156 Wn.2d 289, City of Olympia v. Drebick

[No. 75270-2. En Banc.]

Argued February 8, 2005. Decided January 19, 2006.

THE CITY OF OLYMPIA , *Petitioner* , v. JOHN DREBICK ET AL ., *Respondents* .

[1] Statutes - Construction - Review - Standard of Review. Issues of statutory interpretation are reviewed de novo.

[2] Appeal - Review - Issues of Law - Standard of Review. Claimed errors of law are reviewed de novo.[3] Statutes - Construction - Legislative Intent - Statutory Language - In General. The aim of statutory interpretation is to

discern and implement the legislature's intent. A court is required, whenever possible, to give effect to every word in a statute. Where the meaning of a statutory provision is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. The plain meaning of a statutory provision may be ascertained by examining the statute, related statutes, and other provisions of the same act in which the provision is found. Only when the plain and unambiguous meaning of a statutory provision cannot be ascertained through such an inquiry is it appropriate for a court to resort to aids to construction, such as legislative history.

[4] Building Regulations - Building Permit - Conditions - Development Fees - Statutory Provisions - Purpose. The impact fee provisions of RCW 82.02.050 -.090 authorize local governments engaged in growth management planning under chapter 36.70A RCW to condition development approval on the payment of "impact fees" to defray costs arising from new growth and development. The provisions are intended to enable towns, cities, and counties to plan for new growth and development and to recoup from developers a predictable share of the infrastructure costs attributable to the planned growth, with the qualification that the local government's "procedures and criteria" must protect "specific developments" from "arbitrary fees" or "duplicative fees for the same impact."

[5] Building Regulations - Building Permit - Conditions - Development Fees - Scope - In General. RCW 82.02.050 (2) authorizes local governments engaged in growth management planning under chapter 36.70A RCW to impose impact fees on particular "development activity" as a means of financing the "system improvements" planned to accommodate overall "new development" in a defined service area. "Development activity," as defined by RCW 82.02.090(1), refers to the particular new development for which approval is sought. RCW 82.02.050 (2) therefore authorizes the imposition of impact fees on individual developments to cover the increased demand for roads, parks, schools, or fire stations identified in the capital facilities plan for the designated service area.

[6] Building Regulations - Building Permit - Conditions - Development Fees - Restrictions - "New Development" - What Constitutes. RCW 82.02.050 (3) provides that impact fees imposed on proposed new developments under subsection (2) of the statute "[s]hall only be imposed for [a proportionate share of the costs of] system improvements that are reasonably related to [and reasonably beneficial to] the new development." For purposes of RCW 82.02.050 (3), "new development" means the particular new development for which permit approval is sought.[7] Building Regulations - Building Permit - Conditions - Development Fees - Standards - Purpose. The impact fee standards referenced in RCW 82.02.050 (1)(b), most of which are

spelled out by RCW 82.02.060 , presumably enable local governments to satisfy the criteria of RCW 82.02.050 (3) when determining the impact fee to impose on a new development to help defray the costs of new facilities needed to serve new growth and development.

[8] Building Regulations - Building Permit - Conditions - Development Fees - "Reasonable Relationship" - Defined Service Area and Fee Schedule. The impact fee standard of RCW 82.02.060 (6) of establishing one or more reasonable service areas within which to "calculate and impose impact fees for various land use categories per unit of development" indicates that a reasonable relationship between a proposed new development and the facilities funded by the impact fee may be achieved if the local government defines a reasonable service area, identifies the public facilities therein that would require improvement over a period of six years, and prepares a fee schedule taking into account the type and size of the development for which permit approval is sought and the type of public facility being funded.

[9] Building Regulations - Building Permit - Conditions - Development Fees - Individualized Determination - Necessity. The impact fee provisions of RCW 82.02.050 -.090 permit a local government to base an impact fee on area-wide infrastructure improvements that are reasonably related and beneficial to the particular development for which permit approval is sought. The imposition of an impact fee as a condition of development approval under RCW 82.02.050 -.090 does not depend on an individualized assessment of the proposed

development's direct impact on each improvement planned in the designated service area; i.e., the impact fee required for a particular development may be computed with reference to all improvements in the service area, not simply with regard to those individual projects directly affected by the particular development. The impact fees authorized by RCW 82.02.050 -.090 are not intended to compensate local governments for the direct impacts of specific development projects on specific components of local infrastructure systems or to finance programs that regulate development.

[10] Building Regulations - Building Permit - Conditions - Development Fees - Service Area - Single Area Coterminous With Urban Growth Area - Validity. Under the impact fee provisions of RCW 82.02.050 -.090, a city or town may base its impact fee structure on a single defined "service area" that is coterminous with its urban growth area.

SANDERS and J.M. JOHNSON , JJ., dissent by separate opinion; CHAMBERS , J., concurs in the result of the dissent; ALEXANDER , C.J., did not participate in the disposition of this case.Nature of Action: A city sought judicial review of a hearing examiner's decision invalidating a transportation

impact fee required by the city as a condition of permit approval for a proposed development. The hearing examiner ruled that the impact fee did not comply with statutory requirements in that it was not based on the individualized traffic-related effects of the particular development.

Superior Court: The Superior Court for Thurston County, No. 00-2-02152-3, Christine A. Pomeroy, J., on November 9, 2001, entered a judgment in favor of the city.

Court of Appeals: The court *reversed* the judgment and *reinstated* the hearing examiner's decision at 119 Wn. App. 774 (2004), holding that the hearing examiner correctly concluded that the transportation impact fee required by the city was invalid in that it was not based on the individualized impact of the specific project.

Supreme Court: Holding that the applicable statutes do not require the city to calculate the impact fee by making an individualized assessment of the direct impact of the proposed development on each planned improvement in the service area, the court *reverses* the decision of the Court of Appeals and *reinstates* the judgment.

David J. Lenci and *Julie A. Halter* (of Preston Gates & Ellis, L.L.P.); *Jeffrey S. Myers* (of Law, Lyman, Daniel, Kamerrer & Bogdanovich); and *Bob C. Sterbank* , City Attorney, and *John E. Vanek* , Assistant, for petitioner.

Alexander W. Mackie and *Eric S. Merrifield* (of Perkins Coie, L.L.P.), for respondents.

Kristopher I. Tefft on behalf of Building Industry Association of Washington, amicus curiae.

Russell C. Brooks , *Robin L. Rivett* , and *Samuel A. Rodabaugh* on behalf of Pacific Legal Foundation, amicus curiae.

Marilee J. Scarbrough on behalf of Washington State School Directors Association, amicus curiae.

¶1 OWENS, J. - The city of Olympia (the City) seeks reversal of a Court of Appeals decision that invalidated the City's calculation of a transportation impact fee imposed on a commercial developer, Drebick Investments (Drebick). At issue is whether the City's impact fee ordinances comply with the impact fee statutes, RCW 82.02.050 -.090, of the Growth Management Act (GMA), chapter 36.70A RCW. We hold that, contrary to the city hearing examiner's interpretation, the GMA impact fee statutes do not require local governments to calculate an impact fee by making individualized assessments of the new development's direct impact on each improvement planned in a service area. We reverse the decision of the Court of Appeals.

FACTS

¶2 In July 1998, Drebick sought approval from the City for construction of a four-story, 54,000-square-foot office building within the city limits. The City approved the proposal, subject to Drebick's payment of a transportation impact fee of $132,328.98, calculated according to the City's legislatively adopted fee schedule. *See* former OLYMPIA MUNICIPAL CODE (OMC) 15.06, 15.10, 15.14, 15.18 (1999). In February 1999, Drebick sought a fee

adjustment by submitting an independent fee calculation, as permitted in former OMC 15.10.020, but two months later the City's director of community planning and development rejected Drebick's alternative calculations, concluding that they did not meet the requisite accuracy and reliability criteria of former OMC 15.10.020D.

¶3 Drebick appealed the director's decision to the city hearing examiner, and hearings were held on four days in May and June 2000. In November 2000, the hearing exam

iner reversed the City, and the City sought review in Thurston County Superior Court under the Land Use Petition Act (LUPA), chapter 36.70C RCW. The superior court reversed the hearing examiner's decision, and we then denied Drebick's request for direct review in this court. The Court of Appeals thereafter reversed the superior court and remanded the matter to the City for a recalculation of the impact fee. *City of Olympia v. Drebick* , 119 Wn. App. 774 , 83 P.3d 443 (2004). We granted the City's petition for review.

ISSUE

¶4 In calculating the transportation impact fees imposed on the Drebick development, did the City comply with the statutory standards set forth in RCW 82.02.050 -.090 for apportioning such fees?

ANALYSIS

[1, 2]¶5 *Standard of Review* . At issue are the hearing examiner's interpretation of the impact fee statutes, RCW 82- .02.050-.090, and his conclusion of law that, in calculating the impact fees imposed on Drebick, the City failed to comply with the requirements of RCW 82.02.050 (3).«1»In its LUPA petition, the City asserted that the hearing examiner's decision was "based on erroneous interpretations of law." Clerk's Papers (CP) at 10-11; *see* RCW 37.70C-

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«1»Relying on *New Castle Investments v. City of LaCenter* , 98 Wn. App. 224 , 989 P.2d 569 (1999), *review denied* , 140 Wn.2d 1019 (2000), the hearing examiner determined that the "impact fees must be deemed taxes," but he concluded that, even so, they "must still meet the relationship, proportionality and benefit requirements of RCW 82.02.050 et seq." Clerk's Papers at 42. Similarly, the Court of Appeals described "the [tax-fee] distinction" as "immaterial": "Given that RCW 82.02.020 bars *either* a tax *or* a fee '[e]xcept as provided in RCW 82.02.050 through 82.02.090,' the question here is not whether the City assessed a tax or fee, but whether the City complied with RCW 82.02.050 through RCW 82.02.090 ." *Drebick* , 119 Wn. App. at 778 -79 (alteration in original) (citing *New Castle* , 98 Wn. App. at 234 , 236 (concluding that impact fees "resemble taxes" but declining to "hold that these fees are taxes")). We agree that merely labeling the GMA impact fees either taxes or regulatory fees will not be dispositive here. Our task is to interpret the relational standard prescribed in RCW 82.02.050 (3) and to determine whether the City complied with that standard.

.130(1)(b) (providing relief where party establishes that "land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise"). This court reviews issues of statutory interpretation and claimed errors of law de novo. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.* , 146 Wn.2d 1 , 9, 43 P.3d 4 (2002); *Pinecrest Homeowners Ass'n v. Glen A. Cloninger & Assocs* ., 151 Wn.2d 279 , 290, 87 P.3d 1176 (2004).

[3]¶6 *Principles of Statutory Interpretation* . The aim of statutory interpretation is "to discern and implement the intent of the legislature." *State v. J.P.* , 149 Wn.2d 444 , 450, 69 P.3d 318 (2003); *Campbell & Gwinn* , 146 Wn.2d at 9 . A reviewing "court is required, whenever possible, to give effect to every word in a statute." *Dennis v. Dep't of Labor & Indus.* , 109 Wn.2d 467 , 479, 745 P.2d 1295 (1987). Where the meaning of a provision is "plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Campbell & Gwinn* , 146 Wn.2d at 9 -10. A provision's plain meaning may be ascertained by an "examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found." *Id* . at 10 (citing, inter alia, *C.J.C. v. Corp. of the Catholic Bishop of Yakima* ,

138 Wn.2d 699 , 708-09, 985 P.2d 262 (1999) (stating that "[r]elated statutory provisions are interpreted in relation to each other and all provisions harmonized")); *see also State v. Clausing* , 147 Wn.2d 620 , 630, 56 P.3d 550 (2002) (Owens, J., dissenting) (noting that "[a]pplication of the statutory definitions to the terms of art in a statute is essential to discerning the plain meaning of the statute"). Only when the plain, unambiguous meaning cannot be derived through such an inquiry will it be "appropriate [for a reviewing court] to resort to aids to construction, including legislative history." *Campbell & Gwinn* , 146 Wn.2d at 12 .

[4]¶7 *Impact Fees under the GMA* . In 1990, the legislature enacted RCW 82.02.050 -.090 as part of the GMA,

authorizing local governments to condition the approval of development proposals on the payment of "impact fees" to defray a portion of the costs arising from "new growth and development." RCW 82.02.050 (1)(a). The legislature expressly stated that its "intent" is "[t]o ensure . . . adequate facilities . . . to serve new growth and development; . . . [t]o promote orderly growth and development by establishing standards by which [local governments] may require, by ordinance, that new growth and development pay a proportionate share of the cost of the new facilities needed to serve new growth and development; and . . . [t]o ensure that impact fees are imposed through established procedures and criteria so that specific developments do not pay arbitrary fees or duplicative fees for the same impact." *Id* . subsection (1)(a)-(c). Thus, by enacting the impact fee statutes, the legislature intended to enable towns, cities, and counties to plan for "new growth and development" and to recoup from developers a predictable share of the infrastructure costs attributable to the planned growth, with the qualification that the local government's "procedures and criteria" were to protect "specific developments" from impact fees that were "arbitrary" or that "duplicat[ed]" the amount paid for "the same impact."

[5]¶8 Just as RCW 82.02.050 (1)(a)-(c) distinguishes "specific developments" from, in general, "new growth and development," subsection (2) authorizes local governments to impose impact fees on particular "development activity" as a means of financing the "system improvements" planned to accommodate overall "new development" in a defined service area:

> Counties, cities, and towns that are required or choose to plan under RCW 36.70A.040 are authorized to impose impact fees on *development activity* as part of the financing for public facilities, provided that the financing for system improvements to serve *new development* must provide for a balance between impact fees and other sources of public funds and cannot rely solely on impact fees.

(Emphasis added.) The definition in RCW 82.02.090 (1) leaves no doubt that "[d]evelopment activity" refers to the particular new development seeking approval: " 'Development activity' means any construction or expansion of a building, structure, or use, any change in use of a building or structure, or any changes in the use of land, that creates additional demand and need for public facilities." RCW 82.02.050(2) therefore authorizes local governments, planning under the GMA, to impose impact fees on individual developments to cover the increased demand for roads, parks, schools, or fire stations identified in the capital facilities plan for a designated service area.«2»

[6]¶9 The legislature provided two overlapping definitions of "impact fees." First, setting forth three limitations on such fees, RCW 82.02.050 (3) mandates that they

> (a) Shall only be imposed for system improvements that are reasonably related to *the new development* ;
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> (b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to *the new development* ; and
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> (c) Shall be used for system improvements that will reasonably benefit *the new development* .

(Emphasis added.) Compressing (a)-(c), RCW 82.02.050 (3) explains that impact fees "[s]hall only be imposed for [a proportionate share of the costs of] system improvements that are reasonably related to [and reasonably

beneficial to] the new development." That, here, the statute speaks of " *the* new development," (emphasis added) as opposed to "new growth and development" or "new development" (as in the preceding section .050 (1) and (2)), indicates that " *the* new development" is synonymous with the "development activity" - that is, with *the particular* new development

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«2»The term "[s]ystem improvements" denotes those "public facilities that are included in the capital facilities plan and are designed to provide service *to service areas within the community at large* , in contrast to project improvements." RCW 82.02.090 (9) (emphasis added); *see* RCW 82.02.090 (6) (defining "[p]roject improvements" as "site improvements . . . planned and designed to provide service for a particular development project"); RCW 82.02.090 (7) (defining "[p]ublic facilities" as, generally, roads, parks, schools, and fire stations).

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seeking approval. *See Cowiche Growers, Inc. v. Bates* , 10 Wn.2d 585 , 618, 117 P.2d 624 (1941) (Simpson, J., dissenting) (noting that the use of the definite article has a " 'specifying or particularizing effect' " (quoting 1 WORDS AND PHRASES 1 (perm. ed., n.d.))); *Dennis* , 109 Wn.2d at 479 (requiring courts "to give effect to every word in a statute").

¶10 The definition of impact fees in RCW 82.02.090 (3) echoes the criteria set forth in 82.02.050(3)(a)-(c) and establishes that the phrase "the new development" means the individual development seeking approval: " 'Impact fee' means a payment of money imposed upon development as a condition of development approval to pay for public facilities needed to serve new growth and development, and that is reasonably related to *the new development that creates additional demand and need for public facilities* , that is a proportionate share of the cost of the public facilities, and that is used for facilities that reasonably benefit *the new development* ." (Emphasis added.) Requiring that the impact fee be "reasonably related to the new development that creates additional demand and need for public facilities," the RCW 82.02.090 (3) definition grafts onto "the new development" the definition of "development activity" (a term indisputably denoting the particular development); the legislature thus identified "the new development" as the individual development seeking approval. Moreover, the refund provision plainly equates the beneficiary of the system improvements with the particular new development seeking approval; RCW 82.02.080 (1) refers to the local government's six-year window for spending the impact fees "on public facilities *intended to benefit the development activity for which the impact fees were paid* ." (Emphasis added.) In sum, we conclude that, in RCW 82.02.050 (3) and 82.02.090 (3), the legislature unambiguously provided that the impact fees were to be a "proportionate share" of the costs of "system improvements" (that is, roads, parks, schools, or fire stations identified in the capital facilities

plan) that are "reasonably related to" and "reasonably benefit" the particular development seeking approval.«3»

[7, 8]¶11 The question, then, is what the legislature intended when it required that the facilities funded by impact fees be *reasonably related and beneficial to* the particular development seeking approval. To discern the legislature's intended meaning, we must turn, in the first instance, to "related statutes or other provisions of the same act." *Campbell & Gwinn* , 146 Wn.2d at 10 . The legislature declared at the outset its aim of "establishing standards" by which local governments could impose impact fees. RCW 82.02.050 (1)(b). Those standards, most of which are spelled out in RCW 82.02.060 , presumably enable local governments to arrive at fees that satisfy the criteria of RCW 82.02.050 (3). The primary standard prescribed by the legislature is the local government's creation of a fee schedule: "The local ordinance by which impact fees are imposed . . . [s]hall include *a schedule of impact fees . . . for each type of development activity* that is subject to impact fees, *specifying the amount of the impact fee* to be imposed *for each type of system improvement* . The schedule shall be based upon *a formula or other method* of calculating such impact fees." RCW 82.02.060 (1) (emphasis added). The legislature further prescribed that the local government's impact fee ordinance "[s]hall establish one or more *reasonable* service areas within which it shall calculate and impose impact fees for *various land use categories per unit of development* ." RCW 82.02.060 (6) (emphasis added). The

«3»In contrast to this analysis, the Court of Appeals decision rests on the unpersuasive view that RCW 82.02.050 (3) is "ambiguous in at least two ways." 119 Wn. App. at 780 . The Court of Appeals contended that the phrase "the new development" referred ambiguously to all new developments or to the particular development seeking approval. *Id* . The court necessarily found a second instance of ambiguity in whether the impact fees had to be "reasonably related to" "the cumulative impacts of all new development activity" or to "the individualized impacts of the permittee's specific project." *Id* . Only by declaring RCW 82.02.050 (3) ambiguous was the court able to embark sua sponte on a lengthy examination of legislative history, *id* . at 781-86, and to conclude with an application of two canons of statutory construction. *Id* . at 786-90; *see Campbell & Gwinn* , 146 Wn.2d at 11 -12 (noting that recourse to legislative history is appropriate only where intended meaning is indiscernible from plain language of provision and related provisions and statutes).

legislature thus indicated that a reasonable relationship would be achieved between the funded improvements and the individual development if the local government defined a reasonable service area, identified the public facilities therein that would require improvement over a span of six years, and prepared a fee schedule taking into account the type and size of the development seeking approval as well as the type of public facility being funded.

[9, 10]¶12 Other provisions in the GMA impact fee statutes support the conclusion that the legislature authorized local governments to calculate the fees by tying the particular development to the service area's improvements *as a whole* , not to *particular* system improvements within the service area. First, RCW 82.02.060 (4) and (5) provide that the local government's impact fee ordinance must "allow the county, city, or town . . . to adjust the standard impact fee . . . to consider unusual circumstances in specific cases" and to consider "studies and data submitted by the developer." These provisions, in conjunction with the requirements of the fee schedule, serve the legislature's aim of "ensur[ing] that impact fees are imposed through established procedures and criteria so that specific developments do not pay arbitrary fees or duplicative fees for the same impact." RCW 82.02.050 (1)(c). Just as the very existence of section .060(4) and (5) underscores that a particular development's impact fee is the product of a predetermined schedule for the service area, the distinction between "system improvements" and "project improvements" likewise makes it clear that a particular development's impact fee is computed with reference to all improvements in the service area, not simply with regard to those individual projects that the particular development directly affects. *See supra* note 2.

¶13 By requiring a general fee schedule for planned, systemwide improvements and allowing individualized fee calculations as an exception, the legislature distinguished the impact fee statutes from the regulatory fees referred to in RCW 82.02.020 :

> Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of residential buildings, commercial buildings, industrial buildings, or on any other building or building space or appurtenance thereto, or on the development, subdivision, classification, or reclassification of land. However, this section does not preclude dedications of land . . . within the proposed development . . . which the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a *direct* result of the proposed development . . . .
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> This section does not prohibit voluntary agreements with counties, cities, towns, or other municipal corporations that allow a payment in lieu of a dedication of land or to mitigate a *direct* impact that has been identified as a consequence of a proposed development . . . .

(Emphasis added.) GMA impact fees are likewise distinct from those exacted under the State Environmental Policy Act (SEPA), chapter 43.21C RCW, which authorizes local jurisdictions to impose conditions on a proposed development "to mitigate *specific* adverse environmental impacts." RCW 43.21C.060 (emphasis added). Similarly, the local transportation act (LTA), chapter 39.92 RCW, limits the fee to "the amount that the

local government can demonstrate is reasonably necessary as a *direct* result of the proposed development." RCW 39.92.030 (4) (emphasis added). Notably, in the GMA impact fee statutes, the legislature did *not* require that the funded facilities be *directly* or *specifically* related and beneficial to the development seeking approval. Whereas the starting point in the calculation of SEPA or LTA fees is the individual development and its direct impact, the local government's calculation of a proposed development's GMA impact fee begins, in contrast, with the anticipation of the area-wide improvements needed to serve new growth and development in the aggregate.

¶14 Ignoring the distinction between impact fees under RCW 82.02.050 -.090 and land dedications under RCW 82.02.020, the dissent takes the contrary view that local governments must base GMA impact fees on individualized assessments of the direct impacts each new development

will have on each improvement planned in a service area. To advance this claim, the dissent resorts to inapposite legislative history. *See supra* note 3. According to the dissent, "[t]he legislative history, well documented by the Court of Appeals, *conclusively demonstrates* " the legislature's intent that "the *Nollan/Dolan* standard" - drawn from two Fifth Amendment physical takings cases, the latter postdating the GMA - "be applied with regard to RCW 82.02.050 (3)(a)-(c)." Dissent at 319-20 & n.18 (emphasis added) (citing *Nollan v. Cal. Coastal Comm'n* , 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. City of Tigard* , 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994)). The dissent does not explain that neither *Nollan* nor *Dolan* concerned the imposition of impact fees but addressed instead the authority of a local government to condition development approval on a property owner's dedication of a portion of land for public use; nor does the dissent mention that neither the United States Supreme Court nor this court has determined that the tests applied in *Nollan* and *Dolan* to evaluate land exactions must be extended to the consideration of fees imposed to mitigate the direct impacts of a new development, much less to the consideration of more general growth impact fees imposed pursuant to statutorily authorized local ordinances. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd* ., 526 U.S. 687, 702, 119 S. Ct. 1624, 143 L. Ed. 2d 882 (1999) (noting that the Court has "not extended the rough-proportionality test of *Dolan* beyond the special context of exactions - land-use decisions conditioning approval of development on the dedication of property to public use"). For the proposition that the *Nollan-Dolan* standard should apply to GMA impact fees, the dissent inaptly cites decisions from other jurisdictions applying that standard to *direct* mitigation fees of the type referred to in RCW 82.02.020 (that is, to fees in lieu of possessory exactions), not to the legislatively prescribed development fees at issue here.«4»

«4»For example, the dissent relies on *Ehrlich v. City of Culver City* , 12 Cal. 4th 854, 911 P.2d 429, 444, 50 Cal. Rptr. 2d 242, *cert. denied* , 519 U.S. 929 (1996). There, the owner of a tennis and fitness club sought approval to replace the facility with a condominium development. To address the loss of the recreational space, the city, in response to the developer's offer to build four new tennis courts, conditioned project approval on a payment of $280,000 in lieu of the four courts. The California State Supreme Court concluded that the *Nollan-Dolan* standard applicable to land exactions for direct impacts should also apply to fees imposed in lieu of such exactions for direct impacts. *Id* . at 447. Significantly, the *Ehrlich* court observed that "it is not at all clear that the rationale (and the heightened standard of scrutiny) of *Nollan* and *Dolan* applies to cases in which the exaction takes the form of a *generally* applicable development fee or assessment - cases in which the courts have deferred to legislative and political processes to formulate 'public program[s] adjusting the benefits and burdens of economic life to promote the common good.' " *Id* . (alteration in original) (quoting *Penn Cent. Transp. Co. v. New York City* , 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)).

¶15 Nevertheless, despite the absence of any link between the *Nollan-Dolan* standard and the impact fees authorized in RCW 82.02.050 -.090, the dissent identifies, as "the most important conclusion to be drawn from the legislative history," "the legislature's deliberate use of the *identical* terms [used by the *Nollan* Court] to describe the 'nexus' requirement of the Fifth Amendment: 'reasonably related to.' " Dissent at 320 (citing *Drebick* , 119 Wn. App. at 785 (quoting *Nollan* , 483 U.S. at 838)). First, to be clear, the Court of Appeals pointed to *nothing* in the legislative history that referred to the *Nollan* test, much less anything revealing that legislators had considered and deliberately applied language drawn from *Nollan* . Second, given that the legislature has used the phrase "reasonably related to" in literally dozens of statutes, its use of the phrase in the

impact fee statutes could not be less remarkable; certainly, the presence of this commonplace standard does not, as the dissent claims, "conclusively demonstrate[ ]" the legislature's "deliberate use" of the *Nollan* standard.«5»Finally, we find equally flawed the dissent's claim that "the definition of '[p]roportionate share' in RCW 82.02.090 (5) supports the conclusion that the legislature intended the *Nollan* definition of 'reasonably related.' " Dissent at 322. The dissent states that the "definition clearly defines the amount of impact fees that can be charged in relation to the specific proposed development," but here the dissent rewrites the

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«5»Notably, the hearing examiner did not import the *Nollan-Dolan* standard into his analysis of the statutory standards. CP at 42.

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provision, which refers to " *the service demands and needs of new development* " - not " *the* new development," as the dissent interprets it. *Id* . at 322 (second emphasis added). In sum, legislative history provides no support for the dissent's claim that, by using the term "reasonably related to," the legislature manifested its intention to require local governments to calculate GMA impact fees by making individualized assessments of each proposed development's direct impact on each improvement planned in a service area.

¶16 *The City's Calculation of Transportation Impact Fees* . Exercising the authority granted in RCW 82.02.050 (2) and adhering to the requirements of RCW 82.02.060 , the City adopted its transportation impact fee ordinances, codified in former OMC 15.06, 15.10, 15.14, and 15.18. As permitted in RCW 82.02.060 (6), the City "elected to base its fee structure on a single service area coterminous with its Urban Growth Area [(UGA)]." Admin. R. at 6. Having reviewed the City's method of calculating transportation impact fees, the hearing examiner summarized the City's method as follows:

> (a) Project the cost of the transportation improvement projects in the UGA needed to provide capacity for new growth over the six-year period from 1994 to 2000. This estimate does not include the cost of improvements to address existing deficiencies and has been reduced to account for the percentage of pass-through traffic and funds expected from grants and various other sources.
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> (b) Project the total number of new, afternoon peak-hour trips with at least one end in the UGA during the same six-year period.
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> (c) Divide the projected cost from (a) by the projected number of trips in (b) for the average cost of a new trip in the UGA over the six-year period.
>
> (d) Convert this average cost into impact fees for specific types and sizes of development by considering the number of vehicle trips entering or leaving the land use at issue during the afternoon peak hour, the varying trip lengths generated by different land uses, and the percentage of "pass-by" trips.

CP at 21. In former OMC 15.18.010, the City set forth the resulting fee schedule, as required in RCW 82.02.060 (1). In compliance with RCW 82.02.060 (4) and (5), former OMC 15.10.020 allowed individual developers to request departures from the fee schedule and permitted the City to consider independent fee calculations on a case-by-case basis.«6»

¶17 The hearing examiner then made the following findings regarding the City's legislatively adopted fee schedule:

> 34. Under the method used by Olympia to calculate transportation impact fees, the impact fee assessed a specific development *is proportionate to and reasonably related to the jurisdiction-wide need for new transportation improvements created by that development* .

> 35. Every land use benefits in a general sense from a smoothly functioning transportation system with adequate capacity *in the jurisdiction in which it is located* . Under Olympia's method the transportation impact fee assessed a specific development *is used for improvements that will reasonably benefit that development, if benefit is judged by the effect of the transportation improvements in the jurisdiction as a whole* .

CP at 22 (emphasis added). Paraphrasing his findings, the hearing examiner repeated that "the Drebick fee is proportionate to and reasonably related to the demand for new capacity improvements *considered as a whole* " and that "those improvements *considered as a whole* will benefit the Drebick development." *Id* . at 32 (emphasis added). The hearing examiner's reference to "the jurisdiction-wide need for new transportation improvements," "the transportation improvements in the jurisdiction as a whole," and "improvements considered as a whole" is consistent with the statute's definition of "system improvements" as those "public facilities . . . designed to provide service to service areas

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«6»"Independent fee calculations have been granted by the City in the past where it was shown that the development in question did not generate projected peak hour traffic flows or that the traffic, if generated, primarily utilized transportation facilities in other cities. Cited examples were an apartment complex for the aged, a boat repair workshop, and a hotel on the edge of the City." CP at 7.

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within the community at large, in contrast to project improvements." RCW 82.02.090 (9). The City permissibly defined its "service area" as the City's urban growth area, a fact that explains the hearing examiner's use of the words "jurisdiction-wide" and "jurisdiction." The hearing examiner thus found that the City's method for calculating transportation impact fees met the statutory requirement that "system improvements" be "reasonably related to" and "reasonably benefit" the specific development. RCW 82.02.050(3)(a)-(c), .090(9).

¶18 The dissent takes issue with the City's designation of a single service area. However, RCW 82.02.060 (6) mandates that a local government's impact fee ordinance must "establish *one* or more reasonable service areas." (Emphasis added.) Moreover, nowhere in the hearing examiner's find ings and conclusions was the City's compliance with RCW 82.02.060(6) questioned. *See* CP at 13-48. Indeed, in the only finding touching on the reasonableness of the City's designation of a single service area, the hearing examiner stated that the City's traffic consultant had found "the use of a jurisdiction-wide average cost as the basis for the impact fee rates . . . justified, because *the City's relatively compact geography* matched closely with the average trip lengths, such that in most cases an average trip would traverse a good portion of the City boundaries." *Id* . at 22 (emphasis added). Nevertheless, proceeding as though the reasonableness of the service area were an issue before this court, the dissent attacks the City's designation and, in a hallucinatory sequence, actually likens Olympia to the San Juan Islands. *See* dissent at 318. The dissent disregards the qualification in RCW 82.02.090 (8) that "[s] ervice areas *shall be designated on the basis of sound planning or engineering principles* ." (Emphasis added.) Were we called upon to review a city's compliance with that statutory requirement, we would doubtless rely on evidence previously provided by city planners, engineers, and other experts, not on the deployment of our own strained hypotheticals. We also note that, while the definition of

"[s]ervice area" requires that the "public facilities" within the designated area "provide service to development within the area," that requirement simply does not mean, as the dissent contends, that for a service area to be reasonable each public facility in the service area must directly serve each new development project. RCW 82.02.090 (8). The dissent's contention rests on the insupportable notion that "development within the area" does not mean area-wide development but means instead *the particular new* "development" *project seeking approval* "within the area." In the dissent's view, the only "reasonable" service area would be one no larger than the project site for the new development seeking approval, but the statutory scheme clearly distinguishes between project sites and service areas.«7»

¶19 The hearing examiner's inquiry should have ended with his factual findings that "the Drebick fee is proportionate to and reasonably related to the demand for new capacity improvements *considered as a whole* " and that "those improvements *considered as a whole* will benefit the Drebick development." CP at 32 (emphasis added). However, the hearing examiner went on to hold that the City's calculations violated RCW 82.02.050 (3) because Drebick's impact fee was not "reasonably related to the service demands or needs created by the Drebick proposal on *each* of the individual project groups on which the impact fees [were] based." CP at 22 (emphasis added); *see supra* note 6. But as discussed above, nothing in the plain language of the GMA impact fee statutes supports the hearing examiner's view that the City was required to calculate Drebick's impact fees by *individually* assessing his development's

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«7» *See supra* note 2 (distinguishing "project improvements" and "system improvements"). The dissent's reliance on *Trimen Development Co. v. King County* , 124 Wn.2d 261 , 877 P.2d 187 (1994), underscores the dissent's mistaken belief that GMA impact fees are indistinguishable from the direct mitigation fees of RCW 82.02.020. Dissent at 317. Even though the fees at issue in *Trimen* predated the adoption of GMA impact fees and aimed to mitigate the direct impact of a development project, the dissent nevertheless claims that King County's designation of a "park service area" immediately surrounding the new development "provides an example of an appropriate ordinance" for Olympia. *Id* . at 317.

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direct , *specific* impact on *each* of the improvements listed in the City's capital facilities plan.

¶20 Nor is there any support to be found in prior cases interpreting the impact fee statutes. In *New Castle Investments v. City of LaCenter* , 98 Wn. App. 224 , 989 P.2d 569 (1999), *review denied* , 140 Wn.2d 1019 (2000), a developer challenged the applicability of the city's GMA impact fee ordinance on the grounds that it was adopted two days after the proposed development was approved. The developer argued that, under the vesting statute (RCW 58.17.033), the development was subject only to the "land use control ordinances" in effect at the time the application was perfected. Division Two concluded, however, that the GMA impact fees' "resemblance to taxes" removed them from the definition of " 'land use control ordinance.' " *Id* . at 235. Noting that the GMA impact fee statutes were "codified among excise taxes in RCW 82," the *New Castle* court distinguished the fees from the regulatory exactions of SEPA, the LTA, and RCW 82.02.020 : "By the clear language of the statute, GMA impact fees are not intended to compensate local governments for the *direct impacts* of specific development projects *on specific components of local infrastructure systems* or to finance programs that regulate development." *Id* . at 235-36 (emphasis added). In *Wellington River Hollow, L.L.C. v. King County* , 113 Wn. App. 574 , 54 P.3d 213 (2002), *review denied* , 149 Wn.2d 1014 (2003), Division One of the Court of Appeals agreed with the *New Castle* court's interpretation of RCW 82.02.050(3) and rejected a developer's claim that school impact fees imposed on a proposed apartment complex had to "specifically benefit" the students generated by the development. *Id* . at 237.

CONCLUSION

¶21 The GMA impact fee statutes permit local governments to base impact fees on area-wide infrastructure improvements reasonably related and beneficial to the

particular development seeking approval. We agree with the superior court's conclusion that "this 'rational' [or 'relational'] standard . . . [is] broader than the standard under [SEPA or the LTA]." CP at 674. As the superior court correctly determined, the hearing examiner erred in concluding that the GMA impact fee statutes required the City to calculate Drebick's impact fee by making individualized assessments of the Drebick development's direct impact on each improvement planned in a service area. We hold that the City's method for calculating transportation impact fees complied with the plain language of the GMA impact fee statutes. We therefore reverse the Court of Appeals.

C. JOHNSON, MADSEN, BRIDGE, and FAIRHURST, JJ., and BECKER, J. Pro Tem., concur.

¶22 SANDERS, J. (dissenting) - The city of Olympia (City) claims the fees at issue here "are, in essence, excise taxes on new development generally . . . "«8»"because the ultimate purpose of the fees is to generally raise revenue to fund needed public facilities and infrastructure."«9»I agree. The resulting problem for the City is therefore twofold: (1) the City has not been statutorily authorized to impose an excise tax on new development, and (2) the City has been specifically prohibited by RCW 82.02.020 from doing just that. To put it simply, the only way these fees could pass statutory, much less constitutional,«10»muster is that they be true "impact fees" as that term is defined and limited by the legislature, which excise taxes clearly are not.

¶23 Having stated the general proposition, I repair to the facts which demonstrate these fees are indeed excise

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«8»Br. of Resp't City of Olympia (Ct. App. 29018-9-II) at 12.

«9» *Id* . at 13.

«10»Absent express authorization, municipalities may not impose a tax (*Hillis Homes, Inc. v. Snohomish County* , 97 Wn.2d 804 , 809, 650 P.2d 193 (1982), WASH. CONST . art. VII, § 2), and municipalities may not tax contrary to the general laws (*R/L Assocs., Inc. v. City of Seattle* , 113 Wn.2d 402 , 780 P.2d 838 (1989) and *San Telmo Assocs. v. City of Seattle* , 108 Wn.2d 20 , 24, 735 P.2d 673 (1987), WASH. CONST . art. VII, § 5). *See also Nollan v. Cal. Coastal Comm'n* , 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), discussion *infra* pp. 320-22.

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taxes on new construction, precisely as contended by the City.

¶24 In 1998 petitioner Drebick Investments (Drebick) sought land use approval from the City to construct a four-story office building complex at a corner of the city boundary near an exit to Highway 101. The municipality imposed a $132,000 traffic fee as a condition to new development based upon contemplated cost of citywide traffic projects without regard to the specific impact the Drebick development might or might not have on any proposed project or any benefit the Drebick development would derive from the new public facilities.«11»Drebick contended any additional traffic added by his construction would make minimal, if any, use of the contemplated improvements because of the remote proximity of his development to those projects and traffic patterns which would substantially exclude their use by new development traffic.

¶25 The matter ultimately proceeded to the City's hearing examiner. He factually found:

> 36. Under Olympia's method, a transportation impact fee does not depend on or vary with the location within the City of the development charged. The fee does not depend on or take into account whether the development charged actually contributes any trips to any of the project groups on which the fee is based.
>
> . . . .
>
> 39. Under Olympia's method, the transportation impact fee assessed the Drebick proposal is not proportionate to or reasonably related to the service demands or needs created by the

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«11»The City projected the cost of all transportation improvement projects inside the urban growth area (UGA) needed to provide capacity for all new growth over a six year period. The City then projected the total number of new afternoon peak hour trips with one end inside the UGA, and it divided the cost by the number of trips. This per-trip cost was then applied to new development by multiplying the derived figure by the number of trips the new development would generate, *regardless of whether any of those trips would actually use any of the new transportation improvement projects.* Clerk's Papers at 21 (Findings and Decision of the Hr'g Exam'r of the City of Olympia, Finding 32) (Nov. 2, 2000) (Hr'g Exam'r Findings and Decision).

> Drebick proposal on each of the individual project groups on which the impact fees are based.
>
> 40. The only manner in which the Drebick proposal could be benefited by specific transportation improvements projects it will not use, considered individually, is if those improvements relieve traffic pressure on other links used by the Drebick proposal or if they improved emergency response to the Drebick proposal. No evidence was submitted showing this for any of the individual improvements. Under Olympia's method, the transportation impact fees assessed the Drebick proposal may be used for individual transportation facilities which do not reasonably benefit the Drebick proposal.

Clerk's Papers (CP) at 22-23 (Hr'g Exam'r Findings and Decision). No error has been assigned to these findings. Thus they are verities for the purposes of this appeal. *Henderson Homes, Inc. v. City of Bothell* , 124 Wn.2d 240 , 244, 877 P.2d 176 (1994).

¶26 Notwithstanding, the City conditioned Drebick's use and development of his property upon payment of a transportation "impact fee" of more than $132,000. The hearing examiner set aside this fee because of its perceived conflict with chapter 82.02 RCW. The superior court then reversed the hearing examiner. However, the Court of Appeals reversed again, affirmed the hearing examiner, and remanded for further proceedings. In this context, our majority characterizes the issue to be determined:

> In calculating the transportation impact fees imposed on the Drebick development, did the City comply with the statutory standards set forth in RCW 82.02.050 -.090 for apportioning such fees?

Majority at 294. Although I generally agree with the majority's characterization of the issue as a statutory one, the majority assumes the answer to the real question which is whether we should characterize these fees as "impact fees," the only fees permitted by RCW 82.02.050 through .090.

¶27 The relevant statutes are contained in chapter 82.02 RCW. RCW 82.02.020 is a broad prohibition on develop- ment fees with certain exceptions:

> Except as provided in RCW 82.02.050 through 82.02.090, no county, city, town, or other municipal corporation shall impose any tax, fee, or charge, either direct or indirect, on the construction or reconstruction of . . . commercial buildings . . . .

The $132,000 exaction at issue is obviously within the scope of the aforementioned text since it is imposed on the construction of commercial buildings. Moreover, and just as clearly, it is statutorily barred unless it falls within the statutory exemptions codified in RCW 82.02.050 through .090, all of which relate to "impact fees." As used in the statute, "impact fee" is a term of art defined as:

> [A] payment of money imposed upon development as a condition of development approval to pay for public facilities needed to serve new growth and development, and that is reasonably related to the new development that creates additional demand and need for public facilities, that is a proportionate share of the cost of the public facilities, and that is used for facilities that reasonably benefit the new development. . . .

RCW 82.02.090 (3). Impact fees are therefore by definition site specific to the new development, unlike taxes which generally raise revenue to fund needed public facilities without regard to the impact on or benefit derived by the new individual development from those facilities. *Arborwood Idaho, L.L.C. v. City of Kennewick* , 151 Wn.2d 359 , 371, 89 P.3d 217 (2004).«12»Keeping this distinction in mind, it is telling that even the City claims the fees at issue here "are, in essence, excise taxes on new development generally." Br. of Resp't City of Olympia (Ct. App. 29018-9-II) at 12. The problem is "excise taxes on new development generally" cannot meet

the definition of "impact fees" because taxes have no necessary relationship to meeting the additional demands of "the new development" nor do they

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«12»The majority asserts "merely labeling the GMA impact fees either taxes or regulatory fees will not be dispositive here." Majority at 294 n.1. I disagree because taxes by their nature cannot be "impact fees" as statutorily defined, and only impact fees are excepted from the broad statutory prohibition.

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necessarily benefit "the new development" by building facilities to be actually used by the new development.

¶28 RCW 82.02.050 (3) reinforces the statutory definition with express limitations:

> The impact fees:
>
> (a) Shall only be imposed for system improvements that are reasonably related to *the new development* ;
>
> (b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to *the new development* ; and
>
> (c) Shall be used for system improvements that will reasonably benefit *the new development* .

(Emphasis added.) RCW 82.02.060 prescribes the format of a local impact fee ordinance:

> **Impact fees - Local ordinances - required provisions.** The local ordinance by which impact fees are imposed:
>
> (1) Shall include a schedule of impact fees which shall be adopted for each type of development activity . . . . The schedule shall be based upon a formula or other method of calculating such impact fees. In determining proportionate share, the formula or other method of calculating impact fees shall incorporate, among other things, the following:
>
> (a) The cost of public facilities necessitated by new development;
>
> (b) An adjustment to the cost of the public facilities for past or future payments . . . ;
>
> (c) The availability of other means of funding . . . ;
>
> (d) The cost of existing public facilities improvements; and
>
> (e) The methods by which public facilities improvements were financed;
>
> . . . .
>
> (4) Shall allow the county, city, or town imposing the impact fees to adjust the standard impact fee at the time the fee is imposed to consider unusual circumstances in specific cases to ensure that impact fees are imposed fairly;
>
> (5) Shall include a provision for calculating the amount of the fee to be imposed on a *particular development* that permits

consideration of studies and data submitted by the developer to adjust the amount of the fee;

(6) Shall establish one or more reasonable service areas within which it shall calculate and impose impact fees for various land use categories per unit of development . . . .

RCW 82.02.060 (emphasis added).

¶29 I agree with the majority that the statutory terms "the new development" and "development activity" and "particular development" relate to a specific proposed project, not projected community development in the aggregate. Majority at 296-99. However, the majority essentially fails to recognize that "impact fees" as that term is used in RCW 82.02.060 is a term of art specifically defined to be "reasonably related to *the new development* that creates additional demand and need for public facilities, that is a proportionate share of the cost of the public facilities, and that is used for facilities that reasonably benefit *the new development* ." RCW 82.02.090 (3) (emphasis added). Further, the majority ignores RCW 82.02.050 , which specifically *limits* impact fees to (a) system improvements that are reasonably related to *the new development* , (b) the proportionate share of the cost of those reasonably related system improvements reasonably related to *the new development* , and (c) system improvements that will reasonably benefit *the new development* . Rather the fees allowed by the Olympia ordinance are not calculated to specifically cure an impact of "the new development," nor are they for projects which serve the new development. Rather this fee is based on the aggregate of *all* new development without regard to the cause, consequence, or proportionality as it relates to the specific development at issue here.

¶30 In the context of this case the fee imposed on Drebick under the municipal ordinance does not meet the definition of "impact fee" because the projects funded by the fee were not reasonably necessitated by the Drebick development nor would they be necessarily even used by the Drebick development. In the same sense they violate the limitation criteria in RCW 82.02.050 (3).

¶31 The conclusion that the definition and limitation clauses necessarily apply to the application of any ordinance adopted pursuant to RCW 82.02.060 is buttressed by that statute's reference to "impact fees" and other language which requires site specific consideration by any proper ordinance. Section .060(4) of the statute requires the ordinance to adjust the fee imposed "to consider unusual circumstances in specific cases to ensure that impact fees are imposed fairly." Subsection (5) requires the ordinance to "include a provision for calculating the amount of the fee to be imposed on a *particular development* that permits consideration of studies and data submitted by the developer to adjust the amount of the fee." (Emphasis added.) And subsection (6) requires the ordinance "[s]hall establish one or more reasonable service areas within which it shall calculate and impose *impact fees* for various land use categories per unit of development." (Emphasis added.) Each of those provisions specifically contemplate, consistent with the definition of impact fee and the limitations on an impact fee, that the fee be tailored to the actual impact of the specific individual new development notwithstanding the prescriptive manner of calculating the fee. The "reasonable" service areas requirement also highlights the proposition that a proper ordinance would establish service areas which actually serve the proposed development.

¶32 As to the last point, the majority seems to confuse the propriety of the service area designation with the quite independent analysis of whether the resulting fee imposed as a precondition to development meets the statutory definition of "impact fee." *See* majority at 305-07. Just because RCW 82.02.060 provides the statutory authority and outlines the necessary components of a local ordinance to assess "impact fees" within a "reasonable service area[ ]," does not mean that the resulting fee will actually *be* an "impact fee" as statutorily defined. That statutory definition includes the requirement that the fee "is reasonably related to the new development that creates additional demand and need for public facilities . . . ." RCW 82-

.02.090(3). Therefore, by the majority's own statutory analysis the ultimate fee must be calculated on site specific criteria. Whether or not a local ordinance which sets up a fee schedule based upon a formula and a

service area actually produces a legitimate "impact fee" must, however, be determined on an as applied basis, to the Drebick building, for example.

¶33 The crux of the majority's flaw in reasoning is its assumption, absent statutory or precedential support, that any impact fee ordinance that meets the procedural requirements contained in RCW 82.02.060 *per se* produces a statutory impact fee tailored to the requirements of proportionality and reasonable causation by, and reasonable benefit to, the specific development project at issue. Majority at 298. The majority's conclusion that "the legislature did *not* require that the funded facilities be *directly* or *specifically* related and beneficial to the development seeking approval,"«13»is therefore most problematic. Majority at 301.

¶34 The majority assumes this conclusion through an unanalyzed premise: a city or county is permitted to draw a single service area encompassing the whole of that city or county, and therefore all "system improvements" within that service area may be properly charged to any new development consistent with the statute. The majority's conclusory statement, "As permitted in RCW 82.02.060 (6), the City 'elected to base its fee structure on a single service area coterminous with its Urban Growth Area,' " majority at 304,«14»is devoid of any discussion of the actual statutory requirement. Indeed, the actual text requires the "local ordinance by which impact fees are imposed . . . (6) [s]hall establish one or more *reasonable* service areas within which

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«13»"Directly" and "specifically" are not statutory terms, nor are they derived from the relevant constitutional cases. Such terms are easily confused and misunderstood when divorced from the statutory and constitutional context. As noted, *supra* , the requirement of a nexus and rough proportionality - which define the "reasonable" relationship under the statute - dictate a certain level of connection between the impact fee and the impacts of the development. Whatever that level of connection, whether directly, specifically, reasonably, or roughly related, it is not present in this case.

«14»The majority repeats its conclusion at page 302 without further analysis.

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it shall calculate and impose impact fees for various land use categories per unit of development." RCW 82.02.060 .

¶35 *Trimen Development Co. v. King County* , 124 Wn.2d 261 , 877 P.2d 187 (1994) provides an example of an appropriate ordinance, although its facts arose before the adoption of sections .050 through .090. Under that ordinance, King County imposed park development fees on new construction. Although King County did not conduct a site specific study relating to the Trimen Development, it did calculate the general deficit of parks in the vicinity and the statistical probability of additional park use by each unit of new residential development. The fee was to be expended only in the "park service area" of the new development, an area roughly the size of elementary school boundaries. This methodology, we held, adequately demonstrates the additional need for park space necessitated by each new unit of residential development along with the cost of acquiring it within the specific area to be used by the specific new development. We went on to specifically distinguish the park fee as there calculated from a "tax" which not only lacked legislative authorization but would violate the prohibition of RCW 82.02.020 , holding these park fees " 'are reasonably necessary as a direct result of the proposed development' " and are required to mitigate the direct impact of the development. *Id* . at 270-71 (quoting RCW 82.02.020). However in the case at bar, as acknowledged by the City, the fees at issue are in the nature of taxes to fund generalized public improvements which cost money, not impact fees.

¶36 Moreover, it is important to notice that the park fees were sustained in *Trimen* because they were calculated based upon a "park service area" around the new development only approximately the size of elementary school boundaries, i.e., an area where projected new residents would reasonably recreate in any new park space to be acquired. However, the difference between the park service area approved in *Trimen* and the citywide service area in the case at bar is a qualitative difference of exponential

magnitude. Trimen residents would probably use the new park space whereas Drebick customers would not necessarily use new traffic improvements geographically remote from the Drebick building.

¶37 But by the majority's logic, it is "reasonable" for a city which comprises 17 square miles,«15»has almost 80 miles of major roads,«16»and has a population of 43,330 people,«17»to draw a *single* service area and therefore any resulting fee must be a legitimate "impact fee."

¶38 Thus, King County could define its service area as the entire county. A new resident of Vashon Island could be made to pay fees for a system improvement made outside Skykomish County, even though the Vashon resident may *never* use a road improvement located 60 miles - and one large body of water - away. Or perhaps Stevens County might decide to charge "new development" located outside Northport for a transportation improvement located outside Tumtum, 80 miles distant? Or San Juan County could charge developers on Orcas Island to add a lane to a road on Lopez Island? All this is perfectly sanctioned by the majority opinion, although none of the resulting fees imposed under such ordinances would be reasonably related to the new development nor reasonably benefit the new development and hence neither fits the statutory definition of "impact fee" nor complies with RCW 82.02.050 .

¶39 Further, the statutory definition of "service area" belies the majority's conclusion that Olympia appropriately drew a single service area for the entire city. RCW 82.02.090(8) defines "[s]ervice area" as "a geographic area defined by a county, city, town, or intergovernmental agreement in which a defined set of public facilities *provide*

«15» *See* United States Census Bureau, *State and County Quickfacts* , http://quickfacts.census.gov/qfd/states/53/5351300.html (last visited Jan. 13, 2006).

«16»Including interstates, arterials, and collectors, but not even including smaller roads.

«17» *See* Municipal Research & Servs. Ctr. of Wash., http://www.mrsc.org/cityprofiles/cityprofile.aspx?id=167 (last visited Jan 13, 2006). Olympia is the 19th largest city in Washington State. *Id* ., http://www.mrsc.org/subjects/finance/ctytax04p.aspx.

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service to development within the area." (Emphasis added.) A road which no customer, resident, or visitor to the new development will use hardly provides service to that development.

¶40 In addition to its failure to properly follow the "reasonable" requirement in relation to the scope of the service area, which might at least begin to re-moor the statute to its constitutional pilings, the majority fails to apply "reasonably related" or "reasonably benefit" according to the expressed intent of the legislature. The majority does this by accepting unchallenged the assertion that " 'Every land use benefits in a general sense from a smoothly functioning transportation system with adequate capacity *in the jurisdiction in which it is located* .' " Majority at 305 (quoting CP at 22 (Hr'g Exam'r Findings and Decision, Finding 35)). Yes, but that is what taxes are for.

¶41 At this level of abstraction every improvement in any city or county is *per se* reasonably related to new development in that city or county and reasonably benefits new development in that city or county. The "reasonableness" protections of the statute, the definition of impact fees, the statutory limits on impact fees, are thus rendered a nullity. The legislature could have composed a much simpler statute by simply authorizing local governments to impose jurisdiction-wide excise taxes on all new development without regard to the impact that new development might have on public facilities. But it didn't. Yet that's what the majority gives us.

¶42 Most fundamentally only "system improvements" can be financed by "impact fees," RCW 82.02.050 (3), but such system improvements must still be reasonably related to and reasonably benefit the new development to be "impact fees." RCW 82.02.050 (3)(a) -(c).

¶43 However this ordinance requires *no* relation between the new development and the public facility, yet alone

a "reasonable" one. But we need not rely on the common understanding of the text. The legislative history, well documented by the Court of Appeals, conclusively

demonstrates that the standard of "reasonableness" the legislature intended to be applied with regard to RCW 82.02.050(3)(a) -(c) and 82.02.060(6) is the *Nollan/Dolan* standard.«18»

¶44 The Court of Appeals extensively reviewed the legislative history of House Bill 2929,«19»which was the initial legislation of what became known as the Growth Management Act (chapter 36.70A RCW). For our purposes the most important conclusion to be drawn from the legislative history is the legislature's deliberate use of the *identical* terms the United States Supreme Court used to describe the "nexus" requirement of the Fifth Amendment: "reasonably related to." *City of Olympia v. Drebick* , 119 Wn. App. 774 , 785, 83 P.3d 443 (2004) (quoting *Nollan* , 483 U.S. at 838). As the Court of Appeals noted:

> When the 1990 legislature was considering the GMA, it undoubtedly knew about *Nollan* , which was then the *only* case in which the United States Supreme Court had addressed the propriety of conditioning a building permit on the exaction of private property without compensation. Thus, we infer that the 1990 legislature did not use *Nollan* 's phrase ("reasonably related to") by coincidence; instead, we think, the legislature used the same phrase with intent to adopt *Nollan* 's meaning and assure the new statute's constitutionality. *Nollan* had used the phrase ("reasonably related to") to mean a link or "nexus" between the public problem to be alleviated and the individualized impacts of the permittee's *specific* project, and we conclude that the 1990 legislature used the same phrase in the same way.

Id. «20»

«18» *Nollan v. Cal. Coastal Comm'n* , 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. City of Tigard* , 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

«19» *See City of Olympia v. Drebick* , 119 Wn. App. 774 , 781-85, 83 P.3d 443 (2004).

«20»Further, the legislature is presumed to be familiar with judicial decisions on the subject on which it is legislating. *Daly v. Chapman* , 85 Wn.2d 780 , 782, 539 P.2d 831 (1975).

¶45 *Nollan* , of course, required a nexus between the exaction«21»and the individualized impacts of the specific project. *Nollan* , 483 U.S. at 837. *Dolan* extended *Nollan* by additionally requiring that the exaction be roughly proportional to the impacts of the development. *Dolan* , 512 U.S. at 391. But even if the legislature had only *Nollan* 's definition of "reasonably related" in mind when it used the exact same phrase, our majority defeats the *Nollan* and the Washington State Legislature's definition.

¶46 The citywide averaged fee imposed in this case by definition does not consider the individual impacts of Drebick's development and therefore fails both the *Nollan*

«21»The majority claims "nor does the dissent mention that neither the United States Supreme Court nor this court has determined that the tests applied in *Nollan* and *Dolan* to evaluate land exactions must be extended to the consideration of fees imposed to mitigate the direct impacts of a new development, much less to the consideration of more general growth impact fees imposed pursuant to statutorily authorized local ordinances." Majority at 302. Quite correct, because the United States Supreme Court *has* vacated statutorily imposed monetary impact fees for further consideration in light of *Dolan* . *Ehrlich v. City of Culver City* , 512 U.S. 1231, 114 S. Ct. 2731, 129 L. Ed. 2d 854 (1994). On remand the California Supreme Court "reject[ed] the proposition that *Nollan* and *Dolan* are entirely without application to monetary exactions." *Ehrlich v. City of Culver City* , 12 Cal. 4th 854, 876, 50 Cal. Rptr. 2d 242, 911 P.2d 429, 444 (1996). *See also Benchmark Land Co. v. City of Battle Ground* , 103 Wn. App. 721 , 14 P.3d 172 (2000), *aff'd on other grounds by* 146 Wn.2d 685 , 49 P.3d 860 (2002) (holding that *Dolan* proportionality test applies to impact fees); SANDRA M. STEVENSON, ANTIEAU ON

LOCAL GOVERNMENT LAW 56-47, at § 56.05[2] (2d ed. 2005); ZONING AND LAND USE CONTROLS, PART II, MODERN ZONING TRENDS , ch. 9: EXACTIONS, IMPACT FEES AND OTHER LAND DEVELOPMENT CONDITIONS , 2-9 ZONING AND LAND USE CONTROLS § 9.02, "Nexus, Proportionality, and Takings: *Nollan* , *Dolan* and Progeny, [4] Applicability of *Nollan* and *Dolan* to All Land Development Conditions" (Matthew Bender 2005) and *id* ., § 52A.04 at 8-52A, "Established and Emerging Rules in Takings Cases, [2] Categorical Rules in Exactions Cases, [c] Combined Effect of the 'Rational Nexus' and 'Rough Proportionality' Tests" (citing *Benchmark Land Co.* , 94 Wn. App. 537 , concluding that *Nollan* and *Dolan* tests apply to fees); *City of Portsmouth v. Schlesinger* , 57 F.3d 12, 16-17 (1st Cir. 1995) (impact fee unlawful exaction); *Consumers Union of U.S., Inc. v. State* , 5 N.Y.3d 327, 354, 840 N.E.2d 68, 806 N.Y.S.2d 99 (2005) (fee is exaction to which *Nollan* and *Dolan* apply); *Home Builders Ass'n v. City of Beavercreek* , 2000 Ohio 115, 89 Ohio St. 3d 121, 128, 729 N.E.2d 349, 356 (using *Nollan* and *Dolan* tests when "evaluating the constitutionality of an impact fee ordinance"); *Town of Flower Mound v. Stafford Estates, L.P.* , 135 S.W.3d 620, 639-40 (Tex. 2004) (applying *Nollan* and *Dolan* to impact fees); J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied* Nollan *and* Dolan *and Where They Should Go From Here* , 59 WASH. & LEE L. REV . 373, 390 (2002) (noting "growing recognition that the logic of *Nollan* and *Dolan* " applies to fees).

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test and the requirement that the impact fee be "reasonably related" to the development under RCW 82.02.050 (3).«22»

¶47 Finally, the definition of "[p]roportionate share" in RCW 82.02.090 (5) supports the conclusion that the legislature intended the *Nollan* definition of "reasonably related" (and also tracks *Dolan*). RCW 82.02.050 (3)(b) provides that "impact fees . . . [s]hall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development." RCW 82.02.090 (5) defines "[p]roportionate share" as "that portion of the cost of public facility improvements that are reasonably related to *the service demands and needs of new development* ." (Emphasis added.) This definition clearly defines the amount of impact fees that can be charged in relation to the specific proposed development. The "service demands" of the new development aren't for a "functioning transportation system," an abstract notion not susceptible to definition in any event, but for certain capacities on specific roadways that will be utilized by the development's customers and employees.

«22»The majority posits a distinction between a " ' *generally* applicable development fee' " and a site specific fee. Majority at 303 n.4 (quoting *Ehrlich v. City of Culver City* , 12 Cal. 4th 854, 881, 911 P.2d 429, 447, 50 Cal. Rptr. 2d 242, *cert. denied* , 519 U.S. 929 (1996)). I think the majority's misimpression might be cured if it placed the quoted material in proper context:

> One of the central promises of the takings clause is that truly public burdens will be publicly borne. Where the regulatory land-use power of local government is deployed against individual property owners through the use of conditional permit exactions, the *Nollan* test helps to secure that promise by assuring that the monopoly power over development permits is not illegitimately exploited by imposing conditions that lack any logical affinity to the public impact of a particular land use. The essential nexus test is, in short, a "means-ends" equation, intended to limit the government's bargaining mobility in imposing permit conditions on individual property owners - whether they consist of possessory dedications or the exaction of cash payments - that, because they appear to lack any evident connection to the public impact of the proposed land use, *may* conceal an illegitimate demand - may, in other words, amount to " 'out-and-out . . . extortion.' " (*Nollan* , *supra* , 483 U.S. at 837 [97 L. Ed. 2d at 689].).

Ehrlich , 12 Cal. 4th at 876 (alteration in original). Drebick was indeed subjected to a "conditional permit exaction[ ]" which also "lack[ed] any logical affinity to the public impact of [his] particular land use." *Id* . The fact that the fee was calculated pursuant to a formula the application of which "lack[s] any logical affinity to the public impact of a particular land use" hardly cures the constitutional problem which would exist if the same exaction were imposed in the absence of a formulaic ordinance.

¶48 This court's duty is to construe statutes constitutionally if such is possible. *High Tide Seafoods v. State* , 106 Wn.2d 695 , 698, 725 P.2d 411 (1986). Given that the legislatively intended definition of "reasonably related to" in RCW 82.02.050 complies with - and indeed is identical to - the requirements of *Nollan* and *Dolan* , a constitutional construction is certainly available. Indeed, we have upheld impact fees while specifically noting *Dolan* 's requirements where a reasonable service area was drawn under an ordinance that required the infrastructure to actually serve the new development. *See Trimen Dev. Co. v. King County* , 124 Wn.2d 261 ,

274, 877 P.2d 187 (1994).«23»

¶49 The literal text of chapter 82.02 RCW requires an impact fee imposed under RCW 82.02.050 -.090 be "reasonably related to" and "reasonably benefit" the new development and that local governments define "reasonable" service areas. The legislature used *Nollan* 's exact language for a reason, and the requirement that there at least be a nexus between the impact of the development and the fee imposed thus defines the "reasonableness" of such fees. But here there is no demonstrated connection between this fee and any impact of this development; just the opposite. Thus I

«23»The majority's citation to *New Castle Investments v. City of LaCenter* , 98 Wn. App. 224 , 989 P.2d 569 (1999), and *Wellington River Hollow, L.L.C. v. King County* , 113 Wn. App. 574 , 54 P.3d 213 (2002) are unavailing. *New Castle* was not a case about the validity of impact fees but about whether the impact fees are land use control ordinances for purposes of our state vesting statute. Further, the Court of Appeals specifically noted that *Nollan/Dolan* 's requirement of rough proportionality is not necessarily a direct relationship (which would comport with the "exacting correspondence" rejected in *Dolan* , 512 U.S. at 389-90), but there still must be a "roughly proportional" relationship - a relationship the *Dolan* Court derived specifically from the "reasonable relationship" test adopted by numerous other state courts. *See Dolan* , 512 U.S. at 391. *Wellington* upheld a school impact fee imposed based on projected student enrollment in the school district from the new development. This was at least *some* link between the impact - more students - and the solution - school improvements. But here the city of Olympia did not demonstrate any link between the "impact" of the new development and the capital facilities to be built. In *Wellington* some of the improvements were the addition of classrooms at a high school near the development. However, to the extent that *Wellington* held that impact fees could be imposed where no use of the facilities by students from the new development would occur, the Court of Appeals opinion in *Wellington* should not be followed.

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would hold that Olympia's citywide averaged fee as applied here violates RCW 82.02.020 .

¶50 I dissent.

J.M. JOHNSON, J., concurs with SANDERS, J.

CHAMBERS, J., concurs in the result only. No. 200,153-0. En Banc.]

Argued May 10, 2005. Decided January 26, 2006.

In the Matter of the Disciplinary Proceeding Against JEFFREY T. HALEY , *an Attorney at Law* .

[1] Attorney and Client - Discipline - Findings of Fact - Failure To Assign Error - Effect. Unchallenged findings of fact made by the hearing officer or adopted by the disciplinary board in a bar disciplinary proceeding are verities before the Supreme Court.

[2] Attorney and Client - Discipline - Supreme Court Authority - In General. The Supreme Court has plenary authority when it reviews an attorney discipline decision by the disciplinary board.

[3] Attorney and Client - Discipline - Degree of Punishment - Recommendation of Disciplinary Board - Effect. While the Supreme Court will not lightly depart from the disciplinary board's recommended sanction in a bar disciplinary proceeding, it is not bound by the recommendation.

[4] Attorney and Client - Discipline - Conclusions of Law - Review - Standard of Review. Conclusions of law in a bar disciplinary proceeding are reviewed by the Supreme Court de novo.

[5] Attorney and Client - Discipline - Rules - Construction - Enforcement - Supreme Court Authority. The Supreme Court has the inherent power to interpret and enforce the rules of attorney discipline.[6] Attorney and Client - Communication With Represented Party - Prohibition - Purpose. RPC 4.2(a), which prohibits a lawyer from communicating about the subject of the representation of a client with a party whom the lawyer knows is represented by another lawyer, is intended to protect those who are represented by counsel against possible overreaching by other lawyers who are

participating in the matter, against interference by those lawyers with the lawyer-client relationship, and against

uncounseled disclosure of information relating to the representation. The rule's purpose is to prevent situations in which a represented party is taken advantage of by adverse counsel.

[7] Attorney and Client - Communication With Represented Party - Prohibition - Scope - Pro Se Attorney. A lawyer acting pro se is subject to the RPC 4.2(a) proscription against communicating with a party whom the lawyer knows is represented by another lawyer; i.e., a lawyer acting pro se is "representing a client" for purposes of the rule. This interpretation of RPC 4.2(a) applies prospectively only.

[8] Attorney and Client - Discipline - Degree of Punishment - ABA Standards. The Supreme Court's determination of the sanction to impose in a bar disciplinary proceeding is guided by the *ABA Standards for Imposing Lawyer Sanctions* (1991 & Supp. 1992).

[9] Attorney and Client - Discipline - Degree of Punishment - Two-Stage Process - In General. To determine the appropriate sanction to impose against an attorney after misconduct is found, the Supreme Court performs a two-part analysis. First, the court determines the presumptive sanction based on the ethical duty violated, the attorney's mental state, and the extent of actual or potential harm caused by the conduct. Second, the court considers the aggravating and mitigating factors, which may alter the presumptive sanction or decrease or lengthen a suspension.

[10] Attorney and Client - Discipline - Degree of Punishment - Recommendation of Disciplinary Board - Departure - Factors. The Supreme Court generally will accept the disciplinary board's recommended sanction in a bar disciplinary proceeding unless the sanction departs significantly from sanctions imposed in other similar cases or the board was not unanimous in its recommendation.

[11] Attorney and Client - Discipline - Conflict of Interest - Knowing Conflict - Presumptive Sanction - Suspension. Suspension generally is the appropriate sanction when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict and causes injury or potential injury to a client.

[12] Attorney and Client - Discipline - Conflict of Interest - Negligent Conduct - Presumptive Sanction - Reprimand. A reprimand generally is the presumptive sanction when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

[13] Attorney and Client - Discipline - Degree of Punishment - Factors - Aggravating Factors - Disciplinary History - Subsequent Acts. The discipline of an attorney for misconduct that was committed after the commission of misconduct that is the subject of a current disciplinary proceeding does not operate as a "prior offense" aggravating factor if the attorney was not under investigation for the current misconduct when the so-called "prior offense" was committed.

[14] Attorney and Client - Discipline - Degree of Punishment - Factors - Mitigating Factors - Delay in Initiating Proceedings. A lengthy delay in prosecuting a disciplinary action against an attorney may constitute a mitigating factor justifying an alteration in the presumptive sanction for the attorney's misconduct.

[15] Attorney and Client - Discipline - Degree of Punishment - Factors - Aggravating Factors - Substantial Experience in the Law - Length of Prior Practice. An attorney's substantial experience in practice is not a particularly significant aggravating factor in a bar disciplinary proceeding if the factor is not marked by an exceedingly long period of prior practice.

[16] Attorney and Client - Discipline - Degree of Punishment - Recommendation of Disciplinary Board - Unanimity - Lack of Unanimity - Divided Board. A sanction recommended by a divided disciplinary board is given less deference by the Supreme Court.

MADSEN and SANDERS , JJ., concur by separate opinions; ALEXANDER , C.J., and FAIRHURST , J., dissent by separate opinion.

Nature of Action: Disciplinary action against an attorney for communicating directly with a party represented by another lawyer in an action in which the attorney was acting pro se and for representing conflicting interests in the purchase and sale of corporate assets. The hearing officer concluded that professional conduct rules were violated in each instance and recommended a reprimand for one and a 60-day suspension for the other. The Disciplinary Board recommended two six-month suspensions, to run concurrently.Supreme Court: Interpreting RPC 4.2(a) to prohibit a lawyer acting pro se from contacting a party represented by counsel in the matter but applying the interpretation prospectively only, the court *dismisses* the count alleging improper contact. Holding that the presumptive sanction

for the attorney's knowing violation of the conflict of interest rule is suspension but concluding that a departure from the disciplinary board's recommended sanction is warranted, particularly in light of the considerable delay

in reporting and prosecuting the misconduct, the court imposes a *reprimand* for the violation.

Jeffrey T. Haley , pro se.

Randy V. Beitel , for the bar association.

¶1 OWENS, J. - Attorney Jeffrey T. Haley appeals the recommendation of the Disciplinary Board of the Washington State Bar Association (Board) that he serve two six-month suspensions pursuant to counts 2 and 3 of his disciplinary proceedings. Regarding count 2, the Board determined that Haley was subject to a six-month suspension for knowingly violating RPC 4.2(a), which provides that, "[i]n representing a client, a lawyer shall not communicate . . . with a party . . . represented by another lawyer." The Board concluded as to count 3 that Haley was subject to a six-month suspension for knowingly violating RPC 1.7, which prohibits a lawyer from representing a client if the representation is "directly adverse to another client" or "may be materially limited by . . . the lawyer's own interests." RPC 1.7(a), (b). The Board recommended allowing Haley to serve the two six-month suspensions concurrently. The Washington State Bar Association (WSBA) agrees that two six-month suspensions are appropriate but maintains that the suspensions should run consecutively.

¶2 Although we hold that, under RPC 4.2(a), a lawyer acting pro se is prohibited from contacting a party represented by counsel in the matter, we apply our interpretation

of RPC 4.2(a) prospectively only and dismiss the violation alleged in count 2. We agree that the presumptive sanction for Haley's knowing violation of RPC 1.7 is a suspension, but we conclude that a departure from the Board's recommendation is warranted, particularly in light of the considerable delay in reporting and prosecuting the misconduct. For Haley's violation of RPC 1.7, we therefore impose a reprimand.

FACTS

[1]¶3 Counts 2 and 3 of the WSBA's complaint against Haley arose out of separate sets of events that occurred in 1996-1997 and 1988-1991, respectively. Haley does not challenge any finding of fact as made by the hearing examiner or adopted by the Board. Accordingly, such facts are considered verities on appeal to this court. *In re Disciplinary Proceeding Against Brothers* , 149 Wn.2d 575 , 582, 70 P.3d 940 (2003).«1»

¶4 *Count 2* . In 1994, Haley filed a lawsuit against Carl Highland, the former chief executive officer of a defunct closely held corporation, Coresoft, of which Haley was formerly a shareholder and board member. Initially, Haley acted pro se in the matter but hired counsel when the case went to trial in November 1995. After the trial ended, Haley's counsel filed notice of withdrawal and Haley reverted to pro se status as to appeal and collection issues. Highland was represented by various attorneys at all times during this matter, and Haley knew that Highland was consistently represented by counsel.

¶5 The hearing officer and Board concluded that Haley's improper contact with a represented party arose out of two incidents. First, while Haley was acting pro se after the trial, he sent a letter to Highland and his wife proposing

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«1»The WSBA's motion to strike the appendix attached to Haley's brief is granted pursuant to RAP 10.3(a)(7), but the motion for terms of $500 is denied. Haley's motion to file additional briefing and submit a declaration of authenticity by Nicholas Corff is denied. Notably, the substance of the materials disputed in these motions is not germane to our resolution of the issues in this case.

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settlement. The letter was dated September 9, 1996, and stated in full as follows:

"I am about to spend approximately $25,000 on costs and attorneys fees for the appeal. If the appeal is

> successful, the personal earnings of both Ronda Hull and Carl Highland will be subject to garnishment to satisfy my judgment and the judgment now held by Carl Highland will be overruled. Also, the amount I am about the [sic] spend on costs and attorneys fees will be added to the judgment.
>
> "This is the last opportunity to settle the case before I spend the money on the appeal. This settlement offer will not be open after this week and may be withdrawn at any time if it is not promptly accepted. I am offering that all claims and judgments between the parties be releases [sic] with no payments. Please respond directly to me."

Decision Papers (DP) at 38. Highland forwarded the letter to his attorney who, in turn, suggested to Haley that the letter constituted a violation of RPC 4.2(a) and warned him not to have any further contact with Highland. Second, on January 31, 1997, Haley again contacted Highland, this time by telephone. Haley left the following voice message on Highland's phone:

> "Carl, this is Jeff Haley . . . .
>
> "I hope your attorneys have told you . . . Jim Bates decided that your judgment against me is collectable only from my separate assets and I have none; they're all community assets. And, therefore, your judgment is uncollectable [sic]. And the chance for appeal of that determination by Jim Bates has run so you can't appeal it . . . so that if the appeal proceeds my position can only improve and yours can only get worse and if you have nothing collectable . . . there's no chance of ever getting anything collectable. It seems to me that we ought to settle this case and if we do so Monday . . . there'll be an opportunity on Monday to do so if you're interested. Give me a call."

DP at 41.

¶6 In his "Amended Findings of Fact and Conclusions of Law," the hearing officer stated that Haley's letter and phone message were "clearly prohibit[ed]" by RPC 4.2(a),

DP at 46, but he acknowledged that there was some authority supporting Haley's position that attorneys acting pro se are not subject to the prohibition. DP at 46-47. Ultimately, in his "Additional Findings of Fact, Application of Standards, and Recommendation," the hearing officer determined that, "because of the specific language of RPC 4.2 (i.e., 'In representing a client . . . .') and because of the apparent absence of authority within the state of Washington on this specific issue, Mr. Haley could have harbored a sincere belief that contacts with a represented opposing party were not prohibited." DP at 63. Consequently, the hearing officer concluded that the violation was "negligent" and that the presumptive sanction was thus a reprimand. *Id* . (citing ABA, STANDARDS FOR IMPOSING LAWYER SANCTIONS std. 6.33 (1991 & Supp. 1992) (ABA STANDARDS)).

¶7 Deleting the hearing officer's conclusion that Haley's violation was negligent, the Board substituted its contrary determination that "Haley's mental state was knowledge" and that the presumptive sanction was therefore a suspension. DP at 7 (citing ABA STANDARDS std. 6.32). In doing so, the Board took note that Haley knew Highland was represented by counsel at all times and stated that a "reasonable reading of RPC 4.2 prohibits a lawyer, while representing him[self] or herself, from contacting a represented party." DP at 7-8. The Board also faulted Haley for not "taking time to determine whether his conduct was an ethical violation." DP at 8.

¶8 *Count 3* . In 1988, Haley and four other individuals formed Coresoft, a Washington corporation in the software development business. The four other shareholder/directors were Nicholas Corff, Donald Padleford, Randolph Cerf, and Bruce Haley. In addition to being a shareholder, board member, and secretary of Coresoft, Haley also served as the principal lawyer for the company.

¶9 In raising capital for Coresoft, the corporation obtained a $75,000 line of credit directly from Key Bank, which was personally guaranteed by the Coresoft shareholder/directors. This credit was properly secured with a

security agreement and UCC-1 financing statement, *see* chapter 62A.9A RCW, and, as a result, Key Bank maintained a first priority security interest in Coresoft's assets. Additional capital was obtained in the form of $40,000 loaned to Coresoft by Haley in 1988, the funds for which Haley obtained via personal loan. Haley obtained a promissory note from Coresoft and a signed UCC-1 financing statement as part of the loan transaction. However, there was no separate security agreement securing the note, and the UCC-1 financing statement was not filed until October 1990.«2»Haley's purported security interest had second priority behind Key Bank's interest.

¶10 In late 1990, the Coresoft board of directors came to realize that the company's financial viability was hopeless. The board concluded that the best option was to form another corporation that would purchase Coresoft's assets for an amount at least covering the $75,000 from Key Bank and, thereby, discharge all personal liability they had individually incurred by guaranteeing the line of credit. With the agreement or acquiescence of the board, Haley undertook the following course of action: (1) Haley formed a new corporation, known as Star Software, for the purpose of purchasing Coresoft's assets while leaving as many liabilities as possible behind;«3»(2) Haley conducted a foreclosure sale on Coresoft's assets, which he appeared to be in a position to do as a second priority security interest holder; and (3) acting as Star Software's attorney, the only bidder

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«2»Under the Uniform Commercial Code, as adopted in Washington, a security interest in collateral becomes enforceable when "[t]he debtor has authenticated a security agreement that provides a description of the collateral." RCW 62A.9A-203 (b)(3)(A). Perfection of a security interest (i.e., acquiring priority over unperfected security interests and lienholders under RCW 62A.9A-317) generally requires filing a UCC-1 financing statement. RCW 62A.9A-310 (a). Given these rules, the absence of a separate security agreement and Haley's failure to file the UCC-1 financing statement until Coresoft was failing may have allowed Coresoft to void his security interest; thus, Coresoft and its shareholders might have been in an economic position that was potentially more favorable than they were aware of.

«3»Of the original Coresoft shareholders, only Haley and his brother Bruce became shareholders in Star Software. The other Coresoft shareholders declined Haley's invitation to invest in the new company.

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at the sale, Haley purchased Coresoft's assets for an amount that covered both Key Bank's $75,000 and the $26,000 remaining due on Haley's $40,000 loan to Coresoft. Coresoft became defunct on February 1, 1991.

¶11 Haley concedes that conflicts of interest arose out of this series of events. Specifically, Haley's duty to Coresoft and its shareholders conflicted with his interests in recovering on his personal loan and in moving Coresoft's assets to his new client, Star Software, at the lowest possible price. The hearing officer found that Haley made certain that Star Software took on only those assets and liabilities beneficial to the new company, including foreclosing on assets not covered by his UCC-1 financing statement. The hearing officer also found Haley's actions harmful or potentially harmful to Coresoft and its shareholders. While the Coresoft board members agreed to the formation of Star Software and the foreclosure sale, Haley did not obtain an informed written consent from Coresoft before the sale to Star Software.«4»The hearing officer concluded that Haley acted "with knowledge" and that the presumptive sanction for the violation was a suspension. DP at 64-66 (citing ABA STANDARDS std. 4.32).

¶12 The Board adopted the hearing officer's analysis of the presumptive sanction, but two members of the Board dissented, contending that Haley's failure to obtain written consent was merely negligent and that a reprimand would be the appropriate presumptive sanction.

¶13 *Recommended Sanctions for Counts 2 and 3* . The hearing officer found three aggravating factors (prior disciplinary offense, multiple offenses, and substantial experience) and two mitigating factors (cooperative attitude and delay in the disciplinary proceedings). *See* ABASTANDARDS stds. 9.22(a), (d), (i); 9.32(e), (j). The hearing officer recommended that Haley be reprimanded for the count 2 violation and suspended for 60 days for the count 3 violation. Having

«4»None of Coresoft's shareholder/directors are complaining parties in this disciplinary matter. The grievance was filed by Highland after Haley initiated the litigation described in count 2.

adopted the hearing officer's aggravating and mitigating factors, the Board recommended a six-month suspension for each count, with the two suspensions to be served concurrently.

ISSUES

¶14 1. Does RPC 4.2(a) prohibit a lawyer who is acting pro se from contacting a party who is represented by counsel? If so, should the rule be applied in the present case?

¶15 2. What is the appropriate sanction for Haley's violation of RPC 1.7?

ANALYSIS

[2-5]¶16 *Standard of Review* . When a lawyer discipline decision by the Board is appealed, this court has "plenary authority" on review. *In re Disciplinary Proceeding Against Whitt* , 149 Wn.2d 707 , 716, 72 P.3d 173 (2003). While we "do[ ] not lightly depart from the Board's recommendation," we are "not bound by it." *In re Disciplinary Proceeding Against Tasker* , 141 Wn.2d 557 , 565, 9 P.3d 822 (2000). The court reviews conclusions of law de novo. *Whitt* , 149 Wn.2d at 716 -17. We have "the inherent power to promulgate rules of discipline, *to interpret them* , and to enforce them." *In re Disciplinary Proceeding Against Stroh* , 97 Wn.2d 289 , 294, 644 P.2d 1161 (1982) (emphasis added); *see also* ELC 2.1 (recognizing this court's "inherent power to maintain appropriate standards of professional conduct").

[6]¶17 *Applicability of RPC 4.2(a) to Lawyer Acting Pro Se* . RPC 4.2(a) reads in full as follows:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

The rule is virtually identical to model rule 4.2. *See* ABA, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT (5th ed. 2003) (ABAANNOTATED MODEL RULES) rule 4.2. While we have not formally adopted the commentary to the ABA *Annotated Model Rules, we have noted that it "may be 'instructive in exploring the underlying policy of the rules.' " In re Disciplinary Proceeding Against Carmick* , 146 Wn.2d 582 , 595, 48 P.3d 311 (2002) (quoting *State v. Hunsaker* , 74 Wn. App. 38 , 46, 873 P.2d 540 (1994)). As the comment to model rule 4.2 explains, the rule aims to protect those represented by counsel "against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation."«5»In *Carmick* , we acknowledged that "[t]he rule's purpose is to prevent situations in which a represented party is taken advantage of by adverse counsel." 146 Wn.2d at 597 (citing *Wright v. Group Health Hosp* ., 103 Wn.2d 192 , 197, 691 P.2d 564 (1984)).

¶18 At issue in the present case is whether RPC 4.2(a) applies to lawyers acting pro se - or, more precisely, whether a lawyer who is representing himself or herself is, in the words of RPC 4.2(a), "representing a client." This court has not previously addressed this issue; nor has the WSBA issued an ethics opinion, formal or informal, on the question. Other jurisdictions that have considered the rule's applicability to lawyers acting pro se have generally concluded that the policies underlying the rule are better served by extending the restriction to lawyers acting pro se. *See In re Segall* , 117 Ill. 2d 1, 5-6, 509 N.E.2d 988, 109 Ill. Dec. 149 (1987); *Comm. on Legal Ethics v. Simmons* , 184 W. Va. 183, 185, 399 S.E.2d 894 (1990); *Sandstrom v. Sandstrom* , 880 P.2d

103, 108-09 (Wyo. 1994); *Runsvold v. Idaho State Bar* , 129 Idaho 419, 420-21, 925 P.2d 1118

«5»ABA, ANNOTATED MODEL RULES rule 4.2 cmt. 1, at 417. The annotation to model rule 4.2 summarizes that " Rule 4.2 preserves the lawyer-client relationship, protects clients against overreaching by other lawyers, and reduces the likelihood that clients will disclose confidential or damaging information." *Id* . at 418 (citing ABA Formal Ethics Op. 95-396 (1995)).

(1996); *Vickery v. Comm'n for Lawyer Discipline* , 5 S.W.3d 241, 259 (Tex. Ct. App. 1999); *In re Discipline of Schaefer* , 117 Nev. 496, 507-08, 25 P.3d 191 (2001).

¶19 Haley asks this court to take the contrary view and hold that the plain meaning of the word "client" in RPC 4.2(a) precludes application of the rule to a lawyer acting pro se. The word "client" is variously defined as "[a] person or entity that employs a professional for advice or help in that professional's line of work," BLACK'S LAW DICTIONARY 271 (8th ed. 2004), and "a person who engages the professional advice or services of another." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 422 (2002). Thus, for the rule to apply to lawyers acting pro se, such lawyers would, in effect, be employing or engaging themselves for advice, help, or services. This, as Haley contends, suggests that lawyers who are acting pro se are excluded from the scope of the rule because such lawyers have no client.

¶20 In the alternative, Haley maintains that, even if RPC 4.2(a) were construed to restrict pro se lawyers from contacting represented parties, we should conclude that the rule as applied to him, a lawyer proceeding pro se, was unconstitutionally vague, violating his constitutional due process rights. Such a resolution finds support in *Schaefer* , 117 Nev. 496. There, the Nevada State Supreme Court relied on the principle that "a statute or rule is impermissibly vague if it 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' " *Id* . at 511 (quoting *Connally v. Gen. Constr. Co* ., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)).«6»The

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«6»The dissent recalls that in *Haley v. Medical Disciplinary Board* , 117 Wn.2d 720 , 818 P.2d 1062 (1991), we cited *Connally* but nevertheless "affirmed sanctions against a physician for violating a statute prohibiting ' "moral turpitude" ' although we recognized 'uncertainties associated with' the statutory language in question." Dissent at 353 (quoting *Haley* , 117 Wn.2d at 740). The dissent fails to acknowledge, however, that more recently in *In re Disciplinary Proceeding Against Halverson* , 140 Wn.2d 475 , 998 P.2d 833 (2000), this court distinguished *Haley* and declined to find a violation of RLD 1.1 ("Commission of Act of Moral Turpitude") because "a bright-line rule prohibiting attorney-client sexual relations [did] not exist." *Id* . at 491-92.

Schaefer court based its determination that Nevada's Supreme Court Rule 182, a rule identical to RPC 4.2(a), was unconstitutionally vague on "the absence of clear guidance" from the Nevada State Supreme Court and on "the existence of conflicting authority from other jurisdictions." 117 Nev. at 512; *see State Bar of Tex. v. Tinning* , 875 S.W.2d 403, 408 (Tex. App. 1994) (applying standard that "statute, rule, regulation, or order is fatally vague only when it exposes a potential actor to some risk or detriment without giving fair warning of the nature of the proscribed conduct"); *see also In re Ruffalo* , 390 U.S. 544, 552, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968) (holding that, in state disbarment proceeding, "absence of fair notice as to the reach of the grievance procedure" violated attorney's due process rights).

¶21 Both factors relied on in *Schaefer* are present here. First, as noted above, no prior opinion of this court has addressed the application of RPC 4.2(a) to lawyers proceeding pro se. Second, in late 1996 and early 1997 when Haley contacted Highland, authority permitting such contacts counterbalanced the prohibitions then existing from four jurisdictions. *See Segall* , 117 Ill. 2d at 5-6; *Simmons* , 184 W. Va. at 185; *Sandstrom* , 880 P.2d at 108-09; *Runsvold* , 129 Idaho at 420-21.«7»The comment to rule 2-100 of the California RPCs, a rule

identical to RPC 4.2(a) in all material respects, explicitly permits a lawyer proceeding pro se to contact a represented party:

> [T]he rule does not prohibit a [lawyer] who is also a party to a legal matter from directly or indirectly communicating on his or her own behalf with a represented party. Such a member has independent rights as a party which should not be abrogated because of his or her professional status. To prevent any possible abuse in such situations, the counsel for the opposing party may advise that party (1) about the risks and benefits of communications with a lawyer-party, and (2) not to accept or engage in communications with the lawyer-party.

«7»Looking no further than these four cases, the dissent ignores the counterbalancing authority found in rules, commentaries, and case law from other jurisdictions. Dissent at 352.

CAL. RPC 2-100 discussion ¶ 2. Likewise, a comment to the restatement specifically provides that "[a] lawyer representing his or her own interests pro se may communicate with an opposing represented nonclient on the same basis as other principals." RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 99 cmt. e at 73 (2000).

¶22 Alongside these explicit statements permitting the questioned contact, other authorities supported a reasonable inference that our RPC 4.2(a) did not foreclose a pro se lawyer's communication with a represented opposing party. For example, the comparable rule in Oregon, DR 7-104(A)(1), put lawyers acting pro se squarely within the rule's ambit:

> (A) During the course of the lawyer's representation of a client, a lawyer shall not:
>
> (1) Communicate or cause another to communicate . . . with a person the lawyer knows to be represented by a lawyer . . . . *This prohibition includes a lawyer representing the lawyer's own interests* .«8»

The absence of an explicit prohibition in RPC 4.2(a) could have suggested that Washington's rule was narrower in scope than Oregon's and did not apply to lawyers acting pro se. Additionally, the commentary to model rule 4.2 includes the statement that "[p]arties to a matter may communicate directly with each other." ABA, ANNOTATED MODEL RULES rule 4.2 cmt. 4, at 417. Unlike the commentary to the restatement and to California's RPC 2-100, this comment does not pointedly refer to a lawyer-party acting pro se; consequently, the breadth of the statement permits an inference that all parties may communicate unreservedly with each other. Finally, the holding in *Pinsky v. Statewide Grievance Committee* , 216 Conn. 228, 578 A.2d 1075 (1990), appears to call into question the policy concerns supporting the appli

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«8» *In re Conduct of Smith* , 318 Or. 47, 49 n.1, 861 P.2d 1013 (1993) (emphasis added) (quoting DR 7-104(A)(1)). Oregon's RPC 4.2 (adopted effective Jan. 1, 2005) likewise makes explicit that the prohibition applies to lawyers acting pro se: "In representing a client *or the lawyer's own interests* , a lawyer shall not communicate . . . with a person the lawyer knows to be represented by a lawyer . . . ." (Emphasis added.)

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cation of RPC 4.2(a) to lawyers acting pro se. In *Pinsky* , the Connecticut State Supreme Court concluded that a represented lawyer-party had not violated an identical version of RPC 4.2(a) when he directly contacted his landlord, who was also represented by counsel, during an eviction matter. The *Pinsky* court took note that "[c]

ontact between litigants . . . is specifically authorized by the comments under rule 4.2" and concluded that Pinsky was not " 'representing a client' " as stated in the rule. *Id* . at 236. The *Pinsky* court thus determined that communication between a represented lawyer-party and a represented nonlawyer party did not conflict with a key purpose of RPC 4.2(a) - the protection of a represented nonlawyer party from "possible overreaching by other lawyers who are participating in the matter." ABA, ANNOTATED MODEL RULES rule 4.2 cmt. 1, at 417. Because the *Pinsky* decision did not address why contacts from a lawyer acting pro se would pose a greater threat of overreaching than would contacts from a represented lawyer-party,«9» *Pinsky* provides further equivocal authority on the application of RPC 4.2(a) to lawyers acting pro se.

[7]¶23 In sum, consistent with the resolution of the same issue in *Schaefer* , we hold that a lawyer acting pro se is "representing a client" for purposes of RPC 4.2(a), but given the absence of a prior decision from this court, along with the presence of conflicting or equivocal authority from other jurisdictions and legal commentaries, we find the rule impermissibly vague as to its applicability to pro se attorneys and thus apply our interpretation of the rule prospectively only.«10»We therefore dismiss the violation alleged in

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«9»That a lawyer-party seeks representation may at least suggest that he or she does not have "the superior knowledge and skill of the opposing lawyer" in the subject of the litigation, a circumstance that would arguably diminish the risk of overreaching in the represented lawyer-party's contacts with other represented parties. *Pinsky* , 216 Conn. at 236.

«10»We join the dissent's rejection of "the position taken by Justice Sanders in his concurring opinion that attorney discipline is a punishment scheme and therefore is subject to the rule of lenity - a criminal law doctrine." Dissent at 354. As we stated in *In re Disciplinary Proceeding Against Noble* , 100 Wn.2d 88 , 667 P.2d 608 (1983), "because we are committed to the proposition that discipline is not imposed as punishment for the misconduct, then our primary concern is with protecting the public and deterring other lawyers from similar misconduct." *Id* . at 95.

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count 2. We need not reach Haley's alternative contention that the application of RPC 4.2(a) to his communications with Highland violated his free speech rights.

[8-10]¶24 *Sanction Analysis for Violation of RPC 1.7* . Our court has determined that the ABA *Standards* should guide our determination of appropriate sanctions in bar disciplinary cases. *In re Disciplinary Proceeding Against Johnson* , 114 Wn.2d 737 , 745, 790 P.2d 1227 (1990); *In re Disciplinary Proceeding Against Halverson* , 140 Wn.2d 475 , 492, 998 P.2d 833 (2000). Under the ABA *Standards* , after misconduct is found, the court performs a two-part analysis. *Halverson* , 140 Wn.2d at 492 -93. First, the court determines the presumptive sanction based on the ethical duty violated, the attorney's mental state, and the extent of actual or potential harm caused by the conduct. *Id* . Second, the court considers aggravating and mitigating factors, which may alter the presumptive sanction or decrease or lengthen a suspension. *Id* . at 496; *see* ABASTANDARDS stds. 9.22, 9.32. The court will generally adopt the Board's recommended sanction unless the sanction departs significantly from sanctions imposed in other cases or the Board was not unanimous in its decision. *See In re Disciplinary Proceeding Against Kuvara* , 149 Wn.2d 237 , 259, 66 P.3d 1057 (2003) (holding that the court would "retain the *Noble* factors of proportionality and degree of unanimity, but discard the remaining three as redundant due to the existence of similar provisions in the *Standards* and the ELC"); *In re Disciplinary Proceeding Against Noble* , 100 Wn.2d 88 , 95-96, 667 P.2d 608 (1983) (identifying five factors to be considered in determining appropriate sanction).

[11, 12]¶25 The determination of the presumptive sanction is straightforward. Haley concedes that his dual representation of Coresoft and Star Software was prohibited by RPC 1.7(a) and his representation of Coresoft was materially limited under RPC 1.7(b) by his own interest in

foreclosing on his security interest and transferring Coresoft's assets to Star Software. Therefore, we look to the presumptive sanctions for conflict of interest violations under RPC 1.7:

> Suspension is generally appropriate when a lawyer *knows of a conflict of interest* and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client.
>
> Reprimand is generally appropriate when a lawyer is *negligent in determining whether the representation of a client may be materially affected* by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.

ABASTANDARDS stds. 4.32, 4.33 (emphasis added). As to Haley's mental state, the hearing officer concluded that Haley "could not have reasonably believed that the representation of his own interests as a secured party (if, indeed, he was a secured party) or that his role as lawyer for, officer of, and shareholder of Star Software were not directly adverse to, or materially limited by his responsibilities to Coresoft." DP at 47. Haley offers no argument that he failed to recognize that the conflicts of interest existed, and the conclusion by the Board and hearing officer that Haley knew there was a conflict is well supported by the record. In particular, Haley went to members of Coresoft's board of directors for oral authorization regarding some of his actions. It is also undisputed that Haley's actions created the potential for harm to Coresoft and its shareholder/directors. Consequently, Haley is subject to standard 4.32, which makes suspension the presumptive sanction when a lawyer knows of a conflict and causes potential injury to a client.«11»

«11»Haley does contend that the Board erred in concluding that his violation of RPC 1.7 was done knowingly, suggesting that he was merely negligent in failing to obtain written consent rather than oral consent. This argument is without merit. There is no intent element related to obtaining informed written consent, which either exists or does not. If written consent does exist, there is simply no violation of the RPCs, and the ABA *Standards* for imposing discipline are inapplicable.

¶26 Having determined that suspension is the presumptive sanction under the ABA *Standards* , we next turn to the aggravating and mitigating factors under standards 9.22 and 9.32. The hearing officer determined that three aggravating factors were present: a prior disciplinary offense, multiple offenses, and substantial experience in practice. *See* ABASTANDARDS stds. 9.22(a), (d), (i). The hearing officer identified as mitigating factors Haley's cooperative attitude and the substantial delay in the proceedings. *See id* . at stds. 9.32(e), (j).

[13]¶27 As an initial matter, we note that the "prior disciplinary offense" aggravating factor is no longer present given our resolution of the RPC 4.2(a) issue. In finding that Haley had a prior disciplinary offense, the hearing examiner relied on an unrelated violation of RPC 4.2(a) for which Haley was censured in 1999. The conduct underlying that violation occurred in March 1996, and the subsequent grievance was filed sometime before May 10, 1996, when it was reported to Haley. *See* Ex. 27. Conversely, the findings of fact indicate that Highland's grievance against Haley relating to the violation of RPC 1.7 could not have been made to the WSBA earlier than July 1996. *See* DP at 68 (noting the two grievances leading to this matter were filed in July 1996 and February 1997). We have previously held that an after-the-fact offense operates as a prior offense for aggravating factor purposes as long as the lawyer knew he or she was under investigation for the older offense when committing the more recent offense. *Brothers* , 149 Wn.2d at 586 . However, that holding has no application in this case because nothing in the record suggests that Haley was under investigation for the RPC 1.7 violation when the so-called "prior offense" (Haley's March 1996 violation of RPC 4.2) occurred. As a result, we are left to consider only the two remaining mitigating and aggravating factors.

[14]¶28 The mitigating factors present in this case, in particular the delay in the disciplinary proceedings, are significant enough to justify altering the presumptive sanction. In *Tasker* , this court found the delay in prosecution "so substantial" and "so compelling" as to reduce the presump

tive sanction from disbarment to a two-year suspension. 141 Wn.2d at 570 . Tasker's violations occurred and began to be investigated by the WSBA in 1993-1994. *Id* . at 561-62. However, the WSBA's formal complaint

against Tasker was not filed until February 1998. *Id* . at 562. In relying on delay as the factor tipping the balance toward suspension, the court recognized that Tasker did not cause the delay, that he was subject to the opprobrium of his legal community in the interim, and that the delay resulted from understaffing and slack prosecution by the WSBA. *Id* . at 568. Here, Haley's violation of RPC 1.7 occurred in 1990-1991 but was not reported to the WSBA until July 1996. The formal complaint was not filed until November 21, 2000. Thus, the delay between the grievances and formal complaint in both *Tasker* and this case spanned approximately four years. We must also take note that the substantial delay between Haley's violations and the grievance have now resulted in a near 15-year delay in resolving this case, which weighs heavily in favor of altering the presumptive sanction.«12»

[15]¶29 In contrast to the substantial delay factor, the two remaining aggravating factors are relatively insignificant in this case. First, the "substantial experience in practice" aggravating factor is not marked by an exceedingly long period of prior practice. Haley became a member of the Washington bar in 1979 and began practicing law in 1982. Thus, at the time of the violation of RPC 1.7, Haley had been in practice approximately 8 to 10 years. Second, the "multiple offenses" aggravating factor is largely obviated by our holding that Haley did not violate RPC 4.2(a). Instead, we are left only with the hearing officer's finding that "each count itself reflects multiple events constituting misconduct." DP at 67. While Haley's violation of RPC 1.7(a) and (b) occurred more than once during his representation of Coresoft between 1988 and 1991, we cannot

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«12»Haley agreed not to present argument regarding the "substantial delay" factor in consideration for an extension of time before review by the Board. Clerk's Papers at 371. However, substantial delay is an unchallenged finding by the hearing officer, and this court remains free to consider its effect.

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conclude that this fact weighs strongly against altering the presumptive sanction.

[16]¶30 After establishing the presumptive sanction and weighing the mitigating and aggravating factors, we consider whether, in light of the two remaining *Noble* factors of proportionality and Board unanimity, the Board's recommendation should be altered. *Kuvara* , 149 Wn.2d at 259 ; *Noble* , 100 Wn.2d at 95 -96. We are not persuaded that a downward departure from the presumptive sanction of suspension would be disproportionate under these circumstances. As to unanimity, the Board was split as to the RPC 1.7 violation, with an 11-member majority recommending suspension and 2 dissenting members recommending reprimand. In considering the unanimity of the Board, we give less deference to the decision of a divided board. *Whitt* , 149 Wn.2d at 723 . Although the division was not especially marked in this case, the lack of unanimity supports altering the presumptive sanction from suspension to reprimand. In sum, the substantial weight of the mitigating factors over the aggravating factors, along with the considerations required by the two *Noble* factors, leads us to conclude that reprimand rather than suspension is the appropriate sanction for Haley's violation of RPC 1.7.

CONCLUSION

¶31 We hold that RPC 4.2(a) prohibits a lawyer who is representing his own interests in a matter from contacting another party whom he knows to be represented by counsel. However, because we conclude that RPC 4.2(a) was impermissibly vague as applied to Haley, we apply our interpretation of RPC 4.2(a) prospectively only and thus dismiss count 2 in the complaint. We further conclude that, although the presumptive sanction for Haley's knowing violation of RPC 1.7 is suspension, the mitigating factors, in particular the extensive delay in both reporting and prosecution, demand a more lenient sanction. We therefore depart from the Board's recommendation of a six-month

suspension and impose a reprimand for Haley's violation of RPC 1.7.

C. JOHNSON, BRIDGE, CHAMBERS, and J.M. JOHNSON , JJ., concur.

¶32 MADSEN, J. (concurring) - I agree with part one of Justice Sanders' concurrence. This court currently has a new set of RPCs pending before it. Because I agree with the majority that the better policy is to include self-represented lawyers within the prohibition of RPC 4.2(a), I would revise that rule in conjunction with the review of the RPCs and avoid the issue of prospectivity.

¶33 SANDERS, J. (concurring) - The majority holds that self-represented lawyers are "representing a client" under RPC 4.2(a) and therefore may not contact a represented party. But it refrains from sanctioning Haley, implicitly holding that the scope of RPC 4.2(a) is ambiguous. I concur only in the result, because the majority incorrectly construes RPC 4.2(a). The plain language of RPC 4.2(a) exempts self-represented lawyers. And the rule of lenity requires strict and narrow construction of an ambiguous penal statute. We must apply RPC 4.2(a) prospectively just as we apply it today.

I. THE PLAIN LANGUAGE OF RPC 4.2(A) PERMITS SELF-REPRESENTED LAWYERS TO CONTACT REPRESENTED PARTIES

¶34 Court rules like the Code of Professional Responsibility "are subject to the same principles of construction as are statutes." *In re Disciplinary Proceeding Against McGlothlen* , 99 Wn.2d 515 , 522, 663 P.2d 1330 (1983). Thus, when interpreting a rule we give "the words their ordinary meaning, reading the language as a whole and seeking to give effect to all of it." *Heinemann v. Whitman County Dist. Court* , 105 Wn.2d 796 , 802, 718 P.2d 789 (1986). If the plain language of the rule is unambiguous, additional interpretation is unnecessary. *See Nevers v. Fireside, Inc.* , 133

Wn.2d 804, 815, 947 P.2d 721 (1997); *Rest. Dev., Inc. v. Cananwill, Inc.* , 150 Wn.2d 674 , 682-87, 80 P.3d 598 (2003).

¶35 The plain language of RPC 4.2(a) unambiguously exempts self-represented lawyers. " *In representing a client* , a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." RPC 4.2(a) (emphasis added). A "client" is "a person who consults or engages the services of a legal advisor," WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 422 (2002), or a "person or entity that employs a professional for advice or help in that professional's line of work." BLACK'S LAW DICTIONARY 271 (8th ed. 2004). In other words, a "client" is a *third party* who engages a lawyer. Because self-represented lawyers have no client, *see Somers v. Statewide Grievance Comm.* , 245 Conn. 277, 287, 715 A.2d 712 (1998), under RPC 4.2(a) they may contact a represented party.

¶36 The majority concedes that RPC 4.2(a) applies only when a lawyer is "representing a client" but nonetheless construes it to cover self-represented lawyers. Majority at 338. Apparently, the majority concludes that self-represented lawyers are "employing or engaging themselves for advice, help, or services." *Id* . at 335.

¶37 This ingenious bit of legal fiction illustrates the wisdom of avoiding interpretations "conceivable in the metaphysical sense" when the plain language of a statute "is both necessary and sufficient." *Burton v. Lehman* , 153 Wn.2d 416 , 423, 103 P.3d 1230 (2005). Assuming that a self-represented lawyer represents a "client" certainly produces the majority's preferred outcome. Unfortunately, it does so only at the expense of coherence. Lawyers cannot retain themselves any more than *pro se* litigants can claim legal malpractice or ineffective assistance of counsel. *See* , *e.g.* , *Faretta v. California* , 422 U.S. 806, 834 n.46, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (holding that "a defendant who elects to represent himself cannot thereafter complain

that the quality of his own defense amounted to a denial of 'effective assistance of counsel' "); *State v. DeWeese* , 117 Wn.2d 369 , 379, 816 P.2d 1 (1991); *Gall v. Parker* , 231 F.3d 265, 320 (6th Cir. 2000). Undoubtedly, wise lawyers follow their own counsel. But it is a neat trick indeed to advise oneself.

¶38 The majority's claim to follow an emerging majority rule is unavailing. Indeed, it cites decisions from six

states concluding that self-represented lawyers are their own clients. *See In re Segall* , 117 Ill. 2d 1, 509 N.E.2d 988, 109 Ill. Dec. 149 (1987); *Comm. on Legal Ethics v. Simmons* , 184 W. Va. 183, 399 S.E.2d 894 (1990); *Sandstrom v. Sandstrom* , 880 P.2d 103 (Wyo. 1994); *Runsvold v. Idaho State Bar* , 129 Idaho 419, 925 P.2d 1118 (1996); *Vickery v. Comm'n for Lawyer Discipline* , 5 S.W.3d 241 (Tex. App. 1999); *In re Discipline of Schaefer* , 117 Nev. 496, 25 P.3d 191 (2001). But none offers any more convincing a rationale for this curious conclusion than the majority. Conclusory statements cannot substitute for legal reasoning, and another court's error cannot justify our own.

¶39 Likewise, the majority's reliance on the "purpose" of RPC 4.2(a) is misplaced. As the author of the court rules, we are "in a position to reveal the actual meaning which was sought to be conveyed." *Heinemann* , 105 Wn.2d at 802 . But in the interest of certainty and consistency, we approach them "as though they had been drafted by the Legislature." *Id* . Whatever the purpose of RPC 4.2(a), it cannot extend to persons and actions its plain language excludes. We may not expand the scope of a rule by fiat. If we conclude that self-represented lawyers should not contact represented parties, we should simply rewrite the rule to clearly prohibit that conduct. Other states have already done so. *Compare* CAL. R. PROF. COND . 2-100 discussion § 2 (explicitly permitting self-represented lawyers to contact represented parties) *with In re Conduct of Smith* , 318 Ore. 47, 53 n.5, 861 P.2d 1013 (1993) (noting that DR 7-102, Oregon's equivalent to RPC 4.2, "was amended effective January 1991, to add the phrase, 'or in representing the lawyer's

own interests' "). Lawyers should not have to read slip opinions to divine their professional obligations.

II. THE RULE OF LENITY REQUIRES A CONSTRUCTION OF RPC 4.2(A) EXEMPTING SELF-REPRESENTED LAWYERS

¶40 Even assuming that the plain language of RPC 4.2(a) is somehow ambiguous, the rule of lenity requires a strict and narrow construction exempting self-represented lawyers. The rule of lenity is a venerable canon of statutory interpretation, requiring courts "to interpret ambiguous criminal statutes in the defendant's favor." *In re Pers. Restraint of Stenson* , 153 Wn.2d 137 , 149 n.7, 102 P.3d 151 (2004). *See also United States v. Enmons* , 410 U.S. 396, 411, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973) ("This being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity."); *Bell v. United States* , 349 U.S. 81, 83, 75 S. Ct. 620, 99 L. Ed. 905 (1955) (holding "ambiguity should be resolved in favor of lenity"). While the Rules of Professional Conduct are only "quasi-criminal," *In re Discipline of Little* , 40 Wn.2d 421 , 430, 244 P.2d 255 (1952), the rule of lenity applies to both criminal and quasi-criminal statutes. *Village of Hoffman Estates v. Flipside , Hoffman Estates, Inc.,* 455 U.S. 489, 498-99, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982). The deciding factor is the nature of the sanction imposed.

¶41 As a general rule, courts apply the rule of lenity to any statute imposing penal sanctions. *See , e.g. , Kahler v. Kernes* , 42 Wn. App. 303 , 308, 711 P.2d 1043 (1985) (applying rule of lenity to civil statute imposing penal sanction). "We are mindful of the maxim that penal statutes should be strictly construed." *United States v. Cook* , 384 U.S. 257, 262, 86 S. Ct. 1412, 16 L. Ed. 2d 516 (1966). *And see* Roberta S. Karmel, *Creating Law at the Securities and Exchange Commission: The Lawyer as Prosecutor* , 61 LAW & CONTEMP. PROBS . 33, 34 n.6 (1998) (noting that courts "have sometimes used the doctrine of lenity to interpret a statute narrowly in a civil case because the statute also has criminal sanctions"). A statute is penal if it "can be punished by impris

onment and/or a fine" and remedial if it "provides for the remission of penalties and affords a remedy for the enforcement of rights and the redress of injuries." *State v. Eilts* , 94 Wn.2d 489 , 494 n.3, 617 P.2d 993 (1980).

¶42 The Rules of Professional Conduct are penal because they concern punishing an offender, not compensating a victim. Professional discipline "is punitive, unavoidably so, despite the fact that it is not designed for that purpose." *Little* , 40 Wn.2d at 430 . *See also In re Ruffalo* , 390 U.S. 544, 550, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968) (noting that disbarment "is a punishment or penalty imposed on the lawyer"); *In re Fordham* , 423 Mass. 481, 668 N.E.2d 816, 824 (1996) (stating that disciplinary sanctions constitute a punishment or penalty); *Stegall v. Miss. State Bar* , 618 So. 2d 1291, 1294 (Miss. 1993); *In re Disciplinary*

Proceeding Against Rentel , 107 Wn.2d 276 , 282, 729 P.2d 615 (1986); *Gay v. Va. State Bar* , 239 Va. 401, 389 S.E.2d 470 (1990) (referring to lawyer sanctions as "punishments"); *Comm. on Legal Ethics v. Hobbs* , 190 W. Va. 606, 439 S.E.2d 629, 634 (1993) (considering what steps would "appropriately punish" the attorney); *and People v. Senn* , 824 P.2d 822, 825 (Colo. 1992) (holding that "disciplinary proceedings supplement the work of the criminal courts to maintain respect for the rule of law and protect the public"). *See also Nguyen v. Dep't of Health* , 144 Wn.2d 516 , 525, 29 P.3d 689 (2001) (characterizing medical discipline as "quasi-criminal" and penal); *Commonwealth v. Lundergan* , 847 S.W.2d 729, 731 (Ky. 1993) (finding Kentucky's Legislative Ethics Act a "penal statute" to which "the 'rule of lenity' is applicable"); Julie Rose O'Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer's Proposal* , 16 GEO. J. LEGAL ETHICS 1, 14 (2002) (noting that "disciplinary proceedings seek many of the aims of criminal law and employ similarly punitive and stigmatizing penalties"). While the "purpose of disciplining an attorney is not *primarily* to punish the wrongdoer," *In re Disciplinary Proceeding Against Selden* , 107 Wn.2d 246 , 253, 728 P.2d 1036 (1986) (emphasis added), punishment is an important

purpose - and a necessary consequence - of professional discipline.

¶43 Courts have long recognized that disbarment is "penal in its nature" and subject to the rule of lenity. *Moutray v. People* , 162 Ill. 194, 198, 44 N.E. 496 (1896) (holding statutes authorizing disbarment must be "strictly construed, and not extended by implication to things not expressly within their terms"). *See also Ruffalo* , 390 U.S. at 550-51 ("Disbarment . . . is a punishment or penalty imposed on the lawyer" involving "adversary proceedings of a quasi-criminal nature."); *Charlton v. Fed. Trade Comm'n* , 177 U.S. App. D.C. 418, 543 F.2d 903, 906 (1976)); *In re McBride* , 602 A.2d 626, 640-41 (D.C. 1992) (applying rule of lenity to statute governing disbarment). The same holds for all other sanctions. "Because attorney suspension is a quasi-criminal punishment in character, any disciplinary rules used to impose this sanction on attorneys must be strictly construed resolving ambiguities in favor of the person charged." *United States v. Brown* , 72 F.3d 25, 29 (5th Cir. 1995); *In re Thalheim* , 853 F.2d 383, 388 (5th Cir. 1988).

¶44 In his dissent, Chief Justice Alexander suggests that the Rules of Professional Conduct can tolerate a degree of vagueness. Dissent at 353-54. But RPC 4.2(a) is not vague. It is ambiguous. And the Rules of Professional Conduct certainly cannot tolerate ambiguity.

¶45 A statute is *ambiguous* if it "refers to *P* , *P* can alternatively encompass either *a* or *b* , and it is beyond dispute that the defendant did *a* " and *vague* if it "refers to *X* , but we cannot tell whether the disputed event is an *X* ." Lawrence M. Solan, *Law, Language, and Lenity* , 40 WM. & MARY L. REV . 57, 62, 78 (1998). No one disputes what Haley did: While representing himself, he contacted a represented party. The only question is whether the term "representing a client" encompasses self-represented lawyers, as well as lawyers representing third parties. And if the term "representing a client" is "susceptible to more than one reasonable meaning," it is ambiguous. *City of Seattle v. Guay* , 150 Wn.2d 288 , 300, 76 P.3d 231 (2003).

¶46 Courts routinely apply the rule of lenity to ambiguous statutes. *See* , *e.g.* , *United States v. Granderson* , 511 U.S. 39, 114 S. Ct. 1259, 127 L. Ed. 2d 611 (1994) (applying lenity because statutory term ambiguous). *And see generally* Lawrence M. Solan, *supra* , at 117-20. And the rule of lenity is peculiarly appropriate to the Rules of Professional Conduct. We have recognized that "in a disciplinary proceeding, all doubts should be resolved in favor of the attorney." *In re Disciplinary Proceeding Against Krogh* , 85 Wn.2d 462 , 483, 536 P.2d 578 (1975). *See also In re Discipline of Little* , 40 Wn.2d 421 , 430, 244 P.2d 255 (1952). Because lawyers "are subject to professional discipline only for acts that are described as prohibited in an applicable lawyer code, statute, or rule of court," courts "should be circumspect in avoiding overbroad readings or resorting to standards other than those fairly encompassed within an applicable lawyer code." RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 5 cmts. b, c at 49, 50 (2000). *See also* Bruce A. Green, *The Criminal Regulation of Lawyers* , 67 FORDHAM L. REV . 327, 387 (1998) (suggesting "courts should be more accommodating of professional norms than the restatement contemplates" when interpreting ambiguous rules of professional conduct). Application of the rule of lenity reflects that caution. It demands that we adopt the stricter, narrower construction, excluding self-represented lawyers.

III. CONCLUSION

¶47 The majority objects to the plain language of RPC 4.2(a) only because it believes that permitting self-represented lawyers to contact represented parties would violate the "purpose" of the rule. But the putative "spirit and intent" of a rule can trump only a "strained and unlikely" interpretation. *State v. Wittenbarger* , 124 Wn.2d 467 , 485, 880 P.2d 517 (1994). And the plain language of RPC 4.2(a) is neither strained nor unlikely. It prohibits a lawyer representing a client - but not a self-represented lawyer - from contacting a represented party. As the majority con

cedes, several commentators and courts have found the plain language of essentially identical rules entirely unambiguous. Majority at 336- 38. *See* , *e.g.* , *Pinsky v. Statewide Grievance Comm.* , 216 Conn. 228, 236, 578 A.2d 1075 (1990); CAL. R. PROF. COND . 2-100 discussion § 2; *and* RESTATEMENT (THIRD) OF THE LAW: THE LAW GOVERNING LAWYERS § 99 cmt. e at 73 (2000). We must not manufacture ambiguity and rely on legal fictions to arrive at a preferred result. Especially when we may simply write that result into law.

¶48 I therefore concur in result.

¶49 ALEXANDER, C.J. (dissenting) - I agree with the majority that RPC 4.2(a) prohibits lawyers who are representing themselves from communicating directly with opposing, represented parties unless they first obtain the consent of the parties' counsel. I disagree, however, with the majority's decision to limit application of this important rule to future violators. I know of no authority that supports imposition of a rule of professional conduct prospectively only. I believe, therefore, that this court should suspend Jeffrey Haley from the practice of law for his violation of RPC 4.2(a). The violation is especially egregious in light of Haley's claim that he "studied the rule" before directly contacting his opposing party,«13»and in view of the fact that he contacted the party a second time after the party's lawyer warned him that doing so would violate RPC 4.2(a). Because the majority concludes that Haley should not be subjected to discipline for a violation of RPC 4.2(a), I dissent.

¶50 The majority correctly observes that among states considering the question with which we are here presented,

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«13» *See* Br. of Resp't Lawyer at 16: "Before contacting Mr. Highland directly, I studied the rule. Being a person of common intelligence, I relied on the plain meaning of the rule." *See also* Reply Br. of Resp't Lawyer at 10: "Counsel for the Bar Association repeatedly asserts that I did no legal research or insufficient legal research on Rule 4.2. This position could not be more wrong. I read the rule with great care before I took action." Finally, on page 11 of his reply, Haley said, "I studied the rule and it was perfectly clear on the issue before me. Under modern rule of law, this meant that there was no reason to do more research."

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the prevailing trend has been to apply RPC 4.2(a) to attorneys acting pro se, as was Haley, and not just to attorneys representing someone other than themselves. The majority acknowledges, additionally, that in late 1996 and early 1997, when Haley twice attempted to negotiate a settlement without going through the opposing party's lawyer, at least four jurisdictions already had concluded that RPC 4.2(a) prohibited such contacts. Yet none of the four jurisdictions mentioned by the majority applied the rule to pro se attorneys on a prospective basis only, as the majority does here. Rather, all four jurisdictions applied the rule to the facts before them, as this court should do. *See Runsvold v. Idaho State Bar* , 129 Idaho 419, 421, 925 P.2d 1118 (1996) (attorney reprimanded because Idaho's version of RPC 4.2(a) "applies to prevent the *pro se* attorney from directly contacting a represented opposing party"); *In re Segall* , 117 Ill. 2d 1, 6, 509 N.E.2d 988, 109 Ill. Dec. 149 (1987) ("A party, having employed counsel to act as an intermediary between himself and opposing counsel, does not lose the protection of the rule merely because opposing counsel is also a party to the litigation. Consequently, an attorney who is himself a litigant may be disciplined . . . when, as in the case at bar, he directly contacts an opposing party without permission from that party's counsel."); *Comm. on Legal Ethics v.*

Simmons , 184 W. Va. 183, 185, 399 S.E.2d 894 (1990) (attorney suspended for six months); *Sandstrom v. Sandstrom* , 880 P.2d 103, 109 (Wyo. 1994) (district court did not err in applying RPC 4.2 to prohibit an attorney from contacting his wife during their divorce). These four opinions, all cited by the majority, are sound and make it clear that at the time Haley engaged in the prohibited conduct, the weight of authority supported the disciplining of violators and did not even hint at the prospective-only application embraced by the majority in this case. In shielding Haley from application of RPC 4.2(a), the majority borrows from the reasoning of the Nevada Supreme Court in *In re Discipline of Schaefer* , 117 Nev. 496, 25 P.3d 191 (2001). There, the Nevada court declined to punish an attorney's violation of the Nevada equivalent of

RPC 4.2(a) because of (a) the "absence of clear guidance" from the court and (b) "conflicting authority from other jurisdictions" as to whether the rule applied to pro se attorneys. *Schaefer* , 117 Nev. at 512, 501. In effect, the majority establishes a new test: if there is any doubt about how a rule will be construed, a violator will not be punished. That is a dangerous message to send.

¶51 Furthermore, whereas the *Schaefer* court relied on due process principles articulated by the United States Supreme Court in *Connally* «14»in applying the Nevada rule prospectively, it is worth noting that this court has never drawn from *Connally* the proposition that discipline is inappropriate just because a rule is being interpreted for the first time. In fact, in *Haley v. Medical Disciplinary Board* , 117 Wn.2d 720 , 818 P.2d 1062 (1991), the only discipline case in which this court cited *Connally* , we affirmed sanctions against a physician for violating a statute prohibiting " 'moral turpitude' " although we recognized "uncertainties associated with" the statutory language in question. *Haley* , 117 Wn.2d at 740 . Thus, this court has previously declined to interpret *Connally* in the way the Nevada court did in *Schaefer* and the majority does here - as if professional license holders have a due process right to avoid discipline simply because a court is newly construing the rule in question. Such an interpretation will have far-reaching impact, as many discipline cases that come before this court raise an issue of construction. In declining to sanction Haley for violating RPC 4.2(a), despite the fact that Haley had "studied" the rule and should have known that the prevailing construction prohibited his conduct, the majority suggests that questionable conduct will be tolerated as long as there is no prior Washington court decision exactly on point.

¶52 We must remember that our purpose in disciplining attorneys is to " 'protect the public *and* to preserve confidence in the legal system.' " *In re Disciplinary Proceeding*

«14» *Connally v. Gen. Constr. Co.* , 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

Against Curran , 115 Wn.2d 747 , 762, 801 P.2d 962 (1990) (quoting *In re Disciplinary Proceeding Against Rentel* , 107 Wn.2d 276 , 282, 729 P.2d 615 (1986)). In *Curran* , an attorney argued that he should not be punished for violating RLD 1.1(a) because, in forbidding actions that reflect "disregard for the rule of law," the rule was unconstitutionally vague. *Id* . at 758. This court said, "[W]e choose to give these words a narrowing construction. . . . This law is not so vague as to be unconstitutional, given this limiting construction." *Id* . We noted that "a statute will not be considered unconstitutionally vague just because it is difficult to determine whether certain marginal offenses are within the meaning of the language under attack." *Id* . at 759 (citing *Jordan v. DeGeorge* , 341 U.S. 223, 231, 71 S. Ct. 703, 95 L. Ed. 886 (1951)). This court suspended the attorney, Curran, saying, "Standards may be used in lawyer disciplinary cases which would be impermissibly vague in other contexts." *Id* . (citing *Zauderer v. Office of Disciplinary Counsel* , 471 U.S. 626, 666, 105 S. Ct. 2265, 85 L. Ed. 2d 652 (1985) (Brennan, J., dissenting)). Just as we disciplined Curran there, despite uncertainty about the rule in question, so should Haley be disciplined for violating RPC 4.2(a) in order to " 'protect the public and to preserve confidence in the legal system.' " *Curran* , 115 Wn.2d at 762 (emphasis omitted) (quoting *Rentel* , 107 Wn.2d at 282).

¶53 *Curran* also weighs against the position taken by Justice Sanders in his concurring opinion that attorney discipline is a punishment scheme and therefore is subject to the rule of lenity - a criminal law doctrine. We said in that case, "[T]he purposes of bar discipline do not precisely duplicate the purposes of the criminal law." *Curran* , 115 Wn.2d at 762 (citing *In re Disciplinary Proceeding Against Brown* , 97 Wn.2d 273 , 275, 644 P.2d 669 (1982)). More notably, we have said numerous times that "punishment is not a proper basis for discipline." *Brown* , 97 Wn.2d at 275 (citing *In re Disciplinary Proceedings Against Purvis* , 51 Wn.2d 206 , 223, 316 P.2d 1081 (1957)). In *In re Disbarment of Beakley* , 6 Wn.2d 410 , 424, 107 P.2d 1097 (1940), we said:

> Neither disbarment nor suspension is ordered for the purpose of punishment, but wholly for the protection of the public. When a matter such as this comes before the court, the question presented is not: What punishment should be inflicted on this man? The question presented to each of its judges is simply this: Can I, in view of what has been clearly shown as to this man's conduct, conscientiously participate in continuing to hold him out to the public as worthy of that confidence which a client is compelled to repose in his attorney?

Thus, this court has long rejected the notion that attorney discipline is penal, and the concurrence cannot point to any discipline case in which we have applied the rule of lenity to resolve ambiguity in the attorney's favor.

¶54 In sum, because the purpose of attorney discipline is to protect the public, it is our duty to enforce RPC 4.2 (a) in this case. The majority provides no authority for applying RPC 4.2(a) to pro se attorneys prospectively only. I would apply the rule to Haley and suspend him for six months.

FAIRHURST, J., concurs with ALEXANDER, C.J.