor of another's right or interest, including a right or interest of the distressed home consultant;

(2) To disclose to the distressed homeowner all material facts of which the distressed home consultant has knowledge that might reasonably affect the distressed homeowner's rights, interests, or ability to receive the distressed homeowner's intended benefit from the residential mortgage loan;

(3) To use reasonable care in performing his or her duties; and

(4) To provide an accounting to the distressed homeowner for all money and property received from the distressed homeowner.

Comment: This is one of the most controversial provisions in the law. A distressed home consultant has a fiduciary relationship with a distressed home seller. The standards of a fiduciary relationship are well known in law but, here, the distressed property consultant is to disclose material facts that "might reasonably affect the distressed homeowner's rights..." This is a difficult standard with which to comply, let alone understand.

It is important to remember that the definition of a distressed home consultant is not well established. A consultant certainly makes representations as in RCW 61.34(3)(c) but the systematic contact portion of the definition has not been adjudicated nor well understood.

(1) Seems to be the most difficult provision with which to comply. A fiduciary is essentially a trustee in the law. Trustees can be found in many professions including stock brokers, trustees and in similar occupations and relationships. In most of those cases, the fiduciary is entitled to compensation so long as the compensation is disclosed to the party on whose behalf the fiduciary is working. Here, the consultant is prohibited from compromising the homeowner's right or interest in favor of another. Presumably this will be a question of fact to be tested in a subsequent case. Prudent guidance for a potential consultant would be to fully disclose all relationships and compensation to the homeowner to avoid, or at least reduce, exposure.

61.34.070

Waiver of rights.

(1) A person may not induce or attempt to induce a distressed homeowner to waive his or her rights under this chapter.

(2) Any waiver by a homeowner of the provisions of this chapter is void and unenforceable as contrary to public policy.

Comment: It is not possible for anyone to attempt to have the seller waive rights under this law.

61.34.080

Distressed home reconveyance—Requirements.

A distressed home purchaser shall enter into a distressed home reconveyance in the form of a written contract. The contract must be written in at least twelve-point boldface type in the same language principally used by the distressed home purchaser and distressed homeowner to negotiate the sale of the distressed home, and must be fully completed, signed, and dated by the distressed homeowner and distressed home purchaser before the execution of any instrument of conveyance of the distressed home.

Comment: Distressed home reconveyance is not defined in the statute. However, a reconveyance is typically the transfer of title to a homeowner after an encumbrance is satisfied. Presumably this means that, upon satisfaction of the underlying debt, the property is to be conveyed to the homeowner.

Also, notice that this transaction is not between a distressed property consultant and a homeowner, but a distressed home purchaser and a homeowner. The definition of a distressed

home purchaser is given in the statute, but it is anyone who takes an interest under a distressed home conveyance. That means that this provision does not apply to a transaction where either the homeowner is not allowed to stay in the home nor where the homeowner is offered or given an ownership interest in the home. It appears as though straight sales are excepted from this requirement.

61.34.090

Distressed home reconveyance—Entire agreement—Terms—Notice.

The contract required in RCW [61.34.080](#) must contain the entire agreement of the parties and must include the following:

- (1) The name, business address, and telephone number of the distressed home purchaser;
- (2) The address of the distressed home;
- (3) The total consideration to be provided by the distressed home purchaser in connection with or incident to the sale;
- (4) A complete description of the terms of payment or other consideration including, but not limited to, any services of any nature that the distressed home purchaser represents that he or she will perform for the distressed homeowner before or after the sale;
- (5) The time at which possession is to be transferred to the distressed home purchaser;
- (6) A complete description of the terms of any related agreement designed to allow the distressed homeowner to remain in the home, such as a rental agreement, repurchase agreement, or lease with option to buy;
- (7) A complete description of the interest, if any, the distressed homeowner maintains in the proceeds of, or consideration to be paid upon, the resale of the distressed home;
- (8) A notice of cancellation as provided in RCW [61.34.110](#); and
- (9) The following notice in at least fourteen-point boldface type if the contract is printed, or in capital letters if the contract is typed, and completed with the name of the distressed home purchaser, immediately above the statement required in RCW [61.34.110](#);

"NOTICE REQUIRED BY WASHINGTON LAW

Until your right to cancel this contract has ended, (Name) or anyone working for (Name) CANNOT ask you to sign or have you sign any deed or any other document."

The contract required by this section survives delivery of any instrument of conveyance of the distressed home and has no effect on persons other than the parties to the contract.

Comment: It is interesting that distressed home reconveyance is not in the definitions section of the bill. Also, the duties in this section concern a distressed home purchaser, which is different than a distressed home consultant.

RCW 61.34.100

Distressed homeowner's right to cancel.

(1) In addition to any other right of rescission, a distressed homeowner has the right to cancel any contract with a distressed home purchaser until midnight of the fifth business day following the day on which the distressed homeowner signs a contract that complies with this chapter or until 8:00 a.m. on the last day of the period during which the distressed homeowner has a right of redemption, whichever occurs first.

(2) Cancellation occurs when the distressed homeowner delivers to the distressed home purchaser, by any means, a written notice of cancellation to the address specified in the contract.

(3) A notice of cancellation provided by the distressed homeowner is not required to take the particular form as provided with the contract.

(4) Within ten days following the receipt of a notice of cancellation under this section, the distressed home purchaser shall return without condition any original contract and any other documents signed by the distressed homeowner.

Comment: The right to cancel applies to a distressed home purchaser, not a distressed home consultant. Therefore, anyone taking an ownership interest in a property via a distressed home conveyance, which requires a homeowner to either stay in the property or be offered or take an ownership interest, the right to cancel applies.

RCW 61.34.110

Notice of distressed homeowner's right to cancel.

(1) The contract required in RCW [61.34.080](#) must contain, in immediate proximity to the space reserved for the distressed homeowner's signature, the following conspicuous statement in at least fourteen-point boldface type if the contract is printed, or in capital letters if the contract is typed:

"You may cancel this contract for the sale of your house without any penalty or obligation at any time before

.....

(Date and time of day)

See the attached notice of cancellation form for an explanation of this right."

The distressed home purchaser shall accurately enter the date and time of day on which the cancellation right ends.

(2) The contract must be accompanied by a completed form in duplicate, captioned "NOTICE OF CANCELLATION" in twelve-point boldface type if the contract is printed, or in capital letters if the contract is typed, followed by a space in which the distressed home purchaser shall enter the date on which the distressed homeowner executes any contract. This

form must be attached to the contract, must be easily detachable, and must contain in at least twelve-point type if the contract is printed, or in capital letters if the contract is typed, the following statement written in the same language as used in the contract:

"NOTICE OF CANCELLATION

.....

(Enter date contract signed)

You may cancel this contract for the sale of your house, without any penalty or obligation, at any time before

.....

(Enter date and time of day)

To cancel this transaction, personally deliver a signed and dated copy of this cancellation notice to

.....

(Name of purchaser)

at

.....

(Street address of purchaser's place of business)

NOT LATER THAN

.....

(Enter date and time of day)

I hereby cancel this transaction.

.....

(Date)

.....

(Seller's signature)"

(3) The distressed home purchaser shall provide the distressed homeowner with a copy of the contract and the attached notice of cancellation at the time the contract is executed by all parties.

(4) The five-business-day period during which the distressed homeowner may cancel the contract must not begin to run until all parties to the contract have executed the contract and the distressed home purchaser has complied with this section.

Comment: Again, these requirements apply to a distressed home reconveyance as defined above.

RCW 61.34.120

Distressed home purchaser—Prohibited practices.

A distressed home purchaser shall not:

- (1) Enter into, or attempt to enter into, a distressed home conveyance with a distressed homeowner unless the distressed home purchaser verifies and can demonstrate that the distressed homeowner has a reasonable ability to pay for the subsequent conveyance of an interest back to the distressed homeowner. In the case of a lease with an option to purchase, payment ability also includes the reasonable ability to make the lease payments and purchase the property within the term of the option to purchase. An evaluation of a distressed homeowner's reasonable ability to pay includes debt to income ratios, fair market value of the distressed home, and the distressed homeowner's payment and credit history. There is a rebuttable presumption that the distressed home purchaser has not verified a distressed homeowner's reasonable ability to pay if the distressed home purchaser has not obtained documentation of assets, liabilities, and income, other than an undocumented statement, of the distressed homeowner;

Comment: This is an attempt to place the burden of income qualification on the distressed home purchaser. This requirement is somewhat parallel to regulations in Dodd-Frank.

- (2) Fail to either:

- (a) Ensure that title to the distressed home has been reconveyed to the distressed homeowner; or

- (b) Make payment to the distressed homeowner so that the distressed homeowner has received consideration in an amount of at least eighty-two percent of the fair market value of the property as of the date of the eviction or voluntary relinquishment of possession of the distressed home by the distressed homeowner. For the purposes of this subsection (2)(b), the following applies:

- (i) There is a rebuttable presumption that an appraisal by a person licensed or certified by an agency of the federal government or this state to appraise real estate constitutes the fair market value of the distressed home;

- (ii) "Consideration" means any payment or thing of value provided to the distressed homeowner, including unpaid rent owed by the distressed homeowner before the date of eviction or voluntary relinquishment of the distressed home, reasonable costs paid to independent third parties necessary to complete the distressed home conveyance transaction, the payment of money to satisfy a debt or legal obligation of the distressed homeowner, or the reasonable cost of repairs for damage to the distressed home caused by the distressed homeowner. "Consideration" does not include amounts imputed as a down payment or fee to the distressed home purchaser or a person acting in participation with the distressed home purchaser;

Comment: The 82 percent requirement is somewhat odd. Also, there is a more complete definition of consideration that includes some fees and costs. Consideration excludes fees for the distressed home purchaser.

(3) Enter into repurchase or lease terms as part of the distressed home conveyance that are unfair or commercially unreasonable, or engage in any other unfair or deceptive acts or practices;

(4) Represent, directly or indirectly, that (a) the distressed home purchaser is acting as an advisor or consultant, (b) the distressed home purchaser is acting on behalf of or in the interests of the distressed homeowner, or (c) the distressed home purchaser is assisting the distressed homeowner to save the distressed home, buy time, or use other substantially similar language;

(5) Misrepresent the distressed home purchaser's status as to licensure or certification;

(6) Perform any of the following until after the time during which the distressed homeowner may cancel the transaction has expired:

(a) Accept from any distressed homeowner an execution of, or induce any distressed homeowner to execute, any instrument of conveyance of any interest in the distressed home;

(b) Record with the county auditor any document, including any instrument of conveyance, signed by the distressed homeowner; or

(c) Transfer or encumber or purport to transfer or encumber any interest in the distressed home;

(7) Fail to reconvey title to the distressed home when the terms of the distressed home conveyance contract have been fulfilled;

(8) Enter into a distressed home conveyance where any party to the transaction is represented by a power of attorney;

(9) Fail to extinguish or assume all liens encumbering the distressed home immediately following the conveyance of the distressed home;

(10) Fail to close a distressed home conveyance in person before an independent third party who is authorized to conduct real estate closings within the state.

Comment: These are prohibited practices that apply to a distressed home purchaser, not a distressed home consultant. The two definitions are separate and distinct from one another.

It is important to note that these prohibited practices apply to anyone acquiring an interest in a distressed home via a distressed home conveyance. Again, if the homeowner is allowed to stay and occupy the property or is given an opportunity to take an ownership in the property, these prohibitions apply.

RCW 61.34 DEFINITIONS

(1) An "act of equity skimming" occurs when:

(a)(i) A person purchases a dwelling with the representation that the purchaser will pay for the dwelling by assuming the obligation to make payments on existing mortgages, deeds of trust, or real estate contracts secured by and pertaining to the dwelling, or by representing that such obligation will be assumed; and

(ii) The person fails to make payments on such mortgages, deeds of trust, or real estate contracts as the payments become due, within two years subsequent to the purchase; and

(iii) The person diverts value from the dwelling by either (A) applying or authorizing the application of rents from the dwelling for the person's own benefit or use, or (B) obtaining anything of value from the sale or lease with option to purchase of the dwelling for the person's own benefit or use, or (C) removing or obtaining appliances, fixtures, furnishings, or parts of such dwellings or appurtenances for the person's own benefit or use without replacing the removed items with items of equal or greater value;

OR

(b)(i) The person purchases a dwelling in a transaction in which all or part of the purchase price is financed by the seller and is (A) secured by a lien which is inferior in priority or subordinated to a lien placed on the dwelling by the purchaser, or (B) secured by a lien on other real or personal property, or (C) without any security; and

(ii) The person obtains a superior priority loan which either (A) is secured by a lien on the dwelling which is superior in priority to the lien of the seller, but not including a bona fide assumption by the purchaser of a loan existing prior to the time of purchase, or (B) creating any lien or encumbrance on the dwelling when the seller does not hold a lien on the dwelling; and

(iii) The person fails to make payments or defaults on the superior priority loan within two years subsequent to the purchase; and

(iv) The person diverts value from the dwelling by applying or authorizing any part of the proceeds from such superior priority loan for the person's own benefit or use.

(2) "Distressed home" means either:

(a) A dwelling that is in danger of foreclosure or at risk of loss due to nonpayment of taxes; or

(b) A dwelling that is in danger of foreclosure or that is in the process of being foreclosed due to a default under the terms of a mortgage.

See comments addressing the definition of a home being in danger of foreclosure.

(3) "Distressed home consultant" means a person who:

(a) Solicits or contacts a distressed homeowner in writing, in person, or through any electronic or telecommunications medium and makes a representation or offer to perform any service that the person represents will:

(i) Stop, enjoin, delay, void, set aside, annul, stay, or postpone a foreclosure sale;

(ii) Obtain forbearance from any servicer, beneficiary, or mortgagee;

(iii) Assist the distressed homeowner to exercise a right of reinstatement provided in the loan documents or to refinance a loan that is in foreclosure or is in danger of foreclosure;

(iv) Obtain an extension of the period within which the distressed homeowner may reinstate the distressed homeowner's obligation or extend the deadline to object to a ratification;

(v) Obtain a waiver of an acceleration clause contained in any promissory note or contract secured by a mortgage on a distressed home or contained in the mortgage;

(vi) Assist the distressed homeowner to obtain a loan or advance of funds;

(vii) Save the distressed homeowner's residence from foreclosure;

(viii) Avoid or ameliorate the impairment of the distressed homeowner's credit resulting from the recording of a notice of trustee sale, the filing of a petition to foreclose, or the conduct of a foreclosure sale;

(ix) Cause a contract to purchase an interest in the distressed home to be executed or closed within twenty days of an advertised or docketed foreclosure sale, unless the distressed homeowner is represented in the transaction by an attorney or a person licensed under chapter [18.85](#) RCW;

(x) Arrange for the distressed homeowner to become a lessee or tenant entitled to continue to reside in the distressed homeowner's residence, unless (A) the continued residence is for a period of no more than twenty days after closing, (B) the purpose of the continued residence is to arrange for and relocate to a new residence, and (C) the distressed homeowner is represented in the transaction by an attorney or a person licensed and subject to chapter [18.85](#) RCW;

(xi) Arrange for the distressed homeowner to have an option to repurchase the distressed homeowner's residence; or

(xii) Engage in any documentation, grant, conveyance, sale, lease, trust, or gift by which the distressed homeowner clogs the distressed homeowner's equity of redemption in the distressed homeowner's residence;

OR

(b) Systematically contacts owners of property that court records, newspaper advertisements, or any other source demonstrate are in foreclosure or are in danger of foreclosure.

Comment: (a) is self-explanatory. A person becomes a distressed property consultant if they promise to do anything to assist the distressed home owner.

(b) is problematic because there is no definition of "systematic." Functionally speaking, does this mean that one is a distressed property consultant if they send mailings to those who are known to be in foreclosure or in danger of foreclosure? Probably, yes.

However, it is an open question whether sending marketing materials to a more general audience and receiving a reply from a distressed homeowner would qualify one as a distressed property consultant provided they made none of the requisite promises in (a) above.

"Distressed home consultant" does not include: A financial institution; a nonprofit credit counseling service; a licensed attorney, or a person subject to chapter [19.148](#) RCW; a licensed mortgage broker who, pursuant to lawful activities under chapter [19.146](#) RCW, procures a nonpurchase mortgage loan for the distressed homeowner from a financial institution; or a person licensed as a real estate broker or

salesperson under chapter 18.85 RCW, when rendering real estate brokerage services under chapter 18.86 RCW, regardless of whether the person renders additional services that would otherwise constitute the services of a distressed home consultant, and if the person is not engaged in activities designed to, or represented to, result in a distressed home conveyance.

Comment: This section specifically says that the definition of a distressed home consultant does not include mortgage brokers undertaking certain duties, a financial institution, a nonprofit credit counseling service, attorney, or real estate broker.

However, real estate brokers are exempted from the definition when rendering real estate brokerage services under RCW 18.86 "regardless of whether the person renders additional services that would otherwise constitute the services of a distressed home consultant, AND if the person is not engaged in activities designed to, or represented to, result in a distressed home conveyance." (which is defined below).

In the case of real estate brokers, it appears as though no liability associated with a distressed home consultant would attach unless three conditions defining a distressed property conveyance. Namely:

- 1. Transfer to a distressed home purchaser, AND*
- 2. Distressed homeowner is allowed to occupy the home, AND*
- 3. Distressed homeowner is given an option to purchase or is otherwise given or promised an ownership interest in the home.*

The conclusion is that a real estate broker should be able to approach distressed sellers and facilitate and/or negotiate a sale without fear of being categorized as a "distressed property consultant."

(4) "Distressed home consulting transaction" means an agreement between a distressed homeowner and a distressed home consultant in which the distressed home consultant represents or offers to perform any of the services enumerated in subsection (3)(a) of this section.

Comment: This definition is important because unless a distressed property consultant is so determined via promises made in 3(a) above, even though a Distressed Property Consultant is involved in a transaction, the transaction is not necessarily a "distressed home consulting transaction."

(5) "Distressed home conveyance" means a transaction in which:

- (a) A distressed homeowner transfers an interest in the distressed home to a distressed home purchaser;
- (b) The distressed home purchaser allows the distressed homeowner to occupy the distressed home; and
- (c) The distressed home purchaser or a person acting in participation with the distressed home purchaser conveys or promises to convey the distressed home to the distressed homeowner, provides the distressed homeowner with an option to purchase

the distressed home at a later date, or promises the distressed homeowner an interest in, or portion of, the proceeds of any resale of the distressed home.

Comment: A conveyance is not a distressed home conveyance unless the three elements above are satisfied. So long as either the seller is given no opportunity to take an ownership interest in the home, or the seller is given an ownership interest in the home, but is not allowed to live there, the transaction is not a distressed home conveyance.

(6) "Distressed home purchaser" means any person who acquires an interest in a distressed home under a distressed home conveyance. "Distressed home purchaser" includes a person who acts in joint venture or joint enterprise with one or more distressed home purchasers in a distressed home conveyance. A financial institution is not a distressed home purchaser.

Comment: The definition of a distressed home purchaser is one who acquires an interest in a distressed home conveyance. The comment in 5 above is very specific to what constitutes a distressed home conveyance.

(7) "Distressed homeowner" means an owner of a distressed home.

(8) "Dwelling" means a one-to-four family residence, condominium unit, residential cooperative unit, residential unit in any other type of planned unit development, or manufactured home whether or not title has been eliminated pursuant to RCW [65.20.040](#).

Comment: Essentially, anything that is residential and is not greater than five units is captured in this definition.

(9) "Financial institution" means (a) any bank or trust company, mutual savings bank, savings and loan association, credit union, or a lender making federally related mortgage loans, (b) a holder in the business of acquiring federally related mortgage loans as defined in the real estate settlement procedures act (RESPA) (12 U.S.C. Sec. 2602), insurance company, insurance producer, title insurance company, escrow company, or lender subject to auditing by the federal national mortgage association or the federal home loan mortgage corporation, which is organized or doing business pursuant to the laws of any state, federal law, or the laws of a foreign country, if also authorized to conduct business in Washington state pursuant to the laws of this state or federal law, (c) any affiliate or subsidiary of any of the entities listed in (a) or (b) of this subsection, or (d) an employee or agent acting on behalf of any of the entities listed in (a) or (b) of this subsection. "Financial institution" also means a licensee under chapter [31.04](#) RCW, provided that the licensee does not include a licensed mortgage broker, unless the mortgage broker is engaged in lawful activities under chapter [19.146](#) RCW and procures a nonpurchase mortgage loan for the distressed homeowner from a financial institution.

(10) "Homeowner" means a person who owns and has occupied a dwelling as his or her primary residence within one hundred eighty days of the latter of conveyance or mutual acceptance of an agreement to convey an interest in the dwelling, whether or

not his or her ownership interest is encumbered by a mortgage, deed of trust, or other lien.

Comment: This definition excludes non-occupant owners from the protections of the act. Occupancy is defined as 180 days within the latter of conveyance or mutual acceptance.

(11) "In danger of foreclosure" means any of the following:

(a) The homeowner has defaulted on the mortgage and, under the terms of the mortgage, the mortgagee has the right to accelerate full payment of the mortgage and repossess, sell, or cause to be sold, the property;

(b) The homeowner is at least thirty days delinquent on any loan that is secured by the property; or

(c) The homeowner has a good faith belief that he or she is likely to default on the mortgage within the upcoming four months due to a lack of funds, and the homeowner has reported this belief to:

(i) The mortgagee;

(ii) A person licensed or required to be licensed under chapter [19.134 RCW](#);

(iii) A person licensed or required to be licensed under chapter [19.146 RCW](#);

(iv) A person licensed or required to be licensed under chapter [18.85 RCW](#);

(v) An attorney-at-law;

(vi) A mortgage counselor or other credit counselor licensed or certified by any federal, state, or local agency; or

(vii) Any other party to a distressed home consulting transaction.

Comment: This definition was expanded and better illustrated by The Supreme Court in Jametsky:

"We hold that a property can be distressed under RCW 61.34.020(2)(a) before a certificate of delinquency is issued and instruct the trial court to consider a variety of factors in making this factual determination."

"We find the plain meaning of 'at risk of loss due to nonpayment of taxes' unambiguous because it is not subject to more than one reasonable interpretation."

The Defendants argued for a bright line rule in which a property becomes distressed only when the county treasurer issues a certificate of delinquency. The Court rejected that interpretation.

The Court suggested a balancing test composed of the following factors:

- 1. The total amount owed to the county including all fees and other costs;*
- 2. The total number of payments the delinquency represents and when foreclosure should occur;*
- 3. The financial ability of the homeowner to meet or cure this obligation at the time of the transaction;*
- 4. Any discrepancy between the sale price and the fair market value of the property.*

Beyond guidance given by the Court, the statute defines a homeowner in danger of foreclosure as being 30 days behind or has a good faith belief they will fall behind in four months and have communicated that to one or more of a number of professionals.

(12) "Mortgage" means a mortgage, mortgage deed, deed of trust, security agreement, or other instrument securing a mortgage loan and constituting a lien on or security interest in housing.

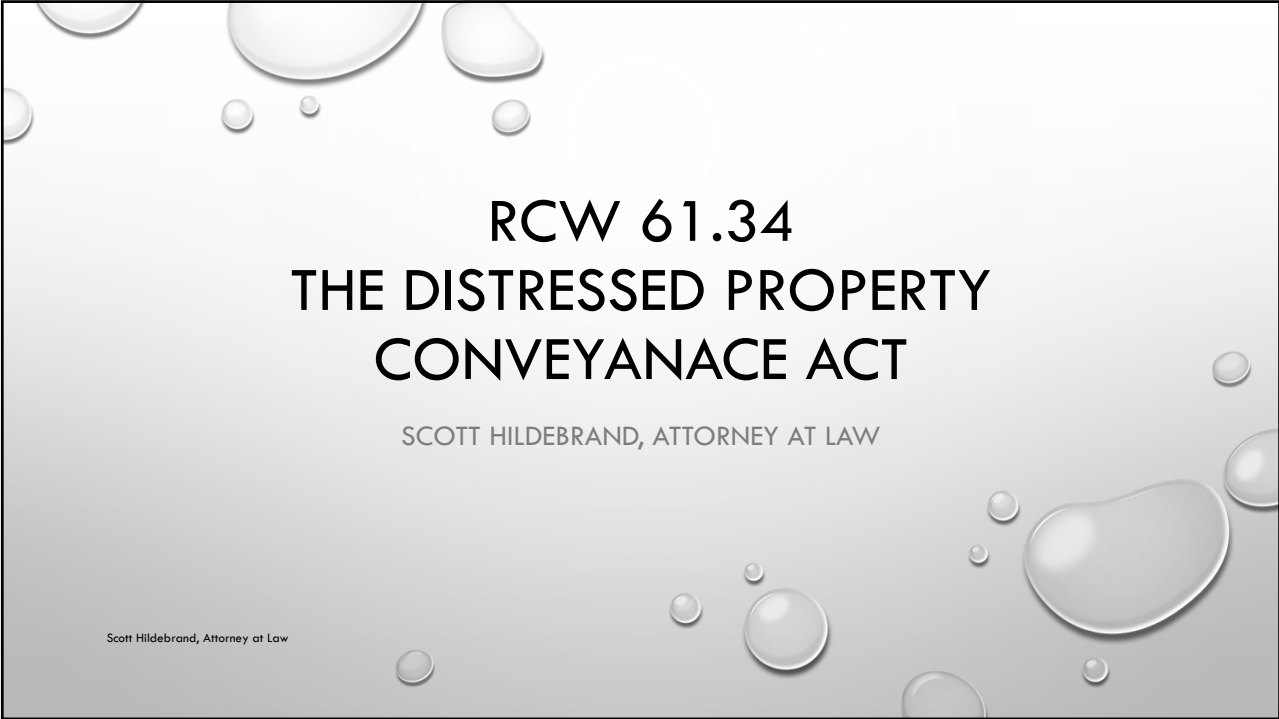
(13) "Nonprofit credit counseling service" means a nonprofit organization described under section 501(c)(3) of the internal revenue code, or similar successor provisions, that is licensed or certified by any federal, state, or local agency.

(14) "Pattern of equity skimming" means engaging in at least three acts of equity skimming within any three-year period, with at least one of the acts occurring after June 9, 1988.

(15) "Person" includes any natural person, corporation, joint stock association, or unincorporated association.

(16) "Resale" means a bona fide market sale of the distressed home subject to the distressed home conveyance by the distressed home purchaser to an unaffiliated third party.

(17) "Resale price" means the gross sale price of the distressed home on resale.



RCW 61.34 THE DISTRESSED PROPERTY CONVEYANCE ACT

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WHY DOES IT MATTER?

- REAL ESTATE ENTREPRENEURS ARE USED TO KNOCKING ON DOORS OF DISTRESSED HOMEOWNERS.
- IN THE CURRENT BOOM, MORE “ENTREPRENEURS” ARE BEING MINTED DAILY.
- MANY “ENTREPRENEURS” AND THEIR LAWYERS ARE LARGELY IGNORANT OF CURRENT LAW.

Scott Hildebrand, Attorney at Law

61.34.010 LEGISLATIVE FINDINGS

- THE LEGISLATURE FINDS THAT PERSONS ARE ENGAGING IN PATTERNS OF CONDUCT WHICH DEFRAUD INNOCENT HOMEOWNERS OF THEIR EQUITY INTEREST OR OTHER VALUE IN RESIDENTIAL DWELLINGS UNDER THE GUISE OF A PURCHASE OF THE OWNER'S RESIDENCE BUT WHICH IS IN FACT A DEVICE TO CONVERT THE OWNER'S EQUITY INTEREST OR OTHER VALUE IN THE RESIDENCE TO AN EQUITY SKIMMER, WHO FAILS TO MAKE PAYMENTS, DIVERTS THE EQUITY OR OTHER VALUE TO THE SKIMMER'S BENEFIT, AND LEAVES THE INNOCENT HOMEOWNER WITH A RESULTING FINANCIAL LOSS OR DEBT.
- THE LEGISLATURE FURTHER FINDS THIS ACTIVITY OF EQUITY SKIMMING TO BE CONTRARY TO THE PUBLIC POLICY OF THIS STATE AND THEREFORE ESTABLISHES THE CRIME OF EQUITY SKIMMING TO ADDRESS THIS FORM OF REAL ESTATE FRAUD AND ABUSE.

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61.34.030 CRIMINAL PENALTY (FOR EQUITY SKIMMING)

ANY PERSON WHO WILFULLY ENGAGES IN A PATTERN OF EQUITY SKIMMING IS GUILTY OF A CLASS B FELONY UNDER RCW [9A.20.021](#). EQUITY SKIMMING SHALL BE CLASSIFIED AS A LEVEL II OFFENSE UNDER CHAPTER [9.94A](#) RCW, AND EACH ACT OF EQUITY SKIMMING FOUND BEYOND A REASONABLE DOUBT OR ADMITTED BY THE DEFENDANT UPON A PLEA OF GUILTY TO BE INCLUDED IN THE PATTERN OF EQUITY SKIMMING, SHALL BE A SEPARATE CURRENT OFFENSE FOR THE PURPOSE OF DETERMINING THE SENTENCE RANGE FOR EACH CURRENT OFFENSE PURSUANT TO RCW [9.94A.589](#)(1)(A).

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61.34.050 DISTRESSED HOME CONSULTING TRANSACTION

- (1) A DISTRESSED HOME CONSULTING TRANSACTION MUST:
 - (A) BE IN WRITING IN AT LEAST TWELVE-POINT FONT;
 - (B) BE IN THE SAME LANGUAGE AS PRINCIPALLY USED BY THE DISTRESSED HOME CONSULTANT TO DESCRIBE HIS OR HER SERVICES TO THE DISTRESSED HOMEOWNER. IF THE AGREEMENT IS WRITTEN IN A LANGUAGE OTHER THAN ENGLISH, THE DISTRESSED HOME CONSULTANT SHALL CAUSE THE AGREEMENT TO BE TRANSLATED INTO ENGLISH AND SHALL DELIVER COPIES OF BOTH THE ORIGINAL AND ENGLISH LANGUAGE VERSIONS TO THE DISTRESSED HOMEOWNER AT THE TIME OF EXECUTION AND SHALL KEEP COPIES OF BOTH VERSIONS ON FILE IN ACCORDANCE WITH SUBSECTION (2) OF THIS SECTION. ANY AMBIGUITIES OR INCONSISTENCIES BETWEEN THE ENGLISH LANGUAGE AND THE ORIGINAL LANGUAGE VERSIONS OF THE WRITTEN AGREEMENT MUST BE STRICTLY CONSTRUED IN FAVOR OF THE DISTRESSED HOMEOWNER;
 - (C) FULLY DISCLOSE THE EXACT NATURE OF THE DISTRESSED HOME CONSULTING SERVICES TO BE PROVIDED, INCLUDING ANY DISTRESSED HOME CONVEYANCE THAT MAY BE INVOLVED AND THE TOTAL AMOUNT AND TERMS OF ANY COMPENSATION TO BE RECEIVED BY THE DISTRESSED HOME CONSULTANT OR ANYONE WORKING IN ASSOCIATION WITH THE DISTRESSED HOME CONSULTANT;
 - (D) BE DATED AND SIGNED BY THE DISTRESSED HOMEOWNER AND THE DISTRESSED HOME CONSULTANT;
 - (E) CONTAIN THE COMPLETE LEGAL NAME, ADDRESS, TELEPHONE NUMBER, FAX NUMBER, EMAIL ADDRESS, AND INTERNET ADDRESS IF ANY, OF THE DISTRESSED HOME CONSULTANT, AND IF THE DISTRESSED HOME CONSULTANT IS SERVING AS AN AGENT FOR ANY OTHER PERSON, THE COMPLETE LEGAL NAME, ADDRESS, TELEPHONE NUMBER, FAX NUMBER, EMAIL ADDRESS, AND INTERNET ADDRESS IF ANY, OF THE PRINCIPAL

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61.34.060 DISTRESSED HOME CONSULTANT DUTIES

- A DISTRESSED HOME CONSULTANT HAS A FIDUCIARY RELATIONSHIP WITH THE DISTRESSED HOMEOWNER, AND EACH DISTRESSED HOME CONSULTANT IS SUBJECT TO ALL REQUIREMENTS FOR FIDUCIARIES OTHERWISE APPLICABLE UNDER STATE LAW. A DISTRESSED HOME CONSULTANT'S FIDUCIARY DUTIES INCLUDE, BUT ARE NOT LIMITED TO, THE FOLLOWING:
 - (1) TO ACT IN THE DISTRESSED HOMEOWNER'S BEST INTEREST AND IN UTMOST GOOD FAITH TOWARD THE DISTRESSED HOMEOWNER, AND NOT COMPROMISE A DISTRESSED HOMEOWNER'S RIGHT OR INTEREST IN FAVOR OF ANOTHER'S RIGHT OR INTEREST, INCLUDING A RIGHT OR INTEREST OF THE DISTRESSED HOME CONSULTANT;
 - (2) TO DISCLOSE TO THE DISTRESSED HOMEOWNER ALL MATERIAL FACTS OF WHICH THE DISTRESSED HOME CONSULTANT HAS KNOWLEDGE THAT MIGHT REASONABLY AFFECT THE DISTRESSED HOMEOWNER'S RIGHTS, INTERESTS, OR ABILITY TO RECEIVE THE DISTRESSED HOMEOWNER'S INTENDED BENEFIT FROM THE RESIDENTIAL MORTGAGE LOAN;
 - (3) TO USE REASONABLE CARE IN PERFORMING HIS OR HER DUTIES; AND
 - (4) TO PROVIDE AN ACCOUNTING TO THE DISTRESSED HOMEOWNER FOR ALL MONEY AND PROPERTY RECEIVED FROM THE DISTRESSED HOMEOWNER.

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61.34.080 DISTRESSED HOME RECONVEYANCE

A DISTRESSED HOME PURCHASER SHALL ENTER INTO A DISTRESSED HOME RECONVEYANCE IN THE FORM OF A WRITTEN CONTRACT. THE CONTRACT MUST BE WRITTEN IN AT LEAST TWELVE-POINT BOLDFACE TYPE IN THE SAME LANGUAGE PRINCIPALLY USED BY THE DISTRESSED HOME PURCHASER AND DISTRESSED HOMEOWNER TO NEGOTIATE THE SALE OF THE DISTRESSED HOME, AND MUST BE FULLY COMPLETED, SIGNED, AND DATED BY THE DISTRESSED HOMEOWNER AND DISTRESSED HOME PURCHASER BEFORE THE EXECUTION OF ANY INSTRUMENT OF CONVEYANCE OF THE DISTRESSED HOME.

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61.34.100 RIGHT TO CANCEL

- (1) IN ADDITION TO ANY OTHER RIGHT OF RESCISSION, A DISTRESSED HOMEOWNER HAS THE RIGHT TO CANCEL ANY CONTRACT WITH A DISTRESSED HOME PURCHASER UNTIL MIDNIGHT OF THE FIFTH BUSINESS DAY FOLLOWING THE DAY ON WHICH THE DISTRESSED HOMEOWNER SIGNS A CONTRACT THAT COMPLIES WITH THIS CHAPTER OR UNTIL 8:00 A.M. ON THE LAST DAY OF THE PERIOD DURING WHICH THE DISTRESSED HOMEOWNER HAS A RIGHT OF REDEMPTION, WHICHEVER OCCURS FIRST.
- (2) CANCELLATION OCCURS WHEN THE DISTRESSED HOMEOWNER DELIVERS TO THE DISTRESSED HOME PURCHASER, BY ANY MEANS, A WRITTEN NOTICE OF CANCELLATION TO THE ADDRESS SPECIFIED IN THE CONTRACT.
- (3) A NOTICE OF CANCELLATION PROVIDED BY THE DISTRESSED HOMEOWNER IS NOT REQUIRED TO TAKE THE PARTICULAR FORM AS PROVIDED WITH THE CONTRACT.
- (4) WITHIN TEN DAYS FOLLOWING THE RECEIPT OF A NOTICE OF CANCELLATION UNDER THIS SECTION, THE DISTRESSED HOME PURCHASER SHALL RETURN WITHOUT CONDITION ANY ORIGINAL CONTRACT AND ANY OTHER DOCUMENTS SIGNED BY THE DISTRESSED HOMEOWNER.

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61.34.120 PROHIBITIONS ON DISTRESSED HOME PURCHASER

- A DISTRESSED HOME PURCHASER SHALL NOT:
- (1) ENTER INTO, OR ATTEMPT TO ENTER INTO, A DISTRESSED HOME CONVEYANCE WITH A DISTRESSED HOMEOWNER UNLESS THE DISTRESSED HOME PURCHASER VERIFIES AND CAN DEMONSTRATE THAT THE DISTRESSED HOMEOWNER HAS A REASONABLE ABILITY TO PAY FOR THE SUBSEQUENT CONVEYANCE OF AN INTEREST BACK TO THE DISTRESSED HOMEOWNER. IN THE CASE OF A LEASE WITH AN OPTION TO PURCHASE, PAYMENT ABILITY ALSO INCLUDES THE REASONABLE ABILITY TO MAKE THE LEASE PAYMENTS AND PURCHASE THE PROPERTY WITHIN THE TERM OF THE OPTION TO PURCHASE. AN EVALUATION OF A DISTRESSED HOMEOWNER'S REASONABLE ABILITY TO PAY INCLUDES DEBT TO INCOME RATIOS, FAIR MARKET VALUE OF THE DISTRESSED HOME, AND THE DISTRESSED HOMEOWNER'S PAYMENT AND CREDIT HISTORY. THERE IS A REBUTTABLE PRESUMPTION THAT THE DISTRESSED HOME PURCHASER HAS NOT VERIFIED A DISTRESSED HOMEOWNER'S REASONABLE ABILITY TO PAY IF THE DISTRESSED HOME PURCHASER HAS NOT OBTAINED DOCUMENTATION OF ASSETS, LIABILITIES, AND INCOME, OTHER THAN AN UNDOCUMENTED STATEMENT, OF THE DISTRESSED HOMEOWNER;

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61.34.120 CONTINUED

- (2) FAIL TO EITHER:
- (A) ENSURE THAT TITLE TO THE DISTRESSED HOME HAS BEEN RECONVEYED TO THE DISTRESSED HOMEOWNER; OR
- (B) MAKE PAYMENT TO THE DISTRESSED HOMEOWNER SO THAT THE DISTRESSED HOMEOWNER HAS RECEIVED CONSIDERATION IN AN AMOUNT OF AT LEAST EIGHTY-TWO PERCENT OF THE FAIR MARKET VALUE OF THE PROPERTY AS OF THE DATE OF THE EVICTION OR VOLUNTARY RELINQUISHMENT OF POSSESSION OF THE DISTRESSED HOME BY THE DISTRESSED HOMEOWNER. FOR THE PURPOSES OF THIS SUBSECTION (2)(B), THE FOLLOWING APPLIES:
- (I) THERE IS A REBUTTABLE PRESUMPTION THAT AN APPRAISAL BY A PERSON LICENSED OR CERTIFIED BY AN AGENCY OF THE FEDERAL GOVERNMENT OR THIS STATE TO APPRAISE REAL ESTATE CONSTITUTES THE FAIR MARKET VALUE OF THE DISTRESSED HOME;
- (II) "CONSIDERATION" MEANS ANY PAYMENT OR THING OF VALUE PROVIDED TO THE DISTRESSED HOMEOWNER, INCLUDING UNPAID RENT OWED BY THE DISTRESSED HOMEOWNER BEFORE THE DATE OF EVICTION OR VOLUNTARY RELINQUISHMENT OF THE DISTRESSED HOME, REASONABLE COSTS PAID TO INDEPENDENT THIRD PARTIES NECESSARY TO COMPLETE THE DISTRESSED HOME CONVEYANCE TRANSACTION, THE PAYMENT OF MONEY TO SATISFY A DEBT OR LEGAL OBLIGATION OF THE DISTRESSED HOMEOWNER, OR THE REASONABLE COST OF REPAIRS FOR DAMAGE TO THE DISTRESSED HOME CAUSED BY THE DISTRESSED HOMEOWNER. "CONSIDERATION" DOES NOT INCLUDE AMOUNTS IMPUTED AS A DOWN PAYMENT OR FEE TO THE DISTRESSED HOME PURCHASER OR A PERSON ACTING IN PARTICIPATION WITH THE DISTRESSED HOME PURCHASER;

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61.34.120 CONTINUED

- (3) ENTER INTO REPURCHASE OR LEASE TERMS AS PART OF THE DISTRESSED HOME CONVEYANCE THAT ARE UNFAIR OR COMMERCIALY UNREASONABLE, OR ENGAGE IN ANY OTHER UNFAIR OR DECEPTIVE ACTS OR PRACTICES;
- (4) REPRESENT, DIRECTLY OR INDIRECTLY, THAT (A) THE DISTRESSED HOME PURCHASER IS ACTING AS AN ADVISOR OR CONSULTANT, (B) THE DISTRESSED HOME PURCHASER IS ACTING ON BEHALF OF OR IN THE INTERESTS OF THE DISTRESSED HOMEOWNER, OR (C) THE DISTRESSED HOME PURCHASER IS ASSISTING THE DISTRESSED HOMEOWNER TO SAVE THE DISTRESSED HOME, BUY TIME, OR USE OTHER SUBSTANTIALLY SIMILAR LANGUAGE;
- (5) MISREPRESENT THE DISTRESSED HOME PURCHASER'S STATUS AS TO LICENSURE OR CERTIFICATION;
- (6) PERFORM ANY OF THE FOLLOWING UNTIL AFTER THE TIME DURING WHICH THE DISTRESSED HOMEOWNER MAY CANCEL THE TRANSACTION HAS EXPIRED:
 - (A) ACCEPT FROM ANY DISTRESSED HOMEOWNER AN EXECUTION OF, OR INDUCE ANY DISTRESSED HOMEOWNER TO EXECUTE, ANY INSTRUMENT OF CONVEYANCE OF ANY INTEREST IN THE DISTRESSED HOME;
 - (B) RECORD WITH THE COUNTY AUDITOR ANY DOCUMENT, INCLUDING ANY INSTRUMENT OF CONVEYANCE, SIGNED BY THE DISTRESSED HOMEOWNER; OR
 - (C) TRANSFER OR ENCUMBER OR PURPORT TO TRANSFER OR ENCUMBER ANY INTEREST IN THE DISTRESSED HOME;
- (7) FAIL TO RECONVEY TITLE TO THE DISTRESSED HOME WHEN THE TERMS OF THE DISTRESSED HOME CONVEYANCE CONTRACT HAVE BEEN FULFILLED;
- (8) ENTER INTO A DISTRESSED HOME CONVEYANCE WHERE ANY PARTY TO THE TRANSACTION IS REPRESENTED BY A POWER OF ATTORNEY;
- (9) FAIL TO EXTINGUISH OR ASSUME ALL LIENS ENCUMBERING THE DISTRESSED HOME IMMEDIATELY FOLLOWING THE CONVEYANCE OF THE DISTRESSED HOME;
- (10) FAIL TO CLOSE A DISTRESSED HOME CONVEYANCE IN PERSON BEFORE AN INDEPENDENT THIRD PARTY WHO IS AUTHORIZED TO CONDUCT REAL ESTATE CLOSINGS WITHIN THE STATE.

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THANK YOU

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CHAPTER TWO

FAMILY LAW/ REAL PROPERTY CROSSOVER

December 2016

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SUE STEPP TAMBLYN is a partner in Somers Tamblyn King Isenhour Bleck PLLC, where she practices in the area of family law. She has practiced 28 years in the Seattle area. Previously she practiced almost 13 years in Texas at Naman, Howell, Smith and Lee, in the areas of commercial litigation and family law (which is a jury practice, in Texas). She taught Marital Property and Family Law as an adjunct professor at Baylor Law School in Texas.

Family Law/ Real Property Crossover

Ethical Issues in the Practice of Real Property Law
Friday, December 16, 2016

RPC 1.6 – Confidentiality of Information:

The attorney client privilege is the bedrock of our assumptions, but it is important to know the limits of that privilege. **EX. 1**, RPC 1.6 and comments.

RPC 1.6, provides in part:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer to the extent the lawyer reasonably believes necessary:

...

(2) may reveal information relating to the representation of a client to prevent the client from committing a crime;

(3) may reveal information relating to the representation of a client to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

...

(6) may reveal information relating to the representation of a client to comply with a court order;

The terms of 1.6 are expansive, as stated by Comment 21:

[21] The phrase “information relating to the representation” should be interpreted broadly. The “information” protected by this Rule includes, but is not necessarily limited to, confidences and secrets. “Confidence” refers to information protected by the attorney client privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Comment 17 to RPC 1.6 seems to give the attorney discretion over whether to reveal confidences:

[17] [Washington revision] Paragraphs (b)(2) through (b)(7) permit, but do not require, the disclosure of information relating to a client's representation to accomplish the purposes specified in those paragraphs. In exercising the discretion conferred by those paragraphs, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 3.3, 4.1(b), and 8.1. See also Rule 1.13(c), which permits disclosure in some circumstances whether or not Rule 1.6 permits the disclosure.

**BEWARE FIDUCIARY DUTIES OWED BY YOUR CLIENTS TO A SPOUSE OR
DOMESTIC PARTNER!**

Fiduciary Duty Begins on Engagement and Continues Until Divorce is Final:

A fiduciary/confidential relationship exists between engagement to marry and a husband and wife. This fiduciary relationship requires that engaged couples and spouses/domestic partners exercise good faith and act with candor and sincerity as to all aspects of their relationship. *Friedlander v. Friedlander*, 80 Wn.2d 293, 301, 494 P.2d 208 (1972).

A fiduciary duty does not cease upon contemplation of the dissolution of a marriage. Fiduciary duty continues after separation. *Seals v. Seals*, 22 Wash.App. 652, 656-666, 590 P.2d 1301 (1979, Div. 3).

A fiduciary duty applies to all agreements reached by spouses/domestic partners until the marriage/domestic partnership is actually dissolved. *In re Marriage of Hadley*, 88 Wash.2d 649, 565 P.2d 790 (1977); *Friedlander, supra*; *Hamlin v. Merlino*, 44 Wash.2d 851, 272 P.2d 125 (1954).

Fiduciary Duty Creates Obligation to Disclose:

A spouse/domestic partner has a fiduciary duty to disclose all community and separate property before a dissolution is entered. *Seals, supra*, at p. 656.

A fiduciary must exercise the utmost good faith and fully disclose all facts relating to his/her interest in property and actions which affect the property. *Moon v. Phipps*, 67 Wash.2d 948, 956, 411 P.2d 157 (1956) [agency case].

When a person is under a duty to speak, the failure to disclose material facts within that person's knowledge also constitutes fraudulent misrepresentation. *Stiley v. Block*, 30 Wash.2d 486, 515-516, 925 P.2d 1941 (1997).

Concealment constitutes fraud when the party possessing the knowledge has a duty to disclose that knowledge to the other party. *Washington Mut. Sav. Bank v. Hedreen*, 125 Wn.2d 521, 526, 886 P.2d 1121 (1994).

There is a duty to disclose the information possessed by one party and of which the other party was ignorant, particularly when one party has superior business acumen and experience or superior factual knowledge than the other. *Liebergesell v. Evans*, 93 Wn.2d 881, 894; 613 P.2d 1170 (1980) [partnership case].

Constructive Fraud:

A fiduciary duty requires utmost good faith. A negligent breach of fiduciary duty constitutes constructive fraud. *Hsu Ying Li v. Tang*, 87 Wash.2d 796, 800, 557 P.2d 342 (1991) [business partners].

Constructive fraud is conduct that is not actually fraudulent but has all the actual consequences and legal effects of actual fraud. *Dexter Horton Bldg. Co. v. King County*, 10 Wash.2d 186, 191, 116 P.2d 507 (1941). *Green v. McAllister*, 103 Wash.App. 452, 467, 14 P.3d 795 (2000).

Breach of a legal or equitable duty, irrespective of moral guilt, is "fraudulent because of its tendency to deceive others or violate confidence." Black's Law Dictionary 314 (6th ed.1990). Constructive fraud is the failure to perform an obligation, not by an honest mistake, but by some "interested or sinister motive." *In re Estate of Marks*, 91

Wash.App. 325, 336, 957 P.2d 235, review denied, 136 Wash.2d 1031, 972 P.2d 466 (1998). *Green, supra*, at 468.

Ignorance of a party does not preclude constructive fraud. “One cannot discharge a duty by remaining ignorant of what that duty entails.” *Senn v. Northwest Underwriters, Inc.*, 74 Wash.App. 408, 416, 875 P.2d 637 (1994). Ignorance of the affairs of a business to which one owes a duty of diligence, care and skill is not a defense from liability for fraud or malfeasance. *Id.* “Mere passivity and disavowal of knowledge alone do not and should not constitute a pass to freedom from responsibility.” *Id.* at 417.

Disposing of partnership assets in an attempt to divest another partner of his interest in the property is a breach of fiduciary duty that constitutes constructive fraud. *Green v. McAllister*, 103 Wash.App. 452, 467-468, 14 P.3d 79 (2000, Div. 3). *Tang, supra*, at 800.

Justifiable Reliance is Created by Fiduciary Relationship:

A fiduciary relationship creates justifiable reliance, which is based upon the duty to disclose. *Liebergessell v. Evans*, 93 Wn.2d 881, 889, 613 P.2d 1170 (1980).

Burden of Proof of Good Faith Shifts in Transactions Between Spouses/Domestic Partners.

RCW 26.16.210 provides:

In every case, where any question arises as to the good faith of any transaction between spouses or between domestic partners, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith.

The shift of burden of proof to the spouse/domestic partner asserting good faith is applicable to a property settlement agreement because the parties are still married when it is executed. *Clayton v. Wilson* 145 Wash.App. 86, 186 P.3d 348 (2008), review granted 165 Wash.2d 1019, 203 P.3d 378, affirmed 168 Wash.2d 57, 227 P.3d 278.

When attorneys' fees are sought in divorce, based on absence of good faith, the burden of proof falls to the spouse/domestic partner defending his/her good faith. *In re Marriage of Sievers* (1995) 78 Wash.App. 287, 897 P.2d 388

Compare the burden of proof when no spousal relationship is involved: The burden of proof for constructive fraud is on the party alleging it. *Medical Lake v. Brown*, 63 Wash.2d 41, 45, 385 P.2d 387 (1963).

Breach of a fiduciary duty imposes liability in tort. The plaintiff must prove (1) existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately caused the injury. *Miller v. U.S. Bank of Wash.*, 72 Wash. App. 416, 426, 865 P.2d 536 (1994).

Person Who Breaches Fiduciary Duty Should Not Have Any Profits:

For the public policy purpose of discouraging the temptation to engage self-dealing behavior by people in fiduciary relationships, all possibility of profit flowing from the breach should be extinguished. A faithless fiduciary must disgorge all ill-gotten gains. *Leppaluoto v. Eggleston*, 57 Wn.2d 393, 403, 408; 357 P.2d 725 (1960) [Stockholders' derivative suit].

Constructive Trusts Can be Imposed for Breach of Fiduciary Duty:

Circumstances that justify imposing a constructive trust include, but are not limited to, fraud, misrepresentation, bad faith, undue influence, duress, and taking advantage of one's weakness. *Baker v. Leonard*, 120 Wash.2d 538, 547, 843 P.2d 1050 (1993).

A constructive trust is an equitable remedy that arises when the person holding title to property has an equitable duty to convey it to another on the grounds that they would be unjustly enriched if permitted to retain it. *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 126, 30 P.3d 446 (2001)126. In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, .." *Bangasser & Assoc., Inc v. Hedges*, 58 Wn.2d 514, 516-17, 364 P.2d 237 (1961).

Attorney's Fees Based on Constructive Fraud:

Attorney's fees are proper when there is constructive fraud. *Tang, supra*, at 800. *Brougham v. Swarva*, 34 Wash.App. 68, 72, 661 P.2d 138 (1983) held, "A partner should share the expense of a lawsuit when he breaches his fiduciary duty to the other partners".

BACK TO LOSS OF THE ATTORNEY CLIENT PRIVILEGE

Attorney-Client Privilege Lost in Criminal and Civil Fraud:

The exceptions to privilege in RPC 1.6 apply when an attorney gives assistance or advice to a client who is perpetrating a **civil fraud**. *In re Disciplinary Proceeding Against Jackson*, 180 Wash.2d 201, 225 and note 14; 322 P.3d 795 (2014). *Escalante v. Sentry Ins. Co.*, 49 Wash.App. 375, 394, 743 P.2d 832 (1987). Application of RPC 1.6 to civil fraud is a change from prior RPCs and disciplinary actions that applied only to criminal fraud.

Two Steps to Loss of Privilege:

Once the objections to disclosure are made, the court should engage in a two-step process. *Jackson, supra*, at 226 and note 14. The first step is a discovery hearing on whether to require the attorney to turn over files for in camera inspection. The second step can be an order for the attorney to actually produce all files, without redaction.

Step One: The Burden of the Opponent to Require In Camera Disclosure of Privileged Materials Based on Civil Fraud is Not Very High:

In a discovery motion, when civil fraud is claimed and attorney work-product or confidential information is sought, the proponent does not have to make a showing of civil fraud. All that is needed is, “**some foundation [in] fact to support a good faith belief by a reasonable person that there may have been wrongful conduct which could invoke the fraud exception.**” *Cedell v. Farmers Ins. Co. of Washington*, 76 Wash.2d 686, 295 P.3d 239 [bad faith insurance claim], citing VRP (Feb. 23, 2009) at 20–21 (citing *Escalante v. Sentry Ins. Co.*, 49 Wash.App. 375, 743

P.2d 832 (1987), overruled on other grounds by *Ellwein v. Hartford Accident & Indem. Co.*, 142 Wash.2d 766, 15 P.3d 640 (2001), [*Ellwein*] overruled by *Smith v. Safeco Ins. Co.*, 150 Wash.2d 478, 78 P.3d 1274 (2003). Please note: *Cedell* was a bad faith insurer claim, where the insurer only has a “quasi-fiduciary” duty. Spouses/domestic partners and engaged couples have a higher duty.

Only a prima facie case of bad faith tantamount to civil fraud is required. *Escalante, supra*. All that is required to order the attorney to make production in camera are facts “adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the fraud exception set forth in *Escalante* to the attorney-client privilege had occurred.” *Cedell, supra*.

Step Two – After Review, the Court may Order Production of All files and Information,

Unredacted:

In *Cedell*, the Court found a “heightened duty – fiduciary duty, which by its nature is not, and should not be, adversarial.” The Court ordered production of *all* files, without any exceptions for the attorney-client privilege.

If production is ordered based on the fraud exception, mental impressions of the attorney, formed in preparation for trial, may also be discovered. *Escalante, supra*.

What to Do If Privileged Materials are Sought:

Duty to Disclose the Existence of Privileged Information:

Information gained in the attorney-client relationship cannot be ignored in discovery. The privileged information must either (1) be revealed, (2) be disclosed that the information exists and assert its privilege, or (3) a protective order must be sought. *Jackson, supra*. See also: *Magana v. Hyundai Motor Am.*, 167 Wash.2d 570, 584, 220

P.3d 191 (2009) (citing CR 37(d)); *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 354, 858 P.2d 1054 (1993).

When the protection of confidentiality is sought, the proponent should provide a document log showing grounds to maintain confidentiality, stated with specificity, as to each document. *Dreiling v. Jain*, 151 Wash.2d 900, 916–17, 93 P.3d 861 (2004); see also *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wash.2d 525, 538–39, 199 P.3d 393 (2009) (emphasizing value of privilege log).

The Burden is On Your Client to Stop Production:

The burden of persuasion is upon the party seeking the protective order.

Cedell, supra. See also: CR 26(c); *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir.1975) (opponent of disclosure bore “heavy burden of showing why discovery [should be] denied”).

Advice: When attorney-client privileged information is sought based on fraud: First, object. Second, seek a protective order. Third: Make a thorough privilege log. Fourth: Don't delay. Fifth: Work your head off to show there isn't adequate proof that a reasonable person might believe there was wrongful conduct. Ouch. Good luck!

WHAT DO YOU DO WHEN YOUR CLIENT WANTS TO COMMIT FRAUD?

RPC 1.2 Scope of Representation When the Client Intends Fraudulent or Criminal Conduct:

RPC 1.2 allocates authority between a client and the attorney. **EX. 2**, RPC 1.2 with comments. RPC 1.2 (d) provides:

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

If your client persists in an action to commit fraud or a crime, the attorney must withdraw.

Example: The client comes to you and reveals that he had defrauded his now ex-wife in a divorce and his creditors in Chapter 11 Bankruptcy, by conveying real property to a third party. You did not represent the client at the time of the fraudulent transfer, the divorce or the bankruptcy. Now, the client wants you to re-convey the property back to him. **EX. 3**, WSBA Advisory Opinion # 1433 indicates:

- (1) The attorney cannot transfer the title back to the client because that would be assisting in the client's fraud,
- (2) The attorney cannot help the client refinance the property because the client failed to make proper disclosures to the bankruptcy trustee and the family court.
- (3) The attorney has not duty to report the client's past conduct to the bankruptcy court or trustee since the information is attorney-client privileged.

Please note that the fraud had already occurred and the attorney did not help perpetrate the fraud in any manner. Therefore, there should not be any exception to the attorney-client privilege based on fraud.

WHAT DO YOU DO WHEN YOU SEE A CLIENT SLIPPING TOWARD FRAUD OR HIDING OF EVIDENCE?

RPC 3.3 Requires Candor Toward the Tribunal:

See: **EX. 4**, RPC 3.3, in full with comments. RPC 3.3 provides in part:

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;

...

(4) offer evidence that the lawyer knows to be false.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding.

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.

(e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(f) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

What do you do if you come to believe that your client is withholding material evidence, that the withholding of disclosure is misleading, or that your client is withholding information for illegal purposes? First, the attorney should attempt to persuade the client to produce the evidence the client wants to hide. Second, if the client does not agree and insists on withholding the evidence, the attorney must withdraw. **EX. 5**, WSBA Advisory Opinion 2124, “Conflict between Federal Law and RPC 1.6 re: client confidence and secrets [attempt of client to obtain Social Security Disability under false pretenses].

False Evidence and Oath by Attorney:

When an attorney engages in false swearing, the presumptive sanction is disbarment. However, if the attorney does not benefit from the falsehood, and doesn't have “a selfish or

dishonest motive,” then 6 months’ suspension was considered adequate. *In re Disciplinary Proceeding Against Dynan*, 152 Wash.2d 601, 98 P.3d 444 (2004).

WHAT DO YOU DO IF YOU FIND OUT YOU’VE ALREADY SUBMITTED FALSE EVIDENCE?

RPC 4.1, Truthfulness to Others is attached as **EX. 6**, with comments. It provides:

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Prior to the change to RPC 1.6 to apply to civil fraud, the WSBA Advisory Committee considered a case where a probate was handled. The attorney had been told there were only two (2) heirs, and funds were distributed. Subsequently, the attorney found out there were three (3) heirs. One heir returned her proceeds but the other did not respond. The Advisory Committee indicated that the client should be urged to return the funds. If the client will not agree, (1) the returned funds should be deposited into the registry of the court and (2) the attorney must withdraw. **EX. 7**, WSBA Advisory Opinion 1322, 1989, “Client Secret or Confidence: Client fraud: failure of heirs to disclose existence of another heir; disposition of funds, duty to withdraw. The 1989 Opinion 1322 indicated that 1.6 prohibited disclosure of the fraud unless the client consents. However, under the revised 1.6, which encompasses civil fraud, the attorney “may” disclose or if ordered by the court, must disclose his file showing civil fraud.

MISCELLANEOUS ETHICS ISSUES RELATED TO FAMILY LAW

Conflicts of Interest Specific to Dissolutions:

If wills have been prepared by the attorney or firm for a couple, then the firm has a conflict of interest and cannot represent either party in the dissolution. **EX. 8**, Advisory Opinion # 1205, 1988, "Conflict of Interest; client confidences and secrets; lawyer who wrote wills for both husband and wife wishes to represent husband in dissolution.

An attorney who represents a husband in a prior dissolution proceeding has a conflict of interest and cannot represent a subsequent wife in a divorce from the husband whom the firm represented in the past. **EX. 9**, Advisory Opinion # 1199, 1988, "Conflict of Interest: representation of wife in divorce when represented the husband in his prior dissolution.

No Contingent Fee in a Dissolution:

RPC 1.5 (d) prohibits a contingent fee in a dissolution:

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a dissolution or annulment of marriage or upon the amount of maintenance or support, or property settlement in lieu thereof;

This prohibition does not apply and a contingent fee *may* be charged for post-dissolution enforcement or collection *unless* the post-dissolution matter involved negotiating or litigating maintenance, child support division of property. **EX. 10**, Advisory Opinion # 1419, 1991, "Contingent fee in post-dissolution proceeding."

A contingent fee *may* be charged on appeal of a division of property in a dissolution action. The reasoning is that the divorce decree has been entered and does not involve a

property settlement in lieu of support. **EX. 11**, WSBA Advisory Opinion # 1393, 1991, “Appeal of dissolution matter on contingent fee basis.”

Attorney Functioning as a Neutral Mediator in Dissolution:

A lawyer-mediator cannot give advice to both sides (or either side). The attorney mediator cannot take the place of each party having counsel. The mediator lawyer cannot draft documents that implement agreements made in mediation since that is a direct conflict of interest; every sentence structure has effect on the resolution and one (1) person just cannot do that nuanced work for both side. The conflict of interest is not waivable by the parties. **EX. 12**, WSBA Advisory Opinion # 2223, 2012, “Lawyer-Mediator Preparing Legal Documents for Unrepresented Parties.

An attorney may not provide a “scrivener service” for assisting parents in completing parenting plans. The “scrivener service” is the practice of law and “fought with violations of the Rules of Professional Conduct.” **EX. 13**, WSBA Advisory Opinion # 1436, 1991, “Scope of representation, practice of law; assisting pro se parties in completing form pleadings under the guise of scrivener.

EXHIBIT 1

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RPC 1.6

CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client gives informed consent, the disclosure is impliedly authorized in order the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer to the extent the lawyer reasonably believes necessary:

(1) shall reveal information relating to the representation of a client to reasonably certain death or substantial bodily harm;

(2) may reveal information relating to the representation of a client to p client from committing a crime;

(3) may reveal information relating to the representation of a client to p mitigate or rectify substantial injury to the financial interests or property of an is reasonably certain to result or has resulted from the client's commission of a c fraud in furtherance of which the client has used the lawyer's services;

(4) may reveal information relating to the representation of a client to s advice about the lawyer's compliance with these Rules;

(5) may reveal information relating to the representation of a client to e claim or defense on behalf of the lawyer in a controversy between the lawyer and th establish a defense to a criminal charge or civil claim against the lawyer based up which the client was involved, or to respond to allegations in any proceeding conce lawyer's representation of the client;

(6) may reveal information relating to the representation of a client to c court order; or

(7) may reveal information relating to the representation to detect and re of interest arising from the lawyer's change of employment or from changes in the c ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client;

(8) may reveal information relating to the representation of a client to i tribunal about any client's breach of fiduciary responsibility when the client is s court appointed fiduciary such as a guardian, personal representative, or receiver.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation

[Originally effective September 1, 1985; amended effective September 1, 1990; Septe

Comment

See also Washington Comment [19].

[1] [Washington revision] This Rule governs the disclosure by a lawyer of information relating to the representation of a client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] [Washington revision] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0A(e) for the definition of informed consent. This principle is the basis of the trust that is the hallmark of the client-lawyer relationship. The client is encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and obligations in the complex of laws and regulations, deemed to be legal and correct. Based upon this experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[Comment [2] amended effective April 14, 2015.]

[3] The principle of client-lawyer confidentiality is given effect by related provisions of the Rules of Professional Conduct, including the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through discovery. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation of the client. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct. See also Scope.

[Comment [3] amended effective September 1, 2011.]

[4] Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of protected information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the disclosure could be used to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] [Washington revision] Except to the extent that the client's instructions or circumstances limit that authority, a lawyer is impliedly authorized to make disclosure to the client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm, in the course of the firm's practice, disclose information relating to a client of the firm to other lawyers or LLLTs within the firm, unless the client has instructed that particular information be confined to specified lawyers or LLLTs.

[Comment [5] amended effective April 14, 2015.]

Disclosure Adverse to Client

[6] [Washington revision] Although the public interest is usually best served by a rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and requires disclosure reasonably necessary to prevent reasonably certain death or substantial harm. Such harm is reasonably certain to occur if it will be suffered imminently or there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a person has accidentally discharged toxic waste into a town's water supply must reveal this information to the appropriate authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] [Reserved.]

[8] [Reserved.]

[9] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with the Rules of Professional Conduct. In most situations, disclosing information to secure such advice will be impliedly authorized by the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, paragraph (b)(4) permits such disclosure because of the importance of a lawyer's access to confidential information to the Rules of Professional Conduct.

[10] Where a legal claim or disciplinary charge alleges complicity of the lawyer or of a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish the defense. The same is true with respect to a claim involving the conduct or representation of the lawyer or of a client. Such a charge can arise in a civil, criminal, disciplinary or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong committed by a third person, for example, a person claiming to have been defrauded by the lawyer and the client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(5) does not require the lawyer to await the commencement of a proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies in a proceeding where a proceeding has been commenced.

[11] A lawyer entitled to a fee is permitted by paragraph (b)(5) to prove the fee rendered in an action to collect it. This aspect of the Rule expresses the principle that a beneficiary of a fiduciary relationship may not exploit it to the detriment of the

[12] [Reserved.]

Detection of Conflicts of Interest

[13] [Washington revision] Paragraph (b)(7) recognizes that lawyers in different firms need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more lawyers are considering a merger, or a lawyer is considering the purchase of a law practice. See Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have begun. Any such disclosure should ordinarily include no more than the identity of the persons or entities involved in a matter, a brief summary of the general issues involved, and whether the matter has been terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced, that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse, or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these rules. See also RPC 1.1, comment [6], [7], and [10] as to decisions to associate other law firms or LLLTs.

[Comment 13 adopted effective September 1, 2016.]

[14] Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure required by paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information by a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a law firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

[Comment 14 adopted effective September 1, 2016.]

[15] [Washington revision] A lawyer may be ordered to reveal information relating to the representation of a client by a court. Absent informed consent of the client, a lawyer should assert on behalf of the client all nonfrivolous claims that the information is protected against disclosure by the attorney-client privilege or other applicable rule. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of an appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph

permits the lawyer to comply with the court's order.

See also Washington Comment [24].

[16] Paragraph (b) permits disclosure only to the extent the lawyer reasonably disclosure is necessary to accomplish one of the purposes specified. Where practica should first seek to persuade the client to take suitable action to obviate the nee disclosure. In any case, a disclosure adverse to the client's interest should be nc the lawyer reasonably believes necessary to accomplish the purpose. If the disclosu in connection with a judicial proceeding, the disclosure should be made in a manner access to the information to the tribunal or other persons having a need to know it appropriate protective orders or other arrangements should be sought by the lawyer extent practicable.

[17] [Washington revision] Paragraphs (b)(2) through (b)(7) permit but do not disclosure of information relating to a client's representation to accomplish the p specified in those paragraphs. In exercising the discretion conferred by those para lawyer may consider such factors as the nature of the lawyer's relationship with th with those who might be injured by the client, the lawyer's own involvement in the factors that may extenuate the conduct in question. A lawyer's decision not to disc permitted by paragraph (b) does not violate this Rule. Disclosure may be required, other Rules. Some Rules require disclosure only if such disclosure would be permitt (b). See Rules 1.2(d), 3.3, 4.1(b), and 8.1. See also Rule 1.13(c), which permits c some circumstances whether or not Rule 1.6 permits the disclosure.

See also Washington Comment [23].

Acting Competently to Preserve Confidentiality

[18] Paragraph (c) requires a lawyer to act competently to safeguard informati the representation of a client against unauthorized access by third parties and aga inadvertent or unauthorized disclosure by the lawyer or other persons who are parti the representation of the client or who are subject to the lawyer's supervision. Se 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclc information relating to the representation of a client does not constitute a violat paragraph (c) if the lawyer has made reasonable efforts to prevent the access or di Factors to be considered in determining the reasonableness of the lawyer's efforts but are not limited to, the sensitivity of the information, the likelihood of discl additional safeguards are not employed, the cost of employing additional safeguards difficulty of implementing the safeguards, and the extent to which the safeguards a affect the lawyer's ability to represent clients (e.g., by making a device or impor of software excessively difficult to use). A client may require the lawyer to impl security measures not required by this rule or may give informed consent to forgo s measures that would otherwise be required by this rule. Whether a lawyer may be req additional steps to safeguard a client's information in order to comply with other state and federal laws that govern data privacy or that impose notification require the loss of, or unauthorized access to, electronic information, is beyond the scope rules. For a lawyer's duties when sharing information with nonlawyers outside the own firm, see RPC 5.3, Comments [3]-[4].

[Comment 16 renumbered to 18 and amended effective September 1, 2016.]

[19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Where a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these rules.

[Comment 17 renumbered to 19 and amended effective September 1, 2016.]

Former Client

[20] The duty of confidentiality continues after the client-lawyer relationship is terminated. See Rule 1.9(c)(2). See Rule 1.9(c)(1) for the prohibition against using confidential information to the disadvantage of the former client.

Additional Washington Comments (21-28)

[21] The phrase "information relating to the representation" should be interpreted broadly. The "information" protected by this Rule includes, but is not necessarily limited to, trade secrets and confidential information. "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional course that the client has requested be held inviolate or the disclosure of which would be or would be likely to be detrimental to the client.

Disclosure Adverse to Client

[22] Washington's Rule 1.6(b)(2), which authorizes disclosure to prevent a client from committing a crime, is significantly broader than the corresponding exception in the Model Rule. While the Model Rule permits a lawyer to reveal information relating to the representation to prevent the client from "committing a crime . . . that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used the lawyer's services," Washington's Rule permits the lawyer to reveal such information to prevent the commission of any crime.

[23] [Reserved.]

[24] [Reserved.]

[25] The exceptions to the general rule prohibiting unauthorized disclosure of confidential information relating to the representation "should not be carelessly invoked." In re Boelter, 1999 WL 91, 985 P.2d 328 (1999). A lawyer must make every effort practicable to avoid unnecessary disclosure.

disclosure of information relating to a representation, to limit disclosure to those who need to know it, and to obtain protective orders or make other arrangements to minimize the risk of avoidable disclosure.

[26] Washington has not adopted that portion of Model Rule 1.6(b)(6) permitting a lawyer to reveal information related to the representation to comply with "other law." Washington's adoption of this phrase arises from a concern that it would authorize the lawyer to decide when a disclosure is required by "other law," even though the right to confidentiality and a lawyer's right to waive confidentiality belong to the client. The decision to waive confidentiality should only be made by a fully informed client after consultation with the client's attorney or by a court of competent jurisdiction. Limiting the exception to compliance with a court order protects the client's interest in maintaining confidentiality while insuring that any determination about the legal necessity of revealing confidential information will be made by a court. It is the need for a judicial resolution of such issues that necessitates the omission of "other law" from this Rule.

Withdrawal

[27] After withdrawal the lawyer is required to refrain from disclosing the client's confidences, except as otherwise permitted by Rules 1.6 or 1.9. A lawyer is not prohibited from giving notice of the fact of withdrawal by this Rule, Rule 1.8(b), or Rule 1.9. If a lawyer's services will be used by the client in furthering a course of criminal or fraudulent conduct, the lawyer must withdraw. See Rule 1.16(a)(1). Upon withdrawal from the representation in such circumstances, the lawyer may also disaffirm or withdraw any opinion, document, affirmation, or the like. If the client is an organization, the lawyer should be in doubt about whether contemplated conduct will actually be carried out by the organization. When a lawyer requires guidance about compliance with this Rule in connection with an organizational client, the lawyer may proceed under the provisions of Rule 1.13(b).

Other

[28] This Rule does not relieve a lawyer of his or her obligations under the Rules for Enforcement of Lawyer Conduct.

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EXHIBIT 2

RPC 1.2

SCOPE OF REPRESENTATION AND
ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's objectives of representation and, as required by RPC 1.4, shall consult with the client as to the objectives they are to be pursued. A lawyer may take such action on behalf of the client as is out the representation. A lawyer shall abide by a client's decision whether to settle a case, the lawyer shall abide by the client's decision, after consultation with the client, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, shall include an endorsement of the client's political, economic, social or moral views or activities unless the lawyer has reason to believe that the client does not understand the lawyer's duty to exercise independent professional judgment on behalf of the client.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of action with a client and may counsel or assist a client to make a good faith effort to determine the validity or application of the law.

(e) [Reserved.]

(f) A lawyer shall not purport to act as a lawyer for any person or organization if the person or organization reasonably should know that the lawyer is acting without the authority of that person or organization or if the lawyer is authorized or required to so act by law or a court order.

[Originally effective September 1, 1985; amended effective October 1, 2002; October 1, 2011.]

Comment

Allocation of Authority between Client and Lawyer

[1] [Washington revision] Paragraph (a) confers upon the client the ultimate purposes to be served by legal representation, within the limits imposed by law and

obligations. The decisions specified in paragraph (a), such as whether to settle a matter made by the client. See RPC 1.4(a)(1) for the lawyer's duty to communicate with the client. With respect to the means by which the client's objectives are to be pursued, the lawyer must consult with the client as required by RPC 1.4(a)(2) and may take such action as is impliedly authorized by the client's representation. See also RPC 1.1, comments [6] and [10] as to decisions to associate with the client.

[Comment 1 amended effective September 1, 2016.]

[2] On occasion, however, a lawyer and a client may disagree about the means by which the client's objectives are to be pursued. Clients normally defer to the special knowledge and skill of the lawyer in determining the means to be used to accomplish their objectives, particularly with respect to tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the client's objectives and concern for third persons who might be adversely affected. Because of the varied interests which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. However, the lawyer, when appropriate, may be applicable and should be consulted by the lawyer. The lawyer should seek a mutually acceptable resolution of the disagreement. If such efforts are unsuccessful, a fundamental disagreement with the client, the lawyer may withdraw from the representation. Conversely, the client may resolve the disagreement by discharging the lawyer. See RPC 1.16.

[3] At the outset of a representation, the client may authorize the lawyer to act on the client's behalf without further consultation. Absent a material change in circumstances, a lawyer may rely on such an advance authorization. The client may, however, revoke or modify the authorization at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer should take steps to protect the client's interests. The lawyer may, by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, representation should not be refused because the client's views or activities are unorthodox, unusual, or unpopular.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement between the lawyer and the client. When a lawyer represents an insured, for example, the representation may be limited to insurance coverage. A limited representation may be appropriate because the client's objectives are limited, or because the client's representation. In addition, the terms upon which representation is undertaken may be limited by the client's objectives. Such limitations may be appropriate if the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the scope of the representation, any limitation must be reasonable under the circumstances. If, for example, a client's objectives are limited, the lawyer should not be required to secure general information about the law the client needs in order to handle a case.

uncomplicated legal problem, the lawyer and client may agree that the lawyer's service be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if it is insufficient to yield advice upon which the client could rely. Although an agreement does not exempt a lawyer from the duty to provide competent representation, the limit is considered when determining the legal knowledge, skill, thoroughness and preparation required for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

See also Washington Comment [14].

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client in the commission of a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion on the legal consequences that appear likely to result from a client's conduct. Nor does the fact that a course of action that is criminal or fraudulent of itself make a lawyer a party to that course of action. A critical distinction between presenting an analysis of legal aspects of a question and recommending the means by which a crime or fraud might be committed with impunity is that the latter is prohibited.

[10] When the client's course of action has already begun and is continuing, it is especially delicate. The lawyer is required to avoid assisting the client, for example, by preparing documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing may be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed to be lawful if the lawyer discovers it is criminal or fraudulent. The lawyer must, therefore, withdraw from the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. The lawyer may be required to give notice of the fact of withdrawal and to disaffirm any opinion, written or oral, that the lawyer has given in the matter. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations to the client and the beneficiary. See Rule 1.7.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. A lawyer must not participate in a transaction to effectuate a crime or fraud. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer or a criminal defense in connection with a lawful enterprise. The last clause of paragraph (d) recognizes that determining the applicability of a statute or regulation may require a course of action involving disobedience of the statute or regulation or the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects the lawyer to act in violation of the Rules of Professional Conduct or other law or if the lawyer intends to act in violation of the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's ability to fulfill the client's expectations. See Rule 1.4(a)(5).

Agreements Limiting Scope of Representation

[14] An agreement limiting the scope of a representation shall consider the agreement. (The provisions of this Comment were taken from former Washington Rule 4.1 [11] to Rule 4.2 for specific considerations pertaining to contact with a person or lawyer to whom limited representation is being or has been provided.)

[Comment [14] amended effective April 14, 2015.]

[Comments originally effective September 1, 2006.]

Acting as a Lawyer Without Authority

[15] Paragraph (f) was taken from former Washington RPC 1.2(f), which was deleted effective September 1, 2006. The mental state has been changed from "willfully" to constructive knowledge. See Rule 1.0A(f) & (j). Although the language and structure of the former version in a number of other respects, paragraph (f) does not otherwise depart from Washington law interpreting former RPC 1.2(f).

[Comment [15] adopted effective September 1, 2011.]

[16] If a lawyer is unsure of the extent of his or her authority to represent a person's diminished capacity, paragraph (f) of this Rule does not prohibit the lawyer from taking protective action in accordance with Rule 1.14 to protect the person's interests. Protective action taken does not constitute a violation of this Rule.

[Comment [15] adopted effective September 1, 2011.]

[17] Paragraph (f) does not prohibit a lawyer from taking any action permitted by court rules, or other law when withdrawing from a representation, when terminated or when continuing representation by a tribunal. See Rule 1.16(c).

[Comment [15] adopted effective September 1, 2011.]

Special Circumstances Presented by Washington Initiative 502 (Laws of 2013, ch. 3)

[18] At least until there is a change in federal enforcement policy, a lawyer may engage in the conduct that the lawyer reasonably believes is permitted by this statute and the orders, and other state and local provisions implementing them.

[Comment [18] adopted effective December 9, 2014.]

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EXHIBIT 3



Advisory Opinion: 1433

Year Issued: 1991

RPC(s): RPC 1.2(d); 1.6

Subject: Assisting client with transferring property previously fraudulently conveyed; client confidence or secret; duty to disclose client fraud

The Committee reviewed your inquiry concerning information you have received that your client previously made a fraudulent conveyance to a third party to defraud his wife in a divorce and his creditors in a Chapter 11 bankruptcy. The Committee was of the opinion that you would be assisting a fraud if you represented the client in now transferring title of the property to him. The Committee is also of the opinion that to assist the client to obtain refinancing of the house would be placing a potential cloud on the title because of possible marital and bankruptcy claims that were not disclosed and therefore you could not so represent him. Finally, because this information was disclosed to you in the context of an attorney-client relationship, you have no duty to report the client's past conduct to the bankruptcy trustee or the family court. See RPC 1.6.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.

EXHIBIT 4


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RPC 3.3

CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to prevent a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction that is directly adverse to the position of the client and not disclosed by the opposing party;

(4) offer evidence that the lawyer knows to be false.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding.

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

(d) If the lawyer has offered material evidence and comes to know of its falsity and is not prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the tribunal of its falsity. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from representation in accordance with Rule 1.16.

(e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(f) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

[Originally effective September 1, 1985; amended effective September 1, 2006; April 1, 2011]

Comment

[1] [Washington revision] This Rule governs the conduct of a lawyer who is representing a tribunal. See Rule 1.0A(m) for the definition of "tribunal." It also applies to a lawyer representing a client in an ancillary proceeding conducted pursuant to the tribunal's order, such as a deposition.

[Comment [1] amended effective April 14, 2015.]

[2] This Rule sets forth the special duties of lawyers as officers of the court undermines the integrity of the adjudicative process. A lawyer acting as an advocate in a proceeding has an obligation to present the client's case with persuasive force. Perpetrating perjury, while maintaining confidences of the client, however, is qualified by the advocate's duty to present the law. Consequently, although a lawyer in an adversary proceeding is not required to present the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the presentation of false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] [Washington revision] An advocate is responsible for pleadings and other documents in litigation, but is usually not required to have personal knowledge of matters asserted in the documents. Documents ordinarily present assertions by the client, or by someone on the client's behalf, by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own affidavit by the lawyer or in a statement in open court, may properly be made only if the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. Where failure to make a disclosure is the equivalent of an affirmative misrepresentation, the lawyer's failure in Rule 1.2(d) not to counsel a client to commit or assist the client in committing such a misrepresentation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also Comment [1].

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but to present the law as it is, and to cite of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate must not present directly adverse authority in the controlling jurisdiction that has not been disclosed. The underlying concept is that legal argument is a discussion seeking to determine the law that is applicable to the case.

Offering Evidence

[5] [Reserved.]

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to present false evidence, the lawyer should seek to persuade the client that the evidence should not be presented. If the evidence is ineffective and the lawyer continues to represent the client, the lawyer must not present the evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify and then elicit or otherwise permit the witness to present the testimony that the lawyer knows to be true.

[7] [Washington revision] The duties stated in paragraph (a) apply to all lawyers representing a party in criminal cases. In some jurisdictions other than Washington, however, counsel is not permitted to present the accused as a witness or to give a narrative statement if the accused knows that the testimony or statement will be false. The obligation of the advocate to present the law is subordinate to such requirements. See *State v. Berrysmith*, 107 Wn.2d 100, 738 P.2d 1000 (1987).

397 (1997), review denied, 134 Wn.2d 1008, 954 P.2d 277 (1998). For an explanation in the criminal context, see Washington Comment [10] to Rule 3.8.

[Comment [7] amended effective April 14, 2015.]

[8] [Washington revision] The prohibition against offering false evidence only that the evidence is false. A lawyer's reasonable belief that evidence is false does not go to the trier of fact. A lawyer's knowledge that evidence is false, however, can be a mitigating circumstance. See Rule 1.0A(f). Thus, although a lawyer should resolve doubts about the reliability of evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[Comment [8] amended effective April 14, 2015.]

[9] [Reserved.]

Remedial Measures

[10] [Reserved.]

[11] The disclosure of a client's false testimony can result in grave consequences not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. If the lawyer cooperates in deceiving the court, thereby subverting the truth-finding process that the legal system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly established that the lawyer will act upon the duty to disclose the existence of false evidence, the client cannot be held responsible to reveal the false evidence and insist that the lawyer keep silent. Thus the client's insistence that the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] [Washington revision] Lawyers have a special obligation to protect a trial from fraudulent conduct that undermines the integrity of the adjudicative process, such as knowingly or otherwise unlawfully communicating with a witness, juror, court official or other participant, unlawfully destroying or concealing documents or other evidence or failing to disclose relevant information to the tribunal when required by law to do so.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false testimony should be established. The conclusion of the proceeding is a reasonably definite point for determining when the obligation ends. A proceeding has concluded within the meaning of this Rule when a final judgment has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the case; the opposing party should consider in reaching a decision; the conflicting position is expected to be presented by the other party. However, in any ex parte proceeding, such as an application for a temporary restraining order,

balance of presentation by opposing advocates. The object of an ex parte proceeding substantially just result. The judge has an affirmative responsibility to accord the consideration. The lawyer for the represented party has the correlative duty to make known to the lawyer and that the lawyer reasonably believes are necessary to an info

Withdrawal

[15] [Washington revision] Normally, a lawyer's compliance with the duty of care does not require that the lawyer withdraw from the representation of a client whose been adversely affected by the lawyer's disclosure. The lawyer may, however, be required seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule such an extreme deterioration of the client-lawyer relationship that the lawyer can represent the client. See also Rule 1.16(b) for the circumstances in which a lawyer tribunal's permission to withdraw. In connection with a request for permission to withdraw client's misconduct, a lawyer may reveal information relating to the representation

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Ethics 3.3 Candor to Tribunal When correct

RPC 3.3
CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by the opposing party; or

(4) offer evidence that the lawyer knows to be false.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding.

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.

(e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(f) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

[Originally effective September 1, 1985; amended effective September 1, 2006; April 14, 2015.]

Comment

[1] [Washington revision] This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0A(m) for the definition of "tribunal." It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition.

[Comment [1] amended effective April 14, 2015.]

[2] This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

Representations by a Lawyer

[3] [Washington revision] An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation. The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation. Regarding compliance with Rule 1.2(d), see the Comment to that Rule. See also Comment [4] to Rule 8.4.

Legal Argument

[4] Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

Offering Evidence

[5] [Reserved.]

[6] If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not elicit or otherwise permit the witness to present the testimony that the lawyer knows is false.

[7] [Washington revision] The duties stated in paragraph (a) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions other than Washington, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See *State v. Berrysmith*, 87 Wn. App. 268, 944 P.2d 397 (1997), review denied, 134 Wn.2d 1008, 954 P.2d 277 (1998). For an explanation of the term "counsel" in the criminal context, see Washington Comment [10] to Rule 3.8.

[Comment [7] amended effective April 14, 2015.]

[8] [Washington revision] The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0A(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

[Comment [8] amended effective April 14, 2015.]

[9] [Reserved.]

Remedial Measures

[10] [Reserved.]

[11] The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. See Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court.

Preserving Integrity of Adjudicative Process

[12] [Washington revision] Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so.

Duration of Obligation

[13] A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

Ex Parte Proceedings

[14] Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that the lawyer reasonably believes are necessary to an informed decision.

Withdrawal

[15] [Washington revision] Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. See also Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation as permitted by Rule 1.6.

EXHIBIT 5



Advisory Opinion: 2124

Year Issued: 2006

RPC(s): RPC 1.6

Subject: Conflict between Federal Law and RPC 1.6 re:client confidences & secrets

Facts

The inquiring attorney presents two hypothetical scenarios. Both involve the attorney's representation of claimants involved in Social Security Disability proceedings. The attorney recognizes a potential conflict between the federal law (the Social Security Act) and the Rules of Professional Conduct 1.6, Confidentiality.

Section 201 of the Social Security Protection Act of 2004, Public Law 108-203, modified the Social Security Act (section 1129) and provides for civil penalties as follows below in pertinent part:

Any person who...(C) omits from a statement or representation for such use, or otherwise withholds disclosure of, a fact which the person knows or should know is material to the determination of any initial or continuing right to or the amount of monthly insurance benefits under title II or benefits or payments under title VIII or XVI, if the person knows, or should know, that the statement or representation with such omission is false or misleading or that the withholding of such disclosure is misleading

First Hypothetical:

The first hypothetical involves the request and receipt of medical records that include a client's substance abuse history. This information is relevant to the disability determination, and an applicant may be denied benefits if the Social Security Administration ("SSA") finds that use of drugs or alcohol is material to the disability. The client may not want the information revealed to the SSA. Under these circumstances, must an attorney withdraw from representation of the client?

Second Hypothetical:

The second hypothetical involves the request and receipt of a report from a treating physician determining that a client is capable of working. Under this circumstance, is an attorney required to forward the report to the SSA and/or must the attorney withdraw from representation if the client refuses to consent to disclosing the information?

Response

The Social Security Act ("SSA") requires disclosure with respect to any information

material to obtaining or continuing benefits. WA RPC 3.3 requires certain actions to preserve the integrity of candor to a tribunal while WA RPC 1.6 clearly requires an attorney to maintain the confidences and secrets of a client. WA RPC 1.6 also provides a number of exceptions, including preventing the commission of a crime or complying with a court order or other law.

Further, RPC 3.3(a)(1) and (2) prohibit an attorney from knowingly making false statements of material fact or law to a tribunal; failing to correct a false statement of material fact they have previously made or failing to disclose a material fact when necessary to prevent a criminal or fraudulent act by the client. Although 3.3(a)(2) does not apply if disclosure is prohibited by RPC 1.6, under the analysis above, disclosure is allowed under RPC 1.6(b)(2) to prevent the commission of a crime. The scenarios presented by the inquirer may also constitute violations of RPC 1.2(d), in that non-disclosure of the information may assist the client in committing a fraud on the SSA.

If the client requests that the attorney not submit the additional required but damaging information, the attorney must counsel the client to produce the information and refuse to withhold it. RPC 1.2(d), 3.3(a)(2). If the client continues to insist on withholding the information, the lawyer must withdraw. RPC 1.6(a)(1).

Finally, it is important for the lawyer to keep in mind that, if the additional information is required to be revealed under the Social Security Act or other applicable law, it is a question of federal law which the Committee does not opine upon, then RPC 1.6 (b)(5) allows disclosure to protect the attorney.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.

EXHIBIT 6

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RPC 4.1

TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to prevent a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6

[Adopted effective September 1, 1985.]

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's affirmative duty to inform an opposing party of relevant facts. A misrepresentation incorporates or affirms a statement of another person that the lawyer knows is false. It may occur by partially true but misleading statements or omissions that are the equivalent of false statements. For dishonest conduct that does not amount to a false statement or for a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be taken as a statement of fact can depend on the circumstances. Under generally accepted conventions in negotiable transactions, estimates of price, value, or the probability of success are not taken as statements of material fact. Estimates of price or value and a party's intentions as to an acceptable settlement of a dispute are not statements of fact, and so is the existence of an undisclosed principal except where nondisclosure constitutes fraud. Lawyers should be mindful of their obligations under applicable law to refrain from tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client whose conduct the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the

1.2(d) and addresses the situation where a client's crime or fraud takes the form of... Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from... Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal... opinion, document, affirmation or the like. In extreme cases, substantive law may require... information relating to the representation to avoid being deemed to have assisted the... the lawyer can avoid assisting a client's crime or fraud only by disclosing this in... paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited

[Comments adopted September 1, 2006.]

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Advisory Opinion: 1123

Year Issued: 1987

RPC(s): RPC 3.3(c); 1.6

Subject: Client confidences and secrets; disclosure of false testimony

The Committee considered your inquiry asking what you should do when you discovered your client in a dissolution trial had given false testimony regarding the amount received from the sale of a car. The Committee understood that no findings or decree have yet been entered. The Committee was of the opinion that, pursuant to RPC 3.3(c) and 1.6, you would not be permitted to disclose that information, but that you should seek the consent of your client to disclose it, and if that consent is denied, you should withdraw.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.



Advisory Opinion: 1549

Year Issued: 1993

RPC(s): RPC 1.6; 3.3

Subject: Client confidence or secret; disclosure of bankruptcy client misrepresentation to tribunal

The Committee reviewed your inquiry concerning your duty or ability to disclose existence of life insurance proceeds payable to your client, who, with her late husband, was in a Chapter Seven bankruptcy proceeding which is now closed. The Committee was of the opinion that the scope of your duty [depends] upon whether the failure to disclose the existence of the funds constitutes a crime, and if so, whether it is a completed or continuing crime under federal or state law. As a completed crime, that is, a past act, pursuant to RPC 1.6 you may not disclose it without your client's consent. If it is a continuing crime, and if the bankruptcy proceeding is not concluded, then under RPC 3.3 you would have a duty to disclose it to the trustee in bankruptcy. If the proceeding has concluded, then pursuant to that rule and RPC 1.6, you may disclose it.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.



Advisory Opinion: 1849

Year Issued: 1998

RPC(s): RPC 1.6

Subject: Client confidences or secrets; lawyer formerly representing personal representative believes former client has or will breach fiduciary duties

I have been instructed by the Rules of Professional Conduct Committee to respond to your ethics inquiry #1849 concerning the clarification of duties to personal representative and residual legatee when lawyer services are terminated [and the lawyer believes the former client has breached or intends to breach his fiduciary duties to the estate].

The committee is of the opinion that RPC 1.6 prevents disclosure of your concerns to the beneficiary unless your belief that the personal representative intends to commit a crime or breach his fiduciary duty to the estate had sufficient factual bases. In that case, RPC 1.6(b) (1) would allow disclosure of your concerns to the affected party. However, the determination of a sufficient factual basis is an issue of law, based upon the facts of the case, which cannot be determined by the committee.

The committee is of the further opinion that the determination of a sufficient factual basis for your concerns should be made prior to disclosure by you. Your concerns could be disclosed to a tribunal under RPC 1.6(c), at an in camera hearing seeking guidance by the court, and if you follow any guidance from the court in regard to disclosure to the beneficiary, you would be in compliance with RPC 1.6.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.

EXHIBIT 7



Advisory Opinion: 1322

Year Issued: 1989

RPC(s): RPC 1.6; 4.1(b)

Subject: Client secret or confidence; client fraud; failure of heirs to disclose existence of another heir; disposition of funds; duty to withdraw

The Committee understood the facts of your inquiry to concern distribution of proceeds of an estate which was handled by probate by affidavit. You were advised that the deceased had two heirs, and after paying bills owed by the deceased, you distributed the funds to the two heirs in December 1988. A few months later you learned from one of those heirs that there was in fact a third heir of whom you had not previously been advised. She returned her portion of the proceeds to you, and you hold those in your trust account. The other heir who received the balance of the funds has not responded to your inquiry to him.

The Committee was of the opinion that RPC 4.1(b) would require you to call upon your clients to correct the apparent fraud which has been committed upon the third heir. If your clients refuse to correct the fraud or refuse to authorize you to disclose it to the third party, then you would be foreclosed from such disclosure by Rule 1.6 and, in the opinion of the Committee, you should advise your clients that you were depositing the funds with the registry of the Court, advising all parties of your act, and withdraw.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.

EXHIBIT 8



Advisory Opinion: 1205

Year Issued: 1988

RPC(s): RPC 1.9

Subject: Conflict of interest; client confidences and secrets; lawyer who wrote wills for both husband and wife wishes to represent husband in dissolution

The Committee considered your inquiry concerning whether you may undertake to represent a husband in a dissolution proceeding where you wrote wills for both the husband and wife in 1975. The Committee was of the opinion that in drafting the wills you necessarily obtained confidences and secrets from both clients and therefore, you could not now undertake to represent the husband adversely to the wife without complying with RPC 1.9.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.

EXHIBIT 9



Advisory Opinion: 1199

Year Issued: 1988

RPC(s): RPC 1.9(a)

Subject: Conflict of interest; representation of wife in divorce when represented husband in his prior dissolution

The Committee was of the opinion that where you had represented a husband in a dissolution proceeding in 1980 and you have now been asked by your former client's new wife to represent her in a new dissolution proceeding, you can only undertake the representation adverse to your former client by complying with the requirements of RPC 1.9 (a), because the Committee was of the opinion that this representation was substantially related to the prior matter.

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EXHIBIT 10



Advisory Opinion: 1419

Year Issued: 1991

RPC(s): RPC 1.5(d)

Subject: Contingent fee in post-dissolution proceeding

The Committee reviewed your inquiry concerning potential representation of a client in a post-dissolution proceeding on a contingent fee basis. RPC 1.5 provides that a lawyer may not charge a contingent fee in any domestic relations matter based upon the securing of a dissolution or annulment of marriage or upon the amount of maintenance or support, or property settlement in lieu thereof (except in post-dissolution proceedings). The Committee was of the opinion that this rule would not prevent you from charging a contingent fee in a post-dissolution matter unless it were based upon the negotiating or litigation of new maintenance or child support, or inclusion of property in lieu of support or maintenance in actions to divide previously undivided property. If you are not sure as to whether those problems would arise, the Committee was of the opinion that you would either have to refrain from the arrangement or possibly make specific exceptions in a written contingent fee agreement.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.

EXHIBIT 11



Advisory Opinion: 1393

Year Issued: 1991

RPC(s): RPC 1.5(d)

Subject: Appeal of dissolution matter on contingent fee basis

[The lawyer wished to enter into a contingent fee agreement for the appeal of a dissolution matter where the only issue on appeal related to division of community property.] Based upon the narrow facts presented by your inquiry, which the Committee understood to include the fact that in this matter the dissolution had been secured, and the appeal from the Superior Court judgment does not involve a property settlement in lieu of support, that RPC 1.5(d) would not prohibit a lawyer from handling this narrow appeal on a contingent fee basis.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Committee on Professional Ethics (CPE) or its predecessor, the Rules of Professional Conduct Committee. Advisory Opinions issued by the CPE are distinguished from earlier RPC Committee opinions by a numbering format which includes the year followed by a sequential number. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law other than the meaning of the Rules of Professional Conduct.

EXHIBIT 12



Advisory Opinion: 2223

Year Issued: 2012

RPC(s): RPC 1.7, 2.4, GR 24(a), GR24 (b)(4)

Subject: Lawyer-Mediator Preparing Legal Documents for Unrepresented Parties

This opinion concerns:

- (1) Whether a lawyer who is acting as a neutral mediator pursuant to RPC 2.4 may prepare a Property Settlement Agreement, Order of Child Support, or Parenting Plan for unrepresented parties; and
- (2) Whether a lawyer may be retained as a neutral mediator solely for the purpose of preparing a Property Settlement Agreement, Order of Child Support, and/or Parenting Plan for unrepresented parties, after agreements between the parties on the substance were reached with the assistance of a non-lawyer mediator.

The inquirer states that the preparation of the Property Settlement Agreement, Order of Child Support, and Parenting Plans at issue is not a matter of checking boxes on standardized forms, but frequently involves the drafting of complex and customized provisions using original language and choices that impact the party's legal and property rights. These inquiries are discussed jointly as the discussion applies equally to both inquiries.

GR 24 defines the practice of law as "the application of legal principles and judgment with regard to the circumstances or objectives of persons which require the knowledge and skill of a person trained in law." GR 24(a). GR 24(a)(1-2) states that the practice of law includes giving advice and drafting documents that affect the rights and responsibilities of an entity or person. GR 24(b)(4) states that whether or not they are the practice of law, a lawyer may serve "in a neutral capacity as a mediator [or] arbitrator." Thus the question presented is whether preparing the documents described causes an attorney-mediator to step out of the neutral mediator role and into a representation role.

A lawyer acts as a third-party neutral "when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them." RPC 2.4. Where a lawyer acts as a mediator for unrepresented parties the potential for confusion arises regarding the lawyer's role:

Unlike nonlawyers who serve as third-party neutrals, lawyers serving in this role may experience unique problems as a result of differences between the role of a third-party neutral and a lawyer's service as a client representative. The potential for confusion is significant when the parties are unrepresented in the process.

EXHIBIT 13

RPC 2.4, Comment 3. This inquiry also implicates RPC 1.7. In a dissolution matter, the parties' interests may be directly in conflict, thus creating a conflict of interest for any attorney involved in the dual representation of the parties. Texas ethics opinion number 583 discusses the questions raised when an attorney-mediator prepares pleadings for unrepresented parties in a dissolution, and finds that the preparation of the pleadings constitutes the representation of the parties:

Although acting as a mediator with respect to a divorce does not constitute the practice of law, the preparation of documents to implement an agreement for divorce reached in a mediation clearly involves the provision of legal services by a lawyer/mediator...[T]he preparation of documents for both otherwise unrepresented parties in a divorce to effect an agreed settlement would constitute representation of both parties in the divorce litigation.

This Texas opinion prohibits the discussed practice pursuant to Texas Rule of Professional Conduct 1.06(a), which bars a lawyer from representing "opposing parties to the same litigation." Similarly, comment 23 to RPC 1.7 finds the conflict raised by the "representation of opposing parties in the same litigation" nonconsentable. Comment 15 to RPC 1.7 states generally that "under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation."

Other courts have raised concerns about a lawyer's ability to provide competent and diligent representation when representing both parties in a family law case, as discussed in Oregon ethics opinion number 2005-86. See *In re McKee*, 316 Or 114, 849 P2d 509 (1993) (lawyer disciplined for representing husband and wife as copetitioners in divorce; concurring opinion suggests that consent usually will not cure conflict of interest between copetitioners in divorce); *In re Bryant*, 12 DB Rptr 69 (1998) (lawyer who merely "put into legal language" dissolution agreement worked out previously by husband and wife nonetheless had actual conflict of interest when minor children and substantial assets were involved, despite lawyer's recommendation that both clients seek separate counsel); *In re Taub*, 7 DB Rptr 77 (1993) (lawyer disciplined for representing both husband and wife in divorce after wife expressed doubts regarding settlement to lawyer; lawyer's claim that he did not represent either party and provided only scrivener services was rejected).

Consequently, because the preparation of "complex and customized provisions using original language and choices" as part of a mediation for unrepresented parties goes beyond the role of a mediator, and is instead the representation of the parties, the practices raised in this inquiry violate RPC 1.7 and are prohibited.

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Family Law/ Real Property Crossover
Ethical Issues in the Practice of Real Property Law

Friday, December 16, 2016

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RPC 1.6 – Confidentiality of Information:

The attorney client privilege is the bedrock of our assumptions, but it is important to know the limits of that privilege.

EX. 1 - RPC 1.6: A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

A lawyer to the extent the
lawyer reasonably believes necessary:

(2) may reveal information relating to the representation of a client to prevent the client from committing a crime;

(3) may reveal information relating to the representation of a client to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(6) may reveal information relating to the representation of a client to comply with a court order;

The terms of 1.6 are expansive, as stated by Comment 21:

[21] The phrase “information relating to the representation” should be interpreted broadly. The “information” protected by this Rule includes, but is not necessarily limited to, **confidences and secrets**.

“**Confidence**” refers to information protected by the attorney client privilege under applicable law, and

“**Secret**” refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.



Comment 17 to RPC 1.6 seems to give the attorney discretion over whether to reveal confidences

[17] [Washington revision] Paragraphs (b)(2) through (b)(7) permit, **but do not require**, the disclosure of information relating to a client's representation to accomplish the purposes specified in those paragraphs

In exercising the discretion conferred by those paragraphs, the lawyer may consider such factors as:

- the nature of the lawyer's relationship with the client and with those who might be injured by the client;
- the lawyer's own involvement in the transaction; and
- factors that may extenuate the conduct in question.

A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 3.3, 4.1(b), and 8.1. See also Rule 1.13(c), which permits disclosure in some circumstances whether or not Rule 1.6 permits the disclosure.

BEWARE FIDUCIARY DUTIES OWED BY YOUR CLIENTS TO A SPOUSE OR DOMESTIC PARTNER!



Fiduciary Duty Begins on Engagement and Continues Until Divorce is Final:

A fiduciary/confidential relationship exists between engagement to marry and a husband and wife.

This fiduciary relationship requires that engaged couples and spouses/domestic partners exercise good faith and act with candor and sincerity as to all aspects of their relationship.

Friedlander v. Friedlander, 80 Wn.2d 293, 301, 494 P.2d 208 (1972)

A fiduciary duty does not cease upon contemplation of the dissolution of a marriage. Fiduciary duty continues after separation.
Seals v. Seals, 22 Wash. App. 652, 656-666, 590 P.2d 1301 (1979, Div. 3)

A fiduciary duty applies to all agreements reached by spouses until the marriage is actually dissolved.
In re Marriage of Hadley, 88 Wash.2d 649, 565 P.2d 790 (1977); *Friedlander, supra*; *Hamlin v. Merlino*, 44 Wash.2d 851, 272 P.2d 125 (1954)



Fiduciary Duty Creates Obligation to Disclose:

- Community and separate property before a dissolution is entered: *Seals, supra*, at p. 656.
- All facts relating to interest in property and actions which affect the property: *Moon v. Phipps*, 67 Wash.2d 948, 956, 411 P.2d 157 (1956).
- Material facts within one's knowledge (failure to disclose constitutes fraudulent misrepresentation): *Stiley v. Block*, 30 Wash.2d 486, 515-516, 925 P.2d 1941 (1997).
- Concealment constitutes fraud when the party possessing the knowledge has a duty to disclose that knowledge to the other party. *Washington Mut. Sav. Bank v. Hedreen*, 125 Wn.2d 521, 526, 886 P.2d 1121 (1994).
- Information possessed by one party and of which the other party was ignorant, particularly when one party has superior business acumen and experience or superior factual knowledge than the other. *Liebergesell v. Evans*, 93 Wn.2d 881, 894; 613 P.2d 1170 (1980).

Constructive Fraud

A fiduciary duty requires utmost good faith. A negligent breach of fiduciary duty constitutes constructive fraud. *Hsu Ying Li v. Tang*, 87 Wash.2d 796, 800, 557 P.2d 342 (1991) [business partners].

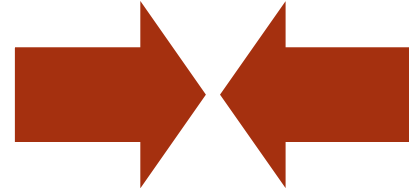
Constructive fraud is conduct that is not actually fraudulent but has all the actual consequences and legal effects of actual fraud. *Dexter Horton Bldg. Co. v. King County*, 10 Wash.2d 186, 191, 116 P.2d 507 (1941). *Green v. McAllister*, 103 Wash.App. 452, 467, 14 P.3d 795 (2000).

Breach of a legal or equitable duty, irrespective of moral guilt, is "fraudulent because of its tendency to deceive others or violate confidence." Black's Law Dictionary 314 (6th ed.1990). Constructive fraud is the failure to perform an obligation, not by an honest mistake, but by some "interested or sinister motive." *In re Estate of Marks*, 91 Wash.App. 325, 336, 957 P.2d 235, review denied, 136 Wash.2d 1031, 972 P.2d 466 (1998). *Green, supra*, at 468.

Ignorance of a party does not preclude constructive fraud. "One cannot discharge a duty by remaining ignorant of what that duty entails." *Senn v. Northwest Underwriters, Inc.*, 74 Wash.App. 408, 416, 875 P.2d 637 (1994). Ignorance of the affairs of a business to which one owes a duty of diligence, care and skill is not a defense from liability for fraud or malfeasance. *Id.* "Mere passivity and disavowal of knowledge alone do not and should not constitute a pass to freedom from responsibility." *Id.* at 417.

Disposing of partnership assets in an attempt to divest another partner of his interest in the property is a breach of fiduciary duty that constitutes constructive fraud. *Green v. McAllister*, 103 Wash.App. 452, 467-468, 14 P.3d 79 (2000, Div. 3). *Tang, supra*, at 800.

Justifiable Reliance is Created by Fiduciary Relationship



A fiduciary relationship creates justifiable reliance, which is based upon the duty to disclose.

Liebergesell v. Evans, 93 Wn.2d 881, 889, 613 P.2d 1170 (1980).

Burden of Proof of Good Faith Shifts in Transactions Between Spouses/Domestic Partners

RCW 26.16.210

In every case, where any question arises as to the good faith of any transaction between spouses or between domestic partners, whether a transaction between them directly or by intervention of third person or persons, the burden of proof shall be upon the party asserting the good faith.

The shift of burden of proof to the spouse/domestic partner asserting good faith is applicable to a property settlement agreement because the parties are still married when it is executed. *Clayton v. Wilson* 145 Wash.App. 86, 186 P.3d 348 (2008), review granted 165 Wash.2d 1019, 203 P.3d 378, affirmed 168 Wash.2d 57, 227 P.3d 278

When attorneys' fees are sought in divorce, based on absence of good faith, the burden of proof falls to the spouse/domestic partner defending his/her good faith.

In re Marriage of Sievers (1995) 78 Wash.App. 287, 897 P.2d 388

when no spousal relationship is involved: The burden of proof for constructive fraud is on the party alleging it. *Medical Lake v. Brown*, 63 Wash.2d 41, 45, 385



Breach of a fiduciary duty imposes liability in tort. The plaintiff must prove (1) existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately caused the injury.

Miller v. U.S. Bank of Wash. 72 Wash. App. 416, 426, 865 P.2d 526 (1994)

Person Who Breaches Fiduciary Duty Should Not Have Any Profits

For the public policy purpose of discouraging the temptation to engage self-dealing behavior by people in fiduciary relationships, all possibility of profit flowing from the breach should be extinguished. A faithless fiduciary must disgorge all ill-gotten gains.

Leppaluoto v. Eggleston, 57 Wn.2d 393, 403, 408; 357 P.2d 725 (1960) [Stockholders' derivative suit].

Constructive Trusts Can be Imposed for Breach of Fiduciary Duty

Circumstances that justify imposing a constructive trust include, but are not limited to, **FRAUD**, misrepresentation, bad faith, undue influence, duress, and taking advantage of one's weakness. *Baker v. Leonard*, 120 Wash.2d 538, 547, 843 P.2d 1050 (1993).

A constructive trust is an equitable remedy that arises when the person holding title to property has an equitable duty to convey it to another on the grounds that they would be unjustly enriched if permitted to retain it. *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 126, 30 P.3d 446 (2001).

In general, whenever the legal title to property, real or personal, has been obtained through actual **FRAUD**, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, .." *Bangasser & Assoc., Inc v. Hedges*, 58 Wn.2d 514, 516-17, 364 P.2d 237 (1961).

Attorney's Fees
Based on Constructive
Fraud:

Assessed Against the Defrauding Party...

Brougham v. Swarva, 34 Wash.App. 68, 72, 661 P.2d 138 (1983): A partner should share the expense of a lawsuit when he breaches his fiduciary duty to the other partners.

Attorney-Client Privilege Lost in
Criminal and Civil Fraud

The exceptions to privilege in RPC 1.6 apply when an attorney gives assistance or advice to a client who is perpetrating a **civil fraud**.

In re Disciplinary Proceeding Against Jackson, 180 Wash.2d 201, 225 and note 14; 322 P.3d 795 (2014).

Escalante v. Sentry Ins. Co., 49 Wash. App. 375, 394, 743 P.2d 832 (1987).

Application of RPC 1.6 to civil fraud is a change from prior RPCs and disciplinary actions that applied only to criminal fraud.

Two Steps to Loss of Privilege

In discovery of attorney-client privileged materials, once the objections to disclosure are made, the court should engage in a two-step process. *Jackson, supra*, at 226 and note 14.

1. The first step is a discovery hearing on whether to require the attorney to turn over files for in camera inspection.
2. After the camera inspection, the second step can be an order for the attorney to actually produce all files, without redaction.

Two Steps to Loss of Privilege

Step One: The Burden of the Opponent to Require In Camera Disclosure of Privileged Materials Based on Civil Fraud is Not Very High

In a discovery motion, when civil fraud is claimed and attorney work-product or confidential information is sought, the proponent does not have to make a showing of civil fraud. All that is needed is, “some foundation [in] fact to support a good faith belief by a reasonable person that there may have been wrongful conduct which could invoke the fraud exception.” *Cedell v. Farmers Ins. Co. of Washington*, 76 Wash.2d 686, 295 P.3d 239 [bad faith insurance claim], citing VRP (Feb. 23, 2009) at 20–21 (citing *Escalante v. Sentry Ins. Co.*, 49 Wash.App. 375, 743 P.2d 832 (1987), overruled on other grounds by *Ellwein v. Hartford Accident & Indem. Co.*, 142 Wash.2d 766, 15 P.3d 640 (2001), [*Ellwein*] overruled by *Smith v. Safeco Ins. Co.*, 150 Wash.2d 478, 78 P.3d 1274 (2003)). Note: *Cedell* was a bad faith insurer claim, where the insurer only has a “quasi-fiduciary” duty. Spouses/domestic partners and engaged couples have a higher duty.

Only a prima facie case of bad faith tantamount to civil fraud is required. *Escalante, supra*. All that is required to order the attorney to make production in camera are facts “adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the fraud exception set forth in *Escalante* to the attorney-client privilege had occurred.” *Cedell, supra*.

Step Two: After Review, the Court may Order Production of All files and Information, Unredacted:

In *Cedell*, the Court found a “heightened duty – fiduciary duty, which by its nature is not, and should not be, adversarial.” The Court ordered production of all files, without any exceptions for the attorney-client privilege.

If production is ordered based on the fraud exception, mental impressions of the attorney, formed in preparation for trial, may also be discovered. *Escalante, supra*.

What to Do If Privileged Materials are Sought Duty to Disclose the Existence of Privileged Information

- Attorney-client privileged information must either (1) be revealed, (2) be disclosed that the information exists and assert its privilege, or (3) a protective order must be sought. *Jackson, supra*. See also: *Magana v. Hyundai Motor Am.*, 167 Wash.2d 570, 584, 220 P.3d 191 (2009) (citing CR 37(d)); *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 354, 858 P.2d 1054 (1993).
- When the protection of confidentiality is sought, the proponent should provide a document log showing grounds to maintain confidentiality, stated with specificity, as to each document. *Dreiling v. Jain*, 151 Wash.2d 900, 916–17, 93 P.3d 861 (2004); see also *Rental Hous. Ass'n of Puget Sound v. City of Des Moines*, 165 Wash.2d 525, 538–39, 199 P.3d 393 (2009) (emphasizing value of privilege log).

The Burden is On Your Client to Stop Production

The burden of persuasion is upon the party seeking the protective order.

Cedell, supra. See also: CR 26(c); *Blankenship v. Hearst Corp.*, 519 F.2d 418, 429 (9th Cir.1975) (opponent of disclosure bore “heavy burden of showing why discovery [should be] denied”).

Advice: When attorney-client privileged information is sought based on fraud:

- First: Object
- Second: Seek a protective order.
- Third: Make a thorough privilege log.
- Fourth: Don't delay!
- Fifth: Work your head off to show there isn't adequate proof that a reasonable person might believe there was wrongful conduct.

Ouch. Good luck!

WHAT DO YOU DO WHEN YOUR CLIENT WANTS TO COMMIT FRAUD?

RPC 1.2 Scope of Representation When the Client Intends Fraudulent or Criminal Conduct (Ex. 2)

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

If your client persists in an action to commit fraud or a crime, the attorney must withdraw.

Example: The client comes to you and reveals that he had defrauded his now ex-wife in a divorce and his creditors in Chapter 11 Bankruptcy, by conveying real property to a third party. You did not represent the client at the time of the fraudulent transfer, the divorce or the bankruptcy. Now, the client wants you to re-convey the property back to him.

EX. 3 - WSBA Advisory Opinion # 1433:

- (1) The attorney cannot transfer the title back to the client because that would be assisting in the client's fraud,
- (2) The attorney cannot help the client refinance the property because the client failed to make proper disclosures to the bankruptcy trustee and the family court.
- (3) The attorney has no duty to report the client's past conduct to the bankruptcy court or trustee since the information is attorney-client privileged.

Note: The fraud had already occurred and the attorney did not help perpetrate the fraud in any manner. Therefore, there should not be any exception to the attorney-client privilege based on fraud.

CLIENT SLIPPING TOWARD FRAUD OR HIDING EVIDENCE

RPC 3.3 - Candor Toward the Tribunal (Ex. 4)

(a) A lawyer shall not knowingly:

- 1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- 2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;
- 4) offer evidence that the lawyer knows to be false.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding.

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.

(e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(f) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

WHAT DO YOU DO?

- Attempt to persuade the client to produce the evidence the client wants to hide.
- If the client does not agree and insists on withholding the evidence, the attorney must withdraw.

EX. 5 - WSBA Advisory Opinion 2124

Conflict between Federal Law and RPC 1.6 re: client confidence and secrets [attempt of client to obtain Social Security Disability under false pretenses].

False Evidence and Oath by Attorney

When an attorney engages in false swearing, the presumptive sanction is disbarment. However, if the attorney does not benefit from the falsehood, and doesn't have "a selfish or dishonest motive," then 6 months' suspension was considered adequate. *In re Disciplinary Proceeding Against Dynan*, 152 Wash.2d 601, 98 P.3d 444 (2004).

WHAT DO YOU DO IF YOU FIND OUT YOU'VE ALREADY SUBMITTED FALSE EVIDENCE?

RPC 4.1, - Truthfulness to Others (EX. 6)

In the course of representing a client a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by

Rule 1.6.

Prior to the change to RPC 1.6 to apply to civil fraud, the WSBA Advisory Committee considered a case where a probate was handled.

The attorney had been told there were only two (2) heirs, and funds were distributed.

Subsequently, the attorney found out there were three (3) heirs. One heir returned her proceeds but the other did not respond. The Advisory Committee indicated that the client should urge to return the funds. If the client will not agree, (1) the returned funds should be deposited into the registry of the court and (2) the attorney must withdraw.

EX. 7 - WSBA Advisory Opinion 1322, 1989

Failure of heirs to disclose existence of another heir; disposition of funds, duty to withdraw. The 1989 Opinion 1322 indicated that 1.6 prohibited disclosure of the fraud unless the client consents. However, under the revised 1.6, which encompasses civil fraud, the attorney "may" disclose or if ordered by the court, must disclose his file showing civil fraud.

MISCELLANEOUS ETHICS ISSUES RELATED TO FAMILY LAW

Conflicts of Interest Specific to Dissolutions

If wills have been prepared by the attorney or firm for a couple, then the firm has a conflict of interest and cannot represent either party in the dissolution.

EX. 8 - Advisory Opinion # 1205, 1988,

both Conflict of Interest; client confidences and secrets; lawyer who wrote wills for husband and wife wishes to represent husband in dissolution.

An attorney who represents a husband in a prior dissolution proceeding has a conflict of interest and cannot represent a subsequent wife in a divorce from the husband whom the firm represented in the past.

EX. 9 - Advisory Opinion # 1199, 1988

in his Conflict of Interest: representation of wife in divorce when represented the husband prior dissolution.

No Contingent Fee in a Dissolution

RPC 1.5 (d) prohibits a contingent fee in a dissolution:

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a dissolution or annulment of marriage or upon the amount of maintenance or support, or property settlement in lieu thereof;

This prohibition does not apply and a contingent fee *may* be charged for post-dissolution enforcement or collection unless the post-dissolution matter involved negotiating or litigating maintenance, child support division of property.

EX. 10 - Advisory Opinion # 1419, 1991

“Contingent fee in post-dissolution proceeding.”

A contingent fee *may* be charged on appeal of a division of property in a dissolution action. The reasoning is that the divorce decree has been entered and does not involve a property settlement in lieu of support.

EX. 11 - WSBA Advisory Opinion # 1393, 1991

“Appeal of dissolution matter on contingent fee basis.”

Attorney Functioning as a Neutral Mediator in Dissolution

A lawyer-mediator cannot give advice to both sides (or either side). The attorney mediator cannot take the place of each party having counsel. The mediator lawyer cannot draft documents that implement agreements made in mediation since that is a direct conflict of interest; every sentence structure has effect on the resolution and one (1) person just cannot do that nuanced work for both side. The conflict of interest is not waivable by the parties.

EX. 12 - WSBA Advisory Opinion # 2223, 2012
Lawyer-Mediator Preparing Legal Documents for Unrepresented Parties.

An attorney may not provide a “scrivener service” for assisting parents in completing parenting plans. The “scrivener service” is the practice of law and “fought with violations of the Rules of Professional Conduct.”

EX. 13 - WSBA Advisory Opinion # 1436, 1991
Scope of representation, practice of law; assisting pro se parties in completing form pleadings under the guise of scrivener.

PREMARITAL AGREEMENTS

Caution is needed in drafting a premarital agreement, or it will not be enforceable when needed.
To determine enforceability, a 2-prong process is required.

In re Marriage of Bernard, 65 Wash.2d 895, 204 P.3d 907 (2009, *En Banc*) held:

(1) **First Prong:** Was the agreement substantively fair at the time of agreement?

a. It is “substantively fair” if it “makes reasonable provision for the spouse not seeking to enforce it.”

I. “There is nothing unfair about two well-educated working professionals agreeing to preserve the fruits of their labor for their individual benefit.” *In re Marriage of DewBerry*, 115 Wash.App. 351, 365, 62 P.3d 525 (2003).

II. However, an agreement disproportionate to the respective means of each spouse, which also limits the accumulation of one spouse's separate property while precluding any claim to the other spouse's separate property, is substantively unfair. See: *In re Marriage of Matson*, 107 Wash.2d at 486, 730 P.2d 668; *Friedlander*, 80 Wash.2d at 301, 494 P.2d 208.

b. If it is substantively fair, it is enforceable.

c. If not substantively fair, then, the second prong applies.

Premarital Agreements

Second Prong: Was the agreement procedurally fair, at the time of agreement?

- a. Whether the spouses made a full disclosure of the amount, character, and value of the property involved, and
- b. Whether the agreement was freely entered into on independent advice from counsel with full knowledge by both spouses of their rights, citing *In re Marriage of Matson*, at 483.

I. How to determine the issue of whether a party received “assistance of independent counsel” is not clear.

1. . A 1992 case held that a party did not have the assistance of independent counsel if the attorney failed in “assisting the subservient party to negotiate an economically fair contract.” *In re Marriage of Foran*, 67 Wn. App. 242, 249, 834 P.2d 1081 (1992).

2. . *Bernard* case, the Supreme Court specifically declined to consider whether the attorney’s failure to give adequate advice caused procedural unfairness.

3. The *Kellar* case, at 588-589, held that no counsel was required at all – only that the party – otherwise the attorney-client privilege would be invaded and require a separate inquiry. All that is required is the *opportunity* to hire independent counsel.

II. . The length of time that the non-enforcing party has had the agreement *before* the wedding has traditionally be very important. This was called into question by *Kellar*, at 918, which held that timing only related to whether the agreement was entered into freely and voluntarily, upon independent advice, and with full knowledge by both spouses of their rights. The Court specifically held there was “nothing fatal” about entering the agreement 5 days before the wedding.

If both substantively and procedurally unfair, the agreement fails. *Bernard* at 902-903

Premarital Agreements: Other Considerations

- Another court reversed the order of consideration of the 2 prongs. It held that if the prenuptial agreement was procedurally fair, there was no need to consider whether it was substantively fair. The standards for procedural fairness were not changed. *Kellar v. Estate of Kellar*, 172 Wn. App. 562, 291 P.3d 906 (Div. 1, 2013), Petition for Review Denied, 178 Wash.2d 1025 (2013).
- The party seeking to enforce the agreement has the burden of proving its validity. *Kellar* at 590, *In re Estate of Crawford*, 107 Wn. 2d 493, 496, 730 P.2d 675 (1986).
- The burden of proof to establish validity is clear and convincing evidence. *Ryan v. Diafos*, 110 Wn. App. 758, 371 P.3d 304 (2001), review denied, 147 Wn.2d 1024 (2002);
- The statute of limitations is tolled on premarital agreements, until one spouse asserts rights in a dissolution action. *In re Estate of Crawford*, 107 Wn. 2d 493, 730 P.2d 675 (1986).

CHAPTER THREE

MARIJUANA AND ETHICS

December 2016

Philip J. Buri
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PHILIP J. BURI founded Buri Funston Mumford, PLLC, in Bellingham, Washington. He practices appellate and civil litigation, land use, and advises homeowner and community associations. He has been lead counsel in over 135 appeals in the three divisions of the Court of Appeals, the Washington Supreme Court, and the Ninth Circuit. He also serves as a pro tem judge in the Lummi Nation tribal courts.

Philip is a founding member and past President of the Washington Appellate Lawyers Association. He recently completed a three-year term as Governor for the Second Congressional District on the Washington State Bar Association Board of Governors.

Philip graduated from Princeton University (1983) and Harvard Law School (1987), and was a law clerk to United States District Court Judge Barbara Rothstein (1987-89) and Washington Supreme Court Justice Richard P. Guy (1993-95). From 1989 to 1993, Philip was a trial attorney with the Antitrust Division, United States Department of Justice.

Outside the Courtroom, Philip spends considerable time skiing with his children, Abraham, Elena, and Isabel. Sometimes they wait for him.

Five Easy Pieces

(For Lawyers to Stay Out of Trouble)

- Don't Lie;
- Don't Steal Your Client's Money;
- Chose A Side;
- Don't Break The Law And Don't Help Your Client Break The Law;
- Keep A Secret.

**Washington State Bar Association:
Ethical Issues In the Practice of Real Property Law**

December 2016 CLE – Ethics Hypotheticals

**Philip Buri
Buri Funston Mumford, PLLC**

“Moral certainty is always a sign of cultural inferiority. The more uncivilized the man, the surer he is that he knows precisely what is right and what is wrong. All human progress, even in morals, has been the work of men who have doubted the current moral values, not of men who have whooped them up and tried to enforce them. The truly civilized man is always skeptical and tolerant, in this field as in all others. His culture is based on "I am not too sure.”

-H.L. Mencken, writer, editor, and critic (12 Sep 1880-1956)

“I went to a cannabis business conference, and it was all capitalism,” he said. “I didn’t smell any pot at all.”

-Tony Serra, [California Bar Journal](#) (June 2016).

Hypothetical #1:

A middle-aged couple owns a small business in the County and they want your help to obtain a new business license. You agree to a one-hour consultation, thinking they want to sell organic produce. Midway through the meeting, the couple tells you they have a community garden growing medical marijuana and operate a small dispensary. They now want to get a retail license from the Washington State Liquor and Cannabis Board.

They begin to tell you about their growing operation when you interrupt and advise them growing marijuana is illegal under federal law.

The couple understands, but they want to fully comply with the new state law. They need a lawyer to help them get the relevant conditional use permits to authorize their greenhouse and locate a site for their retail store.

You agree to represent them. After they leave, you read RPC 1.2(d):

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

You then comment 18 to RPC 1.2, added in December 2014:

Special Circumstances Presented by Washington Initiative 502

[18] At least until there is a change in federal enforcement policy, a lawyer may counsel a client regarding the validity, scope, and meaning of Washington Initiative 502 and may assist a client in conduct that the lawyer reasonably believes is permitted by this initiative and the statutes, regulations, orders and other state and local provisions implementing them.

What can you legally do to help the couple grow and sell marijuana?

Hypothetical #2:

A week later the couple calls you with an exciting business development. The owner of an existing retail store, "420 Dreams", wants to sell his business. The owner is willing to finance the sale by taking payments over time, provided the couple does all the paperwork for the deal. As the couple tells you, the current owner is tired of running the business and just wants to get out.

There is one hitch, though. The current owner has a "silent" partner who financed the business. To satisfy the partner, your clients must sign a promissory note, secured by a deed of trust on their home. Your clients are happy to do so.

They want you to draw up the purchase and sale agreement for the business, as well as the promissory note and deed of trust for the silent partner.

What do you advise the couple?

Hypothetical #3

As part of “Operation Iron Boot Of Oppression”, the federal government begins prosecuting all licensed marijuana growers in Washington and Colorado. The phone rings and it’s the Department of Justice on the line. The federal Assistant United States Attorney tells you that they will be subpoenaing all your records related to your client, the middle-aged couple.

Although your records would normally be privileged, the AUSA states that because you apparently advised your clients to violate federal law, you may be subject to a RICO prosecution if you do not cooperate with the federal investigation. The attorney then tells you she would consider a deal if you could get your clients to voluntarily destroy the crop and pay a substantial fine.

What do you tell the AUSA? What do you tell your clients?

Hypothetical # 4

You are at a dinner party with a group of close friends. It is normally an hours-long meal that ends with a fancy after-dinner drink.

This night is unusual, though, when your host brings out two trays. On the first is fine cognac. On the second is cannabis-infused chocolate purchased from a licensed retail marijuana store.

“Take your pick”, says your hostess. Although tempted by the chocolate, you wonder about your ethical duties as a lawyer. Thankfully, you have the Rules of Professional Conduct in your briefcase. Under RPC 8.4, it says

It is professional misconduct for a lawyer to:

commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;
and

commit any act...which reflects disregard for the rule of law, whether the same be committed in the course of his or her conduct as a lawyer or otherwise, and whether the same constitutes a felony or misdemeanor or not.

Under the federal Controlled Substances Act, 21 U.S.C. § 844,

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance... Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of \$1,000, or both.

What’s your choice? Does it matter if you are a judge?

The Eight Deadly Sins

(According to the US Department of Justice)

- Distribution of marijuana to minors;
- Revenue from the sale of marijuana going to criminal enterprises, gangs, and cartels;
- Diversion of marijuana from states where it is legal under state law in some from to the other states;
- State-authorized marijuana activity is used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Violence and the use of firearms in the cultivation and distribution of marijuana;
- Drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use;
- Growing marijuana on public lands and the attendant public safety and environmental dangers posed by marijuana production on public lands; and
- Marijuana possession or use on federal property.

(From James Cole, Guidance Regarding Marijuana Enforcement, Memorandum for all United States Attorneys (August 29, 2013))

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OPINION 2016-6

Issued August 5, 2016

Ethical Implications for Lawyers under Ohio's Medical Marijuana Law

SYLLABUS: A lawyer may not advise a client to engage in conduct that violates federal law, or assist in such conduct, even if the conduct is authorized by state law. A lawyer cannot provide legal services necessary for a client to establish and operate a medical marijuana enterprise or to transact business with a person or entity engaged in a medical marijuana enterprise. A lawyer may provide advice as to the legality and consequences of a client's proposed conduct under state and federal law and explain the validity, scope, meaning, and application of the law.

A lawyer's personal use of medical marijuana pursuant to a state regulated prescription, ownership in, or employment by a medical marijuana enterprise, subjects the lawyer to possible federal prosecution, and may adversely reflect on a lawyer's honesty, trustworthiness, and overall fitness to practice law.

QUESTIONS: Several lawyers seek guidance concerning Ohio Sub. H.B. 523, effective September 8, 2016, that permits the cultivation, processing, sale, and use of medical marijuana under a state licensing and regulatory framework. This opinion addresses three questions:

- 1) Whether an Ohio lawyer may ethically counsel, advise, provide legal services to, and represent state regulated medical marijuana cultivators, processors, and dispensaries, as well as business clients seeking to transact with regulated entities;

2) Whether an Ohio lawyer may operate, hold employment or an ownership interest in, a licensed medical marijuana enterprise; and

3) Whether an Ohio lawyer may ethically use medical marijuana with a prescription.

APPLICABLE RULES: Prof.Cond.R. 1.2(d), 8.4(b), 8.4(h).

OPINION: Ohio Sub. H.B. 523 permits a patient, upon the recommendation of a physician, to use medical marijuana to treat a qualifying medical condition. Three state regulatory agencies are permitted to issue licenses to persons and entities for the purposes of cultivating, processing, testing, dispensing, and prescribing medical marijuana. The law provides that a registered patient or caregiver is not subject to arrest or criminal prosecution for using, obtaining, possessing, or administering marijuana and establishes an affirmative defense to a criminal charge to the possession of marijuana. The law immunizes professional license holders, including lawyers, from any professional disciplinary action for engaging in professional or occupational activities related to medical marijuana. Notwithstanding this provision, this advisory opinion analyzes the questions presented in light of rules promulgated by the Supreme Court pursuant to Oh. Const. Art. IV, Section 2(B)(1)(g).¹

On and after September 8, 2016, a direct conflict will exist between Ohio law and federal law. The federal Controlled Substances Act (“CSA”) currently designates marijuana as a Schedule I controlled substance which makes its use for any purpose, including medical applications, a crime. 21 USC §§ 812(b)(1), 841(a)(1). Additionally, under the CSA, it is illegal to manufacture, distribute, or dispense a controlled substance, including marijuana (21 USC § 841(a)(1)), or conspire to do so (21 USC § 846). Consequently, any Ohio citizen engaged in cultivating, processing, prescribing, or use of medical marijuana is in violation of federal law.

In 2013, the U.S. Department of Justice (“USDOJ”) issued a memorandum stating its general policy not to interfere with the medical use of marijuana pursuant to state laws, provided the state tightly regulates and controls the medical marijuana market. Memorandum from James M. Cole, Deputy Attorney General, to All United States

¹ “The supreme court shall have original jurisdiction in * * * [a]dmission to the practice of law, the discipline of persons so admitted, and all other matters related to the practice of law.”

Attorneys, Guidance Regarding Marijuana Enforcement (August 29, 2013) (“Cole Memorandum”).² The Cole Memorandum does not override federal law enacted by Congress or grant immunity to individuals or businesses from federal prosecution.

The conflict between the Ohio and federal marijuana laws complicates the application of the Rules of Professional Conduct for Ohio lawyers. While Ohio law permits certain conduct by its citizens and grants immunity from prosecution for certain state crimes for the cultivation, processing, sale, and use of medical marijuana, the same conduct constitutes a federal crime, despite instructions to U.S. attorneys from the current administration to not vigorously enforce the law and therefore implicates Prof.Cond.R. 1.2 for lawyers with clients seeking to engage in activities permissible under state law.³

ANALYSIS:

Advice and Legal Services Provided to Clients Engaged in Conduct as a State Regulated Marijuana Enterprise

A lawyer cannot assist a client who engages or seeks to engage in conduct the lawyer knows to be illegal. Prof.Cond.R. 1.2(d). Nor can a lawyer recommend to a client the means by which an illegal act may be committed. Prof.Cond.R. 1.2(d), cmt. [9]. Prof.Cond.R. 1.2(d) embodies a lawyer’s important role in promoting compliance with the law by providing legal advice and assistance in structuring clients’ conduct in accordance with the law. The rule underscores an essential role of lawyers in preventing clients from engaging in conduct that is criminal in nature or when the legality of the proposed conduct is unclear. N.Y. Op. 1024 (2014).

Prof.Cond.R. 1.2(d) does not distinguish between illegal client conduct that will, or will not, be enforced by the federal government. The first inquiry of a lawyer is whether the legal services to be provided can be construed as assisting the client in conduct that is a violation of either state or federal law. If the answer is in the affirmative

² <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.

³ Federal laws ordinarily preempt inconsistent state laws under the federal Supremacy Clause. In *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court rejected a claim that Congress exceeded its authority under the Commerce Clause insofar as the marijuana prohibition applied to personal use of marijuana for medical purposes. Additionally, the federal government always may enforce its own criminal statutes. “Marijuana remains illegal under federal law, even in those states in which medical marijuana has been legalized.” *United States v. Canori*, 737 F.3d 181, 184 (2d Cir. 2013).

under either law, Prof.Cond.R. 1.2(d) precludes the lawyer from providing those legal services to the client.⁴

Under Prof.Cond.R. 1.2(d), a lawyer cannot deliver legal services to assist a client in the establishment and operation of a state regulated marijuana enterprise that is illegal under federal law. The types of legal services that cannot be provided under the rule include, but are not limited to, the completion and filing of marijuana license applications, negotiations with regulated individuals and businesses, representation of clients before state regulatory boards responsible for the regulation of medical marijuana, the drafting and negotiating of contracts with vendors for resources or supplies, the drafting of lease agreements for property to be used in the cultivation, processing, or sale of medical marijuana, commercial paper, tax, zoning, corporate entity formation, and statutory agent services. *See also*, Colo. Op. 125 (2013). Similarly, a lawyer cannot represent a property owner, lessor, supplier or business in transactions with a marijuana regulated entity, if the lawyer knows the transferred property, facilities, goods or supplies will be used to engage in conduct that is illegal under federal law. Even though the completion of any of these services or transactions may be permissible under Ohio law, and a lawyer's assistance can facilitate their completion, the lawyer ultimately would be assisting the client in engaging in conduct that the lawyer knows to be illegal under federal law.

However, Prof.Cond.R. 1.2(d) does not foreclose certain advice and counsel to a client seeking to participate in the Ohio medical marijuana industry. Prof.Cond.R. 1.2(d) also provides:

A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, or application of the law.

This portion of the rule permits a lawyer to explain to the client the conflict that currently exists between state and federal law, the consequences of engaging in conduct that is permissible under Ohio law but contrary to federal law, and the likelihood of federal enforcement given the policies of the current administration. A lawyer may counsel and advise a client regarding the scope and general requirements of the Ohio medical

⁴ Jurisdictions in accord with this view include Connecticut (Conn. Op. 2013-02); Hawaii (Haw. Op. 49 (2015)); Maine (Me. Op. 199 (2010)); and Colorado (Colo. Op. 125 (2014)).

marijuana law, the meaning of its provisions, and how the law would be applied to a client's proposed conduct. A lawyer also can advise a client concerning good faith arguments regarding the validity of the federal or state law and its application to the client's proposed conduct.

In addition to the permissible range of advice permitted under Prof.Cond.R. 1.2(d), the rule does not preclude a lawyer from representing a client charged with violating the state medical marijuana law, representing a professional license holder before state licensing boards, representing an employee in a wrongful discharge action due to medical marijuana use, or aiding a government client in the implementation and administration of the state's regulated licensing program. With regard to the latter, lawyers assisting a government client at the state or local level in the establishment, operation, or implementation of the state medical marijuana regulatory system are not advising or assisting the client in conduct that directly violates federal law. The state or a local government is not directly involved in the sale, processing, or dispensing of medical marijuana prohibited by federal law, even though it is arguably enabling the conduct through the issuance of licenses and the maintenance of its regulatory system.

For these reasons, the Board concludes that a lawyer violates Prof.Cond.R. 1.2(d) when he or she transitions from advising a client regarding the consequences of conduct under federal and state law to counseling or assisting the client to engage in conduct the lawyer knows is prohibited under federal law. Colo. Op. 125 (2013). Unless and until federal law is amended to authorize the use, production, and distribution of medical marijuana, a lawyer only may advise a client as to the legality of conduct either permitted under state law or prohibited under federal law and explain the scope and application of state and federal law to the client's proposed conduct. However, the lawyer cannot provide the types of legal services necessary for a client to establish and operate a medical marijuana enterprise or to transact with medical marijuana businesses. To document compliance with his or her ethical obligations, a lawyer approached by a prospective client seeking to engage in activities permitted by Ohio Sub. H.B. 523 should enter into a written fee agreement with the client that encompasses a mutual understanding about the exact scope of services the lawyer is ethically and lawfully able to provide under Prof.Cond.R. 1.2(d).

The Board is mindful that the current state of the law creates a unique conflict for Ohio lawyers and deprives certain clients of the ability to obtain a full range of legal services in furtherance of activities deemed lawful by the General Assembly. The

Supreme Court may amend the Rules of Professional Conduct to address this conflict. Several jurisdictions have reached similar conclusions to those contained in this opinion and have amended, or are considering amending Rule 1.2 or the comments to that rule. These states include Illinois, Alaska, Colorado, Nevada, Oregon, Washington, and Hawaii.

A Lawyer's Personal Use of Medical Marijuana and Participation in a Medical Marijuana Enterprise

Under current federal law, an Ohio lawyer's use of medical marijuana, even obtained through a state regulated prescription, constitutes an illegal act and subjects a lawyer to possible prosecution under federal law. Such activity may implicate Prof.Cond.R. 8.4(b) (commit an illegal act that reflects adversely on the lawyer's honesty or trustworthiness) and Prof.Cond.R. 8.4(h) (conduct that adversely reflects on the lawyer's fitness to practice law).

Whether the illegal act "reflects adversely on the lawyer's honesty or trustworthiness" under Prof.Cond.R. 8.4(b) only can be determined on a case-by-case basis. A lawyer is "answerable to the entire criminal law," but is only "professionally answerable" to those offenses that demonstrate a lack of honesty or trustworthiness. Prof.Cond.R. 8.4(b), cmt. [2]. For example, a single violation of the CSA by a lawyer using medical marijuana would not, by itself, demonstrate the requisite lack of honesty or trustworthiness to constitute a violation of Prof.Cond.R. 8.4(b). Other misconduct related to the illegal act, such as lying to federal investigators or obtaining a prescription for medical marijuana for purposes of resale or providing it to a minor, would need to be present to trigger a violation of Prof.Cond.R. 8.4(b). A nexus must be established between the commission of an illegal act and the lawyer's lack of honesty or trustworthiness. Colo. Adv. Op. 124 (2012). Similarly, multiple violations of federal law would likely constitute "a pattern of repeated offenses" indicating an "indifference to legal obligations" and constitute a violation of the rule. Prof.Cond.R. 8.4(b), cmt. [3]. See *Stark County Bar Ass'n v. Zimmer*, 135 Ohio St.3d 462, 2013-Ohio-1962 (respondent's multiple driving infractions constituted a violation of Prof.Cond.R. 8.4(b)).

Personal conduct involving medical marijuana that does not implicate a specific Rule of Professional Conduct may give rise to a standalone violation of Prof.Cond.R. 8.4(h). In these cases, a violation is found when there is clear and convincing evidence that the lawyer has engaged in misconduct that adversely reflects on the lawyer's fitness

to practice law. *Disciplinary Counsel v. Bowling*, 2010-Ohio-5040 (magistrate charged, but not convicted, for marijuana possession under state law violated Prof.Cond.R. 8.4(h)).

Similar to the issue of personal marijuana use, a lawyer's personal ownership or other participation in an Ohio medical marijuana enterprise violates federal law. Consequently, under circumstances similar to those previously discussed in relation to personal marijuana use, a lawyer's ownership of a medical marijuana enterprise may implicate Prof.Cond.R. 8.4(b), Prof.Cond.R. 8.4(h), or both. Likewise, participating in a medical marijuana enterprise as an employee or personally investing or lending money to a medical marijuana enterprise, subjects the lawyer to the same criminal and professional liabilities as having an ownership interest in a medical marijuana enterprise.

CONCLUSION: Federal law currently prohibits the sale, cultivation, processing, or use of marijuana, for any purpose. Prof.Cond.R. 1.2 prohibits a lawyer from counseling or assisting a client to engage in conduct the lawyer knows is illegal under any law. The rule does not contain an exception if the federally prohibited conduct is legal under state law. However, a lawyer may advise a client as to the legality of conduct either permitted under state law or prohibited under federal law, explain the scope and application of the law to the client's conduct, but a lawyer cannot provide the legal services necessary to establish and operate a medical marijuana enterprise or transact with a medical marijuana business. A lawyer seeking to use medical marijuana or participate in a regulated business under Ohio law is in technical violation of federal law. A lawyer's personal violation of federal law, under certain circumstances, may adversely reflect on a lawyer's honesty, trustworthiness, and fitness to practice law in violation of Prof.Cond.R. 8.4(b) or 8.4(h).

Advisory Opinions of the Board of Professional Conduct are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Rules of Professional Conduct, the Code of Judicial Conduct, and the Attorney's Oath of Office.

**AMENDMENTS TO THE
OHIO RULES OF PROFESSIONAL CONDUCT**

The following amendments to the Ohio Rules of Professional Conduct (Prof. Cond. R. 1.2(d)) were adopted by the Supreme Court of Ohio. The history of these amendments is as follows:

August 30, 2016	Initial publication for comment
September 20, 2016	Final adoption by conference
September 20, 2016	Effective date of amendments

OHIO RULES OF PROFESSIONAL CONDUCT

**RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY
BETWEEN CLIENT AND LAWYER**

[Existing language unaffected by the amendments is omitted to conserve space]

(d)(1) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer *knows* is *illegal* or *fraudulent*. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, or application of the law.

(2) A lawyer may counsel or assist a client regarding conduct expressly permitted under Sub. H.B. 523 of the 131st General Assembly authorizing the use of marijuana for medical purposes and any state statutes, rules, orders, or other provisions implementing the act. In these circumstances, the lawyer shall advise the client regarding related federal law.

(e) Unless otherwise required by law, a lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional misconduct allegations solely to obtain an advantage in a civil matter.

Comment

[Existing language unaffected by the amendments is omitted to conserve space]

Illegal, Fraudulent and Prohibited Transactions

[9] Division (d)(1) prohibits a lawyer from knowingly counseling or assisting a client to commit an illegal act or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's

conduct. Nor does the fact that a client uses advice in a course of action that is illegal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which an illegal act or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally permissible but then discovers is improper. See Rules 3.3(b) and 4.1(b).

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Division (d)(1) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate illegal or fraudulent avoidance of tax liability. Division (d)(1) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of division (d)(1) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

Comparison to former Ohio Code of Professional Responsibility

Rule 1.2 replaces several provisions within Canon 7 of the Code of Professional Responsibility.

The first sentence of Rule 1.2(a) generally corresponds to EC 7-7 and makes what previously was advisory into a rule. The second sentence of Rule 1.2(a) states explicitly what is implied by EC 7-7. The third sentence of Rule 1.2(a) corresponds generally to DR 7-101(A)(1) and EC 7-10. Rule 1.2(a)(1) and (2) correspond to several sentences in EC 7-7.

Rule 1.2(c) does not correspond to any Disciplinary Rule or Ethical Consideration.

The first sentence of Rule 1.2(d)(1) corresponds to DR 7-102(A)(7). The second sentence of Rule 1.2(d)(1) is similar to EC 7-4.

Rule 1.2(e) is the same as DR 7-105 except for the addition of the prohibition against threatening "professional misconduct allegations."

Comparison to ABA Model Rules of Professional Conduct

Rule 1.2(a) is modified slightly from the Model Rule 1.2(a) by the inclusion of the third sentence, which does not exist in the Model Rules.

Model Rule 1.2(b) has been moved to Comment [5] of Rule 1.2 because the provision is more appropriately addressed in a comment rather than a black-letter rule.

Rule 1.2(c) differs from Model Rule 1.2(c) in that it requires only that the limitation be communicated to the client, preferably in writing. The Model Rule requires that the client give informed consent to the limitation.

Rule 1.2(d)(1) is similar to Model Rule 1.2(d) but differs in two aspects. The Model Rule language “criminal” was changed to “illegal” in Rule 1.2(d)(1), and Model Rule 1.2(d) was split into two sentences in 1.2(d)(1).

Rule 1.2(d)(2) does not exist in the Model Rules.

Rule 1.2(e) does not exist in the Model Rules.

FORM OF CITATION, EFFECTIVE DATE, APPLICATION

[Existing language unaffected by the amendments is omitted to conserve space]

(m) The Supreme Court of Ohio adopted amendments to Prof. Cond. Rule 1.2(d) and Comments [9] and [12] of the Ohio Rules of Professional Conduct effective September 20, 2016.

CHAPTER FOUR

FORECLOSURES AND LOCKOUTS

December 2016

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CLAY M. GATENS is a Principal of Jeffers, Danielson, Sonn & Aylward, P.S. Clay's primary areas of practice are complex Commercial Litigation, Consumer Class Actions, Commercial Real Estate, and Land Use Law. Clay is the lead Plaintiff's class counsel in the recently published landmark Washington State Supreme Court Decision *Laura Zamora Jordan v. Nationstar Mortgage, LLC*, No. 92081-8, slip op. (Wash. July 7, 2016), in which the Court invalidated form deed of trust provisions that authorized lenders to enter a default borrower's property prior to completion of a foreclosure to change locks and perform other "property preservation" measures. This important decision also adopted for the first time in Washington State's history the definition of "possession" in the context of real property.

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PRE-FORECLOSURE LOCKOUTS AND THE WASHINGTON STATE SUPREME COURT'S RECENT DECISION INVALIDATING ENTRY PROVISIONS IN STANDARD FORM DEEDS OF TRUST

Jordan v. Nationstar Mortgage, LLC
Supreme Court of Washington Case No. 92081-8

RCW 7.28.230

Mortgagee cannot maintain action for possession — Possession to collect mortgaged, pledged, or assigned rents and profits — Perfection of security interest.

(1) A mortgage of any interest in real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law: PROVIDED, That nothing in this section shall be construed as any limitation upon the right of the owner of real property to mortgage, pledge or assign the rents and profits thereof, nor as prohibiting the mortgagee, pledgee or assignee of such rents and profits, or any trustee under a mortgage or trust deed either contemporaneously or upon the happening of a future event of default, from entering into possession of any real property, other than farmlands or the homestead of the mortgagor or his or her successor in interest, for the purpose of collecting the rents and profits thereof for application in accordance with the provisions of the mortgage or trust deed or other instrument creating the lien, nor as any limitation upon the power of a court of equity to appoint a receiver to take charge of such real property and collect such rents and profits thereof for application in accordance with the terms of such mortgage, trust deed, or assignment.

(2) Until paid, the rents and profits of real property constitute real property for the purposes of mortgages, trust deeds, or assignments whether or not said rents and profits have accrued. The provisions of RCW 65.08.070 as now or hereafter amended shall be applicable to such rents and profits, and such rents and profits are excluded from Article 62A.9 RCW.

(3) The recording of an assignment, mortgage, or pledge of unpaid rents and profits of real property, intended as security, in accordance with RCW 65.08.070, shall immediately perfect the security interest in the assignee, mortgagee, or pledgee and shall not require any further action by the holder of the security interest to be perfected as to any subsequent purchaser, mortgagee, or assignee. Any lien created by such assignment, mortgage, or pledge shall, when recorded, be deemed specific, perfected, and choate even if recorded prior to July 23, 1989.

RCW 7.60.015

Types of receivers.

A receiver must be either a general receiver or a custodial receiver. A receiver must be a general receiver if the receiver is appointed to take possession and control of all or substantially all of a person's property with authority to liquidate that property and, in the case of a business over which the receiver is appointed, wind up affairs. A receiver must be a custodial receiver if the receiver is appointed to take charge of limited or specific property of a person or is not given authority to liquidate property. The court shall specify in the order appointing a receiver whether the receiver is appointed as a general receiver or as a custodial receiver. When the sole basis for the appointment is the pendency of an action to foreclose upon a lien against real property, or the giving of a notice of a trustee's sale under RCW 61.24.040 or a notice of forfeiture under RCW 61.30.040, the court shall appoint the receiver as a custodial receiver. The court by order may convert either a general receivership or a custodial receivership into the other.

RCW 7.60.025

Appointment of receiver.

(1) A receiver may be appointed by the superior court of this state in the following instances, but except in any case in which a receiver's appointment is expressly required by statute, or any case in which a receiver's appointment is sought by a state agent whose authority to seek the appointment of a receiver is expressly conferred by statute, or any case in which a receiver's appointment with respect to real property is sought under (b)(ii) of this subsection, a receiver shall be appointed only if the court additionally determines that the appointment of a receiver is reasonably necessary and that other available remedies either are not available or are inadequate:

(a) On application of any party, when the party is determined to have a probable right to or interest in property that is a subject of the action and in the possession of an adverse party, or when the property or its revenue-producing potential is in danger of being lost or materially injured or impaired. A receiver may be appointed under this subsection (1)(a) whether or not the application for appointment of a receiver is combined with, or is ancillary to, an action seeking a money judgment or other relief;

(b) Provisionally, after commencement of any judicial action or nonjudicial proceeding to foreclose upon any lien against or for forfeiture

of any interest in real or personal property, on application of any person, when the interest in the property that is the subject of such an action or proceeding of the person seeking the receiver's appointment is determined to be probable and either:

(i) The property or its revenue-producing potential is in danger of being lost or materially injured or impaired; or

(ii) The appointment of a receiver with respect to the real or personal property that is the subject of the action or proceeding is provided for by agreement or is reasonably necessary to effectuate or enforce an assignment of rents or other revenues from the property. For purposes of this subsection (1)(b), a judicial action is commenced as provided in superior court civil rule 3(a), a nonjudicial proceeding is commenced under chapter 61.24 RCW upon the service of notice of default described in RCW 61.24.030(8), and a proceeding for forfeiture is commenced under chapter 61.30 RCW upon the recording of the notice of intent to forfeit described in RCW 61.30.060;

...

(e) To the extent that property is not exempt from execution, at the instance of a judgment creditor either before or after the issuance of any execution, to preserve or protect it, or prevent its transfer;

...

(g) Upon an attachment of real or personal property when the property attached is of a perishable nature or is otherwise in danger of waste, impairment, or destruction, or where the abandoned property's owner has absconded with, secreted, or abandoned the property, and it is necessary to collect, conserve, manage, control, or protect it, or to dispose of it promptly, or when the court determines that the nature of the property or the exigency of the case otherwise provides cause for the appointment of a receiver;

...

(2) The superior courts of this state shall appoint as receiver of property located in this state a person who has been appointed by a federal or state court located elsewhere as receiver with respect to the property specifically or with respect to the owner's property generally, upon the application of the person or of any party to that foreign proceeding, and following the appointment shall give effect to orders, judgments, and decrees of the foreign court affecting the property in this state held by the receiver, unless the court determines that to do so would be manifestly unjust or inequitable. The venue of such a proceeding may be any

county in which the person resides or maintains any office, or any county in which any property over which the receiver is to be appointed is located at the time the proceeding is commenced.

(3) At least seven days' notice of any application for the appointment of a receiver must be given to the owner of property to be subject thereto and to all other parties in the action, and to other parties in interest as the court may require. If any execution by a judgment creditor under Title 6 RCW or any application by a judgment creditor for the appointment of a receiver, with respect to property over which the receiver's appointment is sought, is pending in any other action at the time the application is made, then notice of the application for the receiver's appointment also must be given to the judgment creditor in the other action. The court may shorten or expand the period for notice of an application for the appointment of a receiver upon good cause shown.

(4) The order appointing a receiver in all cases must reasonably describe the property over which the receiver is to take charge, by category, individual items, or both if the receiver is to take charge of less than all of the owner's property. If the order appointing a receiver does not expressly limit the receiver's authority to designated property or categories of property of the owner, the receiver is a general receiver with the authority to take charge over all of the owner's property, wherever located.

(5) The court may condition the appointment of a receiver upon the giving of security by the person seeking the receiver's appointment, in such amount as the court may specify, for the payment of costs and damages incurred or suffered by any person should it later be determined that the appointment of the receiver was wrongfully obtained.

RCW 7.60.035

Eligibility to serve as receiver.

Except as provided in this chapter or otherwise by statute, any person, whether or not a resident of this state, may serve as a receiver, with the exception that a person may not be appointed as a receiver, and shall be replaced as receiver if already appointed, if it should appear to the court that the person:

(1) Has been convicted of a felony or other crime involving moral turpitude or is controlled by a person who has been convicted of a felony or other crime involving moral turpitude;

(2) Is a party to the action, or is a parent, grandparent, child,

grandchild, sibling, partner, director, officer, agent, attorney, employee, secured or unsecured creditor or lienor of, or holder of any equity interest in, or controls or is controlled by, the person whose property is to be held by the receiver, or who is the agent or attorney of any disqualified person;

(3) Has an interest materially adverse to the interest of persons to be affected by the receivership generally; or

(4) Is the sheriff of any county.

Paragraph 9 of Ms. Jordan's Deed of Trust

9. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect Lender's interest in the Property and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. Lender's actions can include, but are not limited to: (a) paying any sums secured by a lien which has priority over this Security Instrument; (b) appearing in court; and (c) paying reasonable attorneys' fees to protect its interest in the Property and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section 9.

FILE
 IN CLERKS OFFICE
 SUPREME COURT, STATE OF WASHINGTON
 DATE JUL 07 2016
[Signature]
 CHIEF JUSTICE

This opinion was filed for record
 at 8:00 am on July 7, 2016

[Signature]
 Acting
 Supreme Court Clerk

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED)
 STATES DISTRICT COURT FOR THE)
 EASTERN DISTRICT OF WASHINGTON)
 IN)

No. 92081-8

LAURA ZAMORA JORDAN, as her)
 separate estate, and on behalf of others)
 similarly situated,)
 Plaintiff,)

En Banc

v.)

Filed JUL 07 2016

NATIONSTAR MORTGAGE, LLC,)
 a Delaware limited liability company,)
 Defendant.)

OWENS, J. — After defaulting on her home mortgage payment, plaintiff
 Laura Jordan returned home from work one evening to discover she could not enter
 her own house: the locks had been changed without warning. A notice informed her
 that in order to gain access to her home, she must call defendant Nationstar Mortgage
 LLC to obtain the lockbox code and retrieve the new key inside. Although she

eventually reentered her home, she removed her belongings the next day and has not returned since. Jordan's home loan was secured by a deed of trust, a commonly used security instrument that was created as an alternative to traditional mortgages to provide for a simpler method of foreclosure. The deed of trust contained provisions that allowed Nationstar to enter her home upon default without providing any notice to the homeowner. Today, we are asked to decide whether those provisions conflict with Washington law.

Jordan represents a class action proceeding in federal court, which has certified two questions to us. The first question asks whether the deed of trust provisions conflict with a Washington law that prohibits a lender from taking possession of property prior to foreclosure. We hold that it does because the provisions allow Nationstar to take possession of the property after default, which conflicts with the statute. The second question asks whether Washington's statutory receivership scheme—providing for a third party to possess and manage property in lieu of either the lender or homeowner—is the exclusive remedy by which a lender may gain access to the property. As explained below, we hold nothing in our law establishes the receivership statutes as an exclusive remedy.

FACTS

In 2007, Jordan bought a home in Wenatchee, Washington, with a home loan of \$172,000 from Homecomings Financial. She secured the loan by signing a deed of

trust. The original lender assigned the loan to the Federal National Mortgage Association (Fannie Mae), one of the nation's largest mortgagees that primarily participates in the secondary mortgage market, which hired Nationstar to service the loan.

Jordan went into default on her mortgage payments in January 2011. In March 2011, one of Nationstar's vendors came to Jordan's home and changed the locks on her front door. Jordan returned home to find a notice on the front door informing her that the property was found to be "unsecure or vacant" and that to protect her and the mortgagee's interest in the property, it was "secured against entry by unauthorized persons to prevent possible damage." Order Certifying Questions to Wash. Supreme Ct., *Jordan v. Nationstar Mortg., LLC*, No. 2:14-CV-0175-TOR at 6 (E.D. Wash. Aug. 10, 2015). While the above-noted facts are undisputed, the parties dispute whether the home was vacant. Jordan contends she was living there, left for work that morning as usual, and returned to find the lockbox and notice. On the other hand, Nationstar contends that its vendor performed an inspection of the property and determined it was vacant.

Upon finding the notice when she returned home, Jordan called the phone number provided and got the key from the lockbox to reenter her home. She took all of her belongings and vacated the house the next day. Since then, Nationstar's vendor has maintained the property's exterior and winterized the interior. Nationstar does not

claim to have attempted to provide Jordan any notice of its intention to inspect the property and rekey it. Nationstar contends that its usual practice is to change the locks on only one door, such that it can access the home in the future, but also so that the owner can still enter the home through another door. Here, Jordan's home had only a front door and a sliding glass door in the rear of the home. Therefore, when Nationstar's vendor rekeyed the front door, she had no means of entry.

Jordan represents a certified class of 3,600 Washington homeowners who were locked out of their homes pursuant to similar provisions in their deeds of trust with Nationstar. This case presents an important issue for these homeowners and the thousands of others subject to similar provisions, as well as the many mortgage companies that have a concern with preserving and protecting the properties in which they have an interest. Three amicus briefs were filed in this case: Federal Home Loan Mortgage Corporation (Freddie Mac) and the city of Spokane supporting defendant Nationstar, and the Northwest Consumer Law Center supporting plaintiff Jordan. Freddie Mac tells us that the provisions such as the ones at issue here are important to the foreclosure process because they allow lenders to enter the property to maintain and secure it. It contends that such provisions help meet Freddie Mac's requirements it imposes on companies like Nationstar to preserve properties.

In April 2012, Jordan filed a complaint against Nationstar in Chelan County Superior Court, alleging state law claims that include trespass, breach of contract, and

violations of the Washington Consumer Protection Act and the Fair Debt Collection Practices Act. Ch. 19.86 RCW; 15 U.S.C. §§ 1692-1692p. Chelan County Superior Court certified the class action, with Jordan as the representative for the 3,600 similarly situated homeowners. Nationstar removed the action to the United States District Court for the Eastern District of Washington (District Court). The parties each filed motions for partial summary judgment. Nationstar asked the District Court to find the provisions at issue enforceable under Washington law. Jordan asked the District Court to find that before the lender can enter a borrower's property, the lender must obtain either the borrower's postdefault consent or permission from a court. Furthermore, Jordan contends that receivership is the only remedy by which a lender may gain access to the borrower's property. Finding that the case raised unresolved questions of Washington state law, the District Court certified two questions to us. We accepted the following certified questions.

CERTIFIED QUESTIONS

1. Under Washington's lien theory of mortgages and RCW 7.28.230(1), can a borrower and lender enter into a contractual agreement prior to default that allows the lender to enter, maintain, and secure the encumbered property prior to foreclosure?
2. Does chapter 7.60 RCW, Washington's statutory receivership scheme, provide the exclusive remedy, absent postdefault consent by the borrower, for a lender to gain access to an encumbered property prior to foreclosure?

ANALYSIS

Certified questions present questions of law and we review them de novo. *See, e.g., Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1*, 149 Wn.2d 660, 670, 72 P.3d 151 (2003).

1. *Washington's Lien Theory and RCW 7.28.230(1) Prevent a Borrower and a Lender from Contracting To Allow the Lender To Take Possession Based on Borrower Default*

The District Court asks us to determine whether a predefault clause in a deed of trust that allows a lender to enter, maintain, and secure the property before foreclosure is enforceable. We must determine whether these provisions contravene Washington law. As described below, the deed of trust provisions authorize a lender to enter the borrower's property after default. The parties agree that a Washington statute prohibits a lender from taking possession of a borrower's property prior to foreclosure. The controversial issue here is whether the deed of trust provisions allowing the lender to enter constitute taking possession prior to foreclosure, such that they conflict with state law. Based on Nationstar's practices, we find that the provisions do allow the lender to take possession and thus they are in conflict with state law. As such, we answer the first certified question in the negative.

a. *The Deed of Trust Provisions Allow a Lender To Enter the Borrower's Property upon Default or Abandonment*

"[I]t is the general rule that a contract which is contrary to the terms and policy of an express legislative enactment is illegal and unenforcible [sic]." *State v. Nw.*

Magnesite Co., 28 Wn.2d 1, 26, 182 P.2d 643 (1947). While we recognize an overarching freedom to contract, provisions are unenforceable where they are prohibited by statute. *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 481, 687 P.2d 1139 (1984).

The provisions at issue are made up of two sections in the deed of trust. The first provision, in pertinent part, is as follows:

9. Protection of Lender’s Interest in the Property and Rights Under this Security Instrument. If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument, . . . or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender’s interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property. . . . Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although Lender may take action under this Section 9, Lender does not have to do so and is not under any duty or obligation to do so.

Ex. 19, at 8. The provisions also allows the lender to “make reasonable entries upon and inspections of the Property” where the lender has reasonable cause and gives the borrower notice. *Id.* at 7. It also requires the borrower to maintain and protect the property. *Id.*

Together, these sections are the so-called “entry provisions” that are at issue in this case, which allow the lender to enter, maintain, and secure the property after the borrower’s default or abandonment. Nationstar hinges its argument on the need to

secure abandoned property, stating it does not enter occupied property. However, the provision plainly states that the lender may “secure” the property after the borrower defaults *or* abandons the property. The provision specifically lists changing the locks as a method of securing the property. Thus, the provisions authorize the lender to enter and rekey the property solely upon default, regardless of whether the borrower has abandoned the property.

As explained below, it is well settled that Washington law prohibits lenders from taking possession of borrowers’ property before foreclosure. This question turns on whether the above provisions authorize lenders to “take possession” and if, in fact, the lender’s actions here constituted taking possession.

b. Washington’s Lien Theory Does Not Permit a Lender To Take Possession of Property Prior to Foreclosure

Our case law is clear that Washington law prohibits a lender from taking possession of property before foreclosure of the borrower’s home. Importantly, the parties agree on this point; under state law, a secured lender cannot gain possession of the encumbered property before foreclosure.

RCW 7.28.230 provides that

(1) A mortgage of any interest in real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law.¹

¹ Before 1969, this section of the statute ended after “without a foreclosure and sale according to law.” CODE OF 1881, § 546. It was amended in 1969 to make clear that the statute should not be

This statute essentially codified Washington’s lien theory of mortgages. The mortgage lien theory prevails in Washington, meaning that the mortgage is seen as “nothing more than a lien upon the property to secure payment of the mortgage debt, and in no sense a conveyance entitling the mortgagee to possession or enjoyment of the property as owner.” *W. Loan & Bldg. Co. v. Mifflin*, 162 Wash. 33, 39, 297 P. 743 (1931). We have interpreted RCW 7.28.230(1) to mean that a mortgagor’s default does not disrupt the mortgagor’s right to possession of real property, and that the mortgagor retains the right to possession until there has been foreclosure and sale of the property. *Howard v. Edgren*, 62 Wn.2d 884, 885, 385 P.2d 41 (1963).

The *Restatement (Third) of Property* takes the approach that mortgagee possession agreements conflict with lien theory statutes. See RESTATEMENT (THIRD) OF PROP.: MORTGAGES § 4.1 cmt. b (AM. LAW INST. 1997). Several lien theory jurisdictions hold that provisions that allow the lender to take possession of the property contravenes public policy that is inherent to the lien theory; indeed, some states have even codified statutes that specifically invalidate such agreements. See, e.g., COLO. REV. STAT. ANN. § 38-35-117; IDAHO CODE ANN. § 6-104; NEV. REV. STAT. § 40.050; OKLA. STAT. ANN. tit. 42, § 10; UTAH CODE ANN. § 78B-6-1310.

interpreted to prohibit a mortgagee from collecting rents before foreclosure. See LAWS OF 1969, 1st Ex. Sess., ch. 122, § 1; and see *Kezner v. Landover Corp.*, 87 Wn. App. 458, 464, 942 P.2d 1003 (1997). However, the bedrock principle that borrowers have a right to possession prior to foreclosure was not altered by the amendment.

Washington's legislature, however, did not specifically invalidate such contrary agreements in its codification of lien theory prohibiting the lender from taking possession of property before foreclosure. That the legislature did not specifically invalidate such contract provisions, as did other states, does not mean the provisions do not conflict with our laws. Thus, we must determine whether its statute is in conflict with such an agreement.

Nationstar concedes that the borrower's right to possession cannot be overcome by a contrary provision in the mortgage or deed of trust because such a provision would be unenforceable as it would contravene Washington law. Def.'s Answering Br. at 11. However, Nationstar argues that the entry provisions do not authorize the lender to take "possession" and that its specific conduct at Jordan's residence did not constitute possession. Therefore, the determinative issue in answering this first certified question is whether the entry provisions cause the lender to gain "possession." As explained below, the entry provisions do authorize conduct that constitutes "possession."

c. These Entry Provisions Allow a Lender To Take Possession Prior to Foreclosure and Therefore Conflict with State Law

We must determine if the entry provisions authorize the lender to take "possession" of the property. If they do, the provisions are in conflict with Washington law. Here, we look to the actions that Nationstar took pursuant to the entry provisions to see if they constituted "possession." Possession has slightly

different meanings in different areas of the law. The parties supplied definitions from real property law, tort law, and landlord-tenant law because it is unclear which definition is applicable to RCW 7.28.230(1).

Under any definition, the conduct allowed under the entry provisions constitutes possession because Nationstar's actions satisfy the key element of possession: control. In property law, "possession" is defined as "a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land." RESTATEMENT (FIRST) OF PROP.: DEFINITION OF CERTAIN GENERAL TERMS § 7(a) (AM. LAW INST. 1936).

The key element to the property definition of "possession" is the "certain degree of physical control." Tort law similarly requires control. In tort law, which is concerned primarily with liability, a "possessor of land" is defined as "a person who occupies the land and controls it." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 49 (AM. LAW INST. 2012).

The Court of Appeals applied the tort definition of possession when it considered the phrase "mortgagees in possession" for purposes of premises liability. *Coleman v. Hoffman*, 115 Wn. App. 853, 858-59, 64 P.3d 65 (2003). There, the lender used RCW 7.28.230(1) as a defense to its putative possession to avoid liability, arguing that it could not have been "in possession" because the statute forbids it. *Id.*

at 863. The court relied on the above tort definition of “possession” and another prominent source that stated for a lender to be liable, it must “exercise dominion and control over the property.” *Id.* at 859 (quoting 62 AM. JUR. 2D *Premises Liability* § 8, at 356 (1990)). In finding that the plaintiff showed enough facts of lender’s possession, the court pointed to the lender’s repairs and payments of utility bills. *Id.* at 862-63.

We also find that landlord-tenant law’s treatment of “possession” helpful—particularly its analysis of the impact of changing locks. In *Aldrich v. Olson*, the Court of Appeals found that when the landlord changed the locks of her tenant’s home, it was an unlawful eviction. 12 Wn. App. 665, 672, 531 P.2d 825 (1975). The court reasoned, “It is difficult to visualize an act of a landlord more specifically intended as a reassumption of possession by the landlord and a permanent deprivation of the tenant’s possession than a ‘lockout’ without the tenant’s knowledge or permission.” *Id.* at 667.

From any approach, we find that Nationstar’s conduct constituted possession. The foregoing possession definitions, as well as *Coleman* and *Aldrich*, are instructive. Nationstar’s vendor’s actions constituted possession because its actions are representative of control. The vendor drilled out Jordan’s existing locks and replaced the lock with its own. Nationstar stated in its brief that it rekeyed Jordan’s property to allow itself access to return to secure the property by winterizing it and to make

repairs. Def.'s Answering Br. at 33-34. Perhaps that is true; however, rekeying the property also had the effect of communicating to Jordan that Nationstar now controlled the property. The action left Jordan with no method of entering her own property. Nationstar relies on the fact that it did not change the locks to exclude Jordan (because it provided her a lockbox and phone number to call) to provide proof that it did not possess the premises. However, although she was able to obtain a key by calling, the process made Nationstar the "middle man." She could no longer access her home without going through Nationstar. This action of changing the locks and allowing her a key only after contacting Nationstar for the lockbox code is a clear expression of control. Although Nationstar did not exclude Jordan from the premises (as she was able to gain a key and enter), she left the next day and did not return. In its amicus brief, the Northwest Consumer Law Center advised us anecdotally that many similarly situated Washington homeowners felt that when the lender changed the locks to their homes, they no longer had a right to continue to possess the property. *See Br. of Amicus Curiae Nw. Consumer Law Ctr.* at 6.

Nationstar effectively ousted Jordan by changing her locks, exercising its control over the property. Although the mortgagee-mortgagor context is different from the landlord-tenant context, *Aldrich* provides an apt analogy here because the court there found that changing the tenant's locks was the most striking showing of a reassumption of possession. 12 Wn. App. at 667. Changing the locks is akin to

exercising control, which is the key element of possession. By changing the locks, Nationstar took possession of the property. Since these actions are authorized by the entry provisions, the entry provisions allow the lender to take possession of the property. Because Washington law prohibits lenders from taking possession of the borrower's property before foreclosure, the provisions are in conflict with state law. Therefore, we must answer the first certified question in the negative and find that the entry provisions are unenforceable.

2. *Chapter 7.60 RCW Does Not Provide the Exclusive Remedy for a Lender To Gain Access to an Encumbered Property Prior to Foreclosure*

The second certified question asks whether this state's receivership statutes separately prohibit the entry provisions. Specifically, this second question asks whether chapter 7.60 RCW, which provides for the judicial appointment of a third party receiver to manage the property, is the exclusive method by which lenders can gain access to encumbered property prior to foreclosure.

This is an issue of first impression in this court, and no Washington appellate decision is on point. We must answer this question in the negative because nothing indicates that the statutory receivership scheme provides the exclusive remedy for lenders to access a property.

a. *Background on Receivership and Its Role in Mortgage Foreclosure*

Chapter 7.60 RCW governs Washington's receivership scheme. A "receiver" is a third party appointed by a court to take charge of property and manage it as the

court directs. 18 WILLIAM B. STOEBUCK & JOHN W. WEAVER, WASHINGTON PRACTICE: REAL ESTATE: TRANSACTIONS, § 18.6, at 310 (2d ed. 2004). The statutes enumerate some 40 circumstances under which a receiver may be appointed. Only a few concern mortgaged real property. *See* RCW 7.60.025(1)(b), (g), (cc), (dd). Although authorized by statute, lenders are not *entitled* to a receiver, even where a clause in the mortgage provides for the appointment of a receiver. STOEBUCK & WEAVER, *supra*, § 18.6, at 312. While statutory grounds exist for a court-appointed receiver prior to foreclosure, it is rarely sought. *Id.* at 314.

In the context of mortgaged real property, a receiver might be appointed as a “custodial receiver,” who would take possession of the property and preserve it. RCW 7.60.015; 7.60.025(1)(g). Commonly, receivers are appointed to collect rent from income-producing property. STOEBUCK & WEAVER, *supra*, § 18.6, at 310-11; *see* RCW 7.28.230(1) (providing grounds for appointing a receiver to collect rent for application to mortgage). Importantly, nothing in the text of RCW 7.28.230(1) or chapter 7.60 RCW requires the appointment of a receiver in this context.

Jordan argues that the entry provisions are Nationstar’s attempt to contract around chapter 7.60 RCW’s requirements and that the legislature intended for the statutes to provide lenders an exclusive remedy. However, as explained below, Jordan’s arguments fail to establish that chapter 7.60 RCW does so.

b. The Contract Provisions Do Not Conflict with Chapter 7.60 RCW

We have held that the deed of trust act in chapter 61.24 RCW cannot be contracted around in two recent cases where parties attempted to modify the deed of trust act's requirements by private contract. *See Bain v. Metro. Mortg. Grp., Inc.*, 175 Wn.2d 83, 107, 285 P.3d 34 (2012) (holding that parties cannot contract to fit a statutory definition to fulfill the act's requirements); *Schroeder v. Excelsior Mgmt. Grp., LLC*, 177 Wn.2d 94, 107, 297 P.3d 677 (2013) (holding that parties cannot contractually waive a requirement under the act that agricultural properties may only be foreclosed judicially).

Jordan argues that like in *Bain* and *Schroeder*, the entry provisions attempt to "bypass" statutes that dictate a lender's only entry method. Pl.'s Opening Br. at 25. However, Jordan misconstrues the receivership statutes as providing a "list of requisites to a lender gaining access to a borrower's property." *Id.* at 28. While the statutes enumerate receivership requirements, they are not concerned with a lender's access to borrower's property but rather merely set forth requirements *should* a receiver be necessary. Thus, the entry provisions do not attempt to circumvent the receivership statutes and thus do not conflict with chapter 7.60 RCW. Similarly, Jordan's other arguments do not support her contention that the receivership statutes provide lenders an exclusive remedy to access property. In fact, as explained below,

the text of the statute and policy considerations support a finding that chapter 7.60 RCW does not provide lenders the exclusive remedy.

c. The Statute's Text Supports Finding That It Does Not Provide an Exclusive Remedy

The text of the statute supports a finding that it does not provide the exclusive remedy. First, the plain language of the statute must be examined to determine exclusivity. We have held that when engaging in statutory interpretation, our “fundamental objective is to ascertain and carry out the Legislature’s intent, and if the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

Of course, an exclusivity clause would be the clearest indication of the legislature’s intent that the statute be exclusive, but as Jordan concedes, this statute does not have one. However, Jordan argues that because the statutory scheme is “comprehensive,” the legislature intended for the statute to provide the exclusive remedy for lenders such that they cannot contract for entry otherwise. *See generally* Pl. Opening Br. at 24-37; *and see* LAWS OF 2004, ch. 165, § 1. It is true that the receivership statutory scheme is comprehensive, but the plain language of the statute does not suggest that chapter 7.60 RCW was intended to be an exclusive remedy.

If a court were to appoint a receiver in this context, it would likely be pursuant to RCW 7.60.025(1). Thus, we analyze the question of whether the receivership

provides lenders the exclusive remedy under that portion of the provision. The statute provides, in part:

A receiver *may* be appointed by the superior court of this state in the following instances, but except in any case . . . in which a receiver’s appointment with respect to real property is sought under (b)(ii) of this subsection, a receiver *shall* be appointed *only if* the court additionally determines that the appointment of a receiver is reasonably necessary and that *other available remedies* either are not available or are inadequate.

RCW 7.60.025(1) (emphasis added). Subsection (b)(ii) provides that a receiver *may* be appointed after the commencement of a foreclosure proceeding on a lien against real property where the appointment is provided for by agreement or is necessary to collect rent or profits from the property.

In analyzing this text, we look to its plain language. In general, the court’s discretion is illustrated by the word “may.” Under subsection (b)(ii), a receiver *shall* be appointed, but *only if* the court makes additional findings. First the court must find a receiver is “reasonably necessary.” RCW 7.60.025(1)(b)(ii). Second, and more importantly, the court determines that “*other available remedies* either are not available or are inadequate.” RCW 7.60.025(1) (emphasis added).

Courts consider all of the facts and circumstances to determine whether to appoint a receiver. *Union Boom Co. v. Samish Boom Co.*, 33 Wash. 144, 152, 74 P. 53 (1903). “It is well established that a receiver should not be appointed if there is any other adequate remedy.” *King County Dep’t of Cmty. & Human Servs. v. Nw. Defs. Ass’n*, 118 Wn. App. 117, 126, 75 P.3d 583 (2003) (citing *Bergman Clay Mfg.*

Co. v. Bergman, 73 Wash. 144, 147, 131 P. 485 (1913)). The Court of Appeals reasoned that allowing a current board of directors to oversee a corporation “was not an adequate remedy” and, thus, found that appointment of a receiver was appropriate. *Id.* at 126.

Thus, in general, other remedies exist outside of appointing a receiver. It is not before us to determine what particular remedies are available. To answer this question, it is sufficient that the plain language of the provision does not indicate that chapter 7.60 RCW was meant to provide an exclusive remedy to lenders. Finally, public policy also supports the finding that the statute is not the exclusive remedy, which we discuss below.


d. Public Policy Supports Finding That Chapter 7.60 RCW Does Not Provide an Exclusive Remedy

To the extent that chapter 7.60 RCW’s language is not explicit, it is worth noting a relevant policy consideration. One of the advantages of a deed of trust is that it offers “efficient and inexpensive” nonjudicial foreclosure. *Schroeder*, 177 Wn.2d at 104 (quoting *Cox v. Helenius*, 103 Wn.2d 383, 387, 693 P.2d 683 (1985)). Thus, requiring lenders to wade through the judicial receivership process in all cases—regardless of the facts and circumstances—is illogical. Overall, both policy and the plain text of the statute support finding that it does not provide an exclusive remedy to lenders. Thus, we must answer this question in the negative.

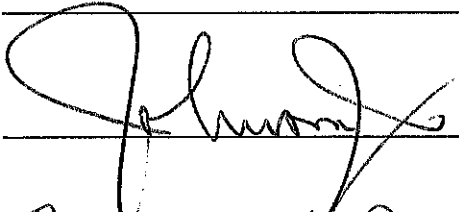
CONCLUSION

We answer the first certified question in the negative. Washington law prohibits lenders from taking possession of property prior to foreclosure. These entry provisions enable the lender to take possession after default, and the lender's action here constitutes taking possession. Therefore, the entry provisions are in direct conflict with state law and are unenforceable.


As to the second question, we also answer it in the negative. The text of the receivership statutes, the legislative intent behind them, and public policy considerations compel us to find that chapter 7.60 RCW is not the exclusive remedy for lenders to gain access to a borrower's property.



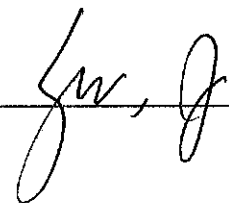
WE CONCUR:



Fairhurst, J.



Conzalez, J.



No. 92081-8

STEPHENS, J. (dissenting)—I respectfully dissent because the majority erroneously equates the entry provisions at issue with actual possession. Months after Laura Jordan defaulted on her loan, Nationstar Mortgage LLC inspected Jordan’s property and determined that it was vacant. Pursuant to the deed of trust’s entry provisions, Nationstar secured the home by changing the lock to the front door and posted instructions on how Jordan could enter the home if she returned. This practice is not inconsistent with Washington’s lien theory of mortgages and RCW 7.28.230(1). Accordingly, the first certified question should be answered in the affirmative.

“Washington courts have hesitated to ‘invoke public policy to limit or avoid express contract terms absent legislative action.’” *Brown v. Snohomish County Physicians Corp.*, 120 Wn.2d 747, 753, 845 P.2d 334 (1993) (quoting *State Farm*

Gen. Ins. Co. v. Emerson, 102 Wn.2d 477, 481, 687 P.2d 1139 (1984)). It is undisputed that the deed of trust's entry provisions were contractually agreed to and authorized Nationstar to change the locks on Jordan's home after default. And as the majority correctly notes, Washington's legislature has not "specifically invalidate[d] such contrary agreements in its codification of lien theory prohibiting the lender from taking possession of property before foreclosure." Majority at 10.

The majority nevertheless finds the entry provisions contravene Washington's rule against lenders taking preforeclosure possession of borrowers' property. The majority does so by describing the entry provisions as authorizing the lender to take "possession." *Id.* at 8, 12. But the certified question asks not whether lenders can take "possession" of property before foreclosure. Instead, it asks whether the lender can "enter, maintain, and secure the encumbered property" before foreclosure. Order Certifying Questions to Wash. Supreme Court, *Jordan v. Nationstar Mortg., LLC*, No. 2:14-CV-0175-TOR at 9 (E. Wash. Aug. 10, 2015). Absent legislation stating otherwise, the entry provisions at issue are not inconsistent with Washington's lien theory of mortgages and RCW 7.28.230(1).

The majority cites inapposite authority to equate the entry provisions with actual possession. At the outset, the majority's reliance on the *Restatement* is misplaced. RESTATEMENT (THIRD) OF PROP: MORTGAGES § 4.1 (AM. LAW. INST.

1997). The *Restatement* does not contemplate entry provisions, like those considered here, but rather a lender taking possession. The *Restatement* merely reiterates the general rule against accelerated preforeclosure possession of property. In illustrative applications of this rule, the *Restatement* examines instances where the mortgagee has “file[d] an action to obtain possession of [the property].” RESTATEMENT § 4.1 cmt. b, illus. 1-3. Here, however, Nationstar has not filed an action to obtain possession of Jordan’s property. Instead, after Jordan defaulted on her loan, Nationstar took contractually authorized steps to secure the abandoned property—and it posted instructions on how Jordan could access the property, consistent with her continued right of possession.

Neither of the two Court of Appeals decisions cited by the majority support equating the entry provisions to possession. *Aldrich v. Olson* does not even interpret “possession” in RCW 7.28.230(1). 12 Wn. App. 665, 531 P.2d 825 (1975). And *Coleman v. Hoffman* merely clarifies the difference between the right to possession (applicable to foreclosure actions) and actual possession (applicable to premises liability matters): “Although RCW 7.28.230 effectively precludes a mortgagee from obtaining possession of property to the mortgagor’s exclusion, the statute does not bear on the question of whether a mortgagee actually possess the property. Actual possession, not a right to possession, is the critical inquiry in premises liability

cases.” 115 Wn. App. 853, 863-64, 64 P.2d 65 (2003). But unlike the landlords in *Aldrich* and *Coleman*, Nationstar never possessed the property to Jordan’s exclusion. Rather, Nationstar provided Jordan with instructions on how to enter her home if she returned. At no point did Nationstar ever object to Jordan’s continued right to possession before foreclosure.

Finally, even if we regarded the entry provisions as interfering with Jordan’s right to possession, Nationstar was nevertheless justified in securing Jordan’s abandoned property. The *Restatement* recognizes three exceptions to the general rule that mortgagees cannot obtain possession of the mortgagor’s property before foreclosure: (1) mortgagor consent, (2) mortgagee’s possession as the result of peaceful entry in good faith after purchasing the property at a void or voidable foreclosure sale, and (3) mortgagor abandonment. RESTATEMENT § 4.1 cmt. c. Here, the evidence supported Nationstar securing Jordan’s home under the mortgagor abandonment exception. Months after Jordan defaulted on her loan, Nationstar inspected Jordan’s property and determined that it was vacant. Nationstar then changed the locks, which it was allowed to do under the entry provisions in order to secure the property. *Cf. PNC Bank, NA v. Van Hoornaar*, 44 F. Supp. 3d 846, 856-57 (E.D. Wis. 2014) (dismissing trespass claim against lender for changing a homeowner’s locks upon default because the mortgage agreement authorizing the

lender to secure the premises upon default or abandonment created an implied consent to entry); *see also Tennant v. Chase Home Fin., LLC*, 187 So. 3d 1172, 1181-82 (Ala. Civ. App. 2015). Moreover, public policy considerations support Nationstar securing Jordan's abandoned property: "Not only is it important to protect the [property] against the elements and vandalism, but society is benefited by [the property's] productive use." RESTATEMENT § 4.1 cmt. c.

Pursuant to entry agreements like the one mutually agreed on by Nationstar and Jordan, a lender may "enter, maintain, and secure" seemingly abandoned property before foreclosure without taking "possession" of it. Because the first certified question should be answered in the affirmative, I dissent.

Stephens, J.
Geoff Madsen, Jr.
Madsen, C. J.

Foreclosures and Lockouts

Jordan v. Nationstar Mortgage, LLC *Supreme Court of Washington Case No. 92081-8*

December 16, 2016

Clay M. Gatens

Jeffers, Danielson, Sonn & Aylward, P.S.



Jody M. McCormick
Washington Trust Bank



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Background of *Jordan* Case

The *Jordan* case centers on
“Entry Provisions”, a standard
provision found in the majority of
mortgages in the United States.

The primary issue is whether the
Entry Provisions contravene
Washington Law – specifically
RCW 7.28.230.



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The Text of Entry Provisions

Protection of Lender's Interest in the Property and Rights Under this Security Instrument.

If (a) Borrower fails to perform the covenants and agreements contained in this Security Instrument,

...

or (c) Borrower has abandoned the Property, then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument, including protecting and/or assessing the value of the Property, and securing and/or repairing the Property

....

Securing the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off.



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History of Standard Form Documents

Standardized form mortgage documents came about in the 1970's as Federal National Mortgage Association (FNMA or "Fannie Mae"), or Federal Home Loan Mortgage Corporation (FHLMC or "Freddie Mac") were created to allow for loans to be bundled and securitized.

See e.g., Woodstock Inst., Unresolved Foreclosures: Patterns of Zombie Properties in Cook County (Feb. 2014).



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Secondary Market

- Loans are sold by lenders and other loan originators to third-parties – often Fannie Mae or Freddie Mac
- 28% of all residential mortgage loans in the US are owned or insured by Fannie Mae¹ and 17% are owned or insured by Freddie Mac²
- 90% of all residential mortgage loans are guaranteed by Fannie Mae, Freddie Mac or the Government National Mortgage Association³

¹ FNMA 2015 10-K

² FHLMC 2015 10-K

³ Amicus Brief of Federal Home Loan Mortgage Corporation, *Jordan v. Nationstar*, pg. 3.



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Loan Servicing

Most lenders and servicers do not own the loans they originate or service.

Servicers:

- are the face of mortgage lenders;
- collect payments;
- conduct foreclosures; and
- enter and conduct property inspections and lock changes pursuant to standardized guidelines



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Servicing Requirements

Servicers are required to comply with the servicing requirements or guidelines found at:

- Fannie Mae's Single Family Servicing Guide
<https://www.fanniemae.com/content/guide/servicing>
- Freddie Mac's Single-Family Seller/Servicer Guide
<http://www.freddiemac.com/singlefamily/guide/>
- HUD Handbook
http://portal.hud.gov/hudportal/HUD?src=/program_offices/housing/sfh



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Problems with Servicing Requirements

- Loan Default – guidelines require an occupancy inspection of the property within 45 days of default – exterior only.
- If the property is “vacant” or “abandoned”, the servicer is directed to forcibly enter and remove borrower’s lock(s) and install and maintain locks for the lender.
- No distinction exists between abandonment or vacancy in the guidelines or servicer’s practices.



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Problems with Servicing Requirements (Cont.)

- Patterns of abuse and entry into occupied homes.
- Contractors are incentivized by per-item fees to conduct lock changes and other preservation services where not needed or when borrower is still living in the home.
- Servicers refuse to remove locks and lock boxes even after the homeowner contacts them and instructs them to be removed.



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The Case

Laura Zamora Jordan v. Nationstar Mortgage, LLC

- Challenged lender pre-foreclosure entries and lock changes on a class wide basis.
- Class was certified and contains over 5,000 Washington borrowers who had their locks changed since 2008 in Washington State.
- Two issues were certified to the Washington State Supreme Court post-class certification:
 - 1) Whether the entry provisions violated Washington law vis a vis RCW 7.28.230; and
 - 2) Whether RCW 7.60 was the exclusive remedy for a lender seeking pre-foreclosure possession of a borrower's property.

The Washington State Supreme Court answered the first certified issue in the affirmative and the second certified issue in the negative.

The case is pending resolution in the Federal District Court for the Eastern District of Washington.



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Parties -

- **Laura Zamora Jordan**
on behalf of herself and over 5,000
certified Washington class
members.
- **Nationstar Mortgage, LLC**
- **Federal Finance Housing Agency**
as Conservator for Fannie Mae and
Freddie Mac



Amici -

- Federal Home Loan Mortgage Corporation ("Freddie Mac")
- City of Spokane
- Northwest Consumer Law Center
- Mortgage Bankers Association
- Consumer Mortgage Coalition
- Federal Housing Finance Agency



Procedural History

- **April 2012** Case Filed Chelan County Superior Court
- **May 2014** Class Certified Chelan County Superior Court
- **June 2014** Case Removed to USDC E.D. Washington
- **Sept. 2014** District Court grants order to remand to Superior Court
- **Oct. 2014** Remand decision appealed to 9th Circuit
- **April 2015** 9th Circuit reverses and returns case to District Court
- **Aug. 2015** District Court certifies two questions to Washington State Supreme Court
- **July 2016** Decision by WA State Supreme Court
- **July 2016** Matter resumes in USDC E.D. Washington



Legal Framework

Washington is a lien-theory state, which vests the exclusive right of possession in the borrower prior to completion of a foreclosure.

“...the mortgage is nothing more than a lien upon the property to secure payment of the mortgage debt, and in no sense a conveyance entitling the mortgagee to possession or enjoyment of the property as owner.”

Western Loan & Bldg. Co. v Mifflin, 162 Wash. 33, 39 (1931)



RCW 7.28.230

RCW 7.28.230 codifies Washington's lien theory prohibition against a lender's possession of a borrower's property prior to completion of a foreclosure and sale at law:

"A mortgage of any interest in real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property, without a foreclosure and sale according to law"



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Possession???

The legal definition of
"possession"
of real property in
Washington State was
undecided prior to
Jordan



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Restatement of Property

The Restatement of Property defines a “possessory interest in land” as follows:

“A possessory interest in land exists in a person who has *a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land...*”



Tort Definition

“A possessor of land is

- (a) a person who is in occupation of the land with intent to control it, or**
- (b) a person who has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it, or**
- (c) a person who is entitled to immediate occupation of the land, if no other person is in possession under Clauses (a) and (b).”**

Coleman v. Hoffman, 115 Wn. App 853.



Landlord / Tenant

“[e]xcept as limited by the terms of the leasehold, a tenant has a present interest and estate in the property for the period specified, which gives him exclusive possession against everyone, including the lessor”.

Aldrich v. Olson, 12 Wn. App. 665, 667 (1975).



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Court's Two Holdings

- *Washington's Lien Theory and RCW 7.28.230(1) Prevent a Borrower and a lender from contracting to allow the lender to take possession based on borrower default*

Lenders may not enter property and change locks under protect and preserve provisions of deeds of trust even if they provide borrowers a means to reenter.

- *RCW 7.60 does not provide the exclusive remedy for a lender to gain access to an encumbered property prior to foreclosure*

Receivership is not the only way to gain access to property.



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. . . and Possession is . . .

In *Jordan* the Court adopted the Restatement (First) of Property definition of “possession” . . .

“a physical relation to the land of a kind which gives a certain degree of physical control over the land, and an intent so to exercise such control as to exclude other members of society in general from any present occupation of the land.”

Restatement (First) of Prop.: Definitions of Certain General Terms [Section] 7(A) (Am. Law Inst. 1936)



Bottom Line

In *Jordan* the Court held that
form entry-provisions

“allow the lender to take possession and thus they are in conflict with state law.”

Jordan v. Nationstar Mortg., LLC 374 P.3d 1195 (Wash.2016)



Lenders are Between a Rock and Various Hard Places

- Rock – Nationstar Decision
- First Hard Place – One Action Rule under Deed of Trust Act (RCW 61.24.030(4))
- Second Hard Place – Servicing Requirements
- Third Hard Place – Municipal Ordinances Requiring Lenders to Protect and Preserve



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Deed of Trust Act One Action Rule - RCW 61.24.030

It shall be requisite to a trustee's sale:

...

- (4) That no action commenced by the beneficiary of the deed of trust is now pending to seek satisfaction of an obligation secured by the deed of trust in any court by reason of the grantor's default on the obligation secured: PROVIDED, That (a) the seeking of the appointment of a receiver shall not constitute an action for purposes of this chapter; and (b) if a receiver is appointed, the grantor shall be entitled to any rents or profits derived from property subject to a homestead as defined in RCW [6.13.010](#). If the deed of trust was granted to secure a commercial loan, this subsection shall not apply to actions brought to enforce any other lien or security interest granted to secure the obligation secured by the deed of trust being foreclosed; (emphasis supplied)



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Servicing Requirements

FannieMae

Fannie Mae requires servicers to gain access and complete securing of all vacant properties within 7 calendar days of: (a) the first time vacant date as reported by the inspection results, (b) notification from the borrower, or (c) any verifiable source.

...

Securing includes, but is not limited to, the following:

- Confirm vacancy.
- Change lock on exterior rear/secondary door on main dwelling.

....

Fannie Mae Property Maintenance and Management: Property Preservation Matrix and Reference Guide, Effective Date: 11.12.2014

Freddie Mac

In accordance with applicable law, the Servicer must first determine if the Borrower has, in fact, abandoned the property and then take the following actions:

- 1. Attempt to locate the Borrower and determine the reason for abandonment
- 2. Protect the property from waste, damage and vandalism, and ensure the continuation of utilities where necessary. [Exhibit 57, 1- to 4- Unit Property Approved Expense Amounts](#), describes the allowable preservation and maintenance expenses that may be incurred without obtaining Freddie Mac's pre-approval.

....

Freddie Mac Single-Family Seller/Servicer Guide 8403.2



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Freddie Mac Servicing Requirements Cont.

8403.2: Servicing Mortgages on abandoned properties (03/02/16)

A Servicer is responsible for acting without delay and in an efficient and responsible manner to protect both the Servicer's and Freddie Mac's interests when the Servicer becomes aware of an abandoned property. . . . An abandoned property is real property to which the owner has voluntarily and intentionally relinquished possession, claim and control, or real property defined as abandoned property by applicable laws. Conditions that may lead to abandonment include: vacancy, waste, deterioration, lack of utilities or Delinquency.

...

In accordance with applicable law, the Servicer must first determine if the Borrower has, in fact, abandoned the property and then take the following actions:

1. Attempt to locate the Borrower and determine the reason for abandonment
2. **Protect the property from waste, damage and vandalism, and ensure the continuation of utilities where necessary.** . . .

...

5. Obtain interior and exterior inspections in accordance with Section 9202.12 . . .



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HUD Requirements – Mortgage Insurance

12 CFR § 203.377 Inspection and preservation of properties.

The mortgagee, upon learning that a property subject to a mortgage insured under this part is vacant or abandoned, shall be responsible for the inspection of such property at least monthly, if the loan thereon is in default. When a mortgage is in default and a payment thereon is not received within 45 days of the due date, and efforts to reach the mortgagor by telephone within that period have been unsuccessful, the mortgagee shall be responsible for a visual inspection of the security property to determine whether the property is vacant. The mortgagee shall take reasonable action to protect and preserve such security property when it is determined or should have been determined to be vacant or abandoned until its conveyance to the Secretary, if such action does not constitute an illegal trespass.

“Reasonable action” includes the commencement of foreclosure within the time required by § 203.355(b) of this part.



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Municipal Ordinances & Vacant Property Registration Requirements

- Spokane Municipal Code Sec. 17F.070.520 (requires lenders to inspect properties upon mortgage default, register property once notice of default is issued under 61.24 RCW, maintain exterior of property while foreclosure is pending, secure property, etc.)
- Pierce County Council Resolution R2013-15 (adopted a resolution similar to Spokane’s registry)
- Bremerton Municipal Code Sec. 6.10 (requires lenders to inspect properties on mortgage default, register the property within 14 days of inspection, maintain the property, secure property, etc.)
- Renton Municipal Code Chapter 1-3 (nuisance ordinances may apply to mortgagees)
- Lynnwood Municipal Code Ch. 16.08 (abatement and unsafe structures ordinance applies to owners, which arguably includes any person with a record interest in the property)



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Servicers' Options Post *Jordan*

Obtain borrower's written consent

Benefits of "Approach"

- Borrower may take property preservation steps him or herself
- Engage borrower in conversation that may lead to resolution of default
- Efforts to obtain consent may form the basis of other relief, if approach unsuccessful

Disadvantages of "Approach"

- May not be practical
- If property is vacant or abandoned, servicer may not be able to locate borrower
- Borrower may be uncooperative



Servicers' Options Post *Jordan* (Cont.)

Custodial Receivership

Advantages

- Exception to One Action Rule in
- RCW 61.24.030(4)
- Clearly permitted by *Jordan*
- Quasi-judicial immunity protects receiver and, indirectly, lender
- Bond protects borrower
- 7 days' notice – RCW 7.60.025(3)



Servicers' Options Post *Jordan* (Cont.)

Custodial Receivership

Disadvantages

- Must show reasonably necessary and that other remedies are not available or are inadequate - RCW 7.60.025(1)
- Expense will ultimately be borne by borrower/property
- May make workout options less viable for borrower
- Delay



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Servicers' Options Post *Jordan* (Cont.)

Declaratory Relief/Injunction

- RCW 7.24/RCW 7.40
- Obtain "Protect and Preserve" order
- Plaintiff must show great injury/irreparable harm
- Bond required
- Order needs to state that the action is not an "action" under RCW 61.24.030
 - Untested



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Servicers' Options Post *Jordan* (Cont.)

Action for Waste

RCW 64.12.020-035

- Waste by guardians or tenants (020)
- Injury to trees (030)
- Vegetation/utilities' immunity (040)
- Situation doesn't fit a statutory basis

Impact of Economic Loss Rule

- Are lenders constrained?

One Action Rule – RCW 61.24.030

RCW 61.24.100(3)(a)(i)

- Exception to anti-deficiency rule in Deed of Trust Act
- Doesn't help prior to foreclosure



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Servicers' Options Post *Jordan* (Cont.)

Judicial Foreclosure with Emergency Order for Abatement of Waste

- Injunctive relief – RCW 7.40
- Plaintiff must show great injury/irreparable harm
- Bond required
- Judicial foreclosure will permit borrower to have possession of the property as a homestead for 12 months post-foreclosure – RCW 6.23.110
- Unless Abandoned – no redemption – RCW 61.12.093
- Court has power to restrain waste – RCW 6.23.100



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Potential Legislative Solutions Post *Jordan*

- Amend RCW 7.28.230 to permit lenders to act under entry provisions in deeds of trust
- Establish a separate statutory procedure to determine when property is vacant and “protect and preserve” remedies are appropriate
- Permit injunctive relief as an ancillary action to a non-judicial foreclosure analogous to a receivership
- Amend One Action Rule in RCW 61.24.030 - if legislative solution involves an “action”



JEFFERS, DANIELSON,
SONN & AYLWARD, P.S.
Attorneys at Law



Economic Justice Project

Working for Justice Since 1967

Abandoned Property and Foreclosure - Preserving Homeowner Rights

Background

The cities of Spokane and Tacoma recognize there is a problem with vacant and blighted properties involved in foreclosure. City ordinances require responsible parties to register vacant properties and make necessary repairs, but banks claim that the recent ruling in *Jordan v. Nationstar* prevents them from complying. The Washington Supreme Court held that a servicer who entered a home and changed the locks when there had been no foreclosure sale took possession of the property in violation of the homeowner’s rights. In response, banks have drafted amendments to the Deed of Trust Act and to RCW 7.28.230 that would let them enter a home even when a loan is not in default. Under the proposed changes, beneficiaries, servicers, or their agents would be able to enter a home when no sale has occurred in order to “secure” premises they deem to be abandoned.

Homeowners oppose this purported “fix” to *Jordan v. Nationstar* because it does nothing to address the Cities’ concerns and only erodes fundamental homeowner rights.

Lili Sotelo, Directing Attorney, Columbia Legal Services, lili.sotelo@columbiainlegal.org, (206) 287-8620



Q3 2016 U.S. Residential Property Vacancy and Zombie Foreclosure Report, ATTOM Data Solutions, Sept. 8, 2016

Analysis

1) Banks own the vast majority of U.S. residential vacancies and already have authority to enter and repair those properties. Other abandoned and blighted properties are likely zombie foreclosures—homes where the bank could, but has not, completed foreclosure. Rather than weaken homeowner rights, banks should take necessary steps to complete foreclosure on abandoned property so they can enter the premises lawfully. In Washington, foreclosure can be completed in as few as five months, particularly when the homeowner is nonresponsive.

2) Banks already have the power to seek appointment of a receiver in order gain access to a property before foreclosure when “its revenue-producing potential is in danger of being lost or materially injured or impaired.” RCW 7.60.025(b)(i). This procedure adds court oversight and assures that entry into the property does not interfere with homeowner rights. The receivership procedure is streamlined and cost-effective, and a better way to take possession of a property before the foreclosure sale.

3) Homeowners are routinely locked out by overzealous servicers and their agents. The case of *Jordan v. Nationstar* continues in the Eastern District of Washington and now includes a class of 5,100 homeowners prematurely locked out by Nationstar. In 2015, King 5 and Komo 4 ran stories about break-ins by servicers and the resulting damage. The proposed amendments give the beneficiary, the servicer, and their agents broad discretion to determine when a property is abandoned and the right to enter the property immediately and change the locks. The Northwest Justice Project and the Northwest Consumer Law Center report that homeowners who have been locked out of their homes prematurely are less likely to receive notice of their rights under the Foreclosure Fairness Act and to avail themselves of options to save their homes.

Foreclosures and Lockouts

Jordan v. Nationstar Mortgage, LLC
Supreme Court of Washington Case No. 92081-8

December 16, 2016

Clay M. Gatens

Jeffers, Danielson, Sonn & Aylward, P.S.



Jody M. McCormick
Washington Trust Bank



JEFFERS, DANIELSON,
SONN & AYLWARD, P.S.
Attorneys at Law

CHAPTER FIVE

JUDGES PANEL

December 2016

Judge John P. Erlick
King County Superior Court

Phone: (206) 477-1623
john.erlick@kingcounty.gov

Judge J. Richard Creatura
Federal District Court

Phone: (253) 882-3780
j_richard_creatura@wawd.uscourts.gov

JUDGE JOHN P. ERLICK was first elected to the King County Superior Court in September 2000 and is currently on the Superior Court's Executive Committee. He previously served as Chief Civil Judge for King County Superior Court and now presides over principally civil cases. He serves as a judicial and Executive Committee member on the State Commission on Judicial Conduct, is a member of the Superior Court Judges' Association (SCJA) Education Committee, and served as chair of the SCJA Ethics Committee from 2005-2014. He is on the Executive Committee and is President Emeritus of the William L. Dwyer Inn of Court. Judge Erlick was the Dean of the Washington State Judicial College in 2014-15.

Judge Erlick is dedicated to the training and teaching of judges and law professionals in legal ethics. Since 2007, he has been an adjunct professor in professional responsibility and the judicial externship program at Seattle University School of Law, where he received the Outstanding Adjunct Faculty Award in 2011. Judge Erlick graduated from the international law training program at the Center for International Legal Studies (CILS), in Salzburg, Austria, has served as a Visiting Professor at the Far Eastern Federal University, in Vladivostok, Russia, at the University of Szczecin Law School in Szczecin, Poland, and is a member of the Academic Committee of the International Organization for Judicial Training (IOJT). He has also been involved as a coach and instructor in countless mock trial and moot court competitions. In addition to authoring numerous articles on professionalism and ethics, Judge Erlick has also lectured on these and other topics at judicial conferences, bar association meetings, and law schools, and is the consulting editor for Washington Trial and Post-Trial Civil Procedure (Lexis-Nexis.) Judge Erlick previously was the SCJA appointee to the State's Ethics Advisory Committee and also served as the chair of the King County Superior Court Ex Parte and Probate Committee, and on the Jury Committee, Governance Committee and King County Bench/Bar Efficiencies Task Force. He was the 2004 judicial co-chair of the King County Bench-Bar Conference. Prior to his election in 2000, he was in private practice, concentrating on defense of professional liability cases.

Judge Erlick graduated from Harvard College in Cambridge, Massachusetts with honors and from the Georgetown University Law Center with honors. He is a graduate of the National Judicial College general jurisdiction program.

website: <http://www.kingcounty.gov/courts/SuperiorCourt/judges/erlick.aspx>

Biographies continued on next page

Biographies (cont).

JUDGE J. RICHARD CREATURA is a Magistrate Judge for the Western District of Washington in Tacoma. He has served since March, 2009.

Before going on the bench, Judge Creatura had been a trial attorney with the law firm of Gordon Thomas Honeywell Malanca Peterson & Daheim LLP, in Tacoma, Washington. He had served on the firm's Board of Directors and as Board Chair.

He is an Emeritus Member of the Robert J. Bryan Chapter of the American Inns of Court and former member of the American Board of Trial Advocates. He served on the Washington State Board of Bar Examiners for over twenty years and was a former Chair of the Commercial Litigation Section of the Washington State Trial Lawyers Association.

He is a former Trustee of the Federal Bar Association and served on a number of committees with the Ninth Circuit, including the Ninth Circuit Advisory Board.

He received his undergraduate degree at Tufts University in 1974 and law degree from University of the Pacific, McGeorge School of Law in 1978. Before graduation, Judge Creatura served as a law clerk to the Honorable Anthony M. Kennedy at the Ninth Circuit Court of Appeals. Kennedy is now a Justice on the United States Supreme Court.

Moderator for panel:

ANNETTE T. FITZSIMMONS, counsel to the Washington REALTORS®, administers a Hotline that answers legal questions as an educational resource for Association members statewide. Annie is a qualified and approved instructor of real estate law classes through the Department of Licensing and a teacher of real estate law to the Department of Licensing, Real Estate Division. She is part of a team of lawyers responsible for drafting and review of statewide forms produced by the NWMLS and used by REALTOR® members throughout the state. She has served on the DOL task forces for creation of the Agency Law, revision of the Licensing Law, the Distressed Property Law Amendment and Short Sale Consumer Protection. In addition, Annie maintains a general real estate practice serving the litigation and transactional needs of her clients. Previously, she was a Member (partner) with Gordon, Thomas, Honeywell. Annie earned her law degree from the University of Washington in 1992.



**ETHICS AND REAL
ESTATE ... IN AND
OUT OF COURT**

Judge John Erlick; King County Superior Court
Judge J. Richard Creatura; U.S. District Court



RULES OF PROFESSIONAL CONDUCT

PREAMBLE: A LAWYER'S RESPONSIBILITIES

- 1) A lawyer, as a member of the legal profession, is a representative of clients, an officer of the court and a public citizen having special responsibility for the quality of justice.
- 2) As a representative of clients, a lawyer performs various functions. As advisory, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer conscientiously and ardently asserts the clients position under the rules of the adversary system. . . .

CANDOR TOWARD THE TRIBUNAL

SCENARIO 1

You represent a Company in a contract dispute with a materials supplier. Your client claims it did not receive full shipment, though the Bill of Lading, purportedly signed by the shop foreman, acknowledges inspection of the shipment and conformity with the order.

The company president is asked on cross examination, “Is that your signature?” He answers, “No.”

At lunch, he asks you, “How did she know I signed that Bill of Lading?” You say, “What do you mean you signed it? You testified it wasn’t your signature.”

“Well,” he responds, “technically, it is my signature. I was signing my shop foreman’s name. But how did she know that?”

Instead of answering his question, you tell him you need to consult the RPCs to decide what to do.

True

False



*WHAT ABOUT THE CLIENT
WHO COMMITS PERJURY?*

*Isn't the lawyer offering
false evidence??*

RPC 1.6

CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by para (b).

(b) A lawyer to the extent the lawyer reasonably believes necessary: ...

(2) may reveal information relating to the representation of a client to prevent the client from committing a crime;

RPC 1.16

DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall, ... withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law; ...

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if: ...

2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent; ...

RPC 1.16

RPC 1.16 requires that, except as otherwise ordered by the court, a lawyer shall withdraw from the representation of a client if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent. Perjury is both a criminal act and a fraud upon the court.

RPC 3.3

CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

...

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6; ...

or (4) offer evidence that the lawyer *knows* to be false.

[T]he true issue was whether [defense counsel] had a sufficient factual basis for his strong belief that perjury was intended and could not be dissuaded, so that continuing with the representation would result in a violation of the Rules of Professional Conduct, absent a court order disallowing withdrawal.

State v. Berrysmith 87 Wash.App. 268, (1997)

Thus, a lawyer who reasonably believes (*now knows*) that his or her client intends to commit perjury and cannot be dissuaded from that course is *ethically bound* to withdraw unless the court, after being so advised, refuses to permit withdrawal. The question for the court, therefore, is whether the lawyer *reasonably believes* (*now knows*) that the client intends to commit perjury and cannot be dissuaded, and not whether the client in fact intends to commit perjury and cannot be dissuaded. *Id.*

AFTER THE FACT....

If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from representation under Rule 1.16.

Misleading the court is never justified.

As stated in *Fisons*: “Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense.”

Imposing sanctions upon an attorney is a “difficult and disagreeable task” for a trial judge, but if sanctions are warranted, it is a necessary task “if our system is to remain accessible and responsible.” ...

“without candor from counsel, this court cannot, and in this case, was not able to make a fully informed and fair decision ...”

Deutscher v. Gabel, 149 Wash.App. 119 (misrepresenting to court when witness was discovered)

SCENARIO 2

Attorney represents the Seller of commercial real estate. Buyer is a partnership of investors who are unrepresented by counsel. Seller's attorney prepares the transaction documents.

After closing, the building fails to produce the rate of return represented by the Seller. Buyer sues Seller for misrepresentation and sues Seller's attorney for misrepresentation and legal malpractice, claiming that seller's counsel also represented buyer's legal interests.

Is there any basis on which Seller's attorneys could be liable to Buyers?

An attorney-client relationship does not require the payment of a fee or formal retainer but may be implied from the conduct of the parties. For purposes of claiming the attorney-client privilege, the existence of an attorney-client relationship turns largely on the client's subjective belief that it exists.

Matter of McGlothlen, 663 P.2d 1330, 1334, 99 Wash.2d 515, 522 (Wash.,1983)

An attorney-client relationship is deemed to exist if the conduct between an individual and an attorney is such that the individual subjectively believes such a relationship exists.” However, the belief of the client will control **only if it “is reasonably formed based on the attending circumstances, including the attorney's words or actions.”** The determination of whether an attorney-client relationship exists is a **question of fact.**

Dietz v. Doe, 935 P.2d 611, 615, 131 Wash.2d 835, 843–44 (Wash.,1997)

RPC 1.7 CONFLICT OF INTEREST:
CURRENT CLIENTS

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

(1) the representation of one client will be directly adverse to another client; or

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

SCENARIO 3

Purchase agreement for seller's rental house has a delayed closing provision. Pending closing, Buyer must pay Seller's mortgage payments and is entitled to collect rents. Seller claims that Buyer mismanaged the rental and failed to make mortgage payments. Seller's attorney seeks ex parte writ of restitution, without notice to the Buyer.

The court commissioner inquires about whether anyone occupies the house. Seller's attorney knows that the occupant is the buyer's son, occupying rent free. Is it ethical for the attorney to represent to the commissioner that the occupant is a "vagrant?"

RULE 3.3

Candor Toward the Tribunal

(f) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

“A **material fact** is of such a nature that it affects the outcome of the litigation.”

Ruff v. County of King, 125 Wn. 2d 697, 703, 887 P.2d 886 (1995)(applying summary judgment standard)

EX PARTE CONSIDERATIONS

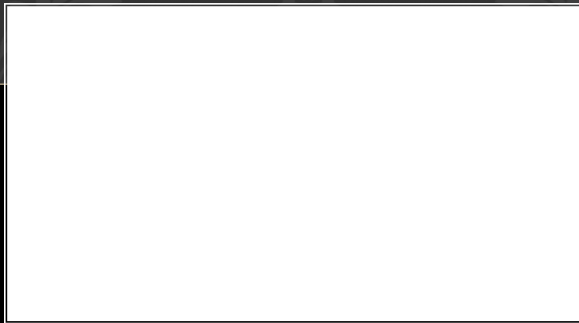
Ordinarily, an advocate has limited responsibility of presenting one side of the matters ... the conflicting position is expected to be presented by the opposing party. *However*, in any *ex parte* proceeding, such as an application for a temporary restraining order, there is *no balance* of presentation by opposing advocates.

Ferguson **knew** that the person living in the rental home was the Bransfords' son but only told the court he was a “vagrant.” The record supports the conclusion that Ferguson **knew** these facts to be true but did not disclose them to the court at the ex parte hearing.

In re Ferguson, 170 Wash.2d 916 (2011) (resulting in 90 day suspension of law license)

THOUGHTS TO PONDER

When the judge/commissioner is presented with your motion for an ex parte order, can she check Judicial Information Services for any convictions or DV history of the parties?



Comment [6] The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.

The court should not conduct a personal investigation of the defendant and should avoid whenever possible receiving ex parte statements concerning the defendant.

State v. Giebler, 22 Wash.App. 640 (1979) (concluding there was an ex parte communication where a judge, during a current proceeding, contacted third parties to verify the defendant's income without the defendant's knowledge) (sentence rev'd);

BUT NOTE:

(5) A judge may initiate, permit, or consider any ex parte communication when expressly authorized by law* to do so.

E.g. Statutory authority addressing domestic violence protection orders, anti-harassment orders, orders of protection, and parenting plans.

ETHICS IN A TRANSACTIONAL PRACTICE



SCENARIO 4

Attorney practices family law. His client needs to sell commercial property. Attorney's son is a recently licensed real estate broker. The son is not part of the law office, he has no business relationship with the attorney and he does not have an office in the same building as the attorney.

Is it proper under the Rules of Professional Conduct for the attorney to recommend and/or steer clients to the broker/son for handling of client's real estate needs and if so, may the attorney discount or reduce client's fees if the client agrees to utilize the professional services of the broker/son?

RPC 1.6

CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

RPC 1.7

Conflict of Interest: Current Clients

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

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

(continued)

RPC 1.7

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

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation ...;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client ... in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

RPC 2.1

ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

RPC 5.4

Professional Independence of a Lawyer

- (b) A lawyer shall not form a partnership with a non-lawyer if any of the activities of the partnership consist of the practice of law.
- (c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.
- (d) A lawyer shall not practice with or in the form of a professional corporation or association authorized to practice law for a profit, if:
 - (1) a non-lawyer owns any interest therein, ...;
 - (2) a non-lawyer is a corporate director or officer ...; or
 - (3) a non-lawyer has the right to direct or control the professional judgment of a lawyer.

SCENARIO 4, REFRAIN

What if the lawyer, representing a buyer, wants to serve as the real estate broker and share in any real estate commission. Is that okay?

- **Real Estate License Law (RCW 18.85)** (“This chapter shall not apply to: ... (3) An attorney-at-law in the performance of the practice of law...”)
- **RPC 2.1 – Advisor**
- **Rule 5.4 – Professional Independence of a Lawyer**
- **RPC 1.5 – Fees (see next slide)**

RPC 1.5

Fees

- (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee ...
- (c) A fee may be contingent on the outcome of the matter If a fee is contingent on the outcome of a matter, a lawyer shall comply with the following:
- (1) A contingent fee agreement shall be in a writing signed by the client;
 - (2) A contingent fee agreement shall state the method by which the fee is to be determined, including the percentage ... that shall accrue to the lawyer in the event of settlement, trial or appeal; ... expenses to be deducted from the recovery; and whether such expenses are to be deducted before or after the contingent fee is calculated. ...

SCENARIO 5

Lawyer represents long-time client/developer. With lawyer's assistance, developer acquires real property and entitlements for a project. Developer brings in a joint venture partner and lawyer represents developer in negotiation of the joint venture. The JV then engages lawyer to continue representing the JV in development and financing of the project. During these efforts, developer seeks lawyer's assistance with a different project – a project that, pursuant to the JV agreement, should have been offered to the JV. What should lawyer do?

Thereafter, JV partner and developer disagree as to terms and timing of sale of project. Developer seeks lawyer's counsel. What should lawyer do?

SCENARIO 6

Husband has a company that hit a rough spot. Husband is sole owner/shareholder and decision-maker. To protect certain assets of the company and the marital community, Husband and Wife hire Law Firm to set up a new company where Wife is the only owner/shareholder. Assets transferred to Wife's company. A few years later, Wife is tired of paperwork for operating her company, and wants to quit claim property back to Husband's company. Husband and Wife both think of Law Firm as their lawyer as well as the lawyer representing each of their companies. Okay?

SCENARIO 7

Lawyer is a practicing attorney and also performs real estate escrow services. One of lawyer's clients asks the lawyer to prepare a purchase and sale agreement with an earnest money provision for client to acquire real property. Client also asks lawyer to handle the escrow services. Lawyer prepares purchase agreement, which is executed by the Seller. Buyer deposits earnest money in escrow. Before closing, but after waiving all due diligence, Buyer refuses to close. Seller claims an interest in the earnest money. Lawyer represents law firm and sues Buyer and Seller in an interpleader action. Problems?

SCENARIO 7; ALTERNATE ENDING

Lawyer/escrow determines that buyer is not entitled to recovery of earnest money, since buyer waived all contingencies, and lawyer releases earnest money to seller. Problems?

CONCLUDING THOUGHTS

The Judiciary, post November 2016.

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CHAPTER SIX
RULES OF PROFESSIONAL CONDUCT

WASHINGTON'S RULES OF PROFESSIONAL CONDUCT (RPC)

(Amended effective October 1, 2002, September 1, 2006, September 1, 2010; September 1, 2011; December 13, 2011; September 1, 2012, September 1, 2013, January 1, 2014, April 14, 2015, September 1, 2016]

Fundamental Principles of Professional Conduct

Preamble and Scope

1.0A Terminology

1.0B Additional Washington Terminology

Title 1 Client-Lawyer Relationship

1.1 Competence

1.2 Scope of Representation and Allocation

1.3 Diligence

1.4 Communication

1.5 Fees

1.6 Confidentiality of Information

1.7 Conflict of Interest: Current Clients

1.8 Conflict of Interest: Current Clients: Specific Rules

1.9 Duties to Former Clients

1.10 Imputation of Conflicts of Interest: General Rule

1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

1.12 Former Judge, Arbitrator, Mediator or Other Third-Party Neutral

1.13 Organization as Client

1.14 Client with Diminished Capacity

1.15A Safeguarding Property

1.15B Required Trust Account Records

1.16 Declining or Terminating Representation

1.17 Sale of Law Practice

1.18 Duties to Prospective Client

Title 2 Counselor

2.1 Advisor

2.2 (Deleted)

2.3 Evaluation for Use by Third Persons

2.4 Lawyer Serving as Third-Party Neutral

Title 3 Advocate

3.1 Meritorious Claims and Contentions

3.2 Expediting Litigation

3.3 Candor Toward the Tribunal

3.4 Fairness to Opposing Party

3.5 Impartiality and Decorum of the Tribunal

3.6 Trial Publicity

3.7 Lawyer as Witness

3.8 Special Responsibilities of a Prosecutor

3.9 Advocate in Nonadjudicative Proceedings

Title 4 Transactions With Persons Other Than Clients

4.1 Truthfulness in Statements to Others

4.2 Communication With Person Represented by a Lawyer

4.3 Dealing With Person Not Represented by a Lawyer

4.4 Respect for Rights of Third Person

Title 5 Law Firms and Associations

5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers

5.2 Responsibilities of a Subordinate Lawyer

5.3 Responsibilities Regarding Nonlawyer Assistants

5.4 Professional Independence of a Lawyer

5.5 Unauthorized Practice of Law; Multijurisdictional Practice of Law

5.6 Restrictions on Right to Practice

5.7 Responsibilities Regarding Law-Related Services

5.8 Misconduct Involving Lawyers and LLLTs Not Actively Licensed to Practice Law

5.9 Business Structures Involving LLLT and Lawyer Ownership

5.10 Responsibilities Regarding Other Legal Practitioners

Title 6 Public Service

6.1 Pro Bono Publico Service

6.2 Accepting Appointments

6.3 Membership in Legal Services Organization

6.4 Law Reform Activities Affecting Client Interests

6.5 Nonprofit and Court-Annexed Limited Legal Service Programs

Title 7 Information About Legal Services

7.1 Communications Concerning a Lawyers Services

7.2 Advertising

7.3 Solicitation of Clients

7.4 Communication of Fields of Practice and Specialization

7.5 Firm Names and Letterheads

7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges

Title 8 Maintaining the Integrity of the Profession

8.1 Bar Admission and Disciplinary Matters

8.2 Judicial and Legal Officials

8.3 Reporting Professional Misconduct

8.4 Misconduct

8.5 Disciplinary Authority; Choice of Law

Appendix Guidelines for Applying Rule of Professional Conduct 3.6