

GRIEVANCE AGAINST A LAWYER



Return your completed form to:

Office of Disciplinary Counsel
Washington State Bar Association
1325 Fourth Avenue, Suite 600
Seattle, WA 98101-2539

GENERAL INSTRUCTIONS

- Read our information sheet *Lawyer Discipline in Washington* before you complete this form, particularly the section about waiving confidentiality.
- Type or write legibly but do not use the back of any page.
- Do not fax your form to us or send your form to us via the Internet.
- If you have a disability or need assistance with filing a grievance, call us at (206) 727-8207. We will take reasonable steps to accommodate you.

INFORMATION ABOUT YOU

Rodgers, Cherie

Last Name, First Name

4803 W. Woodgrove Court

Address

Spokane, WA 99208

City, State, and Zip Code

(509) 466-6636 /

Telephone Number (Day/Evening)

INFORMATION ABOUT THE LAWYER

McDevitt, James A.

Last Name, First Name

920 W. Riverside Ave., Suite 340

Address

Spokane, Washington 99201

City, State, and Zip Code

(509) 353-2767

Telephone Number

Alternate address/phone where we can reach you

INFORMATION ABOUT YOUR GRIEVANCE

Describe **your** relationship to the lawyer who is the subject of your grievance by checking the box that best describes you:

- | | |
|---|--|
| <input type="checkbox"/> Client | <input type="checkbox"/> Judicial |
| <input type="checkbox"/> Former Client | <input type="checkbox"/> Other: <u>Interested Party, Elected</u> |
| <input type="checkbox"/> Opposing Party | <u>Official</u> |
| <input type="checkbox"/> Opposing Counsel | |

Is there a court case related to your grievance? _____ X YES _____ NO

If yes, what is the case name and file number, and who is the lawyer representing you?

CS-01-0127-EFS, U.S. District Court; 00-204173-4, Spokane Superior Court

Explain your grievance in **your own words**. Give all important dates, times, places, and court file numbers. Attach additional pages, if necessary. Attach **copies (not your originals)** of any relevant documents.

Since early 2002, Jim McDevitt has been the U.S. Attorney for the Eastern District of Washington. This grievance is filed because in 2001, when Mr. McDevitt was a private attorney and a member of the Washington state Bar, he had a clear ethical responsibility under state RPC rule 1.7 to fully disclose and obtain written consent for an important conflict of interest he had in the River Park Square litigation. Specifically, he had clear duty to disclose and obtain formal written consent from his new client (the U.S. Government) on account of his direct involvement in activities that had become the basis for substantive securities fraud charges in the Federal District Court for the Eastern District of Washington.

Mr. McDevitt was a private attorney with the firm of Preston Gates & Ellis when he was appointed to the post of U.S. Attorney by President Bush in November 2001. Immediately prior to his appointment he had worked out of the firm's Spokane office where he was deeply involved in the River Park Square garage and garage bond transactions. Preston represented the Spokane Downtown Foundation, a non-profit corporation that, according to both the securities fraud complaint and an extensive investigation by the Internal Revenue Service's Tax Exempt Bond Unit, was created and essentially controlled by a private development company (River Park Square) that was using the Foundation as a front in an unlawful scheme to sell the garage at a highly-inflated price. Indeed, by the summer of 2000, the City of Spokane's special counsel, O. Yale Lewis, had already concluded and filed court papers alleging the transaction constituted a "civil conspiracy" to divert public funds for private use. This was a finding the IRS later corroborated and explained in great detail as part of its June 2004 determination (included on attached CD ROM, with other referenced exhibits) that the bond financing of the garage transaction violated federal tax rules, including rules limiting private profit-taking and those intended to ensure that non-profit organizations like the Spokane Downtown Foundation are actually formed and operated in the public interest.

Ultimately, and as a direct result of the work Mr. McDevitt was engaged in, Preston agreed to pay \$1.3 million to settle the civil securities fraud charges against the firm. According to Preston's settlement agreement with the City of Spokane, the firm agreed to pay a further undisclosed amount to the Internal Revenue Service to settle the adverse tax ruling on the bonds. Preston was potentially liable to a guilty verdict in the civil securities fraud case because, among other things, it had clear responsibilities as the

bond counsel to the Spokane Downtown Foundation to ensure that information provided to investors did not omit material facts. Bondholders alleged that Preston and others withheld literally dozens of material facts and the evidence presented by the IRS clearly supports the breadth of the fraud allegations.

That's important for at least two reasons. First, if Mr. McDevitt was to be confirmed as the U.S. Attorney for Eastern Washington, he was going to be squarely in a position to influence whether and how federal criminal fraud and public corruption investigations into the River Park Square scandal were conducted and in determining whether those responsible would be prosecuted. Clearly, one of the potential targets of such an investigation was his former law firm, Preston Gates & Ellis. Secondly, Mr. McDevitt was one of very few people in 2001 in a position to know the depth of his own involvement in closing the River Park Square garage transaction under what were, at best, dubious circumstances. Thus, he had a direct personal stake in directly or indirectly discouraging a federal criminal probe into the RPS scandal.

It's very significant to the merits of this grievance that Mr. McDevitt no longer disputes that his conflict of interest is a serious one. On August 23rd of this year, in response to a letter from me and another citizen describing the evidence of his involvement in the RPS transaction, Mr. McDevitt formally recused himself (and his office) and directed the evidence to another U.S. Attorney for criminal investigation.

The issue involved in this grievance is whether Mr. McDevitt—prior to his nomination and confirmation—fully and appropriately disclosed his conflict to his prospective new client. State RPC Rule 1.7 (as it existed at that time) required that he consider and fully disclose how his duties to the new client (the people of the United States) might be “materially limited..by the lawyer’s own interests.” If Mr. McDevitt reasonably believed it wouldn’t affect his duties to the new client, Rule 1.7 (b) still required him to obtain his new client’s written consent “after consultation and a full disclosure of the material facts.”

I have made a reasonable effort to find out from Mr. McDevitt whether and how he complied with his Rule 1.7 disclosure responsibilities. (See the attached 9/14/07 letter). Regrettably, Mr. McDevitt refused to provide any information about whether he disclosed his conflict to the President or the U.S. Attorney General and whether he obtained their written consent. (See Mr. McDevitt’s 9/24/07 letter). All I know, on the basis of his August 23rd decision to recuse himself, is that he agrees with me that he has a serious conflict of interest.

My belief, based on his actions to date, is that Mr. McDevitt violated Rule 1.7

because he did not make the required disclosure and obtain the required consent from the President and/or the Attorney General. Had he made the disclosures and obtained the consent required, I think he would have shared this with me in response to my 9/14/07 letter to him. In any event, now that he's conceded the existence of the conflict by recusing himself, the burden should be on him to show how he complied with the rule at the time he was being advanced for the appointment to U.S. Attorney. It should be a simple matter for the Bar to obtain an answer from Mr. McDevitt as to what if anything he disclosed to the President and/or Attorney General and whether he obtained their written consent to the conflict. The Bar should then determine whether the disclosure was adequate given what we now know about the depth of Mr. McDevitt's involvement in the River Park Square transaction. If the Bar determines that Mr. McDevitt disclosed his conflict to the President and/or the Attorney General and obtained the written consent required by RPC Rule 1.7, then this complaint should be dismissed.

There is important context for the Bar to consider in evaluating this grievance. As the IRS noted, repeatedly, in its investigation of the RPS garage bond transaction, Mr. McDevitt's client—the Spokane Downtown Foundation—was supposed to be operating in the public interest. Indeed, the tax-exemption Preston Gates certified for the bonds can only be granted for legitimate public works projects. But (as the IRS concluded) this was not a legitimate public works project, and Mr. McDevitt was in a position to know this based on his deep involvement (documented in his billing records) in closing the transaction. He is certainly among those the IRS was referring to as being “struck by ostrich fever, a collective burying of heads in the sand” in going ahead with a deeply flawed financing plan that violated federal tax rules. Moreover, the IRS concluded the garage transaction was deliberately “rigged” to confer several millions of dollars of illegal public subsidies to the River Park Square developer.

I was a member of the Spokane City Council at that time. Because this was an “on behalf of” financing (where the Spokane Downtown Foundation was buying the RPS garage “on behalf of” the City) I believe Mr. McDevitt had a responsibility to me to fully disclose what he knew about the risks and shortcomings of the transaction before he and his Preston Gates colleagues concluded the sale. Not only did he fail to make those disclosures, but his firm entered into a secret confidentiality agreement with the RPS developer to suppress a public record that would have alerted me and others to the fatal flaws in the transaction. Mr. McDevitt's billing records show that he worked to create the contract—entered into by both the Spokane Parking Public Development Authority, and the Spokane Downtown Foundation--that was shielded by the confidentiality agreement.

The confidentiality agreement was signed by Preston Gates's Mike Ormsby, with whom Mr. McDevitt worked hand-in-hand with on the RPS transaction. (See attached confidentiality agreement).

This grievance should also be examined in light of the other serious ethical allegations that have been made against Preston Gates in the RPS transaction. It is an undisputed fact that the individual members of the board of directors of the Spokane Downtown Foundation were selected by the River Park Square developer. Nevertheless, the board came to the conclusion that Preston Gates (which was recruited by the RPS developer to represent the Foundation) failed to represent the best interests of the client (the Foundation) and, as a result, exposed the Foundation to the securities fraud charges filed against it by Nuveen, Vanguard, and other bondholders. The Foundation retained separate counsel and filed in the federal court a declaration, a supporting memo, and a brief intended to retain the right to file malpractice claims against Preston Gates. Apparently, the malpractice claims were settled out of court and part of that settlement involved Preston agreeing to handle the federal tax liability resulting from the IRS's determination that the SDF bonds violated federal rules.

Among other charges, the board of the Foundation alleged:

1) That Preston did not disclose to the Foundation board members that Preston "performed legal services for the Developer related to financing for the River Park Square garage transaction prior to the Foundation's incorporation."

2) "The Foundation did not waive any conflict that might exist as a result of Preston's representation of the Developer and the Foundation."

3) "Preston did not advise the Foundation about the potential securities disclosure implications that could or did result from Preston's prior representation of the Developer."

4) "Preston did not inform the Board members that the Foundation was not obligated to and/or should not close the garage purchase as a result of AMC's [AMC Theatres, a major RPS tenant] notice of default."

5) "After AMC's notice of default [Preston attorney] Ormsby negotiated a Reimbursement Agreement on behalf of the Foundation, and advised the Board that the Agreement resolved the AMC issue."

With respect to item #1, this allegation is very important because what it means is that Preston had worked for the seller in the garage transaction, right before it went to work (at the seller's arrangement) for the buyer, and that it did not notify the Foundation board members (or securities buyers) of this crucial of interest.

With respect to item #4, it's important to note that Mr. McDevitt and Preston also failed to notify the Spokane City Council of the AMC notice of default and how that affected the City's risks in the transaction. With respect to item #5, I would add that neither the Foundation nor its attorneys, including Mr. McDevitt, notified the Spokane City Council of the Reimbursement Agreement. Again, Mr. McDevitt's billing records indicate he worked on drafting this secret agreement.

In retrospect, the Spokane Downtown Foundation should have filed a Bar complaint against Preston and its attorneys, including Mr. McDevitt. Instead, it appears as though the board and its new lawyers believed the issues could be more directly addressed with the formal legal claims, or threats of legal claims, that were resolved as part of the RPS securities fraud settlement. But, clearly, these were substantive allegations that also clearly implicate Mr. McDevitt and the Preston firm in several violations of the states Rules of Professional Conduct. For that reason, and because it is relevant to the specific grievance I'm making at this time, the WSBA should also consider a broader investigation of the alleged ethical violations involving Mr. McDevitt and the other Preston attorneys involved.

It's possible that the harm done by Mr. McDevitt's failure to disclose his conflicts, and long delay in recusing himself, is incalculable and permanent. It may be that his failures will result in the federal government being unable to successfully prosecute those (possibly including Mr. McDevitt himself) who committed fraud and other criminal offenses in the RPS transactions. But he should, nevertheless, be held accountable by the WSBA if he failed to comply with Rule 1.7, or other RPC rules. If, as I believe, Mr. McDevitt failed to fully disclose his involvement in the RPS garage transaction and obtain formal written consent, then he violated Rule 1.7. This would be a serious infraction because it means he would have denied the President and the Attorney General the facts they were entitled to know in order to determine whether Mr. McDevitt was a suitable candidate to be the U.S. Attorney for the Eastern District of Washington during a period when all the evidence suggests that the RPS federal crimes should have been vigorously investigated and prosecuted.

AFFIRMATION

I affirm that the information I am providing is true and accurate to the best of my knowledge.

Signature: Cherri Rodgers Date: Oct 17, 2007