

1 Joseph E. Shickich, Jr.  
George E. Frasier  
2 RIDDELL WILLIAMS P.S.  
1001 4<sup>th</sup> Ave Ste 4500  
3 Seattle WA 98154-1192  
(206) 624-3600 Telephone  
4 (206) 389-1708 Facsimile  
Counsel to the Tort Claimants' Committee  
5 (application pending)

The Honorable Patricia C. Williams  
Chapter 11

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8 UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF WASHINGTON  
9 AT SPOKANE

10 In re

Case No. 04-08822

11 THE CATHOLIC BISHOP OF SPOKANE  
a/k/a The Catholic Diocese of Spokane,  
12  
13 Debtor.

**RESPONSE OF RIDDELL  
WILLIAMS' TO OBJECTIONS TO  
APPLICATION TO EMPLOY IT AS  
COUNSEL FOR THE TORT  
CLAIMANTS' COMMITTEE**

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15 Riddell Williams submits this Response to the "Tort Claimants' Objection to  
16 Employment of Riddell Williams as Tort Claimant Committee Counsel," filed on  
17 January 20, 2005, under ECF No. 168 ("Jackson Objection") and to the "Objection to  
18 Employment of Riddell Williams," filed on January 20, 2005, under ECF No. 166  
19 ("Conklin Objection"). Riddell Williams responds:

20 **A. Preliminary Statement**

21 The Jackson and Conklin Objections are based on Riddell Williams'  
22 representation of The Corporation of the Catholic Archbishop of Seattle ("Seattle  
23 Archdiocese") in a single, discrete estate matter unrelated to this bankruptcy case.

24 The Jackson and Conklin Objections do not assert that there is any direct  
25 conflict of interest in Riddell Williams' representation of the Committee and the  
26 Seattle Archdiocese. They do not dispute that the Seattle Archdiocese and the

1 Catholic Bishop of Spokane ("Spokane Diocese") are entirely separate Washington  
2 corporations created under Title 24.12 RCW, as corporations sole, each with its own  
3 separate "body corporate" (RCW 24.12.010), management,<sup>1</sup> assets and liabilities.

4 Rather, the Jackson and Conklin Objections erroneously contend that the  
5 appointment of Riddell Williams as counsel for the Tort Claimants' Committee would  
6 place Riddell Williams in a "positional" conflict of interest, due to its concurrent  
7 representation of the Committee in this case and of the Seattle Archdiocese in a  
8 single, unrelated matter. Both Objections incorrectly argue that the "positional"  
9 conflict of interest violates Rule 1.7 of the Washington Rules of Professional Conduct  
10 and requires the disqualification of Riddell Williams as counsel for the Committee.

11 Riddell Williams' concurrent representation of the Committee and of the  
12 Seattle Archdiocese neither constitutes an impermissible "positional" conflict of  
13 interest nor violates Rule 1.7 of the Washington Rules of Professional Conduct.  
14 Before it addresses each of these issues in greater detail, Riddell Williams will  
15 discuss 11 U.S.C. §§ 1103(b) and 328(c), which, respectively, govern the  
16 employment and compensation of committee attorneys.

#### 17 **B. Representation of Seattle Archdiocese**

18 Riddell Williams' representation of the Seattle Archdiocese is discrete and  
19 limited. See Declaration of James W. Minorchio filed herewith. The total time  
20 expended by Riddell Williams on the matter is 13.6 hours. The estate matter  
21 concerns a husband and wife, both of whom are now deceased. In 1988, the wife  
22 died and by her will left her interest in a parcel of real estate in South King County to

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24 <sup>1</sup> "In Washington state, a church may exercise corporate rights in at least three different ways. A  
25 church may incorporate as a "corporation sole", RCW 24.12.010, a nonprofit corporation managed by a  
26 one-person board or a nonprofit corporation managed by a board of two or more persons.  
RCW 24.03.100. The "corporation sole" and the incorporated church managed by a one-person board  
vest full management power in one individual." *Barnett v. Hicks*, 114 Wn.2d 879, 887-888 (1990)  
(Justice Dore dissenting).

1 a trust with a life interest for her husband and the remainder interest for the Seattle  
2 Archdiocese. Apparently, the Seattle Archdiocese's Office of Planned Giving did not  
3 know of this gift. When the husband died in 2001 and left the remainder of the  
4 property to the Archdiocese, it learned of the gifts. This property may have been  
5 occupied by a gas station, and the Seattle Archdiocese does not wish to accept the  
6 gifts. Mr. Minorchio has been representing the Seattle Archdiocese in declining the  
7 gift, disclaiming the property to the heirs, and preparing a quit claim deed to clear title  
8 in exchange for an environmental indemnity agreement for the time period during  
9 which the property arguably was in the name of Seattle Archdiocese. None of the  
10 attorneys involved in representing the Committee have any involvement with this  
11 estate matter.

12 **C. 11 U.S.C. §§ 1103(b) and 328(c)**

13 Although the Jackson and Conklin Objections generally argue that Riddell  
14 Williams should not be appointed as counsel for the Tort Claimants' Committee,  
15 neither Objection addresses, or even mentions, 11 U.S.C. §§ 1103(b) and 328(c),<sup>2</sup>  
16 which prohibit neither the employment nor the compensation of Riddell Williams as  
17 counsel for the Tort Claimants' Committee.

18 Section 1103(b) provides, in relevant part, that "[a]n attorney ... employed to  
19 represent the committee appointed under Section 1102 of this title may not, while  
20 employed by such committee, represent any other entity having an adverse interest  
21 in connection with the case." 11 U.S.C. § 1103(b). For the reasons discussed  
22 below, the interests of the Seattle Archdiocese are not adverse to those of the Tort  
23 Claimants' Committee. Nonetheless, even if the interests of the Seattle Archdiocese

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24  
25 <sup>2</sup> Sections 1103(b) and 328(c) should be read in conjunction. See COLLIER BANKRUPTCY MANUAL, ¶  
26 328.05 ("Section[] ... 1103(b) set[s] forth the standards for employment of professionals;  
Section 328(c) sets forth the sanctions for violations.").

1 were adverse, § 1103(b) does not prohibit the concurrent representation of the  
2 committee and of the holder of an adverse interest, “so long as the [attorney]  
3 represents the holder of the adverse interest in matters unrelated to the case.”  
4 COLLIER ON BANKRUPTCY, ¶ 1103.04[3] (15<sup>th</sup> rev. ed.) (noting further that “[s]ection  
5 1103(b) constitutes a blanket prohibition on representing another entity (except a  
6 creditor) in connection with the case at the same time that the professional is  
7 representing the committee” [Emphasis added.]). The Seattle Archdiocese is not a  
8 party to, has no involvement whatsoever in, and Riddell Williams is not representing  
9 it in connection with the bankruptcy case of the Spokane Diocese. Accordingly,  
10 § 1103(b) does not prohibit the employment of Riddell Williams as counsel for the  
11 Tort Claimants’ Committee.

12 With respect to the compensation of Riddell Williams, § 328(c) provides, in  
13 relevant part, that:

14 the court may deny allowance of compensation for  
15 services and reimbursement of expenses of [an attorney]  
16 employed under section ... 1103 of this title if, at any time  
17 during such [attorney’s] employment under section ...  
18 1103 of this title, such [attorney] is not a disinterested  
person, or represents or holds an interest adverse to the  
interest of the estate with respect to the matter on which  
such [attorney] is employed.

19 11 U.S.C. § 328(c). For purposes of this case, a “disinterested person” is one who  
20 “does not have an interest materially adverse to the interest of the estate or of any  
21 class of creditors or equity security holders, by reason of any direct or indirect  
22 relationship to, connection with, or interest in, the debtor ... or for any other reason.”

23 11 U.S.C. § 101(14)(E). Thus, due to an “overlap” between § 328(c) and the  
24 definition of “disinterested person” under § 101(14)(E), an attorney must show the  
25 following in order to “avoid denial of compensation:” (1) that the attorney holds “no  
26

1 interest adverse to the estate during such [attorney's] employment in the case;"

2 (2) that the attorney holds no "interest materially adverse to the interest of creditors

3 or equity security holders;" and (3) that the attorney represents no "interest adverse

4 to the estate." *In re Kliegl Bros. Universal Electric Stage Lighting Co, Inc.*, 189 B.R.

5 874, 878 (Bankr. E.D.N.Y. 1995). See also *Bay Area Material Handling, Inc. v.*

6 *Broach* (*In re Bay Area Material Handling*), No. C 95-01903, 1995 WL 747954, at \*7

7 (N.D. Cal. Dec. 6, 1995) (noting that an attorney must "be disinterested" and "not

8 represent an interest adverse to the estate").

9 In the instant case, Riddell Williams does not hold or represent any interest

10 that is adverse to the estate, to any creditor, or to any equity security holder. The

11 objections appear to be based solely on Riddell Williams' representation of the

12 Seattle Archdiocese in a single, discrete matter that is completely unrelated to the

13 bankruptcy of the Spokane Diocese. In the absence of an actual conflict, the

14 Jackson and Conklin Objections speculate about a purely hypothetical one. See *In*

15 *re Martin*, 817 F.2d 175, 183 (1<sup>st</sup> Cir. 1987) ("[H]orrible imaginings alone cannot be

16 allowed to carry the day. Not every conceivable conflict must result in sending

17 counsel away to lick his wounds."); *TWI Int'l, Inc. v. Vanguard Oil and Service Co.*,

18 162 B.R. 672, 675 (S.D.N.Y. 1994) ("[M]erely hypothesizing that conflicts may arise

19 is not a sufficient basis to warrant the disqualification of an attorney" (internal citation

20 and quotations omitted)); *In re Caldor, Inc.—NY*, 193 B.R. 165, 172 (Bankr. S.D.N.Y.

21 1996) ("[I]nterests are not considered 'adverse' merely because it is possible to

22 conceive of a set of circumstances under which they might clash.") (internal cite and

23 quotations omitted); *In re Kelton Motors, Inc.*, 109 B.R. 641, 650 (Bankr. D. Vermont

24 1989) ("[M]ere hypothetical conflicts do not meet the heavy burden of proof to

25 warrant disqualification of [an] attorney.").

1 Sections 1103(b) and 328(c) support, rather than defeat, the employment and  
2 compensation of Riddell Williams as counsel for the Tort Claimants' Committee.  
3 Riddell Williams will now address the particular issues raised in the Jackson and  
4 Conklin Objections, specifically regarding (1) Rule 1.7 of the Washington Rules of  
5 Professional Conduct; (2) "positional" conflicts of interest; and (3) other  
6 miscellaneous objections.

7 **D. Specific Objections**

8 1. Rule 1.7 of the Washington Rules of Professional Conduct

9 The Jackson and Conklin Objections vaguely allege that Riddell Williams'  
10 representation of the Committee would violate Rule 1.7(a) and (b) of the Washington  
11 Rules of Professional Conduct. The essence of this objection is that Riddell  
12 Williams' representation of the Committee would require it to argue a position that is  
13 adverse to the position of the Seattle Archdiocese, specifically with respect to the  
14 Section 541 issue of who owns Parish property. This so-called "positional conflict"  
15 will be discussed below. However, out of an abundance of caution, Riddell Williams  
16 will also address Rule 1.7(a) and (b).

17 Rule 1.7(a) and (b) provide:

18 (a) A lawyer shall not represent a client if the  
19 representation of that client will be directly adverse to  
20 another client, unless:

21 (1) The lawyer reasonably believes the representation will  
22 not adversely affect the relationship with the other client;  
23 and

24 (2) Each client consents in writing after consultation and a  
25 full disclosure of the material facts (following authorization  
26 from the other client to make such a disclosure).

(b) A lawyer shall not represent a client if the  
representation of that client may be materially limited by

1 the lawyer's responsibilities to another client or to a third  
2 person, or by the lawyer's own interests, unless:

3 (1) The lawyer reasonably believes the representation will  
4 not be adversely affected; and

5 (2) The client consents in writing after consultation and  
6 full disclosure of the material facts (following authorization  
7 from the other client to make such a disclosure) ... .

8 RPC 1.7(a), (b).

9 Rule 1.7(a) does not apply because Riddell Williams' representation of the  
10 Tort Claimants' Committee is not "directly adverse" to the Seattle Archdiocese. The  
11 matters on which Riddell Williams represents the Committee and the Seattle  
12 Archdiocese are completely unrelated. However, even if there were an economic  
13 adversity of interests, which Riddell Williams disputes, the comments to ABA Model  
14 Rule 1.7 recognize that this does not ordinarily constitute a conflict of interest. See  
15 ABA Model Rule 1.7, comment 6 (2003) (recognizing that "simultaneous  
16 representation in unrelated matters of clients whose interests are only economically  
17 adverse, such as representation of competing economic enterprises in unrelated  
18 litigation, does not ordinarily constitute a conflict of interest and thus may not require  
19 consent of the respective clients.").

20 Rule 1.7(b) is equally inapplicable, given the facts of this case. As an informal  
21 opinion of the Washington State Bar Association recognized, the factors to consider  
22 in determining whether a prospective matter would materially limit the lawyer's  
23 existing obligations include "the duration and intimacy of the lawyer's relationship  
24 with the client or clients involved, the functions being performed by the lawyer, the  
25 likelihood that the actual conflict will arise, and the likely prejudice to the client from  
26 the conflict if it does arise." WSBA Informal Opinion #897 (1985). Riddell Williams  
represents the Seattle Archdiocese on a single, discrete issue that is not related to

1 the bankruptcy of the Spokane Diocese. The representation of the Committee will in  
2 no way materially limit Riddell Williams' existing obligations to the Seattle  
3 Archdiocese and Riddell Williams' representation of the Seattle Archdiocese will in  
4 no way materially limit its obligations to the Committee.

5         Nonetheless, the Jackson Objection argues that Riddell Williams must obtain  
6 a waiver from both the Committee and the Seattle Archdiocese before it can  
7 represent the Committee. In support of this position, the Jackson Objection relies on  
8 a list of factors articulated in comment 24 to ABA Model Rule 1.7. According to  
9 comment 24, the following factors should be considered in deciding whether a  
10 significant risk of material limitation exists, such that the informed consent of the  
11 clients must be obtained: "where the cases are pending, whether the issue is  
12 substantive or procedural, the temporal relationship between the matters, the  
13 significance of the issue to the immediate and long-term interests of the clients  
14 involved[,] and the clients' reasonable expectations in retaining the lawyer."<sup>3</sup> ABA  
15 Model Rule 1.7, comment 24 (2003). The Jackson Objection concludes that these  
16 factors weigh in favor of requiring Riddell Williams to obtain informed consent from  
17 its clients. However, the Jackson Objection fails to mention portions of comment 24  
18 that directly undermine its position. For example, the Jackson Objection argues that  
19 the Spokane Diocese bankruptcy case could result in Ninth Circuit precedent that is  
20 binding on the Seattle Archdiocese. According to comment 24, however, "[t]he mere  
21 fact that advocating a legal position on behalf of one client might create precedent  
22 adverse to the interests of a client represented by the lawyer in an unrelated matter  
23 does not create a conflict of interest." ABA Model Rule 1.7, comment 24 (2003).

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25 <sup>3</sup> The Jackson Objection does not accurately quote these factors. The ultimate purpose of the factors  
26 is to determine whether a conflict of interest exists, yet the Jackson Objection has framed its  
description of the factors to presume that a conflict of interest exists.

1 Comment 24 further recognizes that a conflict of interest *would* exist where “a  
2 decision favoring one client will create a precedent likely to seriously weaken *the*  
3 *position taken on behalf of the other client.*” *Id.* (emphasis added). Riddell Williams  
4 has not taken, and need not take, any position on behalf of the Seattle Archdiocese  
5 regarding the Section 541 issue of who owns Parish property. Therefore, any  
6 precedent that might result from the Spokane Diocese bankruptcy case would not  
7 seriously weaken a position that Riddell Williams has taken on behalf of the Seattle  
8 Archdiocese. Accordingly, there is no conflict of interest and no need to obtain  
9 waivers from either the Seattle Archdiocese or the Committee.

10 2. “Positional” Conflicts of Interest

11 The Jackson and Conklin Objections argue that Riddell Williams has a so-  
12 called “positional” conflict of interest<sup>4</sup> because it represents both the Committee and  
13 the Seattle Archdiocese at the same time. According to both Objections, Riddell  
14 Williams’ representation of the Committee would require it to argue a position that is  
15 adverse to the position of the Seattle Archdiocese, specifically with respect to the  
16 Section 541 issue of who owns Parish property. For the following reasons, this  
17 argument is unavailing.

18 Significantly, the circumstances of this case do not even meet the ABA’s  
19 definition of a “positional” conflict of interest. According to the ABA, a “positional”  
20 conflict of interest occurs

21 When a lawyer is asked to advocate a position with  
22 respect to a substantive legal issue that is directly  
23 contrary to the position being urged by the lawyer (or the  
24 lawyer’s firm) on behalf of another client in a different and  
unrelated pending matter which is being litigated in the  
same jurisdiction.

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26 <sup>4</sup> “Positional” conflicts of interest are also referred to as “situational conflicts” and “issues conflicts.”

1 See ABA Formal Opinion 93-377 (1993). In its representation of the Seattle  
2 Archdiocese, Riddell Williams has not, and need not, argue the issue of who owns  
3 Parish property. Because a “positional conflict” arises only when an attorney argues  
4 both for and against the *same issue* for different clients, Riddell Williams does not  
5 have a “positional conflict” when it argues, on behalf of the Committee, that Parish  
6 property should be a part of the bankruptcy estate. Furthermore, the single, discrete  
7 matter for which Riddell Williams represents the Seattle Archdiocese is in no way  
8 related to the bankruptcy of the Spokane Diocese. Finally, the Seattle Archdiocese  
9 matter is pending in a different jurisdiction than the Spokane Diocese bankruptcy.  
10 For all of the above reasons, Riddell Williams does not have a “positional” conflict of  
11 interest with respect to its concurrent representation of the Seattle Archdiocese and  
12 of the Tort Claimants’ Committee.

13 However, even if a “positional” conflict of interest does exist, which Riddell  
14 Williams disputes, jurisdictions that have recently considered the issue have decided  
15 that certain “positional” conflicts of interest are not prohibited. See Opinion 155  
16 (Maine Jan. 15, 1997) (“A lawyer may represent two clients in different matters that  
17 present the same issue, and thus take opposing positions on that issue. Without  
18 more, an ‘issues conflict’ is not a conflict of interest.”); Opinion 1476 (Virginia Aug.  
19 24, 1992) (analogizing the arguing of inconsistent positions for different clients to the  
20 “arguing of alternative theories of recovery”). See *also* ABA Model Rule 1.7,  
21 comment 24 (2003) (“Ordinarily a lawyer may take inconsistent legal positions in  
22 different tribunals at different times on behalf of different clients.”); ABA Formal  
23 Opinion 93-377 (1993) (“[I]f there is a likelihood that the lawyer *can* win both cases—  
24 as, for example, where the two cases are ‘pending in different trial courts’ or before  
25 different trial judges in the same judicial district—there is no ethical reason why the  
26 lawyer should not proceed.”).

1           Notwithstanding the above, the Jackson Objection argues that a “positional”  
2 conflict of interest exists similar to the one described in Illustration 10-1, § 10.10 of  
3 *The Law of Lawyering* (3<sup>rd</sup> ed. 2001) by Geoffrey C. Hazard and W. William Hodes.  
4 In that illustration, an attorney who represents a “regional banker’s association” and  
5 “a number of banks” defends a debtor who wishes to narrow the scope of the state’s  
6 “holder in due course” rule. It is clear from the illustration that the attorney regularly  
7 represents the banker’s association and the banks. It is also clear from the  
8 illustration that the “holder in due course” issue could foreseeably arise in the  
9 attorney’s regular representation of the banking entities. Thus, Illustration 10-1 does  
10 not fairly reflect the situation in the instant case. In contrast to this Illustration,  
11 Riddell Williams represents the Seattle Archdiocese in a single, discrete matter  
12 unrelated to the bankruptcy of the Spokane Diocese and that has nothing to do with  
13 the Section 541 issue of who owns Parish property. Illustration 10-1 is not on point  
14 and is certainly not controlling.

15           3.     Other Miscellaneous Issues

16           The Conklin Objection raises certain issues, in passing, that question Riddell  
17 Williams’ ability to represent the Tort Claimants’ Committee. First, the Conklin  
18 Objection alleges that Riddell Williams is failing to expedite litigation in violation of  
19 RPC 3.2. In support of this allegation, the Conklin Objection produces a privileged  
20 and confidential statement attributed to Joe Shickich in the Minutes of Committee  
21 Meeting #4. Notwithstanding the impropriety of producing this statement, nothing  
22 about Mr. Shickich’s statement indicates an unwillingness, inability, or failure to  
23 comply with the professional obligation of expediting litigation.

24           Next, the Conklin Objection discusses *privilegium fori* and *Gonzalez v. Roman*  
25 *Catholic Archbishop of Manila*, 280 U.S. 1 (1928). The Conklin Objection says that  
26 the Spokane Diocese raised this privilege in prepetition tort litigation and appears to

1 conclude that the Seattle Archdiocese would benefit if the Spokane Diocese were to  
2 succeed in invoking *privilegium fori* in this bankruptcy case. Based on this  
3 speculative and tangential conclusion, the Conklin Objection *implies*, without stating,  
4 that this would create a “positional” conflict of interest for Riddell Williams  
5 notwithstanding the fact that the Conklin Objection also says the U.S. Supreme Court  
6 unanimously rejected this privilege nearly 80 years ago in *Gonzalez v. Roman*  
7 *Catholic Archbishop of Manila*, 280 U.S. 1 (1928). *Privilegium fori* has nothing to do  
8 with Riddell Williams’ representation of the Committee in this bankruptcy case and is  
9 irrelevant to its representation of the Seattle Archdiocese in disclaiming a gift in an  
10 estate matter. Riddell Williams certainly does not have an obligation to advance a  
11 privilege rejected by the Supreme Court.

12 Finally, the Conklin Objection invokes the “appearance of fairness doctrine.”  
13 In support of this argument, the Conklin Objection cites to legal standards for the  
14 disqualification of federal district judges in criminal cases. There is nothing actually  
15 or apparently unfair or unjust about Riddell Williams’ representation of the Tort  
16 Claimants’ Committee.

#### 17 **E. Conclusion**

18 The Jackson and Conklin Objections are without merit. Riddell Williams  
19 respectfully requests that the Court enter an Order: (1) overruling the Jackson and  
20 Conklin Objections; (2) appointing Riddell Williams as counsel for the Committee;  
21 and (3) granting Riddell Williams such other and further relief as is just and proper.  
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1 Dated this 3<sup>rd</sup> day of February 2005.

2 RIDDELL WILLIAMS P.S.

3 By: /s/ Joseph E. Shickich, Jr.  
4 Joseph E. Shickich, Jr., WSBA No. 8751  
5 George E. Frasier, WSBA No. 1857  
6 Attorneys for Tort Claimants'  
7 Committee (application pending)  
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