

## **Truth in Lawyering Act (“TILA”)**

AN ACT Relating to the protection and education of consumers of legal services; adding new sections to chapter 2.48.

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

NEW SECTION. **Sec. 1.** A new section is added to chapter 2.48 to read as follows:

(1) Promptly upon agreeing to provide legal services for a client, a lawyer shall provide the client a written explanation of the scope of the legal services, the manner by which charges for services or goods will be determined, and all other material terms of their contractual relationship. Promptly upon agreeing to any material changes in the scope or terms, the lawyer shall provide the client a written explanation of the changes.

(2) Except to the extent that a lawyer’s claim to collect payment for legal services or related goods or services is consistent with an explanation of the scope and terms of the lawyer’s engagement, and of any material changes, that was actually agreed to in writing by the client, a lawyer may only bring the claim in a small claims department of a district court in an amount within the jurisdictional limit set by RCW 12.40.010 and must be represented there by a nonlawyer employee or agent. In bringing such a claim, the lawyer shall have the burden of proving by clear and convincing evidence that the client had been informed of and had agreed to any contractual terms that were not explained and agreed to in writing by the client.

(3) If a lawyer provides legal services to a client through a professional services corporation or other law firm that enters into a contractual relationship with the client, then the provisions of this section applicable to the lawyer shall also apply to the law firm.

NEW SECTION. **Sec. 2.** A new section is added to chapter 2.48 to read as follows:

Any lawyer who refers a client to a second lawyer not practicing in the same law firm as the first with the intention or expectation that the second lawyer will pay a referral fee or share fees from the client with the referring lawyer or law firm shall provide the client a written explanation of the intended or expected referral fee or sharing of fees before the client enters into a contractual relationship with the second lawyer. The client may recover any fees paid or shared by the second lawyer to the referring lawyer or law firm that were not so explained to the client, or later agreed to in writing by the client, in an action for disgorgement against either one or both lawyers or their law firms commenced within three years after discovering the material facts of the transaction.

NEW SECTION. **Sec. 3.** A new section is added to chapter 2.48 to read as follows:

(1) At the time of establishment of a professional relationship with a client, or as soon thereafter as practicable, and within three-year intervals in the case of an ongoing professional relationship with a client, a lawyer shall provide to the client a written statement that discloses, in plain language, the circumstances under which information relating to the client will be covered by the attorney-client privilege or by the lawyer's duty of confidentiality, or both, and the meaning of those concepts. The disclosure statement shall explain the exceptions to the attorney-client privilege and to the lawyer's duty of confidentiality that are recognized in state and federal court rules, statutory law, and judicial decisions.

(2) At a minimum, the disclosure statement required by this section shall explain each of the following:

(a) The general conditions under which information communicated between the client and the lawyer is privileged from disclosure that otherwise could be compelled by judicial authority.

(b) The types of actions by the client that might cause the loss of the privilege as to information initially covered by the attorney-client privilege.

(c) The general conditions under which information gained by the lawyer is covered by the lawyer's duty of confidentiality.

(3) The disclosure statement should explain the extent to which the attorney-client privilege and the lawyer's duty of confidentiality apply in each of the following circumstances:

(a) To information relating to the client if the client uses the lawyer's services to further a crime or fraud or to conceal from discovery a crime or fraud, whether or not the lawyer was aware of that purpose when providing the services.

(b) To information the disclosure of which would mitigate or rectify substantial injury to the financial interests or property of another that has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

(c) To information that the client or another person intends to physically harm or intimidate a judge or a person who is not a judge.

(d) To information that the lawyer reasonably believes is necessary to reveal in order to prevent the client or another person from committing a crime.

(e) To information the disclosure of which would rectify or correct perjury or other fraud by the client or another person upon a tribunal.

(f) To information the disclosure of which is necessary to comply with any law.

(g) To information that the lawyer or client is directed to disclose by a court order or by a subpoena issued by an attorney or a governmental official lawfully empowered to issue a subpoena.

(h) To information the lawyer discloses without the client's consent to another lawyer to secure legal advice about the lawyer's compliance with any laws or rules governing the lawyer.

(i) To information acquired by the lawyer while providing services other than legal services, such as business advisory services, investment advisory services, accounting services, counseling services, lobbying services, corporate director services or while interacting socially or in a nonlawyer capacity with the client.

(j) To information acquired by the lawyer to prepare documents for disclosure to a third party, a governmental agency, or the general public.

(k) To information relating to conduct of the client in their capacity as a trustee or other fiduciary if the information is sought by or on behalf of a beneficiary of the trust or other fiduciary relationship.

(l) To information that a client who is a guardian, personal representative, receiver, or other court-appointed fiduciary has breached a fiduciary responsibility.

(m) To information that the lawyer reasonably believes is necessary to reveal in order to establish a claim or defense in a controversy with a client.

(n) To information that the lawyer reasonably believes is necessary to reveal in order to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved.

(o) To information that the lawyer reasonably believes is necessary to reveal in order to respond to allegations in any proceeding concerning the lawyer's representation of the client.

(p) To information from a non-client employee, officer, or director of a client organization if the information is sought by another person on behalf of the organization or if the lawyer's duty to the client organization requires that the lawyer voluntarily disclose the information to the other person.

(q) To information that the lawyer reasonably believes is necessary to reveal to protect the welfare or financial interests of a client who the lawyer reasonably believes cannot adequately act in their own interests.

(r) To information or documents relating to a client that is sought by a guardian or other person authorized to act for a client who has been adjudicated, or the lawyer reasonably believes, to

have lost legal capacity.

(s) To information relating to a deceased client that the lawyer reasonably believes the disclosure of which is necessary to further the client's intentions concerning the disposition of the client's probate or nonprobate estate.

(t) To information that relates to co-clients jointly represented on a matter of common interest by the lawyer, including the disclosure of information to each co-client before or after the development of any adversity between them.

(4) A lawyer may comply with this section by providing a disclosure statement that has been published by either the Washington State Bar Association or the Administrative Office of the Courts for purposes of satisfying the requirements of this section; provided that there has not elapsed more than three years since its publication, or its re-publication without material revisions, or more than one year since that organization's publication of any such disclosure statement with material revisions.

(5) The failure of a lawyer to provide to a client an adequate disclosure statement required by this section, and the actions of a lawyer inconsistent with disclosures made in a disclosure statement provided pursuant to this section, may be considered as evidence by a court in any dispute between the lawyer and the client.

[end of bill]

### EXPLANATORY NOTES

**Legislative Power to Regulate the Business of Lawyering.** 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 this and other judicial decisions of the state supreme court, the legislature may enact 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 this bill is to protect the public interest by requiring lawyer in the conduct of the business of lawyering to disclose to their clients and potential clients information that is important for the client or potential client to know.

Lawyers primarily are regulated by standards of ethics. RCW 2.48.230 which was initially enacted in Chapter 115 of the Laws of 1917, 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). The state supreme court adopted the MRPC with various changes from the ABA model, and as adopted and subsequently amended the Washington Rules of Professional Conduct (WRPC) has been the standard of ethics for Washington lawyers since September 1, 1985.

Several amendments to the MRPC were recommended in 2001 by the ABA's 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. The Washington state supreme court has the power to adopt changes to the WRPC whether or not similar changes are adopted by the ABA to its MRPC.

**Section 1:** WRPC rule 1.5(b) now recommends but does not require, unless requested by a client, that the a Washington lawyer communicate in writing the lawyer's "basis or rate of the fee or factors involved in determining the charges for legal services and the lawyer's billing practices." Rule 1.5(c)(1) requires:

A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its

determination.

The ABA's Ethics 2000 Commission recommended in 2001 that MRPC 1.5(b) be amended to require a written communication by the lawyer to the client of "The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible," except as to small matters and certain continuing clients. That amendment was voted down by the ABA House of Delegates in August 2001.

**Section 2:** WRPC rule 7.2(c) states, "A lawyer shall not give anything of value to a person for recommending the lawyer's services" except for payments for permitted advertising and usual charges for nonprofit lawyer referral services. Rule 1.5(e) forbids a division of a client fee between lawyers who are not in the same firm unless:

(2) The division is in proportion to the services provided by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; the client is advised of and does not object to the participation of all the lawyers involved; and the total fee is reasonable.

Lawyers in Washington for years have paid bare referral fees (often a percentage of a contingent fee) to other lawyers who refer cases to them without informing the referred client of the details of the referral fee. The state bar's monthly periodical to its members regularly publishes advertisements by lawyers offering to pay referral fees. The recommended new section will require that the client who is referred by one lawyer to another lawyer be informed in writing of any referral fee arrangement between those lawyers before negotiating the terms of any engagement of the lawyer to whom the client is referred.

**Section 3: Privilege and Confidentiality Disclosure Statement.** While the concepts of attorney-client privilege and the lawyer's duty of confidentiality are central to the relationship between a lawyer and a client, rarely is the client reasonably informed about those concepts. In fact, those concepts are rarely understood well by either lawyers or clients. The purpose of this section is to promote better understanding of them, by requiring a disclosure statement that explains those concepts, both by lawyers and their clients. It is hoped that the Washington State Bar Association or the Administrator of the Courts, or both, will publish a disclosure statement that lawyers may deliver to clients to satisfy this section.

The attorney-client privilege (**ACP**) is a rule of evidence that a client may assert to bar the admission in a judicial proceeding of testimony or other evidence of communications made in confidence between the client and the client's attorney. Certain conditions must exist for the ACP to apply, and various conditions will cause the ACP to be lost. While the ACP is mentioned in RCW 5.60.060(2)(a), it is principally the result of judicial decisions that are based upon public policy considerations.

The lawyer's duty of confidentiality (**DOC**) is a rule of professional ethics that historically applied only to information protected by the ACP but in 1969 became recognized as applicable to certain client

information whether or not protected by the ACP. For Washington lawyers, the DOC was expressed in CPE Canons 37 and 41 until 1972, in WCPR Disciplinary Rules 4-101 and 7-102(B) until September 1985, and since then in WRPC rule 1.6. The DOC is further defined by many judicial decisions and certain other rules. The rules concerning the DOC have been, since the 1970s, the most controversial of all the rules of lawyer ethics. There is little uniformity among the 50 states in their ethics rules for the DOC, and most state supreme courts have significantly departed from the DOC rules adopted by the ABA in 1983 as part of its MRPC.

**Subsection 3(1):** The delivery of a Privilege and Confidentiality Disclosure Statement at the formation of a lawyer-client relationship, and at least within each three years thereafter, should adequately inform the client of those central concepts.

**Subsection 3(2):** The ACP requires that the client take, or refrain from taking, certain actions in order to preserve the ACP. The disclosure statement should inform them of those actions. The DOC may apply to certain information only if the client specifically has requested that the lawyer hold it inviolate.

**Clause 3(3)(a):** This clause describes the crime-fraud exception to the ACP that results from judicial decisions from over a century. The extent to which it applies to the DOC is debatable. Washington cases recognizing the crime-fraud exception include: *Hartness v. Brown*, 21 Wash. 655, 668 (1899); *State v. Richards*, 97 Wash. 587, 591, 167 P. 47 (1917); *Dike v. Dike*, 75 Wn.2d 1, 14, 448 P.2d 490 (1968); *State v. Metcalf*, 14 Wn. App. 232, 239-40, 540 P.2d 459 (1975); *Whetstone v. Olson*, 46 Wn. App. 308, 310, 732 P.2d 159 (1986); *State v. Hansen*, 122 Wn. 2d 712, 720-21, 862 P.2d 117 (1993). Some federal decisions recognizing that exception include: *Clark v. United States*, 289 U.S. 1, 77 L. Ed. 993, 53 S. Ct. 465 (1933); *United States v. Zolin*, 491 U.S. 554, 562, 105 L. Ed. 2d 469, 109 S. Ct. 2619 (1989); and *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996).

**Clause 3(3)(b):** The crime-fraud exception to ACP would apply to the client's use of the lawyer's services to further a crime or fraud. Whether the DOC permits a lawyer to disclose information to rectify or mitigate the victim's financial harm presently is unclear and is controversial. Disclosure of client fraud was permitted by CPE Canon 41 and by WCPR DR 7-102(B)(1) prior to September 1985. The ABA's Ethics 2000 Commission recommended the language of this clause as amended MRPC 1.6(b)(3), but it was rejected by the ABA House of Delegates in August 2001. Whether the Washington state supreme court adopts it, as many other state supreme courts have, is still to be determined.

**Clause 3(3)(c):** 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. It is unclear if a lawyer ethically is permitted to give such a warning to a threatened person who is not a judge if the lawyer learned from a client of a third party's intention to harm somebody.

**Clause 3(3)(d):** WRPC 1.6(b)(1) expressly permits a lawyer to disclose confidential client information

to prevent the client from committing a crime, but not to prevent a third party from committing a crime.

**Clause 3(3)(e):** WRPC 3.3(c) requires a lawyer to correct false material evidence, including perjurious testimony, that the lawyer has offered to a tribunal and later comes to know its falsity, but not if the corrective disclosure is prohibited by the DOC under WRPC 1.6. Washington courts have liberally interpreted the prevent-crime exception of rule 1.6(b)(1) to cover exposure of past client perjury. *State v. Fleck*, 49 Wn. App. 584 (1987); *State v. Berrysmith*, 87 Wn. App. 268, 944 P.2d 397 (1997). It is unclear if the prevent-crime exception would apply if the perjury was by a person other than the client or if the offering of the false evidence were otherwise not a criminal act by the client.

**Clause 3(3)(f):** Prior to September 1985, WCPR DR 4-101(C)(2) expressly provided that a lawyer's DOC did not prevent the lawyer from revealing confidential client information when required by law or court order. WRPC 1.6(b)(2) retained the express exception for disclosures "pursuant to court order," but not for disclosures "required by law." Nonetheless, it is generally recognized that lawyers must comply with the law, even if that requires disclosing confidential client information (*e.g.*, filing IRS currency transaction reports disclosing confidential client information). Still, lawyers sometimes argue that their DOC would trump various reporting laws, such as those requiring reporting of child abuse.

The ABA's Ethics 2000 Commission recommended a comply-with-law exception to the DOC as a new MRPC 1.6(b)(6), that was approved by the ABA House of Delegates in August 2001. Additionally, if the law requires that information be disclosed, it is unlikely that its communication between the client and the lawyer would be protected by the ACP.

**Clause 3(3)(g):** WRPC 1.6(b)(2) expressly permits a lawyer to disclose confidential client information "pursuant to court order." Generally, a subpoena issued by an officer of a court (including an attorney) or a governmental official lawfully empowered to issue a subpoena is regarded as equivalent to a court order. A lawyer's DOC would not require that the lawyer formally object to compliance with a subpoena for confidential client information, but may have an obligation to formally object if a nonfrivolous argument can be made that the information is protected by the ACP or another privilege.

**Clause 3(3)(h):** It is unclear whether a lawyer may reveal confidential client information to another lawyer in order to obtain advice on ethics, criminal, or other rules or laws that apply to the first lawyer. The ABA's Ethics 2000 Commission recommended such an exception to the DOC as a new MRPC 1.6(b)(4), that was approved by the ABA House of Delegates in August 2001. Such a provision may eventually be adopted by the Washington state supreme court. It is unlikely that such a disclosure would cause a loss of the ACP, for lawyers are generally permitted to share ACP information with agents retained to assist the lawyer.

**Clause 3(3)(i):** Innumerable judicial decisions establish that the ACP only applies to communications

in a lawyer's professional relationship for the delivery of legal services, not if the lawyer is serving or interacting with the client in a nonlawyer capacity, such as business advisor, a tax return preparer, or a lobbyist. By definition (WRPC Preamble definitions of "confidence" and "secret"), the DOC only applies to information gained in a "professional relationship" between the client and the lawyer. It is uncertain whether the judicial decisions that define the requisite professional relationship for application of the ACP will be applied to define the requisite professional relationship for application of the DOC.

**Clause 3(3)(j):** Some judicial decisions hold that the ACP does not apply to client information given to a lawyer to prepare documents for disclosure to a third party, such as a governmental agency. *In re Grand Jury Proceedings*, 33 F.3d 342, 354-55 (4th Cir. 1994) (information to prepare securities filings for the SEC); *United States v. Frederick*, 182 F.3d 496 (7th Cir. 1999) (information to prepare federal tax returns).

**Clause 3(3)(k):** Many judicial decisions hold that the ACP does not apply to client information concerning the client's conduct of duties as a trustee or other fiduciary if the information is sought by a beneficiary of the trust or other fiduciary relationship. *E.g.*, *Riggs Nat. Bank v. Zimmer*, 355 A.2d 709 (Del. Ch. 1976); *In re Grand Jury Proceedings*, 162 F.3d 554 (9th Cir. 1998) (pension trustee).

**Clause 3(3)(l):** WRPC rule 1.6(c) was added in 1990 specifically to permit a lawyer to disclose to a tribunal if a client who is a guardian, personal representative, receiver, or other court-appointed fiduciary has breached a fiduciary responsibility.

**Clause 3(3)(m):** WRPC rule 1.6(b)(2) specifically permits a lawyer to reveal client information that the lawyer reasonably believes is necessary to reveal in order to establish a claim or defense in a controversy with a client.

**Clause 3(3)(n):** WRPC rule 1.6(b)(2) specifically permits a lawyer to reveal client information that the lawyer reasonably believes is necessary to reveal in order to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved.

**Clause 3(3)(o):** WRPC rule 1.6(b)(2) specifically permits a lawyer to reveal client information that the lawyer reasonably believes is necessary to reveal in order to respond to allegations in any proceeding concerning the lawyer's representation of the client. In a professional disciplinary proceeding against the lawyer, the applicable rules (Rules for Lawyer Discipline rule 2.8(d)) provide that the lawyer is not permitted to assert the ACP as a ground for refusing to provide any client information that is requested in an investigation of the lawyer.

**Clause 3(3)(p):** In 1983, the ABA sought through its adoption of rule 1.13 of MRPC to clarify the duties of a lawyer retained or employed by a corporate or other organization, including the duty to disclose information learned from one of the organization's constituents (*e.g.*, management employee) to its higher constituents (*e.g.*, directors or shareholders). In 1985, the Washington state supreme court declined to adopt that rule 1.13 when it adopted WRPC. It is in the public interest for lawyers and

constituents of organizations that use lawyers have a clear understanding of how the ACP and the DOC applies to them.

**Clause 3(3)(q):** WRPC 1.13(b) provides that when a lawyer reasonably believes that a client cannot act in their own interests, the lawyer “may take protective action with respect to [the] client.” Implicitly, taking protective may require that the lawyer reveal confidential client information.

**Clause 3(3)(r):** As mentioned concerning the preceding clause, a lawyer whose client has lost legal capacity may reveal confidential client information to protect the interests of the client. Beyond that, it is uncertain the extent to which a lawyer may or must reveal confidential client information to a guardian, trustee, or attorney-in-fact, or other fiduciary for a client or former client. *See In re Guardianship of York*, 44 Wn. App. 547 (1986) (trial court lacked authority to order lawyer to disclose a living client’s will).

**Clause 3(3)(s):** Many judicial decisions hold that a lawyer, in a dispute among persons claiming interests through a deceased client, may disclose information that was protected by the ACP. American Law Institute, Restatement of the Law Governing Lawyers (2000), section 81. It would seem that the lawyer’s voluntary disclosure of information intended to fulfill the intentions of a deceased client would not violate the lawyer’s DOC to the deceased client.

**Clause 3(3)(t):** A lawyer’s joint representation of two or more co-clients in a matter raises issues about sharing and protecting confidential or ACP information that should be clearly communicated to, and agreed upon, by each of the co-clients. WRPC rule 1.7(b)(2) requires that a lawyer representing multiple clients in a matter provide them an “explanation of the implications of the common representation and the advantages and the risks involved.” *See* American Law Institute, Restatement of the Law Governing Lawyers (2000), section 75 and comment *l* to section 60.

**Subsection 3(4):** This subsection permits lawyers to comply with this section by providing to their clients a reasonably current disclosure statement that has been published the Washington State Bar Association or the Administrator of the Courts. It is hoped that one or both will publish a disclosure statement that lawyers may use to comply with this section.

**Subsection 3(5):** The purpose of the disclosure statement is to inform both clients and lawyers of important information about ACP and the lawyer’s DOC. A client may suffer harm that could have been prevented if the client and the lawyer had been better informed about the ACP and the lawyer’s DOC. In any dispute between them, a court may consider any failure of the lawyer to provide the client an adequate disclosure statement or to act consistent with the information in such a statement. In contrast, the state supreme court has held that in a dispute between a lawyer and a client, a jury may not be informed of any provisions of the code of ethics for lawyers (WRPC and its predecessor, WCPR) or that the lawyer’s conduct allegedly violated any specific ethics code provision. *Hizey v. Carpenter*, 119 Wn.2d 251, 265 (1992).