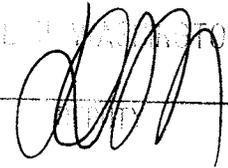


FILED
COURT OF APPEALS
[REDACTED]

10 MAY -7 AM 8:25

STATE OF WASHINGTON

BY



NO. 39939-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

VALLEY/50TH AVENUE LLC, Appellant,

v.

RANDALL STEWART, Trustee, and MORSE & BRATT, a professional
service corporation, Respondents.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This matter arises from the foreclosure of a Deed of Trust granted by Valley/50th Avenue LLC to secure a Promissory Note for attorneys' fees due and costs advanced by the law firm Morse & Bratt pursuant to fee agreement between Neil Rose and Morse & Bratt (hereinafter the "Agreement Regarding Representation"). The Deed of Trust encumbers property owned by Valley/50th Avenue, LLC. When Morse & Bratt began non-judicial foreclosure of the Deed of Trust, Valley/50th Avenue, LLC brought this action to enjoin foreclosure and for declaratory judgment.

Appellant Valley/50th Avenue claims that the Promissory Note and Deed of Trust violate former RPC 1.7(b) and former RPC 1.8 and are therefore void. It is undisputed that Morse and Bratt did not give Valley/50th Avenue any legal advice at the time the Promissory Note and Deed of Trust were negotiated and executed.

II. RESPONSE TO ASSIGNMENTS OF ERROR

ASSIGNMENTS OF ERROR

1. Former RPC 1.7(b) does not void the Promissory Note and Deed of Trust.
2. Former RPC 1.8 does not void the Promissory Note and Deed of Trust.

3. The trial court did not err in limiting the application of the testimony of Plaintiff's expert witness.
4. Substantial evidence supports the Findings of Fact made by the trial court.
5. The Deed of Trust valid and enforceable and the trial court properly entered judgment in favor of Morse & Bratt.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue No. 1. Did Morse & Bratt represent Valley/50th Avenue in the negotiation and execution of the Promissory Note and Deed of Trust for purposes of former RPC 1.7(b) when Morse & Bratt specifically advised Valley/50th Avenue to consult independent counsel and never gave or offered to give Valley/50th Avenue any advice regarding the documents (Assignment of Error No. 1)?

Issue No. 2. Does former RPC 1.7(b) void the Promissory Note and Deed of Trust when Morse & Bratt specifically advised Valley/50th Avenue to consult independent counsel regarding the negotiation and execution of the Promissory Note and Deed of Trust and never gave or offered to give

Issue No. 3. Morse & Bratt complied with the requirements of former RPC 1.8 in the negotiation and execution of the Promissory Note and Deed of Trust (Assignment of Error No. 2).

Issue No. 4. The trial court did not err in considering Appellant's expert testimony (Assignment of Error No. 3).

Issue No. 5. Substantial evidence supports the Findings of Fact made by the trial court (Assignment of Error No. 4).

Issue No. 6. The trial court properly ruled that the Deed of Trust was valid and enforceable and properly entered judgment awarding Morse & Bratt its fees and costs (Assignment of Error No. 5).

Issue No. 7. Morse & Bratt is entitled to attorney's fees and costs incurred in this matter on appeal (Attorneys Fees - RAP 18.1).

III. STATEMENT OF THE CASE

The fees that the Deed of Trust secures arose from matters wherein Morse and Bratt provided legal services and advanced costs to Neil M. Rose in complex litigation conducted by the Clyde Corporation against Neil Rose, Brett Rose, and two corporations they owned and operated. That matter was filed on October 22, 1997 as Clyde Corporation v. Impact Alloys Foundry, Clark County Superior Court Cause No. 97-2-04777-7 (Ex 32). Defendant Morse & Bratt provided legal services in the defense of Neil Rose and the two corporations in that matter. Diane Woolard and J. D. Nellor were the attorneys at Morse & Bratt that were responsible for the defense of the Clyde Corporation matter. Brett Rose is the son of Neil Rose. Brett Rose was represented by Stephen G. Leatham, an attorney not associated with Morse & Bratt.

Canica Export Corporation, the predecessor to Impact Alloys Corporation occupied the property the subject of this litigation until Neil Rose sold its assets to Clyde Corporation (RP 148). Canica Export Corporation has since changed its name to Impact Alloys. Clyde Corporation occupied the real property until late 1997 (RP 147). The Clyde Corporation litigation arose from the sale (RP 148).

Prior to May of 1998, Neil Rose held clear title to the property. Valley/50th Avenue was formed during the litigation in February of 1998

by William Hagedorn, an attorney employed by Morse & Bratt (Ex 7). Diane Woolard served as the registered agent (Ex 5). A statutory warranty deed transferring title to Valley/50th Avenue was executed by Neil Rose on February 19, 1998 and recorded on May 18, 1998 (Ex 8).

The only legal services Valley received from Morse & Bratt concerned the formation of Valley/50th Avenue and the transfer of the property to Valley/50th Avenue. According to Morse & Bratt time records, no legal services were rendered to Valley/50th Avenue for nearly a year before the Deed of Trust was executed (Ex 34). Morse & Bratt was not doing any legal work for Valley/50th Avenue at the time the Agreement for Representation, Promissory Note, and Deed of Trust were negotiated and executed (RP 150, RP 172).

By early 1999, Neil Rose had fallen behind in paying fees incurred and costs advanced by Morse & Bratt (RP 157). Neil Rose offered Morse & Bratt the real property he had transferred to Valley/50th Avenue as security for present and future fees earned and costs advanced (RP 31).

At trial, the parties stipulated to the metadata from Mr. Nellor's archived electronic files of the Agreement for Representation, Promissory Note, and Deed of Trust. Metadata is information about an electronic document file that includes the date the document file was created, the date it was last saved, and the date it was last printed (Ex 33).

The first draft of the Agreement for Representation was created on September 20, 1999 (Ex 15 and Ex 33). The Agreement Regarding Representation provided that Neil Rose and Valley/50th Avenue would execute a Promissory Note in favor of Morse & Bratt and that the Promissory Note would be secured by a Deed of Trust encumbering the property that Neil Rose had conveyed to Valley/50th Avenue (Ex 15). The Promissory Note was drafted on September 22, 1999 (Ex 16 and Ex 33). The Promissory Note and Agreement Regarding Representation were presented to Neil Rose at that time (RP 73).

During the same period of time, Neil Rose was consulting with attorney Bradley Littlefield (RP 168). Mr. Littlefield had represented Neal Rose, and Canica Corporation, the predecessor to Impact Alloys Corporation, in numerous matters for many years. Mr. Littlefield had served as Mr. Rose's general counsel for many years including representing Neal Rose in some patent work and personal matters (RP 167). Mr. Littlefield was admitted pro hac vice on September 29, 1999 to represent one of Neil Rose's corporations in the defense of the Clyde Corporation litigation (Ex 17 and Ex 18). Brad Littlefield continued said representation until shortly before the Clyde Corporation matter was tried in November of 2000 (Ex 32).

The Deed of Trust was created on November 15, 1999 (Ex 33).

On November 22, 1999, Neil Rose presented John D. Nellor with a marked up copy of the Agreement Regarding Representation showing changes that Rose wanted Nellor to make. Mr. Nellor made the changes with Mr. Rose in the room (RP 176, Ex 33). Neil Rose asked Mr. Nellor if he should sign the documents (RP 65). Nellor told Rose that he couldn't answer the question and that Rose needed to consult independent counsel for needed advice on whether the documents met Rose's needs or whether the documents reflected Rose's intent. Nellor told Rose he would not give Rose advice on the transaction because Morse & Bratt was a party (RP 65).

The Promissory Note and Deed of Trust were last printed on January 14, 2000 (Ex 33). They were executed by Neil Rose and Diane Woolard notarized the acknowledgement on the Deed of Trust on February 3, 2000 (Ex 19). Accordingly, they were executed 134 days after the first draft of the Agreement Regarding Representation was given to Neil Rose and 74 days after the changes requested by Neil Rose were made.

Diane Woolard was appointed to the Clark County Superior Court bench and left Morse & Bratt in the spring of 2000. Trial in the Clyde v. Impact Alloys matter began on November 15, 2000 (Ex 32). Judgment was entered on April 18, 2001 (Ex 32). The Judgment awarded no

damages to any party, but awarded \$1,013, 273.36 in attorney's fees against Neil Rose.

On April 10, 2002, a Notice of Default in the performance of the Promissory Note and Deed of Trust was issued by Morse & Bratt to Valley/50th Avenue (Ex 28). On May 31, 2002 a Notice of Trustee's Sale (Ex 29) was issued with the trustee's sale scheduled for September 13, 2002. On September 2, 2002, Valley/50th Avenue commenced this matter by filing a Complaint for Declaratory and Injunctive Relief (CP 1).

On October 9, 2003, Valley/50th Avenue filed a Declaration of Neil Rose in Support of Motion for Summary Judgment (CP 13). The declaration states at page 2, line 15:

No one in the firm ever gave me any legal advice as a client regarding those documents. No one in the firm ever gave or offered to give the LLC any legal advice regarding the documents.

Declaratory Judgment in favor of Morse and Bratt was entered on March 29, 2004. Valley/50th Avenue appealed to the Court of Appeals. On June 21, 2005 Division II of the Court of Appeals issued an unpublished opinion affirming the Declaratory Judgment in part and reversing in part. Valley/50th Avenue's Petition for Review from the decision of the Court of Appeals was accepted by the Washington Supreme Court.

On March 1, 2007 the Supreme Court issued an opinion, *Valley/50th Avenue v Stewart*, 159 Wn.2d 736, 153 P.3d 186 (2007). The opinion stated in Footnote 7:

⁷Valley alleges the Firm violated former RPC 1.7. Neither the trial court nor the Court of Appeals has ruled on this issue and, therefore, neither do we. It may be considered on remand.

Both parties moved for reconsideration of the opinion. On May 31, 2007 the Supreme Court issued an Order Changing Opinion. The Order revised Footnote 7 to say:

⁷The Court of Appeals analyzed the conflict between Rose and Valley and concluded RPC 1.7 was not violated. The court further stated that "it is unlikely that the Firm's own security interest in the property materially limited its ability to represent Valley." *Valley/50th Avenue, L.L.C.*, 2005 Wash. App. LEXIS 1490, at *8. The opinion does not address whether the Firm's interest in obtaining the security interest materially limited its ability to represent Valley when the fee agreement and deed of trust were negotiated and signed. This conflict is distinct from any conflicts that may have resulted after the firm obtained its security interest. Though we endorse the holdings of the Court of Appeals not inconsistent with our opinion, only those conflicts that have been examined under RPC 1.7 are affirmed. The Court of Appeals' generic statement that Valley did not prove a violation of RPC 1.7 does not apply to conflicts the court did not examine.

IV. SUMMARY OF ARGUMENT

Valley/50th Avenue attempts to avoid the language of former RPC 1.7(b) and former RPC 1.8 by referring to Valley/50th Avenue generically

as a “client”. In doing so, Valley/50th Avenue’s argument erroneously applies the rule of the case doctrine.

Former RPC 1.7(b) prohibits a lawyer from representing a client only if the representation of *that client* would be materially limited by the lawyer's responsibilities to another client, a third person, or his own interests. It is undisputed that Morse & Bratt did not provide Valley/50th Avenue legal representation or advice during the negotiation and execution of the Promissory Note and Deed of Trust. Instead, John D. Nellor advised the manager of Valley/50th Avenue to seek the advice of independent counsel. RPC 1.8 does not impose an obligation on Morse & Bratt to represent or advise Valley/50th Avenue instead of referring Valley/50th Avenue to independent counsel.

V. ARGUMENT

ISSUES PERTAINING TO ASSIGNMENT OF ERROR NO. 1

Issue No. 1. Did Morse & Bratt represent Valley/50th Avenue in the negotiation and execution of the Promissory Note and Deed of Trust for purposes of former RPC 1.7(b) when Morse & Bratt specifically advised Valley/50th Avenue to consult independent counsel and never gave or offered to give Valley/50th Avenue any advice regarding the documents (Assignment of Error No. 1)?

Valley/50th Avenue argues that because Valley/50th Ave was a client of Morse & Bratt, RPC 1.7(b) applied to the negotiation and execution of the Promissory Note and Deed of Trust, and Morse & Bratt's alleged failure to comply with the requirements of former RPC 1.7(b) renders the Promissory Note and Deed of Trust unenforceable.

Valley/50th Avenue's argument that it was "the Firm's client under the rule of the case" and that "Valley's status as a client of the firm is not subject to challenge" is misleading. Morse & Bratt has never claimed that Valley/50th Avenue was not a client. That is not the issue in this matter. The issue is whether Morse & Bratt represented Valley/50th Avenue, and whether Valley/50th Avenue relied on Morse & Bratt for advice, in the negotiation and execution of the Promissory Note and Deed of Trust.

Former RPC 1.7(b) states:

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

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

(2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

The rule begins with the words “A lawyer shall not represent a client if the representation of that client...” The rule prohibits a lawyer from representing a client only if the representation of *that client* would be materially limited by the lawyer's responsibilities to another client, a third person, or his own interests. Former RPC 1.7(b) cannot be analyzed and applied without first defining the matter to which the rule is to be applied, the client the lawyer is representing in that matter, what the adverse duties and interests are, and how the lawyer's representation of that client in that matter would be affected. When these definitions are made, it is clear that Morse & Bratt did not violate former RPC 1.7(b).

Any argument that there were conflicts of interest between Neil Rose and Morse & Bratt is irrelevant. Valley/50th Avenue is the party that objects to Morse & Bratt's alleged conflict of interest and is the party to this action. Neil Rose is not a party to this lawsuit. If there is a conflict of interest, Valley/50th Avenue is the client for purposes of former RPC 1.7(b). The transaction that is the subject of this action is the negotiation and execution of the Promissory Note and Deed of Trust by Valley/50th Avenue.

Appellant claims “Although Valley was a client *and had reason to believe that the firm acted on behalf of Valley*, the Firm proceeded with

negotiations with Rose...” (Appellant’s Brief, page 14). This statement is not supported by the record. In fact, the evidence is uncontroverted that no one at Morse & Bratt ever offered to represent or advise Valley/50th Ave with regard to the Promissory Note and Deed of Trust.

John D. Nellor testified that he met personally with Neil Rose to discuss the documents the subject of this action. He testified that during a meeting in November of 1999, Mr. Rose requested changes to Agreement for Representation. Mr. Nellor made the changes and returned the modified agreement to Mr. Rose during the meeting. During the meeting, Mr. Rose asked Mr. Nellor whether he should execute the documents. Mr Nellor specifically told Mr. Rose during that meeting that he could not advise Mr. Rose on whether or not Mr. Rose should execute the documents or whether the documents met Mr. Rose’s understanding or intent, and that Mr. Rose should seek independent counsel for an opinion (RP 36, RP 65)).

The Declaration of Neil Rose in Support of Motion for Summary Judgment states on page 2, line 15 (CP 14):

No one in the firm ever gave me any legal advice as a client regarding those documents. *No one in the firm ever gave or offered to give the LLC any legal advice regarding the documents.*

Former RPC 1.7(b) applies only if the lawyer's "representation of

that client would be materially limited.” What representation does Plaintiff claim is materially limited? The transaction the subject of this action is a Promissory Note and Deed of Trust granted by Valley/50th Avenue for the benefit of Morse & Bratt. Former RPC 1.7(b) does not apply if Morse & Bratt did not represent or advise Valley/50th Avenue on the matter giving rise to the alleged conflict.

Issue No. 2. Does former RPC 1.7(b) void the Promissory Note and Deed of Trust when Morse & Bratt specifically advised Valley/50th Avenue to consult independent counsel regarding the negotiation and execution of the Promissory Note and Deed of Trust and never gave or offered to give Valley/50th Avenue any advice regarding the documents (Assignment of Error No. 1)?

There are no facts suggesting that Neil Rose, as the manager of Valley/50th Avenue, reasonably relied on Morse & Bratt for representation or legal advice in the negotiation and execution of the Promissory Note and Deed of Trust. If Morse & Bratt did not represent or advise Valley/50th Avenue, former RPC 1.7(b) does not apply to the negotiation and execution of the documents.

The American Bar Association Model Rules of Professional Conduct, state at *PREAMBLE: A LAWYER'S RESPONSIBILITIES:*

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. ... Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

The Washington Rules of Professional Conduct do not define the existence of the attorney-client relationship. The Preamble states:

For purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists.... Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and is a question of fact.

The leading case in Washington on the existence of the attorney-client relationship is *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992).

In that case, the Court held:

The essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters. See 1 R. Mallen & J. Smith 11.2 n.18; 7 Am. Jur. 2d *Attorneys at Law* 118 (1980). The relationship need not be formalized in a written contract, but rather may be implied from the parties' conduct. *In re McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). The existence of the relationship 'turns largely on the client's subjective belief that it exists.' ... The client's subjective belief, however, does not control the issue unless it is reasonably formed based on the attending circumstances, including the attorney's words or actions.

See 1 R. Mallen & J. Smith 8.2 n.12; *Fox v. Pollack*, 181 Cal. App. 3d 954, 959, 226 Cal. Rptr. 532 (1986); *In re Petrie*, 154 Ariz. 295, 299-300, 742 P.2d 796 (1987).

In *State v. Hansen*, 122 Wn.2d 712, 862 P.2d 117 (1993), the Washington Supreme Court stated:

An attorney-client relationship is deemed to exist if the conduct between an individual and an attorney is such that the individual subjectively believes such a relationship exists. *In re McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). However, the belief of the client will control only if it 'is reasonably formed based on the attending circumstances, including the attorney s words or actions.' *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992).

Neil Rose was the manager of Valley/50th Avenue when he executed the Promissory Note and Deed of Trust. In the Declaration of Neil Rose in Support of Motion for Summary Judgment, he testified that Morse & Bratt never offered or gave Valley/50th Avenue advice or representation with regard to the Promissory Note and Deed of Trust. Mr. Nellor testified that he would not advise Neil Rose or Valley/50th Avenue with regard to the Promissory Note and Deed of Trust and that Rose should consult independent counsel.

Brett Rose has been the manager of Valley/50th Avenue since prior to commencement of this matter. He testified that the only legal services Valley received from Morse & Bratt concerned the formation of

Valley/50th Avenue, the acquisition of property by Valley/50th Avenue, and acting as Valley/50th Avenue's registered agent.

Valley/50th Avenue's argument that it was "the Firm's client under the rule of the case" and that "Valley's status as a client of the firm is not subject to challenge" is contrary to the evidence as determined by the trial court. In its oral ruling at the conclusion of the trial, the trial court stated (RP 266):

There is no question but what Valley/50th had an ongoing relationship with Morse and Bratt. The fact that all they were doing at this point was keeping the corporate books, I don't think changes that. If you've got that corporate book on your shelf and you're sending that in every year and you're the registered agent, I think your rational expectation is and the client's rational expectation is that if a problem arises, this is the law firm or the lawyer that I'm going to go to.

But just like that business lawyer can say, you know, on this issue I don't represent you, and still maintain a relationship with the client and maintain them as a client, it is possible for any lawyer or any law firm to say on this particular issue, I don't represent you. And that's why we come back to this whole issue of whether or not Neal Rose was told to seek independent counsel becomes important.

The fact that that occurred does make clear that the law firm was advising Neal Rose I don't represent you with regard to this fee agreement and the security for the fee agreement, we can't represent you on that. On that you need to go talk to somebody else.

So, as regards 1.7, there was no representation of Neal Rose or Valley/50th which could be materially limited by the firm's interest in obtaining the agreement. Because of that there was no conflict between Morse and Bratt and Neal

Rose and Valley/50th. And because of that there was no violation of 1.7.

In its simplest terms, the law firm has established by clear, cogent and convincing evidence that they communicated to Neal Rose and to Valley/50th that they were not representing either of those individuals or entities as regards the creation of the fee agreement or the creation of the note and deed of trust.

The trial court accepted John D. Nellor's testimony and found that Morse & Bratt had established by clear, cogent and convincing evidence that they Morse & Bratt was not representing Valley/50th Avenue as regards the Promissory Note and Deed of Trust. Valley/50th Avenue makes no credible claim that Morse & Bratt ever represented it on any matter beyond formation of the limited liability company, including negotiation and execution of the Promissory Note and Deed of Trust. Former RPC 1.7(b) does not apply to the Promissory Note and Deed of Trust.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR NO. 2

Issue No. 3. Morse & Bratt complied with the requirements of former RPC 1.8 in the negotiation and execution of the Agreement for Representation, Promissory Note, and Deed of Trust.

Appellant argues Morse & Bratt failed to comply with RPC 1.8(a). Appellant appears to argue that a duty to advise Valley/50th Avenue is

imposed by RPC 1.8(c).

RPC 1.8(c) says nothing about advising the client and imposes no duty to advise. It requires that the terms be fair and reasonable, that the terms be fully disclosed and transmitted in writing to the client in terms that can reasonably be understood, and that the client be given an opportunity to seek independent legal advice. There is no requirement that the lawyer give advice himself.

Appellant relies on *In Re Glothlen*, 99 Wn.2d 515, 663 P.2d 1330 (1983), to argue Morse & Bratt has a duty to give legal advice regarding the transaction. The court in *Glothlen* interpreted CPR DR5-104. The Code of Professional Responsibility has since been superseded by the Rules of Professional Conduct. CPR DR5-104 specifically applied in situations where the lawyer entered into a transaction where the lawyer and the client had differing interests and “the client expects the lawyer to exercise his professional judgment therein for the protection of the client.” The duty to advise flowed from the client’s expectation that the client would receive advice. That language does not appear in RPC 1.8(a). There is no credible claim that Valley/50th Avenue reasonably expected legal advice from Morse & Bratt with regard to the Promissory Note and Deed of Trust. *In Re Glothlen* does not apply.

Appellant also relies on *In Re Beakley*, 6 Wn.2d 410, 107 P.2d

1097 (1940). *In Re Beakley* involved an attorney who failed to notify client that a settlement check had been received, and who thereafter sought to promote an appeal in the case, who collected money from a client on false pretenses, and who misapplied a client's trust property. That matter was decided before CPR DR 5-105 was enacted and before there were formal rules governing attorney conduct. CPR DR 5-105 codified the principles described in *Beakley*, and required that the lawyer give the client legal advice with regard to a transaction between the lawyer and client. RPC 1.8 removed the requirement that the lawyer give the client legal advice. The reason the requirement was removed is obvious. It is difficult for a lawyer to exercise independent judgment when he has an interest in the transaction. RPC 1.8 substituted disclosure of the terms of the transaction and the opportunity for independent legal advice in place of the requirement that the lawyer give the client legal advice.

Valley/50th Avenue argues that the trial court erred in finding in favor of Morse & Bratt because Morse & Bratt "did not adequately document their attempts to comply with RPC 1.8" (Appellant's Brief, page 25), citing *In re Gillingham*, 126 Wash.2d 454, 896 P.2d 656 (1995) and *Ocean Shores Park v Rawson*, 132 Wash. App. 903, 134 P.3d 1188 (2006). The argument is not viable in that RPC 1.8, *In re Gillingham*, and *Ocean Shores Park* do not contain any requirement that attorneys

“document their efforts to comply with RPC 1.8”.

RPC 1.8 requires that the transaction and terms are fully disclosed and transmitted in writing to the client. The *In re Gillingham* court held that Gillingham did not fully disclose and transmit in writing to the client the terms of the loan, and therefore, the transaction at least technically violated RPC 1.8(a), at page 482. The *Ocean Shores Park* court held that where the attorney failed to document that the client received any consideration for shares of stock issued to the attorney, the court would presume that inadequate consideration was given, at page 912. It is undisputed that Morse & Bratt transmitted the terms of the Promissory Note and Deed of Trust in writing to the client.

Appellant’s argument that the circumstances of this matter are indistinguishable from those of *In re Holcomb*, 162 Wash.2d 563, 173 P.3d 898 (2007) is also erroneous. *In re Holcomb* involved an attorney who received a number of loans from his client during the course of ongoing litigation. The loans were unsecured, were not subject to a written loan agreement, did not specify interest, penalties or fees, and did not specify a schedule for repayment of the principal. The attorney did not provide his client information about his precarious financial condition, and did not advise his client that the client could seek independent counsel about the suitability of his loan request.

The Court held that the loans violated RPC 1.8 because the loans were not fair and reasonable to the client, the terms were not fully disclosed and transmitted in writing to the client, and the client was not given a reasonable opportunity to seek the advice of independent counsel in the transaction.

The trial court correctly found that Morse & Bratt proved compliance with RPC 1.8 by clear, cogent and convincing evidence. The Promissory Note and Deed of Trust are valid and enforceable.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR NO. 3

Issue No. 4. The trial court did not err in considering Appellant's expert testimony.

The purpose of Appellant's expert testimony and Appellant's argument on Assignment of Error No. 3 are both unclear. Appellant appears to argue that because there was no motion to strike at the conclusion of the expert testimony, the testimony was taken without objection. That was not what happened.

Respondent objected to the testimony of Appellant's expert witness several times (RP 116, RP 120, RP 122, RP 125). At one point, Respondent asked that the objection to the testimony of Appellant's expert witness be a continuing objection (RP 126)

Appellant argues that their expert witness's testimony is relevant to show what advice should have been given by a disinterested attorney. Such testimony is irrelevant. Morse & Bratt recognized that the firm was not disinterested and advised Neil Rose that the firm could not advise Valley/50th Avenue on this transaction at all.

Appellant's various arguments are inconsistent. Appellant argues that a conflict of interest as provided by former RPC 1.7(b) prevents Morse & Bratt from representing Valley/50th Avenue on this transaction, then argues that Morse & Bratt failed to advise Valley/50th Avenue in the same manner as a disinterested lawyer.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR NO. 4

Issue No. 5. Substantial evidence supports the Findings of Fact made by the trial court (Assignment of Error No. 4).

Finding of Fact No. 4 states in part "Outside of the John E. Morse Memorandum (Ex 1) and the Rose Personal Residence Trust (Ex 2), no actual completed estate plan by Morse & Bratt was shown." There was no testimony from Neil Rose other than the Declaration of Neil Rose in Support of Motion for Summary Judgment. That declaration states only that he formed Valley/50th Avenue after reviewing the John E. Morse Memorandum and discussing it with several members of the firm. There

is no evidence that Neil Rose formed Valley/50th Avenue as part of a comprehensive estate plan. There is no evidence that Neil Rose ever established and completed a comprehensive estate plan. Furthermore, whether he had or had not done so is immaterial.

Finding of Fact No. 16 states in part “No one at Morse & Bratt was told of or aware of these transfers until the fall of 2001. No inquiry was made by Morse & Bratt and Morse & Bratt had no reason to make such inquiry.”

Appellant does not dispute the finding that Morse & Bratt was not told of the transfers of Economic Units in Valley/50th Avenue by Neil Rose to his two sons. Appellant does not dispute that Economic Units were transferred as opposed to Membership Units.

There is no evidence that Neil Rose has ever transferred his Membership Units to anybody. The Operating Agreement of Valley/50th Avenue, LLC (Ex 4) provides that an Economic Unit does not include any right to participate in the management or affairs of the Company, including the right to vote on, consent to or otherwise participate in any decision of the Members.

There was nothing to cause Morse & Bratt to make such inquiry. Mr. Nellor told Neil Rose that the firm could not give him advice on the documents and that he should seek independent counsel. Furthermore, it

would make no difference if Morse & Bratt had inquired about the transfer. Neil Rose was the manager and only member of Valley/50th Avenue when he executed the Promissory Note and Deed of Trust. He was the only person with the authority to act on behalf of Valley/50th Avenue.

Finding of Fact No. 28 states “Neil Rose was the manager of Valley/50th Avenue at all times from the date of formation of Valley/50th Avenue through the execution of the Agreement Regarding Representation, Promissory Note, and Deed of Trust. In that capacity he possessed the authority to execute these documents and bind Valley/50th Avenue.”

Appellant does not contest the finding that Neil Rose was the manager of Valley/50th Avenue through the execution of the documents. The trial court previously entered a Declaratory Judgment Regarding Cross Motions for Summary Judgment wherein the court ruled that the Promissory Note and Deed of Trust were enforceable. The Declaratory Judgment dismissed Appellant’s claims that Neil Rose was without authority to execute the Promissory Note and Deed of Trust on behalf of Valley/50th Avenue.

On appeal, the Court of Appeals reversed the trial court on other issues, but affirmed the trial court’s dismissal of Appellant’s agency

claims. The Supreme Court granted Appellant's Petition for Discretionary Review and issued an Opinion and an Order on Reconsideration. The Supreme Court reversed the Court of Appeals in part, holding that the Court of Appeals did not address whether the Firm's interest in obtaining the security interest materially limited its ability to represent Valley when the fee agreement and deed of trust were negotiated and signed. The remaining holdings of the Court of Appeals were affirmed, *Valley/50th Avenue v Stewart*.

The Supreme Court did not reverse the Court of Appeals decision affirming the trial court's dismissal of Appellant's claims that Neil Rose lacked authority to execute the Promissory Note and Deed of Trust on behalf of Valley/50th Avenue. Appellant's agency claims have been decided and are not before the court at this time.

Finding of Fact No. 29 states: "Neil Rose was told that Morse & Bratt would not represent or advise Valley/50th Avenue for purposes of negotiating and/or executing the Agreement Regarding Representation, Promissory Note, and Deed of Trust."

Finding of Fact No. 30 states: "Neil Rose was told that Valley/50th Avenue could not rely on Morse & Bratt for legal advice regarding those documents and that transaction at the time he signed each of the Agreement Regarding Representation, Promissory Note, and Deed of

Trust.”

There is substantial evidence to support both of these findings.

John D. Nellor testified:

I specifically told Mr. Rose that I could not advise him whether or not he should execute the note and deed of trust or whether the note and deed of trust and representation agreement met his understanding or his intent, that he had to seek independent counsel, if he wished to have an opinion of that. (RP 35)

My discussions with him were in the context of, if he wanted somebody to interpret this and whether it was a good or bad deal, he needed somebody else to look at it than me. I can't give him advice on something that essentially we're a party to. (RP 36)

I told him that I couldn't answer the question, that he needed to get independent counsel on -- if he needed advice on whether it met his needs or whether it met his intent, whether the document reflected his intent. He needed to seek independent counsel if he wanted an opinion on that. (RP 65)

In its ruling at the close of trial, the trial court specifically found that Morse & Bratt had established by clear, cogent and convincing evidence that they communicated to Neil Rose and to Valley/50th Avenue that they were not representing either of those individuals or entities as regards the Promissory Note and Deed of Trust.

Finding of Fact No. 34 states: “By the signature of its manager, and with full knowledge of the terms of the Agreement Regarding Representation, Valley/50th Avenue consented to the terms of the

Promissory Note, and Deed of Trust.” As set forth above, Appellant’s agency claims have been decided and are not before the court at this time.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR NO. 5

Issue No. 6. The trial court properly ruled that the Deed of Trust was valid and enforceable and properly entered judgment awarding Morse & Bratt its fees and costs (Assignment of Error No. 5).

The trial court determined that neither RPC 1.7(b) nor RPC 1.8 void the Promissory Note and Deed of Trust. The Promissory Note and Deed of Trust each contains an attorney’s fees provision. The trial court properly entered judgment vacating the Preliminary Injunction, dismissing Appellant’s claims, and granting Morse & Bratt a judgment for attorney’s fees and costs.

ATTORNEY’S FEES REQUEST (RAP 18.1)

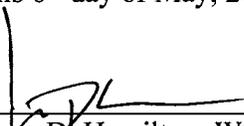
Issue No. 7. Morse & Bratt is entitled to attorney’s fees and costs incurred in the prosecution of this matter in the trial court and on appeal.

Pursuant to the terms of the Promissory Note and Deed of Trust, Morse & Bratt is entitled to attorney’s fees and costs incurred on appeal. Pursuant to RAP 18.1, Respondent Morse & Bratt hereby makes such request.

VI. CONCLUSION

The judgment entered by the trial court in this matter should be affirmed. Further judgment should be entered in favor of Morse & Bratt for attorney's fees and costs incurred on appeal.

Respectfully submitted this 6th day of May, 2010.



James D. Hamilton, WSB#9630
Attorney for Respondent Morse & Bratt

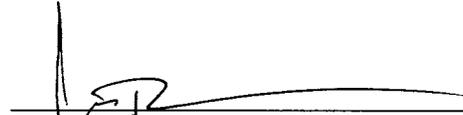
CERTIFICATE OF SERVICE

I hereby certify that on this date I served the foregoing
RESPONDENT'S BRIEF upon the following named person(s) by mailing
a true copy thereof with postage prepaid, contained in a sealed envelope,
at the following address(es):

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Dated: May 6, 2010.



JAMES D. HAMILTON, WSBA #9630
Attorney for Attorney for Respondent
Morse & Bratt, Inc.

FILED
COURT OF APPEALS
10 MAY -7 AM 8:25
STATE OF WASHINGTON
BY 