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**Comments on the Proposed Rules of Professional Conduct
Submitted by Professor Tom Andrews**

As an academic who has taught, lectured and written in the field of professional responsibility for twenty years, I respectfully submit the following comments to the proposed Rules of Professional Conduct. I will refer to the existing Washington Rules as "WRPC", the existing ABA Model Rules as "MR", and the proposed Washington rules as "PWRPC," and to the WSBA Board of Governors as the "BOG." In general, where I have not commented on a proposed rule, it is because I support the proposal of the BOG.

A. Rule 1.6

I have collaborated with Professors John Price, Karen Boxx, and Rob Aronson on other comments to PWRPC 1.6 wherein we have recommended that the Court adopt MR 1.6(b)(3)(the "rectification" exception) and amend PWRPC 1.6(b)(7)(the "fiduciary" exception). I have submitted that comment separately and ask that the Court consider that comment as if incorporated here. Beyond that, I have two comments respecting Rule 1.6.

1. Disclosures to prevent reasonably certain death or substantial bodily harm: PWRPC 1.6(b)(1).

I strongly support incorporation of new ABA MR 1.6(b)(1) which removes the need to show client criminality to justify disclosure to prevent "reasonably certain death or substantial bodily harm." This is a change that is long overdue and well justified to resolve problems such as that posed in the famous case of Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962) and cases, for example, where a lawyer knows as the result of a client confidence that an innocent person has been condemned to death (e.g. Leo Frank). But I respectfully submit that the Court should go further than the ABA and mandate disclosure in such a case.

There is a point at which a client's right to confidentiality must give way to superior interests. I respectfully submit that it is morally indefensible to value a client's right to confidentiality over another's right to life and security from substantial bodily

harm. That this is so is already implicit in the permission contemplated by PWRPC 1.6(b)(1). But how can we justify making this discretionary with the lawyer? In particular, how can we make it discretionary if we conclude, with the BOG, that disclosure of fraud on a tribunal should be mandatory. PWRPC 3.3(c). I respectfully ask the Court to consider the following scenarios: (Case 1) Client A tells his lawyer that he plans to kill B and lawyer reasonably believes that he will do so if lawyer does nothing. PWRPC 1.6(b)(1) permits (as does PWRPC 1.6(b)(2)) the lawyer to disclose this confidence to protect B, but does not require it. (Case 2) Client B (perhaps a spouse of non-client A) tells her lawyer that she believes A may kill her if she files for a protective order or takes other protective action for children, but out of fear for herself or her children absolutely (and perhaps irrationally) refuses to permit lawyer to disclose this confidence to authorities. Lawyer reasonably believes that A will do as B fears absent disclosure of the confidence. Lawyer is permitted by PWRPC(b)(1) to disclose the confidence, but not required to do so.

When this Court considered a similar scenario and a threat on the life of a judge, this court concluded in *State v. Hansen*, 122 Wn.2d 712, 862 P.2d 117 (1993), that “attorneys, as officers of the court, have a duty to warn of true threats to harm a judge made by a client or a third party when the attorney has a reasonable belief that such threats are real.” If the Court is satisfied that attorneys have a duty to disclose in this situation, then I respectfully suggest that the RPCs should impose such an obligation. Further, I respectfully doubt that the Court intended to limit a lawyer’s duty in such a situation to threats on judges, and further doubt that such a limitation could be justified by any special status that might attach to judges.

While I recognize that there are values to be achieved in national uniformity by adopting MR 1.6(b)(1), in fact there is no national uniformity on this issue. The most recent nationwide survey of which I am aware reports that at least twelve (12) states require disclosure in either Case 1 (client crime threatening death or substantial bodily harm) or both Cases 1 and 2 (client in confidence discloses that death or substantial bodily harm is threatened at the hands of someone else). T.M. MORGAN & R.D. ROTUNDA, 2005 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 144-56 (2005). See, e.g., NJ RPC 1.6(b)(1)(client and non-client threats); FLA RPC 4-1.6(b)(2)(client and non-client threats); TEX RPC 1.05(e)(client threats); ILL RPC 1.6(b)(client threats).

Finally, lest the concern be raised that such a duty might compromise a client’s constitutional rights, it should be noted that a lawyer’s right or duty to disclose under the ethics code, absent consent by the client, need not – and typically should not—be viewed as a waiver of the attorney-client privilege by the client. See, e.g., *Purcell v. District-Attorney for the Suffolk District*, 424 Mass. 109 (1997). It might, of course, fall within the crime/fraud exception to the privilege. *Id.* and *State v. Hansen*, *supra*. But the two are not the same and it is possible to protect a client’s legitimate rights against self-incrimination while at the same time imposing a duty on lawyers to disclose client confidences to protect innocent and unknowing third persons.

2. Disclosures to comply with other law: PWRPC 1.6(b)(6).

The BOG has proposed in PWRPC 1.6(b)(6) to carry over the exception for disclosure to comply with court orders but to reject the ABA exception for disclosures "to comply with other law." MR 1.6(b)(6). Rejection of permission to disclose when "other law" requires such disclosure puts lawyers in the position of having to test a legal disclosure obligation in each and every case by going to court, regardless of how frivolous such a testing may become. This problem has already commanded the attention of the WSBA Bar Association and others around the country with regard to federal disclosure obligations imposed where a lawyer receives more than \$10,000 in cash from a client. WSBA Formal Ethics Op. 194 (1997). The position taken in that ethics opinion is that a lawyer is precluded from disclosing the identity of the client (as required by federal law) until ordered to do so by court order. This is the Bar's opinion notwithstanding that the disclosure obligation may have been so fully adjudicated that any opposition by a lawyer would be frivolous. I submit that complying with RPC 1.6 in this connection would require a lawyer to violate another rule (PWRPC 3.1)(frivolous positions). Since a lawyer may not violate any of the rules willingly, and cannot comply with both 1.6 and 3.1 in this context, the lawyer would be required to withdraw under WRPC 1.15(a)(1)(PWRPC 1.16(a)(1)). A similar conflict of duties may arise as a result of the disclosure of client confidences permitted under regulations adopted under the Sarbanes-Oxley Act, but ostensibly prohibited under PWRPC 1.6. See generally WSBA Interim Formal Ethics Op. 197 (2003). Quite apart from this quandary, exempting lawyers from disclosures "required by law" sends the message that lawyers are "above" the law. I respectfully submit that this is not a sound position for the legal profession to take nor for the Court to enforce by rule and recommend that the Court add "or other law" to the Rule. The Comment could clarify that where a lawyer has a good faith and non-frivolous question about the applicability of "other law" then the lawyer is entitled to exercise his or her discretion not to disclose until ordered to comply by a court of competent jurisdiction.

B. PWRPC 1.4: Duty to Inform

1. Disclosure of the Scope of the Duty of Confidentiality

It is commonly claimed that exceptions to the lawyer's duty of confidentiality chill a client's readiness to disclose confidences to counsel, thereby diminishing the lawyer's ability to serve the client's best interests. In fact, there is little empirical evidence available as to the effect that confidentiality rules have on client behavior. What there is fails to corroborate the common claim. See generally, Zacharias, "Rethinking Confidentiality," 74 Iowa L. Rev. 351, 381 and 377 (1989). But perhaps more importantly, studies have raised a serious question as to whether lawyers adequately advise their clients as to the parameters of the existing duty.

In view of the exceptions to the lawyer's duty of confidentiality—whatever they may be—it is not good enough for lawyers to tell their clients that whatever they reveal will be held in the strictest confidence !!! In view of the right that lawyers have (and sometimes the duty) to disclose client confidences, it is time for lawyers to be expected to give clients a clear understanding of what they are entitled to expect and what they are not entitled to expect. In principle, such a duty has always been implicit in the general duty of communication laid out under the law of agency and under RPC 1.4. But there is good reason to question whether lawyers in fact comply with that duty. I respectfully submit that an express duty should be imposed on lawyers to explain the contours of the lawyer's duty of confidentiality, including those instances in which the lawyer is entitled (or required) to disclose otherwise confidential information, as specified in the rules. I furthermore would recommend that such a duty of disclosure be required in writing, and that clients be expected to sign that writing to acknowledge their receipt of the information.

2. Duty to Disclose Lack of Malpractice Insurance

It is striking that while we, as a state, require that automobile drivers maintain liability insurance, no similar requirement has been imposed on lawyers. I do not have empirical information at my disposal that indicates whether clients typically assume that lawyers have such insurance to provide a remedy if the lawyer breaches his or her duties to the client; but I suspect that most do make that assumption. Introducing such a requirement is well beyond the scope of the Rules of Professional Responsibility and would require a major investment of time and study.

Pending such a proposal, however, I respectfully submit that the Court can create incentives for lawyers to maintain an adequate amount of insurance by imposing an affirmative duty on lawyers to disclose to clients the fact that they do not. Such a requirement has been introduced in Alaska, for example. I respectfully commend it for the Court's consideration as a further improvement of PWRPC 1.4. Alaska RPC 1.4 provides, in relevant part:

Rule 1.4. Communication.

“(c) A lawyer shall inform an existing client in writing if the lawyer does not have malpractice insurance of at least \$100,000 per claim and \$300,000 annual aggregate and shall inform the client in writing at any time the lawyer's malpractice insurance drops below these amounts or the lawyer's malpractice insurance is terminated. A lawyer shall maintain a record of these disclosures for six years from the termination of the client's representation.”

The Alaska rules also contain comments pertinent to this section which make it clear that it “does not apply to lawyers in government practice or lawyers employed as in-house counsel” and which suggest forms of disclosure. I respectfully recommend this as an important and valuable addition to Rule 1.4.

C. Conflicts Rules

1. PWRPC 1.8

a. Do the subsections of Rule 1.8 provide Safe Harbors? As a general matter, the interplay between Rules 1.7, 1.9, and 1.8 remains problematic. The question is this: to what extent does compliance with the specific requirements of Rule 1.8 as to any particular generic situation operate as a “safe harbor” such that a lawyer need not examine the situation under Rules 1.7 and 1.9 (or other rules) as well. There are a number of situations in which the comments make it clear that other rules must be considered independently. E.g. PWRPC 1.8, comments [3] and [12]. I would respectfully suggest that an introductory comment be added to clarify that compliance with the specific requirements of Rule 1.8 does not eliminate the need to examine other rules that might preclude the contemplated conduct.

b. PWRPC 1.8(e) The BOG has recommended that MR 1.8(e)(1), permitting repayment of court costs and expenses of litigation generally to be made contingent on the outcome, be replaced with the current Washington RPC 1.8(e) that limits such “contingent” expenses to class actions. I respectfully submit that the broader ABA version is superior. In many contingent fee cases, clients will not have the funds to pay for expenses of litigation if they are unsuccessful. This is true without regard to whether the case is a class action. If contingent fees are appropriate in order to make it possible for injured persons to access the legal system, then so is contingent payment of expenses. The proposed comment makes it clear that a lawyer need not collect on a client’s obligation to repay such expenses. So what the rule is prohibiting is an express agreement, in advance, to make such expenses contingent. I respectfully submit that lawyers are being given an incentive to give informal assurances that such expenses will not be collected in contingent fee cases that are lost, while giving clients no enforceable promise to that effect. This creates an opportunity for client victimization by unscrupulous lawyers who decide, after having lost such a case, to collect from the client in contravention of expectations previously created or expectations that have arisen due to the silence of the contingent fee lawyer. It also rules out a basis for lawyers to compete with one another as to the kinds of contingent fee agreements they make with clients. It is, to that extent, anticompetitive. One comment suggests that this rule ensures “a proper degree of client accountability ...[and] strikes an appropriate balance between enhancing access to the courts and discouraging excessive economic entanglement between lawyer and client.” PWRPC 1.8, comment [21]. Another suggests that further assistance “gives lawyers too great a financial stake in the

litigation.” PWRPC 1.8, comment [10]. But these are conclusory comments and the ABA Model Rule, to the contrary, shows that reasonable minds can differ as to the proper balance. The American Law Institute agrees with the ABA position as well. Restatement of the Law Governing Lawyers (“RLGL”), § 36(2) & comment c. I respectfully submit that the balance struck by the ABA on this matter is superior when one considers the entanglement and financial stake already implicit in the contingent fee system.

I respectfully submit recommend the Court also consider allowing even further assistance in a particular class of cases. Where an indigent client is in such severe need of health care, food or shelter that the client is unable to maintain a suit, a lawyer should be entitled to advance or guarantee such personal expenses. Minnesota’s rules, for example, provide:

“[A] lawyer may guarantee a loan reasonably needed to enable the client to withstand delay in litigation that would otherwise put substantial pressure on the client to settle a case because of financial hardship rather than on the merits, provided the client remains ultimately liable for repayment of the loan without regard to the outcome of the litigation and, further provided, that no promise of such financial assistance was made to the client by the lawyer, or by another in the lawyer’s behalf, prior to the employment of that lawyer by that client.”

Minnesota RPC 1.8(e)(3). I submit that such a rule would make access to justice more meaningful in the case of clients who are on the economic margins of society.

2. PWRPC 1.11 (Former and Current Government Lawyers)

Proposed WRPC 1.11(d), like current WRPC 1.11(c), does not impute the conflict of a personally disqualified government lawyer to the rest of his or her office; for that reason, it does not address whether screening of such a government lawyer prevents the imputation. Proposed comment [5] makes this clear, as does proposed comment [7] to PWRPC 1.10, but neither comment offers a justification for the decision not to impute such conflicts. The ABA takes the same position. MR 1.11 & comment [5] and MR 1.10 & comment [7]. I respectfully submit that this “imputation exception” is not justified, particularly when it is understood that Rule 1.11 controls imputation where a current government attorney has a conflict as a result of Rules 1.7 or 1.9. See PWRPC 1.10(d) and 1.11(d)(1). This “imputation exception” also seems inconsistent with this Court’s holding in *State v. Stenger*, 111 Wn.2d 516; 760 P.2d 357 (1998). In that case, the Court held that not only the prosecutor for Clark County was personally disqualified from prosecuting his former client, but also that the rest of his office had to be disqualified, and a special prosecutor appointed. The Court also stated:

“where a deputy prosecuting attorney is for any reason disqualified from a case, and is thereafter effectively screened and separated from any participation or

discussion of matters concerning which the deputy prosecuting attorney is disqualified, then the disqualification of the entire prosecuting attorney's office is neither necessary nor wise."

Id. at 522-23. I respectfully submit that the Court recognized in Stenger that personal conflicts carried into a government office by a former private lawyer should be imputed to the rest of the office absent appropriate screening. I respectfully recommend that the Court amend PWRPC 1.11 by adding a new section 1.11(denominated dd below to avoid confusion), to follow 1.11(d), to provide as follows:

"(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(i) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(ii) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(dd) When a lawyer currently serving as a public officer or employee is disqualified from personally participating in a matter under paragraph (d), no lawyer in the government office with which that lawyer is associated may knowingly participate in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and; and

(2) written notice is promptly given to the former client to enable the client to ascertain compliance with the provisions of this Rule."

3. PWRPC 1.12 (Screening of former judges or third party neutrals).

Proposed WRPC 1.12 would carry over the current provision that imputes the conflicts of a former judge or third party neutral who was personally and substantially involved in a matter previously undertaken to the rest of the personally disqualified lawyer's law office, but then allows for the cure of the imputation by screening. PWRPC

1.12(c). This is consistent with the ABA. But I respectfully submit that there is an aspect of this rule that has not previously been considered adequately.

Should the rule apply to lawyers who serve, while more generally engaged in the practice of law, as part-time judges (judges pro tem) and/or part-time third party neutrals? The problem is this: screening as allowed by Rules 1.10 and 1.11 generally is only available for lawyers who join a new firm, bringing a personal conflict with them. PWRPC 1.10(e) and PWRPC 1.11(a) & (b). Under Rule 1.10, screening is not available to cure an imputed conflict that had its origins while the attorney was working at the firm to which the conflict is to be imputed, but only for conflicts that had their origins before the attorney “became associated” with the firm. Neither is screening available under Rule 1.11 to cure an imputed conflict that had its origins while the attorney was working at the firm, but only for lawyers who “formerly served as a public officer or employee of the government.” Significantly, screening is not available under Rule 1.11 to cure a conflict if a private attorney, while working generally in private practice, represents a government client, because such an attorney would not be a public officer or employee—but rather an independent contractor. There are good reasons for this limitation to screening. Screening is problematic even in the contexts where it is permitted, for reasons that are well known to this Court. As is also well known, the ABA continues to reject screening entirely in the situations embraced by Rule 1.10, out of a concern for former client interests that may not be adequately protected by a screening rule. Washington has long since concluded that the risks are worth taking under Rule 1.10. But quite apart from this difference of view between Washington and the ABA, there appears to be a general consensus that the balance tips when we move beyond the situation of a lawyer joining a new law office. Screening is just too difficult and impractical to be permitted as a general curative device to prevent imputation of concurrent or former client conflicts which arise among lawyers in a “static” law firm. When a lawyer joins a firm, it is possible at intake to do a conflicts check and to flag personal conflicts as to which the incoming lawyer needs to be screened. But where the conflict is one that develops while a lawyer is at the firm, there are no warning signs that can flag the need for screening in advance.

Yet this is essentially the kind of screening that Rule 1.12 permits if it is applied to part-time judges and third party neutrals. Imagine a lawyer who is mediating a case. He or she may well acquire confidences and may, in fact, share confidences with other lawyers in the firm in order to assist the mediator/lawyer to do his/her job as mediator. Suppose, then, that the mediation fails. The mediator is personally disqualified from serving as lawyer for either party (absent consent from all parties) if the dispute continues. But PWRPC 1.12, as written, would provide for the part-time mediator to be screened and for someone else in the lawyer’s firm to represent one of the parties. I respectfully submit that this is a situation in which screening is both unlikely to work in practice and likely to be pernicious. It is unlikely to work in practice because it presupposes that a part-time judge or mediator would know, in advance, that he or she should not be discussing the case with colleagues at his or her law firm. The only practical way to take advantage of the screening possibility would be for the part-time

mediator/judge to engage in no discussions of such cases with colleagues for fear that it would preclude the possibility of later screening if that proved advisable. On the one hand, such a "cone of silence" attitude would have a deleterious effect on the culture of any law firm where lawyers look to one another as consultants and mentors. On the other hand, the absence of such discussions of confidences would be virtually impossible to verify after the fact. Moreover, allowing screening in this context has the capacity to create a system of incentives that would be quite destructive to the whole enterprise of the part-time adjudication/neutral practice. If, for example, a lawyer who is serving as a mediator knows that if the mediation is unsuccessful, someone else in his or her firm will be able to represent one of the parties, the lawyer/mediator will have incentives to torpedo the mediation. The fact that the former mediator would be denied any part of the fee from such a representation (PWPRC 1.12(c)(1) is not a sufficient safeguard against abuse of the role as third party neutral, because the firm will be advantaged by getting the client and the mediator/lawyer will profit indirectly from this firm prosperity whether he or she profits directly or not.

For these reasons, I respectfully recommend that PWPRC 1.12 be amended to preclude screening where the former judge, arbitrator, mediator or other third party neutral has participated personally and substantially in the matter while associated with the firm that would institute the screening. This could be accomplished by adding a new 1.12(c)(3) to read as follows:

1.12(c)(3): The screening contemplated in sections 1.12(c)(1) and (2) shall not be available to prevent imputation of a conflict where the person who served personally and substantially in the matter as judge, arbitrator, mediator or other third party neutral did so while associated with the firm to whom the conflict would be imputed under this rule absent screening.

4. PWPRC 1.18: Screening of Lawyers Who have Personal Conflicts Resulting from Prospective Client Consultations

Proposed Rule 1.18, which is taken largely verbatim from the new ABA MR 1.18, creates a problem similar to the application of Rule 1.12 to part-time judge and third party neutrals. It envisions screening as sufficient to prevent an imputed conflict where a lawyer has been consulted by a prospective client and has obtained confidential information that might infect a current or later representation by the firm. At a minimum, making screening available to prevent imputation in this situation creates incentives for lawyers who are consulted about prospective representations to keep the information to themselves unless and until they have done a conflicts check. But often an adequate conflicts check cannot be done without disclosure of at least some confidential information. So the availability of screening creates incentives to do inadequate conflicts checks, for fear that the lawyer who has been approached cannot be screened. Moreover, even if an adequate conflicts check can be done and it can be ascertained that there is no present conflict, the lawyer who is considering whether to

take on the client will have incentives not to share pertinent information with his or her colleagues for fear of jeopardizing the screening possibility at a later time. These incentives may actually lead to ill considered decisions to represent certain clients, because the lawyer approached will have been discouraged by the screening rule from fully consulting with colleagues about a prospective client's case. Finally, if an attorney/client relationship is not established with the prospective client, the lawyer who was approached will thereafter have an incentive to maintain the cone of silence for fear of precluding screening should an adverse client later approach someone else in the firm which that lawyer would like to represent.

In short, I respectfully submit that the implications of screening in this context have not been adequately considered. Screening is not a reliable device where applied to a law firm's existing lawyers, as opposed to incoming lawyers. Moreover, it threatens to create a system of destructive incentives which are likely to undermine the benefits of a law firm "community." I encourage the Court to reconsider the advisability of allowing screening in this context and to consider eliminating it by deleting PWRPC 1.18(d)(2).

D. Client with Diminished Capacity

Proposed WRPC 1.14 (current WRPC 1.13) will be greatly strengthened by the changes proposed and the addition of the comments. But I respectfully submit that it remains insufficient to deal with the problems presented by clients with diminished capacity. For example, what are a lawyer's duties or powers when dealing with a person who proposes to retain the lawyer, if the lawyer concludes that the prospective client lacks adequate capacity to enter in the attorney/client relationship, but is nonetheless at risk of fraud, undue influence or coercion? Such a person is not yet a client, and so the lawyer's authority to take protective action under the rule has not yet attached. Proposed comment [9] purports to deal with this situation, but there is really no authority in the rule itself for such actions on behalf of a non-client. I respectfully suggest that authority for this be placed in the rule itself. In that connection, I suggest that a very thoughtful proposal for amendment of this rule resulted from a 1993 Conference whose proceedings were published in the *Fordham Law Review*. PROCEEDING OF THE CONFERENCE ON ETHICAL ISSUE IN REPRESENTING OLDER CLIENT: RECOMMENDATIONS OF THE CONFERENCE, 62 *Fordham L. Rev.* 989 (1994). This proposed amendment was presented to the ABA by the ABA Commission on Legal Problems of the Elderly in 1995, but the proposal was rejected. S. GILLERS & R.D. SIMON (eds.), *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 2005 161 (2005). I respectfully commend this proposal to the Court's attention as an appropriate amendment to Proposed WRPC 1.14. In pertinent part, the proposal was that "the following language should be added as Model Rule 1.14(d) to address legal issues arising when the existence of an attorney-client relationship is not clearly established:

"a. A lawyer is an agent who acts upon the authority of a principal. In many cases, the lawyer will have a pre-existing relationship with a person or that person's family. In the absence of such a pre-existing relationship or a contractual agreement, express or implied, a lawyer generally may not act on behalf of a client.

"b. In certain circumstances, a lawyer may act as lawyer for a purported client even without express or limited agreement from the purported client, and may take those actions necessary to maintain the status quo or to avoid irreversible harm, if

"i. An emergency situation exists in which the purported client's substantial health, safety, financial, or liability interests are at stake;

"ii. The purported client, in the lawyer's good faith judgment, lacks the ability to make or express considered judgments about action required to be taken because of an impairment of decision-making capacity;

"iii. Time is of the essence; and

"iv. The lawyer reasonably believes, in good faith, that no other lawyer is available or willing to act on behalf of the purported client.

"c. A "purported client" is a person who has contact with a lawyer and who would be a client but for the inability to enter into an expressed agreement.

"4. The following language should be added as Model Rule 1.14(e):

"The lawyer should not be subject to professional discipline for invoking or failing to invoke the permissive conduct authorized by 1.14(b) if the lawyer has a reasonable basis for his or her action or inaction.

"B. Recommendation for Model Rule Commentary:

"1. The following language should be added to the Comments to Model Rule 1.14:

"a. Where capacity comes into question, preference should be given to staying with the situation and taking protective action over withdrawal from the case.

"b. If the lawyer decides to act as de facto guardian, he or she, when appropriate, should seek to discontinue acting as such as soon as possible and to implement other protective solutions.

"c. If the lawyer takes protective action under Model Rule 1.14(b), the lawyer's

action shall be guided by:

"i. The wishes and values of the client to the extent known; otherwise, according to the client's best interest;

"ii. The goal of intruding into the client's decision-making autonomy to the least extent possible;

"iii. The goal of maximizing client capacities; and

"iv. The goal of maximizing family and social connections and community resources."

Id. at 989-90.

E. Multi-Disciplinary Practice: PWRPC 5.4(b) and (d).

The BOG has proposed no change to the historic ban on multi-disciplinary practice. I have written at considerable length on this topic in opposition to the current per se ban. Andrews, "Nonlawyers in the Business of Law: Does the One Who Has the Gold Really Make the Rules?" 40 *Hastings Law Journal* 577 (1989). In a nutshell, my position is that a rule which narrowly addresses the evils against which Rule 5.4 is designed to protect is superior to the prophylactic per se ban contained in Rule 5.4. Such was the conclusion of the ABA Kutak Commission in 1981 when it proposed the original Model Rules; such was also the conclusion of the ABA Commission on Multidisciplinary Practice in 1999. Since my article was published, there has been a huge amount of commentary on the issue of MDP and many developments, here and abroad. One of the best recent pieces of scholarship is by Prof. Mary Daly who was the Reporter for the ABA MDP Commission. Daly, "Choosing Wise Men Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership," 13 *Geo. J. Legal Ethics* 217 (2000). The need for a reconsideration of Rule 5.4 is particularly acute in Washington in the wake of ***Perkins v. CTX Mortgage Co.*, 137 Wn.2d 93, 969 P.2d 93 (1999)**. In *Perkins*, this Court concluded that a Texas non-law company could provide legal services (the presentation and completion of legal documents) in Washington provided that the legal documents were drafted and discretionary judgments related to them were made by Texas lawyers employed by the non-law company. This Court held that this "practice of law" in Washington was authorized, despite the fact that the Texas lawyers on whom the Court expressed reliance were not otherwise authorized to practice in Washington. This was not only MDP by CTX Corporation, it was MDP using non-Washington lawyers. It is only fair for Washington lawyers to assume that what was permitted of Texas lawyers who were not licensed in Washington would be permitted of lawyers properly licensed in Washington. Accordingly, I respectfully submit that the CTX case raises serious questions about the meaning and continuing force of Rule 5.4. I hope the Court will take this opportunity to

reconsider the flat ban on Rule 5.4.

F. Pro Bono Service: PWRPC 6.1

The BOG has proposed that Rule 6.1 be left untouched. In particular, it has proposed that the aspirational number of pro bono hours be maintained at 30 hours, even though the ABA has recommended a minimum of 50 hours. The proposal is made notwithstanding a widely accepted view that the legal profession is not doing all it could be doing to meet the need for legal services among the indigent. I respectfully submit that this proposal sends the wrong message in several respects. First, it sends the message to the public and to the legal profession in this state that it need not aspire even to the number of pro bono hours that the ABA has recommended. Second, it stops short of taking even the minimal steps that several other jurisdictions have taken in mandating the reporting of pro bono hours. Florida, for example, provides that:

“(d) Reporting Requirement. Each member of the bar shall annually report whether the member has satisfied the member's professional responsibility to provide pro bono legal services to the poor. Each member shall report this information through a simplified reporting form that is made a part of the member's annual membership fees statement. The form will contain the following categories from which each member will be allowed to choose in reporting whether the member has provided pro bono legal services to the poor:

- (1) I have personally provided _____ hours of pro bono legal services;
- (2) I have provided pro bono legal services collectively by: (indicate type of case and manner in which service was provided);
- (3) I have contributed \$ _____ to: (indicate organization to which funds were provided);
- (4) I have provided legal services to the poor in the following special manner: (indicate manner in which services were provided); or
- (5) I have been unable to provide pro bono legal services to the poor this year; or
- (6) I am deferred from the provision of pro bono legal services to the poor because I am: (indicate whether lawyer is: a member of the judiciary or judicial staff; a government lawyer prohibited by statute, rule, or regulation from providing services; retired, or inactive).

The failure to report this information shall constitute a disciplinary offense under these rules.”

Fla. RPC 4-6.1(d). This mandatory reporting requirement would provide an invaluable source of empirical information about the degree to which the legal profession is, in fact, providing pro bono assistance. The current voluntary reporting in order to win a recognition award cannot really compare as a basis for future decision making. Third, the current proposal sends the message that we still do not take seriously the idea that the legal profession, as a whole, has a moral duty to provide such pro bono assistance. Throughout the state, there are members of the legal profession who are appointed to serve clients without compensation, sometimes against their will. Lawyers that have been singled out in this way rightly question the fairness of a system that does not impose a similar burden on every member of the legal profession. I respectfully submit that if we take the moral duty of pro bono service seriously, we should be prepared to codify it as a rule of professional conduct the breach of which may be met with discipline. To be sure, no other state has been serious enough about pro bono service to do this. I respectfully hope that the Court will not let this reluctance by other jurisdictions stand in its way of making a major statement about the obligations undertaken by a lawyer when he or she is given the right to practice law.

G. In-Person Solicitation: PWRPC 7.3

Proposed Rule 7.3 would liberalize the per se ban on in-person solicitation by excepting solicitations of lawyers and those with whom the soliciting lawyer has a "close personal relationship." This liberalization is welcome, but I respectfully submit it still fails to cover a variety of circumstances where solicitation is easily justified. Where the person solicited is a sophisticated businessman or other professional with whom the lawyer has no prior relationship, it is difficult to see how a per se ban can be justified. Similarly, it is difficult to see how it is justified in many contexts when the lawyer is engaging in personal solicitation of persons who are not known to be in need of legal services. A lawyer might wish to go door to door, for example, to suggest that residents consider contacting the soliciting lawyer should legal needs arise in the future. Such solicitation might be done when a new lawyer is attempting to introduce himself or herself in a new locale in order to establish a law practice there. A prohibition on a CPA engaging in such solicitation was struck down as unconstitutional in *Edenfield v. Fane*, 507 U.S. 761 (1993). But it would still be prohibited under Proposed Rule 7.3. As I understand it, the evil to be guarded against by Rule 7.3 is that lawyers might engage in "coercion, duress, or harassment" while soliciting clients. But this conduct can be expressly prohibited (as it is in a more limited context in PWPC 7.3(b)(2)) without a per se ban on a variety of benign forms of personal solicitation. Other jurisdictions have seen the wisdom of this more limited approach to regulating solicitation. I respectfully recommend for the Court's consideration the District of Columbia solicitation rule, which reads in part as follows:

"(b) A lawyer shall not seek by in-person contact, or through an intermediary, employment (or employment of a partner or associate) by a nonlawyer who has not sought the lawyer's advice regarding employment of a lawyer, if:

- (1) The solicitation involves use of a statement or claim that is false or misleading, within the meaning of paragraph (a);
- (2) The solicitation involves the use of undue influence;
- (3) The potential client is apparently in a physical or mental condition which would make it unlikely that the potential client could exercise reasonable, considered judgment as to the selection of a lawyer;
- (4) The solicitation involves use of an intermediary and the lawyer knows or could reasonably ascertain that such conduct violates the intermediary's contractual or other legal obligations; or
- (5) The solicitation involves the use of an intermediary and the lawyer has not taken all reasonable steps to ensure that the potential client is informed of (a) the consideration, if any, paid or to be paid by the lawyer to the intermediary, and (b) the effect, if any, of the payment to the intermediary on the total fee to be charged."

DC RPC 7.1(b).

H. Reporting Professional Misconduct: PWRPC 8.3

I fully support the BOG's proposal that reporting of professional misconduct be made mandatory, as it is in the ABA Model Rules and the rules of all but a handful of the states. But I respectfully submit that the exception for information "otherwise protected by Rule 1.6," PWRPC 8.3(c) is too broad.

The best illustration of the point, and justification for a narrower exception, is *In re Schafer, 149 Wn.2d 148 (2003)*, a recent case that it is well known to the Court. Schafer was disciplined for violation of client confidences when he reported the misconduct of a sitting judge, notwithstanding that his reports were true and in fact led to the removal of the judge. In its decision imposing discipline, the Court concluded that Schafer made disclosures beyond what was reasonably necessary to achieve a proper purpose: the reporting of misconduct by Anderson. I agree. But the Court also suggests in its opinion that Schafer would have been permitted to make narrower disclosure for this purpose without violating the Rules of Professional Conduct. With all respect, I disagree. Schafer learned about Anderson's misconduct from his (Schafer's) client, Hamilton. What he learned was information relating to his representation of Hamilton and therefore a client confidence. When Schafer used this confidential information to investigate the case, he was using confidential client information without Hamilton's permission. When he disclosed it to the Judicial Conduct Commission without his former client's consent, he was using confidential

client information against a former client in violation of WRPC 1.6, 1.8(b) and 1.9(c). The fact that he did not intend to harm his client is not a consideration that is currently relevant under the Rules, for what he did was to the disadvantage of his former client and even if it was not, to disclose it without the client's consent violated Rule 1.6 as written and as proposed even now.

I respectfully recommend that permission to disclose client confidences for such a purpose should be expressly added to the rules, either in Rule 1.6 or Rule 8.3. Proposed Rule 8.3, for example, could be amended to distinguish between cases where the lawyer with the knowledge of misconduct has been retained to defend against or advise on the charges of misconduct and other cases, like the one faced by Schafer, where the lawyer learns the information from a client whose misconduct is not at issue. Thus, Proposed Rule 8.3 could be rewritten as follows:

(c) This Rule requires a lawyer to report professional misconduct of another lawyer or a judge to appropriate authority even if compliance requires disclosure of information otherwise protected by Rule 1.6 unless the lawyer who would otherwise be required to report has been retained by the lawyer or judge whose misconduct is at issue to provide legal advice on or representation in connection with that misconduct.

The Rules for Enforcement of Lawyer Conduct and the procedures of the Judicial Conduct Commission, I believe, have been written to protect the confidences of the clients who are not the subject of the report. I respectfully recommend that such a change be made to accommodate such cases. Cf. 17 CFR 205.3(b)(7)(exception from reporting duties under Sarbanes-Oxley regulations).

I. Miscellaneous Misconduct: PWRPC 8.4

The BOG has proposed that existing WRPC 8.4 be carried over virtually unchanged from its present form. In doing so, it has offered no proposals for change to subsections (g) through (n) which were added quite recently. The BOG's proposal is fully justified as to WRPC 8.4(g) and (h), but it is not justified as to 8.4(i) through (n).

WRPC 8.4(g), involving discriminatory acts by lawyers, and 8.4(h), involving conduct manifesting prejudice and bias, were adopted in 2000 after being given careful consideration on the merits by the BOG and this Court. There is no good reason to reconsider the rationale given for adopting these subsections so recently.

The same cannot be said about the sections (i) through (n) of Rule 8.4. These sections were added to Rule 8.4 in 2002 in connection with the reconsideration and revision of the Rules for Lawyer Discipline (renamed the rules of Enforcement of Lawyer Conduct). I respectfully submit that I have personal information as to the genesis of and consideration given to Rule 8.4(i) through (n) at that time because I served on the Discipline 2000 Task Force which proposed that these sections be added

to Rule 8.4. The charge of the Discipline 2000 Task Force was to examine the Rules for Lawyer Discipline and to recommend any structural or substantive revisions the Task Force considered advisable. In carrying out that responsibility, I recommended that the grounds for discipline previously set out in RLD 1.1 be moved into the Rules of Professional Conduct so that lawyers would have adequate notice of all the grounds for discipline, without being required to look to two separate codes. The Task Force agreed and, as part of that exercise, recommended approval of the addition of Rules 8.4(i) through (n). In doing so, however, the Task Force did not engage in a substantive review of those rules because the Task Force thought it outside the scope of its charge to engage in such a review. This was done despite the fact that a number of members of the Discipline 2000 Task Force had serious misgivings about the continued advisability of some of those grounds for discipline. It is my belief that the BOG and the Court moved these sections of the former RLD into Rule 8.4, again without a substantive examination of those rules, for the same reason. When the Ethics 2003 Committee came to these sections of Rule 8.4, it also did not engage in a serious reexamination of these subsections, but this time because they had been so recently added to Rule 8.4. So far as I can tell, the BOG took the same position. Thus, these sections—many of which had been in the Rules for Discipline since well before the Code of Professional Conduct was adopted in 1972—have never been given consideration in connection with the adoption of either the CPR in 1972, or the RPCs in 1986, or (until now) in reconsidering the RPCs in 2003 to date.

These sections cry out for substantive reconsideration. It should be noted first that none of these rules appears in the ABA Model Rules. Thus, insofar as the Court aspires to follow the ABA Model Rules except insofar as departures have been affirmatively justified, that aspiration is undermined as to these subsections of Rule 8.4. No such affirmative justification has been offered for Proposed Rules 8.4(i) through (n) other than that they were recently added, which is true only as a technical matter, as explained above. But in addition, there are substantive reasons for eliminating or substantially revising several of these subsections.

Rules 8.4(l) and (m) are easily justified and I do not comment further on them.

1. Conduct involving moral turpitude, disregard for the rule of law or otherwise reflecting adversely on fitness to practice: PWRPC 8.4(b), (i) and (n).

Rule 8.4(i) generally makes it misconduct to “commit any act involving moral turpitude, or corruption, or any unjustified act of assault or other act which reflects disregard for the rule of law.” Rule 8.4(n) makes it misconduct to “engage in conduct demonstrating unfitness to practice law.” Rule 8.4(b) makes it misconduct to “commit a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects.” I respectfully submit that these rules should be consolidated and amended in significant ways.

The ABA Comment to Rule 8.4(b) makes clear that the ABA deliberately

abandoned the traditional prohibition of offenses involving “moral turpitude” and general prohibitions on conduct demonstrating “unfitness to practice.”

“Many kinds of illegal conduct reflect adversely on fitness to practice law....However, some kinds of offense carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving ‘moral turpitude.’ That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses, that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.”

MR 8.4, comment [2]. Thus, Model Rule 8.4(b) represented an attempt to restrict the breadth of former DR 1-102(A)(3) and (6). In retaining the prohibitions now found in RPC 8.4 (i) and (n), however, Washington has so far refused to limit disciplinary authority in that way.

I respectfully submit that it should do so now. Rules 8.4(n) should be eliminated because Rule 8.4(b) sets out a more appropriate and justifiable standard of conduct. It is clearly appropriate to discipline lawyers for criminal conduct that reflects adversely on their fitness to practice. “Fitness to practice” is the right test here. But the proscribed conduct should be limited to criminal conduct as is done in Rule 8.4(b). If conduct reflects adversely on fitness to practice and is non-criminal, it should be specifically addressed and prohibited elsewhere in the rules.

This does not mean that disciplinary authorities should be required to show guilt beyond a reasonable doubt in order to discipline for conduct that does reflect adversely on fitness to practice. The appropriate standard in a disciplinary proceeding is proof by a “clear preponderance of the evidence.” ELC 10.14. This idea is currently captured in the language of Rule 8.4(i), dealing with moral turpitude and disregard for the rule of law, but is not clearly stated in Rule 8.4(b) or 8.4(n), dealing with unfitness to practice. Professors Hazard and Hodes have pointed to the precise language of Rule 8.4(b), “commit a criminal act,” and have noted that it does not say “convicted of a crime,” and argued from this that acquittal or dismissal of criminal charges would not prevent application of this rule. 2 G. C. HAZARD, JR. & W.W. HODES, *THE LAW OF LAWYERING* §65.4 at pp. 65-9 to 65-10 (3d ed. 2005). I agree but think that this should be stated clearly in the rule, as it is in Rule 8.4(i). Thus, I respectfully submit that the following language should be moved from Rule 8.4(i) and added to Rule 8.4(b): “If the act constitutes a felony or misdemeanor, conviction thereof in a criminal proceeding shall not be a condition precedent to disciplinary action, nor shall acquittal or dismissal thereof preclude the commencement of a disciplinary proceeding.”

Rule 8.4(i) currently prohibits acts involving “moral turpitude or corruption” quite apart from whether they are criminal or reflect adversely on fitness to practice. It also

prohibits other acts which reflect “disregard for the rule of law.” I respectfully submit that it is fundamentally unfair to expect lawyers to anticipate the moral judgments of bar disciplinary officials, hearing officers, and courts as to when and if “moral turpitude” and/or “disregard for the rule of law” should subject them to discipline, if the conduct is not criminal and does not reflect adversely on “fitness to practice.” See, e.g., *In re Curran*, 115 Wn.2d 747 (1990)(limiting “disregard for the rule of law” to criminal conduct threatening serious consequences, out of concern for its vagueness otherwise). The “moral turpitude” language of the rule (at the time part of RLD 1.1) was applied as recently at 1998 in a case involving sex with a client. ***In re Heard, 136 Wn.2d 405 (1998)***. There the Court reaffirmed its prior interpretation of “moral turpitude” as conduct covering “commonly accepted standard of good morals, honesty, and justice” and approved this as a ground for discipline in Heard’s case. But I respectfully submit that it was unnecessary to do so. Other provisions were then available to discipline Heard for this conduct. See, e.g., ***In re Halverson, 140 Wn.2d 475 (2000)***(disciplining Halverson for less egregious sex with clients under Rules 1.7, 1.4 and 2.1, but specifically rejecting discipline for conduct involving “moral turpitude” under RLD 1.1). Rule 1.8 has, of course, since been amended to address specifically the problem of sex with clients. But *Halverson* illustrates that this conduct was disciplinable even without a specific rule dealing with the problem. I respectfully submit that the concepts “moral turpitude” and “disregard for the rule of law” are too vague, and too prone to abuse by the relevant authorities, to justify their continued use. I respectfully recommend that the Court delete Rule 8.4(i) except insofar as it is suggested above that a part be moved to Rule 8.4(b).

2. Willful Disobedience of Court Orders: PWRPC 8.4(j).

Rule 8.4(j) prohibits the willful disobedience or violation of a court order which a person in good faith ought to obey. I respectfully submit that this is duplicative of Rule 3.4(c) which prohibits a lawyer from knowingly disobeying “an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.” If the Court is worried about a distinction being drawn between court orders and “rules of a tribunal” then the substance of Rule 8.4(j) could be inserted into Rule 3.4(c) and/or this could be addressed in a comment to Rule 3.4.

3. Violation of the Oath of an Attorney: PWRPC 8.4(k)

Rule 8.4(k) prohibits conduct that violates a lawyer’s “oath as an attorney.” The oath is contained in APR 5(d) and also in RCW 2.48.210, and has been virtually unchanged for almost one hundred years. During that time, this Court has carefully developed rules that specifically target objectionable lawyer conduct and most, if not all, of the conduct sworn to in the oath has been incorporated in the Rules of Professional Conduct. I think it unlikely that the Court would identify any specific conduct which it currently believes would appropriately subject a lawyer to discipline under the oath which is not covered independently by the RPCs. But if the Court finds such conduct, it can and should expressly add that conduct to the RPCs rather than incorporating the

oath by reference into the RPCs. Once this is done, the Oath could usefully be updated and virtually everything worth saving would then be encompassed by an attorney's oath to abide by the Rules of Professional Conduct. In other words, the RPCs should be incorporated into the oath (as they are now), but not the reverse (as at present).

Thank you for the opportunity to submit these comments.

Respectfully submitted

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