mhdecoursey . <mhdecoursey@gmail.com>

Re: Draft of Motion to Publish

1 message

McBride, Ryan P. <McBrideR@lanepowell.com> Tue, Nov 23, 2010 at 1:51 PM
To: cdecoursey@gmail.com
Cc: mhdecoursey@gmail.com, "Degginger, Grant" <DeggingerG@lanepowell.com>, "Gabel, Andrew J." <GabelA@lanepowell.com>

Thanks. I will make these changes and file tomorrow. Our offices are closed today. Have a good thanksgiving.

Sent using my wireless handheld.

From: Carol DeCoursey <cdecoursey@gmail.com>
To: McBride, Ryan P.
Cc: Mark DeCoursey <mhdecoursey@gmail.com>; Degginger, Grant; Gabel, Andrew J.
Sent: Tue Nov 23 13:45:40 2010
Subject: Re: Draft of Motion to Publish

Bloody brilliant, Ryan! Poetry in motion. So economic, so elegant . . . You have outdone yourself.

===

A few comments/suggestions.

1.

Pg. 3. In the para. beginning "Id. For the reasons . . . " I notice this para contains a brief summary of the reasons we think the decision should be published. But there is no mention of Reason No. Three, the jury instructions. For the sake of symmetry, perhaps we can slip a small phrase in there, mentioning the jury instructions? Maybe at the end of the para., something to the effect: "Decourseys also believe the decision provides a needed model jury instruction."

2.

Page 4, para beginning, "As a result . .." The text now reads: "He argued that, regardless of his breach of fiduciary duty by recommending a contractor to DeCourseys with whom he had a conflict of interest . . . "

Perhaps that sentence could read: "He argued that, regardless of his breach of fiduciary duty by recommending a contractor to DeCourseys and not disclosing his conflict of interest . . . "

Page 4.

"Cut-off" should read "cut off." But better yet, can we use the word "abrogate" ? "He argued that . . . the REPSA provision abrogated the DeCourseys right to recover damages."

Page 4-5.

A superfluous "actual" has crept into the text. Sentence beginning "Moreover, while several . . ." continues on to thus: " . . . no significant actual damages appear to have been actually awarded."

It would be better if the text read: " . . . no significant damages appear to have been actually awarded."

===

Mark and I are so very pleased. What a job you did!

See, we told you we made a great team!

Carol & Mark

On Tue, Nov 23, 2010 at 8:15 AM, McBride, Ryan P. <McBrideR@lanepowell.com> wrote:

> Understood. I am working on it now. I will have something done in a couple of hours for your review.
>
> ---
>
> **From:** Mark DeCoursey [mailto:mhdecoursey@gmail.com]
> **Sent:** Tuesday, November 23, 2010 8:13 AM
> **To:** McBride, Ryan P.
>
> **Cc:** Degginger, Grant; Gabel, Andrew J.; Carol DeCoursey
> **Subject:** Re: Draft of Motion to Publish
>
> Thank you for your careful consideration to this matter, Ryan. Of course, we would never enter a double filing.
>
> Please proceed with drafting and filing the motion as we have discussed in this thread.
>
> --
> Carol & Mark DeCoursey
> 8209 172nd Ave NE
> Redmond, WA 98052
> Home: 425.885.3130
>
> On Mon, Nov 22, 2010 at 2:12 PM, McBride, Ryan P. <McBrideR@lanepowell.com> wrote:
>
> > I do not have an opportunity to do this today. I can do it tomorrow morning. I want to make it clear, however, that I will bill you two hours for my time, whether you decide to authorize us to file the document I create or not. I've already spent some time today communicating with you on this issue. Also, I want to make it clear that there can only be one motion to publish; we will not file a motion to publish on your behalf if you intend to file something in addition.
> >
> > ---
> >
> > **From:** Mark DeCoursey [mailto:mhdecoursey@gmail.com]
> > **Sent:** Monday, November 22, 2010 2:04 PM
> > **To:** McBride, Ryan P.
> > **Cc:** Degginger, Grant; Gabel, Andrew J.; Carol DeCoursey
> >
> > **Subject:** Re: Draft of Motion to Publish
> >
> > That's a pretty good statement. I think we are very close to an agreement here, depending on our understanding of the final product.
> >
> > Let's take the chance on that and go ahead and draft it up. Any chance we can see a draft by the end of the day?

Mark

On Mon, Nov 22, 2010 at 12:54 PM, McBride, Ryan P. <McBrideR@lanepowell.com> wrote:

I don't believe any of RAP 12.3(e)'s elements are mandatory; in any event, I probably would simply state that a published opinion would be in the public interest because it would help bring certainty and predictability to trial courts, litigants, real estate professionals and their clients on important issues involving the increasingly common relationships between members of the public and real estate broker/agents.

From: Mark DeCoursey [mailto:mhdecoursey@gmail.com]
Sent: Monday, November 22, 2010 11:33 AM
To: McBride, Ryan P.
Cc: Degginger, Grant; Gabel, Andrew J.

Subject: Re: Draft of Motion to Publish

How would you satisfy the RAP 12.3 requirement to show that publication is in the general public interest?

I think my declaration would do that beautifully.

On Mon, Nov 22, 2010 at 11:15 AM, McBride, Ryan P. <McBrideR@lanepowell.com> wrote:

Mark, as I indicated, I would narrow the argument as follows: we believe publication is necessary because it either determines an unsettled issue of law or clarifies established principles of law in three respects: (1) that contractual provision purporting to waive a real estate professional's fiduciary duties, in a REPSA or other contract, are unenforceable, (2) that a real estate broker or agent, like any fiduciary who breaches his or her duty, may be liable for all damages proximately caused thereby, and not just forfeit of commission; although this principle has been announced in other cases, there doesn't appear to be any (or many) published opinion where such an award has been recognized, and (3) that it provides guidance on the proper instructions to a jury in similar cases; that is useful because the WPI does not contain model instructions in this regard. That would be it.

From: Mark DeCoursey [mailto:mhdecoursey@gmail.com]
Sent: Monday, November 22, 2010 11:05 AM
To: McBride, Ryan P.
Subject: Re: Draft of Motion to Publish

Can you show roughly what you would need removed? Not final edit, just the cuts.

On Mon, Nov 22, 2010 at 10:47 AM, McBride, Ryan P. <McBrideR@lanepowell.com> wrote:

Mark -- we've looked over this, and we can't agree to file it as is. We still recommend against filing any motion to publish. If you insist on doing so, however, we suggest that it be confined to the three legal issues you identify in the first 2.5 pages, i.e., the REPSA, damages and jury instruction points. We believe the rest of the argument is improper and counter-productive to your goal of getting the opinion published. If you are willing to agree to curtail your arguments to the three discrete legal points, we will be willing to revise them slightly and file it. Let me know.

If you chose to go forward yourself, I want to point out that your motion should be revised to conform to RAP 17.3, which sets forth the contents of a motion. All motions should follow that convention. It is the same format as our previous motions (motion for over-length, motion to strike). Also, you don't need to refer to a subjoined affidavit in the caption (and, obviously, there should be no affidavit from me in the body of the document at all). The reason I mentioned a subjoined affidavit in the caption of the application for fees is that the rule governing fees specifically refers to an affidavit, and i wanted to make sure the commissioner knew it was all contained in one document; you don't need to worry

about that here. You can still file an affidavit, of course.

From: Mark DeCoursey [mailto:mhdecoursey@gmail.com]
Sent: Monday, November 22, 2010 9:02 AM
To: McBride, Ryan P.
Subject: Draft of Motion to Publish

The Exhibits attached go with the declaration tagged on the end of the motion.

The motion also refers to appendices A (the opinion) and B (the REPSA addendum, trial exhibit 33)

--
Carol & Mark DeCoursey
8209 172nd Ave NE
Redmond, WA 98052
Home: 425.885.3130

--
Carol & Mark DeCoursey
8209 172nd Ave NE
Redmond, WA 98052
Home: 425.885.3130

This message is private or privileged. If you are not the person for whom this message is intended, please delete it and notify me immediately, and please do not copy or send this message to anyone else.

Please be advised that, if this communication includes federal tax advice, it cannot be used for the purpose of avoiding tax penalties unless you have expressly engaged us to provide written advice in a form that satisfies IRS standards for "covered opinions" or we have informed you that those standards do not apply to this communication.

--
Carol & Mark DeCoursey

8209 172nd Ave NE
Redmond, WA 98052
Home: 425.885.3130

--
Carol & Mark DeCoursey
8209 172nd Ave NE
Redmond, WA 98052
Home: 425.885.3130

This message is private or privileged. If you are not the person for whom this message is intended, please delete it and notify me immediately, and please do not copy or send this message to anyone else.

Please be advised that, if this communication includes federal tax advice, it cannot be used for the purpose of avoiding tax penalties unless you have expressly engaged us to provide written advice in a form that satisfies IRS standards for "covered opinions" or we have informed you that those standards do not apply to this communication.

--
Carol & Mark DeCoursey
8209 172nd Ave NE
Redmond, WA 98052
Home: 425.885.3130

This message is private or privileged. If you are not the person for whom this message is intended, please delete it and notify me immediately, and please do not copy or send this message to anyone else.

Please be advised that, if this communication includes federal tax advice, it cannot be used for the purpose of avoiding tax penalties unless you have expressly engaged us to provide written advice in a form that satisfies IRS standards for "covered opinions" or we have informed you that those standards do not apply to this communication.