95701-1

PETITION FOR DISCRETIONARY REVIEW TO WASHINGTON SUPREME COURT

FROM COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

NO. 74512-3-I

SANDRA L. FERGUSON, Petitioner

Appellant/Cross-Respondent

v.

LAW OFFICE OF BRIAN J. WAID, Respondent

Respondent/Cross Appellant

Submitted by: Emily Rains, Esqu.

Attorney for Petitioner

170 S. Lincoln Street

Ste 100

Spokane, WA 99201

(206)778-1330

mail@emilyrains.com

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I. INTRODUCTION

This motion for discretionary review seeks reversal of the Court of Appeals action dismissing Plaintiff-Appellant's appeal on a procedural technicality, without first considering the appeal on the merits. This request for discretionary review asks this Court to reverse the Court of Appeals' decision to deny Plaintiff-Appellant's Motion to Modify the Court Clerk's ruling of September 11, 2017, which dismissed the appeal because the opening brief was not filed by the deadline of September 7, 2017. The final opening brief was filed by September 25, 2017, along with the Motion to Modify, which the Court of Appeals denied. The Court of Appeals decision to give form priority over substance and to prevent a decision on the merits conflicts with prior decisions of the Supreme Court and the Courts of Appeals.

Appellant (hereinafter, "Plaintiff" or "Plaintiff-Appellant") is a client who has filed a civil suit in

October 2014, against her former attorney, Brian Waid ("Waid"). The case has survived multiple motions for summary judgment by Waid, but Plaintiff has not yet had her trial on the merits. Currently, Plaintiff's malpractice and Consumer Protection Act ("CPA") claims against the attorney, Waid, are pending in the trial court, while the parties litigate certain issues in the Court of Appeals.[1] Waid has filed a cross-appeal and the Court of Appeals has recently granted his motion for an extension of time to file his opening brief on cross-appeal. Therefore, Waid will not be prejudiced by Plaintiff-Appellant's opening brief being also considered on the merits.

In the Court of Appeals, Plaintiff seeks to have her breach of fiduciary duty claim against Waid—which was dismissed by the trial court as duplicative of her malpractice claim against Waid—reinstated. Plaintiff argues that the trial court erred as a matter of law

[1] Plaintiff's appeal is from 14-2-29265-1 SEA. However, Plaintiff's remaining claims against Waid were dismissed under CR 41, and re-filed under a new cause number, 15-2-28797-5 SEA.

when it dismissed her breach of fiduciary claim against Waid, based on a finding that the breach of fiduciary duty claim was duplicative of the malpractice claim, because this is not the law of Washington. On the contrary, malpractice and breach of fiduciary duty claims are frequently allowed to be pursued as independent claims under Washington law. Thus, Plaintiff seeks to try the breach of fiduciary duty claim against Waid to the jury after the Court of Appeals has considered the pending appeal and cross-appeal. The breach of fiduciary duty claim, once reinstated, would be tried with her malpractice and CPA claims which remain pending in the trial court pending resolution of the appeal.

The basis for Plaintiff's breach of fiduciary duty claim against Waid is set forth in her opening brief filed on September 25, 2017. Because the brief was late, the Court Clerk dismissed Plaintiff's appeal, refusing to consider the issue on the merits. Therefore, Plaintiff filed a Motion to Modify the Clerk's order dismissing her appeal. The Motion to Modify

was denied on March 6, 2018. Therefore, Plaintiff is seeking discretionary review by this Court so that the important issues presented on appeal of the dismissal of the breach of fiduciary duty claim will be decided on the merits, rather than on a technicality.

Waid's Breach of Duty of Loyalty, Conflict of Interest, and Breach of RPC 1.8. As set forth in Plaintiff's opening brief, Waid holds himself out to the public as an attorney with a great deal of knowledge and experience in fee disputes, co-counsel relationships, and lien law. Plaintiff, an attorney, retained Waid because of his purported expertise in such matters whereas she had none. Yet, after Waid was retained and entered a limited notice of appearance on behalf of his client (Plaintiff) in the case where she was the priority lienholder under Washington's Attorney-Lien Statute (RCW 60.40) Waid failed to file or otherwise enforce his own client's priority lien for attorneys' fees in the case where the "proceeds" were generated and where her lien had legal effect.

Instead of filing the lien-notice and enforcing his client's priority lien rights which entitled her to have her fee-claim resolved before any other claimants to the proceeds were paid, Waid *opposed* the summary adjudication process available under Washington's attorney-lien statute, charged his client $30,000 for doing so, then caused $530,107 to be moved to the court's registry in a new case where he took the priority lien from his client.[2] The new case was a "sham" case filed by Waid for the sole purpose of creating a priority lien for himself under Washington's attorney-lien statute and depriving his client of the uncontested portion of the proceeds that rightfully belonged to her.

Waid's Admitted Breach of Client Confidences.

Waid has admitted and it is not disputed, that he breached client-confidentiality by speaking about his clients' case, extensively, to a former client of his, as

[2] Summary adjudication would have been in Plaintiff-Appellant's best interest because it would have t resolved the fee-dispute matter cost-effectively, and all parties (including the plaintiffs who were receiving the settlement proceeds) would have had notice and an opportunity to be heard (which was the goal of Waid's client).

well as to his former boss. Both of these lawyers were third parties who had no legitimate interest in the case. Instead, both attorneys were trying to use their influence over Waid to advance the opposing party's, Stephen Teller's, interest in the fee dispute. In other words, Waid communicated the Plaintiff-Appellant's confidences to two attorney who were seeking to advance the interests of the opposing party. Although Waid admits to conferring with these third parties without his client's consent, he has argued to the trial court that any attorney in his position would have done the same.

Five months after Waid filed the sham case in his client's name and charged and billed her $78,350.85 for worthless legal services, he disavowed the sham claims in open court without her informed consent, which caused the adverse party to sue his client (not him) for $102,000 in CR 11 sanctions. The motion for sanctions by the adverse party clouded his client's title to the $265,000 which was unlawfully deposited

and held in the court registry by Waid during the entire sham case.

A few days before his client's response to the CR 11 sanctions motion was due, Waid abandoned his client on a false pretext, leaving her without representation and to defend herself against the sanctions motion caused by his filing of the sham case. Then, Waid made misrepresentations of fact to the trial court to obtain a post-facto order permitting his withdrawal (which had, in truth, already occurred without leave of the court). Then, Waid filed his own lien-notice, claiming his right to take $78,350.85 in attorneys' fees from the money in the court registry which had belonged to his client all along (i.e., the $265,000), but which he had caused to be deposited into the registry of the sham case once it was filed.

Trial Court's Order Setting Waid's Lien Aside. In the sham case, the trial court judge correctly ordered Waid's lien to be set aside as invalid because the money in the court registry was not "proceeds"

from the sham case, but had been earned long before the sham case was filed, by the two attorneys who were disputing the proper division of the fees.

Court of Appeals Finds Waid's Lien Valid. The Court of Appeals reversed the trial court's decision upon Waid's appeal. This was reversed by the Court of Appeals. See Appendix (Published Court of Appeals Decision).

Order Denying Motion to Modify. Plaintiff's appeal to have her breach of fiduciary duty claim reinstated has been dismissed and will not be heard by the Court of Appeals because the brief was filed two weeks late. Therefore, Plaintiff seeks discretionary review of the Court of Appeals' decision denying modification of the Court Clerk's dismissal. Plaintiff's appeal of the trial court's dismissal of her breach of fiduciary duty claim should be decided on the merits in the interest of justice, which would have been consistent with previous holdings by both the Supreme Court and the Court of Appeals.

II. IDENTITY OF PETITIONER

Petitioner Sandra L. Ferguson and the Ferguson Firm, PLLC ("Ferguson") is the "Appellant" in the Court of Appeals and the "Plaintiff" in the trial court. Ferguson was the Respondent in the Court of Appeals' decision in 2013 which reversed the trial court's order setting Waid's Lien for Attorneys' Fees Aside and upheld the legality of Waid's Lien.

III. CITATION TO APPELLATE DECISION TO BE REVIEWED

Petitioner requests the Washington Supreme Court review and reverse the Washington State Court of Appeals decision in *Sandra L. Ferguson and The Ferguson Firm, PLLC, Appellant v. Law Office of Brian J. Waid and Brian J. Waid and Jane Doe Waid and the Marital Community Thereof*, *Respondents*, 74512-3-I Order Denying Extension of Time and Denying Motion to Modify (March 6, 2018), herein the "Order". A copy of said Order is included in the **Appendix**.

IV. ISSUES PRESENTED FOR REVIEW

A. Decision of the Court of Appeals in Conflict with Decision of the Supreme Court.

B. Decision of the Court of Appeals in Conflict with Another Decision of the Court of Appeals.

C. Significant Question of Law Under the Constitution of the State of Washington or the United States is Involved;

D. Petition Involves an Issue of Substantial Public Interest that Should Be Determined by the Supreme Court.

V. STATEMENT OF THE CASE

A. Plaintiff-Appellant Seeks Discretionary Review of the Court of Appeals' Decision to Dismiss Her Appeal and Not Consider the Merits Because the Opening Brief was Filed Two Weeks Late.

This is a request for discretionary review of the Court of Appeals' decision to deny Plaintiff-Appellant's

Motion to Modify the Court Clerk's Ruling which dismissed her appeal on September 11, 2017 because the opening brief was not filed by the deadline of September 7, 2017. Plaintiff-Appellant's Brief was filed 2 weeks late, on September 25, 2017, along with the Motion to Modify the Court Clerk's notation ruling of September 11, 2017, at issue here. The Court of Appeals denied the Motion to Modify the Court Clerk's ruling and therefore, refuses to consider the opening brief or to decide Plaintiff-Appellant's appeal of the trial court's decision to dismiss her breach of fiduciary duty claim on the legal merits. The order denying Plaintiff-Appellant's Motion to Modify and the late-filed opening brief are included as part of the **Appendix**.

B. Appellants Acted in Good Faith to Meet the Court's Deadline, But Failed.

On August 8, 2017, Appellants received notice from the Court Clerk of the Court of Appeals that the due date for Appellants' opening brief would be September 7, 2011. and "no further extensions of time will be permitted." Plaintiff-Appellant failed to file

the opening brief by the September 7, 2011 deadline set forth in the notice of August 8, 2011. The deadline set by the Court of Appeals in advance was taken very seriously. As of the deadline set by the Court of Appeals, the brief was well underway, and the undersigned counsel (a full-time college professor) was working very diligently to complete and file the opening brief. However, the opening brief was still in progress on September 7, 2011, and was not yet suitable for filing. Prior to the deadline set forth by the Court Clerk, the undersigned attorney consulted with her client and a seasoned appellate counsel who advised her to complete the opening brief, then file a motion for an extension of time with the completed brief instead of filing a motion for extension of timr by itself.

Four days later, on September 11, 2017, the Court Clerk entered an order dismissing Plaintiff's appeal, as the undersigned counsel was still preparing the opening brief. On September 25, 2017, the final opening brief was filed, along with the Motion to

Extend the Deadline and Modify the Court Clerk's ruling dismissing the appeal. On March 6, 2018, the Court of Appeals denied the Motion to Extend the Deadline and Modify the Court Clerk's Dismissal of the Appeal. This Motion for Discretionary Review followed.

VI. ARGUMENT

Modern rules of procedure are intended to allow courts to reach merits, as opposed to disposition in technical niceties. *Fox v. Sackman*, 22 Wash. App. 707, 591 P.2d 855 (Div. 3 1979). Plaintiff-Appellant bases this motion for discretionary review on the importance of the underlying issues to the public and on the weight of authority which provides that cases should be decided on the merits, rather than technicalities.

The Court has not generally expressed reasons for granting discretionary review. Typically, the opinion merely has recited that discretionary review was granted. See, e.g., *Bitzan v. Parisi*, 88 Wash. 2d

116, 558 P.2d 775 (1977). Nor do the cases present any strong pattern that would fit the rule provisions. For example, Bitzan v. Parisi, above, is merely a case considering the sufficiency of the evidence supporting some challenged instructions.

Likewise, no reasons were given in *Elliott v. Peterson,* 92 Wash.2d 906, 577 P.2d 1282 (1979) (effect on statute of limitations of an erroneous denial of voluntary dismissal); *Layman v. Ledgett*, 89 Wash. 2d 906, 577 P.2d 970 (1978) (issue of rights to timber); *Childers v. Childers,* 89 Wash. 2d 592, 575 P.2d 201 (1978) (child support education after age of majority); *Goodell v. ITT-Federal Support Services, Inc* . 89 Wash.2d 488, 573 P.2d 1292 (1978) (tort liability); *State v. Agee*, 89 Wash. 2d 416, 573 P.2d 355 (1977) (effect of dismissal of agent on defense persona to agent on liability of principal).

The Supreme Court has granted a petition for review when, although affirming decisions below, it disagreed with the reasoning below. *State v.*

Johnson, 96 Wash. 2d 926, 639 P.2d 1332 (1982) (overruled on other grounds by, *State v. Calle*, 125 Wash. 2d 769, 888 P.2d 155 (1995)).

Though review by Supreme Court is normally limited to issues raised in petition for review and answer, the Court has authority to perform all acts necessary or appropriate to fair and orderly review and can waive Rules of Appellate Procedure when necessary to serve the ends of justice. Thus, court could address substantive issue not raised by parties in order to curtail further appeals. *Kruse v. Hemp*, 121 Wash.2d 715, 853 P.2d 1373 (1993)(holding modified on other grounds by *Berg v. Ting*, 125 Wash.2d 544, 886 P.2d 564 (1994)).

The appellate court's discretion to consider cases and issues on their merits, despite one or more technical flaws in an appellant's compliance with the Rules of Appellate Procedure, should normally be exercised unless there are compelling reasons not to do so. *Wright v. Colville Tribal Enterprise Corp.,* 127

Wash. App. 644, 111 P.3d 1244, 95 Fair Empl. Prac. Cas. (BNA) 1747 (Div. 1 2005), *rev'd on other grounds*, 159 Wash.2d 108, 147 P.3d 1275 (2006).

In a case where the nature of an appeal is clear, and the relevant issues are argued in the body of the brief and citations are supplied so that the appellate court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue, despite technical failures in an appellants compliance with the Rules of Appellate Procedure. *Id.*

Technical violations of appellate rules will not ordinarily bar appellate review where justice is to be served by such review. *Wolf v. Boeing Co.*, 61 Wash. App. 316, 810 P.2d 943 (Div. 1 1991) (a*brogated on other grounds* by, *Hill v. Jawanda Transport Ltd*., 96 Wash. App. 537, 983 P.2d 666 (Div. 1 1999)). See also, *Dana v. Piper*, 173 Wash. App. 761, 295 P.3d 305 (Div. 2 2013), *review denied*, 178 Wash.2d 1006,

308 P.3d 642 (2013)[3], and *Eller v. East Sprague Motors & RVs, Inc*., 159 Wash. App. 180, 2444 P.3d 447 (Div. 3 2010).[4]

In *Clark County v. Western Washington Growth Management Hearings Review Board*, ---P.3d---, 2013 WL 1163889, Slip opinion, p. 6 (Stephens, J., concurring) (March 21, 2013) this Court, citing RAP 1.2(a), stated: "We …liberally construe the rules on determining a party's compliance."

This Motion to Modify the Court's Notation Ruling Dismissing the Appeal Should be Granted to Allow for Consideration and Decision on the Merits. Appellant does not shirk responsibility, or offer

[3] Wife of client who filed legal malpractice suit against law firm was party to client's notice of discretionary review of trial court's pretrial discovery orders, though wife was not named as a petitioner in the initial notice of review due to clerical error, as it was clear from the record that client always intended to include wife in the petition and thus, a waiver of deadline for filing notice of discretionary review to serve ends of justice was justified.

[4] Court of Appeals would overlook appellant's technical failure to comply with rule requiring his opening brief to include assignments of error, as appellant appealed only one order of the trial court and the nature of his appeal was clear from his identification of issues and his argument, such that his technical noncompliance with rule was not an impediment to a decision on the merits.

excuses for the late filing. There simply was not sufficient time to prepare the brief and file it by the deadline date of September 7, 2011. That being said, Appellants worked very diligently and in good faith to meet the deadline once they set to work. Appellants were by no means cavalier about the Clerk's notice regarding the deadline. Although Appellants take full responsibility for the failure to meet the deadline, there are circumstances that show that the failure was not due to a lack of good faith or diligence. First, there is an extensive procedural history and factual record which is relevant to this appeal. Second, counsel for appellants is an attorney who teaches business and tax law and accounting in Salt Lake City, Utah; she is not by background, a legal malpractice attorney. Third, after an extensive search, Ms. Ferguson could not find a malpractice lawyer to represent her because none of the malpractice attorneys in town were willing to take a case against a colleague (Mr. Waid is also a malpractice attorney), regardless of the merits. The

foregoing information is presented to the Court, not because it excusess Appellants' failure to file the brief on time, but to explain that this brief is not late due to a lack of due diligence or good faith by Appellants' or counsel for Appellants. Appellants approached the deadline they were given by the Clerk with the earnest intention to meet it.

As for the extensive record involved with this appeal, this created a lot of work. Ferguson is only appealing two orders of the trial court: (1) the dismissal of the breach of fiduciary duty claim at summary judgment; (2) the order of non-suit dismissal under CR 41. But, this case that is on appeal (Ferguson v. Waid) involves the facts and procedural history of two other cases, and one prior appellate proceeding before the Court of Appeals Division I, which occurred in 2013. For example, this appeal arises from a "malpractice" case brought by Ferguson against Waid in October 2014. Ms. Ferguson's claims against Mr. Waid arose from Mr. Waid's alleged acts, errors and omissions in two separate,

but related cases in which he represented Ms. Ferguson and her law firm (i.e., Ferguson v. Teller, filed by Waid in 2011 and Endres v. Safeway, filed by Ferguson in 2010). Furthermore, in 2013, Ferguson v. Teller was on appeal before this Court. Ms. Ferguson was an appellant, but so was Ms. Ferguson's attorney, Brian Waid, who was seeking reversal of the trial court's order vacating his lien for attorneys' fees he claimed he earned for his role in the *Endres v. Safeway* and Ferguson v. Teller cases. Once the issues on appeal were resolved by this Court, Ms. Ferguson filed Ferguson v. Waid in the trial court below, and that case was vigorously litigated for one year (October 14, 2014 — November 30, 2015), before it was dismissed by the trial court without prejudice on December 1, 2015.

VII. Important Legal Issues Are Presented by this Appeal and Should Be Decided on the Merits.

One of the most important legal questions presented by this appeal is: When does a lien for attorneys' fees "authorized by law" (i.e., by common

law, statute, or contract) run afoul of RPCs 1.8(a) or 1.8(i)?

RPC 1.8(a) provides (inter alia) that "a lawyer shall not knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client [except under certain enumerated circumstances]."

RPC 1.8(i) provides (inter alia) that a "lawyer shall not acquire a proprietary interest in the cause of action or subject matter of the litigation the lawyer is conducting for a client except that the lawyer may…acquire a lien authorized by law to secure the lawyer's fee or expenses; and contract with a client for a reasonable contingent fee in a civil case."

In 2011, Brian Waid agreed to represent Ferguson in the Endres case for the limited purpose of the existing fee dispute with her former co-counsel, Teller. But, after he appeared in the Endres case, he failed to file his client's lien for attorneys' fees in the Endres case, or to enforce his client's "super priority"

lien. His own client's lien had priority status, and he could have and should have foreclosed on the settlement funds from the Endres case, which were in the hands of the adverse party from April 28, 2011 to August 5, 2011. Instead, Mr. Waid filed a new, separate lawsuit against Teller, and as a result, a lien arose in his name or interest, thus, then he deposited the contingent-fee from the Endres case into the court registry of the Ferguson v. Teller case, and thereby, acquired a security or pecuniary interest in the subject matter of the litigation which was adverse to his own client, Ferguson v. Teller. See Ferguson v. Teller v. Waid, 178 Wash. App. 622, 631-32, 316 P.3d 509 (2013). Even when there was no question about Ms. Ferguson's right to possession and control over $265,000 in the court registry because it belonged to her, Waid took no action to have Ms. Ferguson's funds disbursed to her.

In 2013, the Court of Appeals Division I held Waid's lien valid as a matter of law, based on the circumscribed record which was before the Court at

that time (during the appeal from the Ferguson v. Teller case). Waid had the opportunity to adjudicate his claim to fees after remand to the trial court, but he did not seek to do so. Therefore, the $290,000 that remained in the court registry was disbursed to Teller.

Now, due to this appeal, the Court has a more extensive or complete record before it, and is called upon to decide the legal question (based on the undisputed record) whether Waid's lien "authorized by law", violated the Rules of Professional Conduct. This is an important legal question for the Court to resolve, not only for the benefit of the parties in interest on this appeal, but for Washington lawyers who require clear guidance from the appellate courts interpreting RPC 1.8 (a) and 1.8(i).

Pursuant to the Rules of Appellate Procedure, the Court Should Accept and Consider Appellant's Brief on the Merits.

RAP 18.8(a) authorizes the relief sought. The rule provides in relevant part, as follows:

"Generally. The appellate court may, on its own initiative or on motion of a party, waive or alter the provisions of any of these rules and enlarge or shorten the time within which an act must be done in a particular case in order to serve the ends of justice, subject to the restrictions in sections (b) and (c)."

(2) RAP 1.2(a) provides:

"These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b)."

The appellate court will construe the Rules of Appellate Procedure liberally to promote justice and facilitate the decision of cases on the merits. State v. Turner, 156 Wash. App. 707, 235 P.3d 806 (Div. 1 2010).

In a case where the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the court is not really inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or the issue. Id.

VIII. CONCLUSION

For the foregoing reasons, the Court should grant discretionary review in this case.

IX. APPENDIX

RCW 60.40—Washington's Attorney Lien Statute.

Decision Denying Motion to Modify and Extension of Time, filed March 6, 2018.

Appellant's Opening Brief filed September 25, 2017.

Trial Court's Order in Ferguson v. Teller Setting Waid's Lien Aside.

Published Opinion of the Court of Appeals in Waid v. Ferguson v. Teller.

Unpublished Opinion of Court of Appeals in Ferguson v. Teller.

Order of Judge Ramseyer in Ferguson v. Waid

DATED this 5th day of April, 2018.

Respectfully submitted,

/s/Emily Sharp Rains_____

Emily Sharp Rains, WSBA #35686

Attorney for Plaintiffs/Appellants

170 S. Lincoln Street, Suite 100
Spokane, WA 99201
(206) 778-1330
mail@emilyrains.com

DECLARATION OF SERVICE

I certify that on this 5th day of April, 2018, I caused a true and correct copy of his document to be served on counsel of record, Kathleen Nelson, Sarah Demaree via e-mail.

DATED this 5th day of April, 2018

s/Emily Rains_____

Emily Rains

APPENDIX 1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SANDRA L. FERGUSON and THE FERGUSON FIRM, PLLC, Appellants, v. LAW OFFICE OF BRIAN J. WAID, BRIAN J. WAID and JANE DOE WAID, and their marital community, Respondents.	)	No. 74512-3-I ORDER DENYING EXTENSION OF TIME AND DENYING MOTION TO MODIFY

Appellants Sandra Ferguson and the Ferguson Law Firm, PLCC, have moved to modify the court administrator/clerk's September 11, 2017 ruling dismissing the appeal for failure to file the opening brief. Appellants have also filed a motion to extend the time to file the opening brief. Respondents/Cross-Appellants have filed an answer, and appellants have filed a reply. We have considered the motions under RAP 18.8(a) and RAP 17.7 and have determined that both motions should be denied. Respondents' request for sanctions is denied without prejudice. Now, therefore, it is hereby

ORDERED that the motion for extension of time and the motion to modify are both denied. It is further

ORDERED that the appeal remains dismissed, and respondents' cross-appeal shall proceed.

Dated this 6th day of March, 2018.

Cox, J.

Spearman, J.

Schindler, J.

APPENDIX 2

NO. 74512-3-I

COURT OF APPEALS: DIVISION I

OF THE STATE OF WASHINGTON

SANDRA L. FERGUSON,

Appellant/Cross-Respondent

LAW OFFICE OF BRIAN J. WAID,

Respondent/Cross-Appellant.

BRIEF OF APPELLANTS SANDRA L. FERGUSON

Emily Sharp Rains, Esq. PLLC
Attorney for Appellant
Ferguson
170 S. Lincoln St
STE 100
Spokane, WA 99201
(206)778-1330
mail@emilyrains.com

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I. ASSIGNMENT OF ERRORS

ASSIGNMENT OF ERROR NO. 1: The trial court erred when it partially granted summary judgment to Defendant in its order of June 19, 2015.

Issues Pertaining to Assignment of Error No. 1:

(a) *Breach of Fiduciary Duty Claim*. Did the Defendant, an attorney, violate the Rules of Professional Conduct while representing Ms. Ferguson? Answer: Yes.

ASSIGNMENT OF ERROR NO. 2: The trial court erred when it ordered involuntary nonsuit dismissal of Ms. Ferguson's case on December 1, 2015.

Issues Pertaining to Assignment of Error No. 2:

(a) Did the trial court err when it did not grant a reasonable trial continuance so that Ferguson's new counsel, a full-time college professor, could complete her teaching class schedule and have adequate time to prepare Ms. Ferguson's case for trial? Answer: Yes.

(b) Did the trial court err when it considered and decided a motion to dismiss for alleged violations of CR 41, when the moving party had not met the notice and filing requirements of the rule? Answer: Yes.

(c) Did the trial court err by dismissing Ms. Ferguson's case even though Ms. Ferguson made every effort in good faith to comply with pretrial deadlines? Answer: Yes.

(d) Did the trial court err by dismissing Ms. Ferguson's case without considering the prejudice to Ms. Ferguson? Answer: Yes.

(e) Did the trial court err by dismissing Ms. Ferguson's case without considering lesser sanctions to Ms. Ferguson? Answer: Yes.

II. STATEMENT OF THE CASE

A. Procedural History

i. Procedural Facts re: 2013 Appeals (Nos.68329-2-I, 69220-8-I).

This Court is familiar with the parties and many of the underlying facts pertaining to this appeal, because in 2013 Sandra Ferguson ("Ms. Ferguson") and Brian Waid (the "Defendant") and their respective law firms, were adverse appellants before this Court. CP 113-121, CP 123-129. Ms. Ferguson appealed to vacate the judgment in favor of Stephen Teller ("Teller") and his law firm based on evidence that a fraud had been perpetrated on her by her own lawyer, the Defendant. CP 116. See, Ferguson, et al. v. Teller, et al., 2013 WL 6865540 (Wash. App. Div. 1). During a hearing for a 12(c)motion filed by Teller, Defendant falsely conceded that Ms. Ferguson's claims were barred as a matter of law by Mazon v. Krafchick, 158 Wn.2d 448, 144 P.3d

1168 (2006)[redacted]; a case which had no application to the dispute with Teller. Ms. Ferguson alleged that the false and erroneous concession of her claims by the Defendant was due to multiple undisclosed conflicts of interest. Citing RAP 1.12, this Court's review was "circumscribed to the evidence called to the attention of the trial court prior to the entry of its order on summary judgment"; therefore, "the actions of an attorney authorized to appear for a client are binding on the client at law and in equity." Ferguson v. Teller, at 4 (citing Rivers v. Wash. Conference of Mason Contractors[redacted] [t]he sins of the lawyer [were] visited upon the client." CP 116.

The Defendant's 2013 appeal sought relief from the trial court's order vacating his lien for attorneys' fees in the amount of $78,350.85. *Ferguson, et al. v. Teller, et al. v. Waid, et al.*, 178 Wash. App. 622, 316 P.3d 509 (2013). Ms. Ferguson argued that the question of whether the lien was valid was moot because Ms. Ferguson's funds had already been disbursed from the court registry, leaving none of Ms.

Ferguson's money to which the Defendant's lien to attach. This Court disagreed that the question was moot, because $290,000 remained in the court registry. The Court held that the Defendant's lien arose on the date the Defendant filed Ms. Ferguson's action against Teller, was "superior to all other liens", and was "not affected by settlement of the parties until the lien [was] satisfied in full." This Court concluded that under RCW 60.40.010(d) the $290,000 in the court registry were "proceeds". Thus, the trial court's order vacating the Defendant's lien was reversed, the lien was declared legally valid, and the Defendant's claim to his alleged fees was remanded to the trial court "for a determination of what amount, if any, of the funds remaining in the court registry [were] rightfully [the Defendant's]." CP 128-129. After remand, however, the Defendant chose not to adjudicate his claim to fees; thus, the $290,000 in the court registry was disbursed to Teller. CP 2023-24.

ii. Procedural Facts Re: Ferguson v. Waid (14-2-29265-1 SEA).

On October 24, 2014, after trying but failing to mitigate damages with her appeal, Ms. Ferguson filed this lawsuit against the Defendant for his acts, errors and omissions in the Teller Dispute. CP 1-26. The Defendant asserted a counterclaim, suing Ms. Ferguson for the attorneys' fees and interest he claimed to be owed from his failed representation. CP 27-46.

On June 19, 2015, the trial court denied the Defendant's motion for summary judgment, finding that genuine disputes of material fact precluded summary judgment dismissal of Ms. Ferguson's malpractice and CPA claims. However, the court partially granted the Defendant's motion, and dismissed the rest of Ms. Ferguson's claims with prejudice. CP 939-45, CP 1833-1890.

On November 13, 2015, the trial court granted Ms. Ferguson's motion for summary judgment and dismissed Defendant's counterclaim with prejudice, finding the fee claim barred by the doctrine of res judicata. CP 2075-77.

On December 1, 2015, the trial court entered an order of non-suit dismissal, pursuant to Defendant's oral request. CP 2130-31. Then,

Defendant moved for reconsideration and dismissal with prejudice; but after reconsideration, the trial court denied Defendant's motion to dismiss the case with prejudice. CP 2064-65.

B. Statement of Facts Re: Defendant's Representation of Ms. Ferguson in Fee Dispute with Mr. Teller.

i. Defendant's Conflict of Interest Due to His Own Financial Interests.

Ms. Ferguson represented five female managers in two separate but related employment discrimination cases against the same employer ("ABC Corp"). First, she filed an action on behalf of one of the women, and that case settled just before trial on December 2009. Ms. Ferguson filed the second action on behalf of the other four similarly-situated managers in 2010 (the "SEBS case"). Due to the common facts and legal claims against the same employer, Ms. Ferguson's work on the first case advanced the claims of her other four clients in the second case. Ms. Ferguson's lien for attorneys' fees from the SEBS case arose on the date she filed the second action on behalf of the four named plaintiffs, and was "superior to all other liens". CP 128.

Ms. Ferguson, alone, litigated the SEBS case for 9 months. Her efforts resulted in mediation and a settlement offer to the SEBS plaintiffs of $1,375,000. CP 1014. The plaintiffs chose not to accept the offer, and proceeded with their lawsuit. They agreed to retain Stephen Teller as Ms. Ferguson's co-counsel because he agreed that his law firm would advance the substantial costs of at least three expert witnesses that would be needed to establish the full extent of their disparate impact claims and damages. Soon after Teller was retained, Ms. Ferguson withdrew to observe a 90-day suspension and was expected to return to the case on or around May 3, 2011.

During her absence, her former clients decided to accept a settlement offer which was $250,000 more than the offer they had rejected at mediation. Ms. Ferguson learned about the imminent settlement of the case and that Mr. Teller was claiming a disproportionate share of the fee (50%), although he had not paid costs for any of the three experts, due to the plaintiffs' decision to settle. A dispute arose between Ferguson and Teller over the fair and proper

division of the contingent fee between the lawyers. On April 5, 2011, Ms. Ferguson consulted an attorney, the Defendant, regarding the fee dispute with Teller. CP 1013-15.

The Defendant holds himself out as an attorney with substantial knowledge and experience in the law of legal malpractice, legal ethics, co-counsel relationships, fee disputes, and liens. CP 2631-44, CP 550-52, CP 39. Ms. Ferguson followed the Defendant's advice and served a Notice of Lien for Attorneys' Fees on the SEBS clients, Teller, and ABC Corp; the corporate defendant in the SEBS case. CP 1017.[1] The notice of lien asserted Ms. Ferguson's claim to $477,000 (90% of the total $530,107.00 contingent-fee), and expressly acknowledged Teller's right to 10% of the contingent-fee, $53,011. On April 28, 2011, the SEBS case settled and "proceeds" resulted. CP 2567-2589 (*2573).

On May 4, 2011, Ms. Ferguson and the Defendant entered a legal services contract. CP

[1] In Ms. Ferguson's declaration, she mistakenly states that Teller also filed a notice of lien, after hers was filed. Later, she learned that Mr. Teller had not done so. But, there has been no opportunity to correct the declaration accordingly. (*1017).

2569. Ms. Ferguson retained the Defendant for his expertise in fee disputes, liens, co-counsel relationships, and legal ethics. CP 2569-70, 949-50. In consideration for the Defendant's expertise, Ms. Ferguson agreed to hire the Defendant and pay the hourly rates of the Defendant and his associate set forth in the Defendant's contract for services. CP 283-85, CP 489-97.

Teller's claim was that a fee agreement that he prepared and had the SEBS clients sign, formed an express contract which entitled him to an unreasonable fee; grossly disproportionate to the amount of time he worked on the case, or the value he added to achieving the clients' goals. Teller asserted he was entitled to 50% of the contingent-fee, $265,000.[2] Since Ms. Ferguson's lien conceded that Teller was entitled to 10% of

[2]Ms. Ferguson's efforts over several years procured an offer of $1,375,000. Assuming (arguendo) that Teller's appearance in the case netted the plaintiffs the offer they accepted (i.e., an additional $250,000) Teller's claim to 50% of the contingent-fee meant that he would receive a fee which *$15,000 more than his clients* received as a result of his appearance in the case. This is not a "reasonable" fee. See RPC 1.5(e). Also, there is evidence that Teller coerced his clients to settle the case before Ms. Ferguson returned, so that he would receive a windfall. CP 1033

the fee ($53,000), the amount *in controversy* was 40% of the entire fee, $212,000. CP 2567-69.

On May 10, 2011, Defendant filed a limited notice of appearance in the SEBS case. CP 286-88. Defendant knew that his client, Ms. Ferguson, had a "super priority lien" to the proceeds from the SEBS case, and that she had previously served ABC Corp, Teller, and the SEBS clients with notice of her lien. CP 625-26[3]. The Defendant also knew that the settlement proceeds were in the hands of the adverse party in the SEBS case, ABC Corp (CP 596), which meant Ms. Ferguson's lien was ready to be filed in the SEBS case, so it could attach to the judgment, once entered. CP 596. Yet, the Defendant failed to file Ms. Ferguson's "super priority lien" notice in the SEBS case. CP 32. Instead, Defendant filed a *new* cause of action, Ferguson v. Teller.

On June 1, 2011, Teller's attorney wrote to the Defendant stating: "**[w]e need to know in which matter you propose to deposit the fees**".

[3] Defendant testifies to his personal knowledge of the law of liens when filing *his own lien* on February 14, 2012, in Teller.

Defendant responded "**[t]he 2011 Case**", referring to the newly-filed Ferguson v. Teller case. CP 599. Thus, Defendant agreed to deposit the settlement funds from the SEBS case into a case where *Defendant* would possess the "super priority lien", *instead* of his client; thereby, he *knowingly* acquired a security and pecuniary interest adverse to his client in Ferguson v. Teller. CP 625-26.

July 12, 2011, the Defendant signed a stipulated order requiring the contingent fee generated by the SEBS settlement to be deposited into the court registry for the Teller case. CP 2646-48. ABC Corp delayed complying and Defendant advised Ms. Ferguson that there was nothing to be done about the delay. CP 392. Thus, the money remained in ABC Corp's possession until August 5, 2011. CP 2650-51. From April 28, 2011 until the deposit was made into the court registry on August 5, 2011, ABC Corp. was in possession of the settlement funds from the SEBS case. CP 596. The timing of the deposit, when it was finally made, was suspicious because it occurred a couple of days after Teller filed a

baseless counterclaim against Ms. Ferguson, alleging that he was possibly entitled to *more than 50%* of the contingent-fee. CP 1020-21.

After months of pressure from Ms. Ferguson, Defendant filed a motion to dismiss Teller's counterclaim—which was granted on November 2, 2011. CP 959-60. Still, Defendant failed to move for disbursement of his client's funds (50% or $265,000) from the court registry. CP 1023. The Defendant represented Ms. Ferguson until February 10, 2012. In all that time, he never sought or obtained the release of any of his client's money from the court registry.

The Defendant's omissions and misrepresentations to Ms. Ferguson gave him the opportunity to maintain his unlawful security interest, while simultaneously increasing his own financial interest in the contingent-fee from the SEBS settlement. Ms. Ferguson did not feel that she could fire Defendant while her money was in the court registry, because she had no funds to retain another attorney. Defendant took advantage of his client's financial situation, which he was aware of, because he was privy to

his client's confidences. CP 2654, CP 2656. Eventually, the Defendant's monthly billing statements reflected an unpaid balance of $78,350.88. CP 290-315. He then withdrew and filed a lien, which attached to his client's money in the court registry of the Teller case. CP 969-71.

ii. The Defendant's Conflict of Interest Involving Reba Weiss and Bob Gould: June 1, 2011.

On June 1, 2011, a few days after the *Teller* suit was filed, Defendant received a call from his former client, Reba Weiss, an attorney. Ms. Weiss wanted to discuss Ms. Ferguson's fee dispute with Teller. CP 32. The Defendant represented Ms. Weiss while he was employed by Robert Gould's ("Gould") law firm. Gould was still representing Weiss on June 1, 2011, the day Weiss called the Defendant, and Defendant was aware of this fact. CP 32.

Although Weiss was neither a party-in-interest, nor a potential witness, the Defendant had two lengthy telephone conferences with his former client, about his current client's matter, without his current client's informed consent. CP

32, 33. The Defendant's invoices show that he and Weiss discussed Ms. Ferguson's matter for 1.9 hours, time for which Ms. Ferguson was charged. CP 293. Afterwards, the Defendant e-mailed Ms. Ferguson to let her know that Weiss was "fulfilling the role of an intermediary" and that he and Weiss had "agreed" that their "conversations are confidential." CP 870. The Defendant admits that Ms. Ferguson did not authorize him to discuss her fee-dispute matter with Weiss. CP 32. Ms. Ferguson expressed concern that Weiss was not neutral. CP 870.

On June 5, 2011, Teller wrote to Weiss: "**I am trying to hire Bob Gould to talk some sense into [the Defendant].**" CP 1237. On June 14, 2011, Defendant received a call from Gould, and he admits knowing that Gould was not Teller's attorney, but was calling on behalf of *Teller*. CP 33. According to the Defendant's invoices, he spent .40 hours discussing the Teller Dispute with Gould, time for which he charged Ms. Ferguson. CP 293. The Defendant was not authorized by Ms. Ferguson to discuss the fee dispute matter with Gould.

iii. The Defendant's Breach of Duty to Communicate and Concession of His Own Client's Claims: October 28, 2011.

On October 27, 2011, Ms. Ferguson e-mailed the Defendant, requesting a meeting that same day, to discuss her case. Defendant declined to meet with Ms. Ferguson, stating that such a meeting would be "premature", until *after* the trial court ruled on Teller's CR 12(c) motion. CP 2553-54. The hearing was set for oral argument the following day; the briefing was filed, opposing Teller's motion entirely. CP 2612-13.

On October 28, 2011, during the hearing, the Defendant conceded two of Ms. Ferguson's claims stating that one claim was precluded by the holding in Mazon v. Krafchick, 158 Wn.2d 440, 144 P.3d 1168 (2006). Defendant represented to the court and to those present (including his own client), that he was "very familiar" with the law of Mazon, having "lectured" on it. CP 116. But, the Defendant's concession was erroneous. *Mazon* has no application to Ms. Ferguson's fee dispute

with Teller.[4] The concession caused the trial court to grant Teller's CR 12(c) motion on two of Ms. Ferguson's claims. CP 116. After the hearing, Defendant tried to deceive his client by repeatedly stating that the court *first* dismissed one of Ms. Ferguson's claims based on Mazon, which caused Defendant to then concede the other claim. CP 544-45. The true chronology of events was the reverse. CP 1021-22, CP 116.

iv. The Defendant Takes Weiss' Deposition: November 11, 2011

After the Defendant conceded Ms. Ferguson's claims, leaving only her quantum meruit claim surviving, he deposed Weiss. Weiss had no testimony to bear on Ms. Ferguson's quantum meruit claim. CP 1213-1246. During the deposition, Weiss gave false testimony, placing Ms. Ferguson in a negative light. Contemporaneous documents proved that Ms. Weiss' version of the

[4] See Hoglund v. Meeks, 139 Wash.App. 859, 170 P.3d 37 (held that Mazon holding barred attorneys' negligence claim against co-counsel for prospective fee not earned due to co-counsel's negligence, but does not bar attorney from suing co-counsel for alleged entitlement to earned contingent fee).

facts was impossible. Ms. Ferguson insisted Defendant impeach Weiss—which he did. Id.

After the Weiss deposition, Ms. Ferguson gave Defendant three sworn declarations of witnesses to prove that (at another point in the deposition) Weiss committed perjury. CP 1318-19, CP 1256-66, CP 1321-32. Ms. Ferguson wanted Defendant to provide these declarations to Weiss and her attorney, as well as Teller's attorney, and to send a Cease and Desist Letter to Weiss. Defendant refused. CP 932, CP 35. But, Defendant did send Weiss a letter demanding the production of documents. CP 1213-1232. Weiss responded with her own letter, reminding the Defendant of his duty of loyalty to *her*, as a former client, and she copied Gould on this letter. CP 1251. Thus, Weiss and Gould were aware of the conflict of interest that existed for Defendant; they were also aware that he was trying to conceal the conflict from his client, Ms. Ferguson. Ms. Ferguson suspected Defendant of colluding with Ms. Weiss, therefore, she wrote to him and asked him directly to disclose to her, the extent and substance of his communications with Weiss. CP

2655. Defendant ignored this written request for disclosure. Defendant continues to assert, as a matter of law, that "no such conflict existed." CP 35, CP 841-42, CP 1833-1890 (*1844:18-25,1845-46, 1857:5-18).

v. Defendant's Improper Withdrawal on February 10, 2012.

On January 28, 2012, the trial court entered judgment in favor of Teller. Defendant threatened to withdraw on that day, but did not do so, after learning Ms. Ferguson had retained an appellate attorney and planned to appeal. CP 931.

On February 8, 2012, Weiss announced that she had just joined Teller's firm. CP 1348-49. On February 9, 2012, Teller filed a Motion for CR 11 Sanctions against Ferguson (CP 36), expressly excluding Defendant. Teller's motion was captioned as a "motion to disburse" $102,000 of Ms. Ferguson's $265,000 from the court registry; money that should not have been in the registry, since Teller's counterclaim had been dismissed on November 2, 2011. CP 1021, CP 1029.

The next day, Defendant, *during* a three-way teleconference with Ms. Ferguson and the

attorney, *Randy Baker*, abruptly announced his immediate withdrawal, falsely stating that Ms. Ferguson had just threatened to sue him. Ms. Ferguson and Mr. Baker have testified that no such threat occurred on February 10, 2012, that Defendant's account is false. CP 1044-47. During the call, Ms. Ferguson informed Defendant that he could not withdraw with Teller's CR 11 motion looming and a response due in only a couple of days, but he withdrew, anyway. The same day, he notified Teller's attorney of his withdrawal, then began forwarding to Ms. Ferguson, communications from opposing counsel. CP 1030.

Once it became clear that Defendant had abandoned her case, Ms. Ferguson began a frantic search for replacement counsel. She contacted Dick Kilpatrick on December 10, 2012, who as she learned, knew Defendant. Mr. Kilpatrick declined representation, but contacted Teller's attorney to get an extension of the hearing on the CR 11 motion, since Ms. Ferguson had no counsel. But, Teller's attorney refused. The same day, the Defendant contacted Mr. Kilpatrick, who told the

Defendant that his behavior was unethical. CP 2677-2689, CP 1051-1062.

On February 13, 2012, *Ms. Ferguson* requested a telephonic hearing to advise the court that she did not have an attorney and needed a stay of further proceedings until she could find one. The Defendant appeared *without* Ms. Ferguson, failed to inform the trial court that he had withdrawn *the previous Friday*, and used the hearing to obtain a *de facto* order from the court permitting him to withdraw. CP 1030-31. The next day he served and filed his fee-lien. CP 37.

On March 13, 2012, John Muenster appeared as Ms. Ferguson's replacement counsel for post-judgment proceedings. Mr. Muenster immediately sought and obtained a stipulated order for disbursement of the litigants' undisputed funds from the court registry. Now, however, the Defendant's lien for $78,350.85 and Teller's pending CR 11 motion seeking $102,000, prevented Ferguson from having access to the entire $265,000. CP 1878-79.

In July 2012, the trial court granted Ms. Ferguson's motion to set aside Defendant's lien as invalid. The money attached by Defendant's lien was disbursed from the court registry. CP 126. A portion was also disbursed after Teller's motion for sanctions was denied, but Teller was granted prejudgment interest of $27,000. CP 1030.

Everyone appealed. Ms. Ferguson appealed the judgment in Teller's favor, Defendant appealed the order vacating his lien, Teller cross-appealed the trial court's order denying sanctions. Ms. Ferguson and Teller stipulated to the allocation of funds in the court registry ($290,000) as a supersedeas bond. CP 126.

C. Statement of Facts Related to the Dismissal of Ms. Ferguson's Case Under CR 41.

i. Ms. Rains Appears and *Begins Diligently Preparing for Trial.*

Ms. Ferguson was unable to find a malpractice attorney willing to consider the case against Defendant on the merits, because Defendant is a malpractice attorney. Ms. Ferguson filed the complaint in October 2014, *pro se*, in order to preserve her claims. She actively

litigated the case *pro se*, while continuing to search for a lawyer. Eventually, Mr. Muenster (a civil rights attorney)agreed to serve as co-counsel to Mark Olson. Neither of these attorneys knew the Defendant, in part, because neither were malpractice lawyers. However, on September 8, 2015, Mr. Muenster and Emily Rains entered a notice of withdrawal and substitution. CP 1472-1479. Ms. Ferguson retained Ms. Rains to replace Mr. Muenster, as soon as Mr. Muenster became a necessary witness. That occurred on August 24, 2015, when Defendant was deposed. CP 1485-1488, 3285-3328.

Once she appeared in the case, Ms. Rains (not a malpractice attorney) needed to perform legal research, review the record from the SEBS case, from the Teller Dispute, and from the Ferguson v. Waid case, which was extensive by the time. Ms. Ferguson had filed discovery requests when the lawsuit was filed, and made several requests for the outstanding discovery as a *pro se* litigant, but the Defendant had stonewalled her. CP 3448-3647. CP 3412, CP 3415-3433. Therefore, Ms. Rains promptly sent a letter to

the Defendant's attorney requesting the outstanding discovery and demanding a discovery conference. CP 3424-3433. Also, Ms. Rains needed to take depositions that *should* have been taken by the Defendant (e.g., SEBS clients, Teller), so that she could prove the case-within-the-case, essential to winning a malpractice case.

ii. Ms. Rains Has Scheduling Conflict with the Trial Date

Ms. Rains is a full-time college professor who teaches business and tax law in accordance with the academic calendar. She needed a continuance to accommodate her academic schedule. But, as discussed below, there were other reasons for requesting a continuance. Ms. Ferguson had not previously requested a continuance; therefore, she did not anticipate that the request would be denied.

iii. Ms. Ferguson Needs a New Expert Witness.

September 9, 2015, the day after Ms. Rains filed her notice of appearance, Mr. Kilpatrick, Ms. Ferguson's expert witness, informed Ms. Rains that he had sustained an injury that required pain management and rehabilitation, which might

preclude him from testifying at the trial. CP 1472-1479, 1647-1669.

iv. Ms. Rains Files a Motion to Continue Trial Date for 180 days-Denied.

September 30, 2015, Ms. Rains filed a motion to continue, requesting an additional 180 days to resolve a scheduling conflict, to give her the opportunity to familiarize herself with Ms. Ferguson's cases, to take discovery, to retain a new expert witness, and generally prepare for trial. The trial court waited to decide the six-day motion until the pretrial conference on October 16, 2015 (2 weeks later, and 38 days since Mr. Munster withdrew). The trial court denied the request for a 180-day continuance, reasoning that it would prolong the "cloud" over Defendant's reputation. CP 2255-2283.

v. Ms. Rains Requests 10-Day Continuance—Denied.

During the pre-trial conference, Ms. Rains requested a continuance of 10 days, to at least resolve her scheduling conflict, but this request was also denied. The trial court reasoned that Ms. Ferguson could return to her former lawyer, Mr. Muenster, although Ms. Ferguson denied that

this was an option. By this point, Mr. Muenster had moved on and Ms. Rains had been making substantial progress. The court gave Ms. Ferguson and Defendant 4 days each to try their case, and declared that Ms. Ferguson would simply have to go to trial without a lawyer. CP 2255-2283. Then, informed the parties that she had a commitment to speak at a CLE which conflicted with one of trial days; therefore, the number of trial days was reduced from 8 to 7. CP 2403-2455.

vi. Ms. Rains Files a Motion for 3-Day Continuance—Denied.

Though Ms. Rains would now be prevented from representing Ms. Ferguson at trial, she helped Ms. Ferguson prepare for trial, while Ms. Ferguson's health deteriorated due to stress. Id. Ms. Rains retained a new expert, Peter Jarvis, to replace Mr. Kilpatrick, and identified issues of law that had to be decided by the court before the trial. CP 2126-2129. Though, Ms. Rains' teaching schedule had not changed, she notified the court that she could resolve the scheduling conflict with only a 3-day continuance. CP 2098-2125. The court did not rule on the motion until

the first day of trial. Both Ms. Ferguson and the Defendant were present for trial on November 30, 2015. Ms. Rains appeared by telephone from Utah. Ms. Ferguson declined to try her own case, citing a letter to the court from her treating physician, documenting a medical condition which would be aggravated by trying her own case. The court called a one-hour recess. Ms. Rains waited for the court's call back, the court called, but Ms. Rains did not receive the call. The proceedings resumed without Ms. Rains, Defendant stated he was ready for trial, and asked the trial court to dismiss Ms. Ferguson's case under CR 41, pursuant to the authority set forth in Rivers v. Washington State Conference of Mason Contractors, 41 P.3d 1175 (2002). Ms. Ferguson opposed the request. The court did not consider lesser sanctions, but granted Defendant's request, dismissing the case without prejudice. CP 2403-55. On December 15, 2015, Defendant filed a motion for reconsideration, asking the trial court to dismiss Ms. Ferguson's case with prejudice instead. Ms. Ferguson was required to respond. Ms. Ferguson submitted (inter alia) the

opinion of her new expert, Peter Jarvis. CP 2225-2233. The court denied this motion. 2464-65.

III. LEGAL ARGUMENT

A. The Trial Court Erred When It Partially Granted Defendant's Motion for Summary Judgment on June 19, 2015.

i. Standard of Review for Summary Judgment

A court may grant summary judgment when, on the basis of the facts before it, a reasonable fact finder could reach only one conclusion. See *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 331 P.3d 40 (2014). The moving party bears the burden of demonstrating there is no issue of material fact, and all facts and reasonable inferences therefrom must be viewed in the light most favorable to the nonmoving party. See SentinelC3, at 140; Folsom v. Burger King, 135 Wn.2d at 663, 658, 958 P.2d 301 (1998). An appellate court considers all the evidence presented to the trial court and "engages in the same inquiry as the trial court." Id. Summary judgment is appropriate only "when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of

law." SentinelC3, 181 Wn.2d at 140; Folsom v. Burger King, 135 Wn.2d at 663, 658, 958 P.2d 301 (1998).

ii. The Trial Court Erred As a Matter of Law By Dismissing Ferguson's Breach of Fiduciary Duty Claim

The trial court dismissed Ms. Ferguson's breach of fiduciary duty claim, finding that it "sound[s] in tort", and "simply inform[s] Plaintiff's claim of professional negligence…" against the Defendant. CP 1162-63. But this is a misstatement of Washington law. CP 1162-63. A lawyer's alleged breach of fiduciary duty may form the nucleus of a legal malpractice action, but the claim for breach of fiduciary duty can also be framed as an independent cause of action. See, *e.g.*, Eriks v. Denver, 118 Wn.2d 451, 824 P.2d 1207 (1992)(plaintiffs maintained malpractice *and* breach of fiduciary duty claims against lawyer who was held to have a conflict of interest when he represented both investors and promoters of a tax shelter plan). See also, Cotton v. Kronenberg, 111 Wn. App. 258, 44 P.3d 878 (2002), review denied, 148 Wn.2d 1011 (2003)(plaintiff maintained malpractice, breach

of fiduciary duty, conversion and CPA claims against former attorney, alleging the existence of a conflict of interest between the *lawyer's own financial interest* and the client's interests).

These two types of claims (malpractice and breach of fiduciary duty) have not only been allowed to proceed together, but in a line of decisions, the Washington courts have distinguished these two claims by the different requirements of proof, and elements of the prima facie case. For example, in a breach of fiduciary duty case, the trial court (as opposed to the jury) must decide as a question of law, whether the Rules of Professional Conduct have been breached. When deciding this question, the court *may* consider an expert's opinion, but is not required to consider an expert's opinion. Furthermore, the Rules of Professional Conduct may be explicitly referred to, and considered. Eriks, at 456-61; see also, Cotton, at 264-72 (trial court can consider experts' opinion and make reference to RPCs expressly). The jury's role is to decide whether the predicate facts

have been proven. Id., at 456-63; see also, Simburg, Ketter, Sheppard & Purdy, L.L.P. v. Olshan, 97 Wn.App. 901, 910, 988 P.2d 467 (1999), amended on denial of reconsideration, 33 P.3d 742 (2000), review granted, 141 Wn.2d 1001 (2001); accord Holmes v. Loveless, 122 Wn.App. 470, 475, 94 P.3d 338 (2004); In Eriks the trial court bifurcated the case and decided the question of law on to the jury. Eriks, at 462. In Eriks,, the Court held that once a conflict has been identified, the question of whether it is still reasonable for the lawyer to proceed with the representation in that circumstance, becomes a question of fact for the jury. Id, at 453. Thus, in a breach of fiduciary duty case, the court decides as a matter of law whether the lawyer has violated the Rules of Professional Conduct, but the fact issues underlying the legal duties involved remain the province of the jury. The Law of Lawyering in Washington 15-7, n.61;. (See, App. C.)

In malpractice cases, however, the jury decides the ultimate issue of fact, i.e., whether the attorney exercised the degree of care, skill,

diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in this jurisdiction. Hizey v. Carpenter, 119 Wn.2d 251, 257-66, 830 P.2d 646 (1992). Plaintiffs must usually establish the applicable standard of care by presenting testimony of an expert witness. Hansen v. Wightman, 14 Wn. App. 78, 90, 538 P.2d 1238 (1978), *overruled on other grounds* by Bowman v. Two, 104 Wn.2d 181, 185, 704 P.2d 140 (1985). The exception is "where the area of claimed malpractice is within the common knowledge of laymen." Id. But, in malpractice cases—*unlike fiduciary duty cases*—the expert witness may *not* refer explicitly to the Rules of Professional Conduct. Hizey, at 257-66. Hansen, at 90.

The other difference between these two types of claims is that, in breach of fiduciary duty cases—as *opposed to malpractice cases*—damages are presumed as a matter of law once the defendant is found to have breached his fiduciary duty. Thus, the plaintiff has a remedy even if she has not sustained a specific financial loss. Eriks, at

456, , at 264-72 see also, Simburg, Ketter, Sheppard & Purdy, LLP, at 910, accord Holmes, at 475. .

As illustrated by the foregoing line of cases, breach of fiduciary duty claims are frequently coupled with legal malpractice claims. Therefore, the trial court erred when it concluded that Ms. Ferguson, as a matter of law, could not pursue a malpractice *and* a breach of fiduciary duty claim together.

iii. Trial Court Erred by Concluding Plaintiff Did Not Meet Burden of Production for Summary Judgment.

The trial court erred when it concluded that "Plaintiff has failed to come forward with objective evidence, as opposed to allegations and argument, to defeat Defendants' motion for summary judgment..." CP 2699-2702. As discussed below, the *undisputed* record at summary judgment required a finding, as a matter of law, that Defendant violated the Rules of Professional Conduct. Eriks, at 456-63.

Defendant Violated RPCs 1.7(b)(2) and 1.9.

The Defendant had a conflict of interest between his former client, Reba Weiss, and his current

client, Ms. Ferguson. This conflict arose on June 1, 2011, when the Defendant spoke to Ms. Weiss for 1.9 hours about Ms. Ferguson's fee dispute with Teller. Defendant admits that he had this lengthy discussion with Weiss, without Ms. Ferguson's informed consent. However, Defendant argued to the trial court at the summary judgment hearing, that this was not a breach of his fiduciary duty to Ms. Ferguson, stating:

> "Ms. Ferguson suggests that I should not have spoken with Ms. Weiss when she called without her permission. You know, you're an attorney, you're representing a client, you've been in private practice, *another* attorney calls you up and says, look, I'm going to act as an intermediary, I know both of these folks, I'd like to resolve it. Are you going to talk to that person or are you going to tell them, I can't talk to you, I've got to ask my client whether I can talk to you? No, you're not. You're going to take the call." CP 1846.

Here, there are not any material facts in dispute. Defendant admits he treated his former client, Weiss, as an "intermediary" and shared Ms. Ferguson's confidences with Weiss. Then, he deposed Weiss, and she gave false testimony adverse to Ms. Ferguson. Thetrial court was

required to decide the legal question of whether the defendant violated the Rules of Professional Conduct. These undisputed facts required the court to conclude that, yes, he did. Eriks, at 457-58.

RPC 1.7(a)(2)[illegible]1, provides that a "lawyer shall not represent a client if the representation involves a concurrent conflict of interest." See Appendix A (RPCs 1.7, 1.8, 1.9, 1.16). See also, App. B, (Chapter 7, The Law of Lawyering in Washington). The Rule further states that a conflict of interest exists if "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*." RPC 1.7(a)(2) (emphasis added.) If an attorney has a conflict of interest, he is required to disclose the conflict to the clients, determine whether the conflict is waivable, and if it is, to obtain a written waiver from the client. RPC 1.7(b)(4). If the

conflict is not waivable, the attorney must withdraw, in compliance with RPC 1.16. Id.

Defendant clearly violated RPC 1.7(a)(2) and 1.7(b)(4), by failing to disclose to Ms. Ferguson the conflict of interest involving Weiss and Gould, once it arose on June 1, 2011. Defendant did not comply with RPC 1.7(b)(4).

> "When a client employs [an] attorney [s]he has a right to presume, *if the latter be silent on the point,* that he has no engagements, which interfere, in any degree, with his exclusive devotion to the cause confided to him; that he has no interest, which may betray his judgment, or endanger his fidelity." [Emphasis added.]

See Rob Aronson, et. al., The Law of Lawyering in Washington 7-5(quoting, Williams v. Reed, 3 Mason 405, 29 F. Cas. 1386, 1390, No. 17,733 (C.C.D. Me. 1824)). A law firm owes its primary allegiance to existing clients. Id., citing ABA Formal Ethics Op. 358 (1990. See also In re Johnson, 319 Mont. 188, 193-94, 84 P.3d 637(2004)"A conflict of interest exists any time there is a tension between the interests of an attorney or a third person—including a former client—that may influence the attorney's action,

and a present client, 'even if the attorney eventually takes the course of action most beneficial to the present client.'" Robert Aronson, Conflict of Interest, 52 WASH. L. REV. 807, 809 (1977).A lawyer's personal interests may come from many sources. See e.g., Lockhart v. Terhune, 250 F.3d 1223 (9th Cir. 2001) (conflict based on loyalty to former client that prevented lawyer from implicating the former client in the crime for which a current client was charged); see also, United States v. Moore, 159 F.3d 1154 (9th Cir. 1998) (remanded for evidentiary hearing on possible conflict arising from lawyer's personal relationship with client's codefendant); Mannhalt v. Reed, 847 F.2d 576 (9th Cir. 1998)(conflict based on accusations of lawyer's possible criminal conduct associated with client); In re McKean, 148 Wn.2d 849, 64 P.3d 1226 (2003)(conflict based on lawyer's personal financial interest); In re Wood, 137 N.H. 698, 634 A.2d 1340 (1993) (former client conflict based on lawyer's personal interest in opposing client's plan to develop shopping mall next to lawyer's home), 149 Wn.2d 484, 69 P.3d

844 (2003); see also In re Halverson, 140 Wn. 2d 475, 998 P.2d 833 (2000)(conflict based on attorney's sexual relations with client), abrogated on other grounds by In re Anschell, 149 Wn.2d 484, 69 P.3d 844 (2003). See also, RPC 1.9 cmt. [3](App. A). Although the Washington Rule (unlike the ABA Rule) requires only the former client to provide written consent, the obligations owed to the former client can certainly trigger a conflict with the current client under RPC 1.7(a)(2), thus, requiring the lawyer's compliance with RPC 1.7(b)(4). See Law of Lawyering, 7-85. That is precisely what occurred in this case. Defendant's conflict of interest involving his former client, Weiss, triggered a conflict with his current client, Ms. Ferguson, which required him to comply with RPC 1.7(b)(4). He did not comply. CP 35.

Weiss and Gould both understood that Defendant owed a continuing duty of loyalty to Ms. Weiss, which was in conflict with his duty to Ms. Ferguson. CP 1251. Their knowledge of Defendant's duty to Weiss, *and* of his desire to conceal his conflict of interest from Ms.

Ferguson, would be used by Weiss and Teller to force Defendant to withdraw at a critical time in the litigation, when Ms. Ferguson's response to Teller's motion for CR 11 sanctions was soon due.

Defendant Violated RPC 1.8. The Defendant violated both 1.8(a) and 1.8(i), which addresses a lawyer's conflict between his own financial interest and the interest of his client. The purpose is to "'avoid giving the lawyer too great an interest in the representation' or an incentive to dissuade a client wishing to discharge the attorney." See Rob Aronson, et. al., The Law of Lawyering in Washington, 7-77 (quoting RPC 1.8 cmt.[16]). (See App. B.)

The Defendant violated both rules when he failed to enforce his client's priority lien in the SEBS case, filed a new case, then deposited the settlement funds from the SEBS case into the new case; thereby, acquiring *his own* priority lien by depriving his client, Ms. Ferguson, of *her* priority lien in the SEBS case. Then, Defendant refused to have Ms. Ferguson's undisputed 50% ($265,000) disbursed, throughout his representation, even after Teller's frivolous

counterclaim was dismissed as meritless on November 2, 2011. Finally, Defendant withdrew and filed his own notice of lien which attached to his client's money in the registry of Teller.

In 2013, this Court held that Defendant's lien was legally valid, but this does not mean that Defendant legally *acquired* the lien, and in 2013, the record was not before this Court to decide that question. Now, the Court is called upon to decide this question. Defendant *acquired* the lien *unlawfully* in violation of RPC 1.8. No other conclusion is supportable by the record.

Washington courts recognize that a lawyer's personal financial interests can materially limit a client's representation. See In re Shepard, 169 Wn.2d 697, 239 P.3d 1066 (2010) (attorney violated RPC 1.7(b) by entering into agreement with president of living trust company whereby Shepard did not first advise clients of his personal interest in maintaining continuing business arrangement with the company and obtain their informed consent); In re Haley, 156 Wn.2d 324, 339-40, 126 P.3d 1262 (2006) (attorney Haley violated RPC 1.7 in various ways, including

putting his own interest in recovering on a personal loan and acquiring assets at the lowest price from the represented company for a new company formed by Haley, contrary to the best interest of the represented company).

A lawyer's interest in securing payment for legal services has the potential to create a materially limiting conflict of interest. See Valley/50th Avenue, LLC v. Steward, 159 Wn.2d 736, 748 n. 7, 153 P.3d 186 (2007)(noting distinction between holding a security interest and the motivation for obtaining the security interest in the first place). For example, it is improper under RPC 1.7(a)(2) for a lawyer to seek a stipulated judgment against marital property to ensure payment of *future* legal fees, because this creates a significant risk of the lawyer's personal interest in enforcing the judgment, materially limiting his representation of the client. WSBA Ethics Advisory Op. 2178 (2008). Also, this type of conflict is viewed as non-waivable because it is not reasonable for a lawyer to believe he or she would be able to provide the commitment and diligent service

required per PRC 1.7(b)(1), when judgment for a sum certain amount has already been obtained prior to the lawyer performing any service for the client. Id.

The Defendant has claimed that he was forced to withdraw in February 2012, because Ms. Ferguson threatened to sue him for malpractice during a telephone call on February 10, 2012. Ms. Ferguson and Mr. Baker have both testified no such threat was made. But, assuming (arguendo) that Ms. Ferguson *had* threatened to sue the Defendant, this would not have made his withdrawal ethical under the circumstances. See, CP 1051-1062 (Kilpatrick Decl.). A client's threat of a malpractice claim does not "materially limit" the lawyer's ability to competently and diligently represent that client. The Ninth Circuit has reasoned that finding an actual conflict of interest for the "mere threat" of a claim for malpractice "would allow defendants to manufacture a conflict in any case. United States. v. Moore, 159 P.3d 1154, 1158 (9th Cir. 1998); (citing, Brown v. Craven, 424 F.2d 1166 1170 (9th Cir. 1970))[68] ; State v. Shelby,

104 Wn. App. 1042, No. 24986-3-II (2001) WL 337867, at *3 (February 9, 2001)(unpublished), *review denied*, 144 Wn.2d 1010 (2001) (Bar complaint is not per se conflict of interest); (citing Carter v. Armontrout, 929 F.2d 1294, 1300 (8th Cir. 1991)). The *lawyer*, in this case, manufactured a reason to withdraw, to avoid disclosure of the true reason for his withdrawal.

B. The Court Abused its Discretion by Denying Motion for Continuance.

i. Standard of Review—Abuse of Discretion.

This Court reviews trial court orders denying motions for continuance for a manifest abuse of discretion. Martonik c. Durkan, 23 Wn.App. 47, 50, 596 P.2d 1054 (1979)(appellant must make a 'clear showing' that the decision by the trial court is "manifestly unreasonable or is based on untenable grounds or done for untenable reasons."); see also, State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)[illegible]s; Ryan v. State, 112 Wn.App. 896, 899-900, 51 P.3d 175 (2002)[illegible]. The primary consideration on the motion for continuance should be justice." See Coggle v. Snow, 56 Wn.App. 499, 784 P.2d 554

(1990). . The Washington Supreme Court has held that "[i]t is always well for trial courts to be liberal in the matter of granting continuances" where a party has an unavoidable reason and "is unable to be present at the time set for trial." Puget Sound Mach. Depot v. Brown Alaska Co., 42 Wash. 681, 683, 85 P. 671 (1906); Strom v. Toklas, 78 Wash. 223, 226, 138 P. 880 (1914).

ii. The trial court abused its discretion by denying Ms. Ferguson the lawyer of her choice and a necessary witness at trial.

Ms. Ferguson retained new counsel, Emily Rains, because John Muenster became a necessary witness. Much later, the trial court denied the continuance Ms. Rains needed, and told Ms. Ferguson she could return to her former attorney, or go to trial without a lawyer. This was an abuse of discretion.

iii. The trial court abused its discretion by failing to consider relevant factors other than Defendant's reputation.

When a trial court determines whether to allow withdrawal, it "should consider all pertinent factors." See, Kingdom, 78 Wn.App. at

158. Here, the trial court considered one factor (i.e., that the "cloud" on the reputation of the Defendant would be prolonged). This was an abuse of discretion. First, many courts have held that delay, excusable or not, in and of itself, is not sufficient reason to deny the motion." Id. Second, the court was aware that Defendant had two other former clients with lawsuits against him (i.e., Angela Oppe and Carole LaRoche). Thus, the "cloud" would continue to darken the lawyer's reputation, regardless of the ruling.

The court should have considered—but did not consider—the following factors: (1) the necessity for reasonably prompt disposition of the litigation (2) the needs of the moving party (3) the possible prejudice to the adverse party (4) the prior history of the litigation, including prior continuances granted to the moving party (5) any conditions of continuances previously granted, and (6) any other matters that may have a material bearing upon case. See Balandzich v. Demeroto, 10 Wn.App. 718 (1974). 10 Wn.App. 718 (1974). The court's failure to consider any of these factors was an abuse of discretion.

Needs of Moving Party.

Ms. Rains had an unavoidable scheduling conflict. By refusing to grant a continuance of even 10 days or three days, to resolve it, the court was denying Ms. Ferguson legal representation. See, Kingdom v. Jackson, 78 Wn.App. 154, 158, 896 P.2d 101 (1995) (when withdrawal is in a civil case, it generally should be allowed because the relationship is consensual).

Ms. Rains' request for a continuance was reasonable under the circumstances. Ms. Rains (not a malpractice lawyer) needed to come up to speed on the substantive law and review the extensive record in three cases, *Ferguson v. Waid*, the case within a case (i.e., the Teller Dispute), and the case that gave rise to the fee dispute with Teller (i.e., the SEBS case). She also needed to consult with and retain a new expert due to Ms. Kilpatrick's health problems. Further, Defendant had committed proven discovery abuse. Ms. Ferguson and Ms. Rains submitted declarations providing significant detail regarding the materiality of the discovery needed

to prepare for trial. CP 1455-1471, 1474-1479, 3208-3224. See, In Re Recall of Lindquist, 172 Wn.2d 120, 130, 258 P.3d 9 (2011) (motions for continuance based on discovery abuse must be supported by affidavits).

Possible Prejudice to Defendant.

The factors a trial court may consider in determining prejudice include undue delay resulting, hardship and unfair surprise. Caruso v. Local 690, Int'l Bhd of Teamsters, 100 Wn.2d 343, 670 P.2d 240 (1983). Defendant made no showing of prejudice, but opposed the continuance of even three days. In contrast, Ms. Ferguson made a showing of substantial prejudice if a continuance were denied (i.e., no attorney at trial and unfair surprise at trial). The trial court considered only the cloud over Defendant's reputation if the trial date was continued. This was an abuse of discretion.

Prior History—No Prior Continuances.

There were no prior continuances.

Other Material Factors. Plaintiff was diligent before and after Ms. Rains appeared in the case. Ms. Rains moved to continue before the

discovery cut-off date of October 12, 2015. See, Odom v. Williams, 7 Wn.2d 714, 446 P.2d 335 (1968)(moving party seeking a continuance must "exercise due diligence and good faith in the request for a continuance). See also, Coggle,784 P.2d 564, (after obtaining new counsel, a client should not be "penalized for the…dilatory conduct of his first attorney" (if any).

Denying Ms. Ferguson's motions to continue the trial date did not promote justice between the parties. Ms. Ferguson was denied time to properly prepare for trial, she was denied counsel at trial, she was denied reasonable accommodation for a disability, and due to Defendant's proven discovery abuse, she unfairly faced surprise at trial.

iv. *It was not proper for the Court to consider a motion to dismiss under CR 41, where Defendant, the moving party, did not satisfy the notice and filing requirements of the rule.*

a. Standard of Review is De Novo.

Whether a moving party must comply with the notice and filing requirements of CR 41 before a

trial court can dismiss a case for non-suit is an issue of law reviewed de novo. See State v. Breazeale, 144 Wash.2d 829, 837, 31 P.3d 1155 (2001) ("The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.) See also, State Dept. of Ecology v. Campbell & Gwinn, 43 P.3d 4 (2002); State v. J.M., 144 Wash.2d 472, 480, 28 P.3d 720 (2001) ("a word is given its plain and obvious meaning.) See also, Addleman v. Bd. of Prison Terms & Paroles, 107 Wash.2d 503, 509, 730 P.2d 1327 (1986).

b. The Trial Court Violated Ms. Ferguson's Due Process Rights.

It was an error of law for the trial court to consider Defendant's Motion to Dismiss under CR 41. The Court was required to direct the Defendant to serve and file a motion to dismiss, or alternatively, to deny the Defendant's improper request. The Court erred by considering

Defendant's oral request for dismissal on November 30, 2015.

v. It Was an Abuse of Discretion, Under the Circumstances, for the Trial Court to Dismiss Ms. Ferguson's Case Under CR 41.

a. Standard of Review—Abuse of Discretion.

Under CR 41(b), a trial court has the authority to dismiss an action for noncompliance a court order. Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 41 P.3d 1175 (2002). But, the court's decision to dismiss under CR 41 was an abuse of discretion. "When a trial court imposes dismissal or default in a proceeding as a sanction for violation of … order, it must be apparent from the record that (1) the party's refusal to obey the … order was willful or deliberate, (2) the party's actions substantially prejudiced the opponent's ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would probably have sufficed. Id., see also Woodhead v. Discount Waterbeds, Inc., 78 Wn.App. 125, 896 P.2d 66 (1995). (1995).

First, a finding that Ms. Ferguson willfully or deliberately disobeyed the pretrial orders, is not supported by the record. On the contrary, Ms. Ferguson was diligent in the face of many obstacles. Once Ms. Rains appeared in the case, she completed an astonishing amount of work in a very limited amount of time.

Second, a finding that Defendant was substantially prejudiced cannot be made on this record. Defendant admitted to the trial court that he was ready for trial (his only unknown being the order in which his witnesses would testify). It was Ms. Ferguson, not Defendant, who was prejudiced by the trial court's decisions to deny reasonable requests for a continuance.

Third, the trial court failed to consider lesser sanctions. The "sanction imposed should be proportional to the nature of the…violation and the surrounding circumstances." Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997); see also Rivers, at 1188. At no time during the November 30, 2015 hearing did the court consider lesser sanctions. Therefore, it was improper for the court to dismiss Ms.

Ferguson's case. the court to dismiss Ms. Ferguson's case.

IV. CONCLUSION

The court erred as a matter of law by considering the Defendant's improper CR 41 motion, and abused its discretion by dismissing Appellant's case where there was no willfulness in failing to meet pre-trial deadlines. Respondent violated the Rules of Professional Conduct. Accordingly, the Court should reverse the trial court's dismissal of Appellant's breach of fiduciary duty claim and remand the claim to the trial court for trial.

DATED this 25th day of September, 2017.

/s/Emily Sharp Rains
Emily Sharp Rainn
WSBA #35686

Appendix A (RPCs)
Appendix B (Chapter 7, The Law of Lawyering)
Appendix C (Chapter 15, The Law of Lawyering)

APPENDIX 3

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

THE FERGUSON FIRM, PLLC., **Plaintiff,** **vs.** **TELLER & ASSOCIATES, PLLC.,** **Defendant.**	**NO. 11-2-19221-1 SEA** **ORDER GRANTING THE FERGUSON FIRM'S MOTION TO SET ASIDE WAID ATTORNEY'S LIEN, AND ORDERING DISBURSEMENT OF FUNDS** **[CLERK'S ACTION REQUIRED]**

This matter came on for hearing without oral argument on The Ferguson Firm, PLLC's Motion to Set Aside Waid "Attorney's Lien" and For Disbursement of Funds to The Ferguson Firm, PLLC. Based on the evidence and Pleadings of Record, the Court finds:

Judge Mariane Spearman
401 Fourth Ave. North, Room 2D
Kent, Washington 98032
(206) 296-9490

On behalf of several clients, Plaintiff Ferguson and Defendant Teller reached a settlement agreement in an Underlying Matter on April 28, 2011. Due to a dispute concerning the apportionment of the resulting $530,107.58 in attorneys' fees between Ferguson and Teller, the entire sum was deposited into the Court's Registry. On May 4, 2011, Ms. Ferguson retained Brian Waid to represent her in her fee dispute with Mr. Teller over how to divide the fees. On May 27, 2011, Ms. Ferguson filed a Complaint seeking Declaratory Judgment that there was no enforceable contract with Mr. Teller and arguing that the Court should divide the fees based on a theory of *quantum meruit*. To Ms. Ferguson this meant 90% to her and 10% to Teller. Teller argued the existence of an express contract to divide the fees 50:50. On January 30, 2012, this Court rejected Ferguson's argument, found the existence of a contract and ordered the fees divided 50:50. This order is currently on appeal.

On February 13, 2012, Mr. Waid withdrew as Ms. Ferguson's attorney. The following day he filed a lien for his attorney's fees in the amount of $78,350.85. Ms. Ferguson now seeks to set aside Mr. Waid's lien for attorney's fees on the grounds that the lien is invalid under RCW 60.40.010(c), (d), and (e).

The funds are currently in the Court's registry, not in the "hands of an adverse party." RCW 60.40.010(c). This subsection does not apply.

The $530,107.58 in attorneys' fees do not represent "proceeds" received by Ferguson after arbitration or mediation due to services performed by Mr. Waid. RCW 60.40.010(d). The funds were earned by Teller and Ferguson well before Mr. Waid was

Judge Mariane Spearman
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(206) 296-9490

retained.

The funds that are currently in dispute were not obtained by a "judgment" on behalf of Ferguson against Teller. RCW 60.40.010(e). *Wilson v Henkle*, 45 WnApp. 162, 170, 724 P.2d 1069 (1986). Teller, the adverse party, consistently maintained that Ferguson was entitled to half of the attorneys' fees that were generated in the Underlying Matter. Ferguson retained Mr. Waid in her unsuccessful effort to obtain 90% of the fees.

THEREFORE, IT IS ORDERED that the Motion to Set Aside Waid "Attorney's Lien" and For Disbursement of Funds to The Ferguson Firm, PLLC. is **GRANTED**, and;

It is further Ordered that the Clerk of Court is authorized and directed to disburse to the Ferguson Firm, the sum of $78,350.85, held in the Court Registry in this matter, together with all interest accrued on that amount.

DATED this 30th day of July, 2012.

JUDGE MARIANE C. SPEARMAN

Judge Mariane Spearman
401 Fourth Ave. North, Room 2D
Kent, Washington 98032
(206) 296-9490

King County Superior Court
Judicial Electronic Signature Page

Case Number:	11-2-19221-1
Case Title:	FERGUSON FIRM VS TELLER & ASSOCIATES
Document Title:	ORDER
Signed by Judge:	Mariane Spearman
Date:	7/30/2012 2:32:12 PM

Judge Mariane Spearman

This document is signed in accordance with the provisions in GR 30.

Certificate Hash:	43C39890476C001CDC4C9815BD2359E397D46AD1
Certificate effective date:	1/11/2011 8:36:01 AM
Certificate expiry date:	1/10/2013 8:36:01 AM
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CASE NUMBER: 11-2-19221-1 SEA

Honorable Mariane C. Spearman

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DEPARTMENT OF
JUDICIAL ADMINISTRATION

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

THE FERGUSON FIRM, PLLC.,	NO. 11-2-19221-1 SEA
Plaintiff,	
vs.	NOTICE OF CLAIM OF LIEN
TELLER & ASSOCIATES, PLLC.,	[CLERK'S ACTION REQUIRED]
Defendant.	

TO: THE CLERK OF COURT

AND TO: THE FERGUSON FIRM, PLLC, Plaintiff

AND TO: TELLER & ASSOCIATES, PLLC, Defendant

AND TO: KELBY D. FLETCHER, Defendant's Attorney

PLAINTIFF'S EXHIBIT
CASE NO. 11-2-19221-1 SEA
EXHIBIT NO. 2

WAID LAW OFFICE
4847 California Avenue SW, Suite 100
Seattle, WA 98116
206-388-1926

NOTICE IS HEREBY GIVEN that Brian J. Waid d/b/a Law Office of Brian J. Waid, former counsel of record for Plaintiff/claimant here, whose address is:

Brian J. Waid
Attorney at Law
Law Office of Brian J. Waid
4847 California Ave. SW, Suite 100
Seattle, Washington 98116

as former attorney for Plaintiff/Claimant The Ferguson Firm, PLLC in this matter, claims a lien under RCW 60.40.010(1)(c) and (d), has performed legal services and incurred costs in this matter as counsel for Plaintiff/claimant until recently terminated. The last known address for Plaintiff/Claimant is:

The Ferguson Firm, PLLC
c/o Sandra L. Ferguson
321 1st Avenue West
Seattle, Washington 98119-4103

Such legal services were performed on behalf of the Plaintiff/claimant in this matter, as well as the related underlying matter of/ / pursuant to a written hourly fee agreement between Attorney Lien Claimant and Plaintiff/claimant dated May 4th, 2011, in connection with Plaintiff/claimant's claim for compensation for services rendered in nd the resultant fund deposited into the Court Registry in this lawsuit. Attorney Lien Claimant Brian J. Waid and the Law Office of Brian J. Waid claim a lien pursuant to RCW 60.40.010(1)(c) and (d) against any settlement, disbursement or recovery for its attorney fees and costs. Attorney Lien Claimant claims a lien for Plaintiff's unpaid attorney fees in the amount of $73,875.07, together with unpaid expenses, to date, in the amount of $4,475.78, for a total lien claim

WAID LAW OFFICE
4847 CALIFORNIA AVENUE SW, SUITE 100
SEATTLE, WA 98116
206-388-1926

of $78,350.85 together with interest on those amounts from this date forward, at the rate of 12% per annum.

DATED at Seattle, Washington this 14th day of February, 2012.

WAID LAW OFFICE

BY: _____
BRIAN J. WAID
WSBA No. 26038

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of February, 2012, I caused the foregoing Notice of Lien Claim to be delivered to the following parties: A. The Ferguson Firm, PLLC, c/o Sandra L. Ferguson, 321 1st Avenue West, Seattle, Washington 98119-4103 via personal delivery by Gary's Process Service, and; B. Defendant Teller & Associates, PLLC through Defendant's Attorney, Kelby D. Fletcher, Attorney at Law, Stokes Lawrence, P.S., 800 Fifth Avenue, Suite 4000, Seattle, Washington 98101, via ECF service, email and US Mail.

DATED: February 14, 2012.

WAID LAW OFFICE

BY: /s/
BRIAN J. WAID
WSBA No. 26038

WAID LAW OFFICE
4847 California Avenue SW, Suite 100
Seattle, WA 98116
206-388-1926

APPENDIX 4

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE FERGUSON FIRM, PLLC, Respondent, vs. TELLER & ASSOCIATES, PLLC Defendant, and BRIAN J. WAID, d/b/a LAW OFFICE OF BRIAN J. WAID Appellant Attorney Lien Claimant.	DIVISION ONE No. 69220-8-I (Linked with No. 68329-2-I) PUBLISHED OPINION FILED: December 30, 2013

DWYER, J. — The Ferguson Firm, PLLC (Ferguson), sued Teller & Associates, PLLC (Teller), over a fee dispute.[1] Brian J. Waid d/b/a Law Office of Brian J. Waid (Waid) represented Ferguson throughout much of the dispute, but eventually withdrew because of a conflict with the firm's principal, Sandra Ferguson. Soon after withdrawing, Waid filed an attorney's lien in the amount of $78,350.85 for legal services provided to Ferguson. Thereafter, Ferguson moved for a summary dismissal of Waid's lien, which the trial court granted. The

[1] Sandra Ferguson and Stephen Teller are principals of their eponymous law firms. The firms, not the individuals, were parties to the case in which Waid represented Ferguson. Nevertheless, our opinion will use last names and gendered pronouns when referring to the firms, as well as to the individuals.

court also directed the clerk to disburse to Ferguson the sum of $78,350.85 held in the court registry, together with accrued interest. Waid then filed a notice of appeal from that order and—more than three weeks after the order was entered—filed a motion to stay the disbursement to Ferguson of the funds in the court registry and for approval of a supersedeas bond. The trial court denied Waid's motion, holding that—because the funds had already been disbursed—the motion was moot. Although Waid's motion was moot when the trial court considered it, money remains in the court registry to which Waid's lien could attach.[2] Thus, the issue of the propriety of the trial court's ruling on the validity of Waid's lien is not moot. Because the trial court erroneously ruled that the money in the court registry was not "proceeds" of Ferguson's action against Teller, we reverse the trial court's order invalidating Waid's lien and remand to the trial court for further proceedings.

I

Sandra Ferguson is the principal of The Ferguson Firm, PLLC. Her firm began representing a group of clients in an employment discrimination case (hereinafter underlying matter) in August 2009. The clients agreed to a contingency fee arrangement but were unable to advance litigation costs and so, with their consent, Ferguson approached multiple law firms, seeking a co-counsel willing to advance litigation costs and able to represent the clients in the event that she was suspended from practicing law by the Supreme Court. Stephen Teller's firm, Teller & Associates, PLLC, was one of the firms that

[2] This was confirmed by counsel for the parties at oral argument in this court.

Ferguson approached. After negotiating with Ferguson, Teller agreed to jointly represent the clients and to advance all litigation costs. While Teller and Ferguson were jointly representing the clients, Ferguson was, in fact, suspended from practicing law for 90 days and subsequently withdrew from the case. See In re Disciplinary Proceeding Against Ferguson, 170 Wn.2d 916, 246 P.3d 1236 (2011). During the period of Ferguson's suspension, the clients—represented solely by Teller—accepted a settlement offer.

Subsequently, Ferguson and Teller disputed the manner in which the contingent fee resulting from the settlement should be divided, and Ferguson served a notice of lien for attorney fees on Teller. On May 4, 2011, Ferguson hired Waid to represent her in the fee dispute with Teller. The fee agreement between Ferguson and Waid provides that Waid "shall have a lien against any proceeds recovered by, or on behalf of, [Ferguson] in connection with the claims arising out of [the fee dispute with Teller], including pursuant to RCW 60.40.010, *et seq*." Waid invoiced Ferguson each month for services provided with no objection from Ferguson.

On May 27, 2011, Ferguson, seeking 90 percent of the contingent fee, sued Teller to resolve the fee dispute. Both parties agreed to deposit the full amount of the contingent fee—$530,107.58—into the superior court registry. On January 30, 2012, the superior court granted Teller's motion for summary judgment, dismissing all of Ferguson's claims and ordering that the disputed funds be divided equally between Ferguson and Teller.

On February 9, Teller filed a motion seeking the disbursement of the

funds, which required that Ferguson's response be filed by noon on February 15. However, Ferguson had retained a new attorney to replace Waid and wanted the new attorney to prepare the opposition papers, so long as an additional three weeks was granted to prepare the response. On February 10, Ferguson threatened to bring a legal malpractice claim against Waid. Waid then informed Ferguson that he was required to withdraw from representation. Waid filed a notice of withdrawal, moved for permission to withdraw immediately, and moved to continue the hearing on Teller's motion pursuant to Ferguson's instructions. The court granted Ferguson's request for an additional 30 days and authorized Waid's immediate withdrawal.

On February 14, Waid filed an attorney's lien in the amount of $78,350.85. On February 16, the trial court entered an order of partial disbursement in which it determined that Teller was entitled to receive his 50 percent share, but ordered that $101,000.74 of Ferguson's share would remain in the court registry until further notice because issues relating to the calculation of fees, costs, and interest had not yet been resolved. The trial court also ordered that an additional $78,350.85 would remain in the registry until further court order in order to protect Waid's lien. Lastly, it ordered that the remaining portion of Ferguson's 50 percent share—$85,702.20—be disbursed to her. Ferguson, on the same day, filed an emergency motion in this court to stay the order of partial disbursement. Our commissioner granted a temporary stay and directed the parties to provide additional briefing on the issue.

On February 21, Ferguson appealed from the trial court's summary

judgment order and the related orders granted in favor of Teller. She additionally moved the trial court to set a supersedeas bond amount in order to stay the partial disbursement to Teller. On March 22, our commissioner issued a ruling extending the temporary stay an additional 14 days and informing Ferguson that she was required to post a bond, cash, or alternate security approved by the trial court in order to stay enforcement of the order. Ferguson and Teller then agreed that $290,905.53 of the amount on deposit in the court registry would serve as Ferguson's supersedeas bond pending the outcome of the appeal. They also agreed that $78,350.85, representing the amount of Waid's lien, would remain in the registry pending further order of the trial court.[3]

Thereafter, on July 12, Ferguson moved to have the trial court summarily set aside Waid's attorney's lien. On July 30, the trial court granted the motion and directed the clerk to disburse to Ferguson the sum of $78,350.85 held in the court registry, together with accrued interest. The order stated, in pertinent part, as follows:

> The $530,107.58 in attorneys' fees do not represent "proceeds" received by Ferguson after arbitration or mediation due to services performed by Mr. Waid. RCW 60.40.010(d). The funds were earned by Teller and Ferguson well before Mr. Waid was retained.
>
> The funds that are currently in dispute were not obtained by a "judgment" on behalf of Ferguson against Teller. RCW 60.40.010(e). Wilson v. Henkle, 45 Wn. App. 162, 170, 724 P.2d 1069 (1986). Teller, the adverse party, consistently maintained that Ferguson was entitled to half of the attorneys' fees that were generated in the Underlying Matter. Ferguson retained Mr. Waid in her unsuccessful effort to obtain 90% of the fees.

[3] Waid was not a party to this agreement.

Waid filed a notice of appeal from that order.

On August 22, Waid filed a motion to stay disbursement to Ferguson of the funds in the court registry representing Waid's attorney's lien and for approval of a supersedeas bond. However, Ferguson had previously withdrawn the funds. The trial court denied Waid's motion in an order issued on August 30, ruling that the motion was moot. The next day, Waid filed an amended notice of appeal to include the August 30 order.

II

Ferguson contends that Waid may not appeal from the July 30 order. This is so, Ferguson reasons, because the order does not constitute a "final judgment" and because here there was no "action" pertaining to Waid. We disagree.

A party may appeal as of right "[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." RAP 2.2(a)(3). Furthermore, pursuant to RAP 3.1, a party must be "aggrieved" to be permitted to seek review. "An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected." Cooper v. City of Tacoma, 47 Wn. App. 315, 316, 734 P.2d 541 (1987).

The July 30 order meets the criteria of RAP 2.2(a)(3). It is a written decision that affects Waid's substantial right to monetary relief and determined the action with respect to Waid's attorney's lien. Moreover, it is immaterial that Waid was not a named party to the fee dispute between Ferguson and Teller.

> In rare cases, a person who is not formally a party to a case may have standing to appeal a trial court's order because the order directly impacts that person's legally protected interests. Thus, in the case of In re Guardianship of Lasky, 54 Wn. App. 841, 848-50, 776 P.2d 695 (1989), we held that an attorney was an "aggrieved party" for purposes of appealing from an order imposing sanctions against him but was not an "aggrieved party" for purposes of appealing from an order removing him as the legal guardian of an incompetent adult. See also State v. G.A.H., 133 Wn. App. 567, 575-76, 137 P.3d 66 (2006) (Department of Social and Health Services could appeal, even though not a named party, because juvenile court ruling ordered department to assume responsibility for minor's welfare); Breda v. B.P.O. Elks Lake City 1800 SO-620, 120 Wn. App. 351, 353, 90 P.3d 1079 (2004) (sanctioned attorney became "aggrieved party" for purposes of appealing sanctions imposed directly against him); Splash Design, Inc. v. Lee, 104 Wn. App. 38, 44, 14 P.3d 879 (2000) (same).

Polygon Nw. Co. v. Am. Nat'l Fire Ins. Co., 143 Wn. App. 753, 768-69, 189 P.3d 777 (2008); accord Meštrovac v. Dep't of Labor & Indus., 142 Wn. App. 693, 704, 176 P.3d 536 (2008) ("'Aggrieved' has been defined to mean '"a denial of some personal or property right, legal or equitable, or the imposition upon a party of a burden or obligation."'" (quoting G.A.H., 133 Wn. App. at 574 (quoting State v. A.M.R., 147 Wn.2d 91, 95, 51 P.3d 790 (2002)))), aff'd on other grounds sub nom. Kustura v. Dep't of Labor & Indus, 169 Wn.2d 81, 233 P.3d 853 (2010)). Waid has standing to appeal and the July 30 order is appealable.

Ferguson also contends that Waid may not appeal from the August 30 order. Again, we disagree. Appeal is authorized by RAP 2.2(a)(3).

A party may appeal as of right "[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." RAP 2.2(a)(3). Here, the August 30 order was a written decision that affected Waid's right to assert an attorney's lien.

It also, in effect, determined the action by declaring moot Waid's motion to stay disbursement. The trial court's determination that his motion was moot meant that Waid had no alternative recourse in this action by which Waid could seek to obtain the disbursed funds. Accordingly, the August 30 order is appealable as a matter of right pursuant to RAP 2.2(a)(3).[4]

III

Waid contends that the trial court erred in invalidating his lien. This is so, he reasons, because the money that Ferguson received from working on the underlying matter constitutes "proceeds" pursuant to the applicable statute. We agree.

"The interpretation and meaning of a statute is a question of law subject to de novo review." Bennett v. Seattle Mental Health, 166 Wn. App. 477, 483, 269 P.3d 1079, review denied, 174 Wn.2d 1009 (2012). "The goal of statutory interpretation is to discern and carry out legislative intent." Bennett, 166 Wn. App. at 483. "Absent ambiguity, a statute's meaning is derived from the language of the statute and we must give effect to that plain meaning as an expression of legislative intent." Bennett, 166 Wn. App. at 484.

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[4] Although the August 30 order is appealable, the trial court did not err when it held that Waid's motion to stay was moot. CR 62 provides, in pertinent part, "Upon the filing of a notice of appeal, enforcement of judgment is stayed until the expiration of 14 days after entry of judgment." CR 62(a). Judgment on the validity of Waid's attorney's lien was entered on July 30, yet he waited until August 22 to bring a motion to stay enforcement of the order. Pursuant to CR 62, Waid had no reason to expect that the funds would still be in the registry of the court 22 days after entry of the disbursement order. Unsurprisingly, the funds had, in fact, been disbursed in the interim. Thus, the trial court did not err by denying his motion as moot. However, notwithstanding the fact that Waid's motion to stay disbursement was moot at the time that it was considered by the trial court, the question of whether Waid's lien is valid is not moot because money remains in the court registry to which Waid's lien could attach.

An attorney may sue a client for unpaid fees, but an attorney also has the option of asserting a lien to ensure payment without resorting to a lawsuit to recover those fees. See RCW 60.40.010(1). Once an attorney's lien attaches to an action, that lien "is superior to all other liens" and "is not affected by settlement of the parties until the lien is satisfied in full." Smith v. Moran, Windes & Wong, PLLC, 145 Wn. App. 459, 466-67, 187 P.3d 275 (2008). RCW 60.40.010 provides, in pertinent part, as follows:

> (1) An attorney has a lien for his or her compensation, whether specially agreed upon or implied, as hereinafter provided:
>
> . . .
>
> (d) Upon an action, including one pursued by arbitration or mediation, and its *proceeds* after the commencement thereof to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement; and
>
> (e) Upon a judgment to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed and date of filing notice.
>
> (5) For the purposes of this section, "*proceeds*" *means any monetary sum received in the action.*

(Emphasis added.)

The attorney's lien statute provides that an attorney has a lien "upon an action . . . and its proceeds," which means "any monetary sum received in the action." RCW 60.40.010 (1)(d), (5). Here, Waid's lien arose when Waid filed suit

on behalf of Ferguson. Furthermore, Ferguson received a monetary sum in the action—50 percent of the $530,107.58 contingent fee generated by the clients' decision to settle the underlying matter. The plain language of the statute establishes that "any monetary sum received in the action" constitutes "proceeds." Ferguson received a monetary sum and, therefore, received "proceeds" to which the lien attaches.

Nevertheless, Ferguson contends that Waid's lien is invalid because he failed to obtain a judgment in her favor in the underlying matter. In support of this contention, Ferguson cites to two cases in which we held that a former version of RCW 60.40.010[5] did not authorize a lien when the attorneys failed to obtain a monetary judgment in favor of their clients. See Wilson v. Henkle, 45 Wn. App. 162, 170, 724 P.2d 1069 (1986); see also Suleiman v. Cantino, 33 Wn. App. 602, 606-07, 656 P.2d 1122 (1983). Neither case guides our analysis. The previous version of the statute, in effect when Wilson and Suleiman were decided, required attorneys to obtain a monetary judgment in favor of their clients. Now, however, the amended statute requires only that Ferguson obtained "proceeds" in the action. "Proceeds" are defined as "any monetary sum received in the action." Ferguson received a monetary sum in the action and, therefore, received "proceeds." Thus, the trial court erred by invalidating Waid's lien.

Although the trial court correctly denied Waid's motion to stay the disbursement of the funds as moot, the question of whether Waid's lien is valid is

[5] RCW 60.40.010 was amended in 2004. Laws of 2004, ch. 73, § 2 (effective June 10, 2004).

not moot. Here, the trial court erred in determining that Waid's lien was invalid. Accordingly, we reverse the trial court's July 30 order invalidating Waid's lien and remand for a determination of what amount, if any, of the funds remaining in the court registry are rightfully Waid's.

Reversed and remanded.

We concur:

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THE FERGUSON FIRM, PLLC, Appellant, v. TELLER & ASSOCIATES, PLLC Respondent.	)	DIVISION ONE No. 68329-2-I (Linked with No. 69220-8-I) UNPUBLISHED OPINION FILED: December 30, 2013

DWYER, J. — Sandra Ferguson, the principal of The Ferguson Firm, PLLC, spent substantial time and effort developing an employment discrimination case without the assistance of co-counsel. However, by early 2010, she found herself in need of a firm willing to advance litigation costs and—in the event that she was suspended from the practice of law—take responsibility for the case. She approached Stephen Teller, principal of Teller & Associates, PLLC,[1] and the two eventually agreed to work together on the case. Although the two discussed acceptable fee splitting arrangements, they dispute what agreement, if any, was ultimately reached. Subsequently, the Supreme Court suspended Ferguson from practicing law for 90 days. During the period of her suspension, and while Teller was solely representing the clients, a settlement agreement was reached. Thereafter, Ferguson filed an attorney's lien and filed a lawsuit against Teller, claiming that Ferguson was entitled to a substantial percentage of the contingent

[1] Sandra Ferguson and Stephen Teller are principals of their eponymous law firms. The firms, not the individuals, are parties to this case. Nevertheless, our opinion will use last names and gendered pronouns when referring to the parties, as well as to the individuals.

fee, not the 50 percent amount that Teller claimed Ferguson was entitled to pursuant to their contract.

The trial court granted in part Teller's motion for judgment on the pleadings and, subsequently, granted Teller's motion for summary judgment, dismissing the case. Because no genuine issues of material fact exist as to whether a valid contract existed between the parties, we affirm the trial court's grant of summary judgment in favor of Teller. We also affirm the trial court's denial of Teller's motion for sanctions, but we do so without prejudice.

I

On August 24, 2009, Ferguson entered into a fee agreement with four women (hereinafter the clients) who eventually became the named plaintiffs in a lawsuit against the ABC Corporation[2] (hereinafter the underlying matter). The clients were female managers who alleged that they had been subject to similar discrimination by the ABC Corporation. Ferguson's fee agreement with the clients provided for a hybrid one-third contingency fee and a flat fee. The agreement did not obligate Ferguson to file a lawsuit or to litigate the case; instead, Ferguson agreed to attempt to negotiate a settlement. Nevertheless, in order to preserve their claims, Ferguson ultimately did file suit on behalf of the clients in February of 2010.

During this time, Ferguson was defending herself against suspension by the Supreme Court. By June 2010, both Ferguson and the clients were aware

[2] ABC Corporation is a pseudonym used by the parties, presumably to protect the identity of the corporation.

that she could be suspended at any time thereafter. In part because of the possibility of suspension, Ferguson devoted substantial time to locating competent co-counsel. However, she also wanted to locate a co-counsel willing to advance litigation costs because she was unwilling to advance costs and her clients were either unwilling or unable to pay their own costs. Ferguson approached a number of firms, including Teller's.

In early September 2010, Ferguson and Teller discussed various fee sharing arrangements but did not reach an agreement. With a mediation session imminent, Ferguson e-mailed Teller, "If the mediation does not result in settlement, assuming you are still willing to proceed with me, we would enter into a new fee agreement with [the clients] and with each other." Subsequently, Teller e-mailed Ferguson, "Be sure to let the clients know that I've not taken on any role yet. I think it's a good case and I'd like to be involved if we can work out a fee agreement." In late October, a mediation took place in the underlying matter. However, the mediation concluded without a settlement. One day later, Ferguson again sought Teller's assistance as co-counsel. Ferguson stated that she had reconsidered fee splitting arrangements that the two had discussed previously and determined that her firm "need[ed] to associate with a firm who can advance the costs." Teller agreed, at that point, to advance costs, and evidently Ferguson and Teller discussed a fee splitting arrangement because Teller e-mailed Ferguson on November 10, 2010, stating that, "Our proposed fee split is incorporated into the [attached] retainer for [the clients'] signatures." Teller's proposed fee agreement set forth, in pertinent part, "Teller & Associates,

PLLC, and The Ferguson Firm PLLC, have between them agreed to a 50/50 split of fees, and each firm assumes joint responsibility for the representation." On the same day that Teller sent Ferguson the proposed fee agreement, Ferguson e-mailed the clients stating, "At this point, Steve has agreed to take joint responsibility for your case. His firm and mine will represent you going forward."

On November 18, 2010, Ferguson and Teller met with the clients and provided them with paper copies of the fee agreements; three of the four clients accepted the agreement and one chose not to pursue her claim. On November 22, Teller filed his notice of appearance. Shortly thereafter, Ferguson and Teller exchanged e-mail messages in which Ferguson questioned Teller's commitment to the case:

> Are you in this case for the duration or not? Do you intend to withdraw if this case does not settle in the near future?
>
> Because you said something yesterday, about your other case not settling and you are looking for things to cut out . . . etc . . . which led me to have great concern that you were referring to withdrawing as co-counsel in this case. I need to know now, if that is the case. Or did I misunderstand again?
>
> Your immediate response will be greatly appreciated.

Teller assured Ferguson that he was committed to the case. Subsequently, Teller began working on the case, including expending over $9,000 in costs.

Thereafter, on February 2, 2011, a second mediation was held. This session also failed to result in a settlement. The next day, Ferguson was suspended from practicing law for 90 days. See In re Disciplinary Proceeding Against Ferguson, 170 Wn.2d 916, 246 P.3d 1236 (2011). Ferguson withdrew

from representing the clients and Teller successfully moved for a nine month continuance of the trial date. In late April 2011, while Ferguson was still suspended, the clients entered into a settlement agreement with the ABC Corporation. The settlement resulted in an earned contingency fee of $530,107.58.

On April 11, 2011, Ferguson e-mailed Teller saying that she was "somewhat confused whether *the contract between us* governs the fees I am paid . . . while I am suspended, or whether my fees for work on the case must be based on quantum meruit." (Emphasis added.) Ferguson added that "because the clients have no 'dog in the fight' one way or the other, *the agreement between you and I* would stand and would govern the fee I am paid." (Emphasis added.) On April 15, Ferguson e-mailed Teller saying, "Just so you know, apart from the ethics issue, I may decided [sic] to take the position that I have not obtained the benefit of the bargain we made when we *agreed to the 50/50 arrangement*. I have not yet decided." (Emphasis added.) On April 20th, Ferguson e-mailed Teller, "I am entitled to fees based on quantum meruit. I am not sure I need to repudiate *the 50/50 joint representation agreement we had* . . . ." (Emphasis added.) Ferguson went on to say, "*We entered into our 50/50 joint representation agreement* contemplating the possibility of my suspension" and "*I agreed to that fee split* ONLY because you agreed to advance costs and be equally responsible for the workload . . . ." (Emphasis added.) On April 25, Ferguson e-mailed Teller, "*I agreed that you would receive 50% of the fees* BECAUSE you agreed to take the case forward with me and to advance

costs. *That was the reason for our contract.*" (Emphasis added.)

Thereafter, on April 27, Ferguson filed an attorney's lien asserting that, under a theory of quantum meruit, Ferguson was entitled to 90 percent of the contingent fee earned as a result of the settlement. On May 27, Ferguson filed a lawsuit against Teller. Ferguson asserted four causes of action: (1) a declaratory judgment as to whether a fee agreement existed, (2) a declaratory judgment as to whether quantum meruit was appropriate, (3) breach of contract, and (4) negligent misrepresentation. By stipulation, the amount of the contingent fee was deposited into the King County Superior Court registry on July 18, 2011.

Teller subsequently moved for judgment on the pleadings pursuant to CR 12(c). During the hearing on this motion, Ferguson's counsel, Brian Waid, conceded Ferguson's breach of contract claim. There is no indication that Ferguson, who was present at the hearing, objected to this concession. Thereafter, the trial court granted Teller's CR 12(c) motion, but only with respect to Ferguson's breach of contract and negligent misrepresentation claims. In a subsequent letter to the parties, the trial judge wrote, "Mr. Waid did state that Plaintiff was withdrawing her claim for breach of contract based on the authority cited in Defendant's CR 12(c) motion, specifically Mazon v. Krafchick, 158 Wn.2d 440, 144 P.3d 1168 (2006). The court dismissed the claim of negligent misrepresentation based on that same authority."

Thereafter, Teller moved for summary judgment, seeking a declaratory judgment that "(1) an express fee agreement existed between Defendant Teller and Plaintiff Ferguson and (2) Ferguson's claim for compensation in *quantum*

meruit must be dismissed." Ferguson filed a cross-motion for summary judgment. At oral argument, the trial court ruled that Teller had "established as a matter of law the existence of an express contract between the parties to divide attorney fees 50/50." Three days later, the trial court granted summary judgment in favor of Teller with respect to the "issue of whether Ferguson's suspension from the practice of law was a condition subsequent that rendered their agreement unenforceable so that attorney fees should be divided on a *quantum meruit* basis." Ferguson moved for reconsideration,[3] which the trial court denied on February 16, 2012.

On February 9, 2012, Teller moved for an award of fees and costs pursuant to CR 11 and RCW 4.84.185. The trial court denied Teller's motion, and Teller timely appealed.

On February 15, Ferguson's attorney, Waid, filed a notice of intent to withdraw. He also filed a declaration and attachments, wherein he documented the circumstances of his withdrawal, including allegations that Ferguson had deceived the court. Waid was replaced by Ferguson's current counsel. Ferguson timely appealed the trial court's rulings in Teller's favor.

II

As a preliminary matter, we refuse to consider Ferguson's declaration in support of her motion for reconsideration. Her declaration contained new evidence, which implicated new theories of the case, neither presented to nor considered by the trial court prior to its ruling on summary judgment.

[3] Ferguson failed to include her motion for reconsideration in our Clerk's Papers.

"On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. A litigant may not make arguments on a motion for reconsideration that are "based on new legal theories with new and different citations to the record." Wilcox v. Lexington Eye Inst., 130 Wn. App. 234, 241, 122 P.3d 729 (2005). "CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision." Wilcox, 130 Wn. App. at 241.

Ferguson contends that she provided additional evidence after summary judgment because she was not yet aware of Waid's asserted conflict of interest, and of an alleged scheme to interfere with her attorney-client relationship. Regardless of whether Ferguson's allegations in the declaration are true, they have no bearing on the trial court's summary judgment order, which addressed whether Ferguson and Teller had formed a contract. Accordingly, our review is circumscribed to the evidence called to the attention of the trial court prior to the entry of its order on summary judgment.

III

Ferguson contends that the trial court erred by dismissing the breach of contract and negligent misrepresentation claims. This is so, Ferguson asserts, because the trial court's ruling was not based on the legal standards for dismissal under CR 12(c) but, instead, on Waid's erroneous concession that the breach of contract claim was legally baseless. This claim is unavailing.

"We review de novo a trial court's order for judgment on the pleadings."

Pasado's Safe Haven v. State, 162 Wn. App. 746, 752, 259 P.3d 280 (2011). "Absent fraud, the actions of an attorney authorized to appear for a client are binding on the client at law and in equity." Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 679, 41 P.3d 1175 (2002). "The 'sins of the lawyer' are visited upon the client." Rivers, 145 Wn.2d at 679 (quoting Taylor v. Ill., 484 U.S. 400, 433, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988) (Brennan J., dissenting)).

Ferguson's attorney, Waid, conceded the breach of contract claim on the record:

> We did allege breach of contract, and I have my client's authorization to do this. I will – I will concede the defendant's argument that under Mazon vs. Krafchick – and I've lectured about that case before – that under Mazon vs. Krafchick we cannot prove a breach of contract. I think that's also significant to the 12(b)(6) motion that Your Honor will consider that's noted on Tuesday.

Subsequently, the trial court granted in part Teller's motion for judgment on the pleadings with respect to Ferguson's breach of contract and negligent misrepresentation claims, dismissing them both. Nevertheless, Ferguson now asserts that Waid's concession was a clear error of law, claims that Waid's concessions violated the rules of professional conduct, and proceeds to address the merits of the legal position that Waid declined to take.

Ferguson authorized Waid's concession by allowing him to appear as her representative and by refusing to contest his concession in the trial court. Waid's concession is binding upon Ferguson, regardless of whether Waid's legal

analysis was flawed.[4] Accordingly, Ferguson's arguments regarding the merits of the legal position Waid declined to take are unavailing. In the trial court, Waid did not take a legal position on the breach of contract claim, but instead conceded that the claim was not viable. By doing so, he waived the opportunity for Ferguson to argue the merits both in the trial court and on appeal. The trial court properly dismissed the breach of contract claim.

The trial court also properly dismissed Ferguson's negligent misrepresentation claim in light of Mazon v. Krafchick, 158 Wn.2d 440, 144 P.3d 1168 (2006). Mazon stands for the proposition that co-counsel may not sue each other to recover lost or reduced prospective fees. Mazon, 158 Wn.2d at 448. The gravamen of Ferguson's claim is that Teller misrepresented his intention to prepare for trial and advance costs and, instead, focused his efforts on effectuating a settlement. From this, Ferguson asserts that she is entitled to all damages proximately caused by Teller's misrepresentation. In effect, Ferguson asks for the difference between what she earned by virtue of the clients settling and what she could have earned had the case been taken to trial, with a better result being achieved. What Ferguson seeks to recover is lost prospective fees, which Mazon prohibits. Accordingly, the trial court did not err.

IV

Ferguson next contends that the trial court erred by granting summary

[4] Even if Waid's concession violated the Rules of Professional Conduct, which we do not assume, such a violation would not form the basis for an appellate challenge to Waid's trial court legal strategy. See Hizey v. Carpenter, 119 Wn.2d 251, 261-62, 830 P.2d 646 (1992) (explaining that the Rules of Professional Conduct are not statutes promulgated by the legislature and are not intended as a basis for civil liability).

judgment in favor of Teller on the issue of whether Ferguson and Teller contracted to evenly split the contingency fee. This is so, she reasons, because the trial court resolved genuine issues of material fact in favor of Teller. We disagree.

This court reviews a summary judgment order de novo, engaging in the same inquiry as the trial court. Snohomish County v. Rugg, 115 Wn. App. 218, 224, 61 P.3d 1184 (2002). Summary judgment should be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). On a summary judgment motion, the trial court must review all evidence in the light most favorable to the nonmoving party. Lamon v. McDonnell Douglas Corp., 91 Wn.2d 345, 350, 588 P.2d 1346 (1979). The motion should be granted when a reasonable person could reach only one conclusion. Lamon, 91 Wn.2d at 350.

"Washington follows an objective manifestation test for contracts, looking to the objective acts or manifestations of the parties rather than the unexpressed subjective intent of any party." Wilson Court Ltd. P'ship v. Tony Maroni's, Inc., 134 Wn.2d 692, 699, 952 P.2d 590 (1998).

Ferguson asserts five reasons for why the trial court improperly granted summary judgment on the issue of contract formation: (1) the trial court disregarded evidence that Ferguson rejected the draft retainer agreement that Teller presented to the clients; (2) the trial court disregarded evidence that Teller knew that Ferguson had another attorney to handle the case in the event of her suspension; (3) the trial court disregarded evidence that Ferguson and Teller

intended to negotiate a separate written co-counsel agreement; (4) the trial court decided the ultimate issue when it held that Teller substantially performed; and (5) Ferguson's and Teller's words and conduct establish that there was no fee-sharing contract. Each of these assertions will be addressed in turn.

First, Ferguson's present assertion that she ultimately rejected the retainer agreement Teller presented to the clients does not establish trial court error. Ferguson repeatedly confirmed the existence of a contract in a series of e-mail exchanges[5] and presents no evidence of objective manifestations indicating otherwise.

Second, Ferguson's assertion that Teller knew that Ferguson had another attorney to handle the case if she was suspended also does not establish trial court error. The e-mail Ferguson cites in support of this claim actually refutes her position: "*Prior to mediation*, however, I think I need my own attorney, Shawn Newman, to be my back-up should I get suspended." (Emphasis added.) This e-mail was sent several months before the fee agreement at issue was executed, and Ferguson's statement explicitly addresses the relevant time period as being "prior to mediation." Ferguson's objective manifestations following mediation indicate that circumstances changed when the case failed to settle; indeed, Ferguson's e-mail messages to Teller admitting that they had a contract belie the suggestion that evidence of this earlier e-mail created a genuine issue of material fact.

Third, no trial court error is apparent from Ferguson's assertion that she

[5] See supra pp. 5-6.

intended, and that Teller understood, that they would enter into a written co-counsel agreement separate from the contract with the clients. Ferguson e-mailed Teller, "If the mediation does not result in settlement, assuming you are still willing to proceed with me, we would enter into a new fee agreement with them and with each other." This language, coupled with Ferguson's assertion that she has employed separate co-counsel agreements in the past,[6] does suggest that Ferguson, at one time, contemplated entering into a separate co-counsel agreement. However, the numerous e-mail messages sent by Ferguson following the presentation of Teller's retainer agreement to her and to the clients, wherein she acknowledges the existence of a contract, could lead a reasonable person to only one conclusion—that the retainer agreement drafted by Teller constituted a contract between the attorneys.

Fourth, the trial court did not improperly decide the ultimate issue of whether Teller lived up to his end of the bargain. This is so because Ferguson provided no evidence that Teller failed to advance litigation costs or was unwilling to advance costs in an amount equal to that which Ferguson had contemplated. The parties did not specify that Teller had to pay a certain amount of costs in order to perform pursuant to the contract. Moreover, there is no evidence that the parties ever intended to make substantial performance under the contract contingent upon paying a certain amount of money other than simply "litigation costs." The case settled before Teller had advanced the amount of money

[6] Ferguson stated that she has used separate co-counsel agreements both with Teller and with other attorneys.

Ferguson had, perhaps, contemplated. However, Teller did advance costs and represented the clients, leading to the clients' decision to settle. The contract did not require more.

Fifth and finally, the parties' words and conduct after the fee agreement was signed by the clients did not establish the absence of a contract. Ferguson asserts that Teller's response to Ferguson's e-mail sent on December 8, 2010, wherein she asked whether Teller was planning to withdraw, shows that both parties thought that he could withdraw without breaching a contract. This e-mail exchange does not accomplish what Ferguson wants it to—Teller merely says he does not plan to withdraw. Furthermore, the numerous e-mail messages referring explicitly to the existence of a contract establish that the parties understood that they had an agreement. This e-mail exchange is not inconsistent with the parties' objective manifestations indicating that a contract was formed.

Ultimately, the objective manifestations of the parties reveal that both intended to contract for a 50/50 fee splitting arrangement. Accordingly, the trial court did not err when it held that there was a contract to that effect, and it did not improperly resolve genuine issues of material fact when it ruled in favor of Teller.

V

Ferguson next contends that the trial court erred by granting summary judgment in favor of Teller on the issue of whether the contract was enforceable against Ferguson as a matter of law. This is so, she asserts, because Teller failed to provide consideration for the fee agreement, because Ferguson

"substantially performed," and because the agreement violated public policy pursuant to RPC 1.5(e). We disagree.

Ferguson first contends that Teller failed to provide consideration for the fee agreement. This is so, she reasons, because the amount of costs that Teller advanced was miniscule when compared to the amount that Ferguson anticipated he would advance. Ferguson's contention lacks merit.

"Consideration is a bargained-for exchange of promises." Labriola v. Pollard Grp., Inc., 152 Wn.2d 828, 833, 100 P.3d 791 (2004). Determining whether consideration supports a contract is a question of law. Hanks v. Grace, 167 Wn. App. 542, 548, 273 P.3d 1029, review denied, 175 Wn.2d 1017 (2012). "Courts generally do not inquire into the adequacy of consideration and instead utilize a legal sufficiency test" which "'is concerned not with comparative value but with that which will support a promise.'" Labriola, 152 Wn.2d at 834 (quoting Browning v. Johnson, 70 Wn.2d 145, 147, 422 P.2d 314, 430 P.2d 591 (1967)). We will "not relieve a party of a bad bargain . . . unless the consideration is so inadequate as to constitute constructive fraud." Emberson v. Hartley, 52 Wn. App. 597, 601, 762 P.2d 364 (1988).

Ferguson fails to perceive the distinction between adequacy and sufficiency of consideration. Adequacy deals with the comparative value of the exchanged acts or promises, whereas sufficiency deals with that which will support a promise. We will not invalidate a contract for insufficient consideration merely because the parties exchanged acts or promises that differed in comparative value. So long as the consideration exchanged will support the

promise, the consideration is sufficient. Nevertheless, Ferguson argues, in effect, that we should invalidate the contract because Teller paid very little yet profited considerably when the clients decided to settle. Implicit in her position is that Teller did not give comparative value for what he received, or, stated differently, that Teller did not give adequate consideration. However, the consideration provided by Teller does not suggest constructive fraud and, absent evidence to the contrary, we find no need to inquire into adequacy. Ferguson and her clients determined that they needed someone to finance the litigation and, to that end, contracted with Teller to advance costs. The fact that Teller received a good deal when the clients chose to settle does not mean that the consideration he provided was inadequate.

Ferguson next contends that she "substantially performed" and should, therefore, receive one-third of the second settlement offer that the clients rejected. The basis for her claim is that she procured two sizeable settlement offers, ultimately rejected by the clients, prior to the case being settled. Her contention lacks merit.

"It has long been the rule in this state that where the compensation of an attorney is to be paid contingently, and the attorney is discharged prior to the occurrence of the contingency, the measure of the fee is not the contingent fee agreed upon but reasonable compensation for the services actually rendered." Barr v. Day, 124 Wn.2d 318, 329, 879 P.2d 912 (1994). The "substantial performance" exception to the general rule that clients may fire their attorneys at any time with or without cause is meant to protect attorneys from their clients.

Barr, 124 Wn.2d at 329.

Ferguson's contention is unavailing because she was not fired by her clients—she was forced to withdraw due to her suspension by the Washington State Supreme Court. The "substantial performance" exception is designed to protect attorneys from clients, not attorneys from other attorneys. More specifically, the exception protects attorneys from clients, with whom lies the authority to accept or reject a settlement offer,[7] who would seek to unjustly enrich themselves by firing their attorney immediately prior to accepting a settlement offer. Because Teller could not accept or reject a settlement offer without the clients' authorization, there is no reason to extend this exception to protect Ferguson from Teller. Accordingly, Ferguson may not avail herself of the "substantial performance" exception.

Ferguson finally contends that the fee division violates public policy as expressed by RPC 1.5(e). This is so, she avers, because (1) Ferguson and Teller did not sign the retainer agreement; (2) the retainer agreement did not fully disclose to the clients, in writing, Teller's duty to advance litigation costs; and (3) Ferguson's suspension ended joint responsibility. Her contention lacks merit.

"Attorney fee agreements that violate the RPCs are against public policy and unenforceable." Valley/50th Ave., LLC v. Stewart, 159 Wn.2d 736, 743, 153 P.3d 186 (2007). RPC 1.5(e) allows for nonproportional fee agreements between attorneys, subject to some restrictions:

> **(e)** A division of a fee between lawyers who are not in the

[7] "A lawyer shall abide by a client's decision whether to settle a matter." RPC 1.2(a).

same firm may be made only if:

(1) (i) the division is in proportion to the services provided by each lawyer or each lawyer assumes joint responsibility for the representation;

(ii) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(iii) the total fee is reasonable.

RPC 1.5 (e).

Ferguson first contends that both she and Teller were required to sign the fee agreement. Neither RPC 1.5(e) nor Comment 7[8] to the rule includes such a requirement, and Ferguson has failed to provide a compelling reason why this court should read into the rule such a requirement.

Ferguson next contends that the retainer agreement did not fully disclose Teller's duty to advance litigation costs. Neither RPC 1.5(e) nor Comment 5[9] to the rule includes such a requirement. Ferguson asserts that the contract violated the rule because Teller had a strong incentive to settle the case; however, her assertion disregards the fact that the clients have the ultimate authority to authorize a settlement. RPC 1.2(a). Neither the letter nor the spirit of RPC 1.5(e) required the attorneys to disclose to the clients that Teller would pay for all litigation costs.

Ferguson finally contends that her suspension ended her joint responsibility with Teller. WSBA Advisory Opinion 1522 states, "The Committee

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[8] "[T]he client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing."

[9] "An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest."

was of the unanimous opinion that 'joint responsibility' as used in RPC 1.5(e)(2) refers to legal liability to see that the client's work is competently performed." The term "legal responsibility" does not involve the practice of law. See Elane v. St. Bernard Hosp., 284 Ill. App. 3d 865, 872, 672 N.E.2d 820 (1996) (a former lawyer who became a judge sought enforcement of a fee agreement even though she could no longer practice law). There appears to be no meaningful distinction between "legal liability" and "legal responsibility" in this context. Therefore, the fact that Ferguson was suspended from practicing law did not mean that she no longer had "legal liability" with respect to the clients in the underlying matter. Accordingly, the fee does not, as Ferguson asserts, violate public policy as expressed by RPC 1.5(e).

VI

Ferguson next contends that she is entitled to choose between a quantum meruit method of fee division or a lodestar fee calculation. This is so, she reasons, because her fee agreement with Teller permits her to elect between these methods of fee calculation. We disagree.

The contract provision invoked by Ferguson reads, in pertinent part, as follows:

> 6. **DISCHARGE**: If client discharges attorneys, or if attorneys withdraw for cause (e.g., dishonesty of client), client agrees to pay attorneys a reasonable attorney fee and any non-reimbursed costs. The attorney fee shall be, at attorney's option, either (a) an hourly fee for the attorney time expended at $345.00 per hour for Mr. Teller or Ms. Ferguson . . .; (b) contingency percentage computed from the last settlement offer; or (c) a pro-rata portion of the contingent fee ultimately recovered based on relative contributions to the case by the lawyers and any successor

> law firm as determined by Washington law and the factors set out in the Rule of Professional Conduct 1.5(a).

Ferguson is incorrect because this provision, by its terms, applies if *attorneys* withdraw for cause. Only Ferguson withdrew. Accordingly, Teller is not, as Ferguson claims, the "successor law firm." A successor law firm would be a firm that would take over the case after both Ferguson and Teller withdrew for cause. Because only Ferguson withdrew, she may not avail herself of this contract provision.

VII

Teller contends that we should sanction Ferguson for the manner in which she has conducted this appeal and that we should reverse the trial court's order denying sanctions and remand in light of newly discovered evidence. We decline to sanction Ferguson for her conduct of this appeal. Further, we affirm the trial court's denial of Teller's request for sanctions. However, we affirm the trial court's order without prejudice. In rendering our decision, we do not intend for the law of the case doctrine to preclude Teller, if he chooses to do so, from presenting new evidence to the trial court in support of a new request for sanctions.

Affirmed.

We concur:

APPENDIX 5

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

SANDRA L. FERGUSON and THE FERGUSON FIRM, PLLC, Plaintiffs, vs. LAW OFFICE OF BRIAN J. WAID, BRIAN J. WAID and JANE DOE WAID, and their marital community, Defendants.	No. 14-2-29265-1 SEA ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants move for summary judgment, seeking dismissal of Plaintiff's claims. Plaintiff opposes the motion. The Court has reviewed the following documents:

1. Defendant's Motion for Summary Judgment;
2. Declaration of Kathleen Nelson;
3. Plaintiffs' Response Plaintiff's Response in Opposition to Two Motions for Summary Judgment;
4. Declaration Sandra L. Ferguson in Support of Opposition to Summary Judgment;
3. Declaration of Dr. Lila Vidger;
4. Declaration of Randy P. Baker;
5. Declaration of Richard B. Kilpatrick;
6. Declaration of Angela Oppe;

7. Reply in Support of Defendants' Motion for Summary Judgment and Objection to Admissibility of Evidence Pursuant to KCLR 56(e); and

8. Declaration of Kathleen A. Nelson in Support of Defendants' Reply in Support of Summary Judgment

Based on the evidence and argument of counsel and the parties in their unrepresented capacities, the Court finds and rules as follows:

With respect to Plaintiff's claims for professional negligence and violation of the Consumer Protection Act, the Court finds that genuine issues of material fact have been established to preclude summary judgment. As to these claims, Defendants' summary judgment motion is DENIED.

With respect to the following claims, the Court finds that some of the allegations sound in tort, and those allegations simply inform Plaintiff's claim of professional negligence (for example, conflict of interest, breach of contract). Additionally, Plaintiff has failed to come forward with objective evidence, as opposed to allegations and argument, to defeat Defendants' motion for summary judgment. Accordingly, on the claims for conversion, breach of fiduciary duty, conflict of interest, fraud, breach of contract, and negligent or intentional infliction of emotional distress, Defendants' summary judgment motion is GRANTED. These claims are DISMISSED with prejudice.

Dated: June 19, 2015.

Judith H. Ramseyer, Judge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

SANDRA L. FERGUSON and THE FERGUSON FIRM, PLLC,

Plaintiffs,

vs.

LAW OFFICE OF BRIAN J. WAID, BRIAN J. WAID and JANE DOE WAID, and their marital community,

Defendants.

No. 14-2-29265-1 SEA

ORDER DENYING DEFENDANTS' MOTION FOR RECONSIDERATION OF DISMISSAL WITHOUT PREJUDICE

Defendants Law Office of Brian J. Waid, Brian J. Waid, and Jane Doe Waid move for reconsideration of the Court's December 1, 2015 order dismissing this case without prejudice as a nonvoluntary nonsuit, asking that it instead be dismissed with prejudice. Plaintiffs oppose the motion. Having reviewed all materials filed in support of and opposition to the motion, and being familiar with the files and records herein, the Court now finds and rules as follows.

Defendants argue persuasively that it is highly prejudicial for Plaintiffs to simply refile their claims against Defendant, which they have done, while simultaneously appealing dismissal of this case, which they also have done. Defendants' concern is heightened given their view that Plaintiffs' claims are without merit, and continuing to defend against them takes a great toll both financially and emotionally. The Court agrees with Defendants that Plaintiffs' case has been poorly managed, she has willfully and repeatedly disregarded court rules and orders setting

deadlines or limiting claims and witnesses, and has made resolution more difficult by the highly contentious and, at times, unprofessional nature of argument. Plaintiff assumes little responsibility for this state of affairs, instead blaming the Court and others for her inability to timely marshal resources toward deadlines that have been in place since October 24, 2014 or to affirmatively seek relief from such deadlines.

Nonetheless, this Court is unwilling to permanently bar Plaintiff from pursuing relief for which she may have a viable cause of action. Consequently, the Court will not dismiss Plaintiff's claims with prejudice. Defendants' motion for reconsideration is DENIED.

For the sake of judicial economy, efficiency, and just resolution of disputed issues, however, the Court recommends the following possible courses of action to be taken by one or both of the parties:

1. Move to transfer the new case Plaintiff has filed dealing with these issues to the undersigned judge, who is very familiar with the procedural history and legal issues involved.

2. Seek an accelerated case schedule in the newly filed case, given that the case had reached its trial date in this cause of action and little new discovery, if any, should be required.

3. Move to stay the new Superior Court case or the appeal, pending resolution of the other.

This Court has no authority to order the above actions, but strongly encourages the parties to proceed professionally and efficiently to bring this litigation to a close.

DATED: December 31, 2015.

Judith Ramseyer, Judge

Honorable Judith Ramseyer

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

SANDRA L. FERGUSON and THE FERGUSON FIRM, PLLC, Plaintiffs, vs. LAW OFFICE OF BRIAN J. WAID, BRIAN J. WAID and JANE DOE WAID, and their marital community, Defendants.	No. 14-2-29265-1 SEA JUDGMENT [CLERK'S ACTION REQUIRED]

Based on the Court's June 19, 2015 Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment, the Court hereby dismisses Plaintiffs' causes of action for conversion, breach of fiduciary duty, conflict of interest, fraud, breach of contract, and negligent or intentional infliction of emotional distress with prejudice.

Based on the Court's June 19, 2015 Order on Plaintiff-in-Counterclaim's Motion for Summary Judgment on Counterclaims, judgment should be, and hereby is, entered in favor of Defendant/Plaintiff-in-Counterclaim Brian J. Waid and against Plaintiffs/Defendants-in-Counterclaim Sandra L. Ferguson and the Ferguson Firm, PLLC.

Based on the Court's November 13, 2015 Order granting Plaintiffs' Motion for Summary Judgment—Waid Counterclaim, the Court hereby dismisses all remaining counterclaims of Brian J.

LEWIS BRISBOIS BISGAARD & SMITH LLP
1111 Third Avenue, Suite 2700
Seattle, Washington 98101
206-436-2020

Waid d/b/a Law Office of Brian J. Waid against Plaintiffs/Defendants-in-Counterclaims Sandra L. Ferguson and The Ferguson Firm, PLLC, with prejudice.

Based on the Court's November 30, 2015 Involuntary Nonsuit Case Dismissed, all remaining claims of Plaintiffs Sandra L. Ferguson and The Ferguson Firm, PLLC against Defendants are hereby dismissed without prejudice. Accordingly, there is no just reason for delay to enter judgment thereon.

DATED: 12/30/2015

Judith H Ramseyer

Honorable Judith Ramseyer

Presented by:

LEWIS BRISBOIS BISGAARD & SMITH LLP

By: */s Kathleen A. Nelson*
Kathleen A. Nelson, WSBA # 22826
Sarah Demaree, WSBA # 49624
Attorneys for Defendants

LEWIS BRISBOIS BISGAARD & SMITH LLP
1111 Third Avenue, Suite 2700
Seattle, Washington 98101
206-436-2020

Honorable Judith Ramseyer
Noted for consideration
without oral argument:
August 18, 2015

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

SANDRA L. FERGUSON and
THE FERGUSON FIRM, PLLC,

Plaintiffs,

v.

LAW OFFICE OF BRIAN J. WAID,
BRIAN J. WAID and JANE DOE
WAID,

Defendants,

BRIAN J. WAID, Counter-Claimant.

No. 14-2-29265-1 SEA

ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT—WAID COUNTERCLAIM ~~[PROPOSED]~~

Plaintiffs move the Court for summary judgment of dismissal of Brian Waid's counterclaim (Sub. #7, pp. 15-19). Counterclaimant opposes the motion.

The Court has considered all papers filed in support of and in opposition to the motion, and has considered the records and files herein. The Court has reviewed the following documents:

MUENSTER & KOENIG
14940 SUNRISE DRIVE NE
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 501-9565
FAX: (206) 855-1027

(a) Plaintiffs' motion for summary judgment;

(b) Documents declaration of John Muenster, with exhibits A through F; and

(c) Counterclaimant's opposition to the motion.

(d) and hearing argument of counsel on November 13, 2015

Being fully advised, the Court finds and concludes as follows:

(1) There is no genuine issue as to any material fact. The plaintiffs are entitled to a judgment as a matter of law.

~~(2) Mr. Waid's counterclaim is barred by his failure to mitigate his~~ damages by obtaining his fee ~~from the~~ funds which were available in the ~~registry after remand in~~ *Ferguson v. Teller*, King Co. #11-2-19221-1.

(3) In prior proceedings, Mr. Waid ~~has had his day in court to fully~~ have the opportunity to litigate his claim for ~~collect his~~ alleged fees from Plaintiff. The counterclaim, ~~his fourth attempt to collect from Plaintiff~~, is barred by *res judicata* for reasons stated on the record. *

~~(4) Mr. Waid elected to litigate his fee claim as an attorney's lien~~ during the *Ferguson v. Teller* case, a process lasting 2 years. Only after Plaintiff sued him for malpractice and CPA violations (after the *Teller* case ended) did he assert a counterclaim for the same money he had sought on the prior occasions described above. His November 2014 counterclaim, filed years after he claims the fees were allegedly earned, should be dismissed due to waiver.

(5) Mr. Waid's *pro se* counterclaim is a remake of motions he has ~~made before. It does not comply with LCR 7(b)(7)~~

~~(6) The motion for summary judgment should be granted.~~

* (4) Because the court is ruling on res judicata grounds of this motion, the court declines to address the other issues raised by Plaintiff's motion

MUENSTER & KOENIG
14940 SUNRISE DRIVE NE
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 501-9565
FAX: (206) 855-1027

Accordingly,

IT IS HEREBY ORDERED that summary judgment is GRANTED. Mr. Waid's counterclaim is DISMISSED WITH PREJUDICE. * See also

Dated this the 13 day of ~~September~~ November, 2015.

Judith H Ramseyer

Judge of the Superior Court
JUDITH H. RAMSEYER

* order entered on this date denying Defendant Waid's motion for partial summary judgment

Presented by:
MUENSTER & KOENIG

By: S/John R. Muenster
JOHN R. MUENSTER
Attorney at Law
WSBA No. 6237
Co-counsel for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on or about this the 19th day of August, 2015, a true and correct copy of the foregoing document was provided to Working Copies with the Clerk of the Court via ECR and served on opposing counsel via email.

S/ John R. Muenster
Muenster & Koenig

MUENSTER & KOENIG
14940 SUNRISE DRIVE NE
BAINBRIDGE ISLAND, WASHINGTON 98110
(206) 501-9565
FAX: (206) 855-1027

APPENDIX 6

Chapter 60.40 RCW

LIEN FOR ATTORNEY'S FEES

Chapter Listing

Sections

NOTES:

Rules of court: *Return of files of disbarred or suspended attorney—RLD 8.1.*

60.40.010
Lien created—Enforcement—Definition—Exception.

(1) An attorney has a lien for his or her compensation, whether specially agreed upon or implied, as hereinafter provided:

(a) Upon the papers of the client, which have come into the attorney's possession in the course of his or her professional employment;

(b) Upon money in the attorney's hands belonging to the client;

(c) Upon money in the hands of the adverse party in an action or proceeding, in which the attorney was employed, from the time of giving notice of the lien to that party;

(d) Upon an action, including one pursued by arbitration or mediation, and its proceeds after the commencement thereof to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement; and

(e) Upon a judgment to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed and date of filing notice.

(2) Attorneys have the same right and power over actions to enforce their liens under subsection (1)(d) of this section and over judgments to enforce their liens under subsection (1)(e) of this section as their clients have for the amount due thereon to them.

(3) The lien created by subsection (1)(d) of this section upon an action and proceeds and the lien created by subsection (1)(e) of this section upon a judgment for money is superior to all other liens.

(4) The lien created by subsection (1)(d) of this section is not affected by settlement between the parties to the action until the lien of the attorney for fees based thereon is satisfied in full.

(5) For the purposes of this section, "proceeds" means any monetary sum received in the action. Once proceeds come into the possession of a client, such as through payment by an opposing party or another person or by distribution from the attorney's trust account or registry of the court, the term "proceeds" is limited to identifiable cash proceeds determined in accordance with RCW 62A.9A-315(b)(2). The attorney's lien continues in such identifiable cash proceeds, subject to the rights of a secured party under RCW 62A.9A-327 or a transferee under RCW 62A.9A-332.

(6) Child support liens are exempt from this section.

[2004 c 73 § 2; Code 1881 § 3286; 1863 p 406 § 12; RRS § 136.]

NOTES:

Purpose—Intent—Application—2004 c 73: "The purpose of this act is to end double taxation of attorneys' fees obtained through judgments and settlements, whether paid by the client from the recovery or by the defendant pursuant to a statute or a contract. Through this legislation, Washington law clearly recognizes that attorneys have a property interest in their clients' cases so that the attorney's fee portion of an award or settlement may be taxed only once and against the attorney who actually receives the fee. This statute should be liberally construed to effectuate its purpose. This act is curative and remedial, and intended to ensure that Washington residents do not incur double taxation on attorneys' fees received in litigation and owed to their attorneys. Thus, except for RCW **60.40.010**(4), the statute is intended to apply retroactively." [**2004 c 73 § 1.**]

60.40.020
Proceedings to compel delivery of money or papers.

When an attorney refuses to deliver over money or papers, to a person from or for whom he or she has received them in the course of professional employment, whether in an action or not, he or she may be required by an order of the court in which an action, if any, was prosecuted, or if no action was prosecuted, then by order of any judge of a court of record, to do so within a specified time, or show cause why he or she should not be punished for a contempt.

[**2012 c 117 § 152**; Code 1881 § 3287; **1863 p 406 § 13**; RRS § 137.]

60.40.030
Procedure when lien is claimed.

If, however, the attorney claim a lien, upon the money or papers, under the provisions of *this chapter, the court or judge may: (1) Impose as a condition of making the order, that the client give security in a form and amount to be directed, to satisfy the lien, when determined in an action; (2) summarily to inquire into the facts on which the claim of a lien is founded, and determine the same; or (3) to refer it, and upon the report, determine the same as in other cases.

[Code 1881 § 3288; **1863 p 406 § 14**; RRS § 138.]

NOTES:

***Reviser's note:** "this chapter" appeared in section 3288, chapter 250 of the Code of 1881, the lien sections of which are codified as chapter **60.40** RCW.

APPENDIX 7

Rules of Professional Conduct

RPC 1.8
CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) 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 and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of an independent lawyer on the transaction; and

(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.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, expect as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of the client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include spouse, child, grandchild, parent, grandparent or other relative or individual with who the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information

relating to the representation.

(e) A lawyer shall not, while representing a client in connection with contemplated or pending litigation, advance or guarantee financial assistance to a client, except that:

(1) a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses; and

(2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, confirmed in writing. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented by a lawyer in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of an independent lawyer in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not:

(1) have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them at the time the client-lawyer relationship commenced; or

(2) have sexual relations with a representative of a current client if the sexual relations would, or would likely, damage or prejudice the client in the representation.

(3) For purposes of Rule 1.8(j), "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

(k) While lawyers are associated in a firm with other lawyers or LLLTs, a prohibition in the foregoing paragraphs (a) through (i) of this Rule or LLLT RPC 1.8 that applies to anyone of them shall apply to all of them, except that the prohibitions in paragraphs (a), and (h), and (i) of LLLT RPC 1.8 shall apply to firm lawyers only if the conduct is also prohibited by this rule.

(l) A lawyer who is related to another lawyer or LLLT as parent, child, sibling, or spouse, or who has any other close familial or intimate relationship with another lawyer or LLLT, shall not represent a client in a matter directly adverse to a person who the lawyer knows is represented by the related lawyer or LLLT unless:

(1) the client gives informed consent to the representation; and

(2) the representation is not otherwise prohibited by Rule 1.7

(m) A lawyer shall not:

(1) make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm:

(i) to bear the cost of providing conflict counsel; or

(ii) to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law firm personnel; or

(2) knowingly accept compensation for the delivery of indigent defense services from a lawyer who has entered into a current agreement in violation of paragraph (m)(1).

[Adopted effective September 1, 1985; amended effective September 1, 1993; June 27, 2000; September 1, 2006; April 24, 2007; September 1, 2008; September 1, 2011; April 14, 2015.]

Comment

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] [Washington revision] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of an independent lawyer. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of an independent lawyer is desirable. See Rule 1.0A(e) (definition of informed consent).

[Comment [2] amended effective April 14, 2015.]

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but

also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] [Washington revision] If the client is independently represented by a lawyer in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent lawyer. The fact that the client was independently represented by a lawyer in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

[Comment [4] amended effective April 14, 2015.]

Use of Information Related to Representation

[5] [Washington revision] Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client information unless the client gives informed consent, except as permitted or required by these Rules. See Rules 1.2(d), 1.6, 1.9(c), 3.3, 4.1(b), and 8.1.

Gifts to Lawyers

[6] A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

[7] If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client should have the detached advice that another lawyer can provide. The sole exception to this Rule is where

the client is a relative of the donee.

[8] This Rule does not prohibit a lawyer from seeking to have the lawyer or a partner or associate of the lawyer named as executor of the client's estate or to another potentially lucrative fiduciary position. Nevertheless, such appointments will be subject to the general conflict of interest provision in Rule 1.7 when there is a significant risk that the lawyer's interest in obtaining the appointment will materially limit the lawyer's independent professional judgment in advising the client concerning the choice of an executor or other fiduciary. In obtaining the client's informed consent to the conflict, the lawyer should advise the client concerning the nature and extent of the lawyer's financial interest in the appointment, as well as the availability of alternative candidates for the position.

Literary Rights

[9] An agreement by which a lawyer acquires literary or media rights concerning the conduct of the representation creates a conflict between the interests of the client and the personal interests of the lawyer. Measures suitable in the representation of the client may detract from the publication value of an account of the representation. Paragraph (d) does not prohibit a lawyer representing a client in a transaction concerning literary property from agreeing that the lawyer's fee shall consist of a share in ownership in the property, if the arrangement conforms to Rule 1.5 and paragraphs (a) and (i).

Financial Assistance

[10] [Washington Revision] Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. See Washington Comment [21].

Person Paying for a Lawyer's Services

[11] Lawyers are frequently asked to represent a client under circumstances in which a third person will compensate the lawyer, in whole or in part. The third person might be a relative or friend, an indemnitor (such as a liability insurance company) or a co-client (such as a corporation sued along with one or more of its employees). Because third-party payers frequently have interests that differ from those of the client, including interests in minimizing the amount spent on the representation and in learning how the representation is progressing, lawyers are prohibited from accepting or continuing such representations unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client. See also Rule 5.4(c) (prohibiting interference with a lawyer's professional judgment by one who recommends, employs or pays the lawyer to render legal services for another).

[12] Sometimes, it will be sufficient for the lawyer to obtain the client's informed consent regarding the fact of the payment and the identity of the third-party payer. If, however, the fee arrangement creates a conflict of interest for the lawyer, then the lawyer must comply with Rule. 1.7. The lawyer must also conform to the requirements of Rule 1.6 concerning confidentiality. Under Rule 1.7(a), a conflict of interest exists if there is significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in the fee arrangement or by the lawyer's responsibilities to the third-party payer (for example, when the third-party payer is a co-client). Under Rule 1.7(b), the lawyer may accept or continue the representation with the informed consent of each affected client, unless the conflict is nonconsentable under that paragraph. Under Rule 1.7(b), the informed consent must be confirmed in writing.

Aggregate Settlements

[13] [Washington revision] Differences in willingness to make or accept an offer of settlement are among the risks of common representation of multiple clients by a single lawyer. Under Rule 1.7, this is one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent. In addition, Rule 1.2(a) protects each client's right to have the final say in deciding whether to accept or reject an offer of settlement and in deciding whether to enter a guilty or nolo contendere plea in a criminal case. The rule stated in this paragraph is a corollary of both these Rules and provides that, before any settlement offer or plea bargain is made or accepted on behalf of multiple clients, the lawyer must inform each of them about all the material terms of the settlement, including what the other clients will receive or pay if the settlement or plea offer is accepted. See also Rule 1.0A(e) (definition of informed consent). Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class members and other procedural requirements designed to ensure adequate protection of the entire class.

[Comment [13] amended effective April 14, 2015.]

Limiting Liability and Settling Malpractice Claims

[14] [Washington revision] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless permitted by law and the client is independently represented by a lawyer in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by

law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[Comment [14] amended effective April 14, 2015.]

[15] [Washington revision] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of client or former client not represented by a lawyer, the lawyer must first advise such a person in writing of the appropriateness of independent representation by a lawyer in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult an independent lawyer.

[Comment [15] amended effective April 14, 2015.]

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Client-Lawyer Sexual Relationships

[17] The relationship between lawyer and client is a fiduciary one in which the lawyer occupies the highest position of trust and confidence. The relationship is almost always unequal; thus, a sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to

represent the client without impairment of the exercise of independent professional judgment. Moreover, a blurred line between the professional and personal relationships may make it difficult to predict to what extent client confidences will be protected by the attorney-client evidentiary privilege, since client confidences are protected by privilege only when they are imparted in the context of the client-lawyer relationship. Because of the significant danger of harm to client interests and because the client's own emotional involvement renders it unlikely that the client could give adequate informed consent, this Rule prohibits the lawyer from having sexual relations with a client regardless of whether the relationship is consensual and regardless of the absence of prejudice to the client.

[18] Sexual relationships that predate the client-lawyer relationship are not prohibited. Issues relating to the exploitation of the fiduciary relationship and client dependency are diminished when the sexual relationship existed prior to the commencement of the client-lawyer relationship. However, before proceeding with the representation in these circumstances, the lawyer should consider whether the lawyer's ability to represent the client will be materially limited by the relationship. See Rule 1.7(a)(2).

[19] [Washington revision] When the client is an organization, paragraph (j) of this Rule applies to a lawyer for the organization (whether inside or outside counsel). For purposes of this Rule, "representative of a current client" will generally be a constituent of the organization who supervises, directs or regularly consults with that lawyer on the organization's legal matters. See Comment [1] to Rule 1.13 (identifying the constituents of an organizational client).

See also Washington Comments [22] and [23].

Imputation of Prohibitions

[20] Under paragraph (k), a prohibition on conduct by an individual lawyer in paragraphs (a) through (i) also applies to all lawyers associated in a firm with the personally prohibited lawyer. For example, one lawyer in a firm may not enter into a business transaction with a client of another member of the firm without complying with paragraph (a), even if the first lawyer is not personally involved in the representation of the client. The prohibition set forth in paragraph (j) is personal and is not applied to associated lawyers.

Additional Washington Comments (21-31)

Financial Assistance

[21] Paragraph (e) of Washington's Rule differs form the Model Rule. Paragraph (e) is based on former Washington RPC 1.8(e). The minor structural modifications to the general prohibition on providing financial assistance to a client do not represent a change in Washington law, and paragraph (e) is intended to preserve prior interpretations of the Rule and prior Washington practice.

Client-Lawyer Sexual Relationships

[22] Paragraph (j)(2) of Washington's Rule, which prohibits sexual relationships with a representative of an organizational client, differs from the Model Rule. Comment [19] to Model Rule 1.8 was revised to be consistent with the Washington Rule.

[23] Paragraph (j)(3) of the Rule specifies that the prohibition applies with equal force to any lawyer who assists in the representation of the client, but the prohibition expressly does not apply to other members of a firm who have not assisted in the representation.

Personal Relationships

[24] Model Rule 1.8 does not contain a provision equivalent to paragraph (l) of Washington's Rule. Paragraph (l) prohibits representations based on a lawyer's personal conflict arising from his or her relationship with another lawyer. Paragraph (l) is a revised version of former Washington RPC 1.8(i). See also Comment [11] to Rule 1.7.

Indigent Defense Contracts

[25] Model Rule 1.8 does not contain a provision equivalent to paragraph (m) of Washington's Rule. Paragraph (m) specifies that it is a conflict of interest for a lawyer to enter into or accept compensation under an indigent defense contract that does not provide for the payment of funds, outside of the contract, to compensate conflict counsel for fees and expenses.

[26] Where there is a right to a lawyer in court proceedings, the right extends to those who are financially unable to obtain one. This right is affected in some Washington counties and municipalities through indigent defense contracts, i.e., contracts entered into between lawyers or law firms willing to provide defense services to those financially unable to obtain them and the governmental entities obliged to pay for those services. When a lawyer or law firm providing indigent defense services determines that a disqualifying conflict of interest precludes representation of a particular client, the lawyer or law firm must withdraw and substitute counsel must be obtained for the client. See Rule 1.16. In these circumstances, substitute counsel is typically known as "conflict counsel."

[27] An indigent defense contract by which the contracting lawyer or law firm assumes the obligation to pay conflict counsel from the proceeds of the contract, without further payment from the governmental entity, creates an acute financial disincentive for the lawyer either to investigate or declare the existence of actual or potential conflicts of interest requiring the employment of conflict counsel. For this reason, such contracts

involve an inherent conflict between the interests of the client and the personal interests of the lawyer. These dangers warrant a prohibition on making such an agreement or accepting compensation for the delivery of indigent defense services from a lawyer that has done so. See ABA Standards for Criminal Justice, Std. 5-3.3(b)(vii) (3d ed. 1992) (elements of a contract for defense services should include "a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses"); People v. Barboza, 29 Cal.3d 375, 173 Cal. Rptr. 458, 627 P.2d 188 (Cal. 1981) (structuring public defense contract so that more money is available for operation of office if fewer outside attorneys are engaged creates "inherent and irreconcilable conflicts of interest").

[28] Similar conflict-of-interest considerations apply when indigent defense contracts require the contracting lawyer or law firm to pay for the costs and expenses of investigation and expert services from the general proceeds of the contract. Paragraph (m)(1)(ii) prohibits agreements that do not provide that such services are to be funded separately from the amounts designated as compensation to the contracting lawyer or law firm.

[29] Because indigent defense contracts involve accepting compensation for legal services from a third-party payer, the lawyer must also conform to the requirements of paragraph (f). See also Comments [11] [12].

[Comments adopted effective September 1, 2006.]

Settling Malpractice Claims

[30] A client or former client of an LLLT who is not represented by a lawyer is unrepresented for purposes of Rule 1.8(h)(2).

[Comment adopted April 14, 2015.]

Lawyers Associate din Firms with Limited License Legal Technicians

[31] LLLT RPC 1.8 prohibits LLLTs from engaging in certain conduct that is not necessarily prohibited to lawyers by this Rule. See LLLT RPC 1.(a) (strictly prohibiting an LLLT from entering into a business transaction with a client); LLLT RPC 1.8(h)(1) (strictly prohibiting an LLLT from making an agreement prospectively limiting the LLLT's liability to a client for malpractice); LLLT RPC 1.8(i) (strictly prohibiting an LLLT from acquiring a proprietory interest in a client's cause of action or the subject matter of the litigation). These prohibitions do not apply to any lawyers in a firm unless the conduct is also prohibited to a lawyer under this rule.

[Comment adopted April 14, 2015.]

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