

No. 74258-2

COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

TERENCE BUTLER,

Respondent,

vs.

RANDALL T. THOMSEN, Individually and on Behalf of the Marital
Community Comprised of RANDALL THOMSEN and JANE DOE
THOMSEN, and CALFO HARRIGAN LEYH & EAKES, LLP, a
Washington Professional Limited Liability Partnership, f/k/a DANIELSON
HARRIGAN LEYH & TOLLEFSON, LLP,

Appellants.

**BRIEF OF RESPONDENT AND MOTION TO STRIKE
INFORMATION OUTSIDE THE APPELLATE RECORD**

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I. INTRODUCTION

Respondent Terence Butler filed this legal malpractice lawsuit against his former attorney, Appellants Randall Thomsen and Thomsen's law firm, Calfo Harrigan Leyh & Eakes, LLP (collectively "Calfo Harrigan"), arising out of Calfo Harrigan's joint representation of Butler, ImageSource, and Zvirzdys and Sutherland (who constituted two of the three other co-owners of ImageSource), in the *White* case. Calfo Harrigan negotiated, drafted, and approved the settlement documents in the *White* case on behalf of Butler and its other, jointly-represented clients. The Release included the following arbitration provision:

- 19. Dispute Resolution.** Any dispute **arising out of this Agreement** shall be settled by arbitration before Judicial Dispute Resolution ("JDR") in Seattle, using Paris Kallas or a single arbitrator as agreed by **the Parties**. . . .
[Emphasis added where underlined]

In this appeal, Calfo Harrigan seeks to enforce that arbitration clause, to which they are *not* "Parties" or signatories, against its own client's legal malpractice claims. Furthermore, each of the law firm's former, jointly-represented clients had previously waived arbitration relative to the same issue for which Calfo Harrigan seeks arbitration.

Calfo Harrigan cannot enforce the *White* arbitration clause against its own client because to do so would create direct and unwaivable conflicts of interest between attorney and client in connection with the

drafting of settlement documents. The trial court therefore correctly denied Calfo Harrigan's motion to compel arbitration. This Court should affirm that decision; indeed, the suggestion that a client's attorneys can compel arbitration of their client's claim against the client's attorneys, based on an arbitration clause inserted into the client's settlement documents by those same attorneys, is ethically repugnant. See ABA Formal Op. 02-425.

II. REBUTTAL TO ASSIGNMENT OF ERROR

1. Should the Court strike those portions of Appellant's Opening Brief which are *not* supported by the Record on appeal?

Answer: Yes.

2. After undertaking representation of a client, must the attorney comply with RPC 1.7 and RPC 1.8 in connection with any "business transaction" between attorney and client? **Answer: Yes.**

3. Would the *White* settlement documents constitute a "business transaction" between Butler and Calfo Harrigan, for purposes of RPC 1.8, *if* this Court were to enforce the arbitration clause from the *White* settlement documents in this case? **Answer: Yes.**

4. Was Calfo Harrigan required to prove its strict compliance with the requirements of RPC 1.7 and RPC 1.8, in connection with Butler's execution of the *White* settlement documents, as a pre-condition to enforcement of the arbitration agreement against Butler by Calfo

Harrigan? **Answer: Yes.**

5. Does the absence of evidence to prove Calfo Harrigan's strict compliance with RPC .7 and RPC 1.8, relative to disclosure of and consent to Calfo Harrigan's conflict of interest that arises if the arbitration clause in the *White* settlement documents applies to Butler's claims, preclude enforcement of the arbitration clause by Calfo Harrigan against Butler? **Answer: Yes.**

6. Are Butler's claims against Calfo Harrigan encompassed within the arbitration clause in the *White* settlement documents? **Answer: No.**

7. Although Calfo Harrigan was acting as Butler's "attorney/agent" relative to Butler's dispute with White, was Calfo Harrigan also acting as Butler's "attorney/agent" relative to Butler's potential disputes against Calfo Harrigan? **Answer: No.**

8. Can Calfo Harrigan enforce the arbitration clause against its client, as a "third party beneficiary" of the clients' settlement documents, absent proof that it strictly complied with RPC 1.7 and RPC 1.8? **Answer: No.**

9. Can Calfo Harrigan enforce the arbitration clause against its client even though all of its principals, from whom Calfo Harrigan

purports to derive its right to arbitration, had previously waived arbitration of the identical issue? **Answer: No.**

III. REBUTTAL STATEMENT OF THE CASE

Plaintiff/Respondent Terence Butler was one of four (4) co-owners of ImageSource, along with Shadrach White, Victor Zvirzdys and Terry Suutherland. CP 42. Mr. White sued the other owners (Messrs. Butler, Zvirzdys, and Sutherland) and ImageSource in Thurston County Superior Court Case no. 11-2-01309-7 [*White* lawsuit]. CP 43. On June 13, 2011, Butler, Zvirzdys, Sutherland and ImageSource retained Randall Thomsen and his law firm (“Calfo Harrigan”) to jointly represent them in defense of the *White* lawsuit. CP 32-33 ¶¶3.3-3.4, 42-43, 54-56. Calfo Harrigan’s fee agreement does *not* include an arbitration clause. CP 54-56. Thomsen negotiated a settlement of the *White* lawsuit [CP 34 ¶¶3.10-3.13], which was reduced to a CR 2A Agreement that provides, in pertinent part [CP 59-60 §§9, 18]:

9. Mr. White agrees to release all defendants from any claims that he may possess against them. Defendants agree to release Mr. White from any claims that they may possess against him....
18. Any disputes arising out of this agreement, including but not limited to the drafting of final papers, shall be submitted to the Honorable Paris K. Kallas, Judicial Dispute Resolution, for binding arbitration.

Thomsen, in concert with the other attorneys in the *White* lawsuit,

later approved the “final papers,” contemplated by the CR 2A Agreement.

CP 34 ¶3.12. The resulting “Release and Settlement Agreement” provides in pertinent part [CP 67-68 §§10, 19]:

10. **Complete Release.** In consideration of the promises set forth herein, **the Parties**¹ agree to release one another, their spouses, their respective heirs, agents, **attorneys**,² employees, directors, heirs, assigns and personal representatives from any and all charges, claims, and actions, whether known or unknown, arising prior to the date of this Agreement and arising directly or indirectly out of the Lawsuit or their previous dealings. This release specially includes and releases all claims that were asserted or could have been asserted in the Lawsuit by White relating to ImageSource (including employment issue) and any claims or counterclaims that were asserted or could have been asserted by Defendants in the Lawsuit against White. . .

19. **Dispute Resolution.** Any dispute **arising out of this Agreement** shall be settled by arbitration before Judicial Dispute Resolution (“JDR”) in Seattle, using Paris Kallas or a single arbitrator as agreed by **the Parties**. . . .
[Emphasis added where underlined].

After settlement of the *White* case, Butler commenced a new lawsuit against Sutherland, Zvirzdys and ImageSource, alleging significant financial misconduct and misappropriation of corporate funds

¹ “The Parties” to the Settlement Agreement included White, Butler, Sutherland, Zvirzdys, and ImageSource. CP 64. This is significant because the arbitration clause contained in §18 refers to “the Parties.” Neither Thomsen nor Calfo Harrigan were “Parties” to the Release. See, discussion, *infra*, pp. 20-21 and n.22.

² See n. 5, *infra*.

by Sutherland and Zvirzdys, as well as claims for non-payment of significant amounts of compensation due him from ImageSource in King County Superior Court Case no.13-2-4133-4 SEA (the “*Butler* lawsuit”). CP 97-108, 110-129. The *Butler* lawsuit defendants did *not* demand arbitration in their Answers. CP 44 (acknowledging that Butler also did not demand arbitration) and CP 131-150, 152-167. See, CR 8(c) (arbitration is an affirmative defense). Instead, in response to Butler’s motion for summary judgment (CP 169-192) the defendants in the *Butler* case, *i.e.*, Zvirzdys, Sutherland and ImageSource,³ asserted that Butler’s claims against them were barred by virtue of §10 of the Release and Settlement Agreement that concluded the *White* lawsuit. CP 195, 202-204, 204-208, 220, 227-228, 234-236. The trial court (Judge Linde) agreed with the defense and held, as a matter of law [CP 74 ¶D]:

The plain and unambiguous language of the release contained in paragraph 10 of the above-mentioned Release and Settlement Agreement applies to all claims by and between the Parties thereto, arising out of their previous dealings. The claims for relief asserted in the Motion arise from the dealings of the Parties pre-dating the January 2, 2013 date of the Release and Settlement Agreement. Those claims have therefore been released as a matter of law. [Emphasis added; citations omitted].⁴

³ A Receiver had been appointed for ImageSource.

⁴ Calfo Harrigan asserts [App. Br., p. 5] that the underlying Court’s summary judgment order also dismissed *some* of Mr. Butler’s claims, including his claims for wasting corporate assets, because he “did not assert such claims derivatively”.... and certain amounts of compensation he claimed constituted “discretionary bonuses or distributions...[which] were not subject to Washington’s wage statute.” CP 44 (quoting

Butler thereafter initiated this legal malpractice lawsuit against his former lawyers, Thomsen and the Calfo Harrigan law firm, based in part on dismissal of most of the *Butler* lawsuit due to application of the Release to those claims. See CP 1, 18. Calfo Harrigan moved to compel arbitration, based on the arbitration clause contained in the Release and Settlement Agreement that they had drafted for Butler to settle the *White* lawsuit.⁵ CP 41. The King County Superior Court (Hon. Douglass North) denied Calfo Harrigan's motion to compel arbitration and stay. CP 281. This appeal by Calfo Harrigan followed.

IV. ARGUMENT

A. **The Court Should Strike Those Portions of Appellants' Brief Which Are Not Supported by the Record.**

RAP 10.3(a)(5) requires that "each factual statement" in a party's appellate brief must include "[r]eference to the record" that supports the assertion of fact. This Court should strike those portions of a party's brief which the Record does *not* support. RAP 9.1. See, e.g., *Nelson v.*

CP 72). Neither issue is relevant to Calfo Harrigan's motion to compel arbitration or this appeal. Nevertheless, Butler hastens to point out that he did indeed amend his Complaint in the *Butler* lawsuit to assert derivative claims and thus resolve that issue. CP 125-126.

⁵ Based on this same theory, Calfo Harrigan similarly asserts that the Release contained in the *White* settlement documents also effectuated a release of Butler's legal malpractice claims against them. App. Br., pp. 9, 22; CP 38 ¶12. If correct, Calfo Harrigan's interpretation would also implicate RPC 1.8(h)(1) and (2) related to the attorney's settlement of the client's claims against the attorney. Calfo Harrigan's assertion thus further highlights the dangerous implications of allowing attorneys to take self-serving advantage of settlement documents that they prepare for their clients.

McGoldrick, 127 Wn.2d 124, 141, 896 P.2d 1258 (1995); *Dept. of L & I v. Lanier Brugh*, 135 Wn. App. 808, 822, 147 P.3d 588 (2006). Butler properly includes this Motion to Strike in his Brief. RAP 17.2(a)(1).

Calfo Harrigan's opening Brief, page 6 footnote 1, refers to settlement of the *Butler* lawsuit, which: (a) is *not* part of the record on appeal; (b) irrelevant to any issue in this appeal (as well as inaccurate), and; (c) occurred *after* the trial court denied Calfo Harrigan's motion to compel arbitration. The Court should therefore strike footnote 1 from Appellant's Brief.

Calfo Harrigan's opening Brief also states, as fact but without any supporting record reference [App. Br., p. 3]:

Further, Butler said that he had personal counsel to advise him in regard to such issues. . . Because to his understanding disputes among the three shareholders appeared to have been resolved...

No reference to Mr. Butler's "personal counsel" appears at CP 22 and no evidence appears in this appellate record to establish that Mr. Butler "said" any such thing. Although the defendants in the underlying *Butler* lawsuit asserted in a brief that Mr. Butler's personal counsel, Robert Kunold, Jr. had reviewed the Release [CP 195], no evidence in this Record supports that bald assertion (which both Mr. Butler [¶14] and his personal attorney Mr. Kunold [¶19] denied in sworn declarations filed in the underlying *Butler* litigation).

Moreover, regardless of what Mr. Thomsen claims to have “understood” *at the time of his retention* (based solely on the letter of engagement that Appellants’ reference), the Record nevertheless suggests that he became aware of other potential claims by Butler against Zvirzdys, Sutherland and ImageSource during the course of his joint representation. CP 23, 33, 180-181. Thus, this Record does *not* support a conclusion about what Mr. Thomsen “understood” *at the relevant time, i.e., the time the White settlement documents were executed* rather than at the inception of representation.

The Court should therefore strike the offending portions from Appellant’s opening Brief.

B. THE TRIAL COURT CORRECTLY REFUSED TO COMPEL ARBITRATION.

1. The Court Performs a Two-Part Analysis: (a) Is the Arbitration Clause is Valid, and, if so; (b) Whether the Clause Encompasses the Claims Asserted.

The Court determines whether to compel arbitration. *Wiese v. Cach, LLC*, 189 Wn. App. 466 ¶19, 358 P.3d 1213 2015 (2015). To make that determination, the Court engages in a “two-part inquiry: first, whether the arbitration agreement is valid, and if so, whether the agreement encompasses the claims asserted.” *Id.* (Emphasis added). In this particular instance, Calfo Harrigan fails both prongs of the two-part test, although failure to meet either

requirement warrants affirmance of the trial court decision.

2. Enforcement of the *White* Arbitration Clause by Calfo Harrigan, Against Its Own Client, Would Violate Public Policy and thus Render the Arbitration Clause Void as Between Calfo Harrigan and Butler.

Calfo Harrigan premises its entire argument on the erroneous presumption that “Butler does not contest the existence of a valid and enforceable arbitration agreement.” App. Br., p. 8. Compare CP 78, 87 and n. 10. More specifically, an arbitration clause “is valid, enforceable, and irrevocable **except upon a ground that exists at law or in equity for the revocation of contract.**”⁶ RCW 7.04A.060(1)(emphasis added). As used in RCW 7.04A.060(1), the phrase “as exists at law or in equity” refers to general contract defenses such as fraud, duress, or **unconscionability...**. *Weidert v. Hanson*, 178 Wn.2d 462, 436, 309 P.3d 435 (2013)(emphasis added). Washington thus refuses to enforce, as void, an arbitration clause if doing so would violate its public policy. *E.g.*, *Scott v. Cingular Wireless*, 160 Wn.2d 843, 851, 161 P.3d 1000 (2007) (refusing to enforce arbitration clause on public policy grounds), *citing Restatement (Second) of Contracts* §178 (1981); accord, *Tjart v. Smith*

⁶ Calfo Harrigan asserts that review is *de novo*. App. Br., p. 7. Butler does *not* disagree with that *general* proposition of law. However, RCW 7.04A.060(1) expressly invokes “equity” and rescission is equitable in nature reviewed under an abuse of discretion standard. *E.g.*, *Bloor v. Fritz*, 143 Wn. App. 718, 739, 180 P.3d 805 (2008); *Hornback v. Wentworth*, 132 Wn. App. 504, 511, 132 P.3d 778 (2006), *rev. granted*, 158 Wn.2d 1025 (2007). Although the standard of review may present an interesting academic exercise, the Court should affirm the trial court regardless of which standard of review applies.

Barney, Inc., 107 Wn. App. 885, 899-900, 28 P.3d 823 (2001). See further, 25 DeWolf, Allen & Caruso, *Wash. Prac., Contract Law and Prac.* §9.22 (3d ed. updated 11/15)(“any provision in a contract which has the potential of ill effects on the public or is against the public good will be void as against public policy”).

In that context, the practice of law is *not* like an ordinary business; instead, “there are overriding principles of professional ethics to which attorneys must adhere, even when doing so is personally inconvenient.” *In re Hart*, 118 Wn.2d 280, 287, 822 P.2d 264 (1992). Mallen & Smith thus notes that “[u]nder a variety of circumstances, lawyers have sought to avail themselves of arbitration clauses in agreements with other parties. Usually, the courts have refused to allow the lawyers to use the agreement to require arbitration.” 1 Mallen & Smith, *Legal Malpractice* §2:181, p. 296 (2016 ed.).

Attorney and client can enter into an arbitration agreement either before or after the inception of representation; however, even as to an arbitration clause entered into at the inception of representation, *Gorden v. Lloyd Ward & Assoc., P.S.*, 180 Wn. App. 552, 563-564, 323 P.3d 1074 (Div. III, 2014) explains that:

[a]rbitration agreements are **solely permissible** between attorney and client “if the client has been given ‘sufficient information to

permit her to make an informed decision about whether to agree to the inclusion of the arbitration provision in the retainer agreement.”⁷ [Emphasis added].

Golden thus refused to enforce the arbitration clause in the attorney’s fee agreement, holding it “**procedurally unconscionable**”⁸ and therefore “void” because “no attorney or attorney’s representative discussed the arbitration provision with [the client], or advised her of the rights at stake.” *Id.* Accord, ABA Formal Op. 02-425, *supra* at 4-7; *Hodges v. Reasonover*, 103 So.2d 1069, 1073-1078 (La. 2012) (listing disclosures required by attorney vis-a-vis arbitration clause), *discussed in* 1 *Mallen & Smith, supra* §2:180, pp. 295-296; *Feacher v. Hanley*, 2014 WL 119382 *2-4, 5, 6-9 (D. Utah 2014)(finding arbitration requirement **both substantively and procedurally unconscionable**).

However, if the agreement was made “after the inception of the [attorney-client] relationship and before its termination, the fiduciary obligations are implicated.” 1 *Mallen & Smith, Legal Malpractice* §2:179,

⁷ Quoting, *Smith v. Jem Group, Inc.*, 737 F.3d 636, 641 (9th Cir. Wash. 2013) and ABA Standing Comm. on Ethics and Prof. Resp. Formal Op. 02-425 (2/20/2002). Accord, WSBA Ethics Advisory Op. 1670 (1996)(including an arbitration provision in a fee agreement with the client must be “consistent with a lawyer’s fiduciary obligations ...and...**must be done only with full disclosure to the client**”). [Emphasis added].

⁸ See further, 25 *Wash. Prac, Contract Law and Prac. supra* at §9.2 (“Unconscionability is anything which ‘affronts the sense of decency...Washington law recognizes two categories of unconscionability: substantive or procedural. Either substantive or procedural unconscionability is sufficient to render a contract unenforceable either in whole or in part”). Here, the arbitration clause would be valid and enforceable as between the parties to the *White* settlement agreement, but invalid for purposes of compelling arbitration as between one of the parties and that party’s own attorneys.

p. 288 (2016 ed); see further, 1 *Restatement (Third) of the Law Governing Lawyers* §16(3)(ALI 2000); 2 *Mallen & Smith, supra* §15:1, p. 650 (2016 ed.) (“The basic fiduciary obligations are two-fold: undivided loyalty and confidentiality”).

Here, of course, Calfo Harrigan had represented Butler for 1 ½ years prior to execution of the *White* settlement documents, thus implicating Calfo Harrigan’s fiduciary obligation of undivided loyalty to Butler in connection with incorporation of the arbitration clause into the *White* settlement documents. Calfo Harrigan will, therefore, have violated its fiduciary duties to Butler *if* the arbitration clause is interpreted to benefit Calfo Harrigan by requiring that Butler arbitrate his claims against them.

Consistent with *Golden*, “[c]ontracts formed in violation of the RPCs are unenforceable to the extent they contravene public policy.” *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 83, 85, 331 P.3d 1147 (2014), *citing*, *Valley/50th Avenue, LLC v. Stewart*, 159 Wn.2d 736, 743, 153 P.3d 186 (2007). A contract that violates the Rules of Professional Conduct is, therefore, “presumptively unenforceable” and “*prima facie* fraudulent.” *LK Operating*, 181 Wn.2d at 83 (*prima facie* fraudulent”) and 88-89 (“presumptively, but not necessarily, unenforceable). Accord, *In re McGlothlen*, 99 Wn.2d 515, 525, 663 P.3d 1330 (1983)(“*prima facie* fraudulent”), *quoting In re Beakley*, 6 Wn.2d

410, 423-424, 107 P.2d 1097 (1940). This same presumption should apply when the attorney who has a conflict of interest under RPC 1.7 seeks the client's approval of a self-serving agreement that benefits the attorney. *Restatement (Third) of the Law Governing Lawyers* §6 Comment e, p. 67 and §121, Comment f, p. 255 (ALI 2000)(rescission appropriate when lawyer obtains advantage through conflicted transaction).

An attorney has a “concurrent conflict of interest” if “there is significant risk that the representation of one or more clients will be materially limited. . .by a personal interest of the lawyer.” RPC 1.7(a)(2).⁹ If a “concurrent conflict of interest” exists, the lawyer “shall not represent” the client except under the circumstances provided by Rule 1.7(b)(1)-(4) of the Washington Rules of Professional Conduct, including after obtaining the client’s “informed consent, confirmed in writing.” “Informed consent,” in turn, requires disclosure of “adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” RPC 1.0(e). “Confirmed in writing” under RPC 1.7(b)(4) requires “informed consent.” RPC 1.0(b).

A concurrent conflict of interest exists, within the meaning of RPC

⁹ Whether an attorney's conduct violates the RPC's, including RPC 1.7, presents an issue of law. *Eriks v. Denver*, 118 Wn.2d 451, 457-458, 824 P.2d 1207 (1992).

1.7(b), if the attorney's self-interest directly conflicts with the client's interests. *E.g., In re Marriage of Wixom*, 182 Wn. App. 881, 897-903, 332 P.3d 1063 (2014)(Attorney had an unwaivable conflict of interest when he argued that his client, and not the attorney, should bear sole responsibility for sanctions ordered against them both), *citing*, RPC 1.7, Comment 1. See further, *LK Operating, LLC v. Collection Group, LLC*, 168 Wn. App. 862, 872-873 (2012), *aff'd on this issue, LK Operating, supra*, 181 Wn.2d at 84.¹⁰

Accordingly, if this Court were to hold the *White* arbitration clause (as well as the Release) applicable to disputes between Butler and Calfo Harrigan, an unwaivable, RPC 1.7 concurrent conflict of interest would arise each and every time an attorney advised a client in connection with settlement documentation (regardless of whether the attorney advised in favor or against inclusion of an arbitration clause). Calfo Harrigan thus seeks a holding from this Court that would contradict Washington's well-established public policy and have truly extraordinary ramifications for both attorneys and their clients.

¹⁰ The *LK Operating* Court of Appeals opinion rejected rescission as a remedy for the attorney's RPC 1.7 conflict of interest, but nevertheless ordered rescission to remedy the attorney's RPC 1.8 violation. 168 Wn. App. at 876. Although the Supreme Court affirmed the Court of Appeals holding that the attorney had violated RPC 1.7 (181 Wn.2d at 84), it did *not* affirm the Court of Appeals rejection of rescission; it instead held that "we need not determine whether rescission would also be appropriate for the former RPC 1.7 violation. **We do not, however, definitively foreclose that potential outcome in the appropriate case.**" 181 Wn.2d at 94 (emphasis added).

This same analysis applies to “business transactions” within the purview of RPC 1.8. *LK Operating* thus held that the term “business transaction” as used in RPC 1.8 “may be defined as ‘[a]n action that affects the actor’s financial or economic interests, including the making of a contract....[and] ‘represents a broader set of arrangements than ‘contracts.’” *LK Operating, supra*, 181 Wn.2d at 76-77. Application of RPC 1.8 therefore extends even to contracts solely between non-attorneys if the attorney nevertheless participated in the “business transaction” in the role of an “attorney.” *Id.*, 181 Wn.2d at 80-82. Accordingly, if the arbitration clause (and release) applies to disputes between Butler and Calfo Harrigan, as Calfo Harrigan maintains, then execution of the *White* settlement documents also constituted a “business transaction” between Butler and Calfo Harrigan subject to RPC 1.8, meaning that a “business transaction” would arise between attorney and client each and every time the attorney advised the client in connection with settlement documentation (regardless of whether the attorney advised in favor or against inclusion of an arbitration clause).

Whenever an attorney has an RPC 1.8 conflict of interest, “[t]he burden of proving compliance...rests with the lawyer....[who] must prove strict compliance with the safeguards of RPC 1.8(a);...” *Valley/50th Ave., supra*, 159 Wn.2d at 745. Accord, *LK Operating, supra*, 181 Wn.2d at 88-

89. The attorney who has an RPC 1.7 conflict must meet the same standard, *i.e.*, strict compliance with the requirements of RPC 1.7 (b)(4) unless the conflict is unwaivable (in which case, even compliance with RPC 1.7(b)(4) would not resolve the conflict). See, *e.g.*, *LK Operating, supra*, 181 Wn.2d at 82-83; *Valley/50th Ave., supra*, 159 Wn.2d at 745. See further, RPC 1.8, Comment 3 (requires compliance with both RPC 1.7 and RPC 1.8).

Accordingly, as a prerequisite to enforcing the *White* arbitration clause against Butler, Calfo Harrigan had to prove that it had strictly complied with RPC 1.8, prior to Butler's execution of the *White* settlement documents, by explaining the nature of the claims covered by the arbitration clause, and further advising Butler that he would be: (1) required to arbitrate any disputes, including malpractice claims, with Calfo Harrigan; (2) waiving his right to have a jury decide any disputes with Calfo Harrigan; (3) waiving broad discovery rights in the event of a dispute with Calfo Harrigan; (4) waiving his right to appeal any disputes with Calfo Harrigan; (5) preserving his right to file a disciplinary grievance against Calfo Harrigan, and; (6) that he should consult with independent counsel prior to signing the settlement documents. See 1 *Mallen & Smith, supra* §2:180, pp. 295-296. Accord, *Gorden, supra* 180 Wn. App. at 563-564; *LK Operating*, 181 Wn.2d at 82-83; *Valley/50th*

Ave., *supra* 159 Wn.2d at 745-747.

In this case, Calfo Harrigan offered no evidence whatsoever to carry its burden of proving compliance with RPC 1.7 and RPC 1.8 in a manner that would allow Calfo Harrigan to enforce the arbitration clause (or the release provisions) of the *White* settlement documents against Butler. The Court should therefore affirm the trial court's denial of arbitration.

3. The *White* Arbitration Clause Does Not Encompass This Dispute.

Even if Calfo Harrigan could somehow overcome the obstacles of RPC 1.7 and RPC 1.8, enforcement of the arbitration clause in the *White* settlement documents by Calfo Harrigan against Butler also fails the second prong of the two-part test because the *White* arbitration clause does *not* encompass the dispute between Butler and Calfo Harrigan.

More specifically, the presumption in favor of arbitration [App. Br., pp. 7-8] does *not* apply if the contractual language plainly provides that arbitration of a particular controversy is *not* within the scope of the arbitration provision. *E.g.*, *Mundi v. Union Sec. Life Ins., Co.*, 555 F.3d 1042, 1044-1045 (9th Cir. 2009). In other words, “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” *Satami Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 810, 225

P.3d 213 (2009), quoting, *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 82, 123 S. Ct. 588, 154 L.Ed.2d 491 (2002). Moreover, “[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, a meaning that **serves the public interest is generally preferred.** *Restatement (Second) of Contracts* §207 (1981)(emphasis added). Accord, *Restatement (Second) of Contracts* §212(1) (“interpretation... is directed to the meaning of the terms of the writing...in light of the circumstances”). Thus, when parties call upon the Court to interpret an arbitration clause, the public interest must necessarily trump the principle of “liberal construction” urged by Calfo Harrigan. App. Br., p. 9. See discussion, *supra*, pp. 9-17.¹¹

Butler did not agree to arbitrate disputes he might have with his (now former) attorneys. More specifically, the arbitration clause provides:

Dispute Resolution. Any dispute arising out of this Agreement shall be settled by arbitration before Judicial Dispute Resolution (“JDR”) in Seattle, using Paris Kallas or a single arbitrator as agreed by the Parties. . . .[Emphasis added].

Therefore, the arbitration clause contained in the underlying Release and Settlement Agreement only applies to “[a]ny dispute arising

¹¹ Butler acknowledges that public policy concerns “cannot be used to rewrite a clear and lawful contract” if there is only one reasonable interpretation of the contract. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 511, 115 P.3d 262 (2005). Here, the one and only reasonable interpretation of the arbitration clause, considering RCW 7.04A.060(1) together with RPC 1.7 and RPC 1.8 is that the arbitration clause does *not* apply to disputes between Butler and Calfo Harrigan.

out of this Agreement.” For purposes of defining the scope of arbitrable issues, the phrase “arising out of a contract” is much narrower than other frequently used phrases. *Wiese, supra*, 189 Wn. App. 466 at ¶23 (“arising out of a contract” is narrower than “relating to a contract”); *McClure v. Tremaine*, 77 Wn. App. 312, 314-315, 890 P.2d 466 (1995) (“relating to a contract is broader than language covering only claims ‘arising out of a contract’”); *Nelson v. Westport Shipyard, Inc.*, 140 Wn. App. 102, 113-114, 163 P.3d 807 (2007), *rev. granted*, 163 Wn.2d 1033 (2008) (“disputes ‘arising out of this Agreement’” is “much narrower” than “arising from or relating to this Agreement”).¹²

Nevertheless, regardless of how one interprets the phrase “arising out of” in the *White* arbitration clause, that clause also explicitly references an arbitration by “the Parties.” “[T]he Parties” is very specific, in contrast to a phrase such as “any party involved.” Thus, in *Lederman v.*

¹² Calfo Harrigan acknowledges that “where an arbitration clause refers solely to disputes or controversies ‘arising out of’ the contract, arbitration is restricted to claims ‘relating to the **interpretation and matter of performance.**’” App. Br., p. 10 (emphasis added). Based on that thesis, Calfo Harrigan argues that Butler’s claim against it “inherently involves a dispute regarding interpretation of that clause [*i.e.*, ¶10 of the *White Release*].” *Id.*, p. 11. However, an arbitration clause using the phrase “arising out of” applies only to contract claims. *O’keeffe’s, Inc. v. Access Information Technologies, Inc.*, 2015 WL 6089418 *4-5 (N.D. Cal. 10/16/2015). Accord, *Tracer Research Corp. v. National Environmental Services Co.*, 42 F.3d 1292, 1295 (9th Cir. 1994) (“the fact that the tort claim would not have arisen ‘but for’ the parties’ [contract] is not determinative” and “when a tort claim constitutes an ‘independent wrong from any breach’ of the contract it ‘does not require interpretation of the contract and is not arbitrable’”), *cited with approval, Cape Flattery, Ltd. v. Titan Maritime, LLC*, 647 F.3d 914, 922-924 (9th Cir. 2011)(tort claims not arbitrable).

Prudential Life Ins. Co., 385 N.J. Super., App. Div. 324, 897 A.2d 373 (2006),¹³ a law firm attempted to compel arbitration of a client’s legal malpractice claim, in circumstances similar to those present here, based on a *much-broader* arbitration clause contained in an ADR agreement negotiated for the client by the law firm. The Court rejected the law firm’s demand for arbitration, explaining (*id.*, 897 A.2d at 384):

The language of the arbitration clause, in the context of the Agreement as a whole, does not encompass a dispute between plaintiff and his attorneys, or plaintiff’s claim that LMB and Prudential conspired to defraud him. We arrive at this conclusion for the following reasons....Simply put, the Agreement’s purpose is to resolve claims against Prudential for actions taken against him by Prudential while he was in its employ. **The Agreement’s purpose is not to resolve claims that arose out of a conspiracy between Prudential and LMB [*i.e.*, Plaintiff’s attorneys] to limit plaintiff’s ability to seek redress for his employment-related claims.**

The arbitration clause...provides a separate dispute resolution process...that arbitration process calls for a referral of those disputes to the [AAA], to be decided by three arbitrators, one selected by Prudential, one selected LMB, and a neutral third arbitrator to be selected by those two. **This selection clause contemplates arbitration between Prudential on the one hand and plaintiff and his representative, LMB, on the other. It does not provide a mechanism for selecting an arbitrator to resolve claims between plaintiff and his attorneys.** [Emphasis added].

Accord, *Jenkins & Gilchrist v. Riggs*, 87 S.W.3d 198, 202 (Tex. App. 2002) (“[t]he ‘parties’ as the term is used in the arbitration agreement,

¹³ Butler discussed *Lederman* and RPC 1.8 in his trial court opposition. CP 84-87. Calfo Harrigan’s opening Brief nevertheless fails to address *Lederman* or RPC 1.8.

means the parties to the contract...”).

Here, just as in *Lederman* and *Jenkins & Gilchrist*, the arbitration clause does *not* encompass the dispute between Butler and Calfo Harrigan because the arbitration clause does *not* extend to disputes “relating to” the Agreement; nor does it extend to “any matter.” Instead, the arbitration clause *only* applies to “disputes” that arise “out of this Agreement” among “the Parties” to the Agreement. Indeed, as in *Lederman* and *Jenkins & Gilchrist*, the fact that the arbitration clause expressly references “the Parties” cannot reasonably be interpreted to extend to demands for arbitration by non-parties/non-signatories, such as an attorney for one of the Parties. See, *Nelson, supra*, 140 Wn. App. at 113-114.

The Court should therefore conclude that the *White* arbitration clause does *not* encompass disputes between Calfo Harrigan and Butler.

4. Equitable Estoppel Does Not Apply, as Calfo Harrigan’s Cited Authority Explains.

“As a general rule, nonsignatories are not bound by arbitration clauses.”¹⁴ *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 460, 268 P.3d 917 (2012). Instead, non-signatories may *only* compel arbitration by a

¹⁴ Calfo Harrigan concedes that “[n]o Washington case directly addresses whether a nonsignatory defendant may compel arbitration against a signatory plaintiff.” App. Br., p. 12 n. 3. See further, *McClure, supra*, 77 Wn. App. at 315 n. 1.

signatory, if at all, “under the doctrine of equitable estoppel or under normal contract and agency principles.” *McClure, supra*, 77 Wn. App. at 315. Here, the simple fact that the *White* settlement documents only apply to “the Parties” further supports the conclusion that Calfo Harrigan, as a non-party and non-signatory, may *not* enforce the arbitration clause (or release) against its own client.¹⁵

Calfo Harrigan nevertheless asserts that it can compel arbitration even though it is a non-signatory to the *White* settlement documents “under the principle of equitable estoppel, as an agent of the signatories, and as a third-party beneficiary of the release itself.” App. Br., p. 12. Calfo Harrigan’s protestations notwithstanding, none of those exceptions apply to the circumstances presented here; indeed, *Sokol Holdings, Inc. v. BMB Munai, Inc.*, 542 F.3d 354, 361 (2nd Cir. 2008), cited by Calfo Harrigan, directly contradicts Calfo Harrigan’s argument and renders its discussion of the “Rely Upon/Intertwined Requirement” and “Relationship Requirement” [App. Br., pp. 12-13] utterly useless.

As a prelude to discussing *Sokol Holdings*, *Townsend* explains

¹⁵ The arbitration clause in *White* contemplated arbitration among “the Parties.” In contrast, the arbitration clause in *McClure* explicitly referenced “any party involved” in any dispute, controversy or claim arising out of, connected with or relating to the Agreement or its breach. *Id.* The arbitration clause in *McClure* thus distinguishes the narrower scope of “the Parties” and “arising out of” as used in the *White* settlement documents from the much broader *McClure* arbitration clause.

“equitable estoppel” relative to enforcement of arbitration clauses as follows [173 Wn.2d at 461]:

Equitable estoppel “”precludes a party from claiming the the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes equitable estoppel may require a nonsignatory to arbitrate a claim.” [Citations omitted]. In this regard, **if that person, despite never having signed the agreement, “”knowingly exploits”” the contract in which the arbitration clause is contained.** [Citations omitted; emphasis added].¹⁶

In *Townsend*, all plaintiffs, including the non-signatory minor children, alleged eight (8) identical causes of action arising out of home purchases. Unsurprisingly, the Court concluded that the children and their parents should all be bound by the parents’ arbitration agreement. *Id.* at 461-462. Significantly, the Court enforced the arbitration clause against non-signatories who were completely aligned with the interests of the signatory opposing arbitration.

Sokol Holdings, cited by Calfo Harrigan, aptly explains the limited circumstances under which equitable estoppel applies to compel

¹⁶ In this case, *Calfo Harrigan*, and not *Butler*, is the “person...never having signed the agreement,” who “knowingly exploits” the contract. Calfo Harrigan thus erroneously asserts that “a signatory plaintiff is precluded from claiming the benefits of a contract containing an arbitration clause while simultaneously avoiding the burdens that clause imposes.” App. Br., p. 12. Re-stated, the sentence *should* read: **A nonsignatory** [*i.e.*, Calfo Harrigan] is precluded from claiming the benefits of a contract containing an arbitration clause while simultaneously avoiding the burdens that clause imposes. Accord, *Comer v. Micor, Inc.*, 436 F.3d 1098, 1101-1102 (9th Cir. 2006). *Sokol Holdings*, on which Calfo Harrigan relies for its erroneous assertion, does *not* support Calfo Harrigan’s position.

arbitration, but also exposes the fundamental flaw in Calfo Harrigan's reasoning [542 F.3d at 359, 361]:

In describing the cases, to assist in understanding the recurring problems, we have used *x* **[Butler]**¹⁷ to denominate the party which entered into an arbitration contract but then refused to arbitrate with an entity that was not a party to the agreement; *y* **[Shad White]** to designate *x*'s counterparty to the arbitration agreement; and *y-1* **[Calfo Harrigan]** to designate the entity associated with *y*, which successfully compelled *x* to arbitrate with it on the basis of *x*'s promise to arbitrate with *y*, notwithstanding that *y-1* was not a party to the arbitration agreement. . . .[Citations omitted] . . .

While in none of these cases did the court explain what it was that justified the estoppel, examination of the facts shows a pattern which is consistent with the basic principle that one does not give up one's right to court adjudication except by consent. In each case, the promise to arbitrate by *x*, the entity opposing arbitration was reasonably seen on the basis of the relationship among the parties as extending not only to *y*, its contractual counterparty, but also to *y-1*, an entity that **was, or would predictably become, with *x*'s knowledge and consent, affiliated or associated with *y* in such a manner as to make it unfair to allow *x* to avoid its commitment to arbitrate on the ground that *y-1* was not the very entity with which *x* had a contract.** The estoppel did not flow merely from *x*'s agreement to arbitrate with *someone* (*y*) in disputes relating to the agreement. It flowed rather from the conclusion that the relationships among the parties developed in a manner that made it unfair for *x* to claim that its agreement to arbitrate ran only to *y* and not to *y-1*. [Bold added; *italics* theirs].

Calfo Harrigan thus erroneously evaluates the relationship between Butler and Calfo Harrigan [App. Br., pp. 17-21], when its cited authority

¹⁷ For clarity, we have inserted into the quotation from *Sokol Holdings* the names of the parties from this case which correspond to the designations of *x*, *y*, and *y-1* in *Sokol Holdings*. As is readily apparent, equitable estoppel does *not* apply here because Calfo Harrigan (*y-1*) is associated with Butler (*x*), and *not* associated with Shad White (*y*).

instead requires evaluation of the (non-existent) relationship between Shad White and Calfo Harrigan. Therefore, consistent with *Sokol Holdings*, equitable estoppel does *not* apply in this case because Calfo Harrigan (*y-I*) is *not* “an entity that was, or would predictably become, with *x*’s [Butler’s] knowledge and consent, affiliated or associated with *y* [Shad White] in such a manner as to make it unfair to allow *x* [Butler] to avoid its commitment to arbitrate on the ground that *y-I* [Calfo Harrigan] was not the very entity with which *x* [Butler] had a contract.”

Townsend and *Sokol Holdings* are consistent with other Washington cases. For example, *Satomi* held that “a nonsignator is bound by the terms of an arbitration agreement **where the nonsignator’s claims are asserted solely on behalf of a signator to the arbitration agreement.**” *Satomi*, *supra*, 167 Wn.2d at 810-813 (emphasis added).¹⁸ Accord, *Woodall v. Avalon Care Center-Federal Way, LLC*, 155 Wn. App. 919, 925-935, 231 P.3d 1252 (2010)(compelling arbitration of “survival” claim; denying arbitration as to “wrongful death” claim).

Applying this same analysis, Butler agrees that equitable estoppel

¹⁸ *Ragone v. Atlantic Video at Manhattan Center*, 595 F.3d 115 (2nd Cir. 2010), heavily relied upon by Calfo Harrigan [App. Br., pp. 17-19], is actually to the same effect as *Townsend* and *Satomi* in that the non-signatory party [ESPN] seeking to compel arbitration [*y-I*], was an entity that was, or would predictably become, with *x*’s [Ragone] knowledge and consent, affiliated or associated with *y* [Atlantic Video] in such a manner as to make it unfair to allow *x* [Ragone] to avoid its commitment to arbitrate on the ground that *y-I* [ESPN] was not the very entity with which *x* [Ragone] had a contract.

should apply against the non-principal signatory (*x*) when asserted by a non-signatory agent (*y-1*) based on an arbitration clause in the contract of the agent's (*y-1*'s) signatory principal (*y*) with *x*. Both *McClure* and *Townsend* subscribe to this same analysis, *i.e.*, non-signatory agent [*y-1*] can enforce its signatory principal's [*y*] arbitration agreement *against the principal's signatory counterpart* [*x*]). *McClure, supra*, 77 Wn. App. at 315 and n.2 (non-signatory attorney [*y-1*] enforced signatory principal's [*y*] arbitration agreement against the principal's signatory counterpart [*x*]); *Townsend, supra*, 173 Wn.2d at 889 (parent/subsidiary). *Accord, Alaska Protein Recovery, LLC v. Puretek Corp.*, 2014 WL 2011235 *5 (W.D. Wash); *Wiese v. Cach, supra*, 189 Wn. App. 466 at ¶138; *Jenkins & Gilchrist v. Riggs, supra*, 87 S.W.3d at 202 (“agents’ refers to those persons for whom [the attorney’s client] would be vicariously liable”).

Calfo Harrigan nevertheless asserts that it “can compel arbitration on agency principles,” citing *Kwan v. Clearwire Corp.*, 2012 WL 32380 (W.D. Wash.) for the proposition that “agents of a signatory to an arbitration agreement can compel **a signatory** to arbitrate so long as [two conditions are met].” App. Br., pp. 20-21 (Emphasis added). Relying on that proposition of law, Calfo Harrigan further asserts that “[i]t is undisputed that the wrongful acts for which Calfo Harrigan is sued relate to its role as Butler’s agent, as well as the other signatory shareholders

jointly represented by Calfo Harrigan...”. App. Br., p. 20.

Calfo Harrigan owes the Court and Butler an apology for having misstated *Kwan*’s premise, more accurately quoted [*id.* at *11] as follows:

Agents [*y-I*] of a signatory [*y*] to an arbitration agreement can compel the **other signatory** [*x*] to arbitrate so long as (1) the wrongful acts of the agents [*y-I*] for which they are sued relate to their behavior as agents or in their capacities as agents, and (2) the claims against the agents arise out of or relate to the contract containing the arbitration clause. [Emphasis added].¹⁹

Kwan thus applied the same analysis using the same legal principles as *Sokol Holdings, Townsend, Satomi, Wiese*, and others, *i.e.*, that equitable estoppel, whether based on agency or other similar theories, only applies in favor of a non-signatory (*i.e.*, Calfo Harrigan) in the limited circumstances in which the non-signatory party moves to compel arbitration (*y-I*) as the *agent of its signatory principal* (*y*) and *not* as the “agent” of the signatory party who opposes arbitration (*x*). Accord, *Jenkins & Gilchrist, supra*, 387 S.W.3d at 202 (law firm was *not* “agent” of client/employer, within meaning of employer’s arbitration clause, relative to employee reporter’s legal malpractice claim against employer’s lawyers).²⁰

¹⁹ Butler has inserted the appropriate *x*, *y*, and *y-I* designations as per *Sokol Holdings*.

²⁰ Butler agrees that “the attorney-client relationship is *generally* a type of principal-agent relationship.” App. Br., p. 21, *quoting West v. Thurston Cnty.*, 168 Wn. App. 162, 183, 275 P.3d 1200 (2012)(emphasis added). *West* actually held that the “general” rule did *not* apply and the attorney was *not* the client’s agent for purposes of the Public Records Act). Accord, *Jenkins & Gilchrist, supra*, 387 S.W.3d at 203 (non-signatory law firm *not* the “agent” of its TV station client, within the meaning of the arbitration

Here, Calfo Harrigan [y-1] was *not* the “agent” of Shad White [y], and its interests relative to the *White* settlement documents were adverse to and *not* aligned with White. Furthermore, Calfo Harrigan [y-1] is *not* asserting claims against others *on behalf of* its principal, Butler [x]; thus, Calfo Harrigan does *not* stand in the shoes of its Butler in its motion to compel arbitration of its principal’s own claims.

Equitable estoppel, therefore, does *not* apply against Butler.

5. An Attorney Cannot Ethically Enforce Settlement Documents, Against Its Own Client, Based on the Theory that the Attorney Was the Client’s Intended Third Party Beneficiary.

Citing *Satomi*, Calfo Harrigan asserts that it can enforce the arbitration clause as an “intended third-party beneficiary” of the *White* settlement documents. Ap. Br., pp. 21-22.²¹ Intriguingly, Calfo Harrigan’s contention here, that the Release between “the Parties” also

clause contained in the TV station’s employment contract with its reporter, and thus could not enforce the arbitration clause against the TV reporter.

²¹ *Satomi* merely recognized that other courts had held, but *Satomi* expressly “decline[d] to consider,” whether “[n]onsignatories can also seek to enforce arbitration agreements as third party beneficiaries.” *Satomi, supra* 167 Wn.2d at 810-811 n.22. *Satomi*, as does Calfo Harrigan [App. Br. 21], relied on *Mundi v. Union Sec. Life Ins. Co.*, 555 F.3d 1042, 1045 n.2 (9th Cir. 2009). However, just like *Satomi*, *Mundi* merely acknowledged, without deciding, whether such a theory exists or how it might be applied. *Mundi*, in turn, cited *Comer*. However, *Comer* concluded that the non-signatory was *not* an intended third party beneficiary of the management contracts because the nonsignatory because the nonsignatory ERISA plan participant had not sought to enforce the terms of the management agreements nor otherwise take advantage of them. *Comer, supra*, 436 F.3d at 1099-1100, 1101-1102.

released Calfo Harrigan as a third party beneficiary, directly conflicts with its underlying defense theory that Judge Linde erred when he applied the Release to Butler's claims against ImageSource, Sutherland and Zvirzdys.

Nevertheless, by claiming to be a third-party beneficiary of the *White* settlement documents, Calfo Harrigan would again create unwaivable conflicts of interest between itself and Butler that void any such purported contractual relationship. See discussion, *supra* pp. 9-17. See further, *In re Discipline of Greenlee*, 158 Wn.2d 259, 143 P.3d 807 (2006) (affirming attorney's suspension from practice based on violation of RPC 1.8(h) for having obtaining release of unrepresented former client's claims against attorney). Indeed, in Calfo Harrigan's scenario, it makes no difference whether the Release would constitute a "business transaction" or a "gift" by Butler to Calfo Harrigan, because the release would be void regardless of Calfo Harrigan's theory. See, RPC 1.8(a) and Comment 7; *Restatement (Third) of the Law Governing Lawyers, supra* §127 ("lawyer may not prepare any instrument effecting any gift from client to the lawyer" except in very limited circumstances not present here; thus, a transaction that establishes the client's attorney as the third party beneficiary of the client must necessarily involve a "business transaction" with the client.).

Accordingly, Calfo Harrigan cannot qualify as an intended third

party beneficiary of *White* settlement, as against its own client Butler, and thus cannot compel arbitration of Butler's claims against it.

6. The Court Should Not Compel Arbitration Considering that Calfo Harrigan's Arbitration Demand Derives Solely from Its Principals, All of Which Previously Waived Arbitration of this Identical Issue.

Even if Calfo Harrigan could overcome all of the foregoing legal hurdles, the Court should still refuse to compel arbitration because all of Calfo Harrigan's former clients (ImageSource, Butler, Sutherland and Zvirzdys) previously waived arbitration of the identical issue for which Calfo Harrigan demands arbitration.

Calfo Harrigan nevertheless asserts that they, and only they, could waive the right to compel arbitration. App. Br., p. 23. That would, of course, normally be correct; however, its claimed right to compel arbitration is completely derivative, in the sense that Calfo Harrigan has no separate right under the Release except as it might derive through its principals. See, *Woodall, supra*, 155 Wn. App. at 926-936.

Parties to an arbitration agreement can waive the right to arbitration through their litigation conduct. *E.g., Sali v. Parkland Auto Center, Inc.*, 181 Wn. App. 221, 224-228, 329 P.3d 915 (2014). All of Calfo Harrigan's former clients, who were Parties to the Release and also involved in the *Butler* lawsuit, had clearly and unambiguously waived the

right to arbitration by expressly foregoing arbitration and submitting the *identical* issue, raised by Calfo Harrigan in this case, before Judge Linde in the underlying *Butler* case. CP 44, 131-150, 152-167. See Statement of the Case, *supra*, pp. 5-6.

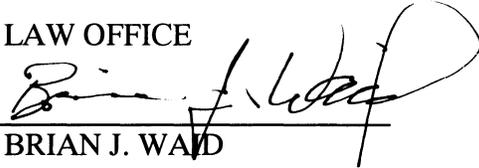
The Court should, therefore, not allow a non-signatory law firm, which asserts its right to arbitration only derivatively through the contract of its principals, to enforce the arbitration clause against of the principals after the principals have all waived arbitration of the same issue.

V. CONCLUSION

The trial court correctly concluded that an attorney may not enforce, as against its own client, an arbitration clause contained in settlement documents drafted for that same client by the attorneys. Mr. Butler therefore asks that the Court strike the inappropriate materials from Appellants' opening Brief, affirm the trial court decision denying arbitration, tax all costs to the Appellants, and remand this case for trial. .

DATED: February 26, 2016.

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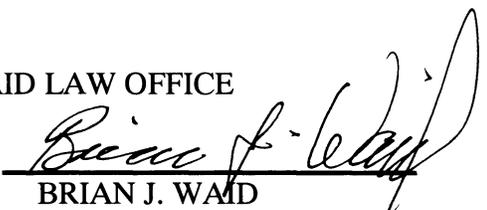
PROOF OF SERVICE

I hereby certify that on this 26th day of February, 2016, I caused a copy of the foregoing Respondent's Brief to be delivered to Appellants, through their attorneys on the following in the manner indicated below:

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