No. 728440

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

GEOFFREY CHISM,

Appellant,

v.

TRI-STATE CONSTRUCTION, INC. and LARRY AGOSTINO,

Respondents.

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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Introduction

From several decades as general counsel for Tri-State Construction, attorney Geoff Chism had the trust and confidence of the company and its president, Ron Agostino. When Chism proposed that Tri-State add him to its payroll so he would be on its medical plan while continuing to work out of his home, and that his relationship to Tri-State and the compensation paid to him would otherwise remain unchanged from when he was their outside general counsel, Agostino agreed.

In April 2010 Chism learned that Agostino had been diagnosed with Alzheimer's disease. Five months later Chism persuaded Agostino to pay him a retroactive bonus of $310,000 for general counsel work Tri-State had already paid for in full. A year later Chism lobbied Agostino for a bonus of $500,000. Five months after that Chism demanded yet another bonus, this time for $250,000, as well as the gifting to him of a Mercedes that Tri-State had provided for his full time use.

Agostino believed that Chism, in proposing these changes to his attorney compensation arrangements, was representing and protecting Tri-State's interests. Agostino believed Chism's explanations of why his proposals were a "good deal" for Tri-State. Chism knew that Agostino would trust and believe him, and would not realize his explanations were untrue.

As the trial court found, no independent counsel would ever have recommended that Tri-State agree to what Chism proposed. But Chism never advised Tri-State to seek independent counsel, and Tri-State didn't do so, thinking Chism was already looking out for their interests.

At Chism's urging, the trial court submitted his breach of contract claims to the jury and got advisory opinions on three generic questions about the fairness of the fee transactions. Also at Chism's urging, the trial court kept away from the jury all testimony, reference, and explanation of the RPC/fiduciary obligations owed by an attorney in Chism's position. The court instructed the jury as though the parties' dealing were all arm's length transactions. The trial court reserved the RPC/fiduciary breach issues for separate adjudication of Tri-State's request for disgorgement.

The jury awarded Chism the damages he asked for. The trial court then entered detailed findings and conclusions enumerating the ways the attorney compensation modifications Chism had persuaded Agostino to go along with were unreasonable, were against Tri-State's interests, and were procured through misrepresentation and other professional misconduct in violation of RPC obligations that the jury never knew about.

The trial court ordered disgorgement of all but $200,000 of what Chism had claimed. Tri-State does not contest that part of the judgment, and has already paid it. But the trial court mistakenly believed it was

legally compelled to award exemplary damages and prevailing party attorney fees despite Chism's professional misconduct, and gave judgment for $200,000 in punitive damage and nearly $1 million in attorney fees. Although not realizing it, the trial court had legal authority to deny those amounts, and erred in not doing so.

Assignments of Error

A. Assignments of Error

1. The trial court erred in granting partial summary judgment that "Plaintiff's status as in house counsel renders the disgorgement of fees for breach of fiduciary duty based on alleged violations of RPC 1.5 unavailable".

2. The trial court erred in its Conclusion of Law No. 86 (adopting the jury's determination of willful withholding).

3. The trial court erred in its Conclusion of Law No. 87, imposing double damages based solely on the jury's determination of willful withholding.

4. The trial court erred in its Conclusion of Law No. 88, having considered only Chism's entitlement to litigation attorney fees as a claimant under Washington's wage statutes.

5. The trial court erred in its Conclusion of Law No. 29 regarding plaintiff's fee petition, concluding Chism had no obligation to segregate

requested time related to the RPC/fiduciary issues on which Tri-State prevailed.

6. The trial court erred in its Conclusion of Law No. 30 regarding plaintiff's fee petition, concluding the court had no equitable authority in the face of a mandatory fee-shifting statute.

7. The trial court erred in Judgment paragraph 4, awarding exemplary damages of $200,000.

8. The trial court erred in its Order Denying Renewed Motion for Judgment as a Matter of Law in ruling on available defenses to a determination of willfulness under RCW 49.52.070.

9. The trial court erred in Judgment paragraph 5, awarding prejudgment interest of $72,460.27.

10. The trial court erred in Judgment paragraph 6, awarding attorney fees and costs of $926,295.89.

B. Issues Pertaining to Assignments of Error

1. Where Chism's professional relationship to his client intentionally remained identical when he became its in-house general counsel as it had been while he was Tri-State's outside general counsel, did the superior court err by ruling that RPC 1.5 ceased to apply to Chism's dealings with his client?

2. Where the judicial branch of government holds exclusive, constitutional authority to regulate the practice of law and discipline practitioners, and where part of that authority is the courts' equitable power to appropriately discipline attorneys for breach of their RPC/fiduciary duties, did the trial court err in concluding it had no such authority in the face of statutory provisions for exemplary damages and award of attorney fees in connection with Chism's claims under fee compensation agreements that he had improperly arranged with his client in breach of his fiduciary obligations?

3. Where Tri-State prevailed in establishing RPC/fiduciary violations for the agreements Chism sued to enforce, did the trial court err by refusing to find any "bona fide dispute" over Chism's claims?

4. Did the trial court err by awarding prejudgment interest on claims for attorney fee compensation that could only be reduced to judgment after a contested determination of reasonableness?

Statement of the Case

Tri-State Construction Company is a closely held general contractor. In 1996, company founder Larry Agostino turned the business over to his three sons (Ron, Tom, and Larry), who have owned and

managed it ever since.[1] From 1996 until he stepped down in early 2012,[2] Ron Agostino ran the company as its president, and Tom and Larry Agostino served as corporate officers overseeing collateral aspects of the company's business.[3]

In 1981, Seattle attorney Geoff Chism began representing Tri-State as its outside counsel.[4] He served as the company's primary lawyer, and developed a relationship of trust and confidence first with Joe Agostino and then with Ron Agostino.[5]

By 1996, when Ron Agostino took over the management of Tri-State, Chism was the company's general counsel. Chism continued his role as general counsel to Tri-State until he terminated his relationship with the company in April 2012.[6]

Until 2002, Chism and his law firm charged for their legal services on a conventional, hourly basis.[7] Toward the end of 2002 Chism modified that arrangement. He and his firm continued billing for litigation work on

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1 CP 2439-40 (Findings of Fact Nos. 1 & 3). RP (5/19/14):151, 154-56.
2 CP 2463 (Finding of Fact No. 97).
3 CP 2439-40 (Finding of Fact No. 1).
4 CP 2440 (Finding of Fact No. 2); RP (5/14/14):61.
5 CP 2440 (Finding of Fact No. 2); CP 32 ¶3.3.
6 CP 2440 (Finding of Fact No. 2); RP (5/13/14):165, RP (5/14/14):71.
7 CP 2440 (Finding of Fact No. 5); CP 32 ¶3.4.

an hourly basis, but Chism began billing for all General Counsel work at a flat monthly fee of $10,000 per month.[8]

In December 2002, Chism wrote a letter to Ron Agostino confirming the terms of their revised fee contract.[9] His letter confirmed that the General Counsel services that the flat fee covered encompassed all of Chism's legal work for Tri-State other than litigation, including "all of my personal time on all matters . . . other than matters that are in formal dispute resolution." He encouraged Tri-State to have all of its project personnel call him directly "on any matter at any time," and encouraged Tri-State to have him attend meetings in its offices and at its jobsites as often as desired. He even urged Tri-State to have him visit all of their significant project sites to know their construction layouts.[10] Chism subsequently and repeatedly confirmed that the flat fee he implemented in 2002 was always intended to be payment in full for "whatever Tri-State asked" and for "whatever it takes," other than litigation work.[11]

Many years later Chism asserted a completely different account of what supposedly had been the basis for the flat fee billing arrangement that he implemented in 2002. Chism would assert that the flat monthly fee

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8 CP 2440-41 (Findings of Fact Nos. 6 & 8).
9 Trial Exhibit 6.
10 *Id.*
11 CP 2441 (Finding of Fact No. 7); RP (5/13/14):166-67; RP (5/14/14):61.

was based on an understanding between himself and Tri-State that his General Counsel services would consume only about seven and a half hours a week of his time. This explanation would serve as the foundation for the claims he would ultimately allege in bringing this lawsuit. But it contradicted the confirming memo he authored in 2002, he could produce no witnesses or evidence to support his after-the-fact narrative, his own trial testimony contradicted it, and Judge Schubert ultimately rejected it as not credible:

> There was no credible or persuasive evidence that Mr. Chism's flat monthly fee arrangement was ever tied to him working an average number of hours per day, week, or month. From the beginning of this retainer relationship to its end (when he went in-house), Mr. Chism repeatedly testified that his monthly retainer was not tied to a number of hours that he would work, rather he would "do whatever it took" and "whatever Tri-State asked" in exchange for a dependable monthly retainer and the benefit of not having to account or bill for his time."[12]

By 2008, Chism wanted to phase into retirement. He began by dramatically increasing the rates he was charging to Tri-State for all of his work. He had earlier raised his flat monthly general counsel fee from $10,000 to $12,000, and in the latter half of 2007 he increased it further by charging a second flat monthly fee of $5,000, ostensibly because the level of general counsel work he was doing was much greater than he had

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[12] CP 2442-43 (Finding of Fact No. 17); *see* RP (5/14/14):61 & 106; RP (5/20/14):29.

earlier been performing.[13] His hourly billing rate in 2008 was $400 an hour; in June 2008 he increased it to $500 an hour.[14] Thus by late summer 2008 Chism had increased his hourly billing rate to Tri-State by 25 percent, and his flat monthly fee for general counsel services by 42 percent.

Chism then told Ron Agostino that he was leaving his law firm and would practice out of his house. Chism proposed that instead of paying his law firm Tri-State would pay the same amount of money to Chism directly for the very same work, done the very same way, but with Chism being placed on the Tri-State payroll so that he would be enrolled in Tri-State's medical plan.[15] Chism proposed that he be paid at the rate of $190,000 a year. He calculated that amount by multiplying his recently raised monthly flat fee of $17,000 by twelve (equaling $204,000), and subtracting $14,000 as the annual cost to Tri-State for Chism's medical benefits and payroll taxes.[16]

Both as proposed by Chism and in reality, the switch in status to his becoming in-house general counsel was entirely nominal, except for his enrollment in the company's medical plan. Whether he remained

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13 CP 2442-43 (Findings of Fact Nos. 12 & 14); RP (5/14/14):45-46.
14 CP 2441-42 (Findings of Fact Nos. 10, 11 & 15).
15 CP 2443-44 (Finding of Fact No. 22). RP (5/14/14):56 & 61.
16 RP (5/14/14):64.

outside counsel or was designated as a Tri-State employee, he would furnish the same legal services, at the same cost, in the same fashion, as he had been furnishing through his law firm, except he would be practicing out of his home. Tri-State was already represented by separated counsel in its litigation matters, and Chism would continue to oversee their work just as he had been doing before.[17] As he admitted on cross examination:

> I was going to do the same work for the same people, the same amount of time. I would continue to work out of my house. I'd come to Tri-State only when need be. I'd get paid the same amount. Apples to apples. The only difference was I'd either continue to bill them [$17,000] a month from home or I'd go in-house and get a paycheck, which would then be reduced by the amount of the health insurance they would pay and some taxes, and get a paycheck.[18]

Thus, the in-house arrangement he proposed in September 2008 was designed and intended to be a continuation of the General Counsel contract arrangement he had implemented in 2002, not a new or fundamentally different relationship between an attorney and his longtime client. "[I] can do the same thing for the same people, same amount of time, work from home. ***There was no change in the substance of what I was going to do.***"[19] And an important part of that continued relationship was the fact that the $190,000 a year compensation would continue to

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17 RP (5/20/14):31; CP 2446 (Finding of Fact Nos 33 & 35).
18 RP (5/14/14):58-59.
19 RP (5/14/14):61 (emphasis added).

represent full payment for "whatever it took" to meet Tri-State's needs.[20] "That had been the rule since 1981. Anything Tri-State asked me to do, I was going to do it happily."[21]

Chism needed to be nearly a full time employee in order to qualify for the Tri-State medical plan.[22] Ron Agostino accepted Chism's proposal, and understood that Chism would be working as much as might be required, up to full time.[23] There was no discussion about what number of hours Chism would devote to Tri-State. Instead, Chism said he would continue to do "whatever it takes," other than for litigation, which would be performed by outside counsel.[24] Chism's $190,000 a year salary was substantially higher than the base salary of everyone else in the company, including the three Agostino brothers, all of whom worked full time for Tri-State.[25]

As Chism well knew from his extensive background as Tri-State's general counsel, Ron Agostino relied heavily on the advice provided by the people around him, and on the trust he placed in those people. Ron Agostino did not normally review contracts or agreements, but instead had

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20 RP (5/14/14):61.

21 RP (5/14/14):61.

22 CP 2445 (Finding of Fact No. 27); RP (5/8/14):59.

23 RP (5/8/14):58-59; CP 2444 (Finding of Fact No. 25) (no discussion between the parties regarding the number of hours Chism would work).

24 CP 2444 (Finding of Fact No. 24).

25 CP 2447 & 2453 (Findings of Fact Nos. 37 & 57).

others (such as Chism) review them and confirm they were appropriate before having Ron sign them.[26] Ron Agostino would not write his own letters, and instead had others (particularly Chism) ghost write them for him to sign.[27]

Ron Agostino and his two brothers had complete faith in Chism, and trusted that whatever Chism recommended was in Tri-State's best interest.[28] Reflective of his trust in Chism, Agostino never refused or questioned anything Chism proposed or asked him to agree to.[29] In all the years that Chism sent monthly bills to Tri-State, Ron Agostino would approve them for payment with barely a glance.[30]

Chism also knew Agostino was generous toward the people he trusted.[31] Chism relied on Agostino's trust and generosity when Chism recommended his various attorney compensation arrangements, and when he proposed revisions to those arrangements.[32] So in 2008 when Chism proposed transitioning in-house while continuing his same role as general

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26 CP 2446 (Finding of Fact No. 34); RP (5/19/14):162-63.

27 CP 2446 (Finding of Fact No. 34); RP (5/14/14):76.

28 CP 2454 & 2461 (Findings of Fact Nos. 59, 85, 86); CP 2474 (Conclusion of Law No. 16); RP (5/21/14):29-30 & 144-45; RP (5/22/14):7, 24-25, 114, 121.

29 RP (5/20/14):129; RP (5/21/14):29-30 & 144-45.

30 RP (5/19/14):176.

31 RP (5/14/14):55, 77 & 100; RP (5/20/14):28.

32 RP (5/14/14):100; RP (5/19/14):179; RP (5/20/14):28.

counsel, and when he told Agostino it would be a good deal that would save Tri-State money, Agostino believed him and agreed to it.[33]

Chism also knew that Tri-State had never had in-house counsel before, and knew nothing about how in-house counsel are customarily compensated.[34] But Chism did not say anything to Tri-State about consulting with independent counsel, and he neither put in writing nor suggested that Tri-State memorialize the terms of his in-house general counsel attorney fee compensation proposal.[35] Because Agostino trusted Chism and assumed that what Chism was proposing was fair, Agostino saw no need to seek out independent counsel, and didn't do so.[36]

Because Chism's compensation was fixed at $190,000 a year regardless of the amount of time he worked, Chism dispensed with documenting his time in any fashion.[37] He did not work regular hours, and worked primarily out of his home, as he had told Agostino he intended to do.[38] His work included time spent on legal and non-legal tasks, paralegal tasks, and associate-level tasks.[39]

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33 CP 2444 (Findings of Fact Nos. 23-24); RP (5/19/14):180.
34 RP (5/19/14):181.
35 CP 2444-45 (Finding of Fact No. 26); RP (5/19/14):181.
36 RP (5/19/14):181-82.
37 CP 2445 (Findings of Fact Nos. 29-30).
38 CP 2445 (Finding of Fact No. 30); RP (5/12/14):58-59 & 61.
39 CP 2445 (Finding of Fact No. 29).

Tri-State's fiscal year ends on September 30. Ron Agostino's practice was, in the event a year was profitable, to pay bonuses to the people who brought in the profitable projects, and to distribute cash to the three Agostino owners after the end of those profitable years. In years when the company did not do well it would not pay bonuses, including to the Agostino brothers.[40] Fiscal year 2009 was a very profitable one for Tri-State, and at the end of that year the company paid substantial bonuses to its employees, including substantial distributions to the three Agostinos.[41]

Chism's in-house compensation agreement did not include any entitlement to a bonus. So Chism did not receive any bonus at the end of fiscal year 2009.[42]

In fiscal 2010, one of the matters Chism performed for Tri-State was to lead the negotiations for a large hydroelectric dam construction project in Canada known as the Bear Hydro Project.[43] Chism and the team of Canadian attorneys he was supervising concluded those negotiations in

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40 RP (5/20/14):30.

41 CP 2447 (Finding of Fact No. 37).

42 CP 2445 (Finding of Fact No. 28) ("Mr. Chism's employment arrangement with Tri-State did not provide for or otherwise contemplate the payment of any bonuses to him, annual or otherwise.").

43 RP (5/12/14):88-89; RP (5/19/14):196-97; RP (5/20/14):20.

September 2010 with the consummation of entering into a contract to build the project and then immediately commencing performance.[44]

The contract Chism and his team negotiated would prove to be a financial disaster for Tri-State. During the next eighteen months, Tri-State would suffer a net loss of $27 million, and barely avoid a contract default.[45]

The other tragic occurrence during Tri-State's fiscal year 2010 occurred in April, when Ron Agostino was diagnosed with Alzheimer's disease and placed on Alzheimer's medication.[46] Agostino disclosed his condition to Chism.[47] From his diagnosis in early 2010 onward, the people at Tri-State all saw Agostino increasingly struggle with memory lapses and related Alzheimer symptoms.[48] Agostino's decline was so significant that by early 2011 Chism was lobbying for him to step down from Tri-State.[49] During trial Chism claimed that he hadn't noticed any significant impairment to Agostino's mental abilities, contradicting his

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44 RP (5/12/14):96.
45 CP 2459 (Finding of Fact No. 79).
46 RP (5/15/14):29-30.
47 RP (5/14/14):90; RP (5/19/14):185-89.
48 CP 2458-59 (Findings of Fact Nos. 71-76).
49 CP 2458 (Finding of Fact No. 71).

own, contemporaneous written statements.[50] The trial court found that Chism's testimony was not credible.[51]

As Tri-State's fiscal 2010 was drawing to a close in September of that year, six months after Agostino's diagnosis and as Tri-State was preparing to begin the Bear Hydro Project, Chism proposed a unilateral change to his attorney fee contract terms. Chism proposed that he be paid a retroactive bonus over and above his $190,000 salary, "effective as of January 1, 2010," that the new bonus arrangement would apply to his future work as well, and that he receive substantial non-cash benefits as well.[52] Chism's proposal was oral, and he claims Agostino accepted it in the same conversation that Chism proposed it. Two weeks later, Chism emailed to Agostino a memorandum purporting to recite the terms that Chism's email said Agostino had already agreed to.[53] Chism's confirming memorandum began with a series of representations about the basis for his current compensation, all of which were false:

> My current compensation, which believe it or not we originally set over ten years ago, is based on me spending an average of less than an hour and a half a day on Tri-State matters, or about seven hours a week.

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50 CP 2458 (Findings of Fact No. 72 & 74).

51 CP 2459 (Finding of Fact No. 77) ("The evidence demonstrates that Mr. Chism believed Ron's impairment was impacting his ability to run Tri-State. Mr. Chism's testimony to the contrary was not credible.").

52 CP 2447 (Finding of Fact No. 38).

53 Exhibit 9.

Chism had first implemented his flat monthly General Counsel fee arrangement eight years earlier, and it was not the basis for his current compensation because his initial monthly flat fee was only $10,000 per month. The fixed monthly amount that Chism used to set his $190,000 annual payment (plus medical benefits) was the $17,000 per month General Counsel amount that he had raised his fee to just one year before proposing and then switching to his annual compensation arrangement. The 2007 increase in his monthly General Counsel fees was ostensibly to pay for a greater level of effort than Chism had originally intended. If the original fixed monthly fee was based on only a given number of hours (which it was not), that basis for payment had long since gone by the wayside and been replaced with the much higher flat fee that Chism used to establish his $190,000 fixed annual payment amount.

Moreover, his contention that his fixed General Counsel fee arrangement was ever based upon an average number of hours a week (let alone that he and Agostino "originally set" it that way ten years earlier) was a pure invention on Chism's part.[54] The fixed payments paid by Tri-State, both when Chism was the company's outside General Counsel and when he became in-house General Counsel, were always agreed to be full

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[54] CP 2442-44 & -48 (Findings of Fact Nos. 17, 23-25 & 41); *see* RP (5/14/14):61 & 106; RP (5/20/14):29.

payment for "whatever it took" for Chism to perform his General Counsel work.[55]

Chism's September 2010 memo then continued by listing the dramatically more favorable cash payment terms that would both retroactively and prospectively apply:

> I understand our arrangement, effective as of January 1, 2010 to be as follows:
>
> 1. My base weekly compensation and quarterly supplement will continue as before.
>
> 2. Immediately prior to the end of Tri-State's fiscal year I will give you my best estimate of the total amount of time I spent during that year on Tri-State matters. I will defer to your judgment as to what bonus/adjustment you feel is appropriate to compensate for any effort over the 1.5 hours a day base. . . .[56]

The memo then recited new expense reimbursement terms that Agostino had (according to the memo) just accepted along with Chism's bonusing request: Reimbursement for Chism's professional liability insurance premiums, his bar dues and CLE expenses, and his phone charges. Lastly, the memo recited that Tri-State would provide Chism with a vehicle (he asked for and was given a Mercedes, as it turned out[57]) for his personal full time use.

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55 CP 2442-44 (Findings of Fact Nos. 17, 23-25); *see* RP (5/14/14):61 & 106; RP (5/20/14):29.

56 Exhibit 9.

57 CP 2450 (Finding of Fact No. 48); RP (5/21/14):35-36.

The memo asked Agostino to initial it. As Chism fully expected, Agostino did so.[58] The trial court found:

> Mr. Chism knew that Tri-State had never employed in-house counsel before Mr. Chism, and Ron had no knowledge about how in-house counsel are typically paid. Mr. Chism did not advise Ron that he was acting in his own personal interest and not as Tri-State's attorney in proposing the new compensation arrangement. Mr. Chism did not advise Ron to seek independent review of the September 2010 memo or the arrangements it described. Ron accepted Mr. Chism's representations about their past arrangements as true. As Mr. Chism could have predicted, Ron never considered obtaining independent review of the memo or the proposed modified arrangement, because he completely trusted Mr. Chism and assumed the proposed arrangement must be reasonable and in Tri-State's interest.[59]

Beyond the misrepresentations in Chism's September 20 memo and his failure to advise Agostino to seek independent counsel, Chism failed to disclose a number of facts essential to any review of the reasonableness of his modified payment arrangement. As to the bonus and retroactive reimbursements he was arranging for himself, Chism said nothing about the fact that Tri-State had already paid in full for all of his work through September 2010. Having a pre-agreed fixed payment that compensated its General Counsel for "whatever it took" for his work was one of the primary benefits to Tri-State of the fixed payment arrangements that Chism had originally proposed and that Tri-State had agreed to.

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[58] Exhibit 57.

Chism's September 2010 proposal for a retroactive bonus and for reimbursements retroactive to January 1 was a change entirely to his benefit, with Tri-State getting nothing in return.

Chism also failed to disclose that he had no reliable way to give a "best estimate of the total amount of time" he had spent on Tri-State's behalf over the past nine months because he intentionally kept no time records.[60] Indeed, he kept *no* meaningful record of the work he performed.[61] Although he collected emails and attachments in his personal Outlook folders regarding his General Counsel activities, he deleted them as he concluded his various assignments.[62] So he had no way (other than inventing a figure without any reliable or verifiable basis) for "estimating" the hours of work that were to be the basis of his retroactive bonus payment.[63] And as to bonus payments he would ask for at the end of future fiscal years, Chism did not disclose that he intended to continue not to keep time records or any other reliable means of estimating

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59 CP 2454 (Finding of Fact No. 59).

60 CP 2445 (Finding of Fact No. 30) ("As in-house General Counsel for Tri-State, Mr. Chism did not track or record the matters he worked on or the time he spent on them.").

61 CP 2455 (Finding of Fact No. 63).

62 *Id.*; RP (5/14/14):123.

63 CP 2455-57 (Findings of Fact Nos. 63-67).

or verifying the extent and nature of his efforts as Tri-State's General Counsel.[64]

Chism's September 20 memo implied that the amount of his bonuses – or even the making of them – would be up to Tri-State ("I will defer to your judgment as to what bonus/adjustment you feel is appropriate to compensate for any effort over the 1.5 hour a day base"). But Chism failed to disclose that he was giving himself the ability to claim a breach by Tri-State if the company refused to pay whatever he might consider to be reasonable bonus compensation for "any effort over the 1.5 hour a day base."[65] By changing his fixed-payment arrangement so that henceforth he could contend that it compensated only for a limited number of hours and that the parties had agreed upon a different, far more vague mechanism to pay for the balance of his work, Chism set himself up to claim that he *earned* a bonus merely by performing additional hours of work, and that Tri-State was obligated in good faith to pay him a reasonable amount for that work, or be in breach. And that was very much the interpretation that Chism promoted after bringing this lawsuit.[66] But Chism disclosed none of that to Tri-State at the time of his proposal.

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64 *Id.*

65 Exhibit 9.

66 RP (5/14/14):157 (Chism claimed he had *earned* his bonus as soon as he performed his extra hours of work.). *See also* Jury Instructions 9 & 22 (Chism pursued a claim of unjust enrichment for the value of his work).

Chism also failed to disclose that whatever hours he might guess he had incurred were in large measure not hours that an attorney of his experience would ordinarily perform or even charge for. Many were for administrative tasks, paralegal tasks, or tasks appropriate for a junior lawyer.[67] But having created in his September 20 memo the premise that the basis for his existing fixed compensation was merely a specific and limited number of hours, Chism bootstrapped his way to the implication that all additional hours should be paid for at a comparable rate of payment.

And that implication was exactly what Chism used to promote his retroactive bonus request, made just days after emailing his September 20 memo to Agostino. On September 30 Chism sent another email to Agostino, purporting to document a conversation they had had that morning in which Chism gave his "best estimate" for his retroactive bonus:

> As per our recent discussion regarding my compensation, we agreed that I would provide you with an estimate of the actual time I spent on Tri-State matters at the end of your fiscal year, September 30. Specifically the memorandum outlining the arrangement (attached for your reference) provides:
>
> > Immediately prior to the end of Tri-State's fiscal year I will give you my best estimate of the total amount of time I spent during that year on Tri-State

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[67] CP 2445 (Finding of Fact No. 29).

> matters. I will defer to your judgment as to what bonus/adjustment you feel is appropriate to compensate for any effort over the 1.5 hours a day base. . . .
>
> **The reference to the 1.5 hour a day base is to the fact that my base compensation was originally set on the assumption that I would average about 1.5 hours a day, or 380 hours a year on Tri-State matters *at my old hourly billing rate of $500 per hour*. . . .**
>
> As we discussed this morning, realistically I have probably been averaging something over 60% of a normal work day on your matters. To be conservative, let's call it 50%. That translates into 1,000 hours of time, of which 380 hours have been covered by my base compensation.
>
> As I have said, I defer to you and your sense of fairness to make whatever adjustment you think is right.[68]

This email built on the misrepresentation in his September 20 memorandum, claiming that his fixed-payment arrangements were based upon him performing only a specific, limited number of hours of work. Chism expanded on that misrepresentation by falsely claiming not only that the original fixed monthly payment had been based on a mere 1.5 hours a week of work, but that it had also been based on "my old hourly billing rate of $500 per hour." In fact, Chism's original billing rate at the time he implemented his fixed monthly billings for General Counsel work was $325 per hour.[69] Chism boosted his hourly billing rate to $500 an

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68 Exhibit 10 (emphasis added).

69 CP 2443 (Finding of Fact No. 19).

hour only three months before proposing his transition to in-house General Counsel, for $190,000 per year.[70]

Chism's September 30 email also surreptitiously granted to himself an even larger retroactive bonus than his September 20 memorandum had claimed the parties had just agreed to. His September 20 memo recited that his retroactive bonus would be "effective as of January 1, 2010." But his September 30 email quantified it to include all of his purported excess hours *going back to the start of Tri-State's fiscal year*: October 1, 2009.

And while Chism's September 30 email spoke of deference to Ron's "sense of fairness," Chism's bonus proposal was explicitly intended to call for a bonus of $500 an hour for 620 hours of time, equaling $310,000.[71] As the trial court found:

> Mr. Chism crafted his September 2010 memo and September 30, 2010 emails as though the new arrangement he sought was a direct outgrowth of his and Tri-State's longstanding practice, which convinced Ron that Tri-State owed Mr. Chism more money for the same work that Mr. Chism had earlier agreed to perform for a fixed salary – including the work Mr. Chism had already performed in FY 2010. In so doing, Mr. Chism laid the foundation for seeking compensation that exceeded even what he would have been paid as outside counsel while enjoying the guaranteed income, benefits, and freedom from timekeeping of his inside-counsel position.[72]

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70 *Id.*

71 CP 2449, 2450 & 2555 (Findings of Fact Nos. 45, 47 & 62).

72 CP 2452 (Finding of Fact No. 53). *See also* CP 2454 (Finding of Fact No. 59) ("As Mr. Chism could have predicted, Ron never considered obtaining

At trial, Tri-State's compensation expert testified that Chism's $190,000 per year compensation was within the customary range for *full time* in-house General Counsel work.[73] He further testified that the established range for a bonus for full time in-house general counsel was between zero and 20 percent. The bonus arrangement Chism proposed for himself was wildly beyond the market range for general counsel in his position: more than eight times the upper limit for general counsel bonus compensation.[74] The trial court specifically found the expert's testimony to be credible.[75] Not even Chism's compensation expert could point to a single instance anywhere in the country where an in-house attorney was paid a bonus such as Chism arranged for himself.[76]

The trial court found that Chism's proposal for his new bonusing arrangement, including the $310,000 bonus, was unfair and unreasonable to Tri-State.[77] It was both far beyond and inconsistent with the way Tri-State paid bonuses to all of its other employees, including its owners. It called for payment to Chism based on the highest hourly billing rate he

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independent review of the memo or the proposed modified arrangement, because he completely trusted Mr. Chism and assumed the proposed arrangement must be reasonable and in Tri-State's interest.").

73 CP 2452-53 (Findings of Fact Nos. 55-56).

74 CP 2453 (Finding of Fact No. 56).

75 CP 2452-53 (Findings of Fact Nos. 55-56).

76 CP 2452 (Finding of Fact No. 54).

77 CP 2453-57 (Findings of Fact Nos. 57-69).

ever charged, after he consistently encouraged Tri-State to have him perform tasks at every level, from administrative and unbillable to paralegal work to junior associate level work. It relied entirely on Chism's estimate of hours worked when Chism neither could nor did provide any reliable estimate.[78] And his 2010 bonus request was for work that Tri-State had already paid for in full, and for which Tri-State got nothing in return.[79]

Chism got Tri-State to agree to his proposal by pitching it exclusively to Ron Agostino, who he knew held Chism in total trust, and who Chism had for months known had been diagnosed as suffering from Alzheimer's disease. And despite all of that, Chism chose not to recommend that Agostino seek independent counsel for what Chism was proposing.

As the trial court found, had Chism arranged for independent counsel to consult on his proposal, no independent counsel would have told Tri-State to agree to it:

> Mr. Chism should have recommended that Tri-State seek independent counsel to review his proposed

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[78] CP 2456 (Findings of Fact Nos. 65 & 66) ("Mr. Chism's estimate of his hours for FY 2010, offered in his September 30, 2010 email to Ron as justification for a $310,000 bonus, is not reliable. . . . [H]e could not say with any accuracy how many hours he actually worked.").

[79] CP 2457 (Finding of Fact No. 69) ("Mr. Chism did not offer or promise to do anything new, nor did he do anything new, in exchange for the $310,000 bonuses.").

> bonus/adjustment. Had he done so, no reasonable independent counsel would have advised Tri-State to agree to Mr. Chism's proposal.[80]

But Chism did not suggest to Agostino that he get independent counsel, and Agostino didn't think he had any reason to do so. He trusted Chism, and believed what Chism was proposing was in Tri-State's interests.[81] So Agostino had Tri-State pay Chism the retroactive $310,000 bonus that Chism requested.[82]

Over the course of the next year (Tri-State's fiscal year 2011), Ron Agostino's condition grew progressively worse.[83] In early 2011, "Mr. Chism began to advocate for a change in Tri-State leadership, in particular to provide more support to Ron or replace him as President."[84] By summer 2011, Chism was lobbying in writing:

> [I]t is widely known that Ron has some issues that are affecting his ability to run the company on a daily basis. . . . [T]he Company needs to acknowledge that he has some health issues (which is obvious to almost everyone within senior management already) that are going

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80 CP 2482 (Conclusion of Law No. 33).

81 CP 2454 (Finding of Fact No. 59) ("As Mr. Chism could have predicted, Ron never considered obtaining independent review of the memo or the proposed modified arrangement, because he completely trusted Mr. Chism and assumed the proposed arrangement must be reasonable and in Tri-State's interest."); RP (5/20/14):33-34.

82 CP 2455 (Finding of Fact No. 62).

83 CP 2458-59 (Findings of Fact Nos. 71-78).

84 CP 2458 (Finding of Fact No. 71).

> to limit his ability to continue carrying the torch as before . . . .[85]

Also during Tri-State's fiscal year 2011, Chism prepared a multi-million dollar claim against design engineer David Evans Associates over design problems on a large I-405 project performed by Tri-State, and Chism chose outside counsel to pursue the DEA claim.[86] Chism told Ron Agostino and others in Tri-State that they could expect to recover $10-12 million on the DEA claim.[87]

On October 21, shortly after the end of Tri-State's fiscal year 2011, Chism and Agostino were driving back together from a meeting in Vancouver, Canada on the Bear Hydro project.[88] Tri-State was suffering heavy losses on the project, with net losses for the year of $27 million.[89] "By mid-October 2011, Mr. Chism was fully aware of the severity of the problem and believed the company was within days of possibly having to shut down."[90] Chism chose that car ride as the opportune time to propose to Agostino that Tri-State should pay him $500,000 as Chism's bonus for fiscal year 2011. He arrived at that figure by spontaneously declaring a

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85 CP 2458 (Finding of Fact No. 72).
86 RP (5/20/14):136-140 & 161-62.
87 RP (5/20/14):42 & 165.
88 CP 2460 (Finding of Fact No. 81).
89 CP 2459 (Finding of Fact No. 79).
90 CP 2459 (Finding of Fact No. 80).

total for the number of hours he worked that year, multiplying it by $500 an hour, and deducting his salary.[91]

Agostino agreed, but only on the condition (given Tri-State's financial condition) of successful recovery on the DEA claim. As long as Tri-State recovered $10-12 million from DEA, Agostino was willing to use a portion of it to fund a bonus to Chism.[92] Eleven days later Chism wrote a memo to Agostino purporting the memorialize the agreement Chism had arranged during the car ride. As with Chism's 2010 memo, his November 1, 2011 memorandum began with a series of misrepresentations:

> For the last couple of years we have been operating under an arrangement where, at the end of TSI's fiscal year, I give you an estimate of the amount of time I have actually spent on TSI matters during that year so you can decide what additional compensation you believe would be appropriate to account for the additional time spent which was not anticipated in our longstanding flat compensation arrangement.[93]

There had not been a longstanding understanding that Chism's flat fee compensation covered only a limited number of hours; Chism misrepresented that history in 2010 and persuaded Ron to believe it. The parties had also not been operating "for the last couple of years" under

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91 CP 2460 & -62 (Findings of Fact Nos. 81 & 90).
92 RP (5/20/14):42-43 & 46.
93 Exhibit 16.

Chism's bonusing proposal. Chism had proposed that only a year earlier. By misrepresenting a longer history of dealings, Chism gave greater weight to the new system than was accurate.[94] Chism then recited how his calculations led to a $500,000 bonus: 1,400 hours worked, "at my old rate" of $500 an hour being worth $700,000, reduced by his base pay "and we end up at $500,000."[95]

Chism did *not* memorialize that he was only be paid a bonus out of a successful DEA claim recovery. Instead, his confirming memo asserted that Agostino had agreed to pay him the $500,000 bonus, and that Chism was flexible over when it would be paid. The memo told Agostino to tell Chism if the memo wasn't accurate, or else to sign it. Chism knew Agostino would not question what Chism had written.

> Mr. Chism testified that he fully expected Ron to sign the memo. He knew that Ron trusted and relied on him, and that Ron was a man of his word. Once Mr. Chism told Ron they had already agreed to the terms of the November 2011 Memo, Mr. Chism would not have expected Ron to say that Mr. Chism had gotten their agreement incorrectly. Neither Mr. Chism nor any other witness identified any occasion on which Ron disputed Chism's account of events or agreements they purportedly had made.[96]

Although Chism had for months been lobbying to replace Agostino because of his declining health, Chism dealt only with Agostino regarding

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94 CP 2460 (Finding of Fact No. 83).
95 Exhibit 16.
96 CP 2461 (Finding of Fact No. 85).

his $500,000 bonus demand, said nothing about the advisability of Tri-State getting independent counsel, and Agostino did not receive independent advice. Chism also did not disclose that he was representing only his own personal interests in pursuing the bonus proposal, and was not serving in his longtime capacity as Tri-State's General Counsel, looking out for its interests.[97]

"Trusting and relying that Mr. Chism was acting in Tri-State's best interest,"[98] and apparently also thinking that Chism would only get a bonus if there was a successful DEA claim recovery,[99] Agostino signed the memo.[100] Although the DEA dispute eventually settled, it resulted in *no* net recovery to Tri-State.[101] Chism nevertheless claimed in this lawsuit that he was owed the $500,000 bonus, and that Tri-State had willfully withheld it from him.

The trial court found that Chism's $500,000 bonus proposal was neither fair nor reasonable. His contended number of hours worked "was nothing more than an educated guess."[102] His bonus claim rested on the same misrepresentations as had his 2010 bonus proposal.[103] He knew

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97 CP 2461 (Finding of Fact No. 86).
98 CP 2461 (Finding of Fact No. 86).
99 RP (5/20/14):42 & 46.
100 Exhibit 17.
101 RP (5/20/14):146.
102 CP 2462 (Finding of Fact No. 90).
103 CP 2462 (Finding of Fact No. 91).

Tri-State only paid bonuses in profitable years when it had cash in hand,[104] yet Chism wrote his memorandum to evade Ron's declaration that any bonus would only be in the event of a successful DEA claim recovery.

Although Chism claimed he had not noticed the dramatic decline from Agostino's Alzheimer's disease during the year and a half before Chism made his $500,000 bonus proposal, the trial court declared his testimony was not credible.[105] And the amount Chism sought was far beyond the market range for general counsel bonusing of someone in Chism's position.[106]

In March 2012, Ron Agostino stepped down and Larry Agostino became Tri-State's president. Chism promptly met with him to discuss payment of his 2011 bonus, and to propose a mid-year bonus for himself for fiscal 2012.[107] Larry Agostino had not been involved in any of Chism's history of compensation arrangements, and Chism did not disclose that history (nor disclose his serial misrepresentations to Ron Agostino about that history).[108] Thus (for example), Chism did not

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104 CP 2461 (Finding of Fact No. 87).
105 CP 2459 (Finding of Fact No. 77).
106 CP 2452 & -56 (Findings of Fact Nos. 54 & 56).
107 CP 2463 (Finding of Fact No. 97).
108 CP 2463-64 (Finding of Fact No. 97).

disclose that his entire premise for bonusing based on $500 an hour for all time beyond a minimal number of hours was inaccurate.[109]

When Chism approached Larry Agostino on March 28, Agostino said he thought Chism had taken advantage of his brother with his $500,000 bonus proposal, and that Chism would have a hard time collecting it.[110] Chism knew that put both his claim to the bonus and his self-interest directly in conflict with Tri-State's interests.[111] But Chism did not withdraw from the discussion, did not disclose that he was not acting as Tri-State's General Counsel but was instead representing solely his own interests, did not get Larry's consent that he act in that capacity, and did not advise Larry to get independent counsel. Instead, Chism just kept negotiating directly with Agostino.[112]

Later than day Chism wrote a memorandum confirming what Chism claimed was an agreement he and Agostino had reached during their face-to-face meeting that morning. The memo did not disclose that Chism never had any entitlement to seek a mid-year bonus. Instead, his memo declares that he will receive his $500,000 bonus from his November 2011 memo, plus another $250,000 bonus, plus reimbursement

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109 *Id.*

110 CP 2464 (Finding of Fact No. 99); RP (5/22/14):50.

111 *Id.*

112 CP 2464 (Finding of Fact No. 100).

of his legal practice costs (bar dues, E&O insurance premiums, CLE expenses), and that upon termination of his employment Tri-State will gift to him the company Mercedes he is using, as well as the company computer and cell phone.[113]

Chism's memo said: "This Agreement may be terminated by either party at any time without notice." The next morning Chism thought up a way to surreptitiously make it even better for himself, so he revised it to say that only Chism's *employment* could be terminated, not the agreement to pay him what the memo claimed Tri-State had agreed to pay him. Chism emailed the revised memo to Larry Agostino the morning of March 29, describing the revision as "a slight change" that makes the memo "a better statement."[114] Chism did not, of course, say anything about how the revision made the memo substantially more favorable to him, and less favorable to Tri-State.

Chism's face-to-face discussion had not included any agreement about gifting him the company Mercedes and other Tri-State property, and Agostino objected to the memo's misrepresentation that he and Chism had agreed to it that morning.[115]

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113 Exhibit 20.
114 Exhibit 21.
115 RP (5/22/14):50-51, 57; Exhibit 132; CP 2466 (Finding of Fact No. 105).

Chism's memo ended by asking Agostino to initial the memo if he agreed to its terms. After realizing and objecting to the gifting of property to Chism that Agostino had not agreed to, he read the memo more carefully and saw that it required paying both the $500,000 and $250,000 bonuses, which Agostino had also not agreed to.[116] So Agostino did not initial Chism's memo. Chism responded by email: "Let's get this resolved first thing Monday when I get back."[117] The trial court's Findings of Fact describe that meeting:

> Mr. Chism said they should get the matter settled. Larry responded that there was no need to talk about it, as Tri-State was not willing to provide Mr. Chism the additional compensation they had discussed. When Mr. Chism asked about the $500,000, Larry said he understood that was still an open issue. Mr. Chism said that under the circumstances, he would have to resign, which he did that same day. Tri-State never paid the $500,000 or $250,000 bonus.[118]

Chism sued for breach of contract and damages for willful withholding, and later added a claim for unjust enrichment.[119] Tri-State counterclaimed for breach of Chism's fiduciary duties, including violation

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116 RP (5/22/14):60-65.

117 CP 2466 (Finding of Fact No. 106); Exhibit 133.

118 CP 2466 (Finding of Fact No. 107).

119 CP 31 (Amended Complaint); CP 39 (Answer); Jury Instructions 9 & 22 (Chism pursued a claim of unjust enrichment for the value of his work); CP 2466 (Finding of Fact No. 108).

of RPCs 1.5, 1.7, 1.8 and 8.4. Tri-State sought disgorgement from Chism's violations.

Prior to trial, Judge Michael Trickey granted summary judgment dismissing Tri-State's claim that RPC 1.5 justified disgorgement or other relief, ruling that RPC 1.5 could not as a matter of law apply to Chism's conduct in proposing and pursing the modifications to his attorney compensation arrangement.[120] However, he denied summary judgment as to all other RPC obligations.[121]

The case went to trial before Judge Ken Schubert in April and May, 2014. Chism had demanded a jury, and Chism's contract claim, wage withholding claim and unjust enrichment claim were tried to the jury, as was Tri-State's common law defense of undue influence.

Both before and during trial Chism objected to any evidence, reference, or submission to the jury regarding his alleged RPC/fiduciary duty violations.[122] Chism took the position that adjudication of the RPC violations issues, including determination of any remedy (such as disgorgement) were equitable, and were exclusively for the trial court to determine.[123] The trial court acceded to Chism's position, and excluded

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120 CP 606 (first summary judgment Order).
121 CP 1142 (second summary judgment Order).
122 RP (9/30/14):46.
123 *See, e.g.*, CP 1924-25 (Plaintiff's Trial Brief).

all such evidence from the jury. All of the testimony regarding RPC violations was received solely by Judge Schubert. As part of Chism's insistence that the jury not be allowed to consider or decide those issues, Chism persuaded the trial court not to instruct the jury on those issues, not to inform the jury about the existence and framework for the fiduciary obligations of an attorney to his client, and instead to ask the jury for advisory opinions about whether the agreements Chism sought to enforce were "fair and reasonable," were "free from undue influence," and were "made after a fair and full disclosure of the facts on which it is predicated."[124]

The jury returned a verdict for Chism on his contract claims, and answered all three advisory interrogatories favorably to Chism.[125] The trial court then took additional evidence and extensive argument in its adjudication of the RPC/fiduciary duty issues and the remedy of disgorgement. During that process Chism reversed his earlier position and declared that the trial court should not adjudicate any issues of Chism's RPC violations, but was instead bound by the advisory answers given by the jury (despite it having never been instructed on any of the law relevant

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124 Jury Instruction 10; RP (5/29/14):56 & 70; RP (9/30/14):42.

125 CP 2228-29.

to Chism's RPC duties and their breach).[126] The trial court rejected that change of position, and proceeded to decide the RPC issues. The trial court found numerous, substantial violations by Chism in his dealings with Tri-State regarding his modified attorney compensation arrangements. The trial court entered extensive Findings of Fact and Conclusions of Law (annotated to trial testimony and trial exhibits), and ruled that substantial disgorgement was appropriate.[127]

The trial court ruled that of the retroactive $310,000 bonus Chism had negotiated for himself, disgorgement of all but $38,000 of was appropriate; of the $500,000 bonus he negotiated, disgorgement of $165,000 was required; and of the $250,000 bonus he negotiated, $113,000 would be disgorged.[128] Accounting for the $310,000 that Tri-State had already paid Chism as bonus compensation, that left the company owing $200,000 in unpaid bonus.[129]

The trial court did not consider whether the parties' dispute over Chism's RPC violations (which the jury never knew about) was a bona fide dispute such that it negated Chism's entitlement to exemplary damages. Instead, the trial court mechanically adopted the jury's

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126 RP (9/30/14):42-29, 61-63, 71-74.
127 CP 2438 & 2503.
128 CP 2502 (Conclusion of Law Nos. 82-84).
129 CP 2503 (Conclusion of Law No. 85).

determination that the nonpayment was willful, and doubled Chism's $200,000 to $400,000.[130]

Although Chism's claims all required a determination of reasonableness (and were all found to be unreasonable), the trial court declared that Chism's claims were liquidated, and that he was entitled to prejudgment interest, which the court awarded in the amount of $72,460.27.[131]

Lastly, because Chism had obtained a net award on his contract claims under Washington's wage statutes, the trial court granted him attorney fees as provided in those statutes. The trial court declined to consider whether Chism's breaches of his fiduciary attorney duties warranted disgorgement of the right to attorney fees, even though Chism's breaches directly led to the parties disputing the claims that the jury and trial court ultimately had to adjudicate.

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130 CP 2503 (Conclusion of Law No. 86).

131 CP 4508 (Judgment).

Argument

I. Chism's opening brief fails to permit meaningful appellate review of most of what he claims to be appealing.

A. Chism fails properly to present alleged error as to any of the 55 Findings of Fact he lists as erroneous.

In his opening brief, Chism assigns error to 55 of the trial court's Findings of Fact (reproduced in the Appendix). Yet in his entire brief he does not address a single one of those Findings, nor argue how it is unsupported by substantial evidence or otherwise erroneous. Because neither the appellate court nor Tri-State has any meaningful opportunity to address particular assignments of error that Chism fails to argue, his assignments of error are deemed abandoned.

> [The City] assigned error to 21 of the findings .... However, in its opening brief the City mentioned only two of the findings to which it had assigned error. Such discussion is inadequate for all except the two mentioned findings. A party abandons assignments of error to findings of fact if it fails to argue them in its brief.

Valley View Industries Park v. City of Redmond, 107 Wn.2d 621, 630, 733 P.2d 182, 188 (1987). *See Shelcon Construction Group v. Haymond*, __ Wn. App. __, 351 P.3d 895, 901-02 (2015) ("[O]ther assignments of error purport to assign error to a finding of fact as written but fail to argue why substantial evidence does not support them. Because Anchor Bank fails to argue why these findings of fact are erroneous, we do not consider them."); *Green v. McAllister*, 103 Wn. App. 452, 469, 14 P.3d 795, 805

(2000) ("We need not review a challenge to findings that does not cite to the record showing why the findings are not supported by the record."); *In re Marriage of Glass*, 67 Wn. App. 378, 381 n.1, 835 P.2d 1054, 1055 (1992) ("A party abandons assignments of error to findings of fact if he or she fails to argue them in his or her brief.").

B. Chism's brief is riddled with factual assertions that contradict uncontested Findings of Fact, as well as factual assertions supported solely by reference to material outside the trial record.

The primary record source for the factual assertions in Chism's brief is a document that occupies CP pages 83-108. The Brief of Appellant cites to it seventy times, frequently as the only source for the brief's factual assertions. Not once does Chism's brief mention what that document is. In fact, it was a Chism declaration in support of a summary judgment motion, filed six months before the trial began. Neither the jury (who of course never saw it) nor the trial judge (before whom it would have been hearsay) could have relied on it for their respective adjudications. It was outside the trial record.

By basing his characterization of the evidence at trial primarily on non-evidence outside the trial record, the Brief of Appellant frequently asserts facts that contradict the *actual* evidence at trial, and that indeed contradict undisputed Findings of Fact. For example, Chism's brief

contradict undisputed Findings of Fact. For example, Chism's brief repeatedly claims that *Tri-State* initiated and requested the various changes that Chism proposed to his attorney compensation terms, while the Findings of Fact explain that in each instance it was *Chism* who promoted the modified arrangements.[132]

The portrayal of facts in the Brief of Appellant is not a fair statement of the facts of the case as shown in the actual trial record.

C. Chism assigns error to 74 Conclusions of Law, but makes no argument that a single one of them is unsupported by the Findings of Fact.

> Where the trial court has weighed the evidence, our review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether those findings of fact support the trial court's conclusions of law.

Green v. Normandy Park, 137 Wn. App. 665, 689, 151 P.3d 1038, 1050 (2007). The Brief of Appellant assigns error to 74 Conclusions of Law. In those Conclusions, the trial court assembled the factual determinations

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[132] *Compare* Brief of Appellant p. 16 ("The Agostinos expressed their desire") *to* CP 2440 (Finding of Fact No. 6) ("In late 2002, Mr. Chism began charging"). *Compare* Brief of Appellant p. 21 ("Agostino suggested that they revisit Chism's compensation arrangement") *to* CP 2447 (Finding of Fact No. 38) ("Mr. Chism raised the concept of his receiving a bonus"). *Compare* Brief of Appellant p. 24 ("A bonus/adjustment in the amount of $500,000 was proposed by Ron Agostino") *to* CP 2460 (Finding of Fact No. 81) ("Mr. Chism raised the issue of a bonus for FY 2011 . . . . and came up with a proposed bonus of $500,000").

RPC/fiduciary duties found to have been violated and by the individual transactions in which those violations took place. The Conclusions not only describe the relevant factual determinations that support the court's Conclusions, but in many instances reference to specific evidence supporting those Conclusions.

For not a single one of the Conclusions of Law for which Chism assigns error does the Brief of Appellant argue that it is unsupported by the Findings of Fact.

Chism's brief *does* make arguments about what he contends the law is (or ought to be). Respondents will therefore focus on the legal issues raised by Chism in those arguments.

II. The trial court did not err by adjudicating the equitable issues of Chism's RPC/fiduciary duty violations.

Chism argues that the trial court, by adjudicating his RPC violations and ordering disgorgement of part of his compensation, unconstitutionally infringed on the jury's adjudication of his claims. Chism's argument is doubly mistaken. First, *he* was the one who urged the trial court to proceed as it did; he cannot now reverse his position and

claim the trial court erred for doing what he had urged.[133] Second, the trial court acted appropriately, with or without Chism's urging.

Plaintiff sued for breach of contract. Tri-State asserted as a defense and counterclaim that Chism breached his RPC/fiduciary duties. Before and during trial, Chism adamantly insisted that all evidence and issues regarding the disputed RPC/fiduciary duty breaches be kept from the jury, and be separately adjudicated by the trial court. For example, Chism's trial brief said:

> This is a bifurcated trial. Plaintiff's contract and wage claims go to the jury. Defendants' claims do not. Judge Trickey previously ruled that RPC 1.5 ("reasonable fees") does not apply to compensation; and all remaining RPC-based claims will be tried to the Court in a separate post-trial proceeding.[134]

At Chism's own insistence, Judge Schubert reserved adjudication of Chism's RPC/fiduciary duties to the court. That reservation included

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[133] *See Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 224-25, 108 P.3d 147, 148 (2005) ("Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.").

[134] CP 1924-25. *See also*, RP (4/23/14 (morning transcript)):5 ("[I]t's our strong belief, and we think it would be error, to submit the [common law fiduciary duty breach claim] to the jury."); RP (4/23/14 (morning transcript)):34 ("So if we try this in a bench proceeding, experts get to hash that out. I'm not saying Tri-State doesn't get their day in court. I'm not moving there. I'm not trying to boot their claim to the sidewalk. I'm suggesting that the proper forum when you seek disgorgement is a bench trial").

determining whether and to what extent disgorgement of the fee compensation paid to (and claimed by) Chism was appropriate. Plaintiff not only understood that the trial court was reserving for its own, independent adjudication whether Chism violated his RPC/fiduciary obligations, plaintiff advocated for that course:

> Defendants' claim for breach of fiduciary duty must be tried to the Court for the Court to determine whether it should exercise the equitable remedy of ordering Mr. Chism to disgorge the $310,000. Likewise, if contract damages are awarded to Mr. Chism, the Court may decide whether to void such awards.[135]

That is how the trial proceeded. The trial court excluded all reference to the RPCs from the jury. The trial court heard outside the jury's presence all testimony on the professional standards applicable to an attorney regarding an attorney's dealings with his own client, the breach of which could warrant disgorgement. The trial court intentionally did not instruct the jury on what an attorney's fiduciary duties to a client entailed, including all of an attorney's RPC obligations.

During the finalizing of jury instructions, the court and counsel discussed whether to give an instruction on the so-called *Kennedy* duties: "[T]hat the contract with [the attorney's] client was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the

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135 CP 1932.

facts". *Kennedy v. Clausing*, 74 Wn.2d 483, 491, 445 P.2d 637, 642 (1968). Chism's counsel raised the idea of submitting those three issues as questions on the verdict form, merely for advisory opinions from the jury to thereafter assist the trial court in its adjudication of the RPC issues, and the trial court adopted that suggestion.[136] The court put Jury Instruction 10 (listing the *Kennedy* factors) in the jury's instructions. Chism's counsel modified the jury form to include questions for each of the three *Kennedy* issues.[137] Chism's counsel then confirmed to the trial court what everyone understood: That the jury's answers would be merely advisory opinions.[138]

Had Chism's counsel not invited the use of advisory questions, Judge Schubert would not have asked them, and would not have given the *Kennedy* instruction.[139]

Even had Chism not advocated for the trial court independently adjudicating the RPC/fiduciary breach issues for purposes of determining disgorgement, the law would have amply supported the trial court in nevertheless doing so. The authority of the judicial branch of government arises from Washington Constitution Article IV, Section 1. An inherent

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136 RP (5/29/14):56 & 70; RP (9/30/14):42.
137 RP (5/29/14):126 & 129.
138 RP (5/29/14):148.
139 RP (9/30/14):49.

part of that authority is the power to regulate the practice of law. *Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 452, 635 P.2d 730, 735 (1981) ("It is a well established principle that one of the inherent powers of the judiciary is the power to regulate the practice of law.").

The rules of professional conduct and the attorney disciplinary system, all under the ultimate authority of the Supreme Court, are part of the judiciary's regulation of the practice of law. "The Supreme Court has an exclusive, inherent power to admit, enroll, discipline, and disbar attorneys." *Short v. Demopolis*, 103 Wn.2d 52, 62, 691 P.2d 163, 169 (1984). Disgorgement is a mechanism for the courts to exercise their inherent constitutional authority to regulate and discipline the practice of law.

> The trial court found that Denver violated the CPR and breached his fiduciary duty to his clients. *Disgorgement of fees is a reasonable way to "discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type."* Such an order is within the inherent power of the trial court to fashion judgments.

Eriks v. Denver, 118 Wn.2d 451, 463, 824 P.2d 1207, 1213 (1992), (citation omitted, emphasis added). The interests protected by the judiciary in enforcing rules of professional conduct are much broader than merely compensating victims. The courts act instead "for the protection of

the court, the proper administration of justice, the dignity and purity of the profession, and for the public good and the protection of clients." *Short v. Demopolis*, 103 Wn.2d 52, 62, 691 P.2d 163, 169 (1984); *see In re Marriage of Wixom & Wixom*, 182 Wn. App. 881, 898, 332 P.3d 1063, 1072 (2014) ("Rules of professional conduct should be construed broadly to protect the public from attorney misconduct.").

Because disgorgement relates to disciplinary interests rather than to compensatory interests that are vested in private parties, proof of causation or damage as a consequence of professional misconduct is not required for disgorgement. "A finding of causation and damages is not required to support an order of disgorgement." *Behnke v. Ahrens*, 172 Wn. App. 281, 298, 294 P.3d 729, 738 (2012). And for the same reason, disgorgement is exclusively and independently the province of the court sitting in equity: "Disgorgement of fees is a discretionary decision for the trial judge, not the jury." WPI 107.08 comment.

Trial courts, in exercising their exclusive authority to adjudicate issues leading to disgorgement, are not infringing on anyone's constitutional right to a jury. The right to a jury is for causes of action *at law*. "The right of trial by jury *on a legal claim* is inviolate. Const. art. I, § 21." *Green v. McAllister*, 103 Wn. App. 452, 462, 14 P.3d 795, 801 (2000) (emphasis added). Disgorgement is not a legal claim. Chism never

had any right to have any aspect of his liability for disgorgement determined by a jury. And as mentioned, it was *Chism's own position* that: "As the Court is aware, disgorgement is an equitable remedy to be decided by the Court."[140]

Consequently, the jury below was never instructed on any of the fiduciary duties an attorney owes her client, let alone on all of the RPC obligations at issue before the trial court. Instead, the issues submitted to the trial court were framed as if the dealings between Chism and Tri-State were arm's length transactions. As the Supreme Court once observed: "Though McGlothlen's conduct *as measured against ordinary standards* was entirely proper, *it did not meet the stringent requirements imposed upon an attorney dealing with his or her client*." *Matter of McGlothlen*, 99 Wn.2d 515, 525, 663 P.2d 1330, 1336 (1983) (emphasis added). The trial court reserved and adjudicated issues the jury never considered. There was no conflict between those adjudications.

Indeed, even without the trial court's inherent authority to adjudicate RPC/fiduciary issues for disgorgement, a trial court's adjudication in equity can operate independent of a jury's determination of legal claims in the same case. The trial court can even obtain advisory

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140 CP 1932.

opinions for the jury without being bound by them in the equity adjudication.

In *Green v. McAllister*, 103 Wn. App. 452, 14 P.3d 795 (2000), a dispute among partners involved claims for damages which were tried to a jury, and a claim for an accounting which was equitable and therefore tried to the bench. Both claims involved the value of certain real property. The judge had the jury determine damages on the damages claim (which determination was final and binding *on the legal claim*), and the judge had the jury make a finding regarding what it considered the value of the property, which was advisory to the judge *on the equitable claim.* The trial court was free to – and apparently did – take a different view about the value of the property for purposes of the equitable claim, but did not have the authority to modify the jury's determination of damages, inasmuch as determining damages was exclusively in the province of the jury:

> The jury's verdict was advisory on the valuation of the property. ***The court functioned in equity and therefore as the ultimate fact finder.*** The breach of contract claim, however, was put to the jury as a legal claim. The power of the court to reduce the *damages* is therefore limited, by well established law.

103 Wn. App. 452, 461-62 (emphasis added).

III. RPC obligations of an attorney in private practice can apply to in-house general counsel, and those duties *do* apply when the in-house attorney's relationship to his client remains identical to his earlier outside general counsel relationship. That was explicitly the relationship between Chism and Tri-State, and the trial court correctly found violations of Chism's RPC/fiduciary duties.

The trial court found that Chism, in proposing and persuading his client to agree to modify his attorney compensation terms so that he could demand each of his three bonuses from Tri-State, violated RPC 1.7, 1.8(a), and 8.4(c). Although the Brief of Appellant concedes that the RPCs apply to in-house counsel,[141] the bulk of Chism's argument is that they somehow don't apply to *him*.

All of Chism's arguments and authorities have a common thread: The premise that "[a]n in-house counsel is different."[142] The reason none of those arguments or authorities is apt in the present case is that when it came to Chism's professional relationship with Tri-State, as in-house counsel he *wasn't* different. His relationship was – by design – identical to what it had been as outside counsel.

> "I was going to do the same work for the same people, the same amount of time. I would continue to work out of my house. I'd come to Tri-State only when need be. I'd get paid the same amount. Apples to apples. The only difference was I'd either continue to bill them [$17,000] a month from home or I'd go in-house and get a paycheck,

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141 Page 55 ("It is not that ethical duties under the RPCs do not apply to in-house corporate counsel. They do.").

142 Brief of Appellant, p. 55.

> which would then be reduced by the amount of the health insurance they would pay and some taxes, and get a paycheck."[143]

Subjecting Chism to the same professional duties when his nominal status became in-house general counsel presents no legal conundrum. The same duties apply to the same attorney performing the same legal service for the same client for the same compensation. Tri-State understood it was continuing the same relationship under the same terms, and so did Chism. His RPC duties do not blink out of existence with a superficial change that did not affect the substance of his relationship to his client.

Indeed, the basis Chism gave for later modifying that compensation arrangement was what he said had been his billing arrangement from when he was outside counsel to Tri-State: A fixed amount for a small number of hours of general counsel work on the one hand, and hourly compensation at his outside-counsel hourly rate on the other.

WSBA Advisory Opinion 1045, on which Chism relies, says nothing different. That opinion related to an attorney negotiating terms to *enter into* an attorney-client relationship where none yet existed. The

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143 RP (5/14/14):58-59.

observation that RPC 1.8(a) would not apply to such a routine exchange is hardly noteworthy.

> RPC 1.8(a) rule does not apply to transactions entered into prior to the creation of the attorney-client relationship or those agreed upon during the relationship's formation.

Rafel Law Group v. Defoor, 176 Wn. App. 210, 220, 308 P.3d 767, 773 (2013). By contrast, Chism's dealings at issue here were anything but routine. He had been Tri-State's general counsel for decades, and Tri-State justifiably understood that he was representing Tri-State's interests in the transactions that he was urging them to agree to.

A. The trial court appropriately found that RPC 1.7(a) applied to Chism's conduct, and that he violated those obligations.

RPC 1.7(a) provides:

> Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
> (1) The representation of one client will be directly adverse to another client; or
> (2) There is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person ***or by a personal interest of the lawyer***.

The trial court found that Chism persuaded Tri-State to accept attorney compensation arrangements that were unfair, unreasonable, and against Tri-State's interests. Chism did that while leaving Tri-State in the

justified belief that Chism was representing Tri-State's interests in proposing those very arrangements.

Chism nevertheless contends that he could not have violated RPC 1.7(a) because his representation of Tri-State could not have been "materially limited" by his personal interests.

Chism's position simply ignores the violations found by the trial court. When Chism proposed and talked his client into attorney compensation modifications, Tri-State justifiably believed that Chism was representing their interests in those transactions, and that what he proposed must therefore have been reasonable. But as only Chism knew, he was solely representing his own personal interests, and was working *against* the interests of Tri-State. There is hardly a more dramatic way for the representation of a client to be "materially limited" than for the client's own lawyer to be working solely for the other side of a transaction, while leaving his client in the dark about that fact.

Chism's personal interests (as found by the trial court, though not mentioned in Chism's brief) materially limited his representation of Tri-State by not doing what any competent general counsel would have done for a client, such as:

- Disclose the risks and downsides of the proposed transactions.

- Accurately disclose important information that an informed client would need to know, but that Tri-State either didn't know or didn't fully appreciate.
- Avoid misrepresenting important information that the attorney *did* communicate to his client.
- Arrange for appropriate legal providers to do Tri-State's work cost effectively, rather than do nonbillable work or paralegal work or junior associate work and then have the client pay $500 an hour for it.
- Keep reasonable documentation of time spent so that to the extent attorney compensation was time-dependent, the time would not need to be guessed at or reconstructed from nonexistent documentation.
- Not propose unfair terms to the client, such as a retroactive bonus for work already paid for in full, where the attorney received $310,000 and Tri-State got nothing in return.

The trial court made detailed Findings of Fact establishing how Chism violated RPC 1.7(a). The Brief of Appellant ignores them. The trial court made exhaustive Conclusions of Law that even explain in narrative fashion how the facts support the RPC 1.7(a) violations found by the court. Chism's brief does not address a single one of them. Other than attempting to re-tell the facts differently from the way the trial court found them, Chism makes no showing of error below.

B. The trial court appropriately found that RPC 1.8(a) applied to Chism's conduct, and that he violated those obligations.

RPC 1.8(a) provides:

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security ***or other pecuniary interest adverse to a client*** unless:

> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed to the client and are transmitted in writing in a manner that can be reasonably understood by the client;
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> (2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
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> (3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

Chism argues that RPC 1.8(a) shouldn't apply to any of the extraordinary transactions that he proposed and got Tri-State to agree to. Chism's own ethics expert disagrees. Co-authored by expert Arthur Lachman, *The Law of Lawyering in Washington*, Ch. 9 at 5-6 (WSBA 2012) says:

> [A]uthorities strongly suggest the Washington Supreme Court, when faced with the issue, may well decide that a change to a fee agreement midstream benefiting the lawyer constitutes a business transaction with a client (and therefore a prohibited conflict of interest) unless the rigorous requirements of RPC 1.8(a) are met.

The Washington Supreme Court has essentially fulfilled that prediction. In *LK Operating, LLC v. Collection Group*, 181 Wn.2d 48, 76, 331 P.3d 1147, 1159 (2014), the Court held that the term "business transaction" in RPC 1.8 encompasses all contracts, and may well be even broader than that. One need look no further than Chism's Complaint in this case to confirm that the extraordinary transactions with Tri-State that

Chism sued to enforce were contracts. The *LK Operating* Court also addressed how the reference in the RPC's commentary to the effect that the rule would not apply to "ordinary fee arrangements" is narrow indeed: "anything reasonably characterized as an attorney-client business transaction is subject to the rule's requirements" unless exempted by the explicit exemptions in the rule itself. 181 Wn.2d at 77. None of those exemptions applies to the transactions at issue here.

The trial court entered Findings of Fact and Conclusions of Law explaining how and why the transactions Chism talked Tri-State into fall within the ambit of RPC 1.8(a). The Brief of Appellant mentions none of them. The trial court's Findings and Conclusions document the myriad ways that Chism violated the Rule. Conclusions 34 through 39 and 49 through 59 are dedicated *exclusively* to Chism's RPC 1.8(a) violations, yet go unchallenged. Chism's brief offers no basis for rejecting any of the trial court's Findings, nor contend that the court's Conclusions are unsupported by those findings, nor even suggest that any of the Conclusions are inconsistent with Washington law.

C. The trial court appropriately found that RPC 8.4(c) applied to Chism's conduct, and that he violated those obligations.

RPC 8.4 provides: "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or

misrepresentation[.]" The trial court entered Findings of Fact documenting Chism's misrepresentations and the central role they played in leading to the disputes in this case. The trial court entered Conclusions of Law 60 through 67, which deal exclusively with RPC 8.4(c) and explain how the facts of the case represent violations of the rule. Chism's brief addresses none of them.

Instead, Chism argues that the advisory findings of the jury, *which was told nothing of the existence or terms of RPC 8.4(c)*, stand as a full and final adjudication that Chism at all times met all of its requirements. Chism's brief offers no meaningful challenge to the trial court's Findings and Conclusions, nor indeed offers any substantive argument for defendants to rebut.

IV. While appropriately refusing to grant punitive damages for amounts not owed because of Chism's fiduciary violations, the trial court erred in granting double damages on the net award.

Chism argues that he should receive the windfall of double damages on compensation he was compelled to disgorge. Chism cites no authority requiring such a result, and none exists. As the trial court put it:

> Plaintiff is improperly putting the cart (the calculation of exemplary damages) before the horse (the amount owed by Defendants). This Court has found and held that Tri-State owed Plaintiff $200,000, not $750,000. Two hundred thousand dollars is the amount of wages the Defendants have not paid, i.e., the amount they unlawfully withheld. Accordingly, $200,000 is the only amount to which

> RCW 49.52.070 could apply. Plaintiff's proposed outcome would allow him to recover exemplary damages based on an amount Defendants do not owe, i.e., a jury verdict that did not factor in disgorgement due to his breaches of fiduciary duty. That result finds no support in either the plain language of RCW 49.52.070 or equity.[144]

Moreover, the trial court's disciplinary authority over attorneys does not end with the regulation of attorney fees compensation. It encompasses the entirety of what an attorney receives, even tangentially, in connection with improper professional conduct. Thus the trial court had the authority to render any or all of Chism's compensation arrangements with Tri-State void in their entirety, or to order partial or complete disgorgement of all that Chism received. *See LK Operating, LLC v. Collection Group*, 181 Wn.2d 48, 85, 331 P.3d 1147, 1163 (2014) ("We have previously and repeatedly held that violations of the RPCs or the former Code of Professional Responsibility in the formation of a contract may render that contract unenforceable as violative of public policy."); *Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 743, 153 P.3d 186, 189 (2007); *Cotton v. Kronenberg*, 111 Wn. App. 258, 269 & 275, 44 P.3d 878, 884 & 887 (2002) ("Attorney fee agreements that violate the Rules of Professional Conduct (RPC) are against public policy and are

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144 CP 4347 n.6.

unenforceable. . . . It was entirely within the trial court's proper exercise of discretion to order complete disgorgement of the fees here.")

Chism's argument would also turn Washington's constitutional priority upside down. Punitive damages for wrongfully withheld wages are a legislative creation. If the legislature had wanted those punitive damages to apply to attorney compensation that had been forfeited because of attorney misconduct, and if the legislature had intended to prohibit courts from denying those punitive damages to disciplined attorneys, the legislature could not have enacted a statute dictating that result. Disgorgement of benefits obtained by an attorney who engaged in misconduct is exclusively in the judiciary's constitutional ambit, and the legislature cannot not infringe on it. *See Bennion, Van Camp, Hagen & Ruhl v. Kassler Escrow, Inc.*, 96 Wn.2d 443, 453, 635 P.2d 730, 736 (1981) ("Since the regulation of the practice of law is within the sole province of the judiciary, encroachment by the legislature may be held by this court to violate the separation of powers doctrine."). But of course the legislature never intended the result Chism argues for.

For their own part, defendants cross-appeal the trial court's grant of punitive damages on the net award to Chism. The trial court did so as the result of an error of law, to be reviewed *de novo*.

Under RCW 49.52.070, withheld wages are subject to double damages when the withholding is "willful." A withholding is *not* willful when there exists a bona fide dispute over the obligation to pay. "An employer does not willfully withhold wages within the meaning of RCW 49.52.070 where he has a bona fide belief that he is not obligated to pay them." *McAnulty v. Snohomish School District*, 9 Wn. App. 834, 838, 515 P.2d 523 (1973). Thus, the nonpayment of wages is willful only "when it is the result of a knowing and intentional action *and not the result of a bona fide dispute*." *Lillig v. Becton-Dickinson*, 105 Wn.2d 653, 659, 717 P.2d 1371 (1986) (emphasis added).

In *Lillig*, the appeals court upheld the trial court's finding that there was no willful withholding where there was a bona fide dispute regarding whether the employer had made an enforceable promise to pay the plaintiff a bonus, the amount of bonus under the employer's plan was subject to discretion, and the amount owing to the plaintiff was subject to dispute at trial. 105 Wn.2d at 660. Other Washington cases have similarly confirmed that there is a bona fide dispute and that no willful withholding exists when issues regarding the alleged wages owed are disputed or are "fairly debatable." *See, e.g., Moran v. Stowell*, 45 Wn. App. 70, 81 (1986) (affirming summary judgment on willful

withholding claim); *Cannon v. City of Moses Lake*, 35 Wn. App. 120, 125 (1983) (same).

When the jury found Tri-State's nonpayment to Chism to be willful, the jury had no idea about his professional misconduct. The jury had no way of knowing of his RPC violations, nor whether the compensation agreements he sought to enforce would be found void, voidable, or subject to disgorgement. All of that was reserved to the trial court for adjudication following the jury's verdict.

Although the jury did not know about the dispute over Chism's RPC/fiduciary breaches, that dispute very much existed. Indeed, Tri-State substantially prevailed in its resolution. Yet the trial court declined to consider the effect of that meritorious dispute on defendants' liability for exemplary damages. Instead of determining whether defendants were liable for willful withholding in light of the dispute *that the jury did not know about*, the trial court deemed itself bound by the jury's finding of willfulness. The trial court made no findings of fact regarding willfulness in light of the RPC/fiduciary breach issues reserved to the trial court, and the court's only Conclusion of Law on the subject based the determination of willfulness (and the imposition of exemplary damages) exclusively on

the jury's finding.[145] In denying defendants' Renewed Motion for Judgment as a Matter of Law, the trial court then confirmed that it did not believe it had the legal authority to consider the RPC/fiduciary breach dispute in connection with determining willfulness.[146]

That was error. The court's authority includes determining the public policy implications of an attorney's misconduct so that appropriate disciplinary response occurs.

> Because "the Supreme Court['s power] to regulate the practice of law is inviolate," this court has legal authority to set public policy in the context of attorney ethics. The RPCs are clearly directed at promoting the public good and preventing public injury: The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.... Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

LK Operating, LLC v. Collection Group, 181 Wn.2d 48, 86-87, 331 P.3d 1147, 1164 (2014) (citation omitted). Among the RPC violations established by Tri-State below were multiple violations of RPC 1.8(a) in the formation of the agreements Chism sought to enforce. Those

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145 CP 2503 (Conclusion of Law No. 86).

146 CP 4342 ("[T]he equitable and RPC claims this Court determined are not defenses to a determination of willfulness under RCW 49.52.070.").

violations necessarily implicate public policy interests to a degree that rendered Chism's agreements presumptively unenforceable.

> There is no way to enter a contract in violation of former RPC 1.8(a) without implicating the formation or terms of the contract itself. Therefore, a violation of the rule presumptively, though not necessarily, results in a contract violative of the public policy underlying former RPC 1.8(a).

181 Wn.2d at 89. Moreover, the implication of a contract violative of public policy is to deny the wrongdoer additional relief that he might otherwise be entitled to.

> Where a contract is entered in violation of public policy, "the rule is to leave the parties in the positions where the court finds them, even if they acted in good faith," and "regardless of whether the situation is unequal as to the parties[.]"

181 Wn.2d at 94.

In *Green v. McAllister*, the trial court had concluded it lacked authority to grant certain relief in a partnership dispute. 103 Wn. App. 452, 467, 14 P.3d 795, 803 (2000). The appellate court reviewed that legal conclusion *de novo* and reversed, finding the trial court had authority that it had not exercised.

Ordinarily the remedy for such an error is remand for the trial court to exercise the authority it had not realized it possessed. But in this case, remand should not be necessary. The RPC violations found by the trial court go to the heart of the public policy interests that RPC 1.8(a) exists to

protect. An attorney took advantage of the trust his client had that he was protecting their interests in order to promote his own interests, and he made misrepresentations and used unfair methods to accomplish that. This Court should hold that the RPC/fiduciary dispute adjudicated below was sufficient as a matter of law to constitute a "bona fide dispute," making Tri-State's failure to pay the $200,000 it was ultimately found to owe non-willful.

V. The trial court erred in awarding Chism virtually all of his attorney fees below, when those expenses resulted from his RPC violations and the bulk of them related to his unsuccessful attempt to show compliance with his fiduciary obligations.

Virtually all of the dispute below was over whether and how Chism had breached the fiduciary obligations of an attorney in his position. The great majority of the legal fees incurred through trial related to – and resulted from – the fiduciary breaches that Tri-State ultimately established.[147]

Just as with the imposition of punitive damages on the net award, the trial court took the view that it lacked the legal authority, in the face of the fee-shifting provisions in the wage claim statutes, to consider Chism's RPC violations as a basis to deny the award of legal fees. And while the trial court agreed that the bulk of Chism's fee request related to litigating

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147 CP 4729-30.

the RPC/fiduciary duty issues, the trial court refused to attempt (or compel Chism to provide) a segregation showing what fraction of those fees was unrelated to the RPC/fiduciary duty dispute.[148]

For the same reasons described in the preceding section regarding the imposition of punitive damages, the trial court erred in believing itself without inherent authority to deny an attorney monies that a non-attorney would have been entitled to. As explained by the *LK Operating* court, the inherent power of a court to deny relief sought by an attorney who acted in violation of RPC 1.8(a) or comparable RPCs is limited only by the extent that the attorney's improper behavior implicates public policy interests. And here, Chism's violations go to the heart of the public policies that RPC 1.8(a) exists to protect.

Preventing attorneys from taking advantage of their clients is part of the goal, but an equally important part is protecting clients from getting into disputes with their attorney in the first place. That is the essential purpose of RPC 1.8(a)'s mandate that the attorney recommend and allow time for the client to get independent counsel before agreeing to a proposed transaction. Rewarding violation of the RPCs by requiring the client to pay the attorney's legal bills for litigating such a dispute

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148 CP 4971 (Conclusions of Law Nos. 29-30).

undercuts the public policies that the disciplinary rules (particularly RPC 1.8(a)) are intended to promote.

The trial court had inherent power to deny Chism the attorney fees he would have been entitled to had he not been found in violation of the RPCs. The trial court made an error of law in concluding it had no such power. This court should reverse the award of fees and either remand for redetermination of what fees were unrelated to litigating the RPC/fiduciary duty issues below, or declare as a matter of law that the violations found by the trial court warrant denial of fees altogether.

VI. The summary judgment ruling that RPC 1.5 could not apply to the agreements at issue in this case was error.

RPC 1.5 regulates attorneys when they enter into any agreement for compensation for professional services. "A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." The rule gives a list of factors for considering whether an agreement is reasonable.

In granting partial summary judgment to exclude RPC 1.5 from the case, Judge Trickey ruled that by changing his status from outside general counsel to in-house general counsel, Chism was no longer subject to RPC 1.5 obligations as a matter of law. That was error.

First, it misconstrued the design of the RPCs, which are intentionally structured for judicial overseers to apply when and as the RPC standards are appropriate to the circumstances in which a client or attorney finds itself. Second, it assumed as a matter of law the opposite of what was undeniably true of the facts: That both Chism and his client understood that his transition to in-house general counsel had no effect on his attorney-client relationship, including how he was being paid. What Chism did for Tri-State, how he did it, and what he charged for what he was doing all remained the same. All that changed was that nominally he was an employee, and that he was enrolled on Tri-State's medical plan rather than paying for his own medical benefits out of the fixed compensation he was charging his client.

Having kept the substance of his compensation arrangement the same when he nominally became an employee, Chism then proposed a series of compensation modifications, and persuaded his client to go along with them *on the basis of his earlier, outside counsel hourly billing arrangement with Tri-State*. Part of what made those fee modifications unreasonable were the very factors enumerated in RPC 1.5(a).

Although the RPC 1.5 summary judgment order did not prevent Judge Schubert from adjudicating the remainder of the RPC/fiduciary duty issues, and although his adjudication found violations of all of those

obligations, the partial summary judgment order had two prejudicial effects. First, it eliminated an explicit reasonableness standard (and therefore the RPC 1.5 reasonableness review) over the amounts Chism sought to charge his client.

> The fee a lawyer collects for legal services must be reasonable. Attorney fee agreements are subject to continued review for reasonableness over the course of the agreement.

Holmes v. Loveless, 122 Wn. App. 470, 473, 94 P.3d 338, 339 (2004). The in-house agreement Chism proposed and entered into was in substance identical to the attorney fee agreement that would have remained in place had he continued as outside counsel practicing out of his house. RPC 1.5 draws no distinction requiring its terms to apply to the latter arrangement but not the former. It was error for the trial court to find such a distinction as a matter of law.

Had RPC 1.5 remained in the case at trial, it would have been obvious that Chism's claims required adjudication of the reasonableness of the sums he sought, meaning his claims could not become liquidated until after that adjudication concluded. The award of prejudgment interest (although erroneous for an independent reason addressed in the next section), would not have happened had RPC 1.5 remained in the case.

Removing RPC 1.5 from the disgorgement adjudication also minimized the inequity of the compensation modifications that Chism proposed, persuaded his client to go along with, and then sued to enforce.

> Once the attorney-client relationship is established, any modification of the fee arrangement becomes subject to the fiduciary obligations and the well-established presumptions. *The courts have generally given particular attention and scrutiny to fee contracts made or altered during the attorney-client relationship.*

Perez v. Pappas, 98 Wn.2d 835, 841, 659 P.2d 475, 479 (1983) (emphasis added).

Where an attorney-client relationship has commenced, and the lawyer has thereby assumed fiduciary duties to act in the client's best interests, an alteration of the compensation arrangement is "fraught with the potential for conflicts of interest and for taking undue advantage of the client," "because the client has placed her trust and confidence in the lawyer and expects the lawyer to represent the client's interests." Andrews *et al.*, *The Law of Lawyering in Washington*, Ch. 9 at 5 (WSBA 2012). Therefore, post-retainer modifications to compensation agreements are viewed with great suspicion, and the usual rule is that they are presumed to be fraudulent and unenforceable unless the attorney proves they were the result of fair dealing. *Id.* at 5-6.

Because the trial court's discretion upon finding Chism in violation of his fiduciary duties includes voiding the attorney's improper fee agreement entirely or ordering complete disgorgement of his fees, when weighing the remedy appropriate for Chism's professional misconduct the trial court should have had the entire range of his fiduciary violations to consider, including his breach of the duties in RPC 1.5.

VII. Awarding interest on Chism's attorney compensation award, when the claim amounts required adjudication of their reasonableness (and were ultimately found unreasonable) was error.

The award of prejudgment interest depends on whether a claim is liquidated. That issue is a question of law, reviewed de novo. *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 536, 128 P.3d 128, 133 (2006) ("The dispositive question, then, is whether the damages were liquidated. This is a question of law, and our review is de novo.").

> Damages are liquidated if the evidence furnishes data that, if believed, made it possible to compute the amount owed with exactness. That is, that the defendant at the time of the transaction was able to ascertain the amount owed. A claim is unliquidated if the facts proved did not permit an exact sum to be fixed. *A claim is unliquidated, for instance, if the amount must be arrived at by a determination of reasonableness.*

McConnell, 131 Wn. App. at 536 (citations omitted, emphasis added). When adjudication of a disputed claim requires adjudication of reasonableness, the ultimate award is inherently subject to discretion, and

is therefore not liquidated. That is true of all claims, whether they seek attorney fees or other monetary amounts.

> Where a defendant has challenged the reasonableness of the amount awarded for extra work arising outside of the contract, the award is unliquidated, "because reliance upon opinion and discretion was necessary in determining the reasonableness of the amounts expended". "A claim is unliquidated if the principal must be arrived at by a determination of reasonableness."

Kiewit-Grice v. State, 77 Wn. App. 867, 872, 895 P.2d 6, 9 (1995) (citations omitted).

> A claim is unliquidated if the principal must be arrived at by a determination of reasonableness.
>
> The question of reasonableness of the attorneys' fees expended by Drake was determined by the jury. Until that was resolved by the jury, the claim was unliquidated.

Tri-M Erectors, Inc. v. Donald M. Drake Co., 27 Wn. App. 529, 537, 618 P.2d 1341, 1346 (1980).

A claim for attorney fees can be liquidated if its reasonableness is not disputed. *See Flint v. Hart*, 82 Wn. App. 209, 225-26, 917 P.2d 590, 599 (1996). But the reasonableness of the amounts sought by Chism below *was* disputed. And indeed, the adjudication below specifically found those amounts were unreasonable.[149]

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[149] CP 2457 (Finding of Fact No. 67) (Chism's proposal for $310,000 bonus "was neither fair nor reasonable."); CP 2478-79 (the basis for Chism's compensation claims was "unfair and unreasonable to Tri-State"); CP 2490 ("Mr. Chism failed to meet his burden of proving that the

The unliquidated nature of Chism's claims would have been more obvious had the trial court not excluded consideration of RPC 1.5 by partial summary judgment prior to trial. But the remaining RPC/fiduciary requirements still required adjudication of the reasonableness of the amounts Chism sought to collect, and the trial court found Chism's compensation modifications to be unreasonable even without resort to RPC 1.5. Chism's claims were therefore unliquidated, and the trial court erred by awarding prejudgment interest on them.

Conclusion

Chism shows no error by the trial court in the disgorgement it found appropriate to Chism's compensation and the denial of punitive damages on compensation that Chism was not owed. The judgment of the trial court should be affirmed in those respects. But the trial court erred in awarding double damages on the $200,000 in compensation found to be owing, and that award should be reversed. Chism's claims were subject to a bona fide dispute (in which Tri-State substantially prevailed). Tri-State's failure to pay the $200,000 amount was therefore not 'willful.'

The claims that led to the $200,000 award all required a determination of reasonableness, and the amounts claimed were ultimately

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transaction he proposed to Larry in March 2012 was fair and reasonable to Tri-State.").

all found to be unreasonable. The trial court erred by awarding $72,460.27 in prejudgment interest on unliquidated claims.

The trial court also erred in awarding virtually all of Chism's litigation expenses, believing itself compelled to do so despite the professional misconduct that gave rise to this dispute between an attorney and his client. That award should be reversed. This court should either remand with direction that the trial court award only attorney fees and expenses unrelated to the RPC/fiduciary duty issues in the case, or deny fees altogether.

RESPECTFULLY SUBMITTED this 2nd day of September, 2015.

ASHBAUGH BEAL

By _____
John S. Riper, WSBA #11161
Attorneys for Respondents/Cross-Appellants

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of this *Brief of Respondents* has been made this ___ day of July, 2015, by sending copies thereof to counsel in the manner indicated below:

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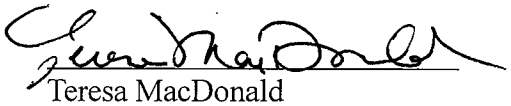
I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.



Teresa MacDonald

APPENDIX

The Honorable Ken Schubert

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

GEOFFREY CHISM, Plaintiff, vs. TRI-STATE CONSTRUCTION, INC. and LARRY AGOSTINO, Defendants.	NO. 12-2-32541-3 SEA FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING FIDUCIARY DUTY COUNTERCLAIM AND AFFIRMATIVE DEFENSES

I. INTRODUCTION

This Court presided over a month-long jury trial in this matter. Plaintiff Geoffrey Chism ("Mr. Chism") claimed breach of contracts for wages in the amount of $750,000, and willful withholding of those wages. Defendants Larry Agostino ("Larry")[1] and Tri-State Corporation ("Tri-State") asserted contractual defenses of undue influence, a bona fide dispute defense to the claim of willful withholding, and put on evidence supporting their allegation that Mr. Chism, as Tri-State's General Counsel, owed and breached fiduciary duties to the Corporation.

[1] Because there are multiple individuals involved in this case who share the Agostino last name, this Court refers to them by their first name without intending any disrespect.

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The jury rendered a verdict in Plaintiff's favor on the contracts and wage clams; it rejected Defendants' undue influence contract defense and determined there was no bona fide dispute to justify non-payment of wages. On the fiduciary duty claim, the jury provided an advisory opinion pursuant to CR 39(c) – without the benefit of testimony from the parties' experts – that the bonus awards were based on an arrangement that was fair and reasonable, free of undue influence, and based on a full and fair disclosure of the facts.

The Court previously determined that Tri-State's fiduciary duty claim is for the Court to resolve, not the jury; namely, deciding whether Mr. Chism owed a fiduciary duty to Tri-State under the Rules of Professional Conduct ("RPCs") or common law, the contours of that duty, and determining whether disgorgement of wages is appropriate for any alleged breach. As explained in detail below, this Court now finds and concludes that Mr. Chism owed a fiduciary duty, that he breached that duty and the duty he owed under the common law, that he violated the applicable RPCs, and that he should disgorge a portion of the bonuses he received as a result.

In making the findings of fact and conclusions of law set forth below, the Court has considered the evidence and the arguments from counsel throughout trial and in post-trial hearings on June 30, 2014 and September 30, 2014. The Court finds and concludes as follows:

II. FINDINGS OF FACT

1. Founded in 1957, Tri-State Construction is a family-owned construction firm that provides general contractor services. Ron, Tom, and Larry Agostino are the current owners of Tri-State. Their father, Joe Agostino, formed the company in the early 1960's, and the brothers worked their way up in the company from being laborers to project foremen to eventually holding management positions. Joe eventually turned the company over to his three sons, appointing Ron, the middle son, as President in 1996. Larry and Tom joined Ron as

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members of Tri-State's Board of Directors ("Board") sometime in the mid-2000s, about the time Joe died. As Directors, Larry and Tom shared responsibility for running the company, but they focused primarily on their particular areas—Tom overseeing Tri-State's equipment and Larry dealing with labor, safety, and real estate issues. Although the brothers spoke informally on an ongoing basis, Larry and Tom generally relied on Ron for guidance of the company as a whole.

2. Mr. Chism began working with Tri-State as outside counsel in the early 1980s.[2] Over the next three decades, Mr. Chism developed relationships of mutual trust and loyalty with Joe Agostino, and Ron.[3] During that time, Mr. Chism became Tri-State's primary attorney, performed the majority of the company's general legal work, and was perceived by himself and Tri-State as the company's General Counsel. He initially reported to Joe, and later reported to Ron, who became President in about 1996.

3. Ron and his two brothers, Thomas and Larry, currently serve as Tri-State's three corporate directors; the brothers are also Tri-State shareholders.[4]

4. Mr. Chism's financial arrangement with Tri-State changed several times over his long relationship with the company.

5. For the first two decades, Mr. Chism billed Tri-State for legal services on an hourly basis under a conventional billing arrangement.[5]

6. In late 2002, Mr. Chism began charging a flat monthly fee for non-litigation matters while continuing to bill litigation matters separately on an hourly basis.[6] The non-litigation matters

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[2] Exhibit 9 (Mr. Chism email to Ron, Sep. 22, 2010) ("I trust you know how much I have appreciated and enjoyed working for you and Tri-State for these last 26 years.")
[3] Plaintiff's Amnd. Compl. ¶¶ 3.1, 3.3; Defendants' Answ. To Amnd. Compl. ¶¶ 3.1, 3.3.
[4] *E.g.*, Exhibit 352 (March 2012 board resolution listing Ron, Tom, and Larry as directors, shareholders, and shareholder-trustees for several Agostino family trusts).
[5] Amnd. Compl. ¶ 3.4; Answ. ¶ 3.4.
[6] Exhibit 6.

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were characterized as "General Counsel" ("GC") services that were expected to be "far-reaching and broadly encompassing" and included "all of [Mr. Chism's] personal time on all matters... other than matters that are in formal dispute resolution."[7] Mr. Chism "encourage[d] the officers and project management personnel for Tri-State to contact [him] on any matter at any time."[8]

7. Mr. Chism repeatedly testified that he would "do whatever it takes" and "whatever Tri-State asked" under the flat monthly fee billing arrangement.

8. Mr. Chism's flat fee began at $10,000/month in November 2002.[9] At the time, his hourly fee was $325 per hour.[10] However, the December 2002 letter did not refer to Mr. Chism's hourly rate or indicate whether his services under the retainer were expected to be limited to a specified number of hours or in any other way, other than that they would not include litigation and other matters in formal dispute resolution ("litigation"), for which Mr. Chism would continue to bill by the hour.

9. After the inception of the monthly retainer in December 2002, Mr. Chism continued to track his time spent on Tri-State litigation matters and to submit detailed monthly invoices showing time worked and tasks performed on those matters.

10. In or about February 2003, Mr. Chism raised his hourly rate for Tri-State's litigation matters to $350, effective for work he had performed in January 2003.[11]

11. In or about March 2004, Mr. Chism raised his hourly rate for Tri-State's litigation matters to $375, effective for work he had performed in February 2004.[12]

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[7] Exhibit 6.
[8] *Id.*
[9] Exhibit 401.
[10] Exhibit 300.
[11] Exhibit 29A.
[12] Exhibit 30A.

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12. In January 2005, Mr. Chism increased the monthly GC retainer to $12,000/month.[13]

13. In or about March 2007, Mr. Chism raised his hourly rate for Tri-State's litigation matters to $400, effective for work he had performed in February 2007.[14]

14. By July 2007, Mr. Chism also began charging a separate monthly flat fee for "Joint Venture/Design Build/405 General Counsel Services" ("JV"). The fees for those were $2,000/month as of July 2007[15] and $5,000/month as of October 2007.[16] Thus, as of October 2007, Mr. Chism's total flat monthly fee was $17,000, comprising of $12,000 (for general GC services) and $5,000 (for JV GC services).

15. In June 2008, Mr. Chism raised his hourly rate for Tri-State litigation matters from $400 to $500.[17]

16. Mr. Chism did not create any documentation similar to the December 2002 letter regarding the increase in his GC retainer, the initiation of the JV I-405 retainer, or the increase in that retainer. He testified that the scope of his work under both retainers was always that he would do whatever it took and whatever he was asked to do. In addition, Mr. Chism testified that all the retainer amounts since 2002 were intended to be a good deal for Tri-State—that is, they were supposed to cover more hours than a simple division of the retainer by Mr. Chism's hourly rate.

17. There was no credible or persuasive evidence that Mr. Chism's flat monthly fee arrangement was ever tied to him working an average number of hours per day, week, or month. From the beginning of this retainer relationship to its end (when he went in-house), Mr. Chism repeatedly testified that his monthly retainer was not tied to a number of hours that he would

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[13] Exhibit 301.
[14] Exhibit 303.
[15] Exhibit 305.
[16] Exhibit 307.
[17] Exhibits 311A, 402A.

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work, rather he would "do whatever it took" and "whatever Tri-State asked" in exchange for a dependable monthly retainer and the benefit of not having to account or bill for his time.

18. Mr. Chism continued to bill hourly for litigation matters, which encompassed "any matter... which there is a formal demand for arbitration, mediation, or litigation."[18] For these matters, Mr. Chism provided contemporaneous monthly statements with detailed descriptions of the work performed.[19]

19. In summary, over a six-year period Mr. Chism's hourly billing rate increased by 54%, beginning at $325/hour in December 2002,[20] rising to $350/hour by February 2003,[21] $375/hour by March 2004[22] and through at least February 2005,[23] $400/hour by March 2007[24] and through May 2008,[25] and $500/hour in June 2008.[26]

20. During that same period of time, other members of Mr. Chism's firm worked on Tri-State matters and charged substantially lower rates; for instance, $225/hour (versus $325/hour) in December 2002[27] and $175/hour and $265/hour (versus $500/hour) in June 2008.[28]

21. During the entire time Mr. Chism represented Tri-State as outside counsel, Tri-State did not once pay him a bonus.

22. Sometime in 2008, Mr. Chism told Ron he was planning to leave his law firm and work for a few existing clients out of his home. Mr. Chism proposed that he become a Tri-State employee and provide his services to the company as in-house GC. Mr. Chism preferred

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[18] Exhibit 6.
[19] See Exhibits 300, 29A, 30A, 302A, 303, 304, 311A, 402A.
[20] Exhibit 300.
[21] Exhibit 29A.
[22] Exhibit 30A.
[23] Exhibit 302A.
[24] Exhibit 303.
[25] Exhibit 311A.
[26] Exhibit 402A.
[27] Exhibit 300.
[28] Exhibit 402A.

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becoming an employee to continuing as outside counsel because he wanted healthcare coverage and did not want to deal with obtaining coverage on his own. He considered it important that he not be required to keep timesheets.

23. Mr. Chism proposed that he be paid a salary of $190,000. He testified that he came up with that number by multiplying the monthly total of his two retainers-$17,000-by 12, then reducing the $204,000 annual total by $14,000 to reflect the extra costs of healthcare and taxes he estimated the company would have to pay for him as an employee. Mr. Chism testified the proposal was supposed to give Tri-State effectively the same deal it had under his two retainers: he was going to continue doing what he had done under the retainers, and coming in house was a change only in format, not substance. Mr. Chism also testified the arrangement was going to continue being a good deal for Tri-State.

24. Mr. Chism told Ron he would continue to do "whatever it takes" other than litigation work, for which Tri-State would need to hire outside counsel. Mr. Chism also told Ron his becoming an employee and in-house GC would save Tri-State money, and Ron accepted the proposal for that reason.

25. At the time of hiring, the parties did not discuss the number of hours Mr. Chism would be expected to work.

26. Although Mr. Chism testified he believes documenting new arrangements is good practice, he admits he did not document the terms of the new employment arrangement. He also did not advise Ron to document the new arrangement or to consult with anyone else about it. Mr. Chism failed to do these things because he and Ron understood that there would be no significant changes in the general parameters of his arrangement established in the December

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2002 letter, other than that Mr. Chism would now be an employee and be paid a salary and basic benefits rather than monthly retainers.

27. Ron informed Tri-State's Controller, Kristi MacMillan, that Mr. Chism was coming on as a full-time Tri-State employee. Ms. MacMillan understood that meant Mr. Chism would generally be working 40 hours a week, and she enrolled him to receive Tri-State healthcare coverage, showing him as working 40 hours per week.[29] Tri-State's health plan requires employees to work at least 32 hours a week to be eligible. Ms. MacMillan testified that she would not have enrolled Mr. Chism for healthcare benefits nor shown him as working 40 hours per week had she known he was only expected to work part time.

28. Mr. Chism is the only in-house lawyer that Tri-State has ever hired. Similar to his work as outside counsel, Mr. Chism's employment arrangement with Tri-State did not provide for or otherwise contemplate the payment of any bonuses to him, annual or otherwise.

29. Mr. Chism continued to invite Tri-State employees to contact him with any legal questions.[30] As in-house GC, Mr. Chism did not track his hours because his salary covered all of his work -- litigation and non-litigation tasks, legal and non-legal tasks, and paralegal/associate and partner-level tasks.

30. As in-house General Counsel for Tri-State, Mr. Chism did not track or record the matters he worked on or the time he spent on them. He did not work a regular schedule, such as from 9:00 a.m. to 5:00 p.m., Monday through Friday. For the first couple of years as an employee, Mr. Chism worked primarily from his home or other locations, and he continued to do so throughout his employment with Tri-State.

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[29] Exhibit 371.

[30] *E.g.*, Exhibit 14, Chism email to several Tri-State employees ("Don't feel shy about calling me for anything.")

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31. Mr. Chism used a laptop and his home desktop computer for his Tri-State work. He saved his Tri-State work on those computers, not to Tri-State's computer server. He also used his own email address and did not use a Tri-State email address or Tri-State's email server for his email correspondence.

32. During the time he served as in-house GC for Tri-State, Mr. Chism continued to do some work for other clients.

33. Mr. Chism advised on legal matters ranging from contract disputes to employee termination, and his job included hiring and oversight of outside lawyers, including informing Tri-State when outside counsel was needed, reviewing outside lawyers' fees, and advising Tri-State as to which fees to pay.[31]

34. Ron did not write letters for Tri-State, and Mr. Chism drafted or "ghosted" letters, emails, and other documents for Ron's signature or transmission. Ron did not draft contracts, and he relied on Mr. Chism and his project managers to review contracts that would go to Ron for his signature. Mr. Chism was the person to whom Ron and Tri-State's project managers went for advice when they had questions about contract issues. Mr. Chism testified he was aware of these things, and he hoped Ron would rely on him to advise whether agreements were acceptable and whether they protected Tri-State's interests.

35. As in-house GC, Mr. Chism determined and recommended when Tri-State needed lawyers other than himself. Mr. Chism also recommended specific attorneys with the appropriate expertise, retained those individuals, oversaw their work, and reviewed their invoices. Ron trusted Mr. Chism to advise him when Tri-State needed other counsel, and trusted and deferred to Mr. Chism's judgment regarding the need for and choice of other counsel.

[31] *E.g.*, Exhibit 326.

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36. Mr. Chism conceded that his work as in-house GC included tasks that a first-year or third-year lawyer or even a non-lawyer could do.

37. In September 2009, the Tri-State Board of Directors ratified the fiscal year 2009 salaries and bonus payments for "key employees including certain officers"; the three Agostino brothers, who were also Tri-State's directors and shareholders, received salaries between $101,000 and $103,000, and each received a bonus of $525,000.[32] The Board ratified bonuses for four additional employees, who were each corporate Vice Presidents: Loren Hatfield received a salary of $89,664 and a bonus of $7,000; Larry Thompson received a salary of $123,820 and a bonus of $25,000; Greg Ritke received a salary of $126,260 and a bonus of $142,000; and Greg Cearley received a salary of $121,000 and a bonus of $230,000.[33] Mr. Chism did not receive a bonus for fiscal year 2009.

38. In September 2010, after about twenty months as an in-house lawyer, Mr. Chism raised the concept of his receiving a bonus. He proposed a new arrangement with Ron whereby he would receive a retroactive discretionary bonus structure to his base salary of $190,000 plus benefits, "effective as January 1, 2010."[34] He testified that he presented the new arrangement to Ron as more beneficial to Tri-State than simply raising his salary because he would be paid for only the time he actually worked and he would only be paid for his extra hours at the end of the fiscal year, and the amount of the bonus would be up to Ron's discretion.

39. Ron agreed to this arrangement and Mr. Chism drafted their agreement and emailed it to Ron ("September 2010 Memo").[35] Ron initialed a copy,[36] and Ron also forwarded the email to his brothers, the other two Tri-State directors.[37]

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[32] Exhibit 7, p.2-3.
[33] Exhibit 7, p.2-3.
[34] Exhibit 9.
[35] Exhibit 9.
[36] Exhibit 57

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40. The September 2010 Memo began by clarifying that Mr. Chism's $190,000 annual salary was based on working part-time at 1.5 hours/day, not full-time:

> My current compensation, which believe it or not we originally set over ten years ago, is based on me spending an average of less than an hour and a half a day on Tri-State matters, or about seven hours a week. It has always taken a little more than that to get things done but, until the last year or two, I think the arrangement worked well for both of us. Needless to say, for the past couple of years the time requirements have been a little more demanding.[38]

41. That memo was the first time Mr. Chism ever stated that his compensation covered a particular number of hours.

42. For the first time in the 25+ year history of his representation of Tri-State, as either outside or in-house counsel, Mr. Chism's arrangement also added a bonus structure:

> 2. Immediately prior to the end of Tri-State's fiscal year I will give you my best estimate of the total amount of time I spent during that year on Tri-State matters. I will defer to your judgment as to what bonus/adjustment you feel is appropriate to compensate for any effort over the 1.5 hour a day base. You can make the bonus/adjustment any time you want so as to include it in either the past or upcoming fiscal year. I am a calendar year taxpayer so the timing doesn't make any difference to me.[39]

43. Under the new bonus structure, at the end of each fiscal year (September 30), Mr. Chism would submit an annual estimate of the time he spent on all Tri-State matters and Ron would use his judgment to determine an "appropriate" "bonus/adjustment" to compensate Mr. Chism for work done over the "1.5 hour a day base."[40]

44. Ron was not aware at the time he received Mr. Chism's September 2010 memo of a seven or 7.5-hour (referred to for convenience as "7.5" hour) base for Mr. Chism's salary. According to Ms. MacMillan, Ron asked her to calculate how much per hour Mr. Chism was being paid

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[37] Exhibits 58.
[38] Exhibit 9.
[39] Exhibit 9.
[40] Exhibit 9.

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if his salary of $190,000 only covered 7.5 hours a week. Ron would not have needed to obtain such a calculation if he had agreed to such an arrangement prior to September 2010.

45. Despite the deference provided by these terms, the bonuses were, in practice, calculated by simply multiplying Mr. Chism's best guess at the end of Tri-State's fiscal year as to the number of excess hours over 1.5 hours/day by the $500/hour outside rate that Mr. Chism had charged during the six months prior to moving in-house. Like the salary, the bonus structure applied to all of Mr. Chism's work; it did not distinguish between litigation and non-litigation tasks, legal and non-legal tasks, or paralegal/associate and partner-level tasks.

46. As part of the September 2010 agreement, Mr. Chism and Ron also agreed that Tri-State would award a bonus to Mr. Chism for his past work during the previous fiscal year (FY 2010.)[41] This bonus was calculated under the new bonus structure. Mr. Chism provided the hours estimate and referenced his $500/hour rate in a September 30, 2010 email:

> As per our recent discussion regarding my compensation, we agreed that I would provide you with an estimate of the actual time I spent on Tri-State matters at the end of your fiscal year, September 30. ***
>
> The reference to the 1.5 hour a day base is to the fact that my base compensation was originally set on the assumption that I would average about 1.5 hours a day, or 380 hours a year on Tri-State matters at my old hourly billing rate of $500 per hour.
>
> This has been, as you know, a pretty busy year. In addition to the routine issues, I have spent a considerable amount of time on several somewhat out-of-the-ordinary matters including the Ploegsma grievance/arbitration, the Ritke matter, the DEA claim/litigation, and, of course, Canada.
>
> As we discussed this morning, realistically I have probably been averaging something over 60% of a normal work day on your matters. To be conservative, let's call it 50%. That translates into 1,000 hours of time, of which 380 hours have been covered by my base compensation.
>
> As I have said, I defer to you and your sense of fairness to make whatever adjustment you think is right.[42]

[41] Exhibit 11.

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47. Although not actually stated, Mr. Chism's memo essentially requested a $310,000 bonus: 1,000 hours minus 380 hours times $500 an hour.

48. In addition, according to the September 2010 memo, Tri-State would pay for/reimburse, retroactively for the FY 2010 year and going forward, Mr. Chism's bar dues, professional insurance premiums, cell phone and email data charges, and continuing legal education expenses. Tri-State would also provide Mr. Chism a company car – a new Mercedes Benz and, until the car was provided, would reimburse him for his gas, maintenance, repairs, and insurance for use of his own vehicle. Mr. Chism had not charged Tri-State for any of those expenses when he was outside counsel or during the prior 20 months of working in-house.

49. The underpinnings cited by Mr. Chism for both the bonus structure and the actual bonus he proposed to Tri-State were inaccurate in several key respects. First, Mr. Chism's claim that his current compensation had been set over ten years ago was not accurate. Mr. Chism's retainer arrangement did not even begin until late 2002, or eight years prior to September 2010. But more importantly, Mr. Chism's "current compensation" of $17,000 a month was based on his monthly retainer set in October 2007, which was only 15 months before he went in-house. During those fifteen months, Tri-State only paid him $500 an hour for the last six months – a $100 an hour increase, i.e., an increase of 25%, from the highest rate Tri-State had previously ever paid him. Mr. Chism was far more familiar with his rate history than Tri-State.

50. Second, Mr. Chism's claim that his retainer arrangement with Tri-State equated to him spending an average of less than an hour and a half a day on Tri-State matters, or about seven hours a week was contrary to his repeated testimony that in exchange for the retainer, he would do whatever Tri-State wanted no matter how long it would take. That Mr. Chism's

[42] Exhibit 10.

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retainer was not based on an expectation of his spending less than an average of an hour and a half a day or about seven hours a week on Tri-State matters finds further support in the fact that there is no correlation between his hourly rate and his monthly retainer. As the following chart shows, Mr. Chism's hourly rate would increase without a commensurate increase in the retainer, and his retainer would increase without a commensurate increase in his hourly rate:

DATE	Retainer	Rate	"Hours" per month
November 2002	$10,000	$325	30.77
February 2003	same	$350	32
March 2004	same	$375	26.66
January 2005	$12,000	same	32
March 2007	same	$400	30
July 2007	$14,000	same	35
October 2007	$17,000	same	42.5
June 2008	same	$500	34

51. Even assuming that he based his monthly retainer on the assumption that he would work a certain number of hours a day, he never worked less than an average of an hour and a half a day or about seven hours a week, with the exception of a ten month period from March 2004 to January 2005. And during the critical time when his "current compensation" was $17,000 a month, dividing that retainer by his hourly rate would mean that Mr. Chism worked anywhere from 2.13 hours per day/10.6 hours a week to 1.7 hours per day/8.5 hours a week.

52. Finally, Mr. Chism mischaracterizes his salary as "originally set on the assumption that I would average about 1.5 hours a day, or 380 hours a year on Tri-State matters at my old hourly billing rate of $500 per hour." Were the cost of his benefits included, Mr. Chism would actually owe 408 hours a year ($204,000 ÷ $500/hour), not 380 hours. Mr. Chism subtracts his salary, not his salary with benefits, when he subsequently provides his estimate

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of hours worked for the bonuses described below, thus effectively double-charging Tri-State for benefits.

53. Mr. Chism crafted his September 2010 memo and September 30, 2010 emails as though the new arrangement he sought was a direct outgrowth of his and Tri-State's longstanding practice, which convinced Ron that Tri-State owed Mr. Chism more money for the same work that Mr. Chism had earlier agreed to perform for a fixed salary—including the work Mr. Chism had already performed in FY 2010. In so doing, Mr. Chism laid the foundation for seeking compensation that exceeded even what he would have been paid as outside counsel, while enjoying the guaranteed income, benefits, and freedom from timekeeping of his inside-counsel position.

54. Neither Tri-State's nor Mr. Chism's respective experts were aware of a single instance in the country when an in-house attorney was paid a bonus at his or her former outside counsel hourly rate based on the number of hours over a certain number of hours a day he or she worked, which hours he or she would estimate at the end of the year.

55. Mr. Gordon Kamisar, an expert in the field of placing attorneys in in-house positions and one that this Court found to be credible and knowledgeable, testified that Mr. Chism's modified arrangement resulted in compensation far in excess of the market range for his GC position. Mr. Kamisar testified the market range for similarly-situated in-house GC positions in the Seattle area is $150,000 to $250,000 for full-time work. Mr. Kamisar's testimony also established that the reasonable range for bonuses for such in-house GC positions is between zero and 20 percent of the lawyer's base salary. None of the experts testified to bonuses being given to reward an in-house lawyer for merely working full time or even less than full time.

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56. Mr. Chism's $190,000 salary was within the customary range for in-house GC working full time. In addition to the healthcare coverage and 401(k) contributions he was already being provided, under his modified compensation arrangement Mr. Chism obtained reimbursement of a number of expenses he had previously borne himself. Yet in FY 2010, Mr. Chism also convinced Ron to pay him a bonus of $310,000 for working what Mr. Chism said had been half-time work. This was 163 percent of Mr. Chism's base salary, which according to Mr. Kamisar would be more than eight times the upper limit of typical bonuses for an in-house GC working full time.

57. In an effort to put his bonus in context, Mr. Chism cited Tri-State's gross revenue during a couple of good years and the bonuses the Agostinos gave themselves in those years-FY 2009 and 2010-implying that his requested bonuses were similar in size and reasonable given the company's income. But Mr. Chism's proposed compensation scheme was wholly inconsistent with Tri-State's compensation practices, giving him the benefits of being an employee and even an owner, with none of the risks or downside to which the owners and other employees were subject. Bonuses aside, Mr. Chism's $190,000 salary significantly exceeded the salaries of the Agostinos and the company's officers, all of whom worked full time.[43] The owners intentionally kept their salaries fairly low, averaging about $101,700 in 2009 and $111,000 in 2010. They took the risk of receiving small or no bonuses in less profitable years, which was balanced by the possibility of receiving good bonuses in more profitable years.

58. Ron's practice was to give bonuses to employees only when the company was profitable. The few bonuses he gave to employees that exceeded their salary were based on a percentage of individual project managers' net profit produced for the company-that is, any

[43] Exhibits 7 and 322.

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losses from a project reduced the profit made from others. The numbers were calculated by Ms. MacMillan. In stark contrast, Mr. Chism's proposed bonus arrangement was founded on his outside-counsel hourly litigation rate and his "estimate" of hours worked, with no requirement that he track his time in any way, make a profit for the company, or even that the company be profitable. Under his proposed arrangement, if he worked full time like all other salaried Tri-State employees, he would have been entitled to ask for a bonus that would have resulted in total compensation of one million dollars a year, well in excess of anyone at Tri-State.

59. Mr. Chism knew that Tri-State had never employed in-house counsel before Mr. Chism, and Ron had no knowledge about how in-house counsel are typically paid. Mr. Chism did not advise Ron that he was acting in his own personal interest and not as Tri-State's attorney in proposing the new compensation arrangement. Mr. Chism did not advise Ron to seek independent review of the September 2010 memo or the arrangements it described. Ron accepted Mr. Chism's representations about their past arrangements as true. As Mr. Chism could have predicted, Ron never considered obtaining independent review of the memo or the proposed modified arrangement, because he completely trusted Mr. Chism and assumed the proposed arrangement must be reasonable and in Tri-State's interest.

60. Mr. Chism did not explain that the September 2010 modified compensation arrangement was very different than his prior retainers, litigation charges, and salary, and that whereas it had made sense for Tri-State employees to call him as much as they wanted when he was on a flat retainer or salary for all hours worked, he was now asking to be paid $500 an hour for everything he did over 1.5 hours a day, including tasks he would not have charged at that rate or at all as outside counsel, without tracking his time as he had done for litigation. Mr.

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Chism did not advise Ron that this new arrangement could result in Tri-State paying him more than if he served as outside counsel and simply charged by the hour. To the contrary, Mr. Chism testified he told Ron the new arrangement would be cheaper than raising his salary, because Tri-State would only pay him for hours actually worked.

61. Ron forwarded this email to his brothers[44] as well as to Ms. MacMillan.[45]

62. Tri-State calculated Mr. Chism's bonus using the identical numbers provided by Mr. Chism in his September 30, 2010 email: 620 excess hours (1000 - 380) x $500/hour rate, or $310,000.[46] Tri-State paid the $310,000 bonus to Mr. Chism over three installments.[47]

63. Mr. Chism's 2010 proposed new compensation arrangement provided for potential bonuses based on his reported "best estimate" of hours worked in the past year. He interpreted that language as leaving him free not to track or record his time in any way, and he did not do so. Although he kept an electronic calendar, he testified he did not include all his activities in it. He testified that he deleted documents, including whole email files, when he considered a matter complete. Mr. Chism also worked at home much of the time, maintained a separate email account, and worked on computers that were not tied to Tri-State's server. As a result, the company did not have a complete record of his work, but only what he chose to share with it, leaving any assessment of the time he spent on Tri-State matters and the tasks he performed practically entirely within his own control. Mr. Chism testified that he "just knew" how much he was working on Tri-State matters. At trial he was unable, without reviewing records, to recall details such as how much he worked on a particular project, how

[44] Exhibits 58 and 59.
[45] Exhibit 57.
[46] Exhibit 11.
[47] Exhibit 372.

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much he worked in any week, month, or year, or whether he actually went on the vacations listed on his calendar.

64. By proposing that he would report his time only once a year, with no requirement of keeping records, Mr. Chism further added to the likelihood that his "best estimate" would be neither reliable nor subject to challenge. He also limited his client's ability to anticipate its potential exposure for the cost of his work on an ongoing basis inasmuch as, unless Tri-State proactively sought the information from him, the company would not know until the end of the year how many hours Mr. Chism claimed to have worked.

65. Mr. Chism's estimate of his hours for FY 2010, offered in his September 30, 2010 email to Ron as justification for a $310,000 bonus, is not reliable. Mr. Chism provided Ron no documentation or details about his work, other than to say it included four "out-of-the-ordinary" matters: the Ploegsma grievance/arbitration; the Ritke matter; the DEA claim/litigation; and the Canadian project. Tri-State was represented by outside counsel on each of those matters. Mr. Chism admitted at trial that one of those matters, the Ploegsma arbitration, did not take much of his time, and he deleted his email file on it at an unspecified time after the arbitration decision was issued. In an email to Ron in December 2010, Mr. Chism stated that any bonus he was awarded for FY 2010 could be attributed to the DEA claim-and all his other work was covered by his "base compensation."[48]

66. Mr. Chism testified that he did not work a regular schedule during FY 2010. His calendar shows a number of multiple-day personal trips to New York, Palm Springs, Los Angeles, Vail, Hawaii, and Whistler during the year, as well as work for other clients than Tri-State, making it even more likely that, without records tracking his time, he could not say with any accuracy how many hours he actually worked.[49]

[48] Exhibit 325.

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67. Mr. Chism testified that he did not recall if he went on some of those trips, which demonstrates the unreliability of his assertions about past events and the time he spent on Tri-State matters. To the extent his memory is so weak that he cannot recall significant events on his calendar, his proposal that he be given substantial bonuses based on only an estimate of his time, with no tracking to ensure its accuracy, was neither fair nor reasonable, and certainly was not in Tri-State's interests.

68. Mr. Chism's proposal that he should be paid $310,000 for FY 2010 was also not fair, because it was based on his misrepresentations about the 7.5 hour a week and $500 an hour foundations for his "base" salary. By starting from those erroneous numbers, he increased the amount of the bonus he proposed as appropriate and was actually paid.

69. At the time Mr. Chism proposed the 2010 modified arrangement, FY 2010 was ending. He had already performed the work on which any additional compensation, i.e., a "bonus," for FY 2010 was based, and had done so under his original salary arrangement, which did not provide for a bonus or reimbursement for the expenses included in the new arrangement. Mr. Chism did not offer or promise to do anything new, nor did he do anything new, in exchange for the $310,000 bonus. He testified that he did not commit to staying at Tri-State for any length of time in exchange for the new, more lucrative arrangement. He also admitted that his agreement under the original salary arrangement was to do whatever it took as far as Tri-State's non-litigation work, and that did not change under the modified arrangement.

70. At its annual meeting, Tri-State's Board of Directors did not discuss Mr. Chism new bonus structure/compensation arrangement. The minutes for that meeting state only generally that "all corporate activity since the last annual meeting and business decisions of the

[49] Exhibit395 (GC 000233-244).

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Corporation's officers, directors and shareholders, while acting for the Corporation are hereby ratified and confirmed."[50]

71. In early 2011, Mr. Chism began to advocate for a change in Tri-State leadership, in particular to provide more support to Ron or replace him as President.

72. By July 2011 Mr. Chism was concerned both that Ron's health condition and memory lapses were impacting his ability to run Tri-State and that everyone at Tri-State knew about the problem.[51] Mr. Chism expressed those concerns in a memo he emailed to Tri-State's accountant on August 4, 2011. In the memo, Mr. Chism said:

> [I]t is widely known that Ron has some issues that are affecting his ability to run the company on a daily basis. . . . [T]he Company needs to acknowledge that he has some health issues (which is [sic] obvious to almost everyone within senior management already) that are going to limit his ability to continue carrying the torch as before . . .

73. Mr. Chism acknowledged he also told the Agostino brothers that Tri-State had a fiduciary duty to tell its partners in the Canadian project about Ron's health. Mr. Chism also said Ron would need to step down as President of Tri-State due to his condition.

74. Mr. Chism testified that despite his own expressed concerns about Ron's health throughout 2011, he did not observe Ron's memory or judgment to be impaired at any time during Chism's employment by Tri-State. However, others, including Ms. MacMillan, Larry, and Tom, all testified that Ron exhibited noticeable memory loss that got worse over time.

75. Ron testified that he had increasing problems with concentration, attention, and memory over time, which, among other things, adversely impacted his ability to follow and understand what he read, including financial documentation.

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[50] Exhibit 322.

[51] Exhibits 332, 333, and 339.

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76. Ms. MacMillan confirmed that Mr. Chism was aware of Ron's impairment and its negative impact on Tri-State both because they spoke about the issue. Her email to Mr. Chism upon his departure from the company in April 2012 also confirmed that he "helped me so much over this past 2 years in dealing with Ron's illness."[52]

77. The evidence demonstrates that Mr. Chism believed Ron's impairment was impacting his ability to run Tri-State. Mr. Chism's testimony to the contrary was not credible.

78. Ron and Tom testified that Mr. Chism offered to replace Ron as President of TRP, the joint venture running the Canadian project. In early October 2011, Ron and Tom decided to accept his offer.[53] Tri-State understood that Mr. Chism's assumption of the role of TRP President meant he might not be able to perform all his usual in-house counsel work, which in fact occurred. Mr. Chism did not request any additional compensation for taking the TRP President position.

79. During FY 2011, Tri-State had a net loss of approximately 27 million dollars, largely attributable to the Canadian project. Mr. Chism helped Tri-State stay in business, preserve its bonding capacity, and avoid default on that project, which in turn, would have cost Tri-State a minimum of 27 million dollars. Tri-State's bonding company representative, Eric Mausolf, testified that Tri-State's risk of failure on the Canadian project was substantial and that Mr. Chism capably handled the troubled project on behalf of Tri-State. The project was a disaster, the owners of the dam involved in the project were ruthless, the work was intense, and the fate of Tri-State was on the line.

80. By mid-October 2011, Mr. Chism was fully aware of the severity of the problem and believed the company was within days of possibly having to shut down. Tri-State exists

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[52] Exhibit 356.

[53] *See, e.g.*, Exhibit 99 (letter to TRP Contractors Limited Partnership, addressing Mr. Chism as "President").

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today because it survived the crisis associated with the Canadian project and it survived that crisis in large part due to Mr. Chism's efforts and hard work.

81. On October 21, 2011, when Mr. Chism and Ron were in the car on the way back from a meeting in Vancouver, B.C. related to the Canadian project, Mr. Chism raised the issue of a bonus for FY 2011. According to Mr. Chism, he did a spontaneous calculation in his head of the hours he had worked during the previous year, multiplied them by $500, subtracted his salary from his total, and came up with a proposed bonus of $500,000, to which Ron agreed.

82. Ron testified, however, that Tri-State was in financial trouble and he could not pay Mr. Chism anything like that. Ron testified that Mr. Chism brought up that he was going to get Tri-State as much as fifteen million dollars on the DEA claim. Ron testified that he told Mr. Chism that Ron could not pay Mr. Chism anything until Tri-State got money out of the DEA claim.

83. Mr. Chism drafted an agreement memorializing their discussion, which Ron signed ("November 2011 Memo").[54] In the agreement, Mr. Chism acknowledged that Tri-State's cash availability was such that he didn't "expect any accrued supplement/bonus" to be paid until the following year and that he was "happy to wait until cash is available."[55] The November 2011 memo, which referred back to the October 21 discussion in the car, said that Mr. Chism's bonus arrangement, which was meant to "account for the additional time spent which was not anticipated in our longstanding flat compensation arrangement," had been operating for "the last couple of years."[56] That statement, apparently intended to give greater weight to the new bonus system, was not accurate: Mr. Chism had just initiated the arrangement regarding a possible bonus one year earlier.

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[54] Exhibit 16.
[55] Exhibit 16.
[56] *Id.*

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84. In the November 2011 memo, Mr. Chism claimed that Ron had already indicated he thought a $500,000 bonus was fair. Rather than writing the email to state that Mr. Chism would not receive the bonus until the DEA money came in, the memo instead said that Mr. Chism did not expect any bonus to be paid until the next year, "maybe out of the DEA settlement."[57]

85. The November 2011 memo went on to say Ron should let Mr. Chism know if he recalled their conversation in the car differently. But Mr. Chism testified that he fully expected Ron to sign the memo. He knew that Ron trusted and relied on him, and that Ron was a man of his word. Once Mr. Chism told Ron they had already agreed to the terms of the November 2011 Memo, Mr. Chism would not have expected Ron to say that Mr. Chism had gotten their agreement incorrectly. Neither Mr. Chism nor any other witness identified any occasion on which Ron disputed Chism's account of events or agreements they purportedly had made.

86. Mr. Chism did not advise Ron that despite Mr. Chism's role as Tri-State's General Counsel, he was acting solely in his own interest and not as Tri-State's attorney in drafting up the November 2011 memo. He did not advise Ron to consult anyone else, including an attorney, about the memo. Trusting and relying that Mr. Chism was acting in Tri-State's best interest, Ron did not believe it was necessary to obtain an independent review of the November 2011 memo and he did not do so.

87. At the time Mr. Chism prepared the November 2011 Memo, Tri-State was losing money. Ron's practice was to give bonuses only when the company made money. The Agostinos did not give themselves any bonus for FY 2011, and Tri-State gave only five other employees bonuses, which were much reduced by 40-50% from what those individuals had received in the past.

88. Tri-State never paid the bonus memorialized in the November 2011 Memo.

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[57] *Id.*

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89. As with his request for a $310,000 bonus for FY 2010, Mr. Chism has not demonstrated he had a reliable basis for estimating his hours worked in FY 2011. He did not track his time. When asked his basis for saying in the November 2011 Memo that he had worked "full time, plus," he testified only that he knows when he is working full time. Yet, he did not work a regular schedule, but rather addressed issues as they came up, sometimes working at night, other days not working at all. He has testified that following the execution of the Canadian contract at the end of August 2010, his work on that project subsided for several months.

90. Mr. Chism testified he first came up with his figures for calculating the FY 2011 bonus in his head during the car ride in which he proposed the bonus to Ron. Mr. Chism's estimate of his hours worked in FY 2011 was nothing more than an educated guess.

91. Mr. Chism's proposal that he should be paid $500,000 for FY 2011 was also not fair to Tri-State because he based it on his underlying premises about the 7.5-hours-a-week and $500-an-hour foundations for his "base" salary, set forth in his September 2010 memo and emails. By starting from those erroneous numbers, he increased the amount of the bonus he proposed was appropriate in his November 2011 memo, on which he based his contract claim in this case.

92. In a meeting in mid-January 2012 regarding the company's financial issues, Ms. MacMillan and Tri-State's accountant said something needed to be put on the books reflecting Mr. Chism's bonus so that the FY 2011 financial statement could be completed. Up to that time, the Agostinos had not agreed to book any amount for a FY 2011 bonus for Mr. Chism, but they agreed to book $400,000 as a liability owed to Mr. Chism.

93. In follow up to the January 2012 meeting, on February 6, 2012, Ms. MacMillan recorded $400,000 as "wages" owed to Mr. Chism in Tri-State's general ledger.[58]

[58] Exhibit 150, p. 2.

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94. Around this same time period, Larry hired attorney Greg Russell. Mr. Chism cites page 139 of the deposition transcript from Tri-State's CR 30(b)(6) deposition and pages 113 and 167 of the deposition of Larry for the contention that Tri-State hired Mr. Russell to advise it regarding Mr. Chism's status as a potential "creditor."[59] None of those pages support that contention nor was there any other evidence that did.

95. Tri-State's 30(b)(6) designee testified that Mr. Williamson suggested that they "think about getting another attorney for corporate matters because now Mr. Chism is a creditor of Tri-State or possible creditor of Tri-State."[60] Larry testified that Tri-State hired Mr. Russell "to replace [Mr. Chism] as our legal counsel, because Mr. Chism, the whole premise was he's going to retire and he would only work on a limited time."[61] Larry confirmed Tri-State hired Mr. Russell to be its lawyer "[o]nly dealing with corporate matters."[62]

96. In short, Tri-State hired Mr. Russell to *replace* Mr. Chism not to advise Tri-State how to resolve the dispute with Mr. Chism. There is no evidence that Tri-State sought or received any advice from Mr. Russell regarding the dispute with Mr. Chism.

97. In March 2012, Larry met with Mr. Chism to discuss his 2011 and a 2012 bonus. Larry had just become President[63] and, according to Mr. Chism, this was the first time Larry negotiated his compensation. Mr. Chism did not provide Larry copies of the September 2010 memos or emails or explain the history of his compensation arrangement with Tri-State. Mr. Chism did not inform Larry that under his September 2010 arrangement with Ron, any bonuses were to be determined at the end of the fiscal year, not mid-year. Mr. Chism did not inform Larry

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[59] *See* Plaintiff's Proposed Findings of Fact and Conclusions of Law, ¶ 79 (citing Sub. No. 213 (Halm. Decl.), Exhibit B (30(b)(6) Dep.), 139; Sub. No. 210 (Halm Decl.), Exhibit E (L. Agostino Dep.), 113, 167).

[60] Sub. No. 213 (Halm Decl.), Exhibit B (30(b)(6) Dep.), 139:16-19.

[61] Sub. No. 210 (Halm Decl.), Exhibit E (L. Agostino Dep.), 168:5-8. Page 113 of Larry's deposition merely discusses when Tri-State hired Mr. Russell, which was in approximately March of 2012.

[62] *Id.*, 168:19.

[63] Exhibit 352.

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that under his arrangement he was to provide his best estimate of his hours for that year, and any bonus was entirely discretionary. Mr. Chism also did not inform Larry that the foundation for his arrangement with Ron, including the 7.5 hour week and $500 an hour premises for his bonuses, was inaccurate.

98. As with his previous estimates of his hours, Mr. Chism's estimate regarding how many hours he had worked in the first half of FY 2012 was not reliable.

99. Larry told him that he would have a hard time collecting the $500,000 because he took advantage of Ron. Mr. Chism admitted he understood Larry's statement to refer to Mr. Chism having taken advantage of Ron's medical condition and the stress of the last year to obtain his agreement to the $500,000 bonus. Mr. Chism testified that he began to walk out of the room because if Larry felt that way then Mr. Chism should not be serving as Tri-State's lawyer or providing legal advice to Larry as Tri-State's President.

100. Although Mr. Chism admits he perceived Larry's accusation as creating a conflict in his continued representation of Tri-State, he continued to negotiate his compensation with Larry without advising him, orally or in writing, that he had a conflict of interest. Mr. Chism also did not advise Larry that he was acting in own personal interest in negotiating his compensation, not as Tri-State's General Counsel, and he did not obtain Larry's consent to Mr. Chism acting in that role. Mr. Chism also did not inform Larry, prior to, during, or in the follow up to their March 28, 2012 negotiation, that Tri-State should consider consulting independent counsel about the proposed terms of Mr. Chism's compensation before any agreement was finalized.

101. Shortly thereafter, Mr. Chism said he had worked a lot of hours during the last six months, for which he would have been paid $500,000 to $700,000 at his $500 hourly rate.

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Those estimates translate to Mr. Chism working 1,190 to 1,590 hours during those six months (1,000 to 1,400 hours plus half of his faulty 380 annual hour estimate). But he eventually said he would accept a $250,000 bonus for that time and $300 an hour going forward if he was paid a minimum salary of $1,500 a week. Mr. Chism also wanted his company computer, cell phone, and the Mercedes Benz when he left Tri-State. Mr. Chism did not commit to continue working for any length of time. Larry agreed to those parameters, but he believed there would be no final agreement until he had a chance to review and sign a written document setting forth all the agreed-upon terms.

102. Mr. Chism had told Ms. MacMillan that he and Larry had reached an agreement to change his compensation from a salary to an hourly rate of $300. Before putting that into effect, Ms. MacMillan told Larry what Mr. Chism said. Larry agreed that Mr. Chism could start being paid by the hour.

103. Mr. Chism was leaving on vacation the next day and said he would prepare a memo of what they had discussed for Larry's review before he left. Mr. Chism drafted the agreement and submitted it to Larry for confirmation.[64]

104. Mr. Chism sent a revised memo on March 29, 2012, which contained a new version of paragraph 6, which Mr. Chism pointed out in his email.[65] Mr. Chism testified that he and Larry had not discussed the substance of paragraph 6, which related to the circumstances in which the agreement could be terminated. Mr. Chism's emails both ended by saying that if Larry found them consistent with his and Mr. Chism's discussion, he should initial two copies of the memo.

[64] Exhibit 20.
[65] Exhibit 21.

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105. Larry reviewed that email and wrote back to object only to paragraph 7, which stated that upon Mr. Chism's departure from the company, Tri-State would give him the computer, cell phone, and the Mercedes Benz that Mr. Chism was using for work.[66] Larry disputed that he had agreed to the transfer of the car and other property. He told Mr. Chism that he would have to deduct $50,000 from the payment they had discussed if Mr. Chism wanted the car. Larry did not object to any of the other terms.

106. On April 4, Mr. Chism responded, "Let's get this resolved first thing Monday when I get back."[67]

107. On April 10, 2012, Mr. Chism and Larry met to follow up on the issue of Mr. Chism's compensation. Mr. Chism said they should get the matter settled. Larry responded that there was no need to talk about it, as Tri-State was not willing to provide Mr. Chism the additional compensation they had discussed. When Mr. Chism asked about the $500,000, Larry said he understood that was still an open issue. Mr. Chism said that under the circumstances, he would have to resign, which he did that same day.[68] Tri-State never paid the $500,000 or $250,000 bonus.

108. Mr. Chism sued Tri-State and Larry Agostino for recovery of $750,000 in unpaid bonuses and damages for Tri-State's willful withholding of wages. Tri-State counterclaimed for breach of fiduciary duty and violation of RPCs 1.5, 1.7, 1.8, and 8.4; however, Tri-State did not bring any claims for legal malpractice. Tri-State also asserted undue influence as a defense and presented evidence to show that Ron suffered from early onset Alzheimer's and that Mr. Chism had known that Ron's judgment was impaired since at least August 2011.[69]

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[66] Exhibit 132.
[67] Exhibit 133.
[68] Exhibit 135.
[69] Exhibit 413.

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109. Prior to trial, then-Superior Court Judge Michael Trickey dismissed the claim on RPC 1.5 (fees).[70]

110. During the period of the month-long trial, the Court heard testimony from Mr. Chism's expert witness, Arthur Lachman, and Tri-State's expert witness, Professor David Boerner, on the subject of lawyers' fiduciary duties. The jury did not hear any testimony from Mr. Lachman or Professor Boerner, and the court did not provide instructions to the jury regarding fiduciary duties.

111. At the end of trial, the parties discussed outside the presence of the jury what instructions and questions the Court would submit to the jury. Tri-State proposed that the Court ask the jury to decide whether the September 2010 arrangement and the $310,000 bonus were enforceable. Mr. Chism objected, arguing that Tri-State could only seek disgorgement in the event it prevailed on its theory and disgorgement was an equitable issue for the court rather than for the jury to decide. Although Mr. Chism was steadfast in his objection to any instruction on that matter being submitted to the jury, his counsel suggested that the Court could ask advisory questions to jury as to whether that arrangement was fair and reasonable, free from undue influence, and made with a full and fair disclosure of the facts upon which the contract was predicated.

112. This Court noted that the commentary to the instruction on restitution, from which disgorgement is derived, allows the court to submit the issue to the jury to obtain an advisory ruling.[71] This Court took Mr. Chism's counsel's suggestion and asked the jury the following three advisory questions as allowed by CR 39(c):

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[70] Sub. No. 90 ("The Court concludes as a matter of law that Plaintiff's status as in house counsel renders the disgorgement of fees for breach of fiduciary duty based on alleged violations of RPC 1.5 unavailable as an affirmative defense or a counter-claim for the Defendants. No Washington case supports the Defendant's legal position on this issue. The Court's ruling does not affect the other alleged RPC violations in this case.")

[71] WPI 303.08 ("Although generally an equitable remedy, the court may elect to submit the issue to a jury because

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QUESTION 1: With respect to Mr. Chism's contention that an enforceable contract arose between himself and Tri-State in or around September of 2010 regarding a modification of his compensation arrangement, whether predicated on Exhibit 9 or otherwise, do you find that Mr. Chism has proven, by a preponderance of the evidence, that the contract was fair and reasonable?

QUESTION 2: With respect to Mr. Chism's contention that an enforceable contract arose between himself and Tri-State in or around September of 2010 regarding a modification of his compensation arrangement, whether predicated on Exhibit 9 or otherwise, do you find that the Mr. Chism has proven, by a preponderance of the evidence, that the contract was free from undue influence?

QUESTION 3: With respect to Mr. Chism's contention that an enforceable contract arose between himself and Tri-State in or around September of 2010 regarding a modification of his compensation arrangement, whether predicated on Exhibit 9 or otherwise, do you find that the Mr. Chism has proven, by a preponderance of the evidence, that he made a full and fair disclosure of the facts upon which the contract was predicated?[72]

The jury answered in the affirmative to all three questions. The jury also found Mr. Chism had proven his contract claims for the FY 2011 bonus of $500,000 and the FY 2012 bonus of $250,000, awarding $750,000 to Mr. Chism, and that Tri-State had willfully withheld these wages, subjecting it to double damages and attorney's fees under RCW 49.52.070 and attorney's fees under RCW 49.48.030. The jury was instructed on, and did not find, undue influence that would have voided these two contracts.

113. On October 1, 2014, the parties appeared for the conclusion of the non-jury portion of the trial. Mr. Chism submitted additional evidence prior to that hearing which the jury did not consider.[73]

III. CONCLUSIONS OF LAW

A. Fiduciary Duties Owed in General.

there is a mixture of equitable and legal issues in the case, or in order to obtain an advisory ruling.").

[72] Jury Verdict form.

[73] Sub. No. 213 (Halm Decl.), Exhibits B, C, D, and E.

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1. As a matter of law, the attorney-client relationship is a fiduciary relationship; an attorney "owes the highest duty" to his client.[74] An attorney must act in and for his client's best interests at all times.[75] An attorney must also act "in complete honesty and good faith" so that he may "honor the trust and confidence" which his client has placed in him.[76] "These duties require full communication and candor."[77]

2. When a lawyer is retained by an organization, his client is the organization "acting through its duly authorized constituents."[78] An in-house lawyer's client is the organization who employs him.[79] An in-house lawyer is still a lawyer; he is subject to the RPCs and "all other laws and rules governing lawyers admitted to the active practice of law in this state."[80]

3. The RPCs capture many of the fiduciary duties that are owed by attorneys. However, the RPCs are not complete; as both sides' experts testified, the fiduciary duties under common law are broader than the RPCs, and a lawyer may breach his fiduciary duty without expressly violating an RPC.

4. Tri-State's expert witness, Professor Boerner, described the history of the fiduciary relationship as arising long before the RPCs,[81] and he characterized the RPCs as "simply a set of rules… that give lawyers guidance as to how they're to perform their obligations"[82] that were "narrower than the fiduciary obligations that lawyers owe."[83]

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[74] *Perez v. Pappas*, 98 Wn.2d 835, 841, 659 P.2d 475 (1983).
[75] *Kelly v. Foster*, 62 Wn. App. 150, 154-155, 813 P.2d 598 (1991).
[76] *Id.* at 155.
[77] *Id.* (citing Black's Law Dictionary 753 (4th rev. ed. 1968))
[78] RPC 1.13(a).
[79] *Id.*
[80] See APR 8(f) (describing limited license to practice for in-house lawyers who are admitted in other jurisdictions).
[81] Fiduciary Duty Proceedings, May 16, 2014, p.13.
[82] *Id.*, p.15, lines 1-3.
[83] *Id.*, p.15, lines 6-7.

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5. Mr. Chism's expert witness, Mr. Lachman, opined that in applying common law and RPCs, the principles that apply to outside lawyers will "apply differently when we're talking about... compensation of employees."[84]

6. RPC 1.7 addresses, among other things, conflicts between a lawyer's personal interest and his client's interest. Under RPC 1.7(a)(2), a lawyer cannot represent a client if "there is a significant risk that the representation of [the client] will be materially limited... by a personal interest of the lawyer" unless certain requirements, such as the client's informed consent in writing, are met.[85] Several comments discuss relationships with organizational clients, but the language is again biased towards outside lawyers.[86] One comment contemplates the conflict of interest that arises when a lawyer seeks employment with his client's opponent or the opponent's law firm, but it addresses the conflict is between the lawyer and his current client, not the lawyer and his potential future employer.[87]

7. Both sides' experts testified to the inherent conflict of interest that exists in matter of legal compensation. As Mr. Lachman stated, "[T]he employee wants to make as much as possible, and the outside lawyer wants to make as possible, and the client, the employer, wants to pay as little as possible."[88]

8. RPC 1.8 provides specific rules for conflicts of interest. RPC 1.8(a) addresses transactions outside of the "ordinary fee arrangements... governed by Rule 1.5."[89] Under this rule, "a lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client" unless certain

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[84] *Id.*, p.104, line 12-14.
[85] RPC 1.7(b).
[86] *See, e.g.,* RPC 1.7, cmt 35 (suggesting that under certain circumstances, "the lawyer and the lawyer's firm" may need to decline representation of a corporate client if the lawyer sits on the board of directors).
[87] RPC 1.7, cmt 10.
[88] Fiduciary Duty Proceedings, May 16, 2014, p.100, lines 9-15. *See also id.* at p.37 (Boerner testimony).
[89] RPC 1.8, cmt 1.

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requirements are met. For instance, the terms must be fair and reasonable, the client must be advised and given the opportunity to seek independent counsel, and the client must give informed consent. Neither the rule nor its comments specifically address inside counsel.

9. In addition to the RPCs, there are numerous cases in Washington State that discuss an attorney's obligations as *outside* counsel; however, Washington case law is silent as to an attorney's obligations as *inside* counsel. There appear to be no Washington cases addressing even the typical dispute that has arisen in other jurisdictions, whether a former lawyer-employee may sue his former client-employer for wrongful discharge. Thus, this issue appears to be one of first impression in Washington.

10. Whether an attorney's conduct violates the RPCs is a question of law.[90] However, there may be material questions of fact as to the exact circumstances and conduct that occurred.[91] The trial court may consider the RPCs in determining whether an attorney breached his fiduciary duty to his client.[92] The trial court or the jury may decide common law breach of fiduciary duty when a client has brought suit against an attorney for legal malpractice.[93]

11. Attorney fee agreements that violate the RPCs are against public policy and unenforceable.[94] The courts give "particular attention and scrutiny" to attorney fee contracts that are "made or altered during the attorney-client relationship."[95] When a lawyer and a client already have an existing relationship and the lawyer seeks to change their fee agreement on "terms more favorable to the lawyer than originally agreed upon," then the new agreement may be void or

[90] *Eriks v. Denver*, 118 Wn.2d 451, 457-458, 824 P.2d 1207 (1992); *see also Behnke v. Ahrens*, 172 Wn. App. 281, 297, 294 P.3d 729 (2012).
[91] *See Valley/50th Ave., LLC v. Stewart*, 159 Wn.2d 736, 746-747, 153 P.3d 186 (2007).
[92] *See Cotton v. Kronenberg*, 111 Wn. App. 258, 266, 44 P.3d 878 (2002).
[93] See Behnke v. Ahrens, 172 Wn. App. 281, 297, 294 P.3d 729 (2012) (stating that trial court's ruling and written findings "made clear" that the trial court intended jury verdict on "common law breach of fiduciary issue" and damages to be binding, not advisory); WPI 107.09-11 (Washington Pattern Jury Instructions for attorney's fiduciary duty, burden of proof, and damages).
[94] *Valley/50th Ave.*, 159 Wn.2d at 743 (citations omitted).
[95] *Perez*, 98 Wn.2d at 841 (quoting R. Mallen & V. Levit, Legal Malpractice § 132, at 235 (2d ed. 1981)).

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voidable "unless the attorney shows that the contract was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts on which it is predicated."[96] An attorney must satisfy the requirements of the RPCs even when dealing with a sophisticated client, although the client's sophistication may be relevant to the satisfaction of those requirements.[97]

B. Mr. Chism Owed Fiduciary Duties to Tri-State

12. Mr. Chism claims that because he was an employee of Tri-State, he had no conflicts of interest, engaged in no business transactions, and owed no fiduciary duty when he negotiated his in-house compensation, because in those matters, his relationship with Tri-State was that of employee-employer rather than attorney-client. Mr. Chism presents two primary arguments to support his position. This Court does not find either persuasive.

13. First, Mr. Chism argues that a lawyer does not represent his employer in personnel matters related to his employment as in-house counsel. Mr. Chism cites to the only Washington State authority on this issue, a 1986 advisory opinion from the WSBA Ethics Committee. The full advisory states:

> A lawyer negotiated with corporate management over an employment contract to serve as legal counsel. The contract provided that part of the lawyer's compensation would be shares in the publicly traded corporation. The Committee was of the opinion that negotiations as described by you in working out an employment contract for the full time job of legal counsel for a corporation does not violate RPC 1.8. It appeared to be an arm's length transaction, and it did not appear that you were in any way giving legal advice to the corporation.

WSBA Ethics Adv. Op. 1045 (1986).[98] Because Tri-State is a corporation that has experience hiring outside lawyers, Mr. Chism claims that, like the subject of this advisory

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[96] *Valley/50th Ave.*, 159 Wn.2d at 743-744 (*citing Kennedy v. Clausing*, 74 Wn.2d 483, 491, 445 P.2d 637 (1968)).
[97] *Valley/50th Ave.*, 159 Wn.2d at 745.
[98] This Court makes three observations regarding the weight it gives this 1986 advisory opinion. First, the Washington Supreme Court has emphasized that that ethics opinions issued by the Bar Association are advisory only, and that the Court is the ultimate arbiter of the RPCs. *See In re Disciplinary Proceeding Against DeRuiz*, 152

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opinion, his own negotiations with Tri-State were arm's length transactions and not subject to any heightened duty.

14. Mr. Chism refers to the Restatements to bolster his position. Under Rest. 3d of Lawyering § 16 ("A Lawyer's Duties to a Client"), a lawyer's duties to his client are limited to "matters within the scope of the representation." Mr. Chism also cites to out-of-state authority for the proposition that "[f]or matters of compensation, promotion, and tenure, inside counsel are ordinarily subject to the same administrative personnel supervision as other company employees."[99] Thus, so the argument goes, when an in-house lawyer negotiates his compensation, this is merely a personnel matter; the lawyer acts as an employee, not as a lawyer, during these discussions, and the lawyer is not subject to the same duties as an outside lawyer negotiating fee agreements. Mr. Chism argues that it would be unreasonable for a sophisticated employer to believe that the lawyer-employee was acting on behalf of the employer, not himself, when discussing his own compensation.

15. Second, Mr. Chism argues that for reasons of public policy, a lawyer-employee should not owe a heightened duty to his employer over his own compensation negotiations. Generally, the employer, not the employee, holds superior information and the superior bargaining

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Wn.2d 558, 99 P.3d 881 (2004). Second, the RPCs were substantially revised in 2006. The language and citations in any advisory opinion issued prior to 2006 may not be consistent with the current rules. That is true for RPC 1.8, the RPC at issue in the advisory opinion relied upon by Mr. Chism. Since the current RPCs' effective date of January 1, 2009, the wording of RPC 1.8(a), (a)(1), (a)(2), (a)(3), (b), (c), (d), (f), (f)(1), (g), (h)(1-2), (l), (i)(1), and (i)(3) has changed compared to the pre-2006 version. Third, and perhaps most importantly, the Opinion stated only that an attorney's act, as described to the WSBA, of "working out an employment contract for the full time job of legal counsel for a corporation" did not implicate RPC 1.8(a), because, again as described to the WSBA, the negotiations "appeared to be an arm's length transaction," and it "did not appear" the attorney was in any way giving legal advice to the corporation. Id. (emphasis added). The advisory opinion provided no information regarding the factual circumstances involved—for example, the lawyer's role with the company at the time he/she negotiated the contract, or the role he/she was going to take in the company. The advisory opinion also said nothing about the modification of existing fee arrangements after the in-house employment had already begun, the circumstances when those modifications would invoke RPC 1.8(a), or the application of RPC 1.8(a) to negotiations that were other than at arm's length.

[99] *Nordling v. N. State Power Co.*, 478 N.W.2d 498, 502 (Minn. 1991).

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position in employment negotiations, and therefore, a corporate client-employer does not need the protection of a court-made fiduciary duty. Mr. Lachman testified that he had never heard of any in-house counsel owing a heightened fiduciary duty on matters of his own pay, nor that he could find any authority for this duty.[100] Mr. Chism speculates on the burdens that such a duty would place on the employee -- "to negotiate down from a generous offer, to ensure that no better deal could be had, to tank an interview in favor of another candidate."[101] According to Mr. Chism, "a Corporation could pay the lawyer whatever it chooses; work the lawyer as hard as it chooses; fire the lawyer; and then sue the lawyer alleging breach of fiduciary duty to recover some or all of the money already paid" -- in effect, encouraging companies to "game the system."[102]

16. Tri-State counters Mr. Chism's argument as a misrepresentation of its position. Professor Boerner agreed that the employer would know that a lawyer-employee who is discussing matters of his own pay would be negotiating on his own behalf, "but what he would believe... in a context like this.... Is that this lawyer wouldn't ask for something that wasn't fair and reasonable to the company; they wouldn't ask for that, because I trust them implicitly."[103] Tri-State refers to Mr. Chism's long relationship with Tri-State, including over twenty-five years as outside counsel, and it is undisputed that there was a deep relationship of trust and loyalty between Mr. Chism and Ron. Tri-State observes that an attorney-client relationship "[does] not wink on and off" when a lawyer acts as both attorney and non-attorney for a client.[104]

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[100] Fiduciary Duty Proceedings, May 16, 2014, p.96-97.
[101] Plaintiff's Trial Brief, p.6.
[102] Plaintiff's Summation Brief, p.13, fn.16.
[103] Fiduciary Duty Proceedings, May 16, 2014, p.68, lines 12-17.
[104] Defendants' Summation brief, p.8 (quoting *Kukla v. Perry*, 361 Mich. 311, 316, 105 N.W.2d 176 (1960)).

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17. Mr. Chism is correct that strict application of ethical and fiduciary requirements to employee compensation negotiations, without regard for the facts and circumstances of the situation, could lead to absurd results. For instance, a lawyer-employee who works for a company with an established in-house legal department should not need to inform his manager that he has a personal conflict of interest and that his manager should seek the advice of independent counsel when he negotiates a bonus or raise. Under the facts of a typical in-house employment situation, any duties regarding compensation, if existent, are easily discharged. In those situations, the client-employer is likely to have a well-staffed internal legal department such that the employer is essentially already represented by independent counsel due to this legal infrastructure. Further, that employer is likely sophisticated in hiring inside counsel and both parties will truly be bargaining at arm's length. Additionally, the lawyer-employee may have narrow responsibilities under the terms of employment, like real estate transactions, compliance, or litigation, such that there can be no confusion that the lawyer represents himself in matters of his own pay.

18. But there are two critical distinctions that make Mr. Chism's reliance on the normal in-house compensation structure wholly inapplicable. First, the unique bonus structure Mr. Chism proposed, and the extraordinary bonuses he requested are readily distinguishable from the typical in-house paradigm. None of the experts could cite a single instance when an in-house attorney sought a bonus based on his or her former hourly rate. Nor could they cite a single instance when an in-house attorney sought a bonus based on his or her former hourly rate regardless of whether the work done was that which a legal assistant, paralegal, first year associate, mid-year associate, senior associate, junior partner, or equity partner might do. Nor could they cite a single instance when an in-house attorney sought a bonus based on his

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or her year-end guesstimate as to how many hours he or she worked during the entire prior year. Nor could they cite a single instance when an in-house attorney sought such a bonus for hours worked in excess of a 1.5 hour workday. Finally, none of them could cite a single instance when an in-house attorney used those or even similar factors to request and receive bonuses totaling in excess of a million dollars covering two and a half years (FY 2010, FY 2011, and half of FY 2012), which bonuses could lead to total compensation equally or exceed one million dollars a year if that employee simply worked full-time.

19. Second, although Tri-State had experience hiring outside counsel, Mr. Chism was its first, and only, inside counsel. Before becoming inside counsel, Mr. Chism was Tri-State's primary outside counsel for over twenty-five years; during this period, Mr. Chism developed a relationship of trust and loyalty with Tri-State's president, and Mr. Chism owed fiduciary and ethical duties in all matters relating to his client, including his charging of fees. When Mr. Chism became a Tri-State employee, the change in the form of his compensation from fees, both hourly and a monthly retainer, to a salary with benefits was the only change to this relationship; Mr. Chism's fiduciary and ethical duties to Tri-State did not disappear. Mr. Chism's role as inside GC was truly general; he advised on all matters ranging from contract disputes to employee termination, he made decisions about hiring outside counsel, and he was responsible for reviewing outside counsel fees. Tri-State trusted Mr. Chism to represent its interests in all legal matters, including ensuring that Mr. Chism charged only fair and reasonable fees when he acted both as outside and inside counsel.

20. Given the extremely unique circumstance of Mr. Chism's bonus structure, the extremely large bonuses he received, and Mr. Chism's unique relation to Tri-State, Mr. Chism's

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concern that imposing a duty on him will have application and consequences to other in-house counsel appears unfounded.

21. Imposing a fiduciary duty on an attorney when he or she seeks a midstream compensation modification, especially one as unique as Mr. Chism's, is appropriate when that attorney is (1) the corporation's General Counsel; (2) the corporation's sole in-house counsel; (3) the only in-house counsel that the corporation has ever hired; and (4) the corporation relies on that sole in-house counsel to recommend when outside attorneys should be retained, hire other attorneys, review the reasonableness of most other attorney's fees, and advise the corporation on which attorneys' fees to pay. These circumstances make an in-house GC like Mr. Chism susceptible to overreaching while the client may reasonably trust that the lawyer represents the client's best interests in all legal matters, including not only the legal fees of outside lawyers, but the inside lawyer's own compensation as an employee.

22. Other jurisdictions have held that an in-house counsel is not exempt from state ethics rules in his conduct towards his client-employer merely because he is an employee.[105] Due to the nature of Mr. Chism's long history with Tri-State, the mutual trust and loyalty in their relationship, and Tri-State's limited internal legal infrastructure and inexperience with hiring inside counsel, Mr. Chism owed a fiduciary duty and was subject to the RPCs in matters including his own compensation with Tri-State, even as an employee.

23. Mr. Chism owed that fiduciary duty to Tri-State each time he negotiated a favorable change to his compensation structure: (1) when Mr. Chism negotiated adding an additional bonus structure to his base salary in September 2010; (2) when Mr. Chism negotiated the $310,000

[105] *See, e.g., Kaye v. Rosefielde*, 432 N.J. Super. 421, 478-9, 75 A.3d 1168 (New Jersey 2013) (rejecting attorney's argument that New Jersey's RPC 1.8(a) applied only to traditional attorney-client relationships, not in-house counsel); *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Williams*, 675 N.W.2d 530, 533 (Iowa 2004) (revoking license of attorney who "took advantage of positions of trust" to defraud "two separate employers" over a period of seven years, violating Iowa ethics rules).

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bonus with Ron Agostino in September 2010; (3) when Mr. Chism negotiated the $500,000 bonus with Ron Agostino in November 2011; and (4) when Mr. Chism negotiated the $250,000 bonus with Larry Agostino in March 2012. Specifically, when Mr. Chism negotiated the additional bonus structure in September 2010, he owed a duty to ensure that the agreement was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts upon which the agreement was predicated. Likewise, when Mr. Chism negotiated the $500,000 and $250,000 bonuses, he owed a duty to ensure that there was a full and fair accounting of the basis for these bonuses.

C. Mr. Chism Breached his Fiduciary Duties and the RPCs When he Modified his Compensation to Include a Bonus for FY 2010, Sought a Bonuses for FY 2010, FY 2011, and half of FY 2012.

C(1). Mr. Chism's Breaches in Relation to the September 2010 Modification.

24. Mr. Chism's modification in September 2010 was a major deviation from his prior fee arrangements. The September 2010 modification contained terms that were much more favorable to Mr. Chism than either his original inside or his previous outside agreement, and the new arrangement resembled neither a typical outside lawyer's fee structure nor a typical inside lawyer's compensation.

25. Under the outside arrangement, Mr. Chism received a $17,000 flat monthly fee for GC services and billed litigation matters on an hourly basis with detailed contemporaneous monthly statements. Mr. Chism's base salary was fairly equivalent to the flat monthly GC fee; however, the new bonus structure differed significantly from the hourly litigation billing. Although the bonus and the litigation matters were both based on hours, the frequency of accounting, detail, scope, and rates were quite different and each favored Mr.

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Chism. These differences were unfair and unreasonable to Tri-State, and Mr. Chism did not fairly and fully disclose facts to Tri-State about these differences, nor their implications.

26. First, Mr. Chism's bonus was calculated based on his best guess, i.e., a guesstimate of hours provided annually by him, rather than based on actual hours worked as provided contemporaneously through monthly invoices that contained a description of the work he did. This was favorable to Mr. Chism because it reduced his recordkeeping and tracking of his own hours. This difference was also unfair and unreasonable to Tri-State. By relying on an annual guesstimate of hours, rather than a monthly statement, Tri-State effectively received a single unpredictable bill for Mr. Chism's excess legal services at the end of each fiscal year, rather than receiving monthly invoices that would allow Tri-State to monitor and adjust its budget for legal expenses. That method was more susceptible to error because at the end of the year, Mr. Chism would simply guess how much he worked based solely on his memory of the entire previous year. Mr. Chism's seemingly spontaneous request for a bonus while in the car on the way back from Canada exemplifies the guesswork employed by Mr. Chism. Further, Mr. Chism never provided any back-up or data to support his request other than generally mentioning a few projects he worked on during the prior fiscal year. Finally, because Mr. Chism was the sole source of this information, Tri-State had limited data to assess or challenge his guesstimate.

27. Mr. Chism argued that Tri-State had more control and visibility over his work activities when he became an employee and could therefore assess whether the hours were accurate. That argument ignores the fact that Mr. Chism often worked from home and had little to no direct supervision at work. If oversight was possible, such oversight adds a burden on Tri-State to actively monitor Mr. Chism's activities if it wanted to confirm his accuracy, and Mr.

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Chism neither disclosed this consequence to Tri-State nor suggested that he provide contemporaneous accounting.

28. Second, Mr. Chism provided no detail about his work compared to when he billed litigation matters. Under his outside billing arrangement, Mr. Chism provided detailed information for each hour worked; a typical entry reads, "Telephone conference R. Thiel; review Summary Judgment orders; telephone conference client re same; review Discovery & open claims."[106] Under the bonus, Mr. Chism was not required to, and did not, provide any details other than to make passing reference to a few things he did during the prior year.

29. Third, Mr. Chism's bonus included all matters; it was not constrained to litigation. This was favorable to Mr. Chism because he would now seek a bonus for non-litigation tasks that would have been included in the flat monthly GC fee under the outside arrangement. Mr. Chism was now also entitled to a bonus for litigation tasks that would previously have been performed by lower-level members or even non-billing staff of his outside firm. In comparison, Mr. Chism's outside litigation billing included work by paralegals and junior attorneys who charged substantially lower rates; as of June 2008, several members of the firm billed litigation matters to Tri-State at $175/hour and $265/hour.[107] This difference dramatically increased the potential compensation that Tri-State owed to Mr. Chism under the new inside agreement; Mr. Chism's bonus now included non-legal work as well as legal, non-litigation matters as well as litigation, and staff, paralegal, or junior attorney tasks as well as partner-level tasks. Mr. Chism did not explain the change in scope and he did not disclose its implications. Mr. Chism, in effect, bargained for overtime under the guise of a bonus and without the infrastructure provided by overtime accounting. As a result, Mr.

[106] Exhibit 402A, p.2.
[107] Exhibit 402A.

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Chism convinced Tri-State to adopt an arrangement that appeared to resemble his outside agreement but was actually an expansion that put Tri-State in a worse position, without clarifying or explaining this difference to Tri-State.

30. Finally, Mr. Chism's bonus was based on a single rate, his "old hourly billing rate of $500 per hour," which he implied had been in place for 10 years. In reality, he had billed that rate for only six months before coming in-house.[108] During the prior six years of his outside work, Mr. Chism's own hourly rate averaged at $400/hour or less; his rate began at $325/hour in December 2002[109] and jumped 25% from $400/hour to $500/hour in June 2008.[110] Mr. Chism became a Tri-State employee in January 2009; it is misleading to characterize $500/hour as his "old hourly billing rate" when Mr. Chism only charged this rate for the final six months of a six year period, and when this rate was at least 25% higher than any of his previous rates. Mr. Chism did not explain the difference or disclose its implications, and Mr. Chism did not provide his rate history, which he would know far more readily than Tri-State. With Mr. Chism's base employee salary of $190,000 (really, $204,000) for 1.5 or 1.7 hours/day, Tri-State would not have appreciated that under the bonus structure, Mr. Chism was effectively entitled to compensation of over $1 million a year by simply working 40 hours a week for fifty weeks. Mr. Chism should have disclosed this information to Tri-State; it would be in his client's best interest to understand its potential exposure in agreeing to this compensation structure. Mr. Chism himself acknowledged that he was "probably not the lowest cost provider"[111] but apparently did nothing to mitigate costs for his client, such as

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[108] Exhibit 10.

[109] Exhibit 300.

[110] Exhibits 311A, 402A.

[111] Exhibit 64. This email, dated February 4, 2011, was sent from Geoff Chism to Jeff Williamson, Tri-State's CPA, and suggests that five months after negotiating the September 2010 agreement, Mr. Chism was still concerned about his compensation: "Frankly, the compensation issue probably should get on the table during these discussions. I am already putting in a great deal more time than was anticipated when this General Counsel

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hiring an additional junior attorney or paralegal to assist him in-house. Whether Tri-State had access to all of his old invoices and could have checked his rate history if it wanted, and whether Tri-State was under an obligation to use Mr. Chism's suggestion of $500/hour is irrelevant; Mr. Chism had a duty to fairly and fully disclose these facts, not expect his client to fact-check his representations.

31. In short, the September 2010 Agreement differed significantly from Mr. Chism's prior arrangements; as compared to the outside arrangement with hourly litigation billing, the new bonus structure was more favorable to Mr. Chism in frequency of accounting, detail, scope, and rates. The terms of the new arrangement were ambiguous and unreasonable; even Mr. Chism is unsure whether he had added a "bonus" (which would be discretionary) or an "adjustment" (which would be owed), as he refers to it as a "bonus/adjustment" in the September 2010 Memo.

32. Mr. Chism had worked with Tri-State for decades, and Mr. Chism had recent experience upon which to estimate the amount of his work. Mr. Chism should have negotiated a simple, common, and customary salary raise, overtime structure, performance-based bonus, arrangement based on his outside fee structure, or other compensation that was more fair and predictable to Tri-State.

33. Mr. Chism should have recommended that Tri-State seek independent counsel to review his proposed bonus/adjustment. Had he done so, no reasonable independent counsel would have advised Tri-State to agree to Mr. Chism's proposal. Independent counsel would have recommended that Tri-State consider raising Mr. Chism's salary and putting in place a

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arrangement was set up more than ten years ago. I have no doubt Ron would be fair and generous as usual, which is part of the reason I am even willing to consider this... Again, I am probably not the lowest cost provider, which needs to figure into the discussion."

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performance-based bonus program similar to how companies normally pay their in-house counsel.

34. In addition to Mr. Chism's common law duty under *Kennedy*, Mr. Chism owed Tri-State a duty arising under RPC 1.8(a), pursuant to which Mr. Chism was prohibited from entering into any "business transaction" with Tri-State, his client, unless (a) "the transaction and terms on which the lawyer acquires the interest [were] fair and reasonable to the client and [were] fully disclosed and transmitted in writing in a manner that [could] be reasonably understood by the client", (b) Tri-State was "advised in writing of the desirability of seeking and [was] given a reasonable opportunity to seek the advice of independent legal counsel on the transaction", and (c) Tri-State gave "informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction."[112]

35. The comments to RPC 1.8 state that "ordinary" fee agreements are exempted from RPC 1.8(a).[113] However, the Washington Supreme Court recently made clear that this is a narrow exception, and "business transactions" under RPC 1.8 should be viewed broadly: "anything reasonably characterized as an attorney-client business transaction is subject to [RPC 1.8(a)'s] requirements unless specifically exempted."[114]

36. The Court concludes that Mr. Chism's proposed modified fee arrangement with Ron in September 2010 was not an "ordinary" fee agreement, because the proposal involved a

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[112] RPC 1.8(a).

[113] RPC 1.8, comment 1.

[114] *LK Operating, LLC v. Collection Grp., LLC*, 181 Wash.2d 48, 76, 331 P.3d 1147 (2014) ("A 'business transaction' may be defined as '[a]n action that affects the actor's financial or economic interests, including the making of a contract'" (quoting BLACK'S LAW DICTIONARY 227 (9th ed. 2009). Under this definition, because "transactions" include "contracts," "transactions" necessarily represents a broader set of arrangements than "contracts"—in the same sense that all squares are rectangles but not all rectangles are squares. If former RPC 1.8(a) were intended to apply only to the narrower set of discrete "contracts," the rule would use the word "contract," rather than the broader term "transaction."}). Current RPC 1.8(a) still uses the broad phrase "business transaction."

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significant change in the parameters of Mr. Chism's compensation, was made after the representation had already begun and after an existing fee agreement had already been in place for more than a year, and the new provisions benefitted only Mr. Chism. As already discussed at length above, such proposed modifications during ongoing representation have long been recognized as extraordinary and deserving of heightened scrutiny.[115] One of Chism's own expert witnesses, Mr. Lachman, has opined that the concerns involved in such midstream modifications, alone, may be sufficient to trigger the requirements of RPC 1.8(a):

> [A]uthorities strongly suggest the Washington Supreme Court, when faced with the issue, may well decide that a change to a fee agreement midstream benefiting the lawyer constitutes a business transaction with a client (and therefore a prohibited conflict of interest) unless the rigorous requirements of RPC 1.8(a) are met.[116]

37. Mr. Chism's procurement of Ron's agreement to the new compensation arrangement in September 2010 was a "business transaction" that was subject to the requirements of RPC 1.8(a).

38. Mr. Chism has not demonstrated he satisfied any of the requirements of RPC 1.8(a) in connection with his dealings with Ron regarding the new arrangement.

39. Because Mr. Chism has not proven that the new September 2010 compensation arrangement was fair and reasonable, predicated upon a fair and full disclosure of the facts, and free from undue influence, Mr. Chism breached his common law duty to Tri-State, in violation of *Kennedy* and its progeny, by negotiating this arrangement. Mr. Chism also breached RPC 1.8(a) and his fiduciary duty to Tri-State.

C(2). Mr. Chism's Breaches in Relation to the Bonus for FY 2010.

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[115] *Valley/50th Ave.*, 159 Wn.2d at 743-44; *Kennedy*, 74 Wn.2d at 490-91.

[116] LAWYERING, Ch. 9 at 5-6 (WSBA 2012).

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40. Mr. Chism also breached his fiduciary duty to Tri-State by suggesting and proceeding under this September 2010 modification by failing to prove this new arrangement was made after a fair and full disclosure of the facts on which it was predicated. Instead, Mr. Chism made numerous misrepresentations and omissions to Ron when requesting these new payment terms, specifically by: (a) misrepresenting that his "current compensation" was "set over ten years ago," when Mr. Chism knew his true "current" compensation—i.e., his $190,000 salary—had just been set a year-and-a-half previously, and his General Counsel retainer, which Mr. Chism now says the memo was meant to reference, had been initiated in 2002, less than eight years prior, when Mr. Chism was working as outside counsel; (b) misrepresenting that Mr. Chism's "base compensation was originally set on the assumption" of the applicability of his "old hourly billing rate of $500 per hour," when Mr. Chism knew that his private practice rate did not become $500 per hour until sometime in 2008 (at which time he did not raise his retainers), and Mr. Chism had not proposed, when he came in house at Tri-State, that his salary be set higher than his retainers to reflect a $500 rate; (c) misrepresenting that his compensation, including his retainers and his salary, had always been "based on me spending an average of less than an hour and a half a day on Tri-State matters, or about seven hours a week," when Mr. Chism knew that his existing salary and the retainers that preceded it were always meant to compensate him for all of the non-litigation hours that he worked for Tri-State, and that he had raised his retainer several times to reflect that the amount of work had increased over time; and (d) failing to explain material aspects of the new arrangement, including that it was unique, extraordinary, and atypical for inside counsel, that Mr. Chism was not the lowest-cost provider, that Tri-State was largely giving up control of this element of its legal expenses, and that, in fact, the new arrangement would

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result in Tri-State paying Mr. Chism more (health benefits, personal expenses, and one rate for all work regardless of skill level involved) than if Tri-State went back to paying him and his firm as outside counsel.

41. Mr. Chism failed to provide a fair and accurate accounting of the basis for calculating those bonuses under the new 2010 compensation arrangement, a further violation of his fiduciary duty to Tri-State.[117] Washington courts have held that to seek fees calculated on an hourly basis, attorneys should maintain contemporaneous records documenting the hours worked and the matters worked on.[118] Courts have noted the unreliability of attorneys' after-the-fact "reconstructed" hours, and expressed concern about using them to justify fees.[119] As discussed above, Mr. Chism kept no contemporaneous or other records of his hours and the matters he worked on during them, and the evidence shows his "estimates" of his hours were unreliable. By seeking payment of $500 an hour at the end of the year for hundreds of hours he could only guess he worked – especially considering that Mr. Chism had no expectation of asking for or receiving such a bonus throughout the year when he performed that work and thus no reason to keep track of those hours, Mr. Chism breached his fiduciary duties to his client.

(C)(3). Mr. Chism Breached his Fiduciary Duty and the RPCs in Relation to the 2011 $500,000 Bonus.

42. RPC 1.7 embodies and provides specific procedures for dealing with a lawyer's more general common law duty of loyalty to his client.[120] Under RPC 1.7, Mr. Chism's fiduciary

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[117] *See, e.g., Perez v. Pappas*, 98 Wn.2d 835, 839, 659 P.2d 475 (1983).

[118] *See, e.g., Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998); *Johnson v Dept. of Transportation*, 177 Wn. App. 684, 699, 313 P.3d 1197 (2013).

[119] *See Johnson*, 177 Wn. App. at 699-700 (affirming denial of fees for reconstructed hours where trial court expressed "skeptic[ism] that anyone can recollect how much time she spent on correspondence more than 18 months prior to the reconstruction of the time"); *In re Disciplinary Proceeding Against VanCamp*, 171 Wn.2d 781, 807-08, 257 P.3d 599 (2011) (review of reconstructed billing statements was "extremely troubling and illustrate[d] the unreasonableness of [the attorney's] fee").

[120] *See, e.g.*, RPC 1.7, Comment 1.

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duty to Tri-State prohibited him from, among other things, providing legal representation to Tri-State if that representation would be materially limited by his own personal interests, including his personal financial interests, unless Mr. Chism took steps to ensure that his personal interests did not have an adverse effect upon the representation.[121] Those steps included, among other things, obtaining Tri-State's informed consent before continuing the representation.[122]

43. A lawyer breaches RPC 1.7(b) if the lawyer fails to fully disclose to the client the full the nature of the lawyer's self-interest in the transaction and the potential risks to the client in entering into the transaction.[123]

44. Mr. Chism breached his fiduciary duty to Tri-State, in violation of RPC 1.7, by requesting that Tri-State pay him $500,000 for FY 2011and indicating that was reasonable, where: (a) Mr. Chism, as Tri-State's GC and only in-house lawyer, was also advising Tri-State in connection with the company's severe financial difficulties; (b) paying such an amount of money to Mr. Chism would have been counter to Tri-State's best interests given its financial straits; (c) the bonus in question served to further only Chism's personal financial interest; (d) Mr. Chism knew that Ron trusted him and would believe anything he proposed was reasonable and in Tri-State's interest; (e) Mr. Chism took no steps to advise Tri-State that it was not legally obliged to pay him a bonus at all and had the discretion to reject his request in its entirety; (f) given the unique, extraordinary, and atypical bonus/adjustment Mr. Chism proposed, Mr. Chism took no steps to advise Ron or anyone else at Tri-State that he was acting in his own personal interest, which created a conflict; (g) and Mr. Chism did not seek

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[121] RPC 1.7(a)(2) and (b).

[122] RPC 1.7(b)(4), and Comment 18.

[123] *See In re McMullen*, 127 Wn.2d 150, 165, 896 P.2d 1281 (1995) (lawyer violated RPC 1.7 by accepting loan from elderly client at below-market rates without adequately explaining lawyer's own poor financial situation or alternate investment opportunities available to client).

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Tri-State's informed consent to continued representation or advise Ron or anyone else to consult independent counsel regarding his proposed bonus.

45. Mr. Chism also breached his fiduciary duty to Tri-State, in violation of RPC 1.7, by advising Larry during the winter of 2011 and the spring of 2012 that the company owed Mr. Chism the $500,000 he had supposedly been promised by Ron and attempting to obtain Larry's independent written agreement that Tri-State would pay Mr. Chism that amount after: (a) Larry had specifically stated his belief that Mr. Chism took advantage of Ron's impairment in the manner in which Mr. Chism procured the supposed approval for this bonus; (b) Mr. Chism recognized that Larry's belief in that regard created a conflict in Mr. Chism's continued representation of Tri-State and working for Larry; (c) Mr. Chism's seeking of a new agreement with Larry to secure the $500,000 purportedly agreed to by Ron served only Mr. Chism's own personal financial interests and no interest of Tri-State; (d) Mr. Chism did not disclose to Larry that Ron had been under no obligation to pay Mr. Chism anything at the time Mr. Chism sought the bonus, and that the underlying premises for the bonus were inaccurate and unfair; (e) Mr. Chism took no steps to advise Larry that he was acting in Mr. Chism's own personal interest, not that of Tri-State, which created a conflict; and (f) Mr. Chism did not advise Larry or anyone else at Tri-State of Chism's personal interest or conflict, seek Tri-State's informed consent to continued representation in negotiating a new agreement, or advise Larry or anyone else at Tri-State to consult independent counsel.

46. Mr. Chism's citation to Los Angeles County Bar Association Op. No. 521 (2007) is not persuasive. In that matter, the Bar Association found, under dissimilar facts and under California's ethics rules, that a fee dispute, by itself, did not create a conflict of interest preventing continued representation in litigation by a law firm whose client disputed its fees.

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The firm served as outside counsel and only represented the client in the single litigation matter in which the fees were at issue.

47. Here, by contrast, Mr. Chism served as Tri-State's General Counsel and only in-house attorney, and advised the company on virtually all matters, including Tri-State's financial problems and the company's need for and representation by outside counsel. Thus, unlike the outside counsel in the L.A. Bar Association Opinion, Mr. Chism's personal interest in a discretionary $500,000 bonus—more than twice his salary—was in direct conflict with his continued representation of and advice to the company regarding its financial difficulties and legal representation, as in those capacities he should have informed Tri-State of the unreasonableness of and absence of any obligation to pay him the requested bonus.

48. That Larry had accused Mr. Chism of taking advantage of Ron regarding the bonus and that Mr. Chism continued to negotiate with Tri-State despite that accusation is yet another fact not present in the California opinion. Whether Mr. Chism may have continued to sufficiently or even successfully represent the company regarding other matters does not change this analysis. Mr. Chism breached RPC 1.7 in seeking the $500,000 bonus for FY 2011.

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(C)(3) Mr. Chism Breached his Fiduciary Duty During the March 2012 Negotiations.

49. A lawyer's efforts to settle a claimed past-due fee obligation is a business transaction that is subject to the requirements of RPC 1.8(a).[124] In addition, the official comment to RPC 1.8 states that the ordinary exclusion of fee agreements from RPC 1.8 does not apply if "the

[124] *Valley/50th Ave*, 159 Wn.2d at 746; *see also In re Discipline of Haley*, 157 Wn.2d 398, 407-08,138 P.3d 1044 (2006) (lawyer violated RPC 1.8(a) by entering into agreement with client that changed their compensation arrangement, among other things to reflect their creditor-debtor status, without making required disclosures).

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lawyer accepts an interest in the client's business *or other nonmonetary property* as payment of all or part of a fee." RPC 1.8, comment 1 (emphasis added).

50. Mr. Chism's negotiations with Larry and the resulting putative agreement were not ordinary fee discussions. Mr. Chism was not merely proposing payment under the parameters of the September 2010 arrangement, he was negotiating the payment of what Mr. Chism believed to be an outstanding debt to him for a $500,000 unpaid bonus for FY 2011, plus for the first time, payment of a *mid*-year bonus (in the amount of $250,000). Moreover, the particular transaction that Mr. Chism proposed, and later claimed Larry had agreed to, included a transfer of nonmonetary property of Tri-State—a Mercedes Benz owned by Tri-State worth at least $50,000, a computer, and a cell phone—as partial payment for Mr. Chism's services. These circumstances made Mr. Chism's negotiations with Larry in March 2012, and the putative "contract" that Mr. Chism argued and the jury concluded resulted therefrom, a business transaction within the scope of RPC 1.8(a).

51. Under RPC 1.8(a), "an attorney-client transaction is prima facie fraudulent."[125] To overcome this presumption of fraud the lawyer "must prove strict compliance with the safeguards of RPC 1.8(a); full disclosure, opportunity to consult outside counsel, and consent must be proved by the communications between the attorney and the client." *Id.* Mr. Chism has the burden to establish these elements, not Tri-State.[126]

52. Mr. Chism failed to meet his burden of proving that the transaction he proposed to Larry in March 2012 was fair and reasonable to Tri-State. Mr. Chism withheld information from Larry that would have shown paying Mr. Chism the $500,000 purportedly agreed to by Ron plus an additional $250,000 was neither in Tri-State's interest nor legally required (let alone

[125] *Valley/50th Ave.*, 159 Wn.2d at 745 (*quoting In re Disciplinary Proceeding Against Johnson*, 118 Wn.2d 693, 704, 826 P.2d 186 (1992)).

[126] *Id.* ("The burden of proving compliance with RPC 1.8 rests with the lawyer.").

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contemplated by the 2010 agreement, which made no reference to a mid-year bonus). Specifically, Mr. Chism discussed nothing with Larry about the history of his bonus arrangement, including that Mr. Chism had procured the arrangement by making inaccurate representations to Ron about Mr. Chism's compensation history, which were the basis for the calculation of the FY 2011 $500,000 bonus. Mr. Chism did not disclose that payment of a bonus under his arrangement was entirely discretionary, and even then any bonuses were not to be discussed until the end of the fiscal year. Mr. Chism also did not disclose that he had no documentation tracking the work he claimed to have performed and the hours he said he had worked were only a guess based on his own unreliable memory. Instead, Mr. Chism told Larry, consistent with Mr. Chism's own personal pecuniary interest, that the $500,000 payment was an absolute and non-negotiable obligation of Tri-State, specifically for the purpose of inducing Larry to pay it.

53. Mr. Chism also failed to prove the transaction he proposed to Larry in March of 2012 was fully disclosed and transmitted in writing in a manner that could be reasonably understood by Tri-State. Indeed, Mr. Chism admittedly presented *nothing* in writing to Larry about the terms of the supposed agreement until *after* the meeting on March 28, 2012 had ended, by which time Mr. Chism contended (and continued to contend at trial) that an enforceable oral agreement had already been reached.

54. Mr. Chism failed to prove that he advised Tri-State in writing of the desirability of seeking the advice of independent legal counsel with respect to the proposed transaction. Indeed, Mr. Chism admits he took no steps to advise Larry or anyone else at Tri-State to seek independent legal counsel concerning the transaction that Mr. Chism claims was negotiated and finalized on March 28, 2012.

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55. Mr. Chism relies heavily on Tri-State's hiring of Mr. Russell in approximately March of 2012. Mr. Chism's counsel questioned Professor Boerner about that hiring.[127] Mr. Chism's counsel paraphrased page 138 of the CR 30(b)(6) deposition of Tri-State, during which Mr. Chism's counsel had questioned Tri-State about the hiring of Mr. Russell. Those questions made clear that the reason for hiring Mr. Russell was due to the fact that Tri-State might need a new corporate attorney, i.e., to replace Mr. Chism, given the apparent conflict with Mr. Chism. Nothing in that deposition suggested that anyone advised Tri-State to retain Mr. Russell to advise Tri-State about how to resolve that conflict with Mr. Chism or that seeking such advice from Mr. Russell was ever contemplated by Tri-State. Mr. Chism's counsel then questioned Professor Boerner about whether the hiring of Mr. Russell satisfied Mr. Chism's obligation to tell Tri-State to hire an attorney regarding the dispute over his $500,000 bonus. Professor Boerner opined: "Certainly if they already knew what Mr. Chism in my opinion was obligated to tell them, he wouldn't need to tell them. They already knew that . . . The duty has been satisfied."[128] Because Tri-State did not already know what Mr. Chism was supposed to tell them, Mr. Chism still had the duty to tell Tri-State to get independent counsel to advise Tri-State about how to resolve the dispute over the $500,000 bonus.

56. Mr. Chism failed to prove he gave Larry a reasonable opportunity to seek independent legal advice before agreeing to the March 2012 transaction. Mr. Chism proposed terms for the first time during their March 28 meeting, including that he be paid a minimum of $1,500 a week even if he did no work, and, by Mr. Chism's account, that he be allowed to keep the Mercedes Benz that Tri-State allowed him to drive, a computer, and a cell phone when he left. By proposing those terms for the first time at that meeting, Larry had no opportunity to

[127] Sub. No. 213 (Halm Decl.), Exhibit A, 86:8-87:19.
[128] *Id.*, 87:15-19.

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have independent counsel review them before the meeting, even if Mr. Chism suggested that he do so. Then, when Larry disagreed with Mr. Chism's memo that sought to memorialize their discussion, Mr. Chism insisted (as he did at trial) that it was too late to disagree, because an enforceable agreement to pay him $750,000 came into existence at the conclusion of their meeting on March 28, an argument the jury appears to have accepted (without the benefit of any testimony regarding Mr. Chism's fiduciary duties and his violations of the RPCs).

57. Mr. Chism was obligated to comply with the independent legal advice provisions of RPC 1.8(a) even if this Court considers Larry to be a sophisticated businessman who already had access to outside lawyers other than Mr. Chism. While a client's sophistication can be relevant to the particular manner in which the lawyer complies with RPC 1.8, Mr. Chism must still meet the requirements of that rule.[129] Regardless of whether Larry had access to and was aware he *could* seek independent counsel does not mean he knew he *should* do so especially when he never received such advice from Mr. Chism, Tri-State's trusted GC. Nor does any of that negate Mr. Chism's responsibility when engaging in a business transaction with that client.[130]

58. Further, "[t]he opportunity to seek independent advice must be real and meaningful. It is not enough that at some moment in time an opportunity existed, no matter how brief or fleeting that opportunity might have been."[131] The disclosures and notices required by RPC 1.8 are meaningless unless Mr. Chism gave Larry a reasonable amount of time to act upon the

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[129] *Valley/50th Ave.*, 159 Wn.2d at 745 ("A client's sophistication does not relax the requirements of RPC 1.8.").
[130] *See In re Discipline of Haley*, 157 Wn.2d at 407-08 (breach of RPC 1.8 where lawyer failed to advise client to consult independent counsel about revised fee agreement, even though client had just recently consulted other counsel about a second agreement presented by the lawyer); *Liebergesel*, 93 Wn.2d at 891 (that individual is shrewd and successful businessman does not negate the impact of his trust and confidence in one acting as fiduciary).
[131] *Id.* at 746.

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information disclosed and seek independent counsel. The definition of a 'reasonable opportunity' may depend on the circumstances of any given case, but it will always mean more than the mere physical ability to contact an attorney.[132] Mr. Chism has the burden to demonstrate that he afforded Tri-State a real and meaningful opportunity to seek independent counsel.[133]

59. In this case, whether Larry had other lawyers with whom he *could* have discussed Mr. Chism's proposal (and the record is clear that Tri-State did not hire an attorney for such purpose) does not excuse Mr. Chism's failure to advise him that he *should* discuss the proposed transaction with another lawyer. Nor did Mr. Chism give Larry an opportunity to do so. Accordingly, Mr. Chism has not proven he satisfied any of the requirements of RPC 1.8(a). He failed to overcome the presumption of fraud as to the transaction with Larry in March 2012 and he violated his duty to Tri-State under RPC 1.8(a) by entering into it.[134]

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D. Mr. Chism Breached RPC 8.4(c) with Respect to Each Transaction.

60. Pursuant to both RPC 8.4(c) and Washington's common law, Mr. Chism further owed a fiduciary duty to be fully honest in all of his dealings with Tri-State.[135] A lawyer violates this duty not merely by lying to a client, but also by failing to disclose all relevant information to

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[132] *Id.*; *see also Haley*, 157 Wn.2d at 408 (violation of RPC 1.8 where lawyer had client sign revised fee agreement the same day it was presented, providing no opportunity for the client to consult with independent counsel).
[133] *Valley/50th Ave.*, 159 Wn.2d at 746.
[134] *Id.* at 745; *Johnson*, 118 Wn.2d at 704.
[135] *See* RPC 8.4(c) (prohibiting lawyers from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation); *In re Discipline of Huddleston*, 137 Wn.2d 560, 573, 974 P.2d 325 (1999) ("[l]awyers are expected 'to exhibit the highest standards of honesty and integrity' and not to engage in dishonest, fraudulent or deceitful conduct"); *In re Disciplinary Proceedings Against Dann*, 136 Wn.2d 67, 77, 960 P.2d 416 (1998) ("Lying to clients is an assault upon the most fundamental tenets of attorney-client relations"); *Perez v. Pappas*, 98 Wn.2d at 841-42 (lawyer breached common law fiduciary duty by, among other things, misrepresenting "contingencies" that supposedly justified an increase in his fee, when lawyer knew the contingencies were "illusory"); *Kelly*, 62 Wn. App. at 154-55 (a lawyer's fiduciary duty to a client includes the "duty to act in and for the client's best interests at all times and to act in complete honesty and good faith to honor the trust and confidence placed in them").

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the client concerning a contract or other business transaction between them.[136] A lawyer also violates this duty by representing something as a fact when the lawyer does not really know if the "fact" is true.[137] A lawyer may also violate this duty by seeking payment from a client for legal services based upon reconstructed billing records created long after the services in question were rendered, and that thus will necessarily overstate and understate the amount of time actually expended by the lawyer on those services.[138]

61. Mr. Chism violated his duty of honesty and forthrightness to Tri-State under RPC 8.4(c) and Washington common law by misrepresenting to Ron in September 2010 that his then-current compensation was "based on me spending an average of less than an hour and a half a day on Tri-State matters, or about seven hours a week," when Mr. Chism knew at the time he made this statement that his existing salary and the retainers that preceded it were always meant to compensate him for all of the non-litigation hours that he worked for Tri-State and that he had raised his retainer several times to reflect that the amount of work had increased over time.

62. Mr. Chism violated his duty to Tri-State under RPC 8.4(c) and Washington common law by misrepresenting to Ron, in that same communication, that his "current compensation" was "set over ten years ago," when Mr. Chism knew at the time he made this statement that his true "current" compensation—i.e., his $190,000 salary—had just been set a year-and-a-half previously. The same is true even if Mr. Chism meant the memo to reference the GC retainer, which had been initiated in 2002. Not only was that compensation initiated eight

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[136] *See Liebergesel*, 93 Wn.2d 881, 889-90.

[137] *In re Disciplinary Proceeding Against Boelter*, 139 Wn.2d 81, 99, 985 P.2d 328 (1999) (lawyer violated RPC 8.4(c) by suggesting to client that he would disclose taped recordings of a particular confidential conversation with the client, where in fact lawyer did not know if the tapes even existed).

[138] *In re Disciplinary Proceedings Against Dann*, 136 Wn.2d at 78 (disciplining lawyer for seeking payment based upon reconstructed billing records; "reconstructed records generally represent an overstatement or understatement of time actually expended") (*quoting Ramos v. Lamm*, 713 F.2d 546, 553 n.2 (10th Cir. 1983)).

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years ago, rather than ten, his compensation of $500 an hour had only been set during the preceding six months or so before he went in-house.

63. Mr. Chism violated his duty to Tri-State under RPC 8.4(c) and Washington common law by stating to Ron in September 2010 that during the prior fiscal year, "realistically I have probably been averaging something over 60% of a normal workday on your matters. To be conservative, let's call it 50%. That translates into 1,000 hours of time, of which 380 hours have been covered by my base compensation." Mr. Chism knew at the time he made this statement that he had kept no records of the time he spent on Tri-State work and had no other reliable basis to say how many hours he had worked during the prior fiscal year, and yet he misrepresented these figures to Ron as reasonable estimates. Mr. Chism also knew at the time he made this statement that there had been no agreement that his salary covered only 380 hours a year; rather, he had agreed to do "whatever it takes" in exchange for his salary just as he had agreed to do whatever it takes in exchange for his GC retainer.

64. Mr. Chism violated his duty to Tri-State under RPC 8.4(c) and Washington common law by misrepresenting to Ron in November 2011 that Mr. Chism's bonus arrangement had been in effect "[f]or the last couple of years," when Chism knew at the time he made this statement that he had only received one prior bonus and that the arrangement had been in effect for just barely over one year.

65. Mr. Chism violated his duty to Tri-State under RPC 8.4(c) and Washington common law by stating to Ron in November 2011 that during the prior fiscal year, Mr. Chism had "actually been working full time, plus, on your matters … conservatively call it 70%, or 1,400 hours," when Mr. Chism knew at the time he made this statement that he had kept no records of the time he spent on Tri-State work and had no other reliable basis to say how many hours he

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had worked during the prior fiscal year, and yet he misrepresented these figures to Ron as reasonable estimates.

66. Mr. Chism violated his duty to Tri-State under RPC 8.4(c) and Washington common law by misrepresenting to Ron in November 2011 that they had agreed Mr. Chism would get paid a $500,000 bonus the following year, whether out of the DEA claim or some other matter, when Mr. Chism knew at the time he made this statement that Ron had told him Tri-State could and would not pay Mr. Chism any bonus until the money from the DEA claim, in particular, came in.

67. Mr. Chism violated his duty to Tri-State under RPC 8.4(c) and Washington common law by advising Larry in March 2012 that Tri-State was obligated to pay Mr. Chism a bonus for work performed during the first half of FY 2012, when Mr. Chism knew at the time he made this statement, by reason of the very terms of the memo he had presented to Ron in September 2010, that whether or not any bonus was ever to be paid to Mr. Chism was purely discretionary on Tri-State's part, and that no obligation to pay a bonus existed.

E. Tri-State Did Not Ratify the Transactions Mr. Chism Seeks to Enforce.

68. Mr. Chism has failed to prove that his breaches of fiduciary duty were cured, ameliorated, or otherwise excused on the grounds of ratification. Under the common law of Washington, "[a] party ratifies an otherwise voidable contract if, after discovering facts that warrant rescission, [the party] remains silent or continues to accept the contract's benefits."[139] But for ratification to apply, the party supposedly engaged in the ratification "must act voluntarily and with full knowledge of the facts."[140] Further, a client cannot ratify a breach of fiduciary duty arising out of certain violations of the RPCs.[141]

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[139] *Snohomish County v. Hawkins*, 121 Wn. App. 505, 510-11, 89 P.3d 713 (2004).

[140] *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 794, 150 P.3d 1163 (2007); *Ward*, 51 Wn. App. 423, 433, 754 P.2d 120 (1988) (same; approval of award disbursement to attorney and acceptance of benefits

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69. Mr. Chism has not proven that Tri-State ever had full knowledge of the facts concerning Mr. Chism's breaches of fiduciary duties or Tri-State's right to repudiate any of Mr. Chism's bonus- or expense-related arrangements with Ron prior to Mr. Chism's departure from the company.

70. Specifically, Mr. Chism has not proven that at the time Tri-State paid installments on the $310,000 bonus to Mr. Chism in 2011 and 2012, or allegedly agreed to and allocated a $500,000 bonus to Mr. Chism for FY 2011, or allegedly agreed to pay a $250,000 bonus to Mr. Chism for 2012, or continued to accept Mr. Chism's legal services, Tri-State had knowledge or understanding (1) of the unreasonable and unfair nature of the bonus arrangement itself; (2) of the misrepresentations made by Mr. Chism in the course of requesting the arrangement; (3) that Mr. Chism maintained no records or other accounting whatsoever of how much time he was spending on Tri-State's work; (4) that Mr. Chism continued representing Tri-State in the face of a direct pecuniary conflict of interest; (5) that Tri-State was entitled to have been cautioned by Mr. Chism to seek the advice of independent counsel and given the opportunity to do so before entering into any particular transaction with him; or (6) that Tri-State was entitled to any of the other protections required by RPC 1.7, 1.8, and 8.4(c) as discussed above.

71. The minutes from an annual meeting are the only evidence Tri-State cites to support its ratification claim. Those minutes do not mention the payment of the bonus or any discussion

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from agreement without challenge for almost six years does not establish ratification of alleged breaches of fiduciary duty; mere passage of time does not establish ratification). *See, e.g., Peterson v. Neal*, 48 Wn.2d 192, 193-94 (1956) (to find ratification of fraudulent contract, circumstances constituting ratification must have occurred *after* discovery of fraud); *Geoghegan v. Dever*, 30 Wn.2d 877, 898, 194 P.2d 397 (1948) (ratification requires "full knowledge of all the facts and a reasonable opportunity to repudiate the transaction"); *F. T. Larrabee Co. v. Mayhew*, 135 Wash. 214, 221, 237 P. 308 (1925) ("There can be no ratification without full knowledge").

[141] *See, e.g., In re Disciplinary Proceeding Against Egger*, 152 Wn.2d 393, 407, 98 P.3d 477 (2004) ("a client's acquiescence to an unreasonable fee does not absolve misconduct").

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about its merits. Even more critically, those minutes do not suggest that Tri-State was aware at any time of any of the facts set forth in the preceding paragraph.

72. For these reasons, even if it were possible for Tri-State to have ratified violations of the RPCs at issue, Mr. Chism failed to prove that the doctrine could or did apply under the circumstances here.

D. Mr. Chism Must Disgorge Some of his Compensation.

73. Based on the findings and conclusions above, the Court determines that Tri-State has established its counterclaim for breach of fiduciary duty, as well as its affirmative defenses to Mr. Chism's claims based on his breaches of that duty and the RPCs.

74. A breach of ethical duties may result in denial of fees or disgorgement of fees already paid.[142] A trial court may consider the RPCs when a client seeks to recover attorney fees for the attorney's alleged breach of fiduciary duty.[143] The court is not required to find causation and damages to support an order of disgorgement.[144] Disgorgement due to a violation of the RPCs or a breach of an attorney's fiduciary duty "is within the inherent power of the trial court to fashion judgments."[145]

75. Notably, Mr. Chism argued repeatedly that disgorgement was an issue for the trial court rather than the jury to decide. Disgorgement is an equitable claim.[146] As a result, and as Mr. Chism repeatedly argued, this Court could not allow the jury to rule on that issue absent the

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[142] *Eriks*, 118 Wn.2d at 462.

[143] *Behnke*, 172 Wn. App. at 297-298 (citing *Cotton*, 111 Wn. App. at 266).

[144] *Id.* at 298 (citing *Eriks*, 118 Wn.2d at 462). In his Proposed Findings of Fact and Conclusions of Law, at paragraph 202, Mr. Chism cites *Luna v. Gillingham*, 57 Wn.App. 574, 582-84 (1990) for the proposition that the trial court improperly reduced fees by 25% without evidence to support that determination. *Luna* is inapplicable – it is not a case involving disgorgement.

[145] *See Eriks*, 118 Wn.2d at 463.

[146] Disgorgement appears to be one of the remedies available for a claim of restitution. Black's Law Dictionary 1339–40 (8th ed.2004) (defining restitution to mean either disgorgement of something that has been taken or compensation for injury done). Restitution is an equitable remedy. *In re Proceedings of King County for Foreclosure of Liens*, 123 Wn.2d 197, 205, 867 P.2d 605 (1994). Thus, disgorgement is likewise an equitable remedy.

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consent of all parties.[147] Here, Mr. Chism objected to the jury deciding whether he should have to disgorge any fees. Accordingly, the jury's verdict on the fiduciary duty claim as to whether the September 2010 arrangement was fair and reasonable, free of undue influence, and based on a full and fair disclosure of the facts was and could only be an advisory opinion under CR 39(c). Mr. Chism failed to address CR 39(c) in his efforts to argue, now that the jury ruled in his favor, that this Court is bound by those verdicts. His arguments are not persuasive.

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76. Disgorgement of fees is a reasonable way to remediate specific breaches of professional responsibility and to deter future misconduct of a similar type.[148] It is also "well within the court's discretion" to deny disgorgement even though a fiduciary duty has been breached.[149]

77. Where, as here, the lawyer's breach of fiduciary duty is pled as a defense to a lawyer's demand for payment, the breach may reduce or bar the lawyer's claim for an unpaid fee.[150]

78. Based on the $310,000 Tri-State already paid Mr. Chism for FY 2010 and the $750,000 the jury awarded him, Mr. Chism would receive bonuses totaling $1,060,000 for two and a half years of work.

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[147] *See Kim v. Dean*, 133 Wn.App. 338, 135 P.3d 978 (2006) (reversing trial court's denial of motion to strike jury demand for a trial involving a purely equitable claim absent the parties' agreement under CR 39(c)); *Anderson*, 94 Wn.2d at 731, 620 P.2d 76 ("In an equity case the court may empanel a jury only for advisory purposes, unless both parties consent to be bound by the verdict[.]" (citing CR 39(c)).

[148] *Eriks v. Denver*, 118 Wn.2d at 462-63; *Ross v. Scannell*, 97 Wn.2d 598, 610, 647 P.2d 1004 (1982); *Behnke v. Ahrens*, 172 Wn. App. 281, 298, 294 P.3d 729 (2012).

[149] *Kelly*, 62 Wn. App. at 157.

[150] *Ross*, 97 Wn.2d at 610. *See also Shimko v. Goldfarb*, No. CV-04-78, 2008 U.S. Dist. LEXIS 121424, *11 (D. Ariz., Jun. 27, 2008) (lawyer's breach of fiduciary duty "may reduce or bar any claim for fees"); *Pringle v. La Chapelle*, 73 Cal. App.4th 1000, 1005, 87 Cal. Rptr. 2d 90 (1999) ("an attorney's breach of a rule of professional conduct may negate an attorney's claim for fees").

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79. In considering whether Mr. Chism should have to disgorge all or a portion of those bonuses, this Court finds the Washington Supreme Court's decision in *Eriks v. Denver* to be instructive. In that case, the trial court found that the attorney had represented both investors and promoters despite the inherent conflict of interest. In ordering disgorgement, the trial court relied on *Woods v. City Nat'l Bank & Trust Co.*,[151] and *Silbiger v. Prudence Bonds Corp.*[152] In affirming the trial court, the Washington Supreme Court quoted from *Woods*:

> Where [an attorney] ... was serving more than one master or was subject to conflicting interests, he should be denied compensation. It is no answer to say that fraud or unfairness were not shown to have resulted....
> ... A fiduciary who represents [multiple parties] ... may not perfect his claim to compensation by insisting that, although he had conflicting interests, he served his several masters equally well.... Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries "at a level higher than that trodden by the crowd." See Mr. Justice Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458, 464; 164 N.E. 545 [(1928)].

80. The Washington Supreme Court affirmed the disgorgement of all of Denver's fees, plus prejudgment interest, paid by his investor clients *even though the trial court made no finding of damages and causation.* Denver's violation of the RPCs and breach of his fiduciary duty to his clients sufficed considering that disgorgement of fees is a reasonable way to "discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type."[153]

81. Here, Mr. Chism breached his fiduciary duties and the RPCs when he modified his compensation to include a bonus for FY 2010, and sought bonuses for FY 2011 and half of FY 2012. Each of those individual breaches of Mr. Chism's fiduciary duties owed to Tri-

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[151] 312 U.S. 262, 61 S.Ct. 493, 85 L.Ed. 820 (1941).
[152] 180 F.2d 917 (2d Cir.1950), cert. denied, 340 U.S. 831, 71 S.Ct. 37, 95 L.Ed. 610 (1950).
[153] *Eriks v. Denver*, 118 Wn.2d at 463. In paragraph 204 of his Proposed Findings of Fact and Conclusions of Law, Mr. Chism appears to argue that only fraud or gross misconduct can support disgorgement. Notably, Mr. Chism fails to discuss *Eriks* in that paragraph, which involved disgorgement due to a conflict of interest just as here.

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State and each individual breach of the RPCs as set forth above warrant disgorgement of a significant portion of the amounts Tri-State paid him and the jury found he was owed.

82. As for his $310,000 bonus for FY 2010, Mr. Chism is entitled to receive a bonus that which an experienced in-house counsel would expect to receive, which is at most 20% of his salary. Mr. Chism's salary was $190,000. Accordingly, he shall disgorge all but $38,000 of the $310,000 bonus he received leaving him with total compensation and benefits for FY 2010 of $242,000.

83. As for his $500,000 bonus for FY 2011, Mr. Chism is entitled to receive a bonus of $335,000, which takes into account the significant contributions he made as president of TRP to help Tri-State stay in business, preserve its bonding capacity and avoid default which, in turn, would have cost Tri-State a minimum of $27 million. Accordingly, he shall disgorge $165,000 of his $500,000 bonus, leaving him with total compensation and benefits for FY 2011 of $539,000.

84. As for his $250,000 bonus for half of FY 2012, Mr. Chism negotiated this bonus despite the absence of any prior agreement that he would be entitled to a bonus based on six months' worth of work. He also negotiated that bonus despite acknowledging the conflict stemming from Larry's accusation that Mr. Chism took advantage of Ron. But Mr. Chism's valuable work on the Canadian project continued into FY 2012, and Tri-State survived in large part due to that work. Accordingly, Mr. Chism is entitled to a bonus of $137,000 and he shall disgorge the remaining $113,000 of the $250,000 bonus, leaving him with total compensation and benefits for half of FY 2012 of $239,000.

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85. In total, Mr. Chism must disgorge $550,000 of the $1,060,000 to which he would otherwise be entitled leaving him with $510,000.[154] Because Tri-State already paid Mr. Chism $310,000, Tri-State owes Mr. Chism $200,000.

86. As found by the jury, Tri-State and Larry are obligated to pay compensation to Mr. Chism pursuant to a contract and their failure to pay him compensation was willful. Accordingly, Tri-State and Larry owe that compensation pursuant to RCW 49.52.050(2).

87. Tri-State and Larry's violation of RCW 49.52.050(2) entitles Mr. Chism to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, i.e., $400,000, together with costs of suit and a reasonable sum for attorney's fees pursuant to RCW 49.52.070.

88. In addition, Mr. Chism's success in recovering judgment for wages or salary owed to him entitles him to an award of his reasonable attorney's fees, in an amount to be determined by the court, to be paid by Tri-State pursuant to RCW 49.48.030.

CONCLUSION

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT:

1. On Mr. Chism's First Cause of Action (Breach of Contract), judgment shall be, and hereby is, entered in favor of the PLAINTIFF.

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[154] Mr. Chism argues in paragraph 207 of his Proposed Findings of Fact and Conclusions of Law that "under the doctrine of account stated, Tri-State is legally barred from asking the Court to return the $310,000 already paid." (citations omitted). In *Sunnyside Valley Irr. Dist. V. Roza Irr. Dist.*, 124 Wn.2d 312, 318, 877 P.2d 1283 (1994), which Mr. Chism cites, the Washington Supreme Court favorably cited the Restatement's definition of that an account stated: "The Restatement (Second) of Contracts § 282(1) (1981) defines an account stated as 'a manifestation of assent by debtor and creditor to a stated sum as an accurate computation of an amount due the creditor.' The Restatement explains further that '[a] party's retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent.'" It cannot be said that Mr. Chism and Tri-State were in a debtor and creditor relationship when Tri-State agreed to pay the $310,000 bonus. The doctrine of account statement does not apply by its terms to the facts of this case nor has Mr. Chism cited a case in which that doctrine barred the disgorgement of fees or compensation in general or in circumstances similar to those present here.

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2. On Mr. Chism's Second Cause of Action (Willful Withholding of Wages), judgment shall be, and hereby is, entered in favor of the PLAINTIFF.
3. On Tri-State's Counterclaim, the Court finds for the DEFENDANTS, which results in the disgorgement of $550,000 of the $1,060,000 to which Mr. Chism would otherwise be entitled. That leaves Mr. Chism with compensation owed of $510,000. Tri-State previously paid him $310,000 leaving $200,000 unpaid.
4. Judgment against Tri-State and Larry Agostino shall be, and hereby is, entered in favor of the PLAINTIFF in the amount of $400,000 plus reasonable attorney's fees and costs in an amount to be determined by the court.

Dated this 14th day of November, 2014.

[E-signature on following page]

Honorable Ken Schubert
King County Superior Court Judge

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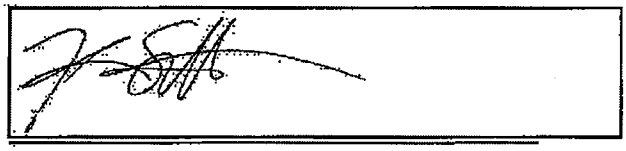

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