

## Conduct of Lawyers Act (“COLA”)

AN ACT Relating to the conduct of lawyers; amending RCW 2.48.210; amending RCW 2.48.220; and amending RCW 2.48.230.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

**Sec. 1.** RCW 2.48.210 and 1921 c 126 § 12 are each amended to read as follows:

~~((Every person before being admitted to practice law in this state shall take and subscribe the following oath:~~

~~—— I do solemnly swear:~~

~~—— I am a citizen of the United States and owe my allegiance thereto;~~

~~—— I will support the Constitution of the United States and the Constitution of the state of Washington;~~

~~—— I will maintain the respect due to courts of justice and judicial officers;~~

~~—— I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land, unless it be in defense of a person charged with a public offense; I will employ for the purpose of maintaining the causes confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement of fact or law;~~

~~—— I will maintain the confidence and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval;~~

~~—— I will abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;~~

~~—— I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay any man's cause for lucre or malice. So help me God.))~~

The supreme court by rule shall prescribe the form of Oath of Attorney for applicants for admission to the state bar.

**Sec. 2.** RCW 2.48.220 and 1921 c 126 § 14 are each amended to read as follows:

~~((An attorney or counselor may be disbarred or suspended for any of the following causes arising after his admission to practice:~~

~~—— (1) His conviction of a felony or misdemeanor involving moral turpitude, in which case the record of conviction shall be conclusive evidence.~~

~~—— (2) Wilful disobedience or violation of an order of the court requiring him to do or forbear an act connected with, or in the course of, his profession, which he ought in good faith to do or forbear.~~

~~—— (3) Violation of his oath as an attorney, or of his duties as an attorney and counselor.~~

~~—— (4) Corruptly or wilfully, and without authority, appearing as attorney for a party to an action or~~

proceeding:

———(5) Lending his name to be used as attorney and counselor by another person who is not an attorney and counselor:

———(6) For the commission of any act involving moral turpitude, dishonesty or corruption, whether the same be committed in the course of his relations as an attorney or counselor at law, or otherwise; and whether the same constitute a felony or misdemeanor or not; and if the act constitute a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disbarment or suspension from practice therefor:

———(7) Misrepresentation or concealment of a material fact made in his application for admission or in support thereof:

———(8) Disbarment by a foreign court of competent jurisdiction:

———(9) Practicing law with or in cooperation with a disbarred or suspended attorney, or maintaining an office for the practice of law in a room or office occupied or used in whole or in part by a disbarred or suspended attorney, or permitting a disbarred or suspended attorney to use his name for the practice of law, or practicing law for or on behalf of a disbarred or suspended attorney, or practicing law under any arrangement or understanding for division of fees or compensation of any kind with a disbarred or suspended attorney or with any person not a licensed attorney:

———(10) Gross incompetency in the practice of the profession:

———(11) Violation of the ethics of the profession:))

The supreme court shall prescribe rules of procedure governing the discipline, including suspension or disbarment, of members of the state bar.

**Sec. 3.** RCW 2.48.230 and 1921 c 126 § 15 are each amended to read as follows:

((~~The code of ethics of the American Bar Association shall be the standard of ethics for the members of the bar of this state.~~)) The supreme court shall establish from time to time and enforce rules of professional conduct for the members of the bar of this state, but no such rules of conduct shall prohibit any member from voluntarily revealing information relating to the representation of a client to the extent the lawyer reasonably believes necessary for any of the following purposes:

(1) To warn that the client or a third person has made, and still poses, a true and real threat to harm another person, whether or not the threatened person has notice of the potential danger.

(2) To prevent the probable death or substantial bodily harm of any person.

(3) To prevent the client from committing any crime

(4) To prevent the client from committing a fraud that is reasonably expected to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.

(5) To prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably expected to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

(6) To report pursuant to RCW chapter 26.44 evidence of reasonable cause to believe that any child has suffered abuse or neglect.

(7) To report pursuant to RCW chapter 74.34 evidence of probable cause to believe that any vulnerable adult has suffered abandonment, abuse, financial exploitation, or neglect.

(8) To report to appropriate authorities or to others evidence that any lawyer has committed misconduct that if known by the authorities would reasonably be expected to result in the lawyer's suspension or disbarment.

(9) To report to appropriate authorities or to others evidence that any judicial officer has committed misconduct that if known by the authorities would reasonably be expected to result in the judicial officer's suspension or removal from judicial office.

(10) To report to appropriate authorities or to others evidence that any elected official or executive state officer, as those terms are defined in RCW chapter 42.17, has knowingly violated any law.

[end of bill]

## EXPLANATORY NOTES

**Sections 1 and 2:** These sections remove misleading language from statutes enacted or last amended in 1921. The new language acknowledges that the state supreme court prescribes rules governing the subjects addressed in the amended statutes. In 1971, the state supreme court held (*In re Chi-Dooh Li*, 79 Wn.2d 561 (1971)) that all the sections of Chapter 126 of the Laws of 1921 were repealed by Chapter 94 of the Laws of 1933, but the Code Reviser retained five sections from the 1921 Act codified as sections RCW 2.48.190, 2.48.200, 2.48.210, 2.48.220, and 2.48.230. The first two of those sections were subsequently amended by the legislature; the last three will be amended by this bill.

**Section 3:** This section amends RCW 2.48.230 which was initially enacted in Chapter 115 of the Laws of 1917, and which prescribes the code of ethics of the American Bar Association (ABA) as the standard of ethics for Washington lawyers. The ABA's initial code of ethics was the Canons of Professional Ethics (CPE) that it adopted in 1908 and significantly expanded in 1928. The ABA replaced that ethics code in 1969 with its Model Code of Professional Responsibility (MCPR), that the Washington supreme court adopted by rule in 1972 as the standard of ethics for Washington lawyers. The ABA, in a highly contentious process, adopted in 1983 a new model ethics code titled the Model

Rules of Professional Conduct (MRPC). Our state supreme court adopted the MRPC with various changes from the ABA model, and, with later amendments, the Washington Rules of Professional Conduct (WRPC) has been the standard of ethics for Washington lawyers since September 1, 1985.

The following excerpts from opinions of Washington state supreme court opinions illustrate that the legislature has the power to prescribe the minimum standards of ethics set forth in Section 3. In *In re Bruen*, 102 Wash. 472 (1918), the state supreme court upheld the legislature's creation, in Chapter 115 of the Laws of 1917, of a board of law examiners, saying:

Now, it is evident that, under our constitution, this board may exercise such delegated legislative powers as have been granted to it, which are the examination of applicants for admission to the bar and the prescribing of certain rules; and they are competent to exercise the administrative powers conferred upon them of investigating the conduct of attorneys who have been admitted, to ascertain whether or not they should be permitted to continue to practice their profession, in order that the mischiefs sought to be remedied by the legislature may be remedied and prevented, and may initiate complaints in such cases and hear the evidence, and make reports and findings thereon. But the board is not a court and cannot exercise the functions of a court, except the limited function of passing upon evidence received by them and reporting it. They can make no order striking the name of an attorney from the rolls or disbaring him from practice.

In *State ex rel. Foster-Wyman Lumber Co. v. Superior Court*, 148 Wash. 1 (1928), the state supreme court rejected an argument that the legislature had acted unconstitutionally by its enactment in 1925 of legislation delegating to the state supreme court its power to make rules of practice and procedure in the courts of this state, the court saying:

We think it follows that the legislature, although formerly functioning in this state as the source of rules of practice and procedure in the courts, did not, in so doing, perform an act exclusively legislative, and may, if it so desires, transfer that power to the courts without such act being a delegation of legislative power.

In *In re Levy*, 23 Wn.2d 607 (1945), the state supreme court rejected a passage by an Illinois court asserting that legislatures lack power to regulate lawyers, saying:

Such a pronouncement seems rather startling, in view of the fact, known to everyone, that the legislatures of all of the states, including our own, have repeatedly passed acts regulating admissions to the bar. Are such acts wholly ineffective? The answer to that question is that they are not, in so far as, ***under the police power, they provide minimum requirements.*** But the legislative power cannot be exercised in such a way as to deprive the courts of the power to require additional qualifications. [emphasis added]

In *In re Randall*, 72 Wn.2d 676 (1967), the state supreme court disciplined a lawyer for violations of the ABA Canons of Professional Ethics that the legislature had prescribed as the standard of ethics for state lawyers, saying:

RCW 2.48.230 provides that the code of ethics of the American Bar Association shall be the standard of ethics for the members of the bar of this state.

In *Short v. Demopolis*, 103 Wn.2d 52 (1984), the state supreme court considered whether the state Consumer Protection Act (CPA), RCW Ch. 19.86, applied to the practice of law. The court rejected an argument, at page 63, that “to allow regulation of lawyers by a ‘politically motivated’ legislature is not in the public interest.” The court accepted the argument by the consumer protection division of the state attorney general’s office, that the court summarized as follows:

Amicus curiae, Washington State Attorney General, relying on *In re Bruen*, 102 Wn. 472, 172 P. 1152 (1918), argues the separation of powers doctrine does not create an impenetrable barrier through which the Legislature may not venture. Rather, the exclusive power of the court lies in determining who may practice law and who, once admitted, shall be suspended or disbarred from such practice. The corollary, according to amicus, is that the Legislature may constitutionally act with regard to attorneys so long as its enactments do not affect or purport to take away the court's power to admit, suspend, or disbar.

The court, in apparent agreement, then held at page 65:

While we should jealously protect our prerogatives, if the legislative power is not limited by the constitution, it should be unrestrained. This is in accordance with our presumption in favor of the constitutionality of legislative acts. Accordingly, we hold the CPA does not trench upon the constitutional powers of the court to regulate the practice of law. [citations omitted]

Based upon these judicial decisions of the state supreme court, the legislature may enact Section 3 of this bill without violating the separation of powers doctrine or unconstitutionally trenching upon the powers of the state’s judicial branch of government. The purpose of the changes proposed in Section is to protect the public interest by forbidding the adoption or enforcement of conduct rules that prevent lawyers from fulfilling their professional and civic duties to society and its members to uphold the rule of law. Several of the provisions reflect proposed amendments to the MRPC that were recommended in 2001 by the ABA Commission on the Evaluation of the Model Rules of Professional Conduct (chaired since 1997 by Delaware’s chief justice), commonly called the “Ethics 2000 Commission,” some of which were rejected by the ABA House of Delegates in August 2001.

**Subsection 3(1):** In *State v. Hansen*, 122 Wn.2d 712 (1993), the state supreme court held that lawyers have a *duty* to warn of any true threat of harm to a *judge* by a client or any third party. In

*Hawkins v. King County*, 24 Wn. App. 338 (1979), a lawyer (now state supreme court Justice Richard Sanders) argued that an ethics rule *forbade* the lawyer from warning of a client's dangerousness, and the court held that lawyers do *not* have a duty to warn of a client's intent to inflict serious injury on a third person. In the *Hawkins* case a dangerous, mentally ill man had been arrested for assaulting a young girl on the UW campus but was charged only for possessing marijuana. His court-appointed lawyer was immediately informed by a psychiatrist of his dangerousness but the lawyer obtained his release from jail without informing the judge of that. The client soon thereafter attacked and repeatedly stabbed his mother, then attempted suicide causing the amputation of both legs.

Since nothing is, nor should be, more fundamental in our legal system than the preservation and protection of innocent human life, Subsection 3(1) provides that no lawyer ethics rule shall forbid a lawyer from warning any person of a true threat of harm.

**Subsection 3(2):** A lawyer may possess confidential client information that, if disclosed, would prevent the probable death or substantial bodily harm of a person, but the lawyer may believe that ethics rules forbid the lawyer from disclosing the information. Examples would be the prevention of a probable suicide and the reporting of a life-threatening structural or environmental condition or hazardous product. This provision was proposed, using "reasonably certain" instead of "probable," as amended MRPC 1.6(b)(1) by the Ethics 2000 Commission and was approved by the ABA House of Delegates in August 2001.

**Subsection 3(3):** Disclosures of client confidential information to prevent the client from committing a crime were permitted by Canon 37 of the CPE and by Disciplinary Rule 4-101(C)(3) of the MCPR. The ABA rejected that exception to confidentiality in 1983 when it adopted the MRPC, but the Washington state supreme court retained it as WRPC 1.6(b)(1). It only applies expressly to crime by the client, not crime by another, and it is unclear how it applies to the prevention of the continuation of a continuing crime.

**Subsection 3(4):** Fraud may be a crime or it may be a civil matter, depending upon the circumstances. This provision would permit a lawyer to disclose confidential information to prevent a client from committing a serious civil fraud that is furthered by the lawyer's services. The ABA's Ethics 2000 Commission recommended this as amended MRPC 1.6(b)(2), but it was voted down by the ABA House of Delegates in August 2001. The provisions of Canon 37 of the CPE and of Disciplinary Rule 4-101(C)(3) of the MCPR that had permitted disclosures to prevent crime by a client had been construed liberally for decades prior to 1983 as applying to also to civil fraud.

**Subsection 3(5):** Even though a client has committed a serious fraud, a lawyer's disclosures of confidential information might prevent, mitigate, or rectify serious financial harm to the victims of the fraud. This provision permits such disclosures if the client had used the lawyer's services to further the fraud. The ABA's Ethics 2000 Commission recommended this as amended MRPC 1.6(b)(3), but it was rejected by the ABA House of Delegates in August 2001. Such rectification disclosures were permitted by Canon 41 of the CPE and by Disciplinary Rule 7-102(B)(1) of the MCPR (until 1974)

and of WCPR (until 1985).

**Subsection 3(6):** The WRPC rule 1.6 does not presently permit a lawyer to report confidential client information that provides reasonable cause to believe that a child has suffered abuse or neglect, even though it may be likely to continue or to recur. This provision would permit a lawyer to report such information.

**Subsection 3(7):** The WRPC rule 1.6 does not presently permit a lawyer to report confidential client information that provides probable cause to believe that a vulnerable adult has suffered abandonment, abuse, financial exploitation, or neglect, even though it may be likely to continue or to recur. This provision would permit a lawyer to report such information.

**Subsection 3(8):** The WRPC rule 8.3(c) does not presently permit a lawyer to report confidential client information that another lawyer has committed serious misconduct demonstrating their unfitness to serve the public as a lawyer. This provision would permit a lawyer to report such information.

**Subsection 3(9):** The WRPC rule 8.3(c) does not presently permit a lawyer to report confidential client information that a judge has committed serious misconduct demonstrating their unfitness to serve the public as a judge. This provision would permit a lawyer to report such information.

**Subsection 3(10):** It is unclear under WRPC rule 1.6 whether a lawyer whose client is a governmental organization, including a lawyer employed by the organization, may report confidential information about unlawful conduct by the highest officials of that governmental organization to appropriate authorities outside of that organization. This provision would permit a lawyer to report such information.

In the last two years, California recognized such uncertainty after a staff lawyer for its state's elected insurance commissioner reported his lawlessness to a state legislative committee, following which the insurance commissioner resigned in disgrace. Though the state bar declined in October 2000 to prosecute the staff lawyer, the state's attorney general opined in May 2001 that her actions of disclosing confidential information to persons outside her own governmental agency client violated the lawyer ethics rules and were not shielded by the state's whistleblower protection statutes.