

FILED

SEP 26 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 297411-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LK OPERATING, LLC,
a Washington Limited Liability Company,

Appellant,

v.

THE COLLECTION GROUP, LLC,
a Washington Limited Liability Company,
and BRIAN FAIR and SHIRLEY FAIR, husband and wife,
and the marital community composed thereof

Respondents/Cross-Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR CHELAN COUNTY
THE HONORABLE THEODORE SMALL

BRIEF OF RESPONDENTS/CROSS-APPELLANTS

SMITH GOODFRIEND, P.S.

HACKETT, BEECHER & HART

By: Catherine W. Smith
WSBA No. 9542

By: Ronald J. Trompeter
WSBA No. 3593

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

1201 Third Avenue, Suite 1650
Seattle, WA 98101-3036
(206) 382-1830

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	CROSS-APPEAL ASSIGNMENTS OF ERROR	2
III.	STATEMENT OF ISSUE RAISED ON CROSS- APPEAL.....	3
IV.	RESTATEMENT OF FACTS	3
	A. Appellant LKO Was Controlled By Two Attorneys Who Never Told Their Client Fair Of The Ethical Constraints On Their Business Dealings With Respondents TCG Or Fair.	4
	B. When Fair Tried to Formalize The Business Deal, The Attorneys Caused LKO To Sue Their Clients.....	11
	C. The Trial Court Held That The Attorneys' Ethical Lapses Justified Rescission, And After Trial Ordered TCG To Return Funds Invested In The Business Deal Through LKO.	14
V.	ARGUMENT	18
	A. This Was A Case Of "Bait And Switch".	18
	B. The Court Did Not Abuse Its Discretion In Determining That Any Agreement Between TCG and LKO Should Be Rescinded Because Powers Violated RPC 1.7.....	20
	1. Powers Violated RPC 1.7.....	20
	2. Rescission Was A Proper Remedy For Powers' Violation Of RPC 1.7.	24
	3. Appellant LKO Is Not An Innocent Party, But An Enterprise Of The Powers And Therrien Families.....	30

C. The Court's Order Rescinding Any Agreement With Powers And Therrien Or LKO May Be Upheld Due To Violation Of RPC 1.8. The Court's Conclusion That The Contracting Entity Was Irrelevant To Fair Cannot Be Sustained. (Argument Of Cross-Appeal)..... 33

VI. CONCLUSION..... 43

TABLE OF AUTHORITIES

CASES

<i>Bartlett v. Bartlett</i> , 84 A.D.2d 800, 444 N.Y.S.2d 157 (N.Y.A.D. 2 Dept., 1981).....	28
<i>Bloor v. Fritz</i> , 143 Wn. App. 718, 180 P.3d 805 (2008)	24
<i>C.B. & T. Co. v. Hefner</i> , 98 N.M. 594, 651 P.2d 1029, <i>cert. denied</i> , 651 P.2d 636 (1982)	25, 26, 27
<i>Capital Sav. & Loan Ass'n v. Convey</i> , 175 Wash. 224, 27 P.2d 136 (1933)	29, 30
<i>Conner v. Hodgdon</i> , 120 Wash. 426, 207 P. 675 (1922)	36
<i>Corporate Dissolution of Ocean Shores Park, Inc. v. Rawson-Sweet</i> , 132 Wn. App. 903, 134 P.3d 1188 (2006), <i>rev. denied</i> , 159 Wn.2d 1009 (2007)	34, 37-49, 41
<i>Disciplinary Proceeding Against Botimer</i> , 166 Wn.2d 759, 214 P.3d 133 (2009).....	28
<i>Disciplinary Proceeding Against Egger</i> , 152 Wn.2d 393, 98 P.3d 477 (2004)	23
<i>Eriks v. Denver</i> , 118 Wn.2d 451, 824 P.2d 1207 (1992)	22
<i>Friedlander v. Friedlander</i> , 80 Wn.2d 293, 494 P.2d 208 (1972)	28
<i>Hizey v. Carpenter</i> , 119 Wn.2d 251, 830 P.2d 646 (1992)	28
<i>Holmes v. Loveless</i> , 122 Wn. App. 470, 94 P.3d 338 (2004)	22

<i>Hornback v. Wentworth</i> , 132 Wn. App. 504, 132 P.3d 778 (2006), <i>rev. granted</i> , 158 Wn.2d 1025 (2007)	24
<i>Hough v. Stockbridge</i> , 150 Wn.2d 234, 76 P.3d 216 (2003)	24
<i>In re Lovell</i> , 41 Wn.2d 457, 250 P.2d 109 (1952).....	36
<i>Marrazzo v. Orino</i> , 194 Wash. 364, 78 P.2d 181 (1938)	29
<i>Matter of McGlothlen</i> , 99 Wn.2d 515, 663 P.2d 1330 (1983)	21, 36
<i>Nishikawa v. U.S. Eagle High, LLC</i> , 138 Wn. App. 841, 158 P.3d 1265 (2007), <i>rev. denied</i> , 163 Wn.2d 1020 (2008).....	29
<i>Pasado's Safe Haven v. State</i> , --- P.3d ---, 162 Wn. App. 746 (July 25, 2011).....	41
<i>Peterson's Estate</i> , 6 Wn.2d 294, 107 P.2d 580 (1940)	36
<i>Ramsey v. Mading</i> , 36 Wn.2d 303, 217 P.2d 1041 (1950)	29
<i>Transcon. Ins. Co. v. Faler</i> , 9 Wn. App. 610, 513 P.2d 864 (1973).....	38
<i>Valley/50th Ave., L.L.C. v. Stewart</i> , 159 Wn.2d 736, 153 P.3d 186 (2007).....	39, 40
<i>Verbeek Properties, LLC v. GreenCo Environmental, Inc.</i> , 159 Wn. App. 82, 246 P.3d 205 (2010).....	41

STATUTES

RCW 25.15..... 31
RCW 25.15.005..... 19
RCW 25.15.115..... 19

RULES AND REGULATIONS

RPC 1.7.....*passim*
RPC 1.8..... *passim*

OTHER AUTHORITIES

Restatement (Third) of the Law Governing Lawyers § 6 (2000)....25

I. INTRODUCTION

Les Powers, a Washington attorney, violated RPC 1.7 (conflict of interest) and 1.8 (going into business with a client) by failing to comply with the informed consent requirements of those rules. When their business relationship soured, Powers and his law partner, Keith Therrien, sued respondents Brian and Shirley Fair and The Collection Group, LLC (TCG), both of whom were clients of the firm Powers & Therrien, P.S. when the lawsuit was commenced, in the name of LK Operating LLC (LKO), a company the attorneys admit that they formed for their own estate planning purposes, and that they and their wives controlled. (See CP 603-08, 965, 969, 2371)

This case dragged on for over four years in the trial court, with over five hundred pleadings filed. The upshot of these years of contentious litigation was the court's conclusion (a) that Powers had violated RPC 1.7 by representing LKO and Fair simultaneously, without complying with the informed consent requirement of the rule; and (b) that because of that violation, any agreement between appellant and TCG was rescinded. (CP 2333, 2347) After entry of the rescission order, there followed another

year of litigation as to the amount of money that was to be returned to LKO as a condition of the rescission, with LKO insisting it was entitled to the value of legal services provided by Powers and Therrien. Ultimately, the court ruled that TCG should return to LKO the amount of money TCG had received in the form of four LKO checks, plus interest, a total of \$78,431.61. (CP 2402, 2405)

This five years of litigation has financially destroyed TCG and has been a huge financial drain on Brian and Shirley Fair. (See CP 1908) If Powers and Therrien had fulfilled their professional responsibilities under the Rules of Professional Conduct, this case would never have been filed. It is unfortunate that the only viable sanction available to the trial court in *this* case was to undo the deal. The trial court's order must be affirmed, and its irrelevant findings reversed.

II. CROSS-APPEAL ASSIGNMENTS OF ERROR

To the extent necessary to preserve its arguments in this and the related appeal in case number 30161-3 respondents assign error to the court's entry of the following Findings of Fact:

18. Provided that TCGB received the cash and free legal services as requested, Fair both personally and as manager of TCG did not care who Les Powers chose to make the investment in TCG.

(CP 2396)

33. Diane Sires, Powers' assistant, testified that she communicated to Brian Fair that LKO was the investor in TCG. Fair denied this in his testimony. Fair did make it clear that he was not concerned about who Les Powers chose to provide the money and services, as long as the desired funds and legal services were being supplied.

(CP 2397-98)

34. Because Fair did not care who the investor was, he was leaving it up to Les Powers to determine who would be the Investor.

(CP 2398)

III. STATEMENT OF ISSUE RAISED ON CROSS-APPEAL

Whether the trial court erred in failing to recognize the consequence of Powers and Therrien's violation of RPC 1.8 in the business transaction at issue?

IV. RESTATEMENT OF FACTS

As appellant's challenge is largely to the pre-trial grant of rescission premised on violations of RPC 1.7, this restatement of facts relies for the most part on the undisputed facts as set forth in the pleadings considered by the trial court in granting partial summary judgment.

A. Appellant LKO Was Controlled By Two Attorneys Who Never Told Their Client Fair Of The Ethical Constraints On Their Business Dealings With Respondents TCG Or Fair.

On May 10, 2004, Fair formed The Judgment Group LLC, a Washington limited liability company, by filing a Certificate of Formation with the Washington Secretary of State. (CP 214) The name of the company was changed to The Collection Group LLC ("TCG") by article of amendment filed with the Secretary of State on June 7, 2004. (CP 1614, 1621)

Fair formed TCG to engage in the business of debt collection, by purchasing debt on the open market and then taking steps, including legal proceedings if necessary, to collect that debt. (CP 195-96) The Certificate of Formation expressly states that the company was to be manager-managed. (CP 214) It is undisputed that the manager of the company is and has always been Fair. (See CP 847, 924-25, 1412)

During the summer and fall of 2004, Fair, as manager of TCG, set up the company and investigated possible sources of debt. (CP 195) Fair, who is a CPA, knew that a necessary part of any debt collection business would be filing legal actions to obtain judgments in cases where debtors could not or would not pay the

balances owed. (CP 908) For that reason, he believed that it would be useful to include in the business an attorney. In the fall of 2004, Fair spoke with at least two attorneys about the possibility of joining in the venture. (CP 942) One of those attorneys was Powers. (CP 195-96) In his CPA practice, Fair had become acquainted with lawyers Powers and his partner Therrien, who practiced together as Powers & Therrien in Yakima, Washington. (CP 194-95) Earlier in 2004, Powers and Therrien had assisted Fair in tax planning by providing legal services to form, renew, and close a Nevada corporation, BF Trading, of which Fair was sole shareholder. (CP 195, 1591) These services continued until after the commencement of this lawsuit. (CP 1520-21)

Following discussions with attorneys Powers and Therrien in the fall of 2004, on October 27, 2004, Fair, as manager of TCG, sent to Powers and Therrien an email that discussed the possibility of TCG, Powers and Therrien working together to purchase a particular portfolio of debt, two accounts from the company Unifund:

Les, Keith

...

Attached is a sample purchase agreement from Unifund, the company selling the debt, and the attachment for when they sell FUSA debt (aka First

USA). I have not had a chance to review it, but I will do so tonight.

Regarding an agreement between myself and you two, this is how I would like to see it:

....

B. You will contribute legal services you can provide (review the purchase agreement contract, *legal doc for this JV (if needed)*, demand letter, ask smart questions, kick the tires, etc.)

(CP 216) (emphasis added). Fair did not have any particular structure in mind, but thought a joint venture ("JV") between TCG and Powers & Therrien P.S. might be a possibility, and therefore asked the attorneys to draft an agreement. (CP 196, 1007) Fair attached to the e-mail a sample purchase agreement from Unifund, a seller of indebtedness. (CP 216, 1416) The sample agreement did not identify the buyer. (CP 1417-30)

On December 16, 2004, Powers sent Fair an e-mail forwarding a redlined redraft of the Unifund agreement. (CP 218) Powers made extensive changes to the Unifund agreement, but did not directly respond to Fair's request that he draft a joint venture agreement. (CP 196-97, 219-27)

Fair, as manager of TCG, continued to negotiate with Unifund. (See CP 1442) On January 26, 2005, Fair received from

Unifund an updated purchase and sale agreement naming TCG as the prospective purchaser of debt from Unifund. (CP 1906; see *also* CP 1911) The same day, Fair sent that updated agreement to Powers. (CP 1118) In the body of the email, Fair asked Powers whether he was still interested in the deal with Unifund. (CP 1118) Powers did not respond. (CP 197, 1114)

On February 1, 2005, TCG went forward with the purchase of two accounts from Unifund using its own resources. (CP 197) Fair then began work to collect the debt that TCG had purchased. (CP 197) On February 8, 2005, Fair sent e-mails to Powers forwarding a quitclaim deed for review and legal advice (CP 729-30, 731), and told Powers: "Also, the name of the company is The Collection Group, LLC." (CP 732)

The following day, on February 9, 2005, Diane Sires, a legal assistant employed by Powers & Therrien, sent an e-mail to Fair forwarding legal pleadings for TCG to use:

Attached is the DRAFT Summons and Lis Pendens Les is working on the Complaint. We checked the statute and once we file with the court it must be served and/or published in the newspaper within 90 days. Thought you would like to know.

(CP 733) The attached summons and *lis pendens* both named "The Collection Group, LLC" as the plaintiff. (CP 734, 737)

On February 10, 2005, Fair followed up on Sires' e-mail: "The docs look fine to me. I double-checked the legal description and parcel #. *Can we spur Les on the Complaint ??*" (CP 740) (emphasis added) The next day, February 11, 2005, Sires sent another e-mail to Fair stating "See attached draft for your use. Review and if you need any changes just let me know." (CP 741) The e-mail went on to give specific instructions to Fair regarding filing lawsuits *pro se* on behalf of TCG. (CP 741) Attached to the February 11, 2005 e-mail from Powers & Therrien were pleadings prepared by Powers & Therrien, naming TCG as the plaintiff. (CP 741-45)

On February 16, 2005, Fair sent e-mails to Powers and Sires forwarding other draft documents, including promissory notes, mutual releases, and a deed of trust. (CP 746-48) In that e-mail, Fair wrote: "I leave it to you to draft a 2nd DOT and review these and other docs and decide if we should use them." (CP 748) On February 18, 2005, Fair sent another e-mail to Powers and to Sires asking for help in filing a lawsuit. (CP 749) In that e-mail, Fair

wrote: "Please set up a new account for me, The Collection Group, LLC, 159 S. Worthen, Suite 100, Wenatchee, WA 98801." (CP 749)

By mid-February 2005, TCG was making progress in its efforts to collect the accounts in the Unifund portfolio. (CP 197) But TCG had not received any funds from Powers and Therrien. Back on January 26, 2005, Fair had told Powers in an email that Unifund would not agree to some of Powers' proposed changes to the agreement to purchase its debt portfolio, and asked Powers if he still wanted in the deal. (CP 1118) In early February 2005, Powers had told Fair in a phone call that he was interested (CP 1114), so on February 8, 2005, Fair sent a fax to Sires, Powers' legal assistant, asking her to arrange for the issuance of a check for \$3,984.61 (half the cost of the Unifund portfolio) made out to "The Collection Group, LLC." (CP 1153) On February 18, 2005, still not having received any funds, but believing that Powers was again interested in participating in the deal, Fair re-faxed the February 8, 2005 fax, this time to Eva Reider, who was the bookkeeper for Powers & Therrien. (CP 1154)

Sometime after February 21, 2005, TCG received a check in the amount requested, \$3,984.61, signed by Michelle Briggs, whom Fair knew to be an employee of Powers & Therrien. (CP 90-91, 197, 231) The check was a "counter check," with the name "LK Operating LLC" handwritten in the upper left-hand corner. (CP 197, 441) Fair did not know what LK Operating LLC was, but did recognize the amount as being half the cost of the Unifund proposal. (CP 197) Given the name LK Operating, he assumed it was from an account owned by Powers and Therrien, and that Les and Keith ("LK") had decided to participate in the collection of the Unifund portfolio. (See CP 88, 197)

On February 23, 2005, Fair faxed an accounting to Powers and Therrien. It concluded "Les, this gives you guys ½ ownership in the company. You can formalize however you wish." (CP 311)

There is no evidence that either Powers nor Thierren ever told Fair of the ethical constraints of lawyers entering into business arrangements with a client, as required by RPC 1.8. Nor is there any evidence that they told Fair that their interests, or those of LKO or its principals, might conflict with the interests of Fair and TCG, as required by RPC 1.7. (CP 89, 94)

B. When Fair Tried to Formalize The Business Deal, The Attorneys Caused LKO To Sue Their Clients.

Fair and his wife Shirley (also a CPA) worked tirelessly over the next two years to get the business up and running. (CP 198) When an opportunity was presented for the purchase of additional portfolios of debt that appeared attractive, Fair asked Powers and Therrien for additional funds. (CP 295-99, 311, 577, 580) They responded by sending three additional checks: One dated March 3, 2005 in the amount of \$13,015.39; one dated December 23, 2005 in the sum of \$10,000; and a final check dated September 9, 2006 in the amount of \$25,000. Each of these was an "LK Operating LLC" counter check. (CP 281, 284, 286)

Between February 2005 and April 2007, the Fairs devoted approximately 4,500 hours to making TCG a profitable business. (CP 198) They did everything required to build a debt collection business from the ground up, including interviewing and hiring employees, reviewing and purchasing portfolios of debt, handling all aspects of the procedures to collect the debt and otherwise managing and operating the company and its finances. (CP 198) As of June 30, 2007, TCG had purchased over 2,800 accounts and

had analyzed perhaps ten times that number but elected not to purchase them. (CP 198)

During this period, Fair advanced additional funds to TCG, as did his mother Dorothy. (See CP 198) Powers and Therrien had not at any time proposed a joint venture agreement, or any other type of agreement to clarify and document the relationship among the parties. (CP 89) Nor did they recommend that Fair or TCG obtain independent legal counsel. (CP 94) In an April 21, 2007 letter, Fair told Powers and Therrien that it was necessary to get an agreement among the parties finalized, and proposed that the parties jointly own TCG. (CP 238) Fair proposed that Powers and Therrien would own a 38% interest, reflecting their financial contribution and the legal services they had provided; that his mother would own a 7% interest, in recognition of her financial contribution, and that Fair and his wife would own a 55% interest, in recognition of their financial contribution and their two-plus years of effort on behalf of the company. (CP 238)

Powers and Therrien rejected this proposal, and insisted that they were entitled to a 50% ownership interest in TCG – meaning that Fair and his wife would essentially receive nothing for their two

years of sweat equity. (CP 199) Powers told Fair to “go plant a spear outside your second story window and jump out onto it” if he didn’t agree. (RP 305-06)

Fair retained the firm of Eisenhower & Carlson to advise him in resolving the issue with Powers and Therrien. Attorney Clemencia Castro-Woolery sent a letter to Powers and Therrien informing them that they had exposure for ethical violations, and proposing a negotiated settlement. (CP 1799-801) Powers’ counsel responded by suggesting that Fair resolve the dispute “by discussion between businessmen,” without lawyers, and that otherwise Fair would face expensive litigation. (CP 401-02)

Fair had previously arranged a \$300,000 line of credit that was personally guaranteed only by him and his wife. (CP 93) The Fairs decided that they were not going to continue working for TCG if there was a possibility that they would not be compensated for their labors. (CP 93) These decisions were communicated to Powers and Therrien in a letter from Castro-Woolery dated June 29, 2007. (CP 31) On July 10, 2007, Powers and Therrien caused LKO, the company they had formed for their own estate planning purposes, to file suit against TCG and the Fairs. (CP 1-10) The

Complaint alleged a contract between plaintiff LKO and Fair and sought damages from Fair for breach of contract. (CP 9) No affirmative relief was sought against defendant TCG. (See CP 9)

In October 2007, the Fairs filed a malpractice action against attorneys Powers & Therrien in Yakima County Superior Court. (See CP 1879) That case was transferred to Chelan County and consolidated with this matter for all purposes other than for trial. (CP 416-17, 2096-98) The Jeffers Danielson firm initially represented LKO as plaintiff in the TCG matter, and also represented Powers and Therrien as defendants in the malpractice case. (See CP 4, 416)

C. The Trial Court Held That The Attorneys' Ethical Lapses Justified Rescission, And After Trial Ordered TCG To Return Funds Invested In The Business Deal Through LKO.

Fair moved for partial summary judgment on October 29, 2007. (See CP 178) On June 26, 2008, TCG moved for partial summary judgment. (CP 682) After several hearings, the court issued its Memorandum Decision on March 31, 2009. (CP 1248-62) The court first held that Fair was a client of Powers & Therrien at all material times. (CP 1258) The court further held that because Powers & Therrien represented LKO, and because LKO

was a potential purchaser of an ownership interest in TCG, Powers and Therrien had a conflict of interest under RPC 1.7, as neither Powers nor Therrien had ever obtained informed consent from Fair under RPC 1.7. (CP 1260) The court called for additional briefing on two issues: the extent of Powers and Therrien's control over the operations of LKO, and whether rescission of the agreement was an appropriate remedy for the violation of RPC 1.7. (CP 1261)

On April 14, 2009, TCG and the Fairs filed a Joint Memorandum Re: Leslie Powers' and Keith Therrien's Control of LK Operating, LLC, supported by a declaration by Fair. (CP 1263-68) On May 14, 2009, TCG and the Fairs filed a Joint Memorandum re Rescission for Attorneys' Violation of RPC 1.7. (CP 1310-58)

On May 21, 2009, James Perkins substituted as counsel for LKO. (CP 1394) On June 1, 2009, LKO filed a series of motions, including a motion for reconsideration of the court's rulings in the March 31, 2009 Memorandum Decision, and a request for postponement of the upcoming hearing scheduled for June 11, 2009. (CP 1369, 1384) After LKO moved to compel the Fairs to produce their personal tax returns, the parties through their counsel

stipulated that the transaction at issue was between TCG and the purchaser, and was not a sale of Fair's interest in TCG. (See CP 1903)

LKO filed additional briefs with the court contending that this stipulation (which it misstated repeatedly in its arguments) somehow required the court to reverse its previous decisions in favor of TCG. (CP 1878-86, 1937-41) The court rejected those additional arguments in a Memorandum Decision dated September 25, 2009:

Now, based upon the parties' stipulation, the issue has become whether the violation of RPC 1.7 by Les Powers voids any agreement between LK Operating, LLC and the Collection Group, LLC?

Mr. Powers and Mr. Therrien controlled the operation of LK Operating, LLC through their ownership of Powers & Therrien Enterprises, Inc., the manager of LK Operating, LLC. As an owner of Powers & Therrien Enterprises, Inc., Mr. Powers had a fiduciary duty to LK Operating, LLC at all times material hereto.

The creation of LK Operating, LLC by Les Powers and Keith Therrien assisted their estate plans. The success of LK Operating, LLC benefitted their children. Les Powers and Keith Therrien had a personal interest in the success of LK Operating, LLC.

There is clearly a question of fact as to when Powers & Therrien, P.S. began to represent The Collection Group, LLC. However, at the time their client, the owner of a new collection business, first approached them about joining him as partners in this business,

they had a duty *inter alia* to disclose their personal interest (as parents), legal duties (as manager) and professional duties (as attorneys) that they had to LK Operating, LLC pursuant to RPC 1.7.

They also owed professional duties to Brian Fair, their existing client, the individual who represented to them that he was the sole owner of the collection business. They owed these professional duties to Brian Fair regardless of the fact that he approached them as an agent of The Collection Group, LLC because he was still their client and he owned The Collection Group, LLC. His ownership interest in The Collection Group, LLC would be affected by the addition of any investors. Consequently, any representation of LK Operating, LLC by Mr. Powers would be adverse to the interests of Brian Fair, even if the transaction was going to be between LK Operating, LLC, and The Collection Group, LLC, Mr. Fair's company.

It is not necessary to determine when Mr. Powers began representing The Collection Group, LLC in order to conclude RPC was violated by Mr. Powers as a matter of law. He represented LK Operating, LLC. He had a significant personal and financial interest in LK Operating, LLC as a parent, as an owner of its manager, Powers & Therrien Enterprises, Inc. and as the attorney for LK Operating, LLC. He represented Brian Fair, who had significant personal interest in any transaction between LK Operating, LLC and The Collection Group, LLC.

As a result, Mr. Powers had a concurrent conflict of interest as a matter of law. Because he failed to disclose his relationships to LK Operating to Brian Fair and he failed to obtain written informed consent from Brian Fair and LK Operating LLC, he violated RPC 1.7 as a matter of law.

(CP 2371-72) The court then concluded that the remedy of rescission was appropriate. (CP 2373)

On November 16, 2009, the court entered its Order Granting Defendants' Motion for Partial Summary Judgment, Denying Plaintiff's Cross-Motion for Summary Judgment and Dismissing Plaintiff's Claims against Brian and Shirley Fair and The Collection Group, LLC. (CP 2359-73) The court reserved ruling on the issues of attorneys' fees and the amount of money defendant must pay to plaintiff. (CP 2365)

This court denied discretionary review on July 15, 2010. The case went to trial on August 16, 2010 on the remaining issues. On January 31, 2011, the court entered its Findings of Fact and Conclusions of Law awarding LKO \$78,431.61, the amount invested in TCG plus interest, and statutory attorney fees and costs. (CP 2405) That judgment has been fully satisfied. LKO appealed. (CP 2314)

V. ARGUMENT

A. This Was A Case Of "Bait And Switch".

This was a case of "bait and switch." It is undisputed that as Fair was entering the collection business, he was looking for one or more attorneys who could bring to the venture legal expertise that

is necessary to run a debt collection business. That is why he sought out attorneys, not “investors,” to join in the business. Powers and Therrien knew this to be the case, but for their own purposes they slipped LKO into the transaction.

Powers and Therrien contend that they told Fair that a company owned by their children, LKO, might be interested in investing in TCG (App. Br. 5);¹ Fair denies ever having heard of LKO until the lawsuit was filed. (CP 1906) The records in this case are voluminous, and in all those records, there is not a single communication between Powers or Therrien, and Fair, that mentions “LK Operating LLC” or LKO. (See RP 309-10) Indeed, the only piece of paper in the entire case hinting at the involvement of LKO were the checks sent to Fair, by employees of the Powers & Therrien law firm. Those checks were “counter checks” on which someone had either hand written or typed “LK Operating LLC” with an account number. (CP 231, 281, 284, 286)

¹ In fact, corporations owned by the children (but controlled by Powers and Therrien), were members of LKO. See Arg. B.3, *infra*. LKO’s ownership claim, in the absence of any writing, would also violate RCW 25.15.005(5) and RCW 25.15.115(2) (interest in LLC must be reflected in writing). The only writing in this case is an accounting reflecting interests of Powers and Therrien. (CP 238; 311)

Fair did not know what LK Operating LLC was, but inferred from the initials "LK" that the checks were from an entity owned by Powers and Therrien. (CP 197) And as the court observed in its March 31, 2009 Memorandum Decision, the source of the checks does not establish the identity of the member:

[Fair] requested funds from Les Powers and Keith Therrien, not LKO. Powers and Therrien provided TCG the money. Whether they got the money from their own account a loan from the Bank of America or LKO is immaterial to the issue of who Brian Fair entered into an agreement with regarding ownership of TCG.

(CP 1258) The trial court then determined that the remedy for this bait and switch was to rescind the agreement. As argued below, that remedy was well within the trial court's discretion.

B. The Court Did Not Abuse Its Discretion In Determining That Any Agreement Between TCG and LKO Should Be Rescinded Because Powers Violated RPC 1.7.

1. Powers Violated RPC 1.7.

Powers & Therrien represented Fair with regard to the formation of BF Trading, a Nevada corporation. Their law firm formed the corporation as part of business planning for Fair. Their law firm maintained the corporation. (CP 195, 205, 206-217) Once an attorney-client relationship is established it continues until it is either terminated by some action of the parties or is abandoned.

Matter of McGlothlen, 99 Wn.2d 515, 523-24, 663 P.2d 1330 (1983). There is no evidence that the relationship was terminated or abandoned. In fact, Powers & Therrien sent Fair a bill for legal work after this case had been filed. (CP 1520-21)

In its appeal, LKO does not argue that Powers did not represent Fair. Instead, LKO argues that “because Fair was not personally a party to the LKO/TCG agreement and did not ask that Powers personally represent him with regard to the transaction in which Fair personally was not a party, the court erred in ruling that powers violated any RPC 1.7 obligation owed to Fair.” (App. Br. 15) Although obscure, it appears that LKO’s argument here is that Powers’ representation of Fair was not adverse to the interests of LKO because Fair was not personally one of the parties to the TCG agreement. Or, put in the language of RPC 1.7, LKO argues that Powers did not have a concurrent conflict of interest. This argument is misplaced.

A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former

client, or a third person by the personal interest of the lawyer.

RPC 1.7. In this case, Powers was representing LKO (although Fair did not know that), working on behalf of LKO to make LKO a member of TCG. The practical effect of this effort would be to saddle Fair with a “partner” he had never even met. This effort by Powers was directly adverse to the Fairs’ interest and therefore was in violation of RPC 1.7.

LKO contends that there is a factual issue whether Powers violated RPC 1.7. (App. Br. 37) But whether an attorney’s conduct violates the relevant RPC’s is a question of law. *Eriks v. Denver*, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992); *Holmes v. Loveless*, 122 Wn. App. 470, 475, 94 P.3d 338 (2004). Further, the facts pertaining to Powers’ violation of RPC 1.7 were not in dispute. It was undisputed that Powers represented LKO. It was undisputed that Powers & Therrien represented Fair in forming, maintaining and ultimately dissolving BF Trading. Powers & Therrien sent a billing for legal services to Fair in December 2007, some six months after this lawsuit was filed, relating to that matter. (CP 1521) And Powers & Therrien represented TCG as well,

drafting pleadings and providing advice on the development of the business. (CP 733, 740, 741-45)

What LKO is really arguing is not that factual issues exist, but that RPC 1.7 should be narrowly interpreted to apply only when the lawyer's two clients are both involved in the same transaction. This is an incorrect interpretation of the rule. RPC 1.7 also bars a lawyer from representing a client in a negotiation with someone who is a client of the lawyer in an unrelated matter. Comment 7 to the RPC 1.7 discusses this very point:

Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, **not in the same transaction but in another**, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

(emphasis added) *Disciplinary Proceeding Against Egger*, 152 Wn.2d 393, 412, 98 P.3d 477 (2004) (App. Br. 40) also illustrates the error of LKO's reading of RPC 1.7(b). In that proceeding, the question was whether Egger represented a lender at the same time the firm represented the borrower in unrelated matters. The Court answered that question in the affirmative and imposed discipline as a consequence. *Egger*, 152 Wn.2d at 412-421.

Leaving aside the much more direct conflict of Powers' representation of LKO in gaining a claimed ownership interest in TCG, under RPC 1.7, Powers could not ethically represent LKO in a negotiation with Fair when Fair was still a client in the BF Trading matter. The rule applies whether or not Powers was attempting to represent both LKO and Fair in the negotiation of the TCG transaction. LKO's argument to the contrary is based upon a mistaken reading of RPC 1.7.

2. Rescission Was A Proper Remedy For Powers' Violation Of RPC 1.7.

A court sitting in equity has broad discretion to shape appropriate relief. *Bloor v. Fritz*, 143 Wn. App. 718, 739 ¶¶48, 180 P.3d 805, 817 (2008); *Hough v. Stockbridge*, 150 Wn.2d 234, 236, 76 P.3d 216 (2003). The appellate court reviews a trial court's decision to rescind a contract for an abuse of discretion. *Bloor*, 143 Wn. App. at 740, ¶50; *Hornback v. Wentworth*, 132 Wn. App. 504, 511 ¶16, 132 P.3d 778 (2006), *rev. granted*, 158 Wn.2d 1025 (2007). In this case, the court did not abuse its discretion in determining that rescinding the transaction and returning to LKO the funds that had been advanced to TCG was the appropriate remedy. Any other ruling would have left as co-owners of a

business Fair and either LKO or the attorneys who controlled it, Powers and Therrien, necessarily resulting in ongoing discord and ultimately the failure of the company and rewarding the attorneys for the breach of ethical obligations.

The Restatement (Third) of the Law Governing Lawyers §6 (2000) sets out a variety of judicial remedies available to a client (or nonclient) for a lawyer's breach of ethical duties, including ordering "cancellation or reformation of a contract, deed, or similar instrument." The trial court did not abuse its discretion in rescinding the agreement here for Powers' ethical lapses. See **C.B. & T. Co. v. Hefner**, 98 N.M. 594, 651 P.2d 1029, *cert. denied*, 651 P.2d 636 (1982).

In **Hefner**, the New Mexico Supreme Court voided a real estate purchase and sale agreement on the grounds that the attorney who drafted the agreement had represented both the buyer and the seller and had violated his fiduciary duty to the seller. The seller was the personal representative of a decedent's estate; the buyer was the decedent's former business partner. The attorney and the buyer knew, but neither of them disclosed to the personal representative, that the real property included a valuable

interest in a natural gas well. After the sale, the personal representative learned about the well. He sued to set aside the transaction on grounds that both the lawyer and former partner had breached their fiduciary duties to disclose the existence of the well.

The Supreme Court affirmed the judgment voiding the sale, quoting the trial court's decision:

"[The] attorney for both parties had an absolute duty to make a full disclosure ... of the existence of this well and that [the decedent's] interest in the well was a valuable interest which should be considered in the sale of the [real property]." The trial court concluded that the failure of the attorney to inform [the personal representative] of all pertinent facts surrounding the sale and purchase of the [real property] was a violation of the attorney's fiduciary duty to [the personal representative].

Hefner, 651 P.2d at 1036 (emphasis added). The Supreme Court further noted:

In granting rescission, ... the trial court did not find fraud or misrepresentation on the part of the attorney. Rescission was granted on the basis that [the buyer] and the attorney had breached their fiduciary duties [to the seller].

Hefner, 651 P.2d at 1032.

As Judge Small observed in his September 25, 2009 Memorandum Decision, the facts in the present case are more egregious than those in **Hefner**, because in that case neither client

had any relationship with the attorney. In the present case, however, LKO was formed and controlled by Powers and Therrien. (CP 2371) LKO attempts to distinguish *Hefner* on the grounds that the agreement in that case was unfair, whereas (according to LKO), the alleged contract with LKO was not unfair. (App. Br. 28) This argument overlooks the fact that the attempted bait and switch would have saddled Fair with a partner he did not know, and that he did not agree to admit as a member to TCG.

LKO also attempts to distinguish *Hefner* on the grounds that the court in that case allowed the rescission “in part based upon the breach of a fiduciary duty owed by one of the contracting parties to the other.” (App. Br. 28) Although the duty owed by the seller to the buyer was discussed in the case, it was not the basis for the court’s holding. The court expressly stated “there being, in fact, a violation of the attorney’s duty of disclosure to plaintiff, the trial court did not err in rescinding the contract of sale.” *Hefner*, 651 P.2d at 1036.

Other courts have voided agreements between two parties represented by the same attorney where the attorney’s allegiance was greater towards one party than to the other, or where one party

was not adequately informed of the consequences of the agreement. See, e.g., *Friedlander v. Friedlander*, 80 Wn.2d 293, 303, 494 P.2d 208 (1972) (pre-nuptial agreement); *Bartlett v. Bartlett*, 84 A.D.2d 800, 444 N.Y.S.2d 157 (N.Y.A.D. 2 Dept., 1981) (spousal separation agreement). LKO references several cases involving attorney ethical violations and argues that in those cases rescission was not granted. This, according to LKO, means that rescission should not have been granted in this case. But review of the facts of those cases shows LKO's conclusion to be illogical.

First, *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992) (App. Br. 32), was a malpractice case seeking damages. The case does not mention rescission, as it was not a remedy sought by plaintiffs. *Hizey* is irrelevant to the issue here.

Next, LKO cites *Disciplinary Proceeding Against Botimer*, 166 Wn.2d 759, 214 P.3d 133 (2009) (App Br. 35). *Botimer* was a disciplinary proceeding against an attorney who represented multiple clients simultaneously in an underlying breach of contract action. There is no mention of rescission being sought in the underlying case. *Botimer* is irrelevant to the issue here.

Finally, LKO cites *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 158 P.3d 1265 (2007), *rev. denied*, 163 Wn.2d 1020 (2008) (App. Br. 36). That case, unlike the two just discussed, did discuss rescission as a remedy. But it did not involve any claim of ethical violations by an attorney. *Nishikawa* has no bearing on the issues presented in this case.

LKO further contends that under Washington law, the party seeking rescission must establish that a substantial injury was sustained, citing *Ramsey v. Mading*, 36 Wn.2d 303, 217 P.2d 1041 (1950) (App. Br. 29). But *Ramsey* does not hold or even discuss the need to prove damages as a condition to the granting of rescission. LKO cites two even older decisions for the proposition that “if there are no damages, there are no grounds for rescission.” *Marrazzo v. Orino*, 194 Wash. 364, 78 P.2d 181 (1938); *Capital Sav. & Loan Ass’n v. Convey*, 175 Wash. 224, 27 P.2d 136 (1933) (App. Br. 29). But neither case stands for the proposition. *Marrazzo* holds that under Washington law at the time, “a failure of consideration or a breach of contract is not a ground for rescission unless it is substantial, but only a basis for the recovery of damages.” 194 Wash. at 378. *Capital Savings* holds

that “where the partial failure of consideration is slight in comparison with the whole consideration and subject-matter of the contract, where damages are easily ascertainable and the vendee can be thereby fully compensated, and where a rescission would be grossly inequitable to the vendor, the purchaser will not be permitted to rescind, but will be allowed a proportionate abatement from the purchase price.” 175 Wash. at 227-28. Neither of those cases has any bearing on the issues in this case.

The trial court did not abuse its discretion in determining that rescission was an appropriate remedy for breach of RPC 1.7.

3. Appellant LKO Is Not An Innocent Party, But An Enterprise Of The Powers And Therrien Families.

LKO contends it is an “innocent party” that is being hurt by the unethical actions of its attorney Powers. But LKO is not an innocent bystander. LKO was undoubtedly controlled by Powers and Therrien, as the trial court found. (CP 2371) LKO was formed by Powers and Therrien for their own estate planning purposes, to benefit themselves and their children. (CP 965, 969) For reasons known only to Powers and Therrien, it is a very elaborate and complex entity. Appendix A, CP 1247, is a chart of that complex structure. LK Operating LLC, a Washington limited liability

company formed under RCW 25.15, is managed by Powers & Therrien Enterprises, Inc., a corporation wholly owned and controlled by Powers and Therrien. (CP 1275) LKO has five members, each of which is a corporation: SBT Enterprises, SRT Enterprises, DCP Enterprises, ALP Enterprises, and NFP Enterprises. (CP 1272, 1275) The letters making up the names of the corporations correspond to the initials of the adult children of Powers and Therrien. (See CP 501, 522, 543, 565, 995)

Each of these "initial" corporations has a board of directors consisting of three members: Powers' wife, Therrien's wife, and the child whose initials are in the name of the particular corporation. (CP 501, 522, 543, 565, 995, 1290) The officers of each of the corporations are the wives of Powers and Therrien, with the exception of the vice-president, who in each case is the child whose initials are on that corporation. (CP 501, 522, 543, 565, 995, 1290) The wives of Powers and Therrien and an employee of Powers & Therrien, P.S. are the only authorized signers on the bank accounts of the corporate members of LK Operating LLC. (CP 671-74)

Each "initial" corporation has a single shareholder: a trust, formed by Powers and Therrien, and of which Powers and Therrien are trustors, for the benefit of the adult child whose initials are in the name of the trust. (CP 844-45) In each case, the application for a federal identification number named either the wife of Powers or Therrien as grantor. (CP 660-64)

All these entities were created by Powers and Therrien. (CP 844) All entities use the same address as the Powers & Therrien law firm. (CP 1291) All are controlled by Powers and Therrien, either directly (in the case of Powers & Therrien Enterprises) or through their wives (as officers and directors of the corporate members of LK Operating LLC). (CP 1290)

The LKO Operating Agreement vests the broadest possible management control in the manager, Powers & Therrien Enterprises, Inc. – a corporation owned by Powers and Therrien 50-50:

5.1 MANAGEMENT. The Company shall be managed solely by the Manager. The business of the Company shall be managed by and under the direction of the Manager, who may exercise all such powers of the Company and do all such lawful acts and things as are not by statute or by the Certificate of Formation or by this Agreement directed or required to be exercised or done by the Members. It

is intended that the powers and authority of the Manager shall be substantially the same as the powers and authority of directors of a corporation formed under the laws of the State of Washington. Without limiting the generality of the foregoing, the Manager shall have the power and authority, on behalf of the Company: [the agreement then lists fifteen specific powers of the Manager].

(CP 1281) In fact, the only powers reserved to the members are the power to voluntarily dissolve the company, to sell all or substantially all the company's assets, to change the terms of the Certificate of Formation or the Operating Agreement, to establish the compensation of the manager, and to cause the company to go into some other line of business. (CP 1283-84)

The contention that appellant LKO is an innocent third party is a fantasy. Appellant LKO is not an innocent party, but an enterprise of the Powers and Therrien families.

C. The Court's Order Rescinding Any Agreement With Powers And Therrien Or LKO May Be Upheld Due To Violation Of RPC 1.8. The Court's Conclusion That The Contracting Entity Was Irrelevant To Fair Cannot Be Sustained. (Argument Of Cross-Appeal)

Because the trial court granted rescission on the basis of Powers' violation of RPC 1.7, it found it unnecessary to rule on the question of the alleged violation of RPC 1.8. (CP 237) But any agreement between TCG and Powers or Therrien also violated

RPC 1.8, and was void under the rule enunciated in ***Corporate Dissolution of Ocean Shores Park, Inc. v. Rawson-Sweet***, 132 Wn. App. 903, 134 P.3d 1188 (2006), *rev. denied*, 159 Wn.2d 1009 (2007). To the extent necessary to preserve the decision in this case, and to preserve the arguments of Fair in the related malpractice case cause number 30161-3, respondents assert this cross-appeal.

The bench trial in August, 2010, determined, among other things, who the contracting parties actually were. The court entered Findings of Fact and Conclusions of Law on January 31, 2011. Conclusion of Law J states: "The terms of the Proposal by Fair as agent for TCG were accepted by Les Powers." (CL J, CP 2401) Conclusion of Law K states: "Ultimately, Les Powers pursuant to his agreement with Fair, as agent for TCG, chose to enter into the Investment Agreement with TCG." (CL K, CP 2401) Conclusion of Law M states: "Les Powers accepted the business offer by having LKO provide the sum of \$17,000 to TCG, which occurred beginning February 21, 2005, and by having Powers & Therrien, P.S. provide the legal services to TCG as requested in Fair's October 27, 2004 email." (CL M, CP 2401)

These findings that Powers was the contracting party mean that Powers went into business with TCG. Conclusion of Law M states that the acceptance occurred on February 21, 2005. (CL M, CP 2401) TCG was undoubtedly a client of Powers well before February 21, 2005. In mid-February, 2005, Powers was drafting form pleadings for use in collecting debt for TCG, including a summons naming TCG as plaintiff, a complaint, and a *lis pendens*. (CP 733, 734, 737)

The version of RPC 1.8 in effect in 2004-05 prohibited a lawyer from entering into a business transaction with a client unless the transaction and terms were fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client; the client was given a reasonable opportunity to seek the advice of independent counsel in the transaction; and the client consented. It is undisputed that Powers did not disclose the terms of the proposed agreement to TCG (injecting LKO as the contracting party) and that TCG never consented to the transaction (LKO being a partner in the venture). On the basis of the court's post-trial findings and conclusions, it is

undisputable that Powers violated RPC 1.8, and this provides an alternative grounds for rescinding the agreement.

Agreements between an attorney and client to go into business together are void as a violation of public policy. As early as 1922, the Washington Supreme Court likened the relationship of attorney and client to that of guardian and ward, and stated that a court would “relieve a client from hard bargains or from any undue advantage secured over him by his attorney.” **Conner v. Hodgdon**, 120 Wash. 426, 432, 207 P. 675 (1922). Dealings between an attorney and his client advantageous to the attorney are “prima facie fraudulent.” To uphold such a transaction, the attorney bears the burden of showing not only that the attorney used no undue influence, but also (a) that the attorney provided to the client all information and advice which it would have been the duty to give if the attorney had not been involved in the transaction and (b) that the transaction was as beneficial to the client as it would have been had the client dealt with a stranger. **Peterson’s Estate**, 6 Wn.2d 294, 311, 107 P.2d 580 (1940); see also **In re Lovell**, 41 Wn.2d 457, 459, 250 P.2d 109 (1952); **Matter of McGlothlen**, 99 Wn.2d 515, 525, 663 P.2d 1330 (1983).

The extreme skepticism of business deals between attorneys and clients was carried forward into RPC 1.8, which requires that the attorney provide to the client written disclosure of the transaction and the terms on which the lawyer proposes to acquire an interest. Powers indisputably made no such disclosure to TCG. The rule also requires that the transaction be “fair and reasonable to the client.” Again, Powers cannot make such a showing. Fair, the manager of TCG, would never have worked for the TCG, along with his wife, for two years, had they known that Powers and Therrien expected that their expenditure of literally thousands of hours be *gratis*. (CP 92-93)

Corporate Dissolution of Ocean Shores Park, Inc. v. Rawson-Sweet, 132 Wn. App. 903, 134 P.3d 1188 (2006), *rev. denied*, 159 Wn.2d 1009 (2007) summarizes the current status of an attorney’s obligations under RPC 1.8, and the consequences of the failure to fulfill those obligations. In ***Ocean Shores***, the clients and the attorney agreed that they would be joint owners of a corporation, of which the attorney would be the president. Ultimately, the clients retained new counsel and initiated a lawsuit

to dissolve the corporation and recover the real property they had transferred to it. 132 Wn. App. at 908, ¶11.

The trial court denied the clients' motion for partial summary judgment that their transfer of real property to the corporation should be set aside because the attorney breached his professional obligations under RPC 1.8. The appellate court reversed. The court's discussion of the applicable law is equally pertinent here:

An attorney must show that any business dealings with clients are fair and ethical.

The relation of attorney and client has always been regarded as one of special trust and confidence. The law therefore requires that all dealings between an attorney and his client shall be characterized by the utmost fairness and good faith, and it scrutinizes with great closeness all transactions had between them. So strict is the rule on this subject that dealings between an attorney and his client are held, as against the attorney, to be prima facie fraudulent, and to sustain a transaction of advantage to himself with his client the attorney has the burden of showing not only that he used no undue influence but that he gave his client all the information and advice which it would have been his duty to give if he himself had not been interested, and that the transaction was as beneficial to the client as it would have been had the client dealt with a stranger.

Ocean Shores, 132 Wn. App. at 908, ¶18 (quoting *Transcon. Ins. Co. v. Faler*, 9 Wn. App. 610, 612, 513 P.2d 864 (1973)). The *Ocean Shores* court held that to justify a transaction between an

attorney and his client, the attorney has the burden to prove: (1) there was no undue influence, (2) he gave the client exactly the same information or advice as would have been given by a disinterested attorney, and (3) the client would have received no greater benefit had he dealt with a stranger. "To meet this burden of proof, the attorney is responsible for documenting the transaction and preserving this documentation to protect himself in the future." *Ocean Shores*, 132 Wn. App. at 911-12.

This very high standard was confirmed by the Washington Supreme Court in *Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 153 P.3d 186 (2007). In *Stewart*, a law firm had obtained a deed of trust from a client in part to secure existing attorneys' fees and costs owed by another related client. The court began its analysis with the principle that attorney fee agreements that violate the RPCs are against public policy and unenforceable. The court then explained the nature of the burden borne by the attorney under (former) RPC 1.8:

Under this rule, the lawyer must establish, " (1) there was no undue influence; (2) he or she gave the client exactly the same information or advice as would have been given by a disinterested attorney; and (3) the client would have received no greater benefit had he or she dealt with a stranger." The disclosure which

accompanies an attorney-client transaction must be complete. Attorneys, to defend their actions, must prove they complied with the "stringent requirements imposed upon an attorney dealing with his or her client."

Stewart, 159 Wn.2d at 745 ¶15 (citation omitted.) A lawyer must prove strict compliance with the safeguards of RPC 1.8(a): full disclosure, opportunity to consult outside counsel, and consent must be proved by the communication between the attorney and the client. *Stewart*, 159 Wn.2d at 745, ¶16.

In this case, Powers cannot bear the burden imposed by RPC 1.8 and the case law cited above. He cannot show that he or his partner Thierren gave the mandatory disclosures, he cannot show the transaction (as they view it) was fair and reasonable to either the Fairs or TCG, he cannot show that he gave the same advice to the Fairs or to TCG that a disinterested attorney would have given, he cannot show that the Fairs and TCG would have fared no better if they had dealt with a stranger, and (despite Fair's requests) he cannot show any documentation of the transaction.

When an attorney who has gone into business with a client cannot carry the burden of proof imposed by these cases, any alleged agreement is void as being in violation of public policy. In

Ocean Shores, for instance, the court remanded to the trial court with the direction that if the attorney's widow² could not make the required showing that the attorney had fulfilled his ethical obligations, the superior court was to enter an order divesting her of her shares in the corporation. 132 Wn. App. At 915-16, ¶33.

An appellate court may affirm the judgment on any alternative basis supported by the record. *Pasado's Safe Haven v. State*, --- P.3d ---, 162 Wn. App. 746, ¶22 (July 25, 2011); *Verbeek Properties, LLC v. GreenCo Environmental, Inc.*, 159 Wn. App. 82, 90 ¶26, 246 P.3d 205 (2010). In this case, if the court were to find that the court's entry of an order rescinding the transaction under RPC 1.7 is for any reason incorrect, the court should nevertheless affirm the rescission based on the violation of RPC 1.8, given the trial court's finding that the original business transaction was between Powers and TCG.

Further, this court should reverse the trial court's findings that Fair "did not care" and "left up to Powers" the entity that invested in TCG, both because they are irrelevant to the trial court's determination and because they are not supported by the evidence.

² The attorney had died in an automobile accident, so his widow was representing his interests in the case.

LKO argued that TCG only proposed contract terms that it wanted an "interested party" to accept, and LKO accepted those terms without change or amendment. The trial court then made findings that Fair "did not care" and "left up to" Powers the "partner" from which investments funds would come. (FF 34, CP 2398) But these findings are inconsistent with, and irrelevant in light of, the trial court's determination that the original agreement was between Powers and TCG. (FF 19, CP 2396; CL J, K, CP 2401)

In addition, the evidence simply does not support the argument, or any finding, that Fair "did not care" with whom he went into business. The evidence is indisputable that Fair sought an attorney, or attorneys, who could provide litigation support in the debt collection business. Notably absent from the claim that LKO could "accept" Fair's offer to Powers and Therrien is any identification of the "investment proposal" to which LKO refers. If the reference is to the 10/27/04 email, it is not true that it was accepted by LKO without change or amendment. The email was addressed to "Les, Keith" and stated: "Regarding an agreement between myself and you two, this is how I would like to see it." (CP 216) LKO could not accept that offer "without change or

amendment” because the “offer” was not made to LKO—it was made to Powers and Therrien.

Moreover, that e-mail was not a proposal for an ongoing relationship, but to purchase a specific tranche of debt from Unifund. And the evidence was clear, and uncontroverted, that Fair envisioned the debt collection business as one in which *the attorneys* would be partners, as their services would be necessary to undertake any litigation necessary in the business.

Even if Fair “left it up” to Powers to determine the business entity that would provide the funds, the attorneys could not use LKO to evade the proscriptions on business relationships with a client that are embodied in RPC 1.8 given their control of LKO. To the extent necessary to preserve the trial court’s judgment, or to preserve any arguments that might be made in the pending appeal of the dismissal of the Fairs’ malpractice claim, this court should hold a violation of RPC 1.8 and vacate the findings that the entity with an interest in TCG was irrelevant to Fair.

VI. CONCLUSION

This court should affirm the trial court’s rescission award and vacate the findings identified in respondent’s assignments of error.

Dated this 22nd day of September, 2011.

HACKETT, BEECHER & HART

SMITH GOODFRIEND, P.S.

By: 

Ronald J. Trompeter
WSBA No. 3593

1201 Third Ave., Suite 1650
Seattle, WA 98101-3036
(206) 382-1830

By: 

Catherine W. Smith
WSBA No. 9542

1109 First Ave., Suite 500
Seattle, WA 98101-2988
(206) 624-0974

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on September 22, 2011, I arranged for service of the foregoing Corrected Brief of Respondents/Cross-Appellants, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division III 500 N. Cedar Street Spokane, WA 99201	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Ronald J. Trompeter Hackett, Beecher & Hart 1601 Fifth Avenue, Suite 2200 Seattle, WA 98101-1651	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Bradley Kelley, Joshua Selig Byrnes & Keller LLP 1000 Second Avenue, Suite 3800 Seattle, WA 98104	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
James A. Perkins Larson Berg & Perkins, PLLC P.O. Box 550 Yakima, WA 98907-0550	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Steve Lacy Attorney at Law PO Box 7132 East Wenatchee, WA 98802-0132	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 22nd day of September, 2011.



Carrie L. Steen

This flowchart has been updated from the original version filed as Exhibit D to the Brian Fair declaration signed on March 24, 2008. New information is listed in Blue Ink

Las Powers
Correspondence from IRS indicates Las Powers is or was at October 11, 2004 a member of UK Operating, LLC
Owner ??

16.67%

16.67%

NFP Enterprises
<p>Owner: Patricia Powers, spouse of Les Powers</p> <p>President: Neta F. Powers-Hunter, daughter of Les Powers</p> <p>Vice Pres: Marsha J. Therrien, spouse of Keith Therrien</p> <p>Secretary: Marsha J. Therrien, spouse of Keith Therrien</p> <p>Treasurer: Patricia Powers, spouse of Les Powers</p> <p>Chairman of the Board: Marsha J. Therrien, spouse of Keith Therrien</p> <p>Other Director: Les Powers</p> <p>Incorporated: Las Powers</p> <p>Registered Agent: Office of Powers & Therrien, P.S.</p> <p>Tax Return Address: Office of Powers & Therrien, P.S.</p> <p>Source of Tax Return Information: None</p> <p>Correspondence from CPA to Corp Officers: Michelle Briggs, employee of Powers & Therrien P.S.</p> <p>Authorized signer on bank account: Office of Powers & Therrien, P.S.</p> <p>Bank Statement sent to: Office of Powers & Therrien, P.S.</p> <p>Phone number for bank: None</p> <p># of employees and compensation paid: None</p>

DCP Enterprises
<p>Owner: Patricia Powers, spouse of Les Powers</p> <p>President: Doreen Powers, daughter of Les Powers</p> <p>Vice Pres: Marsha J. Therrien, spouse of Keith Therrien</p> <p>Secretary: Marsha J. Therrien, spouse of Keith Therrien</p> <p>Treasurer: Patricia Powers, spouse of Les Powers</p> <p>Chairman of the Board: Marsha J. Therrien, spouse of Keith Therrien</p> <p>Other Director: Les Powers</p> <p>Incorporated: Las Powers</p> <p>Registered Agent: Office of Powers & Therrien, P.S.</p> <p>Tax Return Address: Office of Powers & Therrien, P.S.</p> <p>Source of Tax Return Information: None</p> <p>Correspondence from CPA to Corp Officers: Michelle Briggs, employee of Powers & Therrien P.S.</p> <p>Authorized Check signer: Office of Powers & Therrien, P.S.</p> <p>Bank Statement sent to: Unknown, no signature card provided</p> <p>Phone number for bank: None</p> <p># of employees and compensation paid: None</p>

100%

Neta Powers Trust
<p>Trustee - per declaration: Neta F. Powers-Hunter, daughter of Les Powers</p> <p>Beneficiary - per declaration: Neta F. Powers-Hunter, daughter of Les Powers</p> <p>Trustee per IRS filing: Patricia Powers, spouse of Les Powers</p> <p>Grantor per IRS filing: Patricia Powers, spouse of Les Powers</p> <p>Tax Return Address: Office of Powers & Therrien, P.S.</p>

LK Operating, LLC

Owners: "The adult children of Les and Keith" per declaration of Diana Siew, employee of Powers & Thermen, P.S.

... our children" Keith Thermen

Formed by: Powers & Thermen, P.S.
Registered Agent: Leslie Powers
Annual Report Completed by: Michelle Biggs, employee of Powers & Thermen P.S.
Authorized Check signer: Michelle Biggs, employee of Powers & Thermen P.S.
Authorized Check signer: Les and Leslie Powers and Keith Thermen
Banking transactions performed by: Eva Fielder, employee of Powers & Thermen, P.S.
Tax Return Address: Office of Powers & Thermen, P.S.
CPA corresponds only with: Les Powers, Eva Fielder, employee of Powers & Thermen, P.S.
First accounting recognition of TOG: None
Bank Statement sent to: February 7, 2007
Phone number for bank: Office of Powers & Thermen, P.S.

Manager of LK Operating, LLC

Les Powers 50% 50% Keith Thermen

16.67%

ALP Enterprises

25%

SRT Enterprises

Owner: Avon Powers Trust
President: Patricia Powers, spouse of Les Powers
Vice Pres: Avon L. Powers-McAlister, daughter of Les Powers
Secretary: Marsha J. Thermen, spouse of Keith Thermen
Treasurer: Patricia Powers, spouse of Les Powers
Chairman of the Board: Marsha J. Thermen, spouse of Keith Thermen
Other Director: Les Powers
Incorporator: Les Powers
Registered Agent: Les Powers
Tax Return Address: Office of Powers & Thermen, P.S.
Source of Tax Return Information: Office of Powers & Thermen, P.S.
Correspondence from CPA to Corp Officers: None
Authorized Check signer: Michelle Biggs, employee of Powers & Thermen P.S.
Bank Statement sent to: Office of Powers & Thermen, P.S.
Phone number for bank: Office of Powers & Thermen, P.S.
of employees and compensation paid: None

Owner: Seth Thermen Trust
President: Marsha J. Thermen, spouse of Keith Thermen
Vice Pres: Seth Thermen, son of Keith Thermen
Secretary: Patricia Powers, spouse of Les Powers
Treasurer: Patricia Powers, spouse of Les Powers
Chairman of the Board: Marsha J. Thermen, spouse of Keith Thermen
Other Director: Patricia Powers, spouse of Les Powers
Incorporator: Powers & Thermen, P.S.
Registered Agent: Les Power
Tax Return Address: Office of Powers & Thermen, P.S.
Source of Tax Return Information: Office of Powers & Thermen, P.S.
Correspondence from CPA to Corp Officers: None
Authorized Check signer: Michelle Biggs, employee of Powers & Thermen P.S.
Bank Statement sent to: Office of Powers & Thermen, P.S.
Phone number for bank: Office of Powers & Thermen, P.S.
of employees and compensation paid: None

Trustee - per declaration: Avon L. Powers-McAlister, daughter of Les Powers
Beneficiary - per declaration: Avon L. Powers-McAlister, daughter of Les Powers
Trustee per IRS filing: Patricia Powers, spouse of Les Powers
Grantor per IRS filing: Patricia Powers, spouse of Les Powers
Tax Return Address: Office of Powers & Thermen, P.S.

100%

Avon Powers Trust

Trustee - per declaration: Seth Thermen, son of Keith Thermen
Beneficiary - per declaration: Seth Thermen, son of Keith Thermen
Trustee per IRS filing: Marsha J. Thermen, spouse of Keith Thermen
Grantor per IRS filing: Marsha J. Thermen, spouse of Keith Thermen
Tax Return Address: Office of Powers & Thermen, P.S.

100%

Seth Thermen Trust

Powers & Therman Enterprises, Inc.

Providing Legal Services 7777

Owner: 777

President, Chairman of the Board:
Vice Pres, Secretary, Treasurer:
Formed by:
Registered Agent

Les Powers
Keith Therman
Powers & Therman, P.S.
Les Powers

Annual Report Completed by:
Tax Return Address
Bank statements sent to:

Michelle Biggs, employee of Powers & Therman P.S.
Office of Powers & Therman, P.S.
Office of Powers & Therman, P.S.

25%

SBT Enterprises

Owner: Sarah B. Therman Trust
President: Marsha J. Therman, spouse of Keith Therman
Vice Pres: Sarah B. Therman, daughter of Keith Therman
Secretary: Patricia Powers, spouse of Les Powers
Treasurer: Patricia Powers, spouse of Les Powers
Chairman of the Board: Marsha J. Therman, spouse of Keith Therman
Other Director: Patricia Powers, spouse of Les Powers
Incorporator: Les Powers
Registered Agent: Les Powers
Tax Return Address: Office of Powers & Therman, P.S.
Source of Tax Return Information: Office of Powers & Therman, P.S.
Correspondence from CPA to Corp Officers: None
Authorized Check signer: Michelle Biggs, employee of Powers & Therman P.S.
Bank Statement sent to: Marsha J. Therman, spouse of Keith Therman
Phone number for bank: Office of Powers & Therman, P.S.
of employees and compensation paid: None

100%

Sarah B. Therman Trust

Trustee - per declaration: Sarah B. Therman, daughter of Keith Therman
Beneficiary - per declaration: Sarah B. Therman, daughter of Keith Therman
Trustee per IRS filing: Marsha J. Therman, spouse of Keith Therman
Grantor per IRS filing: Marsha J. Therman, spouse of Keith Therman
Tax Return Address: Office of Powers & Therman, P.S.