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BOARD OF GOVERNORS' MEETING
Public Session Supplemental Materials
May 18-19, 2017
Seattle, WA

NO. 75671-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

KING COUNTY CORRECTIONS GUILD,
Appellant,

v.

JARED KARSTETTER and JULIE KARSTETTER,
Respondents.

APPELLANT'S UPDATED OPENING BRIEF

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I. INTRODUCTION

Appellant King County Corrections Guild (hereafter, "Guild") submits this opening brief in its appeal of a King County Superior Court order denying dismissal of two claims brought against the Guild by its former legal counsel, Attorney Jared C. Karstetter, Jr. ("Karstetter"). The Guild contends that the trial court's order, failing to grant dismissal of two claims against the Guild which undisputedly stem directly from the Guild's decision to sever its attorney-client relationship with Karstetter, is in error.

II. ASSIGNMENTS OF ERROR

1. Did the trial court err in denying the King County Corrections Guild's motion to dismiss Plaintiff Jared Karstetter's claim for termination of employment in breach of contract, which was predicated on the Guild's termination of its attorney-client relationship with Mr. Karstetter?

2. Did the trial court err in denying the King County Corrections Guild's motion to dismiss Plaintiff Jared Karstetter's claim for wrongful termination of employment, which likewise was predicated on the Guild's termination of its attorney-client relationship with Mr. Karstetter?

III. STATEMENT OF THE CASE

The King County Corrections Guild is an independent labor union based in Tukwila, Washington, which represents certain correctional officers and sergeants employed by the King County Department of Adult and Juvenile Detention (DAJD) for the purposes of collective bargaining. CP 2-3, ¶ 7. The Law Firm of Jared C. Karstetter, Jr., P.S., based in Edmonds, Washington ("Karstetter Law Firm"), served as the Guild's legal counsel from approximately 1996 to April 2016. CP 2, ¶ 5. Jared C. Karstetter, Jr. is the managing partner of the Karstetter Law Firm and was the primary provider of legal services to the Guild. *Id.* Karstetter admits that, during his relationship with the Guild, his firm maintained other legal clients. CP 7, ¶ 30. It is undisputed that the firm also employed at least one associate attorney to assist in its legal practice. CP 18, ¶ 34. Karstetter also alleges that the firm employed his wife, Julie Karstetter, as an office support staffer. CP 2, ¶ 6.

During the period in which the Guild was represented by the Karstetter Law Firm, the Guild and the Karstetter Law Firm were party to a series of written agreements. CP 11-15. The most recent agreement, executed on October 12, 2011, states on its face that it was entered into by the Guild and The Law Firm of Jared C. Karstetter, Jr., P.S. CP 11, 13. The agreement was drafted with an express duration of January 1, 2012 to

December 31, 2016. CP 12. Styled as an "Employment Agreement," it set forth a monthly fee rate of $8,500 in exchange for prescribed legal services from The Karstetter Law Firm. CP 11-12. The agreement purported to provide the Karstetter Law Firm just cause and procedural due process rights before termination of the attorney-client relationship, including the right to "due notice," "an opportunity to correct any behavior that [the] Guild deems inappropriate," and "an opportunity to answer any and all charges" before such termination could be effected. CP 12-13.

On April 27, 2016, the Guild decided to end its relationship with the Karstetter Law Firm. CP 6-7. Prior to terminating the relationship, Guild leadership sought and received the opinion of a different law firm, the Public Safety Labor Group ("PSLG"), as to whether the protections negotiated by the Karstetter Law Firm in its written agreements with the Guild were enforceable. CP 6, ¶ 25. PSLG advised the Guild that not only were the terms of the agreement protecting the Karstetter Law Firm from termination likely unenforceable, but that the Guild should terminate its relationship with the Karstetter Law Firm in light of strong evidence that Karstetter had disclosed Guild client confidences in violation of Rule

of Professional Conduct ("RPC") 1.6. CP 98-105 (April 21, 2016 letter, appended as exhibit to Declaration of David Brown).[1]

The Guild informed Karstetter of the termination of the attorney-client relationship between it and the Karstetter Law Firm on April 28, 2016. CP 7, ¶ 28.

On May 24, 2016, Karstetter and Julie Karstetter filed the instant litigation against the Guild, six individuals with relationships to the Guild as officers, Executive Board members, and/or general members ("individual Guild Defendants"; together with the Guild, "Guild Defendants"), three PSLG attorneys and that firm itself (together, the "Attorney Defendants"). *See generally*, CP 1-16. In Plaintiffs' Complaint, Karstetter claims that the Guild had a "permanent" employment relationship with him and that the Guild breached the terms of its agreement with him by denying him the agreement's substantive just cause and pre-termination procedural rights. CP 5, ¶¶ 18-20; CP 8. He also alleged that the termination constituted "wrongful discharge." CP 8.

[1] In the advice letter, PSLG summarized the evidence of Karstetter's troubling pre-termination misconduct, which included instigating what PSLG dubbed a "rambling, accusatory, and unrestrained" interview with DAJD in which he revealed extensive client confidences of the Guild, including but not limited to (1) the details of a sensitive internal Guild investigation against its former officer, (2) contents of a confidential settlement agreement between the Guild and that officer, (3) the substance of legal advice he had previously provided to the Guild, and (4) communications between Guild officers and other Guild counsel to which he was privy. CP 98-105 (April 21, 2016 letter, appended as exhibit to Declaration of David Brown).

Against the individual Guild Defendants, Karstetter pled claims for wrongful discharge, retaliatory discharge, defamation, and negligent infliction of emotional distress. CP 8-9. Finally, Karstetter pled claims for wrongful discharge, negligent infliction of emotional distress, tortious interference, and deceptive business practices against the Attorney Defendants arising from their consultation with the Guild and their subsequent retention by the Guild for legal services after the termination of its relationship with the Karstetter Law Firm. *Id.* Among other remedies, Plaintiffs' Complaint sought Karstetter's reinstatement as the Guild's legal counsel via specific performance of contract, payment of the Karstetter Law Firm's fees under the contract through the end of 2016, and double damages, attorney fees, and costs based on the theory that the fees constituted unpaid employment wages. *Id.*

On June 29, 2016, the Guild filed a motion to dismiss Karstetter's claims against it. *See generally*, CP 17-30. In its motion to dismiss, the Guild argued that Karstetter's claims for termination in breach of contract and wrongful discharge should be dismissed because they did not plead causes of action applicable to the attorney-client relationship. CP 19-23. In light of the unambiguous and consistently-recognized public policy allowing legal clients in Washington to terminate their relationship with their counsel at any time, for any reason or for no reason at all, with no

special formality required to effect the termination, the Guild argued that the provisions of the Karstetter Law Firm's agreements with the Guild entitling it to protection from termination must be deemed unenforceable. CP 18-20. The Guild argued further that, to protect this fundamental right of legal clients, Karstetter must not be allowed to pursue a claim for breach of contract through termination of employment, or for wrongful discharge, against his former client. CP 20-22.

On July 21, 2016, the trial court granted the Guild's motion to dismiss as to certain other of Karstetter's claims, but did not grant dismissal of the breach of contract and wrongful termination counts.[2] CP 39-40.

Following the Court's ruling on the Guild's motion to dismiss, Plaintiffs issued three sets of discovery requests to the Guild Defendants. These requests sought a broad swath of information, documents, and correspondence relating to the performance history of Karstetter and the Karstetter Law Firm as the Guild's counsel, the expectations set for such performance, and communications by the Guild's officers and Executive Board members relating to such performance. *See generally,* Declaration Of Counsel In Support Of Petitioner's Motion For Discretionary Review (filed Sept. 1, 2016), Ex. 2-4 (total of 59 requests for production and six

[2] The trial court did dismiss Karstetter's claim for reinstatement via specific performance, however. CP 40.

interrogatories propounded to the Guild); *see in particular,* Ex. 2, Request for Production No. 1 (seeking "all personnel files, administration files, disciplinary files or other documents retained by Defendant Guild that relates to work performance of Plaintiff Jared Karstetter" from the beginning of his relationship with the Guild); Ex. 2, Request for Production No. 4 (seeking "all emails, correspondence, or other documents that reference in any manner the performance of Plaintiff Jared Karstetter" from January 1, 2006, to present); Ex. 4, Request for Production No. 58 ("For the period of January 1, 2006 through the present, produce all emails, correspondence or other documents that reference any expectation of Guild Defendants that Plaintiff Jared Karstetter keep records of billable hours spent on any matter relating to Guild business").

On September 19, 2016, the Guild filed its First Amended Answer to Karstetter's complaint, asserting a counterclaim against Karstetter. CP 116-127 (Guild's First Amended Answer and Counterclaim). In its counterclaim, the Guild alleges that Karstetter has interfered with, coerced, and restrained the Guild's members in the free exercise of their rights under Chapter 41.56 RCW following the severance of his attorney-client relationship with the Guild, by, *inter alia*, holding himself out as though he should still be treated as the Guild's legal representative and

systematically attempting to interfere in the Guild's representation of its members. *Id.* at 10-11.

In light of the trial court's failure to dismiss Karstetter's claims for breach of contract and wrongful termination, the Guild filed its Motion for

[3] Also pending is a lawsuit by the Washington State Attorney General against Karstetter for campaign finance misconduct committed in his role as the Guild's legal counsel. *See, State of Washington v. Jared Karstetter*, Thurston County Superior Court, Cause No. 16-2-04713-34 (filed November 21, 2016). In that suit, the Attorney General alleges that Karstetter concealed the source of $12,650 or more in campaign contributions made by the Guild, as well as contributions made by another legal client, by reporting himself or his wife as the donor, in violation of RCW 42.17A.435.

Discretionary Review with this Court. *See* Petitioner King County Corrections Guild's Motion For Discretionary Review (filed Sept. 1, 2016). On November 16, 2016, the Court of Appeals accepted review. *See,* Commissioner's Notation Ruling (entered Nov. 16, 2016). Pursuant to the perfection schedule issued by the Court, this brief of appellant timely follows.

IV. ARGUMENT

A. Standard Of Review

The standard of review is *de novo*. *Tenore v. AT&T Wireless*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998). Dismissal is appropriate under Civil Rule ("CR") 12(b)(6) if it is beyond a doubt that a party "can prove no set of facts which would entitle it to relief." *Bravo v. Dolsen Companies,* 125 Wn.2d 745, 750, 888 P.2d 147 (1995). Dismissal of a complaint is also appropriate under CR 12(b)(6) for failure to either articulate or fairly imply the specific legal theories it alleges or to plead the elements of such theories. *See*, *Northwest Line Constr. Chapter of Nat'l Elec. Contractors Ass'n v. Snohomish Cnty. Pub. Util. Distr. No. 1*, 104 Wn. App. 842, 848-49, 17 P.3d 1251 (2001) (failure to identify theory); *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 24-25, 974 P.2d 847 (1999) (failure to plead elements).

B. The Trial Court Erred By Failing To Dismiss Attorney Karstetter's Breach Of Contract Claim, Which Is Predicated Upon Unenforceable Terms Limiting The Guild's Right To Discharge Its Legal Counsel.

Contractual provisions which run contrary to clearly-established public policy are unenforceable and should be voided. *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 92, 331 P.3d 1147 (2014) ("It is... a settled issue that a contract that violates public policy is unenforceable in the courts"). The Washington Supreme Court has consistently applied this principle to contracts entered into by attorneys in violation of the Washington Rules of Professional Conduct ("RPCs"). *See e.g., LK Operating*, 181 Wn.2d at 95; *Valley/50th Ave LLC v. Stewart*, 159 Wn.2d 736, 743, 153 P.3d 186 (2007); *Belli v. Shaw*, 98 Wn.2d 569, 578, 657 P.2d 315 (1983). Because the contract provisions that Karstetter seeks to enforce via his breach of contract claim violate both Washington RPC 1.16 and unambiguous public policy declared by Washington's appellate courts, the trial court below erred by failing to dismiss this claim.

Count I of Karstetter's complaint below alleges that the Guild breached the terms of its "Employment Agreement" with him. Complaint For Damages And Relief, CP 8. This allegation is based on the substantive and procedural protections negotiated by Karstetter in the Karstetter Law Firm's most recent fee agreement with the Guild, which

Karstetter purports provided him a "permanent employment relationship" with the Guild. *Id.*, CP 5, ¶ 18. Specifically, Karstetter seeks to enforce the Karstetter Law Firm's contractual rights to "just cause," "due notice… and an opportunity to correct any behavior that [the] Guild deems inappropriate," and "an opportunity to answer any and all charges" before the Guild may terminate the parties' attorney-client relationship. *Id.*, ¶ 19. As a remedy, Karstetter seeks his contractually-established fees for the remainder of the contract's duration. *Id.*, CP 9. These are unenforceable contract terms.

Legal clients in Washington are afforded the clear right "to discharge a lawyer at any time, with or without cause." *See,* RPC 1.16, Comment 4; *see also,* RPC 1.16(a)(3) (requiring attorneys to withdraw from representation if discharged by their client). This RPC contains no exceptions to protect in-house legal counsel, as Karstetter has, at times, characterized himself. Unwavering Washington precedent has affirmed this essential client right. *See e.g., Belli*, 98 Wn.2d at 577 ("Unlike general contract law, under a contract between an attorney and a client, a client may discharge his attorney at any time with or without cause"); *Fetty v. Wenger*, 110 Wn. App. 598, 600 fn. 4, 36 P.3d 1123 (2001) ("Clients have the right to discharge their attorney at any time, for any reason."); *Kimball v. Pub. Util. Dist. 1*, 64 Wn.2d 252, 257, 391 P.2d 205

(1964) ("A client may, at any time, either for good or fancied cause, or out of whim or caprice, or wantonly and without cause whatever, discharge his attorney and terminate the attorney-client relationship."); *Wright v. Johanson*, 132 Wash. 682, 692, 233 P. 16, 20 (1925) ("That the client may at any time for any reason or without any reason discharge his attorney is a firmly established rule").

It is equally clear that a legal client may effect the termination of his attorney without observing any special procedural formality. *Belli*, 98 Wn.2d at 577 ("Ordinarily, no special formality is required to discharge an attorney and any act of the client indicating an unmistakable purpose to sever relations is sufficient"); *Kimball*, 64 Wn.2d at 257 (client may even terminate attorney "wantonly"). For example, in *Belli*, the Washington Supreme Court held that merely employing other counsel inconsistent with continued representation by a prior attorney was sufficient to sever the attorney-client relationship. *Belli*, 98 Wn.2d at 577.

These unambiguous and consistently affirmed public policies render the provisions in Karstetter Law Firm's agreement with the Guild that allegedly provide that firm or Karstetter a right to continued employment by the Guild, even over the Guild's objection, unenforceable. They therefore warrant the dismissal of Karstetter's claim for breach of contract. *Compare,* Complaint, CP 5, ¶ 19 (purporting to require "just

cause" for termination); *with, Kimball*, 64 Wn.2d at 257 (law permits client "to discharge his attorney *without good cause*") (emphasis added); *compare,* Complaint, CP 5, ¶ 19 (purporting to require "due notice... and an opportunity to correct any behavior" before termination of attorney-client relationship); *with*, *Belli*, 98 Wn.2d at 577 ("any act of the client indicating an unmistakable purpose to sever relations is sufficient").[4]

C. The Trial Court Also Erred By Failing To Dismiss Karstetter's Wrongful Discharge Claim On the Grounds That It Failed To Plead The Elements Of This Common Law Tort.

Karstetter's claim for wrongful discharge should also have been dismissed below, both for its failure to articulate a cognizable claim and because Washington courts have never recognized this tort as one applicable to the attorney-client relationship.

In Washington, the tort of wrongful discharge in violation of public policy has four *prima facie* elements:

> (1) The plaintiffs must prove the existence of a clear public policy.
> (2) The plaintiffs must prove that discouraging the conduct

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[4] Washington law permitting attorney termination at the legal client's will does not preclude a discharged attorney from suing to recover "a reasonable fee for the service he has rendered up to the time the attorney-client relationship is terminated." *Kimball*, 64 Wn.2d at 257. This is typically accomplished through an *in quantum meruit* action. *See, Fetty*, 110 Wn. App. at 600 fn. 4 (attorney may recover *in quantum meruit* for the "reasonable value of the services rendered through the date of discharge"); *Seattle Inv. Co. v. Kilburn*, 5 Wn. App. 137, 139, 485 P.2d 1005 (1971) ("recovery... is necessarily based on *in quantum meruit* and not on the grounds of breach of contract"). However, Karstetter has not contended that the Guild failed to pay the Karstetter Law Firm's contractual fees during the existence of their attorney-client relationship.

> in which they engaged would jeopardize the public policy.
> (3) The plaintiffs must prove that the public-policy-linked conduct caused the dismissal.
> (4) The defendant must not be able to offer an overriding justification for the dismissal.

Gardner v. Loomis Armored, Inc., 128 Wn.2d 931, 941, 913 P.2d 377 (1996); *Rose v. Anderson Hay and Grain Co.*, 184 Wn.2d 268, 277, 358 P.3d 1139 (2015). When determining whether a public policy is clear and is violated, courts should:

> [I]nquire whether the employer's conduct contravenes the letter or purpose of a constitutional, statutory, or regulatory provision or scheme. Prior judicial decisions may also establish the relevant public policy.

Thompson v. St. Regis Paper Co., 102 Wn.2d 219, 232, 685 P.2d 1081 (1984).

Karstetter's complaint does not adequately allege this tort, as it fails to identify any clear public policy Karstetter allegedly took action to support, which led to his termination, much less allege that discouraging Karstetter's conduct would jeopardize that public policy. *Gardner*, 128 Wn.2d at 941 (first through third elements).

To the extent that Karstetter may seek to rely upon the allegation that he "participat[ed] in a whistleblowing investigation" by producing documentation to the King County Ombudsman's Office, this does not

sufficiently identify conduct protected by any established public policy.[5] Complaint, CP 8. While it is true that Washington courts have recognized a public policy interest "in protecting employees who are discharged in retaliation for reporting employer misconduct, i.e., employee 'whistleblowing activity,'" upon a fair reading of Karstetter's complaint, this is not what Karstetter alleges that he did. *Compare, Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989), *with* Complaint, CP 6, ¶ 22. Instead, Karstetter alleges that, by the permission of one non-executive officer of his client, he provided documents related to the Guild to a King County official in the context of a parking reimbursement investigation against two Guild members. *Id.* This is not "reporting *employer misconduct*" – the quintessential feature of whistleblowing – that has, in certain contexts, been deemed protected by public policy. *Dicomes*, 113 Wn.2d 618-619 (emphasis added).[6]

Finally, Karstetter's complaint wholly fails to identify how the Guild's termination of its attorney-client relationship with him could

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[5] Based on this premise, Karstetter also pled a cause of action for "retaliat[ion]... for participating in a whistleblowing investigation" in his complaint, which was dismissed by the trial court for its failure to state a claim for which relief could be granted. *See* Complaint, CP 8; Order Granting In Part Defendant King County Corrections Guild's Motion to Dismiss Jared Karstetter's Suit Against It, CP 40.

[6] Further emphasizing the importance of reporting employer misconduct to a wrongful discharge in violation of public policy claim relating to alleged whistleblowing, the *Dicomes* Court went on state: "In determining whether retaliatory discharge for whistleblowing activity states a tort claim... courts generally examine the degree of alleged *employer wrongdoing*, together with the reasonableness in which the employee reported, or attempted to remedy, the alleged misconduct." *Id.*

jeopardize the King County Ombudsman's ability to investigate parking reimbursement complaints, moving forward. *See Gardner*, 128 Wn.2d at 941 (second *prima facie* element to prove this tort). This presents an additional basis for finding dismissal of this claim warranted. *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. at 24-25.

D. Dismissal Of Karstetter's Wrongful Discharge Claim Is Additionally Appropriate On The Grounds That No Authority Suggests This Tort Is Available To Washington Attorneys Discharged By Their Clients.

Alternatively, Karstetter's wrongful discharge claim should have been dismissed by the trial court on the basis that Washington law does not recognize the application of the tort of wrongful discharge in violation of public policy to attorneys discharged by their clients, whereas clear public policy reinforces clients' rights to terminate their attorney-client relationships "for any reason."[7] *Fetty*, 110 Wn. App. at 600 fn. 4; *Kimball*, 64 Wn.2d at 257 (client may terminate "for good or fancied cause, or out of whim or caprice"). Allowing Karstetter to pursue a claim for wrongful discharge undermines this vital client right.

[7] Faced with this argument before the trial court, Karstetter merely referred the court to *Weiss v. Law Offices of Judith A. Lonnquist*, 173 Wn. App. 344, 224 P.3d 1264 (2013), a case which upheld an attorney's right to pursue a wrongful discharge claim against her law firm employer, not the attorney's legal client. CP 110-115 (Plaintiffs' Response to Motion to Dismiss Claims Against Defendant King County Corrections Guild).

E. Substantial Public Policy Concerns Support The Conclusion That The Trial Court Erred In Failing To Dismiss Karstetter's Termination-Related Claims Against the Guild.

Important public policy considerations underlie the well-established rule permitting legal clients to freely terminate their relationships with their counsel. Washington courts have frequently cited the "personal and confidential nature of the attorney-client relationship" as the primary reason clients must have control over whose legal services upon which they rely. *See*, *Kilburn*, 5 Wn. App. at 138; *Johanson*, 132 Wn. at 692 (this "firmly established rule... springs from the personal and confidential nature of the relation which such a contract of employment calls into existence").[8]

Decisions in other jurisdictions support this policy rationale. *See e.g., Herbster v. North Am. Co. for Life & Health Ins.*, 150 Ill.App.3d 545, Ill.Dec. 417, 508. N.E.2d 728 (1987), *cert. denied*, 484 U.S. 850, 108 S.Ct. 150, 98 L.Ed.2d 105 (1987) (attorney-plaintiff did not have retaliatory discharge claim against client-employer due to presence of attorney-client relationship; court noted that it "cannot separate plaintiff's role as an employee from his profession" and undermining the client's right to terminate could promote "evil... gendered by any friction or distrust"

[8] *See also, Matter of McGlothlen,* 99 Wn.2d 515, 529, 663 P.2d 1330 (1983) (in other context, calling the attorney-client relationship "one of the strongest fiduciary relationships known to the law" and "one of special trust and confidence") (internal citation omitted).

between attorney and client); *Balla v. Gambro*, 584 N.E.2d 104, 108, 164 Ill.Dec. 892, 896, 145 L.2d 492, 501-501 (1991) (finding no retaliatory discharge tort available to attorney, in part, because "extending the tort... to in-house counsel would have an undesirable effect on the attorney-client relationship that exists").

This is sound analysis; in order to receive the fullest benefit of counsel's advice, a client must have confidence in his ability to both be candid with, and to rely on, counsel. If he feels that he cannot do those things, he must be free to obtain other counsel without the delay contract requirements like "an opportunity to correct any behavior" and "an opportunity to answer... all charges" would impose. Complaint, CP 5, ¶ 19. The same is true if a client in any way does not feel that his interests are being properly represented by his attorney.

Indeed, the facts of this particular case, as set forth in the allegations and pleadings below, illustrate the wisdom and importance of this legal standard. Here, the Guild terminated its counsel because of what it credibly believed to be that attorney's unauthorized and intentional disclosure of client confidences to a third-party. CP 98-105 (April 21, 2016 letter, appended as exhibit to Declaration of David Brown). If the Guild does not have an unrestricted right to discharge its counsel under this type of circumstance, courts will be forced to second-guess the

Guild's conclusions regarding whether its attorney's conduct was unprofessional or otherwise fell below the level of zealous representation to which the client is entitled. Thus, to cite just one example of how this might play out, should Karstetter be permitted to pursue his termination in breach of contract claim, the Guild's decision to terminate his law firm may be subjected to judicial second-guessing under the "seven tests of just cause."[9]

Undermining this client right could also subject legal clients to intrusive discovery regarding the rationales for their decision, performance expectations they set for counsel, and communications regarding counsel, as the Guild has seen here. *See generally,* Declaration Of Counsel (filed Sept. 1, 2016), Ex. 2-4.[10] Legal clients' decisions to sever their relations with counsel were not intended to be subject to external scrutiny, as a client's legal goals, interests, preferences, and perceptions of his counsel's

[9] *See generally*, Adolph M. Koven, Susan L. Smith, *Just Cause: The Seven Tests* (BNA 2nd ed. 1992); *Enterprise Wire Co.*, 46 LA 359 (Daugherty, 1966) (seminal "just cause" labor arbitration). Under the seven tests, the Guild's decision could be dissected to ensure that the Guild (1) set reasonable expectations for the Karstetter Law Firm's performance, (2) provided the firm notice of the possible consequences of its misconduct, (3) performed an adequate investigation into its grievances against the firm before severing the relationship, (4) conducted a fair investigation, (5) had sufficient evidence that the firm engaged in the wrongdoing of which it was accused at the time of severance, (6) treated the Karstetter Law Firm equally to others in comparable circumstances, and (7) whether severance of the relationship was a just penalty, in light of the misconduct and any positive mitigating factors regarding the firm's prior performance. *Id.*

[10] *See* Ex. 2, RFP No. 1 (seeking documents "that relate[] to work performance of Plaintiff Jared Karstetter"); Ex. 2, RFP No. 4 (seeking correspondence and documents that reference "in any manner" Karstetter's performance over ten year span); Ex. 4, RFP No. 58 (seeking any correspondence or documents over ten year span that reference certain performance expectation of Guild to Karstetter Law Firm).

performance are inherently personal and subjective.[11] *Kilburn*, 5 Wn. App. at 138 ("personal... nature" of relationship).

The Guild's counterclaim further illustrates how problematic it is to countenance an attorney claiming that he was fired unlawfully, because this creates the possibility of genuine confusion and ambiguity as to whether or not a particular attorney actually represents a client, which the Guild contends has already occurred in the instant matter. CP 116-127 (Guild's First Amended Answer and Counterclaim). This is self-evidently at odds with the best interest of legal clients, as well as the public.

V. CONCLUSION

The trial court's denial of dismissal here was reversible error. For the foregoing reasons, the Guild respectfully requests that the Court issue an order reversing the trial court's order denying dismissal of Karstetter's breach of contract and wrongful discharge claims against his former client.

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[11] It would be equally problematic for the trial court to attempt determine whether and how evidence of Karstetter's alleged campaign finance misconduct with Guild funds, misconduct discovered only subsequent to the termination by the Guild of its relationship with the Karstetter Law Firm, may apply to Karstetter's claims for relief based on wrongful discharge and termination in breach of a written agreement. *See*, *State of Washington v. Jared Karstetter*, Thurston County Superior Court, Cause No. 16-2-04713-34 (filed November 21, 2016).

RESPECTFULLY SUBMITTED this 27th day of February, 2017.

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DECLARATION OF SERVICE

I, Jennifer Woodward, hereby declare under penalty of perjury under the laws of the State of Washington that on February 27, 2017, I caused the foregoing Appellant's Updated Opening Brief to be electronically filed with the Court of Appeals, Division I, and a true and correct copy of the same to be sent via email, per agreement of counsel, to the following:

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I. INTRODUCTION

This case presents a question of whether an employer-client can avoid the contractual commitments and statutory protections owed to its employee-attorney. While a generic attorney-client relationship is terminable upon a client's expression to sever the relationship, this general rule fails to resolve the layered legal inquiry that is necessary within this employment case. Because Appellant King County Corrections Guild (hereinafter "Guild") focuses solely on the attorney-client relationship that existed between itself and Mr. Karstetter, it also strategically ignores the controlling nuance that is implicated by the dual relationship of employer-employee. Considering the rich legal history in Washington that protects persons in the workplace, this Court should affirm the trial court and permit Mr. Karstetter's nascent employment-based claims to proceed.

After decades into Mr. Karstetter's career of serving and representing the interests of corrections offers, the Guild unexpectedly terminated his employment. The employer initiated this adverse action after more than four years into a then-existing five-year employment contract. The Guild had employed Mr. Karstetter for many years pursuant to a series of employment agreements that honored the parties' long-term employment relationship, the benefit to the Guild of employing Mr. Karstetter at below-market rates and provided Mr. Karstetter with reassurance of job security on terms similar to those enjoyed by the Guild's membership. Mr. Karstetter and his wife, Julie, then brought employment and contract claims following his sudden termination.

The Guild now seeks review of Judge Oishi's refusal to grant dismissal of the breach of contract and wrongful discharge claims based on the pleadings alone. Even though it had thoughtfully negotiated and voluntarily consented to a series of employment contracts with Mr. Karstetter, the employer now attempts to assert that public policy considerations amount to an absolute defense and prohibition of these claims. On this assertion, the Guild is wrong because no source of Washington law permits an employer to retaliate and breach a contract without recourse.

II. STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court should be given the opportunity to first examine the factual circumstances and evidence of repeated negotiations and voluntary consent to a series of employment contracts between Mr. Karstetter and the Guild.

2. Whether Mr. Karstetter's employment contract with the Guild is, as a matter of law, inherently unfair to the Guild, voidable for lack of informed consent by the Guild, or is otherwise subject to unilateral avoidance by the Guild upon termination of its attorney. RPC 1.8, 1.16.

3. Whether persons licensed to practice law in Washington are, as a class, wholly exempted from the protections and remedies typically afforded to other employees under Washington law.

4. Whether persons licensed to practice law in Washington may enjoy the benefits of an employment contract with an employer-client.

III. KARSTETTER'S RESTATEMENT OF THE CASE

To understand Mr. Karstetter's claims,[1] one needs to start from the beginning. His dedication and service on behalf of the King County Corrections Officers began 1975 when he first served as a corrections officer.[2] At the time of working in this corrections position, Mr. Karstetter was a member of SEIU Local 519, Public Safety Employees, which is essentially a predecessor entity of the Guild. He then worked for Local 519 in the position of Business Representative between 1984 and 1987.[3]

After graduating from law school and passing the Bar in Washington, Mr. Karstetter remained employed with Local 519 in the position of Legal Advisor, which included the job functions of both the Business Representative and the union's in-house legal representative for non-litigation matters. Throughout his employment with Local 519, Mr. Karstetter received a Continuing Employment Contract, which contains terms like those found in the subsequent employment contracts signed by

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[1] Mrs. Karstetter's claims are dependent on the success of her husband's claims and, therefore, not before the Court in this appeal.

[2] Appx. at 2 (the Declaration of Jared Karstetter in Support of Answer to Motion for Discretionary Review is previously on file herein, but is filed with this brief in the form of an Appendix for ease of reference).

[3] *Id.*

the Guild.[4] Specifically, Mr. Karstetter received the benefit of a just cause standard and an expectation of continuing employment.[5]

Local 519 later discovered it had incurred a financial liability with SEIU and Mr. Karstetter due to a failure to contribute toward his retirement. The employer and employee then worked cooperatively to preserve their relationship and resolve the liability identified by SEIU.[6] The resolution of this internal administration issue first necessitated that Local 519 provide Mr. Karstetter with counsel and, second, that he create of The Law Firm of Jared C. Karstetter, Jr., P.S., in order to encourage an appearance of Mr. Karstetter working as a non-employee contracted counsel.[7] Despite the creation of this business entity, Local 519 and its attorney-employee did not intend to alter the fundamental and long-term nature of their employment relationship.[8] Mr. Karstetter, in fact, did not experience any appreciable change in his employment and Local 519 continued to provide him with reassurances of job security.[9]

A decertification movement occurred within Local 519 and, following a brief break in employment, Mr. Karstetter began working for the newly-birthed Guild that the corrections officers founded after separating their bargaining interests from those of the police officers.[10]

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[4] *Id.* at 2-3; Appx. at 9, 15-17 (the Declaration of Henry H. Cannon is included in the Appendix for ease of reference).
[5] Appx. at 26 (the Declaration of Rick Hubl is included in the Appendix for ease of reference). (CP 137-46).
[6] Appx. at 3-4, 9-10.
[7] Appx. at 10-11.
[8] Appx. at 3-4, 26, 30-31.
[9] Appx. at 3, 9-10.
[10] Appx. at 3-4, 26.

Similar to his position with Local 519, Mr. Karstetter worked in the position of Legal Advisor, which consists of a hodgepodge of labor relations work, both legal and administrative.[11] During his tenure, Mr. Karstetter frequently served as the 'public face' of the Guild on routine and formal matters alike. In this capacity, the former Director of the Department of Adult and Juvenile Detention recognized Mr. Karstetter's status as employment-like and acting in an official capacity on behalf of the Guild.[12] When necessary, the Legal Advisor and the Guild would agree to retain the services of outside counsel for litigation or external disciplinary proceedings.[13]

The similarity of Mr. Karstetter's employment positions is important, as he enjoyed the benefit of employment contracts with the Guild over a period of 20 years. The employment agreements between the Guild and Mr. Karstetter memorialized his historical service to the corrections community, the parties' interest to continue their employment relationship, the benefit of the Guild to have unfettered access to Mr. Karstetter, the benefit of Mr. Karstetter's services at below-market rate, his reporting relationship to the President and the Executive Board, a five-year term of employment and just cause protections.[14] His long-standing employment protections were clearly important to Mr. Karstetter, especially when considering the substantial nature of his Guild

[11] Appx. at 4.
[12] Appx. at 32-33 (the Declaration of Claudia Balducci is included in the Appendix for ease of reference). (CP 131-12).
[13] Appx. at 4.
[14] CP 11-16; Appx. at 4-5.

employment and the fact that any outside non-conflicting work could not begin to replace his employment with the Guild.[15]

The factors supporting the existence of the Guild's employment relationship with Mr. Karstetter are boundless. The Guild identified publicly Mr. Karstetter as its Legal Advisor on the staff section of its website and it did not attempt to differentiate him in any manner from the officers or other Guild members.[16] The Guild also provided its attorney-employee with business cards, a Guild email address, an iPad and name badges, in addition to issuing Mr. Karstetter secured identification that provided him access to facilities and parking structures that the general public cannot access.[17] On a somewhat informal basis, the Guild also provided compensation by handwritten check, with Mr. Karstetter identified individually as the payee.[18] Some of the his compensation took the form of "retro pay," which was triggered when the Guild members were also to receive retroactive pay or other compensation adjustments pursuant to the labor agreement.[19] Such factors support the employer-employee status of the parties and dispel the myth that Mr. Karstetter performed duties through a separate entity as a wholly removed, outside counsel to the Guild.

More directly, the attorney representing the Guild in these proceedings admitted the factual reality of Mr. Karstetter's employment

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[15] Appx. at 4-6; 9-10.
[16] Appx. at 5.
[17] Appx. at 4-5, 34-35.
[18] Appx. at 36-37.
[19] *Id.*

status during a separate hearing on November 2, 2016. When appearing before the Public Disclosure Commission, Mr. Iglitzin identified Mr. Karstetter as **"the sole employee of the Guild."**[20] Except for purposes of verifying the employer-employee relationship in this case, references to other external matters involving these parties is specious, as those matters do not control the legal analysis herein.[21] The still unproven allegations of lawyer misconduct require a different legal inquiry in a separate tribunal.[22] Even if relevant to an analysis of Mr. Karstetter's pre-termination performance as an employee, Mr. Iglitzin's reprisals occurred months after the initiation of Mr. Karstetter's lawsuit and, in the end, only subjected the Guild to additional liability.[23]

On April 27, 2016, the Guild summarily terminated Mr. Karstetter's employment without warning, opportunity to confer with the Executive Board or any observation of just cause standards. It did so after more than four years into a five-year employment contract term.[24] Strangely, the Guild did not contest its voluntary assent to the employment

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[20] Appx. at 60, p. 23 ln. 16 (a certified and excerpted transcript of the Special Commission Meeting of the Public Disclosure Commission is included in the Appendix at 38-70).

[21] Appellant's Amended Opening Brief at p. 8, fn.3 (referencing the WSBA grievance and the 45-Day Citizen Action Letter to the Public Disclosure Commission, each filed by Mr. Iglitzin on behalf of the Guild).

[22] It is significant that, when complaining to the WSBA, the Guild did not attempt to assert that Mr. Karstetter had coerced the Guild into signing a series of employment contracts, nor does it assert that he engaged in ethical misconduct by negotiating an employment contract.

[23] Appx. at 85 (a true and correct copy of the PDC Compliance Officer's report is included in the Appendix at 71-85; includes staff recommendations for reference of two violations committed by the Guild to the Attorney General for possible prosecution).

[24] CP 1-16.

contract in any of the prior four years, nor had it questioned the employment of Mr. Karstetter during any of the 15 years before the most recent contract. To justify this revelatory approach of contractual avoidance, the Guild relies on alleged ethical violations by Mr. Karstetter and the advice given to it by the Public Safety Labor Group (hereinafter "Legal Defendants").[25] The soundness of the legal advice is dubious when considering the advising counsel's inability to practice law in Washington and the lack of any appreciable investigation or interview involving Mr. Karstetter.[26] By offering their opinions and encouraging the ouster of Mr. Karstetter, the Legal Defendants also earned the Guild's business as its new counsel.[27] The Karstetters then filed suit against the Guild, individual Guild officers/members and the Legal Defendants.[28]

The parties have engaged in a substantial amount of early motions practice, but little or no discovery to date. The motions practice request Mr. Karstetter to submit a number of declarations and responses.[29] Counsel for Mr. Karstetter also issued written discovery requests for information that is typically sought in employment cases.[30] The Guild filed a motion to dismiss, pursuant to CR 12(b)(6), based on an assertion that the parties' attorney-client relationship renders Mr. Karstetter's claims

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[25] Appellant's Amended Opening Brief at 3-4; CP 98-105.
[26] Appx. at 88 (the Declaration of Judith A. Lonnquist is included in the Appendix at 86-88 for ease of reference). (CP 128-30).
[27] The claims against the Legal Defendants, including tortious interference, are not before this Court on appeal.
[28] CP 1-16.
[29] CP 128-52.
[30] Appellant's Amended Opening Brief at 6-7.

barred by law.[31] After significant briefing and oral argument, the trial court granted dismissal of some claims, but permitted Mr. Karstetter to proceed on claims of breach of contract and wrongful termination.[32] The Guild then sought interlocutory review of this matter.

IV. ARGUMENT

1. Standard of review.

An inquiry as to whether certain alleged facts establish an RPC violation is a question of law that is subject to *de novo* review. *LK Operating, LLC v. Collection Grp.*, LLC, 181 Wn.2d 49, 72-73, 331 P.3d 1147 (2013). Such analyses are typically fact intensive, thus requiring all reasonable inferences and disputed facts to be interpreted in Mr. Karstetter's favor. *LK Operating*, 181 Wn.2d at 72.

The appellate review of a 12(b)(6) motion will consider whether *any plausible set of facts* that would support the valid claims can be conceived. *Halvorson v. Dahl*, 89 Wn.2d 673, 674-75, 574 P.2d 1190 (1978). Dismissal of an action for failure to state a claim pursuant to CR 12(b)(6) is appropriate only if "it appears beyond doubt that the plaintiff can prove *no set of facts*, consistent with the complaint, which would entitle the plaintiff to relief." *Haberman v. Wash. Pub. Power*, 109 Wn.2d 107, 120, 744 P.2d 1032 (1987) (*quoting Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985) (*emphasis supplied*); *Orwick v.*

[31] CP 17-30.
[32] CP 39-40.

Seattle, 103 Wn.2d 249, 254, 692 P.2d 793 (1984)). This Court is entitled to consider hypothetical situations that are not part of the formal record and may even be raised for the first time on appeal. *Halvorson*, 89 Wn.2d at 675. Any conceivable hypothetical will defeat motion to dismiss on the pleadings if the scenario is sufficient to support the claims at issue. *Id.* at 674.

Mr. Karstetter pled properly claims that are legally sufficient and suitable for trial on the merits. There is no error in the trial court's denial of the Guild's 12(b)(6) motion and this matter should be remanded for further proceedings.

2. Washington law simply does not constrain any person, even an attorney-employee, from working pursuant to an enforceable employment agreement and, therefore, the trial court did not err.

The Guild relies predominately upon RPC 1.16[33] for its assertion that *any* employment agreement with an attorney-employee is subject to unilateral avoidance based on an at-will privilege held exclusively by a client-employer.[34] The Guild's position is inherently flawed for several reasons. First, RPC 1.16 is an ethics rule of general applicability that is designed to protect clients, possibly vulnerable or less sophisticated, from being bound in contract during a legal controversy that is often sensitive, highly personal and filled with emotion for the layperson client. Second, the Guild ignores purposely the legal and factual differences between an

[33] "A client has the right to discharge a lawyer at any time, with or without cause . . ." RPC 1.16(a)(3), comment 4.
[34] Appellant's Amended Opening Brief at 10-13.

enforceable employment contract and a fee agreement involving an attorney-client relationship.[35] And third, there is an utter absence of Washington authority to support the Guild's interpretation of RPC 1.16 as applied to an employer-employee relationship.

Instead of relying on case law that interprets the application of RPC 1.16 to permit a unilateral termination of an employment contract without risk of liability, the Guild references other cases that cite ethics rules and attempts to apply those decisions by analogy.[36] These cases are not authoritative in the employment law context, nor are they sufficiently analogous. In *LK Operating*, the Washington Supreme Court analyzed former RPC 1.8(a) and whether the terms of a joint venture proposal between an attorney and client were unfair to the client's interests, or if there lacked an appreciable disclosure of terms to the client. *LK Operating, LLC v. Collection Grp.*, LLC, 181 Wn.2d 49, 89, 331 P.3d 1147 (2013). When considering whether a contract is unenforceable because it violates public policy, this Court must decide whether the contract itself is injurious to the public. *LK Operating*, 181 Wn.2d at 87. Clearly, a contract of employment – *even one that involves an attorney-employee* – is neither prohibited, nor does it violate the public good. Even when a RPC violation is asserted as a defense to a contract claim, there is no rule that declares such contracts as automatically unenforceable. *Id.* at 87-88. Referring to its reluctance to establish a strict rule, the Washington

[35] *Id.*
[36] *Id.*

Supreme Court stated that the following:

> "Such a holding would shift the guiding inquiry from whether the *contract* is injurious to the public to whether the *RPC violation* is injurious to the public — the former is relevant when determining whether a contract is unenforceable because it violates public policy, while the latter is relevant in attorney disciplinary proceedings. It would also ignore the clear admonishment that "the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.""

Id. (*citing* Model Rules, Scope at ¶ 20) (*italics and internal quotes in the original*).

The admonishment above is particularly relevant herein, as the trial court may later wish to evaluate whether the employer simply invoked RPC 1.16 to manipulate a defense and establish a plausible excuse for terminating the employee after four years into a five-year term.[37] Even assuming *arguendo* that Mr. Karstetter's employment agreement violated RPC 1.16, the trial court would need to conduct a separate factual inquiry outside the context of the Guild's 12(b)(6) motion.[38] Like the inquiry in *LK Operating*, there will be relevant facts, documents and witness perspectives that are more appropriate for consideration by the trial court in the context of a CR 56 summary judgment motion. *LK Operating*, 181 Wn.2d at 73 (*e.g., What was the contractual intent of the Guild officers when contracting with its attorney-employee and repeatedly extending his contracts?*). An attorney's compliance or non-compliance with ethical

[37] CP 1-16.
[38] CP 17-30.

rules is likely a factual inquiry that cannot be resolved easily on summary judgment, let alone a 12(b)(6) motion to dismiss. *See e.g., Simburg, Ketter, Sheppard & Purdy, LLP v. Olshan*, 109 Wn.App. 436, 445-46, 988 P.2d 467 (Div. I, 1999).

For the same reasons, the other decisions relied upon by the Guild are equally inapplicable to the facts of Mr. Karstetter's employment. *See generally Belli v. Shaw*, 98 Wn.2d 569, 657 P.2d 315 (1982); *see also Valley/50th Ave. LLC v. Stewart*, 159 Wn.2d 736, 153 P.3d 186 (2007). In *Belli*, the Washington Supreme Court considered whether the execution of a second fee agreement amounted to a termination an attorney identified in the first fee agreement. The case also involved an ethical analysis of a fee splitting agreement, but this decision does not discuss the enforcement of an employment contract, as is relevant to the analysis herein. *Belli*, 98 Wn.2d at 577-78. In *Valley/50th Ave.*, the Washington Supreme Court considered the ethical implications of enforcing a deed of trust between and attorney and client. It determined that a violation of RPC 1.8 might render the deed of trust void or voidable, but there remained material issues of genuine fact as to whether the law firm fully abided by its ethical duties. *Valley/50th Ave.*, 159 Wn.2d at 743-47. Again, this decision offers nothing when considering the dual status of a client-employer union organization and its attorney-employee who seeks to enforce an enforceable employment contract.

It is undisputed that a client may terminate a traditional attorney-client relationship for a variety of reasons, or no reason at all. *Fetty v.*

Wenger, 110 Wn.App. 598, 600, fn. 4, 36 P.3d 1123 (2001); *Kimball v. Public Util. Dist. 1*, 64 Wn.2d 252, 257, 391 P.2d 205 (1964). Mr. Karstetter's employment contract requires a different analysis, however. His situation is layered with an employer-employee relationship and is fundamentally different from a claim to enforce a fee agreement for representing an heir in an estate action, or to seek the reasonable value of services as outside counsel on a dam project. *Fetty*, 110 Wn.2d at 599-600; *Kimball*, 64 Wn.2d at 253-56. The fact that a client retains the right to sever an attorney-client relationship simply does not equate to a conclusion that an employer possesses an unfettered legal privilege under Washington law to void an employment contract. If such were the case, the retention of employees and the validity of their employment contracts would be in jeopardy.

Finally, the Guild argues that just cause protections are inconsistent with the norms of an attorney-client relationship.[39] Indeed, it is inconsistent for a fee agreement, but is not uncommon in employment contracts. Mr. Karstetter's interest to enforce his just cause standard for termination is based on his relationship to the Guild as its attorney-employee. Although just cause language is inconsistent with a typical attorney-client relationship, the California Supreme Court found no reason to prohibit an attorney-employee from pursuing contract-based claims, especially when any other type of employee is able to enforce the same

[39] Appellant's Amended Opening Brief at 19-20.

contractual provision. *General Dynamics Corp., v. Superior Court,* 7 Cal.4th 1164, 876 P.2d 487, 490 (1994). The *General Dynamics* decision further emphasized that "contract and tort claims in wrongful termination cases are analytically distinct from the circumstances" involved with contingent fee agreements. *General Dynamics,* 876 P.2d at 493-94. To hold otherwise will ***"compel us to embrace an intuitively unjust, even outrageous, result"*** based upon other precedents that are expressly limited to clients with contingent fee agreements. *Id.* (*emphasis supplied*).

3. Washington law permits attorney-employees to negotiate compensation and to enter into employment agreements with their client-employers and, therefore, the trial court did not err.

It is undebatable that the act of negotiating an unfair contract or taking an unreasonable fee can result in a client's avoidance of a contract and disgorgement of fees. This Court found that counsel's disqualification prior to trial, combined with his breach of fiduciary duties and the taking an unreasonable fee by accepting a transfer of the client's property, violated ethics rules and rendered the fee arrangement unenforceable. *Cotton v. Kronenberg*, 111 Wn.App. 258, 270-71, 44 P.3d 878 (Div. I, 2002). Such circumstances are totally incongruent with Mr. Karstetter's employment contract and experience with the Guild; it is implausible to argue that his employment agreements, negotiated with an elected Executive Board, were unethical or unfair to his client-employer. Where the facts demonstrate fairness, proper disclosure of terms and voluntary assent to a contract, the possibility of undue influence and coercion by counsel are negated. *Kennedy v. Clausing*, 74 Wn.2d 483, 492, 445 P.2d

637 (1968).

Considering the unique circumstances of employment as an in-house counsel (*i.e.* simultaneous status as legal counselor and employee), the very limited number of Washington cases on this subject is not unsurprising. The Washington Supreme Court only recently decided, in a case of first impression, that discussions between corporate counsel and former employee witnesses are not entitled to the protection of privilege. It is the employment relationship that is *essential to the legal analysis* and former employees are fundamentally different from those persons that are currently employed. *See Newman v. Highland School Dist. No. 203*, 186 Wn.2d 769, 776-80, 381 P.3d 1188 (2016). Here too, Mr. Karstetter's employment relationship with the Guild is fundamental to the analysis of this case.

In the *Chism* decision, this Court considered the interplay between the Rules of Professional Conduct and the breach of contract claims brought by an attorney-employee of a construction company. *See generally Chism v. Tri-State Constr., Inc.*, 193 Wn. App. 818, 374 P.3d 193 (Div. I, 2016). When considering the application of RPC 1.5 and 1.7, there existed a lack of clear guidance on the issue of attorney-employee wage contracts, and inferring a conclusion from this lack of clear guidance can lead to absurd results. For example, a finding that an ethical conflict exists inherently between an attorney-employee and client-employer when negotiating compensation, "would cast doubt on the wage negotiations of scores of Washington attorneys – not only in-house corporate counsel like

Chism, but also government attorneys and numerous nonprofits attorneys." *See Chism*, 193 Wn. App. at 848. Advocating for a result that will garner short-term results, the Guild readily disregards this warning.

When evaluating RPC 1.8, this Court reached a conclusion to avoid disastrous long-term consequences. Because there is a fundamental difference between an employment contract and a fee agreement, there is a risk of applying RPC 1.8 to the disruption of a variety of employment arrangements. A broad interpretation would render each compensation agreement of an attorney-employee as *prima facie* fraudulent, thus "disturbing the settled expectations of many lawyer-employees." *See Chism*, 193 Wn. App. at 852. Notably, Mr. Chism also relied on a WSBA advisory opinion stating that RPC 1.8 does not apply to the negotiation of an employment contract as in-house legal counsel.[40] *Id.* at 853. Likewise, Mr. Karstetter's employment agreement with the Guild does not violate RPC 1.8, and should not be applicable to RPC 1.16 because an employment agreement is fundamentally different from a fee agreement and does not violate public policy.

The Guild's preferred interpretation of RPC 1.16 would yield untenable and absurd results like those contemplated and rejected in *Chism*. *Id.* at 852. For example, a client-employer may simply preempt

[40] Appx. 89 (a true and correct copy of the WSBA Rules of Pro'l Conduct Comm., Advisory Op. 1045 (1986) is included in the Appendix for ease of reference.) Respondent's counsel could not locate any relevant advisory opinions on RPC 1.16. Advisory Op. 2219 (2012) addresses the responsibilities of in-house counsel regarding supervision of others, but does not provide any meaningful guidance on the issues contested herein.

any potential liability on statutory or contractual claims by specifying a decision to terminate the attorney-client portion of their relationship and, therefore, enable the employer to disregard its legal responsibilities. Notably, the Guild cannot point to any Washington authority to suggest that an employer may sever unilaterally a contracted employment relationship, even if it does possess the right to terminate the co-existing attorney-client relationship. Assuming that RPC 1.16 applies to an employment relationship with an attorney-employee, which it should not, the Court should recognize that the Guild still had options to avoid a breach of the employment agreement; it could have placed Mr. Karstetter on administrative leave through the end of his contract, provided him the opportunity to meet and respond to the concerns of the Executive Board, or limited his work responsibilities to non-legal, non-representational tasks.

The *Corey* decision is equally instructive here. *See Corey v. Pierce Co.*, 154 Wn.App. 752, 225 P.3d 367 (Div. 1, 2009). Ms. Corey faced the decision to accept a promotion, but lose her job security as a consequence of this advancement. Before she accepted the position as the third-highest ranking deputy prosecutor for her employer-client, Pierce County, Ms. Corey secured an agreement for just cause protections applicable to her position. *Corey*, 154 Wn.App. at 757. At issue in this case is a similar just cause contractual provision, upon which Mr.

Karstetter has relied.[41] Although the *Corey* court found a lack of consideration for an express or implied contract to provide due process, it allowed her to pursue a promissory estoppel claim using the same evidence. *Corey*, 154 Wn.App. at 768. Similar to the facts in *Corey*, Mr. Karstetter received a clear and definite promise of employment security and just cause protections.[42] *Id.* at 768-70.

The *Chism* and *Corey* decisions are both Division I cases that permit attorney-employee actions against their client-employers. As such, the trial court did not err and Mr. Karstetter should be permitted to prosecute his claims.

4. Washington courts have permitted on repeated occasions attorney-employees to bring wrongful discharge actions and, therefore, the trial court did not err.

The law of wrongful discharge in Washington provides a comprehensive remedy and there exist no exceptions to attorney-employees bringing such actions. Despite the Guild's bold assertions that attorney-employees are somehow "exempt" from bringing wrongful termination actions, no Washington court has issued such a decision. The tort of wrongful discharge is available to both at-will employees and those under contract, because it "embodies a strong state interest in protecting against violations of public policy." *Wilson v. City of Monroe*, 88 Wn.App. 113, 115-16, 943 P.2d 1134 (Div. I, 1997); *accord: Smith v. Bates Tech. College*, 139 Wn.2d 793, 807, 991 P.2d 1135 (2000). In Mr.

[41] CP 1-16.
[42] *Id.*

Karstetter's case, there exist public policy implications because he asked his employer with assistance to fend off complaints from several Guild members, responded professionally and under compulsion to an Ombudsperson during an investigation of a public agency, and he participated in a King County whistleblower case. While there are various sources of public policy, whistleblower protection and non-retaliation are chief among them. *See e.g.,* RCW 42.41.010; 49.60.210. Mr. Karstetter need only assert that his actions were reasonable and taken in furtherance of the public policy. *Rickman v. Premera Blue Cross*, 184 Wn.2d 300, 313, 358 p.3d 1153 (2015).

Washington courts have permitted attorney-employees to bring wrongful discharge claims in a number of cases. *See Weiss v. Lonnquist*, 173 Wn.App. 344, 359-60, 293 P.3d 1264 (2013) (wrongful termination trial verdict overturned on appeal), *review denied*, 178 Wn.2d 1025, 312 P.3d 652 (2013), *abrogated by Becker v. Cmty. Health Sys., Inc.*, 182 Wn.App. 935, 332 P.3d 1085 (2014); *see also Wise v. City of Chelan*, 133 Wn.App. 167, 135 P.3d 951 (Div. III, 2006) (municipal judge bringing breach of contract action following position elimination). In *Muhl*, the reviewing court found more than enough disputed facts to warrant reversal of summary judgment on the attorney's wrongful termination and retaliation claims. *Muhl v. Davies Pearson, P.C.*, 2015 Wash. App. LEXIS 2522, 14-28 (Div. II, 2015).[43]

[43] The *Muhl* case is cited pursuant to GR 14.1(a) as nonbinding authority that this Court may consider for its relevant persuasive value.

Still other cases offer insight when attorney-employees bring claims to enforce contracts or for wrongful termination. The Montana Supreme Court denied the notion that a client may discharge its attorney with absolute impunity and without considering the nature of the attorney-client relationship. *Burkhart v. Semitool, Inc.*, 300 Mont. 480, 5 P.3d 1031, 1039 (2000). It rejected the "universal rule" (giving the client the right to terminate her attorney) in the context of an attorney-employee relationship because special statutory protections are extended to an employee and are not otherwise enjoyed by independent contractors. *Id.* The Tennessee Supreme Court also recognized that in-house attorneys are typically dependent on their employer-client for their livelihood; to deny this reality fails to "present an accurate picture of modern in-house practice." *Crews v. Buckman Labs. Int'l, Inc.*, 78 S.W.3d 853, 860-64 (2002). An employee-lawyer should not be cheated out of his wrongful discharge action simply because it involves his client-employer. *Fox Searchlight Pictures, Inc. v. Paladino,* 89 Cal.App.4th 294, 314-15, 106 Cal.Rptr.2d 906 (2001); *see also* RPC 1.6(b)(5) (resolving issue concerning use of attorney-client privilege in claim by a lawyer against a client). Recognizing that a second relationship of employer-employee co-habits with that of attorney-client in an in-house counsel role, another court found that the Kansan equivalent of RPC 1.16 does not give a client a cloak of immunity and permitted a wrongful discharge claim brought by the attorney-employee. *Heckman v. Zurich Holding Co. of Am.*, 242 F.R.D. 606, 610 (D.Kan. 2007).

5. The Guild relies errantly on non-binding authority to suggest a public policy override that requires dismissal of Mr. Karstetter's claims.

As justification for its position on appeal, the Guild relies on non-authoritative decisions from Illinois that prohibit actions brought by persons identified as attorney-employees. *See* Appellant's Amended Opening Brief at pp. 17-18. In *Herbster*, an Illinois appellate court barred an attorney-employee's retaliation action, even where the employee opposed an order to destroy discoverable documents and a violation of his ethical obligations if he followed the order. *Herbster v. N. Am. Co. for Life & Health Ins.*, 150 Ill.App.3d. 21, 26-29, 501 N.E.2d 343 (1986). In the *Balla* decision, the Illinois Supreme Court held that in-house attorneys are unable to bring claims for wrongful termination or retaliatory discharge, largely due to sanctity of the attorney-client relationship and the need to protect the privileged information that one obtains in the course of performing duties as in-house counsel. *Balla v. Gambro, Inc.*, 145 Ill.2d 492, 502-05, 584 N.E.2d 104 (1991). The court prohibited Mr. Balla's claim despite evidence that his employer's alleged sale of misbranded or adulterated dialyzers posed a risk to public safety. *Balla*, 145 Ill.2d at 501-502.

Several years later, the Illinois Supreme Court reaffirmed its narrow construction of retaliatory discharge claims and the prohibition against attorney-employees obtaining relief under this tort. Even where an attorney is employed by a law firm and raises concerns about the firm's debt collections work, an employee-attorney is denied any remedy for his

subsequent discharge. *Jacobson v. Knepper & Moga, P.C.*, 185 Ill.2d 372, 376-78, 706 N.E.2d 491 (1998). Chief Justice Freeman noted his long-standing concern by stating the following in dissent:

> "[M]y colleagues today now extend the *Balla* holding to law firms and their employee attorneys. Thus, ***one class of employees in this state, attorneys, has been stripped of a remedy*** which Illinois clearly affords to all other employees in such "whistle-blowing" situations. Today's opinion serves as yet another reminder to the attorneys in this state that, in certain circumstances, it is economically more advantageous to keep quiet than to follow the dictates of the Rules of Professional Responsibility."

Jacobsen, 185 Ill.2d at 379 (*dissenting opinion, emphasis supplied*).

This dissent is more closely aligned with liberal construction of Washington employment law, as the *Balla* decision has been widely rejected in other courts and never adopted by any court of Washington.

The 9th Circuit specifically considered and rejected the *Balla* decision. *See Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 994-96 (9th Cir. 2009). When reviewing the claims of the Van Asdales, husband and wife that worked as in-house counsel in the same company, the court found the issue of attorney-client privilege as an insufficient basis to bar their claims, and found that in-house counsel were not exempted from protections against retaliation. *Id.* at 995-96.

For several reasons, the Guild's reliance on Illinois law is both misguided and conflicts directly with the established employment law jurisprudence in Washington. First, the ethics rules in Washington permit an attorney to bring a lawsuit against a former client, even when that

former client is also an employer. RPC 1.6(b)(5) (ethics rule that governs the potential use of attorney-client privileged materials in a claim by a lawyer against a former client). Second, Washington employment law is to be construed liberally for the purpose of vindicating the rights of employees where appropriate. *See e.g.*, RCW 49.60.020. Third, the Guild is unable to point to any authority that carves out a classification of "attorneys" as being exempt from the workplace remedies available under Washington law.

6. The trial court must be afforded the opportunity to evaluate the material facts and consider in equity whether the Guild may avoid Mr. Karstetter's claims.

It is undisputed that, after a series of employment agreements and an inducement of Mr. Karstetter's reliance on the same, the Guild terminated the contract in the fifth year of the most recent contract.[44] If the Guild believes the contract to violate public policy or ethics rules, it waited an awfully long time to assert its position. Considering the significant delay to suggest that multiple voluntary agreements are void as a matter of public policy, the trial court must necessarily confront the doctrines of waiver, laches, unclean hands, promissory estoppel or equitable estoppel. As discussed *supra*, promissory estoppel is a viable equitable remedy for an attorney-employee. *Corey*, 876 P.2d at 493-94.

The doctrine of equitable estoppel will deny a late assertion of a right when, by reason of the delay, the Guild placed Mr. Karstetter in an

[44] CP 11-13; Appx. 5-6.

untenable position and is injured as a result. *Young v. Jones,* 72 Wash. 277, 130 P. 90 (1913). Also, the Guild's untimely assertions might be so harmful that equity will operate as an estoppel against this desperate maneuver to repudiate the employment agreements it had entered into with Mr. Karstetter. *Amende v. Pierce County,* 70 Wn.2d 391, 398, 423 P.3d 634 (1967) (examining the doctrine of laches/equitable estoppel).

This case involves a fact-laden history and requires an in-depth examination by the trier of fact. When considering Mr. Karstetter's claims for wrongful termination and breach of contract, the trial court should also be afforded the opportunity to consider whether any equitable doctrines apply to these facts. Because returning this case to the trial court will promote justice and permit consideration of equity, this Court should affirm and remand.

V. KARSTETTER REQUESTS AN AWARD OF REASONABLE ATTORNEY FEES AND COSTS FOR SUCCESSFULLY OPPOSING THE GUILD'S APPEAL

Instead of litigating the disputed issues of material fact pertaining to Mr. Karstetter's claims in the court below, the Guild delayed, obstructed and maneuvered with its pursuit of this interlocutory foray. It did so with little, if any, meaningful discovery of the underlying factual history of Mr. Karstetter's employment, which influences much of the analysis herein. Even if this appeal satisfies the intellectual itch pertaining to Mr. Karstetter's unique status as an attorney-employee for the Guild, it brings him no closer to the resolution of his claims in the trial court. For this reason, Mr. Karstetter respectfully requests an assessment of his

attorney fees and costs should he oppose successfully this appeal. RAP 18.1.

An award of attorney fees and costs is available to a successful party on appeal when the law governing the claims at issue will typically permit the party to receive such recovery at the trial court level. RAP 18.1(a). Pursuant to statute, an employer is obligated to pay the attorney fees and costs in any action where an employee is able to recover wages or salary owed. RCW 49.48.030. A recent case considered by Division I, the court identified strong remedial underpinnings of this wage recovery statute, a decision of which the Washington Supreme Court later affirmed. *Arnold v. City of Seattle*, 185 Wn.2d 510, 520-21, 374 P.3d 111 (2016). Because Mr. Karstetter is entitled to recover his fees and costs a statutory claim that provides for recovery of salary owed under his employment contract, this Court should likewise permit him to recovery his fees for this appeal. RAP 18.1(a); RCW 49.48.030.

VI. CONCLUSION

Based on the foregoing, the Guild cannot rely on any direct authority to support its assertion that RPC 1.16 should be given a widespread interpretation and application to the employment of an attorney-employee. Contracts that regulate the employment of attorney-employees neither violate RPC 1.8, nor are they harmful to the public. Further, because Division I issued rulings in other cases that permit attorney-employees to prosecute claims for breach of contract and

wrongful termination, Mr. Karstetter should be granted a similar opportunity to conduct discovery and pursue his claims against the Guild.

Mr. Karstetter respectfully requests this Court reject the Guild's appeal, award him fees and costs, and remand this case for further proceedings consistent with the opinion of this Court.

RESPECTFULLY SUBMITTED this 29th day of March, 2017.

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CERTIFICATE OF SERVICE

I, Kathy Olivarez, an employee of the Law Offices of Judith A. Lonnquist, P.S., declare under penalty of perjury that on the date below, I caused to be served upon the below-listed parties, via the method of service listed below, a true and correct copy of the foregoing document.

Party	Method of Service
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Dated: March 29, 2017

Kathy Olivarez

NO. 75671-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

KING COUNTY CORRECTIONS GUILD,
Appellant,

v.

JARED KARSTETTER and JULIE KARSTETTER,
Respondents.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

In the Brief of Respondents, Respondent Jared Karstetter ("Karstetter") erects a straw man, mischaracterizing Appellant King County Corrections Guild ("the Guild") as seeking a ruling that would require broad changes to Washington law by "render[ing] each [existing] compensation agreement of an attorney-employee as *prima facie* fraudulent." Brief of Respondents ("Resp. Brf.") at 17. The truth is the opposite; what would disrupt clear and settled Washington law would be to permit discharged attorneys to bring wrongful discharge claims, and breach of contract claims premised on the client's termination of the attorney-client relationship, notwithstanding the undisputed right of clients to fire their attorneys "at any time, with or without cause." RPC 1.16, Comment 4.

Likewise, despite Karstetter's contentions, the Guild does not seek a ruling that that "persons licensed to practice law in Washington are, as a class, wholly exempted from the protections and remedies typically afforded to other employees under Washington law." Resp. Brf. at 2. The Guild acknowledges that in an appropriate case, the Washington State Supreme Court might conceivably rule that that an attorney might have a viable "wrongful discharge" cause of action against his/her former

employer-client – for example, for violation of a state anti-discrimination statute.

Karstetter, however, claims merely that he was terminated as the Guild's lawyer (and employee) because he agreed to provide information to the King County Ombudsman's Office to assist in its alleged parking reimbursement investigation against two Guild members, individuals it was Karstetter's job to represent, not to injure. He has thus failed either to assert any "clear public policy" which would be jeopardized by the termination, as the tort of wrongful discharge requires, *see Rickman v. Premera*, 184 Wn.2d 300, 310, 358 P.3d 1153 (2015); *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 941, 913 P.2d 377 (1996), or to show that any such public policy, if it existed, is sufficient to overcome the well-established public policy permitting legal clients to terminate their attorney-client relationships at their election.

Accordingly, the Guild submits this timely reply brief in support of its appeal, requesting that the Court issue an order reversing the trial court's July 21, 2016 order and remanding this matter with instructions that the two causes of action at issue here be dismissed with prejudice.

IV. ARGUMENT

A. Dismissal Of Karstetter's Breach Of Contract Claim Is Warranted Because Under Settled Washington Law, The Specific Contract Terms Karstetter Seeks To Enforce Violate Public Policy.

As was noted in Appellant's Updated Opening Brief, under Washington law, contractual promises between attorneys and clients which violate public policy are unenforceable. *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 92, 331 P.3d 1147 (2014). As was demonstrated in that Brief, at pages 11-12, well in excess of ninety years of unwavering Washington precedent, establishes that notwithstanding the existence of a written contract, "a client may discharge his attorney at any time with or without cause." *Belli v. Shaw*, 98 Wn.2d 569, 577, 657 P.2d 315 (1983). *See also Wright v. Johanson,* 132 Wash. 682, 692, 233 P.16 (1925) (noting that even as of the date of that decision, 1925, this was a "firmly established rule"). This result is also clearly compelled by Comment 4 to RPC 1.16, which notes the undisputed right of clients to fire their attorneys "at any time, with or without cause." In light of both the Washington precedent previously cited to this Court, and Comment 4 to RPC 1.16, it is beyond reasonable dispute that to the extent that the provisions of the written agreement entered into between the Guild and the The Law Firm of Jared C. Karstetter, Jr., P.S., purported to limit the right

of the Guild to fire Karstetter, those provisions are unenforceable as violative of public policy.

Unable to either distinguish or evade this authority, Karstetter attempts to persuade this Court that the Guild seeks a ruling that *the whole* of the fee agreement between Karstetter's law firm and the Guild, or even *the act of executing* such an attorney-client fee agreement (or putative employment contract), should be found contrary to public policy. The Guild seeks no such ruling.

Because Karstetter misconstrues the Guild's argument, his analysis of *LK Operating* is flawed. Karstetter argues that because (1) "a contract of employment – even one that involves an attorney employee," – is not *per se* injurious to the public, and (2) Karstetter allegedly did not commit an RPC violation by entering into that contract, the agreement between Karstetter's law firm and the Guild cannot be deemed void as against public policy.

But it is not the general concept of an alleged "contract of employment" between the Guild and Karstetter's law firm that the Court should scrutinize for its injuriousness, but rather the *specific contract terms* Karstetter is seeking to enforce here: terms that substantively restrict a legal client from terminating its attorney except "for just cause" and that purport to procedurally require that the client provide "due notice," "an

opportunity to correct any behavior [the client] deems inappropriate," "an opportunity to answer all charges," and other "fundamental due process" before termination can be effected as "a final option." Complaint, Ex. A at 2-3, CP 12-13.[1] While breaches of other provisions of an attorney-client contract, or even potentially of other portions of the contract that was formerly in place between the Guild and The Law Firm of Jared C. Karstetter, Jr., P.S., could very possibly be actionable under Washington law, the terms of the contract at issue here that purported to prevent the Guild from dispensing with Karstetter's services absent "just cause" and due process violate public policy because they purport to divest the client of the fundamental right to end an attorney-client relationship at his or her election.

Likewise, it is Karstetter's attempt to enforce the specific terms above that distinguishes the instant case from *Chism v. Tri-State Constr., Inc.*, 193 Wn. App. 818, 374 P.3d 193 (2016), which Karstetter relies upon for the broad generalization that "attorney-employee actions against their client employers" are permitted, Resp. Brf. at 16-17, 19. In *Chism*, it was undisputed that the attorney had *resigned* from his employment by his client-employer; thus, this Court was not called upon to enforce terms

[1] *See also* CP 19-20 (the Guild's motion to dismiss, which explained that Karstetter's breach of contract claim must fail because "*the portions of the agreement* that Karstetter alleges entitle him to continued employment… are unenforceable.") (emphasis added).

preventing or constraining the client's right to terminate an attorney-client relationship. *Chism*, 193 Wn. App. at 835 (reciting trial court's factual finding: "Chism said that… he would have to resign. He did so the same day."). Chism was merely seeking enforcement of contractual agreements with his client-employer for *certain sums of money which he had already earned,* funds which the trial court had ordered disgorged from Chism despite jury findings that he had earned them as wages and that the client-employer had willfully withheld them. *Id.* at 836-38.[2]

Further, Karstetter's urging that the Court must not find any "ethical conflict *inherently* exists between an attorney-employee and client-employer when negotiating compensation" and that the Court must consider whether the contract constituted a transaction prohibited by RPC 1.8 in order to find the contract terms above void for public policy (*see,* Resp. Brf. at 16-17) misstates both the Guild's argument and Washington law. The Court need not focus on whether Karstetter's conduct constitutes a direct RPC violation, and the Guild does not seek any such ruling. The Court must merely look at whether the contract terms cited above, which

[2] This presents an additional, significant point of distinction between *Chism* and the instant case. Whereas the *Chism* Court found that those circumstances invoked the "strong legislative preference in favor of employers paying *earned* wages (*Chism,* 193 Wn. App. at 860) (emphasis added) warranting restoration of the sums to Chism, here Karstetter seeks payment of sums he has *undisputedly never earned* (prospective payment for eight months of legal work never performed, on account of his termination). Thus, whether considered as attorney fees or wages, the same "significant threat to the legislative policy in favor of the consistent payment of employee wages," posed by the trial court ruling in *Chism* is not present here. *Id.* at 860.

Karstetter seeks to enforce, conflict with the public policy acknowledged by both RPC 1.16 and Supreme Court and Court of Appeals precedent, in a manner that could injure the public.[3] *See, LK*, 181 Wn.2d at 86-88.

B. The Court Should Dismiss Plaintiff's Claim Without Further Factual Development Because The Contract Terms In Question, On Their Face, Conflict With RPC 1.16 And Clear Washington Public Policy.

It is well established that a court need not look further than the face of a contract to consider its enforcement unless the terms stated therein are ambiguous. *Quadrant Corp v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005). While Karstetter urges the Court to allow the trial court to "conduct a … factual inquiry" into the intent of the parties at the time of the contract (*see* Resp. Brf. at 12, 24-25), Karstetter fails to cite any ambiguity in the terms discussed above which would merit such inquiry. In fact, the Court can determine from the face of Karstetter's Complaint and the contract he seeks to enforce whether the contractual provisions relied upon by Karstetter in his claim for breach of contract violate public policy. As explained above, they clearly do.

Additionally, the Court need not resolve the parties' dispute as to whether Karstetter was an in-house counsel employee of the Guild, or an

[3] The Washington Supreme Court has expressly stated that the rule permitting a client to discharge his counsel exists "for the protection of the client in particular and the public in general." *Kimball v. Pub. Util. Dist. No. 1 of Douglas Cnty.*, 64 Wn.2d 252, 257, 391 P.2d 205 (1964). Thus, the final *LK* criterion for finding Karstetter's contrary contract provisions unenforceable is plainly satisfied.

attorney whose law firm, The Law Firm of Jared C. Karstetter, Jr., P.S., was an independent contractor providing services to the Guild, before finding dismissal warranted.[4] Even assuming *arguendo* that Karstetter's assertion of an employer-employee relationship is correct, he has cited no Washington authority that dictates that the RPC 1.16 and judicially-protected right of legal clients to terminate their legal counsel freely does not apply to legal clients with in-house employee attorneys.

RPC 1.16, Comment 4 provides generally that, "*A client* has a right to discharge *a lawyer* at any time, with or without cause, subject to liability for payment for the lawyer's services." (Emphasis added). It contains no express exceptions for in-house employment relationships.[5] Further, neither RPC 1.16 nor its Comments confine the application of this client right to "vulnerable or less sophisticated" legal clients nor, in duration, to the life of a discrete "legal controversy that [may be] sensitive,

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[4] The reference in Karstetter's brief, at 7, note 20, to undersigned counsel having generically referred to Mr. Karstetter as having been an "employee" of the Guild, a comment made while counsel was extemporaneously addressing the Washington State Public Disclosure Commission regarding Mr. Karstetter's primary responsibility in conducting certain campaign finance transactions for the Guild, transactions which the State of Washington has subsequently deemed unlawful, cannot fairly be characterized as a concession that the legal relationship between Mr. Karstetter and the Guild was one of common-law employment, and it was not such a concession.

[5] Comments 5 and 6 to this RPC contemplate two other exceptions under which a client may be legally prevented from freely terminating counsel (when counsel is appointed by a court and when a client has severely diminished capacity and lacks the legal capacity to effect termination) and provide guidance for such situations. No mention of any client-employer exception is made.

highly personal, and filled with emotion for the layperson client," as Karstetter contends without authority. Resp. Brf. at 10.

The cases in which Washington courts have articulated this fundamental client right have, likewise, characterized it without the limitations Karstetter suggests this Court should impose on it:

- "Unlike general contract law, under a contract between an attorney and client, a client may discharge his attorney at any time with or without cause... Ordinarily, no special formality is required to discharge an attorney and any act of the client indicating an unmistakable purpose to sever relations is sufficient... Employment of other counsel, which is inconsistent with the continuance of the former relationship, shows an unmistakable purpose to sever the former relationship." *Belli v. Shaw*, 98 Wn.2d at 577;

- "A client may, at any time, either for good or fancied cause, or out of whim or caprice, or wantonly and without cause whatever, discharge his attorney and terminate the attorney-client relationship... This rule, though a harsh and stringent one against the attorney... is thought necessary for the protection of the client in particular and the public in general. But a necessary and rightful corollary to this rule which permits the client to discharge his attorney without good cause, is the obligation implied in law to pay the attorney a reasonable fee for the services he has rendered to the client up to the date the attorney-client relationship is terminated." *Kimball v. Pub. Util. Dist. No. 1 of Douglas Cnty.*, 64 Wn.2d at 257-58 (internal citations omitted);

- "Because of the personal and confidential nature of the attorney-client relationship, the client may, at any time and for any reason or without any reason, discharge his attorney. This does not constitute a breach of the [attorney-client] contract. The right to discharge an attorney is a term of the contract, implied from the particular relationship that exists between attorney and client. The client retains the power and right to

> discharge the attorney." *Seattle Inv. Co. v. Kilburn*, 5 Wn. App. 137, 138, 485 P.2d 1005 (1971).

No Washington authority suggests that the relationship between an in-house attorney and private client-employer is any less "personal and confidential [in] nature" such that the client forsakes its innate right to discharge the attorney – a right which Washington courts have held must be implied as a term of attorney-client contracts, preventing breach of contract claims from arising through attorney termination. *Id.*[6]

Corey v. Pierce County, cited by Karstetter, is inapposite in that the *Corey* Court does not appear to have been presented and been asked to grapple with the employer-County's fundamental, RPC-based right, as a legal client, to discharge a lawyer-employee. *See, Corey,* 154 Wn. App. 752, 769-71, 225 P.3d 367 (2010) (addressing other arguments, primarily based on RCW 36.27.040, RCW 41.56.030(2), and the Pierce County Charter). "An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered." *Continental Mutual Savings Bank v. Elliot,* 166 Wn. 283, 300, 6 P.2d 638 (1932); *see also Hizey v. Carpenter*, 119 Wn.2d 251, 264–65, 830 P.2d 646 (1992) (holding that where a prior decision

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[6] *Cf. Fetty v. Wenger*, 110 Wn. App. 598, 600 fn. 4, 36 P.3d 1123 (2001) (explaining rationale for plaintiff-attorney's *quantum meruit* action: "Because no breach [of contract] occurs [from an attorney's termination], a discharged attorney may not sue on a contingent fee agreement, but must sue in *quantum meruit* arising out of the contract for the reasonable value of the services rendered…") (internal citations omitted).

merely "*assumed,* without squarely addressing," the relevance of the Code of Professional Responsibility and the Rules of Professional Conduct, the Supreme Court would not deem the prior decisions as any kind of precedent on the issue in question) (emphasis in original).[7]

Moreover, Washington law recognizes that there are differences in the legal relationships, rights, and responsibilities of attorneys in private practice and those in public-sector roles. *See, e.g.,* RPC, Scope, § 18 (describing certain such differences, e.g., "under various legal provisions… government lawyers may [have] authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships."); *see also*, *Wise v. City of Chelan*, 133 Wn. App. 167, 172, 135 P.3d 951 (rejecting city's *Belli*-based argument to void employment contract with municipal judge, as "[t]he relationship was not that of attorney and client," and thus, contract was not "an attorney-client contract under which the client can discharge its attorney at any time").

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[7] *Accord: ETCO, Inc. v. Department of Labor and Industries*, 66 Wn. App. 302, 307, 831 P.2d 1133 (1992) ("Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court."); *Rainier Nat. Bank v. McCracken*, 26 Wn. App. 498, 510, 615 P.2d 469 (1980) ("We do not consider that opinion controlling here because on the face of that ruling, and from the lack of any authority cited in the opinion to support it, it seems obvious that the deposits in court statute … was not cited to the court and was therefore overlooked.").

C. Public Policy Considerations Favor Non-Enforcement Of The Contract And A Legal Client Should Not Bear The Risk Of His Attorney's Failure To Research The RPCs And Likely Unenforceability Of A Contract He Drafted.

Plaintiff's equitable arguments regarding promissory estoppel, equitable estoppel/laches, and waiver, unsupported by any legal authority arising out of any similar claim, do not apply, as RPC 1.16, Comment 4 and case law make clear that client may exercise its right to terminate "at any time," and in no way suggest that this right is lost either by the mere passage of time or by the fact that a naïve or negligent attorney might have relied on a contrary understanding of his rights.

Moreover, while Karstetter makes much of the Guild's failure to investigate the enforceability of its agreement with his law firm until 4 years into a 5 year contract, there is no reason to have expected the Guild to investigate this issue until problems in the attorney-client relationship gave the Guild a motivation to explore whether it had the right to rid itself of an attorney whose conduct it no longer found acceptable. In the instant case, of course, the triggering event for the Guild to conduct this inquiry was learning of Mr. Karstetter's unprofessional, disloyal, and damaging conduct, i.e., his intentional disclosure of client confidences. *See, e.g.,* Opening Brief of Appellant at 4 fn. 1, 8 (noting that Mr. Karsetter admittedly disclosed client confidences).

Moreover, it is an attorney's obligation to read and know the Rules of Professional Conduct. *See, e.g., Matter of McGough*, 115 Wn.2d 1, 18, 793 P.2d 430 (1990) ("We recognize that the Rules of Professional Conduct place a heavy burden of ethical responsibility upon the shoulders of lawyers. Nonetheless, it is a load which must be carried."). Thus, Karstetter cannot be heard to complain that he did not know that the "just cause dismissal" provisions he bargained into his law firm's contract with the Guild were unenforceable until years into the agreement; it was his duty to ascertain for himself whether the terms of a contract he hoped to enforce were, or were not, in conflict with state law and RPC 1.16. As a matter of law, the equities of enforcement versus non-enforcement do not weigh in Karstetter's favor.

Finally, despite Karstetter's attempts to argue in equity that he has been denied the benefit of a bargain, the RPCs and Washington case law make abundantly clear that not *every* bargain an attorney can wrangle from a legal client is worthy of enforcement. No matter how Karstetter seeks to slice and dice the equities of the situation, the bottom line is still the same: Karstetter, an attorney with many decades of experience, chose to negotiate an extremely unusual contract that purported to preclude his client from firing him (or his law firm) without "just cause" and certain other protections, even though he knew or should have known, at the time

he negotiated it and at all times thereafter, that such a contract was unenforceable under Washington law. Karstetter cannot be heard now to complain that he has unfairly been injured by that fact.[8]

D. Even If Circumstances Exist Where A Fired Attorney Could Assert A Viable Claim for Wrongful Discharge From Employment, Dismissal Of Karstetter's Wrongful Discharge Claim Is Appropriate Here, As There Is No "Clear Public Policy" In Washington Which Protects Or Directly Relates To A Private Attorney's Cooperation With A King County Parking Reimbursement Investigation That Is Directed At Union Members That Attorney Himself Represents.

Though Karstetter seeks to cloak himself in the mantle of a whistleblower, the facts alleged in his Complaint and briefs wholly fail to assert any actual activity by Mr. Karstetter which "directly relates to" or "was necessary for the effective enforcement of" a protected public policy (much less any "clear public policy" as controlling case law requires). *See, Rickman v. Premera*, 184 Wn.2d at 310. In essence, Karstetter claims that while the King County Ombudsman's Office was conducting an investigation into two King County employee-Guild members' parking reimbursements by the County, it asked him for documents in his possession, documents he had obtained through his role as legal representative of the Guild. Complaint at ¶¶ 22, 26, CP 6-7; Resp. Brf. at

[8] Notably, Karstetter has never claimed that he was in any way vulnerable or less sophisticated than his lay client, such that it unfair to impose upon him the full consequences of his decision to enter into the contract he negotiated and signed on behalf of his law firm, and any such assertion would be risible.

19-20. Even though no subpoena or court order had been issued, Karstetter claims that his voluntary decision to provide the information requested was protected under Washington whistleblower law and that his termination, as a result, was unlawful. *Id.*

To date, Karstetter has failed to provide any legal authority that supports his contention that his actions constituted "whistleblowing," or would directly relate to or be necessary for the effective enforcement of a clear public policy. In his Complaint, Karstetter alleged that his cooperation in the County investigation was protected by the King County Code, however the County Code protects only *County employees* from retaliation for reporting or assisting in County investigations. *See*, King County Code, Section 3.42.010 ("*[C]ounty employees* are encouraged to report on improper governmental action… [T]his chapter provides *county employees* a process for reporting… and protection from retaliatory action…") (emphasis added). In the Brief of Respondents, Karstetter again directs the Court to whistleblowing statutes unrelated to him and the facts he asserts: RCW 42.41.040, which expressly only protects "local government employee[s]", and RCW 49.60.210, the Washington Law Against Discrimination, which protects (1) those who complain of "practices forbidden by [that] chapter" (i.e., unlawful discrimination on the basis of a protected characteristic), (2) state employees who report

improper governmental actions under the State Employee Whistleblower Protection Act (Chapter 42.40 RCW), and (3) those who report fraud within the state's public assistance programs to the Department of Social and Health Services' Office of Fraud and Accountability pursuant to RCW 74.04.012.[9]

Because Karstetter cannot identify any clear public policy favoring, much less requiring, him to have taken the action he took, he cannot establish that any clear public policy would be jeopardized by discouraging his alleged actions.[10] *Rickman*, 184 Wn.2d at 310; *Gardner*, 128 Wn.2d at 941 (first and second *Perritt* elements). Thus, even accepting Karstetter's alleged facts as true, they fail to state a proper cause of action for wrongful discharge in violation of public policy, and the trial court erred by denying dismissal of this claim.

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[9] Moreover, whistleblowing typically involves the actor reporting *his employer's* misconduct, not the conduct of two of his legal client/putative employer's members. *See,* Appellant's Updated Opening Brief at 15 (citing *Dicomes v. State*, 113 Wn.2d 612, 618, 782 P.2d 1002 (1989)).

[10] Karstetter adds to his factual allegations upon appeal by asserting that he also "asked his employer with [sic] assistance to fend off complaints from several Guild members" against him. Resp. Brf. at 20. We assume he is referring to his effort to get the Guild to discourage or prevent its members from filing complaints against him with the Washington State Bar Association. *See,* Complaint at ¶ 23,CP 6. The suggestion that an attorney's effort to persuade a labor organization to discourage its members from filing bar complaints against him constitutes "whistleblowing" does not warrant a response.

E. Washington Courts Have Never Permitted An Attorney Wrongful Discharge Claim Against A Client. Karstetter's Alleged Acts, Which Reflect No Public-Policy Protected Conduct, Present No Reason To Create Such A Right Of Action.

As was noted in the Guild's opening brief, Washington courts, to date, have never recognized the existence of a "wrongful discharge" claim brought by an attorney against a legal client based on its termination of that person as its legal counsel. Karstetter cites various cases for the proposition that, "Washington courts have permitted attorney-employees to bring wrongful discharge claims in a number of cases" (*see,* Resp. Brf. at 20); crucially, however, none of the cases Respondent cites involved the termination of an attorney by her legal client. *See, Weiss v. Lonnquist*, 173 Wn. App. 344, 293 P.3d 1264 (2013) (attorney fired by law firm); *Muhl v. Davies Pearson, P.C.*, 190 Wn. App. 1038, 2015 WL 6441849 (2015) (unpublished opinion cited per GR 14.1(a) also involving law firm employer); *Wise v. City of Chelan*, 133 Wn. App. 167, 135 P.3d 951 (2006) (municipal court judge terminated by city deemed not to be judge's client).

While foreign jurisdictions are mixed on whether attorneys may bring wrongful termination claims against client-employers, Washington courts have never carved out such an exception to the strongly-stated public policy protecting legal clients' right to terminate their relationships

with attorneys at any time, for any reason, or for no reason. To the extent that the Court could conceive of a public policy which might warrant extending Washington law by displacing the client's unfettered right to terminate its relationship with counsel who is also the client's employee, one is not presented in the instant case, in which Karstetter wholly fails to assert any clear public policy that protects or would be furthered by creating such an exception to the general rule in this case.[11]

F. Karstetter Request For Attorneys' Fees Should Be Rejected Because He Has Not Recovered Any Judgment For Wages Or Salary Owed to Him.

RCW 49.48.030 permits the recovery of reasonable attorneys' fees "[i]n any action in which any person is successful in recovering judgment for wages or salary owed to him or her." Karstetter has not recovered any judgment for wages or salary owed to him; thus, even if he should prevail

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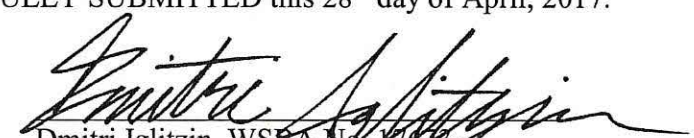
[11] Karstetter points to RCW 49.60.020, the Washington Law Against Discrimination ("WLAD"), in support of the statement that "Washington employment law is to be construed liberally for the purpose of vindicating the rights of employees where appropriate." (In actuality, RCW 49.60.020 states that "[that] chapter," should be construed liberally.) If the Court had before it a claim of discriminatory termination on the basis of a protected characteristic by a putative client-employer, conduct which the WLAD proclaims "threatens not only the rights and proper privileges of [Washington] inhabitants, but menaces the institutions and foundation of a free democratic state," the Court could reasonably consider whether that strong public policy interest might justify altering existing law to permit a right of action for wrongful discharge to be brought under this statute. *See* RCW 49.60.010. The possibility that such a cause of action could conceivably be recognized in some circumstances does not, however, provide any basis for this Court to invent a previously non-existent "wrongful discharge" exception to the well-established rule, discussed above and in the Guild's prior brief, that for very good public policy reasons, clients in Washington State can fire their attorneys for any reason they choose, even if those attorneys are also their employees.

in the instant appeal, his request for attorney fees is premature. *See, e.g., Brunbridge v. Flour Fed. Svcs., Inc.*, 109 Wn. App. 347, 361, 35 P.3d 389 (2001) (reversing dismissal of plaintiff's claim but denying request for attorney fees and costs on appeal as plaintiffs had "not yet obtained a judgment for owed wages"), *rev. denied*, 146 Wn.2d 1022 (2002), *cert. denied*, 538 U.S. 906 (2003).

V. CONCLUSION

For the foregoing reasons, as well as those stated in the Guild's Opening Brief, the Guild requests that the Court issue an order finding that the trial court erred by denying dismissal of Karstetter's breach of contract and wrongful discharge claims, reversing the trial court's order, and remanding with instructions that the two causes of action at issue here be dismissed with prejudice.

RESPECTFULLY SUBMITTED this 28th day of April, 2017.

By: 

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DECLARATION OF SERVICE

I, Genipher Owens, hereby declare under penalty of perjury under the laws of the State of Washington that on April 28, 2017, I caused the foregoing Reply Brief of Appellant to be electronically filed with the Court of Appeals, Division I, and a true and correct copy of the same to be sent via email, per agreement of counsel, to the following:

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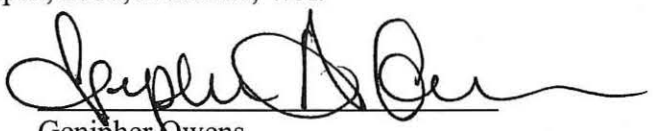

Genipher Owens
Paralegal

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. _____

(Court of Appeals No. 483751-1-II)

TORI KRUGER-WILLIS,

Appellant,

v.

HEATHER HOFFENBURG AND JOHN DOE HOFFENBURG,

Respondent.

PETITION FOR REVIEW

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I. INTRODUCTION

In every insurance defense case, the first question a defense attorney should ask is: "Who is the client?" In Washington, "it is clear that *legally* and *ethically* the client of the lawyer is the insured (emphasis added)." WSBA Advisory Opinion 195 (1999) (citing *Tank v. State Farm Fire & Cas. Co.,* 105 Wn.2d 381, 715 P.2d 1133 (1986) and *Van Dyke v. White,* 55 Wn.2d 601, 349 P.2d (1960)). Appendix at A3. Under *Tank,* the relationship between the insured and the defense attorney is that of attorney and client (emphasis added). *Tank v. State Farm,* 105 Wn.2d at 388.[1]

The foregoing *was* the law until recently when the Court of Appeals issued its opinion in this case on March 28, 2017. In the published part of its opinion, the court abolished the requirement for the formation of an attorney-client relationship between an insurance defense attorney and the insurer's insured.

This case involves the authority of an insurance defense attorney to represent an insurer's insured under a duty to defend provision in a liability insurance contract when the defense attorney has never had contact with the insured and it illustrates the unique nature of the tripartite

[1] States vary in their treatment of whether the insurance defense attorney represents only the insured or both the insured and the insurer. In Oregon and in Nevada, by contrast, in the absence of a conflict, the insurance defense attorney represents both the insured and the insurer. OSB Formal Ethics Opinions 2005-30, 2005-77, and 2005-121 (Appendix at B1, B5-B8, B9-B12 respectively); *Nevada Yellow Cab Corp., v. Eighth Judicial District Court*, 152 P.3d 737 (Nev. 2007). Appendix at C4.

relationship that is created among an insurer, its insured, and the insurance defense attorney when an insurer hires an attorney to represent its insured.

In a tripartite relationship, legal and ethical lapses arise when an insurance defense attorney fails to determine whom he or she represents and where his or her loyalties lie. As this case also illustrates, courts can become confused when distinguishing between the contractual duties owed to an insured by an insurer from the legal and ethical duties owed to an insured-client by an insurance defense attorney.

II. IDENTITY OF PETITIONER

The Petitioner is Tori Kruger-Willis ("Kruger-Willis"), the Appellant in the Court of Appeals and the Plaintiff in the trial court. Kruger-Willis asks this Court to accept review of the Court of Appeals' opinion terminating review designated in Part III of this Petition.

III. CITATION TO THE COURT OF APPEALS' DECISION

Kruger-Willis seeks review in its entirety of the part published opinion and the part unpublished opinion filed by Division II of the Court of Appeals on March 28, 2017, and its denial of her motion for reconsideration filed on April 18, 2017.

A copy of the Court of Appeals' opinion is included in the Appendix at pages D1 through D12. A copy of Appellant's motion for reconsideration is included in the Appendix at pages E1 through E26. A copy of the court's order requesting an answer from Respondent to Appellant's motion for reconsideration is included in the Appendix at page

F1. A copy of the order denying Kruger-Willis's motion for reconsideration is included in the Appendix at page G1.

IV. ISSUES PRESENTED FOR REVIEW

A. Whether an insurer's duty to defend provision in an insurance contract grants implied authority on an insurance defense attorney to represent an insurer's insured when the defense attorney has never had contact with the insured;

B. Whether the Appellant received a fair hearing when the trial court and the appellate court failed to consider Appellant's claims of defense attorney misconduct; and

C. Whether the Court of Appeals erred in awarding the Respondent attorney fees on appeal and for responding to Appellant's motion for reconsideration when the Respondent failed to comply with the provisions of RAP 18.1(b).

V. STATEMENT OF THE CASE RELEVANT TO THIS PETITION

The crux of this case stems from the defense attorney's inability to negotiate a check made payable to Respondent Heather Hofferbert ("Hofferbert") tendered to him in satisfaction of prevailing party fees and costs under RCW 4.84.250 awarded by the trial court because the defense attorney has never had contact with her. Appendix at E24.

Thereafter, the defense attorney moved the trial court to compel Kruger-Willis to make payment under the prevailing party statute, RCW 4.84.250, to non-parties to this case: GEICO; Mary E. Owen &

Associates; Hofferbert and Mary E. Owen & Associates; Mary E. Owen & Associates (again); and finally, Lockner & Crowley, Inc., P.S.[2] Appendix at E24; Appellant's Opening Br. ("AOB") at 56.

Kruger-Willis's primary issue on review[3] giving rise to this Petition was whether the trial court erred when it denied her motion under RCW 2.44.030 for the defense attorney to prove his authority to appear on behalf of Hofferbert when he has never had contact with her. AOB at 6.[4] The court held in the published part of its opinion "that when an insurer has a contractual obligation to defend its insured, that insurer has the implied right to authorize defense counsel to represent its insured even in the absence of the insured's express authority." Appendix at D5-D6. Additionally, the court held in the published part of its opinion "that under RPC 1.2(f), defense counsel retained by an insurer is authorized by contract law to represent that insurer's insured." Appendix at D8.

Kruger-Willis's primary issue on review in the second appeal was whether the trial court erred when it denied her motion under RCW 2.44.030 for the defense attorney to prove his authority to appear on behalf of Hofferbert when he has never had contact with her. AOB at 12. The court held that "[w]here civil defense counsel admitted that he never had any contact with his purported client, the trial court abused its discretion

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[2] Thereby creating a conflict of interest under RPC 1.7 between the insurer and its insured.

[3] The third appeal in this case.

[4] There were two insurance defense attorneys that appeared in this case, both of whom have had no contact with Hofferbert. For clarity, Kruger-Willis refers to the attorneys in the singular.

by denying the motion." Appendix at H1. The court reversed the trial court and remanded for further proceedings. *Id.*

Kruger-Willis's primary issue on review in the first appeal was that the trial court erred in awarding Hofferbert prevailing party fees and costs under RCW 4.84.250 because the defense attorney was, in fact, representing GEICO and not Hofferbert; GEICO was not an aggrieved party under mandatory arbitration rules, therefore, it lacked standing to file a request for a trial de novo; and similarly, it could not be considered the prevailing party under RCW 4.84.250 as it was not a real party in interest in this case. AOB at 8-9, 40. The defense attorney denied the foregoing claims by Kruger-Willis to the trial court and to the appellate court and he failed to disclose to Kruger-Willis, to the trial court, and to the appellate court that he never had contact with Hofferbert. AOB at 40-41. The court found no error and affirmed the trial court. Appendix at I1.

VI. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS BY THE WASHINGTON STATE SUPREME COURT.

This case warrants review by the Supreme Court because the decision of the court is in conflict with a number of decisions of this Court. RAP 13.4(b)(1), (2). RAP 13.4(b) provides in pertinent part:

> A petition for review will be accepted by the Supreme Court only...:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals.

The Court of Appeals' decision conflicts with this Court's decisions in *Tank v. State Farm Fire & Cas. Co,* 105 Wn.2d 381, 715 P.2d 1133 (1986); in *Van Dyke v. White,* 55 Wn.2d 601, 349 P.2d (1960); in *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 43 P.3d 4 (2002); in *Hewson Const., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 823, 685 P.2d 1062 (1984); in *Washington Imaging Services, LLC v. Washington State Dept. of Revenue*, 171 Wn.2d 548, 252 P.3d 885 (2011); in *Woo v. Fireman's Fund Ins. Co.,* 161 Wn.2d 43, 164 P.3d 454 (2007), in *Nat'l Sur. Corp. v. Immunex Corp.,* 176 Wn.2d 872, 297 P.3d 688 (2013); in *Dietz v. Doe*, 131 Wn.2d 835, 935 P.2d 611 (1997); in *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992); and in *Hudson v. Hapner*, 170 Wn.2d 22, 33, 239 P.3d 579 (2010). Additionally, the court's decision conflicts with the provisions of RCW 2.44; RCW 2.44.010(1), (2); RPC 1.2; 1.2(f); RPC 5.4(c); and RAP 18.1(b).

This case does not involve a reservation of rights by the insurer, however, the line of cases cited by the court in its opinion occur in the context of a reservation of rights, so the court appears to extend the duties of an insurer and the obligations of an insurance defense attorney under a reservation of rights to a duty to defend provision in a liability insurance contract.[5] Appendix at D6-D7, E10.

[5] Although most standard liability insurance policies impose upon the insurer the duty to defend. *United Services Automobile Ass'n v. Speed,* 179 Wn. App. 184, 194, 317 P.3d 532 (2014).

In analyzing the issues presented in this case, it is important that a court keep in mind the maxim "it is clear that *legally* and *ethically* the client of the lawyer is the insured (emphasis added)." WSBA Advisory Opinion 195 (1999) (citing *Tank v. State Farm,* 105 Wn.2d 381 and *Van Dyke v. White,* 55 Wn.2d 601). Appendix at A3.

As previously stated, the primary issue before the court was whether the trial court erred when it denied Kruger-Willis's motion under RCW 2.44.030 for the defense attorney to prove his authority to appear on behalf of Hofferbert when he has never had contact with her. AOB at 6.

1. RCW 2.44.030

The authority of an attorney to represent a client may be challenged under RCW 2.44.030 by the opposing party. RCW 2.44.030 provides:

> **Production of authority to act.**
>
> The court, or a judge, may, on motion of either party, and on showing reasonable grounds therefor, require the attorney for the adverse party, or for any one of several adverse parties, to produce or prove the authority under which he or she appears, and until he or she does so, may stay all proceedings by him or her on behalf of the party for whom he or she assumes to appear.

In affirming the trial court, the court held in the published part of its opinion "that when an insurer has a contractual obligation to defend its insured, that insurer has the implied right to authorize defense counsel to represent its insured even in the absence of the insured's express authority." Appendix at D5-D6. The court appears to implicitly hold that under RCW 2.44.030, the defense attorney has authority to appear in this

case *and to represent*[6] Hofferbert absent any contact with her by virtue of the duty to defend provision in a liability insurance contract.

However, in interpreting RCW 2.44.030, the court failed to ascertain or to give effect to the legislature's intent by considering the text of the provision, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole (emphasis added). *See Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 10-11, 43 P.3d 4 (2002).

The statute in question, RCW 2.44.030, is governed by Washington's attorneys-at-law act, Chapter 2.44 RCW, which addresses the authority of an attorney in legal proceedings. The act provides in relevant part that an attorney has authority to bind his or her client in any legal proceedings (emphasis added). RCW 2.44.010(1); *Turner v. Stime,* 153 Wn. App. 581, 594, 222 P.3d 1243 (2009). Appendix at E4-E5. Furthermore, the act provides in relevant part that an attorney has authority to receive money claimed by his or her client in any legal proceedings (emphasis added). RCW 2.44.010(2). Appendix at E4-E5.

Based upon the act's express use of the term "client," it is clear and unambiguous that the act requires the formation of an attorney-client relationship between an attorney and the person he or she purports to represent.[7] However, the court's holding "that when an insurer has a

[6] Thereby raising the issue as to whether an attorney-client relationship exists between the defense attorney and Hofferbert.

[7] Kruger-Willis addresses the formation of an attorney-client relationship in ¶2 below and the significance of such a relationship in the insurance defense context in §B below.

contractual obligation to defend its insured, that insurer has the implied right to authorize defense counsel to represent its insured even in the absence of the insured's express authority[,]"[8] abolishes the act's requirement of the formation of an attorney-client relationship between a defense attorney and an insurer's insured.[9]

Essentially, from the foregoing, the court has created an agency relationship based upon contract law principles between the insurer and the defense attorney without regard to the formation of an attorney-client relationship between the defense attorney and the insurer's insured. The problem with the court's holding, however, is that it is inherently flawed under the laws of agency, under *Tank v. State Farm*, and under the Rules of Professional Conduct ("RPC").

An attorney-client relationship is generally a type of principal-agent relationship. *West v. Thurston County*, 168 Wn. App. 162, 183, 275 P.3d 1200 (2012). *See Fite v. Lee*, 11 Wn. App. 21, 28, 521 P.2d 964 (1974); *see also Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978). An agency relationship may exist, either expressly or by implication, when one party acts at the instance of and, in some material degree, under the direction and control of another. *Hewson Const., Inc. v. Reintree Corp.*, 101 Wn.2d 819, 823, 685 P.2d 1062 (1984). Both the principal and agent must consent to the relationship. *Id.* The burden of

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[8] Appendix at D5-D6 (emphasis added).

[9] As well as the formation of an attorney-client relationship under RPC 1.2, 1.2(f), and *Tank v. State Farm*, 105 Wn.2d at 388.

establishing the agency relationship rests upon the party asserting its existence. *Id.*

The crucial factor which must exist to prove agency is the right of control. *Washington Imaging Services, LLC v. Washington State Dept. of Revenue*, 171 Wn.2d 548, 562, 252 P.3d 885 (2011); *O'Brien v. Hafer*, 122 Wn. App. 279, 283, 93 P.3d 930 (2004). Control is not established if the asserted principal retains the right to supervise the asserted agent merely to determine if the agent performs in conformity with the contract. *Bloedel Timberlands Development, Inc. v. Timber Industries, Inc.*, 28 Wn. App. 669, 674, 626 P.2d 30 (1981). Instead, control establishes agency only if the principal controls the manner of performance. *Id.*

When it comes to agency, particularly when an attorney is involved, the first question should be: "Who is the principal?" In this case, under RPC 5.4(c) and *Tank v. State Farm*, the principal is the insured-client and it *cannot* be the insurer.

"The RPCs contain two rules addressing the duty of loyalty that potentially apply when an insurer retains an attorney to defend its insured[,]" which are RPC 1.7 (conflict of interest)[10] and RPC 5.4(c). *Arden v. Forsberg & Umlauf PS*, 193 Wn. App. 731, 743-44, 373 P.3d 320 (2016). Of relevance to this issue is RPC 5.4(c), which provides:

[10] While a conflict of interest between the insurer and Hofferbert arose when the defense attorney sought to compel Kruger-Willis to issue payment under the provisions of RCW 4.84.250 from Hofferbert to the insurer and then to the law firms purportedly representing her, RPC 1.7 is not relevant to the issue concerning a principal's control over an agent.

> 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.

Under *Tank v. State Farm*, a defense attorney owes a duty of loyalty to the insured-client, not to the insurer, consistent with RPC 5.4(c). *Arden v. Forsberg & Umlauf PS*, 193 Wn. App. at 744; *Tank v. State Farm*, 105 Wn.2d at 388. "RPC 5.4(c) demands that counsel understand that he or she represents only the insured, not the company...'[T]he standards of the legal profession require undeviating fidelity of the lawyer to his client. No exceptions can be tolerated.'" *Arden v. Forsberg & Umlauf PS*, 193 Wn. App. at 744-45 (quoting *Van Dyke v. White*, 55 Wn.2d at 613).

On point with the foregoing principles, the Washington State Bar Association ("WSBA") issued an advisory opinion with respect to an insurance defense attorney's rendering of legal services. "[A] lawyer representing an insured client must follow the instructions of the client, and not the insurance carrier." WSBA Advisory Opinion 974 (1986). Appendix at J1.

From the foregoing authorities, it is clear that the defense attorney performs under the direction and control of the insured-client and not the insurer. *See Washington Imaging Services, LLC v. Washington State Dept. of Revenue*, 171 Wn.2d at 562; *Hewson Const., Inc. v. Reintree Corp.*, 101 Wn.2d at 823. *See also Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey PC*, 180 Wn. App. 689, 694, 324 P.3d 743 (2014) (insurer lacked

standing to sue insurance defense attorney because it was not defense attorney's client) and *Stewart Title Guaranty Co. v. Sterling Savings Bank*, 178 Wn.2d 561, 569-70, 311 P.3d 1 (2013) (a title insurer that hired an attorney to defend its insured was not an intended beneficiary of the attorney's representation).

Therefore, under the laws of agency, the insured-client is the principal and the agent is the defense attorney. Furthermore, to create an expressed or an implied agency, both the principal and the agent must consent to the relationship. *Hewson Const., Inc. v. Reintree Corp.*, 101 Wn.2d at 823. In this case, Hofferbert has not consented to the formation of an agency relationship because the defense attorney has never had contact with her to obtain such consent.

The Court of Appeals' part published opinion is disquieting. On the one hand, the court acknowledges that under *Tank v. State Farm* "the law is clear that the insurer-retained defense counsel's client is the insured, and not the insurer (emphasis added)." Appendix at D7. Yet, on the other hand, the court goes on to eviscerate the law by holding "that when an insurer has a contractual obligation to defend its insured, that insurer has the implied right to authorize defense counsel to represent its insured even in the absence of the insured's express authority[,]" because it completely disregards the necessity of the formation of an attorney-client relationship between an insurance defense attorney and an insured. Appendix at D5-D6.

2. RPC 1.2(f)

In the published part of its opinion, the court held "that under RPC 1.2(f), defense counsel retained by an insurer is authorized by contract law to represent that insurer's insured." Appendix at D8. In so holding, the court appears to carve out a public policy exception to the "client" requirement found in RPC 1.2 and RPC 1.2(f) (discussed further below), as well as in RCW 2.44 and in *Tank v. State Farm.* Appendix at E15-E16.

Under the Rules of Professional Conduct 1.2 RPC, which provides for the scope of representation and allocation of authority between client and lawyer, "[a] lawyer shall not purport to act as a lawyer for any person or organization if the lawyer knows or reasonably should know that the lawyer is acting without the authority of that person or organization, unless the lawyer is authorized or required to so act by law or a court order (emphasis added)." RPC 1.2, 1.2(f). Appendix at E4.

On point with the subject issue, the WSBA issued an advisory opinion with respect to the formation of an attorney-client relationship when the defense attorney had no contact with the insurer's insured. When it comes to the formation of an attorney-client relationship between an insurance defense attorney and an insurer's insured, no attorney-client relationship is formed when a defense attorney has had no contact with the insured, thus, the defense attorney lacks authority to act as lawyer for the insured. WSBA Advisory Opinion 928 (1985). Appendix at K1.

Whether an attorney-client relationship exists is a question of fact. *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). The foundation of an attorney-client relationship is whether the attorney's advice or assistance was sought and received. *Id.* The relationship may be implied from the parties' conduct and need not be formalized in a written contract. *Id.* The existence of an attorney-client relationship depends largely on the clients' subjective belief, but this belief must be reasonably formed based on attending circumstances, including the attorney's words and actions. *Id.* Appendix at D6-D7. *See also* WSBA Advisory Opinion 1821 (1998) at Appendix L1 (formation of attorney-client relationship).

Notably, the court acknowledged in its opinion that under *Tank v. State Farm*, "the law is clear that the insurer-retained defense counsel's client is the insured, and not the insurer (emphasis added)." Appendix at D7. Moreover, in its opinion, the court appeared to recognize that RPC 1.2(f) contemplates the existence of an attorney-client relationship by its reasoning that "RPC 1.2(f) does not always require express authorization from the client. An attorney can represent a client if authorized 'by law.' RPC 1.2(f) (emphasis added)." Appendix at D8, E4.

The trial court and the Court of Appeals, however, have not resolved the issue as to whether an attorney-client relationship existed between the defense attorney and Hofferbert by the courts' failure to make explicit findings of fact or conclusions of law regarding the existence of an attorney-client relationship between the defense attorney and Hofferbert.

See *Dietz v. Doe*, 131 Wn.2d 835, 844, 935 P.2d 611 (1997). Appendix at E5-E6.

Based upon what actually occurred between the defense attorney and Hofferbert, which is no contact whatsoever between them, there is an absence of any competent evidence to support the existence of an attorney-client relationship. *See Dietz v. Doe*, 131 Wn.2d at 845. Appendix at E7. An attorney-client relationship simply does not exist between the defense attorney and Hofferbert because she did not seek advice from the defense attorney and she did not receive advice from defense attorney in that there has been no contact whatsoever between her and the defense attorney. *See Bohn v. Cody*, 119 Wn.2d at 363. Appendix at E7.

Despite the court's passing references to "client" in the published part of its opinion, the court nevertheless held "that under RPC 1.2(f), defense counsel retained by an insurer is authorized by contract law to represent that insurer's insured[,]" without regard to determining whether an insured is the defense attorney's client under *Bohn v. Cody* and *Dietz v. Doe*. In so holding, the court has improperly adopted an implied agency relationship between a defense attorney and an insured[11] based upon an insurer's contractual duties to its insured and the court has rejected the factual queries to determine the existence of an attorney-client relationship between the defense attorney and the insured as expressed by this Court in

[11] Discussed *supra*.

Bohn v. Cody, 119 Wn.2d at 363 and in *Dietz v. Doe*, 131 Wn.2d at 844-45. Appendix at E5-E7.

2. Fair Hearing

To conserve space with respect to a Petition's page limits, Kruger-Willis refers the Court to the factual summary of her claims of misconduct against the defense attorney and her argument regarding the resulting prejudice to her recounted in Appellant's motion for reconsideration. Appendix at E19-E21.

3. Attorney Fees under RCW 4.84.250 and RAP 18.1(b)

Again, to conserve space with respect to a Petition's page limits, Kruger-Willis refers the Court to her argument and authorities regarding this issue recounted in Appellant's motion for reconsideration. Appendix at E24-E25.

B. THIS PETITION INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE SUPREME COURT.

This case presents an issue of substantial public interest. RAP 13.4(b)(4). RAP 13.4(b) provides in pertinent part:

> A petition for review will be accepted by the Supreme Court only...:
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The court held in the published part of its opinion "that when an insurer has a contractual obligation to defend its insured, that insurer has the implied right to authorize defense counsel to represent its insured even

in the absence of the insured's express authority." Appendix at D5-D6. Additionally, the court held in the published part of its opinion "that under RPC 1.2(f), defense counsel retained by an insurer is authorized by contract law to represent that insurer's insured." Appendix at D8.

In so holding, the court failed to consider the unintended consequences of the published part of its opinion when it conferred authority on an insurance defense attorney to represent an insurer's insured based upon the insurer's contractual duty to defend without regard to the formation of an attorney-client relationship between the defense attorney and the insured. Under the court's holding, while an insurance defense attorney is authorized to represent the insured under the insurer's duty to defend provision of the insurance contract, absent the formation of an attorney-client relationship, the defense attorney's authority is only illusory, such as:

1. The defense attorney has no authority to bind the insured in any legal proceedings, such as enforcement of settlement agreements under CR 2A. RCW 2.44.010(1); *Lavigne v. Green*, 106 Wn. App. 12, 16, 23 P.3d 515 (2001); and

2. The defense attorney has no authority to receive money claimed by the insured in any legal proceedings. RCW 2.44.010(2).[12]

[12] In this case, absent a finding by a court that an attorney-client relationship exists between the attorney and Hofferbert under *Bohn v. Cody*, the defense attorney lacks authority under RCW 2.44.010(2) to claim the funds currently deposited in the court's registry. *See Bohn v. Cody,* 119 Wn.2d at 363.

Likewise, absent an attorney-client relationship between the defense attorney and the insured, the legal and ethical obligations owed to the insured by the defense attorney are merely illusory, such as:

1. The defense attorney does not owe fiduciary duties to the insured. An attorney owes fiduciary duties to his or her client. *Arden v. Forsberg & Umlauf PS*, 193 Wn. App. at 743; *VersusLaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 333, 111 P.3d 866 (2005);

2. The defense attorney does not owe a duty of care to the insured. In a claim for legal negligence, the plaintiff must prove four elements: (1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred (emphasis added). *Clark County Fire Dist. No. 5 v. Bullivant Houser Bailey PC*, 180 Wn. App. at 701;

3. The defense attorney does not owe a duty of confidentiality to the insured. "An attorney or counselor shall not, without the consent of his or her client, be examined as to any communications made by the client to him or her, or his or her advice given thereon in the course of professional employment (emphasis added)." RCW 5.60.050(2). The initial inquiry for purposes of RCW 5.60.060(2) is whether an attorney-client relationship or other protected relationship exists. *Dietz v. Doe*, 131 Wn.2d at 843; and

4. The defense attorney does not owe a duty of full and ongoing disclosure to the insured under *Tank v. State Farm* (client of lawyer is insured). This duty of disclosure has three aspects:

> First, potential conflicts of interest between insurer and insured must be fully disclosed and resolved in favor of the insured. The dictates of RPC 1.7, which address conflicts of interest such as this, must be strictly followed. Second, all information relevant to the insured's defense, including a realistic and periodic assessment of the insured's chances to win or lose the pending lawsuit, *must be communicated to the insured* (emphasis added). Finally, all offers of settlement must be disclosed to the insured as those offers are presented.

Tank v. State Farm, 105 Wn.2d at 388-89.

When an insurer or its defense counsel is unable to contact the insured regarding defense of the case against him or her, there are provisions that exist in current law to prevent a default judgment from being entered against the insured while also protecting the insurer from liability for breach of contract, bad faith, and violation of the CPA. Appendix at D7, E15-E16.

Under existing law, the insurer or defense counsel could first defend under a reservation of rights by serving the insured with a notice of its reservation of rights due to the insured's breach of the cooperation clause under the terms of the policy. *See Van Dyke v. White*, 55 Wn.2d at 604. "[W]hen the insured cannot be located, is uncooperative, or temporarily unavailable[,][13] then the insurer may defend under a reservation of rights and seek a declaratory judgment that it has no duty to

[13] Appendix at D8.

defend. *See Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d at 54; *see also Nat'l Sur. Corp. v. Immunex Corp.,* 176 Wn.2d at 879.

Based upon this Court's decisions in *Woo,* in *Immunex,* and in *Van Dyke*, there was no need for the court in its opinion to carve out a public policy exception to the formation of an attorney-client relationship requirement between an insurance defense attorney and an insurer's insured found in RPC 1.2, RPC 1.2(f), RCW 2.44, and in *Tank v. State Farm.*

VII. CONCLUSION

Based on the foregoing, Kruger-Willis requests that this Court accept review; find that no attorney-client relationship existed between the defense attorney and Hofferbert, thus, the defense attorney did not have authority to appear on her behalf under RCW 2.44.030; and reverse the Court of Appeals.

RESPECTFULLY SUBMITTED this 28th day of April, 2017.

ALANA BULLIS, PS

Alana Bullis, WSBA No. 30554
Attorney for Appellant Tori Kruger-Willis
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CERTIFICATE OF SERVICE

Pursuant to RAP 13.4(a), the undersigned certifies that an original of this Petition for Review was filed, and the statutory filing fee paid, this date with the Court of Appeals of the State of Washington, Division II. Further, the undersigned certifies that a copy of this Petition for Review was served on the following by legal messenger to:

Counsel for Respondent:

Paul L. Crowley
Lockner & Crowley, Inc., P.S.
524 Tacoma Avenue South
Tacoma, WA 98402

I certify under the penalty of perjury under the laws of the State of Washington and the laws of the United States that the foregoing is true and correct.

DATED this 28th day of April, 2017.

Alana K. Bullis

Alana Bullis

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TORI KRUGER-WILLIS, individually and on behalf of her marital community, Appellant, v. HEATHER HOFFENBURG and JOHN DOE HOFFENBURG, and the marital community comprised thereof, Respondents, and DEREK S. LEBEDA and JANE DOE LEBEDA, and the marital community comprised thereof, Defendants.	No. 45593-5-II UNPUBLSIHED OPINION

MELNICK, J. — Tori Kruger-Willis appeals from the trial court's denial of her motion to require Heather Hoffenburg's attorney (defense counsel) to prove the authority under which he appeared. Where civil defense counsel admitted that he never had any contact with his purported client, the trial court abused its discretion by denying the motion. Accordingly, we reverse the trial court ruling and remand for further proceedings consistent with this opinion.

FACTS

This action arose out of a motor vehicle collision that occurred in 2008. Hoffenburg drove a truck that struck and damaged Kruger-Willis's parked vehicle. GEICO, Hoffenburg's insurance company, paid to repair Kruger-Willis's vehicle. Kruger-Willis then sued Hoffenburg to recover

the diminished value of her repaired vehicle. GEICO hired defense counsel and paid the costs of Hoffenburg's defense pursuant to its contractual duty to defend her.[1]

Following a three-day trial, the jury rendered a verdict in Hoffenburg's favor. The trial court awarded Hoffenburg $11,490 in costs and attorney fees.[2] Kruger-Willis appealed the trial court's award of attorney fees and costs. In an unpublished opinion, we held that Hoffenburg had standing to recover fees and costs as the aggrieved party in the underlying action and was the prevailing party entitled to fees and costs, regardless of the fact that GEICO was defending her. *Kruger-Willis v. Hoffenburg*, noted at 173 Wn. App. 1024, slip op. at 5 (2013).

Following our decision, Kruger-Willis's counsel executed a check for $11,490 payable to Heather Hoffenburg despite defense counsel's request that the check be made out to Hoffenburg's insurer, GEICO. Defense counsel asked Kruger-Willis's counsel to reissue the check payable to GEICO, but Kruger-Willis's counsel refused, stating that GEICO was not a party to the suit. Defense counsel filed a motion to enforce the trial court's award of costs and attorney fees. In support of his motion, defense counsel stated that Hoffenburg had never been involved in the defense of the case against her, and that he (defense counsel) worked for GEICO. The trial court granted this motion, but named Hoffenburg and not GEICO as the judgment creditor.[3]

Kruger-Willis then filed a motion for defense counsel to produce or prove the authority under which he appeared, and to stay all proceedings until such authority was produced or

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[1] Although Hoffenburg is not the named insured on the insurance contract with GEICO, she is an insured person under the terms of the contract because she drove the insured vehicle with permission of the named insured.

[2] The trial court awarded Hoffenburg costs and reasonable attorney fees because she was the prevailing party under RCW 4.84.250.

[3] The parties do not appeal this order.

provided. *See* RCW 2.44.030. During argument on this motion, defense counsel admitted that he had "not had contact with the named defendant in this lawsuit." Report of Proceedings (Aug. 9, 2013) at 25. However, defense counsel asserted that he had authority to appear for Hoffenburg under the terms of the insurance contract. The trial court denied Kruger-Willis's motion. Kruger-Willis appeals.

ANALYSIS

I. STANDARD OF REVIEW

This case involves the application of RCW 2.44.030:

> The court, or a judge, may, on motion of either party, and on showing reasonable grounds therefor, require the attorney for the adverse party . . . to produce or prove the authority under which he or she appears.

This statute expressly states that the trial court "may" require an attorney to prove his or her authority. RCW 2.44.030. In other words, RCW 2.44.030 vests authority in the trial court to require a showing of authority by an attorney, but nothing in the statute purports to *require* the court to do anything.

We typically interpret the word "may" as a permissive word that confers discretion on the trial court. *See Angelo Property Co. v. Hafiz*, 167 Wn. App. 789, 817 n.49, 274 P.3d 1075 (2012); *In re Guardianship of Johnson*, 112 Wn. App. 384, 387-88, 48 P.3d 1029 (2002). Therefore, we will review the trial court's denial of Kruger-Willis's motion to prove the authority under which defense counsel appears for abuse of discretion. "'A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.'" *In re Marriage of Valente*, 179 Wn. App. 817, 822, 320 P.3d 115 (2014) (quoting *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)).

II. TRIAL COURT RULING

Kruger-Willis assigned error to the trial court's denial of her motion under RCW 2.44.030 to require defense counsel to prove the authority under which he appears. We agree with Kruger-Willis that under the circumstances the trial court abused its discretion by denying the motion.

Defense counsel's admission that his purported client has never been involved in her own defense, that he has not had contact with the client, and that he works for her insurance company are reasonable grounds for the opposing party's motion to require counsel to prove the authority under which he appears. We hold that when, as here, a civil defense attorney states that he has never communicated with his client, it is manifestly unreasonable for the trial court to deny opposing counsel's motion to require counsel to prove the authority under which he appears.

The parties appear to invite us to decide whether defense counsel had authority to appear for Hoffenburg in this case. Because the trial court did not require defense counsel to prove the authority under which he appears, defense counsel has not had the opportunity to provide the requisite proof and the trial court has not had an opportunity to consider it. Therefore, we decline the parties' invitation to decide whether defense counsel had authority to appear for Hoffenburg in this case.

III. ATTORNEY FEES

Hoffenburg requests costs and attorney fees in connection with this appeal pursuant to RAP 14.1. Because Hoffenburg is not the prevailing party on appeal, she is not entitled to an award under RAP 14.1.

We reverse the trial court ruling and remand for further proceedings consistent with this opinion.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Maxa, P.J.

Lee, J.

No. 48375-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

TORI KRUGER-WILLIS,

Appellant,

v.

HEATHER HOFFENBURG AND JOHN DOE HOFFENBURG,

Respondent.

APPELLANT'S MOTION FOR RECONSIDERATION

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Attorney for
Appellant

I. IDENTITY OF MOVING PARTY

The moving party is the Appellant, Tori Kruger-Willis (Kruger-Willis).

II. STATEMENT OF RELIEF SOUGHT

For the reasons stated below, Kruger-Willis respectfully moves for reconsideration under RAP 12.4 of this Court's March 28, 2017, decision.

III. FACTS RELEVANT TO MOTION

In affirming the superior court, the Court's opinion overlooks or misapprehended points of fact and law which warrant reconsideration. RAP 12.4(c).

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. THE COURT'S PUBLISHED OPINION CONFLICTS WITH DECISIONS BY THE WASHINGTON STATE SUPREME COURT

Kruger-Willis argued on appeal that defense counsel lacked the authority under RCW 2.44.030 to appear and to act on behalf of Hofferbert when defense counsel had no contact whatsoever with her throughout the course of litigation. Appellant's Opening Br. at 17-25.

In response to Kruger-Willis's aforementioned issue on review, the Court held in the published part of its opinion "that when an insurer has a contractual obligation to defend its insured, that insurer has the implied right to authorize defense counsel to represent its insured even in the absence of the insured's express authority." Opinion at 5-6. Moreover, the

Court held "that under RPC 1.2(f), defense counsel retained by an insurer is authorized by contract law to represent that insurer's insured." Opinion at 8.

The foregoing holdings by the Court are in conflict with the Washington State Supreme Court's decisions in *Tank v. State Farm Fire & Cas. Co,* 105 Wn.2d 381, 715 P.2d 1133 (1986), in *Van Dyke v. White,* 55 Wn.2d 601, 349 P.2d (1960), in *Woo v. Fireman's Fund Ins. Co.,* 161 Wn.2d 43, 164 P.3d 454 (2007), in *Nat'l Sur. Corp. v. Immunex Corp.,* 176 Wn.2d 872, 297 P.3d 688 (2013), in *Dietz v. Doe*, 131 Wn.2d 835, 935 P.2d 611 (1997), and in *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992). Additionally, the Court's holdings conflict with the provisions of RCW 2.44, RCW 2.44.010(1), (2), RPC 1.2, 1.2(f), and RPC 5.4(c).

1. DEFENSE COUNSEL'S AUTHORITY

In support of its position that under an insurer's contractual duty to defend, the insurer "generally has the right to select the defense counsel who will represent its insured[,]" the Court relies upon *Johnson v. Cont'l Cas. Co.,* 57 Wn. App. 359, 788 P.2d 598 (1990) (holding that an insurer had no obligation to pay for counsel the insured retained). Opinion at 7.

The facts in *Johnson* are distinguishable from the facts in this case. In *Johnson*, there had been actual contact between the insured and the insurer and between defense counsel and the insured. In this case, there

has been no contact between the insured and the insurer and between defense counsel and the insured.

In *Johnson v. Cont'l Cas. Co.,* the insured (Johnson) tendered the defense of a lawsuit against him to the insurer (Continental). *Johnson v. Cont'l Cas. Co.,* 57 Wn. App. at 360. The insurer defended under a reservation of rights, but suggested in a letter to the insured that he may want to retain counsel at his own expense in the event of non-covered losses. *Id.* Thereafter, the insurer selected defense counsel to represent the insured. *Id.* The insurer-retained defense counsel stayed fully in touch with the insured, cooperated with and provided materials to the insured's independent attorney, and ultimately settled the underlying claim with the insured's knowledge and consent. *Id.* at 363. In this case, the insurer-retained defense counsel has not stayed fully in touch with Hofferbert as defense counsel has had no contact whatsoever with her.

Kruger-Willis has never disputed that under an insurer's contractual duty to defend, the insurer has the right to select defense counsel. What Kruger-Willis consistently argues is that without any contact whatsoever between the insurer-retained defense counsel and Hofferbert, defense counsel does not have the authority to appear and to act on her behalf. Opening Br. of Appellant at 17. Simply put, without some form of contact or communication between defense counsel and

Hofferbert, the parties never formed an attorney-client relationship. CP 746, 780, 793-94.

In its opinion, the Court acknowledges that under *Tank v. State Farm*, "the law is clear that the insurer-retained defense counsel's *client* is the insured, and not the insurer (emphasis added)." Opinion at 7. Under *Tank,* the relationship between the insured and defense counsel is that of attorney and *client* (emphasis added). *Tank v. State Farm,* 105 Wn.2d at 388.

Similarly, the provisions of RPC 1.2 pertain to the scope of representation and allocation of authority between *client* and lawyer. The Court appears to recognize that RPC 1.2(f) contemplates the existence of an attorney-client relationship by its reasoning that "RPC 1.2(f) does not always require express authorization from the *client*. An attorney can represent a *client* if authorized 'by law.' RPC 1.2(f) (emphasis added)." Opinion at 8.

Based upon the aforementioned reasoning by the Court, defense counsel is authorized by contract law to represent Hofferbert under RPC 1.2(f) if she is a *client* of defense counsel. See also *Tank v. State Farm,* 105 Wn.2d at 388 (the relationship between the insured and defense counsel is that of attorney and *client*) (emphasis added) and RCW 2.44.010(1), (2) – Authority of Attorney (an attorney has authority to bind his or her *client*; to receive money claimed by his or her *client*) (emphasis

added). Thus, whether defense counsel has the authority to appear and to act on Hofferbert's behalf under RPC 1.2(f), *Tank*, and/or RCW 2.44 is dependent upon resolving the issue as to whether Hofferbert is a client of defense counsel.

Kruger-Willis has long-questioned the existence of an attorney-client relationship between Hofferbert and defense counsel when there has been no contact between the parties and based upon defense counsel's words and actions. *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992) (an attorney-client relationship may be implied from the parties' conduct, which includes the attorney's words or actions). Opening Br. of Appellant at 3-4, 36 fn 12, 46-50; RP 7-9, 48, 54-55; CP 745, 890-91, 978, 1013-14, 1016. The trial court and this Court, however, have not addressed whether Hofferbert is a client of defense counsel.

Whether Hofferbert is a client of defense counsel is similar to the issue before the Washington State Supreme Court in *Dietz v. Doe*, 131 Wn.2d 835, 935 P.2d 611 (1997). In *Dietz,* the trial court did not address the question of whether the defendant was the attorney's client; "the trial court assumed it, and made no explicit findings of fact or conclusions of law... regarding the existence of an attorney-client relationship" between the defendant and the attorney. *Dietz v. Doe*, 131 Wn.2d at 844. Additionally, and like the facts in this case, "the Court of Appeals did not address the question" of whether the defendant (Doe) was the attorney's

client. *Id.* Therefore, and again like the situation in *Dietz*, the existence of an attorney-client relationship in this case is an unresolved issue. *Id.*

Under the court's decision in *Dietz*, it is Hofferbert's burden to make a factual showing to support the existence of an attorney-client relationship. *Dietz v. Doe*, 131 Wn.2d at 844. There are no facts in the record to support a finding that Hofferbert is defense counsel's client. All we have on the record is defense counsel's word for the existence of a relationship. See *Dietz v. Doe*, 131 Wn.2d at 844. Opening Br. of Appellant at 2; CP 983-84, 1036.

In this case, the trier of fact on the issue of the existence of an attorney-client relationship between the insured and defense counsel may not simply accept defense counsel's legal conclusion that the insured is his client. The trial court needed the facts of what actually occurred between the insured and defense counsel to decide the legal question of whether the insured is defense counsel's client. See *Dietz v. Doe*, 131 Wn.2d at 845.

The question of whether an attorney-client relationship exists is a question of fact. *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). The foundation of an attorney-client relationship is whether the attorney's advice or assistance was sought and received. *Id.* The relationship may be implied from the parties' conduct and need not be formalized in a written contract. *Id.* The existence of an attorney-client relationship depends largely on the clients' subjective belief, but this belief must be reasonably

formed based on attending circumstances, including the attorney's words and actions. *Id.*

Since there has been no contact between Hofferbert and defense counsel, her subjective belief that an attorney-client relationship exists is not applicable, so whether such a relationship exists may be implied from the parties' conduct, which includes the attorney's words or actions. *Bohn v. Cody*, 119 Wn.2d at 363.

As Kruger-Willis argued to the Court, defense counsel's words and actions are inconsistent with the formation of an attorney-client relationship between defense counsel and Hofferbert. Opening Br. of Appellant at 3-4, 46-50; RP 7-9, 48, 54-55; CP 745, 890-91, 978, 1013-14, 1016.

Based upon what actually occurred between Hofferbert and defense counsel, which is no contact whatsoever between Hofferbert and defense counsel, there is an absence of any competent evidence to support the existence of an attorney-client relationship. See *Dietz v. Doe*, 131 Wn.2d at 845. An attorney-client relationship simply does not exist between defense counsel and Hofferbert because she did not seek advice from defense counsel and she did not receive advice from defense counsel in that there has been no contact or communication whatsoever between her and defense counsel. See *Bohn v. Cody*, 119 Wn.2d at 363.

2. DUTY TO DEFEND

The Court held that "GEICO had a contractual, legal duty to defend Hofferbert against Kruger-Willis's lawsuit." Opinion at 6. Otherwise, GEICO "would be subject to liability for breach of contract, bad faith, and violation of the CPA" if it failed to defend Hofferbert. *Id.*

In support of its holding that "when an insurer has a contractual obligation to defend its insured, that insurer has the implied right to authorize defense counsel to represent its insured even in the absence of the insured's express authority[,]"[1] the Court relies on the insurer's contractual duty to defend the insured in *Nat'l Sur. Corp. v. Immunex Corp.,* 176 Wn.2d 872, 297 P.3d 688 (2013); *Woo v. Fireman's Fund Ins. Co.,* 161 Wn.2d 43, 164 P.3d 454 (2007); *Tank v. State Farm Fire & Cas. Co.,* 105 Wn.2d 381, 715 P.2d 1133 (1986); and *United Servs. Auto. Ass'n v. Speed,* 179 Wn. App. 184, 317 P.3d 532 (2014).

The facts in this case, however, are distinguishable from all of the foregoing cases in that where the issue regarding an insurer's duty to defend is addressed in the cases cited by the Court, there had been actual contact between the insured and the insurer, either by tender of the defense of a lawsuit by the insured to the insurer or by a request for coverage of an incident by the insured to the insurer. In this case, there has been no

[1] Opinion at 5-6.

contact whatsoever between the insured and the insurer or between the insured and defense counsel.

In *Nat'l Sur. Corp. v. Immunex Corp.,* the insured (Immunex) notified its insurer (National Security) that it was the subject of state and federal investigations. *Nat'l Sur. Corp. v. Immunex Corp.,* 176 Wn.2d at 875. The insurer acknowledged the notice and requested copies of any complaints the insured may receive. *Id.* Thereafter, the insured tendered the defense of a number of lawsuits to the insured and in response, the insurer issued a reservation of rights letter to its insured.

In *Woo v. Fireman's Fund Ins. Co.,* the insured (Woo) was sued for a practical joke he performed on an employee while he performed a dental procedure on the employee. *Woo v. Fireman's Fund Ins. Co.,* 161 Wn.2d at 48. The insured tendered the defense to his insurer (Fireman's Fund), which refused to defend the insured.

In *Tank v. State Farm Fire & Cas. Co.,* the insured (Tank) was sued for assault. *Tank v. State Farm Fire & Cas. Co.,* 105 Wn.2d at 384. Tank tendered the defense to his insurer (State Farm) through a personal attorney he retained. *Id.* State Farm accepted the defense under a reservation of rights. *Id.* The insurer-retained defense counsel "maintained contact with the insured, the insured's personal attorney, and the insurer, providing a written evaluation of the case to all parties prior to trial." *Id.*

In *United Servs. Auto. Ass'n v. Speed,* the insured (Geyer) notified his insurer (USAA) of an altercation he was involved in with Speed (assignee of the insured). *United Servs. Auto. Ass'n v. Speed,* 179 Wn. App. at 189. The insured requested coverage under both his homeowners and auto policies. *Id.* at 190. The insurer informed the insured in a letter that it was investigating the incident under a reservation of rights. *Id.*

All of the aforementioned cases relied upon by the Court in support of its holding that "when an insurer has a contractual obligation to defend its insured, that insurer has the implied right to authorize defense counsel to represent its insured even in the absence of the insured's express authority"[2] involve situations where the insurer acted under a reservation of rights.[3] While this case does not involve a reservation of rights by GEICO, since the line of cases cited by the Court in its opinion with respect to this issue occur in the context of a reservation of rights,[4] the Court overlooked the Washington State Supreme Court's decision in *Tank v. State Farm.*

In Washington, the seminal case that defines the ethical obligations of an insurance defense counsel is *Tank v. State Farm.* In *Tank*, the Washington State Supreme Court held that:

[2] Opinion at 5-6.
[3] With the exception of *Woo v. Fireman's Fund Ins. Co.* where the insurer refused to defend the insured after the insured tendered defense of the suit to the insurer.
[4] Although most standard liability insurance policies impose upon the insurer the duty to defend. *United Services Automobile Ass'n v. Speed,* 179 Wn. App. at 194.

> First, it is evident that such attorneys owe a duty of loyalty to their clients. Rules of Professional Conduct 5.4(c) prohibits a lawyer, employed by a party to represent a third party, from allowing the employer to influence his or her professional judgment. In a reservation-of-rights defense, RPC 5.4(c) demands that counsel understand that he or she represents only the insured, not the company. As stated by the court in *Van Dyke v. White*, 55 Wash.2d 601, 613, 349 P.2d 430 (1960), "[t]he standards of the legal profession require undeviating fidelity of the lawyer to his client. No exceptions can be tolerated."
>
> Second, defense counsel owes a duty of full and ongoing disclosure to the insured. This duty of disclosure has three aspects. First, potential conflicts of interest between insurer and insured must be fully disclosed and resolved in favor of the insured. The dictates of RPC 1.7, which address conflicts of interest such as this, must be strictly followed. Second, all information relevant to the insured's defense, including a realistic and periodic assessment of the insured's chances to win or lose the pending lawsuit, *must be communicated to the insured* (emphasis added). Finally, all offers of settlement must be disclosed to the insured as those offers are presented. In a reservation-of-rights defense, it is the insured who may pay any judgment or settlement. Therefore, it is the insured who must make the ultimate choice regarding settlement. In order to make an informed decision in this regard, the insured must be fully apprised of all activity involving settlement, whether the settlement offers or rejections come from the injured party or the insurance company.

Tank v. State Farm Fire & Cas. Co., 105 Wn.2d at 388-89.

Applying the first prong of the ethical obligations of an insurance defense counsel from *Tank* to the facts of this case, Kruger-Willis has consistently argued that defense counsel's conduct demonstrates that defense counsel represents GEICO and not Hofferbert. Opening Br. of Appellant at 1, 46 fn 17, 18, 47-48.

With respect to *Tank's* second prong of the ethical obligations of an insurance defense counsel, there has been no full and ongoing

disclosure to Hofferbert because defense counsel has had no contact whatsoever with her. Defense counsel did not communicate to Hofferbert any potential conflict of interest between defense counsel's representation of its insured, Derek Lebeda, and Hofferbert, a beneficiary under Lebeda's insurance contract;[5] defense counsel did not disclose to Hofferbert all information relevant to her defense; and defense counsel did not disclose to Hofferbert all offers of settlement. Opening Br. of Appellant at 7-8, CP 845-46, 906-08.

3. GEICO'S INTERESTS

The Court's reasoning that "if GEICO failed to defend Hofferbert, it would be subject to liability for breach of contract, bad faith, and violation of the CPA"[6] is contrary to the Supreme Court's holding in *Tank* in that it puts GEICO's interests in protecting itself from the foregoing potential claims by its insured above its duty to fully inform Hofferbert "of all developments relevant to [her] policy coverage and *progress of [her] lawsuit*" by defending this case without any contact whatsoever with her (emphasis added). *Tank v. State Farm,* 105 Wn.2d at 388. An important provision relevant to coverage under the terms of GEICO's policy is that it cannot be sued unless the insured has fully complied with all the policy terms, which include notice and *cooperation* from the insured (emphasis). CP 26-28.

[5] Representation of multiple clients under RPC 1.7.
[6] Opinion at 7.

With respect to informing the insured regarding the progress of his or her lawsuit, the Washington State Supreme Court holds that:

> [T]he [insurance] company has the responsibility for fully informing the insured not only of the reservation-of-rights defense itself, *but of all developments relevant to his policy coverage and the progress of his lawsuit*. Information regarding progress of the lawsuit includes disclosure of all settlement offers made by the company (emphasis added).

Tank v. State Farm, 105 Wn.2d at 388.

In this case, GEICO failed to disclose to Hofferbert the progress of her lawsuit and all settlement offers made by it to Kruger-Willis because there has been no contact between GEICO and Hofferbert. Opening Br. of Appellant at 7-8, CP 845-46, 906-08.

Additionally, the Court criticized Kruger-Willis's position with respect to the insurer or defense counsel's inability to make contact with the insured:

> [I]f the insurer or defense counsel could not contact the insured to obtain express authority to represent him or her, the insurer and defense counsel would not even be able to file a notice of appearance and would be forced to allow a default judgment to be entered against the insured.

Opinion at 8.

Kruger-Willis's response to the aforementioned criticism is that her position was based upon the WSBA's Advisory Opinion 928 (1985) (insurance defense attorney had no contact with client; thus, no authority to act as lawyer for client). Opening Br. of Appellant at 24; CP 738. Kruger-Willis focused on the WSBA's position with regard to the

authority of an insurance defense attorney and when such authority is triggered, which, according to WSBA's Advisory Opinion 928, is when there has been contact between defense counsel and the *client*.

In its opinion, the Court reasoned that without contact with the insured, "the insurer and the defense counsel would not even be able to file a notice of appearance and would be forced to allow a default judgment to be entered against the insured."[7] Opinion at 8. However, the Court failed to consider that a default judgment against the insured is not the only remedy available when there has been no contact with an insured:

> If the insurer is uncertain of its duty to defend, it may defend under a reservation of rights and seek a declaratory judgment that it has no duty to defend. *Truck Ins.*, 147 Wash.2d at 761, 58 P.3d 276 (citing *Grange Ins. Co. v. Brosseau*, 113 Wash.2d 91, 93-94, 776 P.2d 123 (1989)).

Woo v. Fireman's Fund Ins. Co., 161 Wn.2d at 54; see also *Nat'l Sur. Corp. v. Immunex Corp.,* 176 Wn.2d at 879.

The same principle from *Woo* and *Immunex* can be found in a long-standing Washington state case regarding the duties of a liability insurer. In *Van Dyke,* 55 Wn.2d 601, 349 P.2d 430 (1960), the insured breached the cooperation clause under the terms of the insurance policy. *Van Dyke v. White*, 55 Wn.2d at 604. The court found that there was no evidence that after discovering that the insured declined to cooperate under the terms of the policy, the insurer notified the insured that it would

[7] It is defense counsel and not the insurance company who would file a notice of appearance on behalf of the insured.

continue to defend the action under a reservation of rights because of the insured's breach of the cooperation clause. *Id.* at 607-08. Since the court found no evidence that the insurer informed the insured that it would continue to defend the action under a reservation of rights, the insurer was estopped from denying liability for the insured's breach of the cooperation clause. *Id.* at 608-09.

The GEICO policy in this case is similar to the insurance policy in *Van Dyke v. White*. GEICO's policy contains the standard provisions requiring notice to the company as soon as possible after an accident; cooperation with the insurer in the defense of all actions; and a provision requiring the insurer to defend any suit for damages. CP 24, 26-28. Additionally, GEICO's policy expressly bars action against it "unless the insured has fully complied with all the policy terms." CP 28.

When an insurer or its defense counsel is unable to contact the insured regarding defense of the case against him or her, there are provisions that exist in current law to prevent a default judgment from being entered against the insured while also protecting the insurer from liability for breach of contract, bad faith, and violation of the CPA. See Opinion at 7. Based upon the Washington State Supreme Court's decisions in *Woo,* in *Immunex,* and in *Van Dyke*, there was no need for the Court to carve out a public policy exception to the "client" requirement

found in RPC 1.2, RPC 1.2(f), RCW 2.44, and in *Tank v. State Farm.* ("Under RPC 1.2(f), defense counsel retained by an insurer is authorized by contract law to represent that 'insured's insured").[8]

Under existing law, the insurer or defense counsel could first defend under a reservation of rights by serving the insured with a notice of its reservation of rights due to the insured's breach of the cooperation clause under the terms of the policy. See *Van Dyke v. White*, 55 Wn.2d at 604. "[W]hen the insured cannot be located, is uncooperative, or temporarily unavailable[,][9] then the insurer may defend under a reservation of rights and seek a declaratory judgment that it has no duty to defend. See *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d at 54; see also *Nat'l Sur. Corp. v. Immunex Corp.,* 176 Wn.2d at 879.

Or, the insurer may do what GEICO did in this case – place a provision in the insurance policy that it cannot be sued unless the insured has fully complied with all the policy terms, which include notice and cooperation from the insured. CP 26-28. Interpretation of an insurance policy is a question of law and "[w]here the language in a contract for insurance is clear and unambiguous, the court should enforce the policy as

[8] Opinion at 8. Which raises the question whether a court has the authority to modify and/or amend the Rules of Professional Conduct's Allocation of Authority Between "Client" and Lawyer to Allocation of Authority Between "Insured's Insured" and Lawyer. Revisions and amendments to the Rules of Professional Conduct are submitted to the Washington State Supreme Court and it is that court that approves proposed amendments for publication. *See In re Disciplinary Proceeding Against Greenlee*, 158 Wn.2d 259, 268, 143 P.3d 807 (2006).

[9] Opinion at 8.

written." *Matthews v. Penn-America Ins. Co.*, 106 Wn. App. 745, 747-48, 25 P.3d 451 (2001). GEICO's provision in its policy that it cannot be sued unless the insured has fully complied with all policy terms is clear and unambiguous. Opening Br. of Appellant at 20.

B. FAIR HEARING

In the unpublished part of its opinion, the Court held that Kruger-Willis was not denied the right to a fair hearing by the trial court because "it never intended for the payee to be anyone other than Hofferbert." Opinion at 10. The Court either misapprehended or overlooked Kruger-Willis's argument regarding the payee.

Due to defense counsel's continually changing position as to whether Hoffenburg, GEICO, or Mary E. Owen & Associates was the party entitled to the award of costs and fees under RCW 4.84.250, and due to the misconduct of defense counsel on June 3, 2013, when he improperly added Mary E. Owen & Associates as a judgment creditor to a judgment order he presented to the trial court for its signature, defense counsel was successful in obtaining a written ruling from the trial court which modified its order of June 27, 2011, changing the payee from Hofferbert to Mary E. Owen & Associates.[10] Opening Br. of Appellant at 50; CP 67, 656-58, 987, 1016-17; RP 56-59.

[10] Despite its oral ruling on May 17, 2013, denying defense counsel's motion to change the payee from Hofferbert to GEICO and then to Mary E. Owen & Associates. Opening Br. of Appellant at 4, 9-10; CP 67, 977-78, 1000, 1016-17.

In an October 21, 2013, letter to the parties, the trial court held that "Plaintiff shall make payment to Defendant's Counsel, Mary E. Owen & Associates, a check in the amount of $11,490.00 not later than 14 days from the date of this order. Opening Br. of Appellant at 12, 50; CP 656-58.

As a result, for nearly three years, Kruger-Willis vigorously disputed that Mary E. Owen & Associates was entitled to the prevailing party costs and fees under the trial court's order of June 27, 2011. Opening Br. of Appellant at 51; CP 986. Then, on February 1, 2016, the trial court found that its order of June 27, 2011, contained a "scrivener's error" where it stated that payment shall be made to "Defendant's counsel, Mary E. Owen & Associates." Opening Br. of Appellant at 51; CP 986; RP 61. During that period, interest accrued to Kruger-Willis's detriment[11] while she disputed the trial court's ruling in its October 21, 2013, letter awarding Mary E. Owens & Associates the prevailing party costs and fees which it later attributed to a "scrivener's error." Opening Br. of Appellant at 51; CP 986.

C. PUBLIC POLICY INTERESTS OF INSURANCE

In its opinion, the Court noted that "insurance contracts are imbued with public policy." Opinion at 8. In *Tank v. State Farm,* the court acknowledged that "the duty of good faith has been imposed on the insurance industry in this state by a long line of judicial decisions." *Tank*

[11] Addressed further in Section C of this brief.

v. State Farm, 105 Wn.2d at 386. The court further noted that not "only have courts imposed on insurers a duty of good faith, the Legislature has imposed it as well"[12] under RCW 48.01.030, which provides:

> The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

Based upon the foregoing legislative declaration, the insurer-retained defense counsel has a statutory duty to abstain from deception and to practice honesty in all insurance matters. Defense counsel violated his duty under the insurance code[13] in the following material ways:

1. Defense counsel actively deceived Kruger-Willis and her counsel that he was in contact with Hofferbert for several years into this case when he never had contact with her and he did not know her location.[14] Opening Br. of Appellant at 40; CP 400-07, 453.

2. Defense counsel conceded liability only when Kruger-Willis notified him that she intended to call Hofferbert at trial. Even after he conceded liability, defense counsel moved for a directed verdict at trial on the basis that Kruger-Willis could not prove liability, which forced Kruger-Willis's counsel to scramble and to have Kruger-Willis rush to court for less than five minutes of testimony regarding liability. Opening Br. of Appellant at 40; CP 417, 454; RP 80.

3. When Kruger-Willis argued to the trial court and to the Court in the first appeal that defense counsel was defending this case on behalf of GEICO and not on behalf of Hofferbert, defense counsel consistently denied the claim, knowing full well he never had contact with Hofferbert. Opening Br. of Appellant at 2, 40; CP 420, 455, 778.

[12] *Tank v. State Farm* at 386.
[13] As well as the Rules of Professional Conduct.
[14] From June 14, 2010, to August 9, 2013.

4. When defense counsel could not negotiate payment of the court-awarded fees and costs to Hofferbert under RCW 4.84.250, he finally concede that Hofferbert "had never been involved in defense of the case against her;" that he never had contact with her; and that in the absence of contact with Hofferbert, he defended the case under the duty to defend provision of the insurance policy.[15] By this time, the parties had already engaged in pre-trial proceedings, discovery, deposition, arbitration, a trial de novo, post-trial proceedings, and an appeal. Opening Br. of Appellant at 3, 8-11; CP 890-91.

5. Defense counsel abused the legal process by continually advancing conflicting arguments as to which party he considered the prevailing party entitled to costs and fees. Prior to the first appeal, the prevailing party was Hofferbert. Post-mandate from the first appeal, the prevailing party was GEICO. When the trial court would not enter judgment for GEICO, the prevailing party became the law firms that purportedly represented Hofferbert. Opening Br. of Appellant at 2-4.

6. The trial court heard defense counsel's motion to enter judgment for GEICO on May 17, 2013. During the hearing, the trial court remarked that "information subsequent to that tells me that...payment wasn't made." Defense counsel intentionally failed to inform the trial court that payment in the amount of $11,490.00 had indeed been tendered to him 71 days before the hearing date. Opening Br. of Appellant at 10; CP 977, 1016.

7. During the May 17, 2013, hearing, the trial court would not enter judgment for GEICO or for Mary E. Owen & Associates as defense counsel requested. The trial court ruled that judgment would be in favor of only Hoffenburg and the attorney for the judgment creditor would be the Mary E. Owens law firm. The trial court then continued the matter to June 3, 2013, for presentation of the judgment. The judgment presented to the trial court for its signature on June 3, 2013, by defense counsel (which he believed was going to be presented *ex parte*), failed to comply with the trial court's oral rulings from the May 17, 2013, hearing. On defense counsel's renewed judgment order, which he pre-signed, he listed the judgment creditor(s) as "Heather Hoffenburg *and* her attorneys Mary E. Owen & Associates (emphasis added)" instead of Heather Hoffenburg as the trial court had ruled. For the attorney for the judgment creditor, he listed his name instead of the "Mary E. Owens law firm" as the trial court had ruled. Opening Br. of Appellant at 4, 9-10; CP 67, 977-78, 1000, 1016-17.

[15] The first time he asserted the defense after defending the case for four years.

8. During the June 3, 2013, judgment presentation, defense counsel misrepresented to the trial court and to Kruger-Willis's counsel that the only change he made to the renewed judgment order from the May 17, 2013, hearing was to its format instead of the addition of Mary E. Owen & Associates as a judgment debtor, contrary to the trial court's previous ruling, by stating:

> This [motion hearing] was set following the motion hearing which was held the 17th of May where I appeared live before you [the trial court] and you had essentially stated that you had no problem signing the order given that it was affirmed by the Court of Appeals, but it was in the wrong format at the time and it wasn't – didn't have a judgment summary on the top as is required. So, I reformatted things such that it would comply with a judgment, and so the Court then set it for today's presentation, which originally I thought was going to be just done *ex parte*.

Opening Br. of Appellant at 4-5; CP 987-88, 1000.

9. Defense counsel argued to the trial court during Kruger-Willis's initial motion under RCW 2.44.030 that he was diligent in his efforts to accomplish communication with "that person" (his client, Hofferbert) lacked candor. As Kruger-Willis provided to the trial court in various pleadings, Hofferbert had numerous court activities in Mason County during the pendency of this case. Opening Br. of Appellant at 41; CP 423-25, 455-56.

This case is not a matter where Kruger-Willis "rolled the dice" in an attempt to better her position at trial over the offer of judgment extended to her by defense counsel, only to complain later to the courts when the trial de novo resulted in a defense verdict and the trial court awarded prevailing party fees under RCW 4.84.250. As stated above, there is substantial evidence in the record to show that defense counsel was deceptive and dishonest with the courts and with the opposing party regarding the nature of his representation of Hofferbert.

Moreover, this case is not a matter where Kruger-Willis seeks to "shirk" her obligation under the trial court's order with respect to the award of prevailing party fees and costs under RCW 4.84.250. After the Court issued its opinion in the first appeal, defense counsel made demand for payment in the amount of $11,490.00, stating that the check should be made payable to GEICO. Opening Br. of Appellant at 9; CP 734-35, 742. A check was promptly tendered to Mary E. Owen & Associates made payable to the prevailing party in this case, Heather Hofferbert, in the full amount of $11,490.00 demanded in writing by defense counsel. Opening Br. of Appellant at 9; CP 731-33, 742; RP 53. Defense counsel received payment on March 8, 2013. CP 883-885.

Kruger-Willis argued to the Court that due to defense counsel's continually changing position as to whether Hoffenburg, GEICO, or Mary E. Owen & Associates was the party entitled to the award of costs and fees under RCW 4.84.250, and due to the misconduct of defense counsel on June 3, 2013, when he improperly added Mary E. Owen & Associates as a judgment creditor to a judgment order he presented to the trial court for its signature, defense counsel was successful in obtaining a written ruling from the trial court which modified its order of June 27, 2011, changing the payee from Hofferbert to Mary E. Owen & Associates.[16] Opening Br.

[16] Despite its oral ruling on May 17, 2013, denying defense counsel's motion to change the payee from Hofferbert to GEICO and then to Mary E. Owen & Associates. Opening Br. of Appellant at 4, 9-10; CP 67, 977-78, 1000, 1016-17.

of Appellant at 50; CP 67, 656-58, 987, 1016-17; RP 56-59. Based on the foregoing, Kruger-Willis argued to the Court that during the nearly three year period she disputed the trial court's modification of its order, interest accrued to her detriment. Opening Br. of Appellant at 51; CP 986.

In response, the Court noted that Kruger-Willis could have filed a bond supersedeas. Opinion at 11. However, defense counsel was in possession of a check in the amount of $11,490.00 made payable to Hofferbert since March 8, 2013. CP 883-885. It was not until August 9, 2013, that defense counsel finally conceded he was not able to negotiate the check because he never had contact with Hofferbert. Opening Br. of Appellant at 11; CP 583. Defense counsel never returned the check and he indicated that he was actively searching for Hofferbert to have her sign the appropriate documents so that Kruger-Willis could satisfy the trial court's order of June 27, 2011.

While it is commendable that in its holding, the Court seeks to prevent harm to the insured,[17] the Court should also have an equal interest in ensuring that an insurance defense counsel abide by his or her statutory duties under RCW 48.01.030 to abstain from deception and to practice honesty and equity in all insurance matters. All of Kruger-Willis's claims of misconduct against defense counsel are not merely allegations; they are supported by the record.

[17] Opinion at 8.

The Court correctly noted that Kruger-Willis admitted that this lawsuit began as a "straight-forward, low-value vehicle property damage claim." Opinion at 11. Where this case derailed into the "twilight zone"[18] of litigation was on March 8, 2013, when defense counsel received a check for the prevailing party attorney fees and costs and discovered that he could not negotiate the check because he never had contact with Hofferbert.[19] As a result, litigation was prolonged when defense counsel attempted to bypass the settled matter from the first appeal that Hofferbert was the prevailing party under the provisions of RCW 4.84.250 by abusing the legal process to change the payee from Hofferbert, to GEICO, to Mary E. Owen & Associates, to Hofferbert and Mary E. Owen & Associates, to Mary E. Owen & Associates (again), and finally to Lockner & Crowley, Inc., P.S. Opening Br. of Appellant at 56; CP 135, 458.

D. AWARD OF ATTORNEY FEES ON APPEAL

As Kruger-Willis argued in her reply brief, the Court should deny the defense's request for attorney fees under RAP 18.1 and RCW 4.84.250 because it failed to provide argument as to how it is entitled to such fees under the foregoing authorities. See RAP 18.1(b). Reply Br. of Appellant at 23.

[18] Opening Br. of Appellant at 24.

[19] If a dispute existed between the parties regarding payment, it would have been to the amount of accrued interest, which would have been promptly remedied, thereby ending this case in 2013. Opening Br. of Appellant at 53; CP 988, 1002-03.

The Washington State Supreme Court has held RAP 18.1(b) requires "[a]rgument and citation to authority" as necessary to inform the court of grounds for an award, not merely "a bald request for attorney fees." *Hudson v. Hapner*, 170 Wn.2d 22, 33, 239 P.3d 579 (2010) (citing *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.,* 134 Wn.2d 692, 710 n. 4, 952 P.2d 590 (1998)). A party's request for attorney fees and costs must include a separate section in its brief devoted to the fees issue as required by RAP 18.1(b). This requirement is mandatory. *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996). As the defense failed to meet the requirements under RAP 18.1(b), the Court should reconsider its award of attorney fees on appeal.

V. CONCLUSION

For the foregoing reasons, Kruger-Willis respectfully requests that the Court reconsider its opinion in this case.

RESPECTFULLY submitted this 30th day of March, 2017.

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CERTIFICATE OF SERVICE

I certify that on March 30, 2017, I caused a true and correct copy of Appellant's Motion for Reconsideration to be served on the following by U.S. Mail, postage prepaid, and by email to:

Counsel for Respondent:

Paul L. Crowley
Lockner & Crowley, Inc., P.S.
524 Tacoma Avenue South
Tacoma, WA 98402

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

/s/ Alana K. Bullis
Alana K. Bullis

Filed
Washington State
Court of Appeals
Division Two

March 28, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TORI KRUGER-WILLIS, Appellant, v. HEATHER HOFFENBURG and JOHN DOE HOFFENBURG, Respondents.	No. 48375-1-II PART PUBLISHED OPINION

SUTTON, J. — This is the third time this case is before us on appeal. This appeal addresses whether defense counsel for Heather Hofferbert[1] had authority to appear and act on her behalf regarding a vehicle damage claim filed against her by Tori Kruger-Willis. Kruger-Willis appeals the trial court's decision denying her RCW 2.44.030 motion and ruling that defense counsel had the authority to represent Hofferbert, entering judgment against Kruger-Willis, and denying her motion to reconsider. In the published portion of this opinion, we hold that the trial court did not err in holding that defense counsel had authority to represent Hofferbert, and we affirm the trial court's decision. In the unpublished portion, we hold that the trial court did not err in its entry of judgment and affirming its order. We also hold that Kruger-Willis was not denied the right to a fair hearing and that Hofferbert is entitled to attorney fees as the prevailing party in this appeal.

[1] Respondent spells her name "Hofferbert," although it is spelled incorrectly as "Hoffenburg" throughout the record and in prior opinions. Br. of App. at 1 n.1

FACTS

This action arose out of a motor vehicle collision that occurred in 2008. Hofferbert drove a truck that struck and damaged Kruger-Willis's parked vehicle. GEICO, Hofferbert's insurance company, paid to repair Kruger-Willis's vehicle. Kruger-Willis then sued Hofferbert to recover the diminished value of her repaired vehicle. GEICO hired defense counsel and paid the costs of Hofferbert's defense pursuant to its contractual duty to defend her.[2]

The insurance contract required that GEICO "will defend any suit for damages payable under the terms of this policy." Clerk's Papers (CP) at 694. The contract further specified that GEICO will pay "damages which an ***insured*** becomes legally obligated to pay because of . . . [d]amage to or destruction of property," so long as the damage arose from the ownership, maintenance, or use of a covered vehicle. CP at 693-94. The contract defined an "insured" to include "[a]ny other person using the auto with ***your*** permission." CP at 695.

Following a three-day trial, the jury rendered a verdict in Hofferbert's favor.[3] The trial court awarded Hofferbert $11,490 in costs and attorney fees.[4] Kruger-Willis appealed the trial court's award of attorney fees and costs. In an unpublished opinion, we held that Hofferbert had standing to recover fees and costs as the aggrieved party in the underlying action and was the

[2] Although Hofferbert was not the named insured on the insurance contract with GEICO, she is an insured person under the terms of the contract because she drove the insured's vehicle with permission from the named insured.

[3] Prior to trial, GEICO conceded liability and the trial was on damages only.

[4] The trial court awarded Hofferbert costs and reasonable attorney fees because she was the prevailing party under RCW 4.84.250. It is referred to herein as the "2011 order."

prevailing party entitled to fees and costs, regardless of the fact that GEICO was defending her. *Kruger-Willis v. Hoffenburg*, noted at 173 Wn. App. 1024, slip op. at *5 (2013) (*Kruger-Willis* I).

Following our decision, Kruger-Willis's counsel executed a check for $11,490 payable to Hofferbert despite defense counsel's request that the check be made payable to Hofferbert's insurer, GEICO. Defense counsel asked Kruger-Willis's counsel to reissue the check payable to GEICO, but Kruger-Willis's counsel refused because GEICO was not a party to the suit. Defense counsel filed a motion to enforce the trial court's award of costs and attorney fees. In support of his motion, defense counsel stated that Hofferbert had never been involved in the defense of the case against her and that he (defense counsel) worked for GEICO. The trial court granted this motion, but named Hofferbert and not GEICO as the judgment creditor.

Kruger-Willis then filed a motion for defense counsel to produce or prove the authority under which he appeared and to stay all proceedings until such authority was produced or provided. *See* RCW 2.44.030. During argument on this motion, defense counsel admitted that he had "not had contact with the named defendant in this lawsuit." CP at 640. However, defense counsel asserted that he had authority to appear for Hofferbert under the terms of the insurance contract. The trial court denied Kruger-Willis's motion. Kruger-Willis appealed.

In that appeal, we held that where civil defense counsel admitted that he never had any contact with his client, the trial court abused its discretion by denying opposing counsel's motion to require counsel to prove the authority under which he appears. *Kruger-Willis v. Hoffenburg*, noted at 187 Wn. App. 1010, slip op. at *4 (2015) (*Kruger-Willis* II). We reversed and remanded to the trial court to determine whether defense counsel had the authority to appear for Hofferbert in this case. *Kruger-Willis* II, slip op. at *5.

On remand, Kruger-Willis renewed her motion under RCW 2.44.030. After a hearing, the trial court ruled that defense counsel had authority to represent Hofferbert under the omnibus clause in the insurance policy; an omnibus clause was required to be present in the policy under RCW 46.29.490(2)(b); defense counsel did not surrender any of Hofferbert's substantial rights; and Hofferbert ratified defense counsel's actions after the fact. Kruger-Willis moved to reconsider, and the trial court denied the motion. Kruger-Willis appeals the trial court's ruling.

While the second appeal was pending, Hofferbert made a motion in the trial court for a judgment on sum certain based on the trial court's 2011 order. After a hearing, the trial court found that the 2011 order contained a scrivener's error by stating that payment shall be made to Hofferbert's attorney, Mary E. Owen & Associates, rather than to Hofferbert. The trial court also found that Kruger-Willis's tender of the check in 2013, payable to Heather Hofferbert and delivered to Mary E. Owen & Associates, did not constitute an accord and satisfaction. Finally, the trial court held that judgment would be entered in favor of Hofferbert against Kruger-Willis in the amount of $11,490 with interest accruing from the date of the 2011 order. The next day, Kruger-Willis filed a bond supersedeas with the county clerk to cover the judgment and costs on appeal, including interest. Kruger-Willis amended her pending appeal and now also appeals the judgment.

ANALYSIS

I. STANDARDS OF REVIEW

Following a mandate for further proceedings, a trial court must comply with that mandate, and we review the trial court's compliance for an abuse of discretion. *See Bank of Am., N.A. v. Owens*, 177 Wn. App. 181, 189, 311 P.3d 594 (2013). A trial court abuses its discretion when its

decision is manifestly unreasonable or based on untenable grounds or reasons. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 458, 229 P.3d 735 (2010). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

We uphold a trial court's findings of fact if those findings are supported by substantial evidence. *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 555, 132 P.3d 789 (2006). Substantial evidence is that which is sufficient to persuade a fair-minded individual of the truth of the matter asserted. *Hegwine*, 132 Wn. App. at 555-56.

II. AUTHORITY TO APPEAR

Kruger-Willis argues that the trial court erred in finding that GEICO's retained defense counsel had the authority to represent Hofferbert. Kruger-Willis claims that defense counsel lacked the authority to represent Hofferbert because counsel had no contact with her throughout the course of the litigation, and therefore, Hofferbert could not have provided such authority.[5] We hold that when an insurer has a contractual obligation to defend its insured, that insurer has the

[5] Kruger-Willis also argues that GEICO's counsel surrendered a substantial right of Hofferbert by conceding liability. Hofferbert argues that GEICO's counsel's decision to concede liability advanced Hofferbert's interests. We agree with Hofferbert. Kruger-Willis further argues that GEICO's counsel surrendered a substantial right of Hofferbert when Hofferbert was listed as a judgment debtor on the second appeal, as Kruger-Willis was the prevailing party and entitled to attorney fees under RCW 4.84.250. Kruger-Willis does not cite any authority for this argument, so we decline to reach this issue. RAP 10.3(6).

implied right to authorize defense counsel to represent its insured even in the absence of the insured's express authority.

A. DUTY TO DEFEND

GEICO's policy stated, "We will defend any suit for damages payable under the terms of this policy." CP at 694. In Washington, an insurer's contractual duty to defend its insured is extremely broad. *See, e.g., Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 878-79, 297 P.3d 688 (2013). An insurer must defend a lawsuit against its insured not only for claims that are actually covered, but also for claims that are potentially covered. *Immunex*, 176 Wn.2d at 879. An insurer must provide a defense whenever the applicable insurance policy "*conceivably covers*" the allegations in a complaint against the insured. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53, 164 P.3d 454 (2007) (alteration in original). And the duty to defend arises as soon as the complaint is filed. *Immunex*, 176 Wn.2d at 889.

Once the insurer's duty to defend is triggered, the consequences of failing to provide a defense are severe. An insurer that wrongfully breaches its duty to defend is liable for breach of contract, and may also be liable for bad faith and violation of the Consumer Protection Act (CPA).[6] *See Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 394, 715 P.2d 1133 (1986). In addition to being liable for contract damages, the insurer may be estopped from denying coverage for any judgment or settlement. *United Servs. Auto. Ass'n v. Speed*, 179 Wn. App. 184, 203, 317 P.3d 532 (2014).

Here, Hofferbert was entitled to coverage under GEICO's policy because she was driving the insured's vehicle with the named insured's permission. As noted above, GEICO had an

[6] Ch. 19.86 RCW.

obligation to defend Hofferbert for "any suit for damages payable under the terms of this policy." CP at 694. It is undisputed that Kruger-Willis's lawsuit against Hofferbert alleged damages payable under the terms of GEICO's policy. Therefore, GEICO had a contractual, legal duty to defend Hofferbert against Kruger-Willis's lawsuit. And if GEICO failed to defend Hofferbert, it would be subject to liability for breach of contract, bad faith, and violation of the CPA.

B. DEFENSE COUNSEL'S AUTHORITY

To fulfill its duty to defend, an insurer generally has the right to select the defense counsel who will represent its insured. *See Johnson v. Cont'l Cas. Co.*, 57 Wn. App. 359, 362-63, 788 P.2d 598 (1990) (holding that an insurer had no obligation to pay for counsel the insured retained). But the law is clear that the insurer-retained defense counsel's client is the insured, not the insurer. *Tank*, 105 Wn.2d at 388.

The Rules of Professional Conduct (RPC) 1.2(f) provides for an attorney's authorization to represent a client:

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

Here, it is undisputed that Hofferbert did not expressly authorize defense counsel retained by GEICO to represent her. Therefore, Kruger-Willis argues that defense counsel had no authority to represent Hofferbert under RPC 1.2(f).[7]

[7] Kruger-Willis also asserts that our opinion in the second appeal established the law of the case because Kruger-Willis interprets that opinion as holding that the key to authority is some form of communication between attorney and client. In that opinion, we expressly stated that we did not decide the issue of counsel's authority to appear. *Kruger-Willis* II, slip op. at *4.

However, RPC 1.2(f) does not always require express authorization from the client. An attorney can represent a client if authorized "by law." RPC 1.2(f). An insurer necessarily has implicit authority under its contractual duty to defend—to authorize defense counsel to represent its insured. Otherwise, the insurer would have no way of fulfilling its broad duty to defend when the insured cannot be located, is uncooperative, or temporarily unavailable.

Under Kruger-Willis's position, if the insurer or defense counsel could not contact the insured to obtain express authority to represent him or her, the insurer and defense counsel would not even be able to file a notice of appearance and would be forced to allow a default judgment to be entered against the insured. Such a result would be harmful to the insured, the beneficiary of the insurer's contractual duty to defend. In addition, "insurance contracts are imbued with public policy concerns." *Immunex*, 176 Wn.2d at 878. Such a result would be inconsistent with public policy. We hold that under RPC 1.2(f), defense counsel retained by an insurer is authorized by contract law to represent that insurer's insured.[8] Therefore, we hold that the trial court did not err in holding that defense counsel had authority to represent Hofferbert, and we affirm the trial court's decision.

A majority of the panel having determined that only the foregoing portion of this opinion will be published in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

[8] Here, there was no indication that Hofferbert objected to defense counsel's representation of her. We do not address the situation where the insured objects to the representation of insurer-retained counsel or expressly withdraws defense counsel's authority.

III. ENTRY OF JUDGMENT

Kruger-Willis argues that it was error to grant defense's motion for entry of judgment when defense counsel never considered Hofferbert to be the prevailing party under RCW 4.84.250. Kruger-Willis also argues that the trial court erred by granting relief in its 2011 order that Hofferbert did not request.

RCW 4.84.250 provides,

> [I]n any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is [$10,000] or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees.

We decided this issue in the first appeal:

> The fact that GEICO is defending [Hofferbert] does not render the insurance company a party or somehow diminish [Hofferbert]'s standing as either the aggrieved party in the underlying action or the prevailing party entitled to fees and costs under RCW 4.84.250.

Kruger-Willis I, slip op at *3. Thus, Hofferbert is the prevailing party under RCW 4.84.250, and therefore, is entitled to an entry of judgment for attorney fees and costs.

Hofferbert moved the court to order an entry of judgment based on the trial court's 2011 order that granted costs, attorney fees, and interest at 12 percent per year to Hofferbert as the prevailing party. The trial court entered judgment in favor of Hofferbert against Kruger-Willis in the amount of $11,490 with interest accruing from the date of the 2011 order. Accordingly, the trial court's ruling is not inconsistent with Hofferbert's request for relief. Therefore, we hold that the trial could did not err in its entry of judgment.

IV. Right To a Fair Hearing

Kruger-Willis also argues that she was denied a fair, impartial, or neutral proceeding due to the trial court's errors and the misconduct of opposing counsel. Specifically, Kruger-Willis argues that the trial court's finding, that the 2011 order contained a scrivener's error as to the payee of judgment, resulted in a financial detriment to Kruger-Willis in interest and attorney fees over the three years that Kruger-Willis disputed this designation of payee; she also argues that the trial court's finding of fact is not supported by the record. Kruger-Willis also notes the trial court's extended proceedings.

The trial court is presumed to perform its functions regularly and properly without bias or prejudice. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841, 14 P.3d 877 (2000). A judicial proceeding is valid only if it has an appearance of impartiality, that is, that a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995). A violation of the appearance of fairness doctrine requires evidence of a judge's actual or potential bias. *State v. Carter*, 77 Wn. App. 8, 11, 888 P.2d 1230 (1995).

Here, Kruger-Willis fails to provide evidence of the trial judge's actual or potential bias. By Kruger-Willis's own admission, the trial court never intended for the payee to be anyone other than Hofferbert. Therefore, the trial court's finding that the payee on its 2011 order was a scrivener's error is supported by substantial evidence.

Kruger-Willis argues that the procedural history in this case is "long and convoluted because the [defense attorneys] never communicated with [Hofferbert]" and "the trial court prolonged the litigation," but Kruger-Willis admits that the lawsuit was a "straight-forward, low-value vehicle property damage claim." Br. of Appellant at 1. Had she filed a bond supersedeas in 2011 (as she did five years later prior to this appeal) and payable according to the trial court's order, she would have met accord and satisfaction.

Therefore, we hold that Kruger-Willis was not denied the right to a fair hearing because the alleged errors and misconduct by the trial court are unfounded.

ATTORNEY FEES

Kruger-Willis requests attorney fees on appeal under RCW 2.44.020, which provides:

> If it be alleged by a party for whom an attorney appears, that he or she does so without authority, the court may, at any stage of the proceedings, relieve the party for whom the attorney has assumed to appear from the consequences of his or her act; it may also summarily, upon motion, compel the attorney to repair the injury to either party consequent upon his or her assumption of authority.

Here, Kruger-Willis is not successful in her challenge of authority; as such, she is not entitled to attorney fees.

Hofferbert also requests attorney fees under RCW 4.84.250 and RAP 18.1. As provided above, we have already decided that Hofferbert is entitled to attorney fees under RCW 4.84.250. Therefore, Hofferbert is entitled to attorney fees as the prevailing party in this appeal.

CONCLUSION

We hold that the trial court did not err in its entry of judgment and Kruger-Willis was not denied the right to a fair hearing. Finally, we hold that Hofferbert is entitled to attorney fees as the prevailing party in this appeal.

Sutton, J.
SUTTON, J.

We concur:

Worswick, J.
WORSWICK, J.

Maxa, A.C.J.
MAXA, A.C.J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TORI A. KRUGER-WILLIS, individually and on behalf of her marital community, Appellant, v. HEATHER HOFFENBURG and JOHN DOE HOFFENBURG, and the marital community comprised thereof, Respondents, DEREK S. LEBEDA and JANE DOE LEBEDA, and the marital community comprised thereof, Defendants.	No. 42417-7-II UNPUBLISHED OPINION

QUINN-BRINTNALL, J. — Tori Kruger-Willis appeals the trial court's award of attorney fees and costs following a trial de novo, arguing that Heather Hoffenburg's motion for fees and costs was untimely, that Hoffenburg's insurance company lacked standing to request fees and costs, and that the trial court erred in awarding fees incurred before Hoffenburg requested the trial de novo. Finding no error, we affirm.

FACTS

This action arises out of a motor vehicle collision that occurred on February 21, 2008. Hoffenburg was driving a truck that struck and damaged Kruger-Willis's parked vehicle. GEICO, Hoffenburg's insurance company, paid to repair Kruger-Willis's vehicle. Kruger-Willis then sued Hoffenburg to recover the diminished value of her repaired vehicle. Counsel for GEICO represented Hoffenburg throughout the proceedings that followed.

Kruger-Willis responded to Hoffenburg's request for a statement of damages by listing her damages as $6,353. The case proceeded to mandatory arbitration, and the arbitrator made an award of $5,044 in favor of Kruger-Willis. Hoffenburg filed a request for a trial de novo and a demand for a jury trial. She then provided Kruger-Willis with an offer of judgment for $1,000 that Kruger-Willis declined. On April 28, 2011, following a three-day trial, the jury rendered a zero dollar verdict in Hoffenburg's favor.

On May 27, 2011, Hoffenburg moved for statutory costs and reasonable attorney fees. At the June 6 hearing, and upon Hoffenburg's further motion, the trial court entered judgment upon the jury's verdict in her favor and set the matter over for further detail regarding her request for attorney fees.

On June 16, Hoffenburg filed a second motion for costs and attorney fees. At the June 27 hearing on that motion, the trial court awarded her $11,490 in costs and fees. This amount included $500 in costs, which included the jury demand and trial de novo filing fees, and $10,990 in attorney fees based on 62.8 hours multiplied by a rate of $175 per hour.

Kruger-Willis appeals this award.

DISCUSSION

We review de novo a trial court's determination as to whether a particular statutory or contractual provision authorizes an award of attorney fees. *Gray v. Pierce County Housing Auth.*, 123 Wn. App. 744, 760, 97 P.3d 26 (2004). Hoffenburg sought attorney fees under RCW 4.84.250 and RCW 4.84.270 and costs under RCW 4.84.010. RCW 4.84.250 provides,

> [I]n any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is [$10,000] or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees.

The plaintiff is the prevailing party if the plaintiff's recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff. RCW 4.84.260. The defendant is the prevailing party if the recovery is as much or less than the amount offered in settlement by the defendant. RCW 4.84.270. The prevailing party may recover filing fees under RCW 4.84.010(1).

TIMELINESS

Kruger-Willis argues initially that Hoffenburg's motion for fees and costs pursuant to these statutes was untimely because it followed an untimely presentation of the judgment. Kruger-Willis contends that under CR 54(e), Hoffenburg's attorney was required to present a proposed form or order of judgment no later than 15 days after the entry of the verdict. The pertinent provision of the rule provides,

> The attorney of record for the prevailing party shall prepare and present a proposed form of order or judgment not later than 15 days after the entry of the verdict or decision, or at any other time as the court may direct.

CR 54(e). While acknowledging that this provision grants a trial court discretion to enlarge the 15-day time period, Kruger-Willis contends that the court's discretion is limited by the following provisions of CR 6(b):

> **Enlargement**. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion, (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or, (2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under rules 50(b), 52(b), 59(b), 59(d), and 60(b).

Kruger-Willis cites no authority for her assertion that a trial court may exercise its discretion to direct entry of judgment under CR 54(e) "at any other time" only where the prevailing party's failure to act within 15 days of the verdict is the result of excusable neglect, and we reject this reading of the rules. CR 54(e) expressly grants trial courts the discretion to extend the 15-day period for presenting a proposed judgment, and that discretion is not limited by the conditions on time enlargement in CR 6(b). *See State v. Kone*, 165 Wn. App. 420, 435, 266 P.3d 916 (2011) (where a court rule's meaning is unambiguous, we need look no further), *review denied*, 173 Wn.2d 1034 (2012).

Because Hoffenburg's presentation of the order of judgment was timely under CR 54(e), her motion for costs and fees was timely under CR 54(d), which provides that unless otherwise provided by statute or court order, claims and motions for costs and fees must be filed no later than 10 days after entry of judgment. CR 54(d)(1), (2); 4 KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE CR 54, at 41 (supp. 2012). Hoffenburg complied with this temporal requirement by filing her second motion for fees and costs 10 days after entry of the judgment. *See Corey v. Pierce County*, 154 Wn. App. 752, 774, 225 P.3d 367 (timeliness requirement of

CR 54(d) applies only after the underlying claim is reduced to judgment in court), *review denied*, 170 Wn.2d 1016 (2010).

STANDING

Kruger-Willis next contends that GEICO lacked standing to move for an award of fees and costs. This contention is based on her allegation that GEICO was not an aggrieved party that could file a request for trial de novo under MAR 7.1. Under this rule, any aggrieved party that has not waived the right to appeal may request a trial de novo within 20 days after the arbitrator's award is filed. MAR 7.1; 4A KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE MAR 7.1, at 54 (7th ed. 2008). The party seeking review must be named in the notice for trial de novo. *Wiley v. Rehak*, 143 Wn.2d 339, 345, 20 P.3d 404 (2001).

The record shows, however, that Hoffenburg was the aggrieved party named in the notice for trial de novo and that Hoffenburg filed the motion for fees and costs. The fact that GEICO is defending Hoffenburg does not render the insurance company a party or somehow diminish Hoffenburg's standing as either the aggrieved party in the underlying action or the prevailing party entitled to fees and costs under RCW 4.84.250.

MAR 7.3

Finally, Kruger-Willis contends that the trial court erred in compensating Hoffenburg for attorney fees incurred before the trial de novo. As support, she cites MAR 7.3, which provides,

> The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo. . . . Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule.

This rule does not apply for two reasons. First, Kruger-Willis did not appeal the arbitration award. Second, Hoffenburg requested fees pursuant to RCW 4.84.250, which does

not contain MAR 7.3's limitation on an award of fees. The trial court properly awarded reasonable attorney fees under RCW 4.84.250 where the amount pleaded by Kruger-Willis in response to Hoffenburg's request for a statement of damages was less than $10,000. *See Pierson v. Hernandez*, 149 Wn. App. 297, 303, 202 P.3d 1014 (2009) (request for damages triggers pleading of damages required under RCW 4.84.250). Kruger-Willis does not succeed in showing that the trial court erred in awarding Hoffenburg reasonable attorney fees and costs.

In the final sentence of her brief, Hoffenburg asserts that "[c]osts and reasonable attorney's fees associated with this appeal should also be awarded." Br. of Resp't at 15. Because she fails to include supporting argument or authority for her request for attorney fees on appeal, we deny it. *In re Marriage of Taddeo-Smith*, 127 Wn. App. 400, 407, 110 P.3d 1192 (2005); *see also* RAP 18.1(b) (party must devote section of opening brief to request for fees). Hoffenburg is entitled to costs upon compliance with RAP 14.4.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Quinn-Brintnall, J.
QUINN-BRINTNALL, J.

We concur:

Van Deren, J.
VAN DEREN, J.

Worswick, C.J.
WORSWICK, C.J.

12.f. AMICUS

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST IMMIGRANT RIGHTS PROJECT ("NWIRP"), a nonprofit Washington public benefit corporation; and YUK MAN MAGGIE CHENG, an individual,

Plaintiffs,

v.

JEFFERSON B. SESSIONS III, in his official capacity as Attorney General of the United States; UNITED STATES DEPARTMENT OF JUSTICE; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; JUAN OSUNA, in his official capacity as Director of the Executive Office for Immigration Review; and JENNIFER BARNES, in her official capacity as Disciplinary Counsel for the Executive Office for Immigration Review,

Defendants.

No. 2:17-cv-00716

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

The Northwest Immigrant Rights Project ("NWIRP") provides free and low-cost legal services to more than 10,000 immigrants each year through its 70 staff members and more than 350 volunteer attorneys. NWIRP provides these services to noncitizens in deportation (removal) proceedings before the Executive Office for Immigration Review and to those who are not in such proceedings but seek to apply for immigration benefits from U.S. Citizenship and Immigration Services—benefits that include asylum, family visas, naturalization, visas for

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survivors of trafficking and other violent crimes, and Temporary Protected Status. NWIRP offers various different legal services depending on the needs of each client, the type of relief sought, and the resources NWIRP has available. These services range from full representation to brief counseling, and they take place on an individualized basis, in legal clinics, in group assistance events, and at community outreach functions.

Over the past several weeks, the Executive Office for Immigration Review, the U.S. Department of Justice, and the individual Defendants (collectively, "EOIR") have set out to restrict NWIRP's ability to offer this assistance. Relying on a new and novel interpretation of its 2008 rule governing attorney misconduct, EOIR now insists on a Hobson's choice: either NWIRP must commit to full legal representation of ***every*** immigrant in removal proceedings it presently assists (which is plainly impossible), or NWIRP must refrain from providing them ***any*** form of legal assistance—not even a brief consultation. EOIR's cease-and-desist order to NWIRP will deprive thousands of immigrants—including asylum seekers and unaccompanied children—of the chance to consult with a NWIRP lawyer to evaluate their potential claims for legal residence. EOIR's interpretation will also deprive otherwise unrepresented immigrants of legal advice they need to understand United States law, and assistance with navigating the immigration court system.

EOIR's new edict purports to control not just the appearance of attorneys in removal proceedings but their communications with clients (and even potential clients) and other limited assistance provided outside of an active EOIR proceeding. The vague and overbroad rule, and EOIR's application of it to NWIRP, violates (1) the First Amendment, by restricting NWIRP's rights to free speech, free association, and to petition the government, and (2) the Tenth Amendment, by invading the power reserved to the State of Washington (and other states) to regulate the practice of law. And, because individuals in deportation proceedings are not provided with appointed counsel and most of them cannot afford to pay for private counsel, EOIR's actions will ultimately prevent many immigrants from receiving ***any*** legal assistance at all.

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Plaintiffs now bring this lawsuit for declaratory and injunctive relief, and respectfully ask this Court to halt EOIR's unconstitutional overreach.

I. PARTIES

1.1 Plaintiff NWIRP is a Washington nonprofit public benefit corporation with its principal place of business in Seattle, Washington, and with additional offices in Tacoma, Wenatchee, and Granger, Washington. NWIRP was founded in 1984. Its mission is to promote justice by defending and advancing the rights of immigrants through direct legal service, systemic advocacy, and community education.

1.2 Plaintiff Yuk Man Maggie Cheng is a NWIRP staff attorney licensed to practice law in Washington by the Washington Supreme Court. As a licensed Washington attorney, she is subject to regulation and supervision by the Washington Supreme Court and by the Washington State Bar Association, a state agency.

1.3 Defendant Jefferson Beauregard Sessions III is the United States Attorney General and head of the United States Department of Justice. Sessions is sued in his official capacity.

1.4 Defendant United States Department of Justice ("DOJ") is an executive department of the United States charged with enforcing federal law.

1.5 Defendant Executive Office for Immigration Review is a federal office/agency within and overseen by DOJ, and is responsible for adjudicating immigration cases. EOIR issued the cease-and-desist letter at issue in this case.

1.6 Defendant Juan Osuna is the Director of EOIR. Osuna is sued in his official capacity.

1.7 Defendant Jennifer Barnes is an employee of EOIR and holds the title of Disciplinary Counsel. Barnes is sued in her official capacity.

II. JURISDICTION & VENUE

2.1 This Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331, as this civil action arises under the laws of the United States, and pursuant to 28 U.S.C. § 1361, as this

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action seeks to compel an officer or employee of the United States, or an agency thereof, to perform a duty owed to Plaintiffs. The United States has waived its sovereign immunity pursuant to 5 U.S.C. § 702.

2.2 This Court has personal jurisdiction over all Defendants, and venue is proper in this district, pursuant to 28 U.S.C. § 1391(e).

III. FACTS

A. NWIRP Plays a Critical Role in Providing Legal Assistance to Immigrants

3.1 NWIRP is the primary nonprofit legal services provider for immigrants in removal proceedings in Washington State and for persons detained at the Northwest Detention Center ("NWDC"), an immigration prison in Tacoma, Washington. NWIRP staff attorneys provide direct representation in hundreds of cases and organize pro bono representation for more than 200 additional cases each year.

3.2 NWIRP screens more than 1,000 potential clients per year. In 2016 alone, NWIRP screened 641 individuals who were potentially eligible for asylum.

3.3 NWIRP also provides "Know Your Rights" ("KYR") presentations, community workshops, and individual consultations to unrepresented individuals.

3.4 NWIRP relies on grants and charitable contributions to provide limited services to unrepresented immigrants. These services include helping immigrants file motions to terminate proceedings, motions to change venue, and motions to reopen old removal orders before EOIR. NWIRP also assists hundreds of clients in preparing various application forms seeking relief from removal, including applications for asylum, family visas, cancellation of removal, special immigrant juvenile status, and U & T visas for victims of trafficking and violent crimes.

3.5 Due to time, cost, and other resource constraints, NWIRP can provide limited or full representation to clients in only a small fraction of the total screenings it performs. Full representation in removal proceedings can entail the preparation and filing of a) required procedural and substantive motions; b) applications and briefing for all forms of relief for

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which the applicant is eligible; and c) extensive documentation of key facts in the case, including reports on country conditions, testimony by an expert or lay witness, and evaluations by psychologists or other medical professionals. Removal proceedings often involve multiple hearings over the course of several years.

3.6 For every individual it screens, NWIRP provides personal consultations to advise the individual of procedural requirements and to help identify potential defenses and forms of relief.

3.7 Of the individuals it screens, NWIRP places, on average, over 200 cases per year with pro bono attorneys. In 2016, NWIRP placed 242 cases with pro bono attorneys, with 103 of those cases in removal proceedings. Through the first four months of 2017, NWIRP placed 137 cases for direct representation with pro bono attorneys, with 73 of those cases in removal proceedings.

B. EOIR Threatens NWIRP with Disciplinary Sanctions for Providing Limited Legal Assistance to Unrepresented Immigrants

3.8 On December 18, 2008, EOIR published new rules of professional conduct governing "practitioners who appear before [EOIR]," creating additional categories of attorney misconduct that are subject to disciplinary sanctions. *See* Professional Conduct for Practitioners, 73 Fed. Reg. 76,914 (Dec. 18, 2008), codified at 8 C.F.R. §§ 1001, 1003 & 1292. One of these rules, 8 C.F.R. § 1003.102(t), establishes that EOIR may impose disciplinary sanctions against any attorney representing noncitizens before the agency who fails to file a notice of entry of appearance (on Form EOIR-27 or -28).

3.9 EOIR's rule defines representation very broadly. The rule requires attorneys to submit a notice of appearance where they have engaged in "practice" or "preparation," as defined in 8 C.F.R. § 1001.1:

> (i) The term ***practice*** means the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with DHS, or any immigration judge, or the Board.

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> ...
>
> (k) The term ***preparation,*** constituting practice, means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers, but does not include the lawful functions of a notary public or service consisting solely of assistance in the completion of blank spaces on printed Service forms by one whose remuneration, if any, is nominal and who does not hold himself out as qualified in legal matters or in immigration and naturalization procedure.

3.10 Notably, the immigration court does not permit limited appearances[1] or unilateral withdrawals in removal proceedings. Once an attorney files a notice of appearance, the attorney must represent the immigrant for the entirety of the removal case before the immigration judge (or, if on appeal, before the Board of Immigration Appeals). The attorney may only withdraw with leave of the court, and leave is granted only in exceptional circumstances.

3.11 When these new rules were adopted, NWIRP met with the local immigration court administrator to discuss how the rule would impact the services NWIRP provides to pro se individuals. NWIRP agreed that it would notify the court when it assisted with any pro se motion or brief by including a subscript or other clear indication in the document that NWIRP had prepared or assisted in preparing the motion or application. This convention was accepted, and no concerns were raised by the local immigration courts or by EOIR in the intervening nine years.

3.12 In August 2016, the EOIR's Fraud & Abuse Prevention Counsel, Brea C. Burgie, contacted NWIRP to coordinate efforts on combatting "notario fraud."[2] Using funding received from the Washington State Attorney General's Office, NWIRP had already implemented a special project addressing notario fraud. NWIRP discussed with Ms. Burgie the

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[1] The one exception, created in 2015, allows for a limited appearance only for the purpose of representing a respondent in a custody (bond) proceeding. *See* Separate Representation for Custody and Bond Proceedings, 80 Fed. Reg. 59,500 (Oct. 1, 2015) (amending 8 C.F.R. § 1003.17).

[2] The American Bar Association (ABA) describes this problem as "immigration consultants who are engaging in the unauthorized practice of law" by using "false advertising and fraudulent contacts [and] hold[ing] themselves out as qualified to help immigrants obtain lawful status, or perform[ing] legal functions such as drafting wills or other legal documents." *See* ABA, *Fight Notario Fraud*, http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/fightnotariofraud.html.

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tools it uses to combat such fraud, including community education outreach, KYR presentations, and asylum workshops. The aim of these tools is to provide avenues, besides notarios, for unrepresented people to seek assistance in filling out immigration applications when they cannot afford the representation of an immigration attorney.

3.13 Ms. Burgie then requested a follow-up call with NWIRP to discuss the asylum workshops. She noted that Defendant Jennifer Barnes, EOIR's Disciplinary Counsel, would participate in the call. In the subsequent call on October 11, 2016, Defendant Barnes stated that EOIR's regulations limit organizations, including nonprofit organizations, from assisting pro se individuals in filling out asylum applications.

3.14 On April 13, 2017, NWIRP received a letter from Defendant Barnes on behalf of EOIR's Office of General Counsel, stating EOIR was aware that NWIRP had assisted at least two pro se applicants in filing motions without first filing notices of appearance with the immigration court. Defendant Barnes instructed NWIRP to "cease and desist from representing aliens unless and until the appropriate Notice of Entry of Appearance form is filed with each client that NWIRP represents." A copy of the letter is attached hereto as ***Exhibit 1***.

3.15 Attached to Defendant Barnes's letter were two motions to reopen that NWIRP assisted pro se immigrant clients in preparing: one submitted to the Seattle Immigration Court, and another submitted to the Tacoma Immigration Court at the NWDC. Both motions clearly identified NWIRP as assisting the pro se individual in preparing the motion.

3.16 The motion filed with the Tacoma Court was a one-page template motion in which a NWIRP advocate assisted the detained person by handwriting in the substance of the basis for the detained person's request for a new hearing. The pro se individual later submitted the motion through the internal mailing system at the detention center.

3.17 The motion filed with the Seattle Court was prepared and submitted on behalf of a pro se individual by Plaintiff Maggie Cheng, a NWIRP staff attorney specializing in asylum cases. The motion explained the reasons why the client had missed a prior hearing, which had led the immigration court to issue an order of removal in absentia. In addition, the motion

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explained that the respondent is prima facie eligible for asylum, withholding of removal, and protection under the Convention Against Torture ("CAT"). The motion stated that "Northwest Immigrant Rights Project is assisting [the respondent] in submitting this motion to reopen." The motion included an application for asylum, withholding, and CAT protection. The motion also clearly identified Plaintiff Cheng as the attorney preparing the application, and it included Plaintiff Cheng's contact information. After the motion to reopen was denied, Plaintiff Cheng submitted a notice of appearance with EOIR agreeing to directly represent the respondent in appealing the decision to the Board of Immigration Appeals.

C. EOIR's Threat to Impose Disciplinary Sanctions for Limited Legal Assistance Will Cripple Pro Bono Legal Aid to Immigrants

3.18 There is no right to appointed counsel in immigration court, other than for detained individuals with serious mental illness or disorders.[3] According to a recent national study, only 37 percent of individuals appearing before immigration court are represented; in Washington state, 65 percent of individuals are represented before the immigration court in Seattle, and only 8 percent in Tacoma.[4] As of May 4, 2017, there are approximately 8,882 pending cases before the Seattle and Tacoma immigration courts.[5]

3.19 Access to legal counsel critically affects an individual's likelihood of success in removal proceedings. Non-detained individuals represented by counsel are five times more likely to submit applications for relief and over three times more likely to succeed than their unrepresented counterparts; even more significantly, detained individuals with representation are over ten times more likely to seek and succeed on their applications for relief when compared to their unrepresented counterparts.[6] Yet, pro se immigrants—even those who are

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[3] *See* INA § 240(b)(4)(A) (providing right to counsel "at no expense to the Government"); *Franco-Gonzalez v. Holder*, 767 F. Supp.2d 1034, 1058 (C.D. Cal. 2011) (finding that mentally disabled immigrant detainees are entitled to appointed counsel at the government's expense).

[4] *See* Ingrid Eagly and Steven Shafer, American Immigration Council, *Access to Counsel in Immigration Court* 5 (Sept. 2016), available at https://www.americanimmigrationcouncil.org/sites/default/files/research/access_to_counsel_in_immigration_court.pdf.

[5] *See* TRAC Immigration, "Immigration Court Backlog Tool," *available at* http://trac.syr.edu/phptools/immigration/court_backlog/ (last visited May 4, 2017).

[6] *See* Eagly & Shafer, *supra* n.3, at 10–20.

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detained—are not entitled to any assistance in preparing and filing forms or briefs with EOIR. Further, although 8 C.F.R. § 1003.33 requires that all written documents be submitted in English, EOIR provides no translation assistance to persons in removal proceedings.

3.20 NWIRP seeks to meet the high demand for legal counsel through its staff and pro bono volunteer attorneys, but there remain a vast number of individuals whom NWIRP cannot represent or place with a pro bono attorney, or who require vital services before NWIRP has the opportunity to evaluate their capacity for full representation.

3.21 NWIRP seeks to ameliorate the significant disadvantage faced by unrepresented persons in removal proceedings by providing limited services to hundreds of unrepresented individuals each year to whom it cannot provide full representation. Some of these services include:

a. Provision of general information about the immigration court system, such as an overview of court procedures, the elaborate procedural requirements for filing applications with the immigration court, and the consequences of failing to appear for a hearing;

b. Individual consultations to review the facts of a particular person's case, including assistance with record requests, to identify potential forms of relief and paths to legal status;

c. Assistance in preparing applications for relief from removal, including i) applications for asylum, withholding of removal, and relief under the Convention Against Torture ("CAT"); ii) applications for cancellation of removal for lawful permanent residents under 8 U.S.C. § 1229b(a); iii) applications for cancellation of removal for non-permanent residents under § 1229b(b); iv) applications for U and T non-immigrant status for victims of violent crimes and human trafficking; and v) applications for family petitions;

d. In the case of asylum seekers in particular, expedited assistance in preparing asylum applications, as immigrants are required to file asylum applications

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with the immigration court within one year of arrival in the United States—a deadline many are often unaware of until they are screened by NWIRP;

e. Assistance in gathering evidence and preparing packets of materials on country conditions for detained individuals seeking asylum, withholding of removal, and relief under CAT;

f. Assistance in filing motions to terminate removal proceedings where DHS charges individuals as being deportable for certain criminal or immigration violations that arguably do not constitute grounds of removability;

g. Assistance in filing motions to change venue, which require detailed pleadings and statements of relief—a service that is particularly important for individuals who have relocated to Washington after being detained and released near the border, as their cases are still scheduled to continue at the border and most will be ordered removed in absentia if they fail to travel to their court hearing; and

h. Assistance in filing motions to reopen cases where persons previously ordered removed, often times in absentia, face imminent removal from the United States unless they immediately file a motion to reopen.

3.22 When assisting individuals with these matters, NWIRP explains the scope of the services that it will and will not provide to make sure the individual understands the nature of the assistance. In every case where NWIRP is able to provide only limited services and not full representation to a client, NWIRP obtains the client's informed consent to that limitation, consistent with Washington Rule of Professional Conduct 1.2(c).

3.23 NWIRP cannot comply with EOIR's cease-and-desist letter without greatly curtailing its services to immigrants. It does not have—and could not possibly be expected to have—the resources to provide full representation to every person who is potentially eligible for relief.

3.24 In fact, as written, EOIR's letter casts into doubt whether NWIRP can continue to consult with unrepresented persons, screen cases for referral to volunteer attorneys, or

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conduct workshops and presentations. Due to this uncertainty, NWIRP is now compelled to choose between halting most of the services it provides to immigrants or continuing to provide those services under threat of disciplinary sanctions. EOIR's letter has a considerable chilling effect on NWIRP's activities, impairing NWIRP's ability to advocate for the statutory and constitutional rights of immigrants.

3.25 EOIR's interpretation of its administrative rule fundamentally violates the First Amendment rights of NWIRP and its attorneys to communicate and associate with their clients, and to petition the government. It also encroaches upon the power reserved to Washington (and other states) to regulate the practice of law—a power that belongs exclusively to the States under the Tenth Amendment.

3.26 For these reasons, NWIRP now brings this lawsuit to enjoin EOIR from further constitutional violations.

IV. FIRST CAUSE OF ACTION—VIOLATION OF THE FIRST AMENDMENT (AS APPLIED)

4.1 The First Amendment to the United States Constitution guarantees Plaintiffs the rights to free speech, to free assembly, and to petition the government.

4.2 Plaintiffs exercise these rights when they screen, consult with, advise, and otherwise assist immigrants in need of legal services.

4.3 EOIR's new and overbroad interpretation of 8 C.F.R. § 1001.1(i) and (k), as incorporated into 8 C.F.R. § 1003.102(t), violates the First Amendment by curtailing Plaintiffs' exercise of their First Amendment rights.

4.4 This violation causes ongoing and irreparable harm to Plaintiffs, who have no adequate remedy at law for EOIR's wrongful conduct. Absent immediate injunctive relief, Plaintiffs will continue to suffer irreparable harm.

V. SECOND CAUSE OF ACTION—VIOLATION OF THE FIRST AMENDMENT (FACIAL)

5.1 The First Amendment to the United States Constitution guarantees Plaintiffs the rights to free speech, to free assembly, and to petition the government.

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5.2 Plaintiffs exercise these rights when they screen, consult with, advise, and otherwise assist immigrants in need of legal services.

5.3 8 C.F.R. § 1001.1(k), as incorporated into 8 C.F.R. § 1003.102(t), violates the First Amendment because it is a vague, overbroad, and unduly burdensome restriction on Plaintiffs' rights to free speech, to free assembly, and to petition the government.

5.4 8 C.F.R. § 1001.1(k), as incorporated into 8 C.F.R. § 1003.102(t), also violates the First Amendment because it burdens the constitutionally protected speech of third parties, including others similarly situated to Plaintiffs and the clients and potential clients of Plaintiffs.

5.5 This violation causes ongoing and irreparable harm to Plaintiffs, who have no adequate remedy at law. Absent immediate injunctive relief, Plaintiffs will continue to suffer irreparable harm.

VI. THIRD CAUSE OF ACTION—VIOLATION OF THE TENTH AMENDMENT (AS APPLIED)

6.1 The Tenth Amendment prohibits the federal government from exercising powers not expressly delegated to it by the Constitution, and reserves those powers to the States or to the people.

6.2 Regulation of the practice of law is a matter reserved to the States. While the federal government may regulate the conduct of attorneys who appear in federal administrative proceedings, it may not promulgate or enforce general regulations affecting the conduct of lawyers outside the scope of such proceedings, such as regulations that purport to prohibit consulting with and/or providing limited services to pro se immigrants.

6.3 Many of NWIRP's services—giving KYR presentations, consulting with unrepresented persons, identifying defenses and forms of relief, advising persons regarding procedural steps for obtaining relief, screening and evaluating cases, making referrals, and assisting with forms and applications—are all part of the general practice of law. In the performance of these services, NWIRP attorneys may agree to represent a client and appear in a

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federal administrative proceeding—or they may not. But these services occur outside the confines of an EOIR administrative proceeding.

6.4 The Supreme Court of the State of Washington regulates the practice of law in Washington. In furtherance of that power, the Supreme Court adopted the Washington Rules of Professional Conduct ("WRPCs"), which govern the conduct of Washington-licensed lawyers and their relationships with clients. Relevant here:

a. WRPC 1.2(c) allows lawyers to limit the scope of representation with the informed consent of the client;

b. WRPC 1.6(a) prohibits a lawyer from revealing information relating to the representation of a client absent informed consent; and

c. WRPC 6.5(a) provides special consideration for pro bono representation, specifically where lawyers provide short-term limited legal services under the auspices of a not-for-profit organization such as NWIRP.

6.5 EOIR's new and overbroad interpretation of 8 C.F.R. § 1001.1(i) and (k), as incorporated into 8 C.F.R. § 1003.102(t), violates the Tenth Amendment by purporting to restrict and unduly burden Plaintiffs in their general practice of law before they have appeared or agreed to represent a client in an agency proceeding. EOIR's interpretation also violates the Tenth Amendment because it conflicts with a Washington lawyer's rights and obligations established by the State as set forth in the WRPCs.

6.6 This violation causes ongoing and irreparable harm to Plaintiffs, who have no adequate remedy at law. Absent immediate injunctive relief, Plaintiffs will continue to suffer irreparable harm.

VII. FOURTH CAUSE OF ACTION—VIOLATION OF THE TENTH AMENDMENT (FACIAL)

7.1 The Tenth Amendment prohibits the federal government from exercising powers not expressly delegated to it by the Constitution, and reserves those powers to the States or to the people.

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7.2 Regulation of the practice of law is a matter reserved to the States. While the federal government may regulate the conduct of attorneys who appear in federal administrative proceedings, it may not promulgate or enforce general regulations affecting the conduct of lawyers outside the scope of such proceedings, such as regulations that purport to prohibit consulting with and/or providing limited services to pro se immigrants.

7.3 Many of NWIRP's services—giving KYR presentations, consulting with unrepresented persons, identifying defenses and forms of relief, advising persons regarding procedural steps for obtaining relief, screening and evaluating cases, making referrals, and assisting with forms and applications—are all part of the general practice of law. In the performance of these services, NWIRP attorneys may agree to represent a client and appear in a federal administrative proceeding—or they may not. But these services occur outside the confines of an EOIR administrative proceeding.

7.4 The Supreme Court of the State of Washington regulates the practice of law in Washington. In furtherance of that power, the Supreme Court adopted the WRPCs, which govern the conduct of Washington-licensed lawyers and their relationships with clients.

7.5 In 1983, the American Bar Association promulgated Model Rules of Professional Conduct ("MRPCs"), which have since been adopted by 49 states and the District of Columbia.

7.6 Various WRPCs and MRPCs are implicated by EOIR's action here, namely:

a. WRPC 1.2(c) and MRPC 1.2(c) allow lawyers to limit the scope of representation with the informed consent of the client;

b. WRPC 1.6(a) and MRPC 1.6(a) prohibit a lawyer from revealing information relating to the representation of a client absent informed consent; and

c. WRPC 6.5(a) and MRPC 6.5(a) provide special consideration for pro bono representation, specifically where lawyers provide short-term limited legal services under the auspices of a not-for-profit organization such as NWIRP.

7.7 8 C.F.R. § 1001.1(k), as incorporated into 8 C.F.R. § 1003.102(t), violates the

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Tenth Amendment by restricting and unduly burdening Plaintiffs in their general practice of law before they have appeared or agreed to represent a client in an agency proceeding. EOIR's interpretation also violates the Tenth Amendment insofar as it conflicts with lawyers' rights and duties established by the States as set forth in the WRPCs and the MRPCs.

7.8 This violation causes ongoing and irreparable harm to Plaintiffs, who have no adequate remedy at law. Absent immediate injunctive relief, Plaintiffs will continue to suffer irreparable harm.

VIII. FIFTH CAUSE OF ACTION—DECLARATORY JUDGMENT (28 U.S.C. § 2201)

8.1 An actual controversy has arisen between Plaintiffs and EOIR. The parties have genuine and opposing interests, which are direct and substantial.

8.2 A judicial determination of the parties' rights and other legal relations would provide final and conclusive relief. Absent such a determination, Plaintiffs will continue to suffer invasion of their constitutional rights due to EOIR's wrongful conduct.

8.3 Plaintiffs are entitled to a declaration that EOIR cannot lawfully enforce 8 C.F.R. § 1003.102(t).

8.4 In the alternative, Plaintiffs are entitled to a declaration that EOIR cannot lawfully enforce 8 C.F.R. § 1003.102(t) against Plaintiffs or any staff or volunteer attorney under Plaintiffs' direction and control.

PRAYER FOR RELIEF

Plaintiffs respectfully pray for the following relief:

A. That the Court find and declare:

(i) 8 C.F.R. § 1001.1(k), as incorporated into 8 C.F.R. § 1003.102(t), is vague, overbroad, unduly burdensome, and violates the First and Tenth Amendments to the United States Constitution; and

(ii) To the extent EOIR relies on 8 C.F.R. § 1001(i) and (k), as incorporated into 8 C.F.R. § 1003.102(t), to sanction, purport to sanction, or otherwise discipline Plaintiffs and all other similarly situated attorneys for a) conduct unconnected with any agency

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proceeding or b) the provision of limited services related to an agency proceeding in which the attorney has not agreed to represent a client in the proceeding, EOIR violates the First and Tenth Amendments to the United States Constitution;

B. That the Court enter an order permanently enjoining Defendants, their officers, agents, representatives, servants, employees, successors and assigns, and all other persons in active concert or participation with them, from:

(i) Enforcing the cease-and-desist letter, dated April 5, 2017, from Defendant Barnes and EOIR's Office of General Counsel to NWIRP; and

(ii) Enforcing or threatening to enforce 8 C.F.R. § 1003.102(t); or, in the alternative,

(iii) Enforcing or threatening to enforce 8 C.F.R. § 1003.102(t) against Plaintiffs and all other similarly situated attorneys for a) conduct unconnected with any agency proceeding or b) the provision of limited legal services in which the attorney has not appeared or otherwise agreed to represent a client in an agency proceeding;

C. That EOIR be required to pay to Plaintiffs both the costs of this action and reasonable attorneys' fees incurred by Plaintiffs in pursuing this action, pursuant to 5 U.S.C. § 504, 28 U.S.C. § 2412, and any other statute or other rule of law or equity which permits such an award; and

D. That Plaintiffs be awarded such other, further, and additional relief as the Court deems just and equitable.

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DATED this 8th day of May, 2017.

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORTHWEST IMMIGRANT RIGHTS PROJECT ("NWIRP"), a nonprofit Washington public benefit corporation; and YUK MAN MAGGIE CHENG, an individual,

Plaintiffs,

v.

JEFFERSON B. SESSIONS III, in his official capacity as Attorney General of the United States; UNITED STATES DEPARTMENT OF JUSTICE; EXECUTIVE OFFICE FOR IMMIGRATION REVIEW; JUAN OSUNA, in his official capacity as Director of the Executive Office for Immigration Review; and JENNIFER BARNES, in her official capacity as Disciplinary Counsel for the Executive Office for Immigration Review,

Defendants.

No. 2:17-cv-00716

MOTION FOR TEMPORARY RESTRAINING ORDER

Note on Motion Calendar:
May 8, 2017

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

The Northwest Immigrant Rights Project ("NWIRP") provides free and low-cost legal assistance to more than 10,000 immigrants each year through its 70 staff members and more than 350 volunteer attorneys. However, the Executive Office for Immigration Review ("EOIR")—the federal agency charged with adjudicating immigration court cases—has now issued NWIRP a "cease and desist" order, constraining NWIRP's ability to offer this assistance. Based on a new and novel application of its own 2008 rule governing attorney misconduct, EOIR now insists that NWIRP must either commit in advance to full legal representation of ***every*** immigrant in removal proceedings it assists (which is plainly impossible), or refrain from providing them ***any*** form of legal assistance. EOIR's cease-and-desist order to NWIRP will deprive thousands of unrepresented immigrants—including asylum seekers and unaccompanied children—of the chance to consult with a NWIRP lawyer and to receive critical assistance in understanding immigration law and navigating the byzantine immigration system.

EOIR's new edict restricts not just the appearance and conduct of attorneys in removal proceedings, but also their communications with clients and potential clients outside such proceedings. By compelling NWIRP to provide full representation to every immigrant NWIRP seeks to assist in removal proceedings, EOIR is effectively preventing NWIRP from offering ***any*** form of limited legal assistance to such persons—even assistance provided entirely outside of an active EOIR proceeding. EOIR's rule, and its application to NWIRP, violates the First Amendment by restricting NWIRP's rights to free speech, to free association, and to petition the government. It also violates the Tenth Amendment by invading the sovereign power reserved to Washington and other states to regulate the practice of law within their borders.

EOIR has suddenly targeted Washington state—specifically, its primary nonprofit legal services provider for immigrants—with an unprecedented application of a vague, overbroad rule. Armed with the chilling threat of disciplinary sanctions, EOIR's cease-and-desist order sharply curtails NWIRP's ability to provide legal assistance to immigrants in removal proceedings. EOIR's unconstitutional conduct has caused and is causing immediate and irreparable harm to

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NWIRP, its staff, and its volunteer attorneys, and it is decidedly contrary to the public interest. NWIRP respectfully asks this Court to temporarily enjoin EOIR from further enforcement of its compulsory-representation rule against NWIRP.

II. FACTUAL BACKGROUND

A. NWIRP Plays a Critical Role in Providing Legal Assistance to Immigrants

Founded in 1984, NWIRP seeks to promote justice by defending and advancing the rights of immigrants through direct legal services, systematic advocacy, and community education. Compl. ¶ 1.1. NWIRP is the primary nonprofit legal services provider for immigrants in removal proceedings in Washington State and for persons detained at the Northwest Detention Center ("NWDC") in Tacoma, Washington. Compl. ¶ 3.1. NWIRP relies on grants and charitable contributions to fund its operations and services. Compl. ¶ 3.4. NWIRP provides "Know Your Rights" ("KYR") presentations, community workshops, and individual consultations to unrepresented individuals. Compl. ¶ 3.3; Cheng Decl. ¶ 5. NWIRP screens more than 1,000 potential clients per year, and its staff attorneys provide direct representation in hundreds of immigration cases before EOIR, Compl. ¶¶ 3.1–3.2. NWIRP also organizes pro bono representation for more than 200 additional cases each year in removal proceedings. Compl. ¶ 3.2.

Indigent persons in removal proceedings are not entitled to appointed counsel; as a result, the majority of people in removal proceedings do not have legal representation. Compl. ¶ 3.18; Warden-Hertz Decl. ¶ 5. Due to time, cost, and other resource constraints, however, NWIRP cannot provide full legal representation to every person who seeks out NWIRP's assistance. Compl. ¶ 3.5; Cheng Decl. ¶¶ 6–8. Full representation in removal proceedings often entails the preparation and filing of required procedural and substantive motions, applications and briefing for all defenses and forms of relief for which the applicant is eligible, and/or extensive documentation of key facts in the case, including reports on country conditions, testimony by expert or lay witnesses, and evaluations by psychologists or other medical professionals. Compl. ¶ 3.5. Removal proceedings also often involve multiple hearings over the

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course of several years. *Id.*; Cheng Decl. ¶ 6. So, as an alternative to full representation, NWIRP provides a range of limited legal services to otherwise unrepresented immigrants. Compl. ¶ 3.4; Warden-Hertz Decl. ¶ 7. These services include helping them file motions to terminate proceedings, motions to change venue, and motions to reopen old removal orders before EOIR. *Id.*; Cheng Decl. ¶ 5. NWIRP also assists hundreds of clients in preparing various application forms seeking relief from removal, including applications for asylum, family visas, cancellation of removal, special immigrant juvenile status, and U & T visas for victims of trafficking and violent crimes. Compl. ¶ 3.4; Cheng Decl. ¶ 5.

NWIRP's limited legal services are critical to immigrants who cannot afford private legal representation, especially those who are illiterate or speak a rare language and therefore have difficulty accessing resources and preparing their own filings. Cheng Decl. ¶ 9; Warden-Hertz Decl. ¶ 8. These services help pro se individuals navigate complex immigration court procedures, file motions and applications with all information necessary to preserve eligibility for relief, and understand their rights and options. *Id.* To ensure accountability when providing these services, NWIRP provides written and oral notice to individuals that it is not agreeing to represent them, and explains the scope of the services it will and will not provide. Cheng Decl. ¶ 10; Warden-Hertz Decl. ¶ 7.

B. EOIR Threatens NWIRP with Disciplinary Sanctions for Providing Limited Legal Assistance to Unrepresented Immigrants

On December 18, 2008, EOIR published a new rule of professional conduct governing "practitioners who appear before [EOIR]," creating additional categories of attorney misconduct that are subject to disciplinary sanctions. *See* Professional Conduct for Practitioners, 73 Fed. Reg. 76,914 (Dec. 18, 2008) (the "Rule"), codified at 8 C.F.R. §§ 1001, 1003 & 1292. Among other things, EOIR's Rule establishes that an attorney "shall be subject to disciplinary sanctions" if the attorney "[f]ails to submit a signed a completed Notice of Entry of Appearance … when the [attorney] … [h]as engaged in practice or preparation." 8 C.F.R. § 1003.102(t)(1). The Rule further defines the terms "practice" and "preparation" as follows:

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> The term ***practice*** means the act or acts of any person appearing in any case, either in person or through the preparation or filing of any brief or other document, paper, application, or petition on behalf of another person or client before or with DHS, or any immigration judge, or the Board. . . .
>
> The term ***preparation,*** constituting practice, means the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities, including the incidental preparation of papers . . . .

8 C.F.R. § 1001.1(i), (k).

When this Rule was adopted, NWIRP met with the local immigration court administrator to discuss its impact on NWIRP's services to pro se individuals. Compl. ¶ 3.11. NWIRP agreed that it would notify the courts of its assistance with any pro se motion or brief by including a subscript or other clear indication that NWIRP had prepared or assisted in preparing the motion or application. *Id.* In the nine years since the Rule was adopted, neither the immigration courts nor EOIR raised any concerns over this practice—until now. *Id.*

On April 13, 2017, NWIRP received a letter from Defendant Jennifer Barnes, EOIR's Disciplinary Counsel, stating EOIR was aware that NWIRP had assisted at least two pro se applicants in filing motions without first filing notices of appearance. Compl. ¶ 3.14 & Ex. 1. Defendant Barnes instructed NWIRP to "cease and desist from representing aliens unless and until the appropriate Notice of Entry of Appearance form is filed with each client that NWIRP represents," threatening disciplinary action if NWIRP failed to do so. *Id.* Notably, EOIR did not suggest NWIRP's limited assistance to the two pro se individuals was deficient in any respect.

EOIR does not allow practitioners to enter limited notices of appearance to handle discrete motions or issues in a removal case.[1] Cheng Decl. ¶ 6; Warden-Hertz Decl. ¶ 7. Any attorney who appears consents to fully represent the immigrant in the proceeding until its conclusion. The attorney cannot withdraw from representation without leave of the immigration court, and that leave is granted only in exceptional circumstances. *See* Immigration Court Practice Manual, Rule 2.3(d) ("Once an attorney has made an appearance, that attorney has an

[1] The one exception allows for a limited appearance for the purpose of representing a respondent in a custody proceeding. *See* Separate Representation for Custody and Bond Proceedings, 80 Fed. Reg. 59,500 (Oct. 1, 2015).

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obligation to continue representation until such time as a motion to withdraw or substitute counsel has been granted by the Immigration Court.");[2] *see also* Cheng Decl. ¶ 9. NWIRP does not have the resources to provide full representation of each immigrant to whom it currently provides limited services. In effect, EOIR's new application of its compulsory-representation rule will force NWIRP to discontinue providing limited legal services to thousands of individuals in removal proceedings. Cheng Decl. ¶ 6; Warden-Hertz Decl. ¶ 14.

The Rule forces NWIRP attorneys to accept a scope of representation beyond what they and their clients have agreed to. As written, EOIR's also letter casts into doubt whether NWIRP can even consult with pro se persons or screen cases for referral to volunteer attorneys, let alone provide assistance with preparation of applications or motions. This uncertainty means NWIRP must now choose to either abandon most of the services it provides to immigrants in removal proceedings or to continue to provide those services under the imminent threat of disciplinary sanctions. EOIR's letter has a considerable chilling effect on NWIRP's activities, impairing its ability to advocate for the statutory and constitutional rights of immigrants.

III. ARGUMENT

A. Plaintiffs Meet the Standard for Granting Temporary Relief

The standard for granting a temporary restraining order is "substantially identical" to the standard for granting a preliminary injunction. *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001). The Court need only find (1) a likelihood of succeed on the merits; (2) a likelihood of irreparable harm if relief is denied; (3) the balance of equities tips in the movant's favor; and (4) the public interest favors granting relief. *See Winter v. Nat'l Res. Def. Council*, 555 U.S. 7, 20 (2008). The Ninth Circuit uses a balancing, or "sliding scale," approach, clarifying that where the balance of equities weighs strongly in favor of the moving party, it may prevail if its claims raise serious legal questions and otherwise meet the remaining factors. *See, e.g., Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–35 (9th Cir.

[2] *Available at* https://www.justice.gov/sites/default/files/pages/attachments/2016/12/02/practice_manual.pdf#page=26 (last updated April 11, 2017).

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2011). "Under this approach, the elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Id.* at 1131–32.

B. Plaintiffs Are Likely to Succeed on the Merits Because EOIR's Compulsory-Representation Rule is Unconstitutional

"The court need not examine [Plaintiffs'] likelihood of success on all of [their] claims, but rather only those claims sufficient to justify the injunctive relief sought." *3BA Intern. LLC v. Lubahn*, No. C10-829RAJ, 2010 WL 2105129, at *4 (W.D. Wash. May 20, 2010). Here, NWIRP is likely to succeed on the merits of its claims because EOIR's Rule, and its application to NWIRP, violates the First and Tenth Amendments to the United States Constitution.

1. EOIR's Compulsory-Representation Rule Violates the First Amendment Because It Unduly Burdens Plaintiffs' Right to Free Speech and Petition the Government

The Rule, both on its face and as applied to NWIRP, violates the First Amendment. NWIRP has a well-established First Amendment right to advocate on behalf of immigrants, including the right to speak and associate through the provision of nonprofit legal services. Because the Rule is a content-based restriction and because it targets political speech, it warrants strict scrutiny—a standard it cannot survive. But, even under intermediate scrutiny, the Rule must still be invalidated because it is not narrowly tailored to achieve EOIR's interest in adopting it.

a. Plaintiffs Have a Well-Established First Amendment Right to Speak and Associate through the Provision of Nonprofit Legal Services

NWIRP's right to advise and assist clients and prospective clients in immigration proceedings, free of government interference, is protected by the First Amendment. "Attorneys have rights to speak freely subject only to the government regulating with 'narrow specificity.'" *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (citing *NAACP v. Button,* 371 U.S. 415, 433, 438–39 (1963)). "[T]he creation and dissemination of information" in the context of a lawyer-client relationship unquestionably constitutes "speech within the meaning of the First Amendment." *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011).

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"The Supreme Court has repeatedly emphasized that counsel have a [First Amendment] right to inform individuals of their rights . . . when they do so as an exercise of political speech without expectation of remuneration." *Jean v. Nelson*, 727 F.2d 957, 983 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985). For instance, in *NAACP v. Button*, the Supreme Court invalidated a state restriction on lawyer solicitation that prohibited attorneys from "advis[ing] another [person] that his legal rights have been infringed and refer[ing] him to a particular attorney . . . for assistance." 371 U.S. 415, 434 (1963). Because the regulation burdened an attorney's right to communicate with a prospective client, the Court struck down the law, holding that the government "may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id.* at 439. The Court strongly affirmed constitutional protections for lawyers to "advocat[e] lawful means of vindicating legal rights," concluding the First Amendment "protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." *Id.* at 429, 437. Further, the Court emphasized that the NAACP provided nonprofit legal services—as Plaintiffs do here—as "a form of political expression" by "serving to vindicate the rights of members" of a particular community." *Id.* at 429, 431.

Likewise, in *In re Primus*, the Supreme Court again underscored the broad First Amendment protection for pro bono attorneys seeking to vindicate the legal rights of underserved populations. 436 U.S. 412 (1978). The Court held that South Carolina could not punish an attorney for soliciting "a prospective litigant by mail, on behalf of the ACLU," without violating the First Amendment. *Id.* at 432. The Court affirmed that the government may "not abridge unnecessarily the associational freedom of nonprofit organizations, or their members, having characteristics like those of the NAACP or the ACLU." *Id.* at 439; *see also United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 221 (1967) (the Court's holding in *Button* is not "narrowly limited" to apply only to "litigation that can be characterized as a form of political expression"). And again in 2001, the Court affirmed that the government may not seek to "prohibit the analysis of certain legal issues" without violating the First Amendment. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) ("*LSC*").

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EOIR may not evade First Amendment scrutiny here by mischaracterizing the Rule as a restriction on conduct as opposed to speech. In 2010, the Supreme Court categorically rejected the government's argument that a statutory prohibition on lawyers providing terror organizations "material support" through "specialized knowledge" or "expert advice or assistance" regulated conduct rather than speech. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 25 (2010) ("*HLP*") (rejecting the government's position as "extreme"). As the Court explained, while the law "may be described as directed at conduct . . . as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28. "[L]abeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and susceptible to manipulation." *Wollschlaeger v. Florida*, 848 F.3d 1293, 1308 (11th Cir. 2017) (quoting *King v. New Jersey*, 767 F.3d 216, 228 (3d Cir. 2014)).

Nor can EOIR avoid First Amendment scrutiny by characterizing its Rule as a regulation of the legal profession rather than a restriction on speech. The Supreme Court routinely applies "heightened scrutiny to regulations restricting the speech of professionals." *Wollschlaeger*, 848 F.3d at 1310. "Being a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights." *Conant*, 309 F.3d at 637 (citing *Button,* 371 U.S. at 433). "[I]t is no answer to the constitutional claims . . . to say that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression." *Button*, 371 U.S. at 438–39.

EOIR's compulsory-representation rule infringes the same First Amendment rights recognized by the Supreme Court in *Button*, *Primus*, and *LSC*. The First Amendment "protects vigorous advocacy, certainly of lawful ends, against governmental intrusion," particularly when offered on a pro bono basis on behalf of an "unpopular minority." *Button*, 371 U.S. at 429, 434, 441. NWIRP exists to provide pro bono advocacy for the rights of an "unpopular minority"—immigrants in removal proceedings. And like the NAACP and ACLU, the services NWIRP provides to individual clients are part of the organization's broader political efforts on behalf of immigrants' rights, which implicates the right to free speech, the right to free association, and the

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right to petition the government for redress.[3] Moreover, by constraining NWIRP's ability to advise or assist persons in immigration proceedings, the compulsory-representation rule limits NWIRP's right to provide "vigorous advocacy . . . against governmental intrusion"—which is "even more problematic because . . . the client is unlikely to find other counsel." *LSC*, 531 U.S. at 546. As a result, EOIR's Rule is subject to the "exacting scrutiny applicable to limitations on core First Amendment rights." *Primus*, 436 U.S. at 432 (quoting *Buckley v. Valeo,* 424 U.S. 1, 44–45 (1976)).

b. EOIR's Rule is Subject to Strict Scrutiny Because It Imposes a Content-Based Restriction and Targets Political Speech

Because EOIR's compulsory-representation rule is a content-based restriction, it must be analyzed under strict scrutiny. A content-based law is one that "cannot be justified without reference to the content of the regulated speech." *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015). "[A] speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 2229–30. And, as the Supreme Court confirmed in *HLP*, government conduct that restricts the content of attorney advice is subject to strict scrutiny. 561 U.S. at 27 (the law "regulates speech on the basis of its content [because] Plaintiffs want to speak to [terrorist organizations], and whether they may do so . . . depends on what they say."). The Rule here singles out a certain form of speech on a specific subject matter: legal advice about immigration law to unrepresented immigrants in removal proceedings. Moreover, EOIR cannot measure an attorney's compliance with the Rule unless it examines content of the speech, as it applies in those instances where an attorney has rendered "legal advice." *See* 8 C.F.R. §§ 1001.1(k), 1003.102(t). To the extent NWIRP intends to speak to unrepresented immigrants who are seeking legal advice, and wants to do so without triggering the compulsory-representation rule, "whether they may do so . . .

[3] *See Button*, 371 U.S. at 428–29 ("[T]he activities of the NAACP, its affiliates and legal staff shown on this record are modes of expression and association protected by the First and Fourteenth Amendments . . . ."); *id.* at 430 ("[U]nder the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.").

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depends on what they say." *HLP*, 561 U.S. at 27 (2010). The Rule is therefore a content-based restriction and subject to strict scrutiny.

Strict scrutiny is also warranted in this case because EOIR's Rule targets political speech on issues of public concern. The Supreme Court "has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985) (internal citations and quotations omitted). "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community . . . or when it is . . . a subject of general interest and of value and concern to the public." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (citations and quotations omitted). Informing immigrant communities of their legal rights without expectation of compensation is "an exercise of political speech." *See Jean*, 727 F.2d at 983. And when a "law burdens core political speech," the Supreme Court requires courts to apply strict scrutiny. *McIntyre*, 514 U.S. at 347.

c. The Rule Cannot Survive Strict Scrutiny

EOIR's compulsory-representation rule cannot withstand strict scrutiny. EOIR cannot articulate a compelling interest served by applying the compulsory-representation rule to NWIRP. And, both on its face and as applied to NWIRP, the Rule is not narrowly tailored to serve that compelling government interest.

(1) EOIR Cannot Articulate a Compelling Interest in Enforcing the Compulsory-Representation Rule Against NWIRP

In enacting the Rule, EOIR explained that it wanted "to advance the level of professional conduct in immigration matters and foster increased transparency in the client-practitioner relationship." 73 Fed. Reg. 76,914. EOIR sought to ensure that "[a]ny practitioner who accepts responsibility for rendering immigration-related services to a client [will] be held accountable for his or her own actions, including the loss of the privilege of practice before EOIR, when such conduct fails to meet the minimum standards of professional conduct . . . ."

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Therefore, ostensibly to ensure it could enforce those standards against an attorney who provided substandard assistance, EOIR required practitioners to enter a notice of appearance and identify themselves as representing a particular immigrant in a pending proceeding. *Id.*

NWIRP does not dispute that, on its face, EOIR's professed interest is compelling. In fact, NWIRP has sought to further this interest and has even assisted EOIR in doing so. NWIRP received funding from the Washington State Attorney General's Office to implement a special project addressing "notario fraud"—the unauthorized practice of law by "immigration consultants" who charge immigrants and deliver substandard services, or no services at all.[4] Compl. ¶ 3.12. NWIRP informed EOIR of the tools it uses to combat notario fraud, and has worked with EOIR on coordinated efforts to combat such fraud. *Id.*

In this case, however, NWIRP asserts both facial ***and*** as-applied challenges to the Rule. This means EOIR must also articulate not only a compelling interest in enacting the Rule in the first place, but also a compelling interest in applying the Rule to NWIRP in these particular circumstances. *See In re Primus*, 436 U.S. at 434–35 (an attorney "may not be disciplined unless her activity in fact involved the type of misconduct" the rule was intended to prevent, and the record was devoid of evidence that such misconduct "actually occurred" in her case). Here, EOIR cannot articulate any compelling interest in enforcing the compulsory-representation rule against NWIRP. None of the problems EOIR allegedly seeks to prevent are present here. EOIR's cease-and-desist letter does not suggest that NWIRP's legal services at issue here—assisting two immigrants with preparing motions—were deficient in any respect. EOIR has never alleged NWIRP has "fail[ed] to meet the minimum standards of professional conduct" established by EOIR. 73 Fed. Reg. 76,914. And, more broadly, EOIR's purported interest in holding attorneys accountable for misconduct and fraud is not served by barring nonprofit legal organizations (especially those, like NWIRP, that have been accredited by EOIR and placed on its pro bono referral lists, *see* Warden-Hertz Decl. ¶ 4) from providing limited legal services to

[4] *See* ABA, *Fight Notario Fraud*, http://www.americanbar.org/groups/public_services/immigration/projects_initiatives/fightnotariofraud.html.

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indigent person for little or no compensation, especially when those organizations identify themselves on the forms, motions, briefs, and applications they assist in preparing.

EOIR cannot articulate ***any*** compelling interest in enforcing the Rule against NWIRP.

(2) The Rule Is Not Narrowly Tailored to Achieve EOIR's Purported Interest

"[S]trict scrutiny requires a direct rather than approximate fit of means to ends." *Hunter ex rel. Brandt v. Regents of Univ. of Cal.*, 190 F.3d 1061, 1077 (9th Cir. 1999) (internal quotation marks omitted). Even if the interest expressed by EOIR were sufficiently compelling, the means used to achieve those interests—the Rule—is not narrowly tailored to achieve that interest, for at least four reasons:

First, the Rule imposes an all-or-nothing paradigm of client representation that has no logical bearing on EOIR's professed interest in reducing attorney misconduct. If EOIR's interest is to hold providers accountable when they fail to meet minimum standards of professional conduct, a rule requiring them simply to identify themselves in a proceeding is sufficient to satisfy that interest. Compelling them to accept full representation of the client, however, is an additional and entirely unnecessary burden that does not further EOIR's professed interest. In fact, if anything, the compulsory-representation requirement is likely to ***increase*** attorney misconduct by overburdening attorneys with an excessive caseload they cannot reasonably and diligently manage.

Second, the Rule triggers an appearance requirement based on preliminary contacts between a lawyer and a client (or even a prospective client)—contacts that do not implicate EOIR's concern about minimum standards of professional conduct. For instance, NWIRP frequently screens potential clients, during which NWIRP gathers information necessary to provide or refer services based on the individual's needs. Compl. ¶¶ 3.1, 3.2, 3.21(b). Almost *anything* a lawyer says during that process could be construed as "advice" or an "auxiliary activity" related to immigration proceedings—even if NWIRP ultimately declines to provide representation or assistance. Additionally, a NWIRP lawyer may provide general information

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about the immigration court system, identify potential avenues for relief, identify necessary forms for the individual to complete, inform a client about upcoming deadlines, and advise the client regarding how to request a custody hearing. Compl. ¶ 3.21. This is similarly true where NWIRP screens individuals and completes the necessary paperwork for purposes of referring their cases to pro bono attorneys. None of these services constitute an agreement to represent a client sufficient to trigger professional-conduct standards applicable to an EOIR proceeding, but each might nonetheless trigger EOIR's compulsory-representation rule. Likewise, NWIRP's community workshops and KYR presentations may also be subject to the Rule. NWIRP does not automatically form an attorney-client relationship with individuals who attend these community events, but almost every word spoken by a NWIRP attorney during the event could be construed as "advice," and the presentation itself may be an "auxiliary activity," especially if NWIRP provides assistance in filling out application forms. But these community events do not implicate EOIR's interest in establishing minimal standards of professional conduct in EOIR proceedings.

Third, the Rule is impermissibly vague and overbroad. "The vagueness of [any content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997). Likewise, any regulation that impacts speech may be invalidated as overbroad "in cases where the [regulation] sweeps to broadly, penalizing a substantial amount of speech that is constitutionally protected." *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). The Court in *Button* described the extraordinary threat created by a vague and overbroad restriction on attorney speech and advocacy:

> The objectionable quality of vagueness and overbreadth [depends] . . . upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.

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Button, 371 U.S. at 432–33. An ambiguous law that leaves unclear whether certain attorney speech is permissible cannot be tolerated. *See id.* at 432.

The Rule's definition of "preparation" is vague because it does not sufficiently define the scope of conduct that triggers the compulsory-representation requirement. "Preparation," for example, requires the giving of "advice" and "auxiliary activities," but neither of these terms is defined. Some ***or all*** of the above examples of services NWIRP provides could fall within the definition. The Rule—and EOIR's recent application of it to NWIRP—provide no constitutionally sufficient guidance from which NWIRP can fairly determine what conduct is and is not burdened by the Rule.

The Rule is also overbroad because it "sweeps too broadly" and burdens constitutionally protected speech. *Forsyth Cnty.*, 505 U.S. at 130. NWIRP's community workshops and KYR presentations are two of the most apparent examples. "[W]here a professional is engaged in public dialogue, First Amendment protection is at its greatest." *Pickup v. Brown*, 740 F.3d 1208, 1227–28 (9th Cir. 2014). "The right of free speech, the right to teach and the right of assembly are … fundamental rights." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 n.1 (1995). The Rule, however, will curtail, if not prevent, NWIRP from engaging in these constitutionally protected activities.

Fourth, the Rule distorts the traditional attorney-client relationship, the practical effect of which is to limit legal advocacy for unrepresented, indigent immigrants. On this basis alone, the Rule violates the First Amendment and must be invalidated.

In *LSC*, the Court compared a restraint on lawyer speech to cases where "the Government seeks to use an existing medium of expression and to control it . . . in ways which distort its usual functioning." 531 U.S. at 543. "Where the government uses or attempts to regulate a particular medium," courts must examine the medium's "accepted usage in determining whether a particular restriction on speech is necessary for the program's purposes and limitations." *Id.* The Court ultimately invalidated the speech restraint because "[r]estricting

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LSC attorneys in advising their clients and in presenting arguments and analyses to the courts distorts the legal system by altering the traditional role of the attorneys." *Id.* at 544.

EOIR's Rule similarly distorts the legal system and alters the traditional role of attorneys. The right of attorneys and clients to jointly define and limit the scope of the representation is a crucial aspect of the attorney-client relationship. *See* Wash. R. Prof. Conduct ("WRPC") 1.2(c) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.") The "rule affords the lawyer and client substantial latitude to limit the representation." *Id.*, cmt. 7. Like in *LSC*, the Rule here inhibits the "proper functioning" of the attorney-client relationship by imposing a "serious and fundamental restriction on advocacy of attorneys." *LSC*, 531 U.S. at 544.

The regulation also may force lawyers to violate their ethical duty of confidentiality. Clients may not wish to disclose their identities or the fact they have received legal assistance, and lawyers must honor that: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." WRPC 1.6(a). "If by compelling an individual to reveal information that he would rather keep confidential the state chills the individual's ability to engage in protected speech, the state has infringed the individual's First Amendment right in the protected speech, unless it provides a sufficient justification for the required disclosure." *Denius v. Dunlap*, 209 F.3d 944, 954–55 (7th Cir. 2000) (citations omitted).

In sum, the Rule is not narrowly tailored to achieve EOIR's interest and it therefore fails strict scrutiny.

d. The Rule Cannot Survive Intermediate Scrutiny

Even if the Court reviews the Rule under intermediate scrutiny, the Rule cannot survive. Under intermediate scrutiny, the regulation must be "narrowly tailored to serve a significant governmental interest and . . . leave open ample alternative channels for communication of the information." *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989).

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For the same reasons the Rule does not serve a "compelling" EOIR interest, it also fails to serve a "significant" interest. As explained above, the Rule is not narrowly tailored to serve EOIR's interest. Moreover, the regulation does not "leave open ample alternative channels for communication of the information." *Id.* The ***only*** channel left open by the regulation is for an attorney to commit in advance to full representation of a client before she can provide any meaningful legal assistance. This single channel will greatly curtail NWIRP's ability to associate and express through advocacy by broadly reaching the immigrant community.

* * *

"Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) (citations omitted). But that is exactly what EOIR has chosen to do here. EOIR's compulsory-representation rule violates the First Amendment and should be invalidated.

2. EOIR's Compulsory-Representation Rule Violates the Tenth Amendment Because It Interferes in the States' Power to Regulate Lawyer Conduct and Representation

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. The Tenth Amendment "is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution[:] . . . that what is not conferred, is withheld, and belongs to the state authorities." *New York v. United States*, 505 U.S. 144, 156 (1992). Individuals and private organizations—like NWIRP here—have standing to bring Tenth Amendment claims so long as their "injury [stems] from governmental action taken in excess of the authority that federalism defines." *Bond v. United States*, 564 U.S. 211, 220 (2011).

a. The Tenth Amendment Vests States with the Exclusive Right to Regulate Lawyer Conduct Outside of Federal Proceedings

The Tenth Amendment unequivocally vests "the right to control and regulate the granting of license to practice law" in the States, not the federal government. *Bradwell v. People of State of Illinois*, 83 U.S. (16 Wall.) 130, 139 (1872). "Since the founding of the Republic, the

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licensing and regulation of lawyers has been left ***exclusively*** to the States and the District of Columbia within their respective jurisdictions." *Leis v. Flynt*, 439 U.S. 438, 442 (1979) (emphasis added). "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) (quoting *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792 (1975)). To that end, the "States prescribe the qualifications for admission to practice and the standards of professional conduct. They also are responsible for the discipline of lawyers." *Leis*, 439 U.S. at 700–01. The Tenth Amendment's limitations on federal power are implicated whenever a federal agency tries to regulate the practice of law. *See Sperry v. Florida*, 373 U.S. 379 (1963).

Federal agencies have inherent powers to regulate the conduct of attorneys who appear and practice before them, but that inherent power extends only to the matter or case before the particular agency or court in which the attorney has appeared. Federal agencies do not have the broad power to regulate an attorney's professional life and practice of law outside the agency proceeding. The Supreme Court's *Sperry* decision recognizes the constitutionally limited role federal agencies perform in regulating lawyer conduct. In *Sperry*, the Court reversed an injunction prohibiting unauthorized practice of law by a Florida patent agent who was not admitted to the Florida bar. 373 U.S. at 404. Nonetheless, the Court also reaffirmed that, as a general principle, the regulation of the practice of law is "otherwise a matter within the control of the State." *Id.* at 403–04.

b. EOIR's Compulsory-Representation Rule Encroaches Upon Washington State's Sovereign Power to Regulate Lawyer Conduct

The Rule encroaches upon the professional life and practice of law by NWIRP's attorneys, well outside the scope of any specific EOIR-related proceeding. It intrudes upon the sovereign power of the State of Washington to regulate lawyer conduct and the practice of law within its borders, and it directly conflicts with the obligations the State imposes on its attorneys.

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The Rule compels an attorney to appear and commit in advance to full representation of an immigrant once the attorney has engaged in either "practice" or "preparation," as the Rule defines those terms. Practice includes "the preparation ***or*** filing of any brief or other document, paper, application, or petition" on behalf of the immigrant. 8 C.F.R. § 1001.1(i) (emphasis added). Thus, a lawyer who merely assists a client by submitting a filing to EOIR—even if the lawyer played no role in preparing the filing—has engaged in "practice." The definition of "preparation" is even broader. Preparation means "the study of the facts of a case and the applicable laws, coupled with the giving of advice and auxiliary activities . . . ." § 1001.1(k). The Rule does not define "auxiliary activities," but includes within its scope the "incidental preparation of papers," *id.*—a ubiquitous task common to nearly every legal engagement.

Under the Rule's definition of "preparation," a short consultation in which an attorney offers general advice to an unrepresented immigrant about court procedures probably constitutes "preparation," requiring the attorney to enter an appearance. Indeed, this obligation would almost certainly be triggered during every initial screening of a prospective client in which the attorney offers any legal advice—long before the attorney has a full understanding of the facts and can make an informed decision about whether to commit the resources necessary to offer full representation. This is especially troubling because once an attorney has appeared in an EOIR proceeding, she cannot withdraw without leave of the court, which is granted only in exceptional circumstances. *See* Immigration Court Practice Manual, Rule 2.3(d); Cheng Decl. ¶ 9. Thus, when an attorney enters an appearance, she is committing to fully represent the client in the proceedings from that point forward for the entire duration of the case. Faced with the significant burden this Rule imposes on those attorneys who engage in mere "practice" or "preparation," many attorneys will understandably choose to sharply curtail the services they offer and the communications they have with unrepresented immigrants.

EOIR's Rule impermissibly encroaches upon Washington State's sovereign interest in regulating lawyer conduct within its borders, and it creates conflicting ethical and legal duties for NWIRP's attorneys, in at least three different ways:

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First, under the Tenth Amendment, EOIR has no authority to regulate conduct that occurs entirely within an attorney's ordinary practice of law outside of a particular agency proceeding. There are an unimaginable (and ill-defined) set of circumstances that may constitute "preparation" under this definition, none of which involve an attorney's participation in EOIR proceedings. For example, NWIRP attorneys participate in community meetings and group assistance events, where they might present legal advice on a particular topic and answer questions involving removal proceedings. Compl. ¶ 3.3. EOIR's definition of "preparation" is so broad that it would even, perversely, include individual screenings in which an NWIRP lawyer advises a prospective client that she has ***no*** legal or factual basis for bringing or challenging a proceeding; thus, ***after*** determining that the individual case does not merit the use of NWIRP's scarce resources, the NWIRP lawyer would then be compelled, under EOIR's regulations, to commit to that same representation.[5]

Second, the compulsory-representation requirement conflicts with Washington Rule of Professional Conduct 1.2 because it mandates an all-or-nothing approach to the lawyer-client relationship. Rule 1.2 specifies that "a lawyer shall abide by a client's decisions concerning the objectives of representation," and that a "lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent," WRPC 1.2(a), (c). As the comments to Rule 1.2 reflect, "the client [has] the ultimate authority to determine the purposes to be served by legal representation," WRPC 1.2, cmt. 1. Moreover, limited representation may ultimately serve the best interests of both the lawyer and the client:

> If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation.

Id., cmt. 7.

[5] The regulation also does not take into account those situations, however rare, when an immigrant may decline an attorney's services—once an attorney has offered legal advice, under EOIR's Rule, the attorney is obligated to enter an appearance whether the client wants the attorney's services or not.

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The sensible approach Washington has taken to adopt and encourage (where appropriate) the right of attorneys and clients to enter into limited representation arrangements is not unique to this state. Indeed, this same professional-conduct rule and its comments appear in the Model Rules of Professional Conduct adopted by the American Bar Association, which have now been adopted in 49 states and the District of Columbia. EOIR's Rule, however, overrides Washington's decision to permit limited representation, and in so doing, it violates Washington's sovereign right to regulate the conduct of its lawyers.

Third, the compulsory-representation requirement conflicts with Washington Rule of Professional Conduct 1.6 because it requires an attorney to disclose to the government the fact that a particular individual has received legal assistance, even in those situations where the client may not want that assistance disclosed. Rule 1.6 prohibits a lawyer from "reveal[ing] information relating to the representation of a client." WRPC 1.6(a). "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." WRPC 1.6, cmt. 2. By imposing strict confidentiality on a client (or even a prospective client's) communication with lawyer, "[t]he client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter." *Id.* This ironclad guarantee of confidentiality "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." *Id.*, cmt 3. "The phrase 'information relating to the representation' should be interpreted broadly [and] includes, but is not necessarily limited to … 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." *Id.*, cmt. 21. In fact, the ABA has issued an opinion specifically authorizing the limited representation prohibited by the EOIR's Rule: "A lawyer may provide legal assistance to litigants appearing before tribunals '*pro se*' and help prepare written submissions ***without disclosing or ensuring the disclosures of the nature or extent of such assistance***." ABA Opinion 07-446 (May 5, 2007) (emphasis added). To the

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extent EOIR's Rule compels attorneys to disclose a client's identity and the fact of representation before NWIRP has agreed to provide full representation, it impermissibly intrudes upon Washington's sovereign power to require lawyers to maintain client confidences.

* * *

The State of Washington, through its supreme court's sovereign exercise of judicial power, has established requirements for and regulates the licensing and conduct of lawyers within this state. The Rules of Professional Conduct are one result of the exercise of that power. These Rules define the professional obligations of attorneys that practice within this State, and they impose inviolable duties that govern the practice of law.

EOIR cannot, under the guise of controlling administrative proceedings before it, arrogate to itself the authority to generally regulate the interactions and agreements between lawyers and their clients, particularly when the activities it seeks to regulate are unconnected with any specific agency proceeding. Unless and until the attorney seeks to appear before the agency and files the notice of appearance, the attorney has not consented to appear before the agency in that proceeding. EOIR cannot use threat of lawyer disciplinary regulations to ***compel*** the lawyer to undertake greater representation than the lawyer and client have bargained for, nor can it forbid the lawyer and client from agreeing to discrete services outside of the proceeding. EOIR's compulsory-representation rule violates the Tenth Amendment.

C. Plaintiffs Are Suffering, and Will Continue to Suffer, Immediate and Irreparable Harm from EOIR's Conduct

If the Court declines to intervene, Plaintiffs have and will continue to suffer immediate irreparable harm. "It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). This is particularly true of "[t]he loss of First Amendment freedoms . . . [as] [t]he timeliness of political speech is particularly important." *San Diego Comm. Against Registration & the Draft (Card) v. Governing Bd. of Grossmont Union High Sch. Dist.*, 790 F.2d 1471, 1473 (9th Cir. 1986). Although EOIR's

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actions deprive NWIRP of fundamental constitutional rights—and this fact alone would constitute sufficient irreparable injury to warrant injunctive relief—the harm caused by EOIR's actions reaches far beyond NWIRP.

EOIR's order that NWIRP "cease and desist from representing [persons in removal proceedings]" absent a notice of appearance prevents NWIRP attorneys from advocating on behalf of unrepresented persons unless NWIRP can commit in advance to assuming full representation of their case before the immigration court or the Board of Immigration Appeals. Despite more than 1,000 unrepresented people in removal proceedings in Seattle and Tacoma immigration courts, EOIR's cease-and-desist letter has already forced NWIRP forced to curtail the limited legal services it provides to the hundreds of unrepresented individuals in removal proceedings. Cheng Decl. ¶ 16. NWIRP is the only organization listed in EOIR's List of Pro Bono Legal Services that provides assistance to adults facing removal proceedings in Tacoma and Seattle. Warden-Hertz Decl. ¶ 4. EOIR's actions are depriving or will deprive hundreds of people from receiving *any* legal assistance in their removal proceedings.

The cease-and-desist order dramatically impacts NWIRP's ability to carry out its mission of promoting the statutory and constitutional rights of immigrants in removal proceedings. Cheng Decl. ¶ 11; Warden-Hertz Decl. ¶ 15. For example, following EOIR's letter, four asylum seekers have already sought *pro se* assistance at NWIRP. Cheng Decl. ¶ 16. All of them needed to file their asylum applications with the immigration court within several days in order to meet a statutory one-year deadline. *Id.*; *see* Compl. ¶ 3.21(d). EOIR's letter, however, prevents NWIRP from fully analyzing the facts of these individuals' cases and ensuring the proper completion of their applications. EOIR's letter also prevents NWIRP from performing simple but critical tasks such as physically submitting an individual's application for asylum at the Seattle immigration court, which is located only a few blocks away from NWIRP's office. One of the above-mentioned asylum seekers, who resides two hours away from Seattle, was unable to arrive at immigration court on his own before the court closed; consequently, he will have to expend significant resources to return to Seattle in order to file his application.

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Cheng Decl. ¶ 16. Yet another example of the harmed caused by EOIR's cease-and-desist letter is an individual who requested NWIRP's help in filing a motion to change venue. Cheng Decl. ¶ 9; *see* Compl. ¶ 3.21(g). While EOIR publishes a template motion and self-help instructions on its website, even completing the template requires individuals to enter pleadings to their charges of removability and indicate the forms of relief they intend to seek, Cheng Decl. ¶ 16—tasks that necessarily entail legal and factual analysis, which NWIRP cannot perform without either violating EOIR's cease-and-desist letter or committing to full representation.

Further, NWIRP's inability to provide limited *pro se* assistance translates into irreparable harm for unrepresented individuals in proceedings before the Seattle and Tacoma immigration courts. *See* Cheng Decl. ¶¶ 12-15 (detailing the consequences faced by indigent individuals for failure to properly file applications for relief and key procedural motions); Warden-Hertz Decl. ¶¶ 9-11 (same). The harm is particularly pronounced for the vast numbers of unrepresented immigrants in detention, who face significant challenges to obtaining legal representation or evidentiary support for their cases. *See* Warden-Hertz Decl. ¶ 9 (describing obstacles faced by immigrant detainees in establishing their eligibility for relief); Ingrid Eagly & Steven Shafer, *Special Report: Access to Counsel in Immigration Court*, Am. Imm. Council, (Sept. 2016), at 6, available at https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court (last accessed May 4, 2017) ("[I]n the immigration system noncitizens can be transferred to detention centers located a great distance from where they reside or were apprehended. This means that they are far from their families, lawyers, and the evidence they need to support their cases. Furthermore, many detention facilities are located in remote areas."); *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1690 (2013) ("[D]uring removal proceedings noncitizens are not guaranteed legal representation and are often subject to mandatory detention, § 1226(c)(1)(B), where they have little ability to collect evidence.").

EOIR's constitutional violations will continue to cause irreparable harm unless and until the Court enters injunctive relief.

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D. The Balance of Equities and Public Interest Strongly Favor Immediate Relief

In balancing the equities, the Court must consider "'the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 24 (internal quotation omitted); *see also Univ. of Haw. Prof. Assembly v. Cayetano*, 183 F.3d 1096, 1108 (9th Cir. 1999) (to determine which way the balance of the hardships tips, a court must identify the possible harm caused by the preliminary injunction against the possibility of the harm caused by not issuing it). Since this case involves the government, the balance-of-equities factor merges with the fourth factor, public interest. *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2013).

Here, these factors weigh strongly in favor of granting preliminary relief. "It is ***always*** in the public interest to prevent the violation of a party's constitutional rights." *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012); *see also Small v. Avanti Health Sys., LLC*, 661 F.3d 1180, 1197 (9th Cir. 2011) ("[T]he public interest favors applying federal law correctly."); *cf. Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) ("Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution."). NWIRP has shown ongoing and irreparable harm caused by EOIR's Rule and its cease-and-desist order, and it has illustrated how enforcement of that order against NWIRP does absolutely nothing to further EOIR's interest in promoting minimal standards of professional conduct for attorneys in EOIR proceedings.

IV. CONCLUSION

For the last thirty years, NWIRP has advocated for low-income immigrants in Washington by providing limited legal services to pro se persons in removal proceedings. Relying on a nine-year-old rule governing attorney misconduct, EOIR has now suddenly ordered NWIRP to "cease and desist" providing such services. EOIR has violated NWIRP's constitutional rights. NWIRP respectfully asks this Court to grant a temporary restraining order, enjoining EOIR from further enforcing its compulsory-representation rule until such time as the Court can further consider the merits of NWIRP's claims.

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DATED this 8th day of May, 2017.

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CERTIFICATE OF SERVICE

I certify that on May 8, 2017, I caused the following documents:

1. Complaint for Declaratory and Injunctive Relief, with Exhibit
2. Civil Cover Sheet
3. Motion for Temporary Restraining Order
4. [Proposed] Temporary Restraining Order
5. Declaration of Timothy Warden-Hertz
6. Declaration of Yuk Man Maggie Cheng

to be served by hand delivery, at or near the time they were filed with the Court, on the following:

United States Attorney's Office
Western District of Washington
700 Stewart Street, Suite 5220
Seattle, WA 98101-1271

Declared under penalty of perjury under the laws of the State of Washington this 8th day of May, 2017, in Seattle, Washington.

By *s/ James Harlan Corning*
James Harlan Corning, WSBA #45177

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