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No. 60158-0-1

**COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON**

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COURT OF APPEALS  
STATE OF WASHINGTON

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ANDREA SHOEMAKE, by and through JULIE SCHISEL, Guardian ad  
Litem; and KEITH SHOEMAKE, and their marital community,

*Appellants/Cross-Respondents,*

v.

R. DOUGLAS P. FERRER and JANE DOE FERRER,  
husband and wife,

*Respondent/Cross-Appellant*

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**REPLY BRIEF OF APPELLANTS/CROSS-RESPONDENTS**

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ORIGINAL

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I. SUMMARY OF ARGUMENT IN REPLY  
AND ON CROSS-APPEAL

Attorneys who lie to, deceive, and malpractice their clients should not get paid, and Washington courts may indeed impose attorney fees as an equitable remedy against fiduciaries who lie and deceive the beneficiaries of their trust.

When calculating the lodestar, Washington courts may exclude time incurred on unsuccessful claims arising in connection with distinct causes of action, but must not parse each and every motion to decide whether the prevailing party pursued unsuccessful “theories” that arose out of the same core of operative facts as the causes of action upon which the party prevailed. Thus, losing part of a motion does not constitute an “unsuccessful claim” if the party obtains substantial relief on the party’s cause of action. Furthermore, in deciding whether to award a lodestar multiplier, Washington courts must evaluate the risk of the litigation in which the right to attorney fees arises, as well as the prevailing party’s contingent risk of *recovery* (as opposed to merely obtaining a judgment).

## II. REPLY ARGUMENT

### A. **FERRER CLAIMS CREDIT FOR A 40% CONTINGENT FEE, REGARDLESS OF HIS PROTESTATIONS TO THE CONTRARY.**

As his fundamental premise, Ferrer repeatedly asserts that “[d]efendant makes no claim to a fee or a credit” *E.g.*, Resp. Br., pp. 14, 24, 27. On this foundation, Ferrer builds his related arguments that the Shoemakes seek to recover “punitive damages” [*id.*, pp. 1, 13, 24, 25] and their breach of fiduciary duty cause of action “adds nothing” to their claims against him [*id.*, p. 22].

Conversely, Ferrer concedes that \$60,000 represents “**the amount they** [*i.e.*, Mr. and Mrs. Shoemake] **would have recovered** in 1995 from their UM claim with State Farm, **net of the transactional costs, i.e., the agreed-upon contingent fee, had the negligence not occurred.**” *Id.*, pp. 11-12 (emphasis added).<sup>1</sup> *If* Ferrer truly “makes no claim to a fee or credit,” then the Shoemakes’ delay damages consist of interest on \$100,000, *i.e.*, \$117,519.31, precisely as the Shoemakes’ contend. See, App. Op. Br., p. 16. This is the amount Mr. and Mrs. Shoemake would have recovered, *before giving Ferrer credit for a contingent fee*, but for Ferrer’s negligence.

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<sup>1</sup> In the lower court, Ferrer also agreed that he does indeed claim credit for a contingent fee. *E.g.*, CP 245 (“the agreed contingent fee should be deducted from the underlying settlement offer...”).

To illustrate this conclusion, assume that Ferrer had done nothing other than lie to Mr. and Mrs. Shoemake, and the Shoemakes had *not* recovered the \$100,000. Mr. and Mrs. Shoemakes' damages, in that situation, would have been \$100,000 plus legal interest since 1995 on that same \$100,000. The *only* way to arrive at a delay damage award of less than \$117,519.31 requires a *credit* applied against the recovery by Mr. and Mrs. Shoemake based upon Ferrer's contingent fee agreement. Ferrer's Brief presumes precisely such a credit, notwithstanding his protestations to the contrary. *E.g.*, Resp. Br., p. 27.

Ferrer, of course, may waive his claim to credit for a contingent fee. His Opening Brief does so, by repeatedly asserting that he claims no fee or credit. The Court should therefore reverse the lower court damage award consistent with Ferrer's waiver. The Court should also recognize the inconsistency inherent in Ferrer's position.

**B. THE COURT SHOULD ADOPT MALLEN & SMITH'S FORMULATION OF THE DISTINCTION BETWEEN CAUSES OF ACTION FOR BREACH OF FIDUCIARY DUTY AND LEGAL MALPRACTICE.**

Citing *Kelly v. Foster*, 62 Wn. App. 150, 813 P.2d 598 (1991),<sup>2</sup>

Ferrer argues that his "after-the-fact breach of fiduciary duty in dissembling to his clients" makes no difference because "the real

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<sup>2</sup> *Kelly v. Foster*, *supra*, was decided prior to the Supreme Court decision in *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992).

gravamen of this case was and is defendant's negligence..." Resp. Br., p. 22. Ferrer thus confuses an attorney's duty of loyalty, the breach of which gives rise to the client's cause of action for breach of fiduciary duty, with the attorney's duty of care, the breach of which gives rise to the client's cause of action for legal malpractice. Resp. Br., pp. 22-25. Ferrer relies upon this identical analysis to support his cross-appeal relative to the lower court's authority to award attorney fees to Mr. and Mrs. Shoemake. Resp. Br., p. 43.

Ferrer's confused analysis is not uncommon, but erroneous nonetheless. 2 *Mallen & Smith, Legal Malpractice*, §14.2, pp. 584-92 (2007 ed.)("Thus, the standard of care [*i.e.*, legal malpractice] concerns negligence and the standard of conduct [*i.e.*, breach of fiduciary duty] concerns a breach of loyalty or confidentiality"). Accord, *Ulico Casualty Co. v. Wilson, Elser, Moskowitz, Edelman & Dicks*, \_\_N.Y.S.2d \_\_, 16 Misc.2d 1051, 2007 WL 2142299 (N.Y. Sup. 2007)("breach of fiduciary duty claims 'do not relate to the manner in which the attorney pursued the underlying case, **but rather the manner in which the defendants [*i.e.*, attorneys] interacted with their client.**")(emphasis added); W. Gregory, *The Fiduciary Duty of Care: A Perversion of Words*, 38 *Akron L.R.* 181 (2005)("This conflation...is not a mere matter of semantics, but threatens to obfuscate legal reasoning."). See further, 1 *Restatement (Third) of the*

*Law Governing Lawyers*, §§48, 49, pp. 342-52 (ALI 2000)(distinguishing between breach of fiduciary duty and professional negligence). Indeed, *Kelly v. Foster, supra* [Resp. Br., pp. 22-24] also confuses these two distinct concepts, considering that: (1) the lower court instructed the jury<sup>3</sup> in *Kelly* that “the terms ‘legal malpractice’ or ‘breach of fiduciary duty’ are used interchangeably” [*Kelly, supra*, 62 Wn. App. at 153]; and (2) the Court of Appeals characterized the attorney’s non-disclosure of his multiple conflicts of interest as “a legal malpractice action” when the Court should have recognized that an attorney’s conflicts of interest and non-disclosure of material information constitute breaches of fiduciary duty.<sup>4</sup> See, App. Op. Br., pp. 26-30.

In the specific context of a client’s fee forfeiture or disgorgement claim, Washington case law overwhelmingly confirms that an attorney’s breach of duty to disclose material information to the client does indeed represent a breach of fiduciary duty rather than legal malpractice. App.

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<sup>3</sup> See n. 2, *supra*. *Eriks* further held that whether an attorney’s conduct violates the Rules of Professional Conduct constitutes a “question of law.” *Eriks, supra*, 118 Wn.2d at 457-58.

<sup>4</sup> *Kelly v. Foster* actually decided two very narrow issues: (1) whether a breach of fiduciary duty, standing alone, “mandate[s] an award of attorney’s fees,” and; (2) whether a breach of fiduciary duty, standing alone, “compels reimbursement of all attorney’s fees paid,” to the attorney. *Kelly, supra*, 62 Wn. App. at 153, 156 (emphasis added). This Court need not revisit these two narrow issues to decide this case in favor of Mr. and Mrs. Shoemake. See, App. Op. Br., pp. 33, 31-32. See further, *infra*, pp. 9-12, 23-25.

Op. Br., pp. 27-29. Mallen & Smith thus explains, “[a] better analytical approach is to recognize that an attorney’s duties to a client include two obligations: (1) competent representation; and (2) compliance with the fiduciary obligations.” 2 Mallen & Smith, *supra*, §14.2 at p. 585. Indeed, the Washington Supreme Court recognized this distinction in *Eriks* when it affirmed the lower court’s fee forfeiture without requiring proof of proximate cause, intent, or resultant damage. *Eriks v. Denver*, 118 Wn.2d 451, 462, 824 P.2d 1207 (1992).

Ferrer’s “dissembling” [Resp. Br., p. 22], and non-disclosure of material facts to his clients [CP 270-71], provide superb examples of an attorney’s breach of fiduciary duty distinct from his breach of the standard of care (*i.e.*, legal malpractice). See, App. Op. Br., pp. 26-30. Ferrer’s ethical misconduct thus relates to *the manner in which he interacted with Mr. and Mrs. Shoemake, rather than the manner in which he pursued the underlying case*. These breaches represent breaches of fiduciary duty, separate and apart from Ferrer’s legal malpractice.

The client’s complaint arising out of the attorney’s fiduciary obligations thus constitutes a cause of action for breach of fiduciary duty; the client’s complaint arising out of the attorney’s duty of competent representation constitutes a cause of action for legal malpractice. The Court should therefore hold that a client’s breach of fiduciary duty and

legal malpractice claims are *not* “interchangeable” and that an attorney’s non-disclosure of material information to a client does indeed constitute a cause of action for breach of fiduciary duty rather than “legal malpractice.” Breaches of an attorney’s other fiduciary obligations which implicate the attorney’s interaction with the client rather than the attorney’s competence during representation in the underlying matter, likewise give rise to causes of action for breach of fiduciary duty rather than legal malpractice. This conclusion is entirely consistent with Washington case law. *E.g.*, *Eriks, supra*, 118 Wn.2d at 458-61 (conflicts of interest; RPC 1.7); *Valley/50<sup>th</sup> Ave., LLC v. Stewart*, 159 Wn.2d 736, 743-48, 153P.3d 186 (2007) (fee modifications and transactions with clients; RPC 1.8); *In re: Discipline of Dann*, 136 Wn.2d 67, 80, 960 P.2d 416 (1998) (lying to clients; RPC 8.4). To the extent that Ferrer interprets *Kelly v. Foster* as inconsistent with this formulation as to these two distinct types of claims, the Court should clarify *Kelly*’s limitations.

The lower court correctly held that Ferrer breached his fiduciary duties to Mr. and Mrs. Shoemake [CP 270-71], but erred when it adopted Ferrer’s erroneous legal reasoning that Ferrer’s breach of fiduciary duty “adds nothing” [Resp. Br., p. 22] to the Shoemakes’ claim. See, CP 252-53.

**C. FEE FORFEITURES DO NOT CONSTITUTE PUNITIVE DAMAGES.**

Ferrer characterizes forfeiture of an attorney's fee as "punitive damages." *E.g.*, Resp. Br., pp. 1, 13, 24-25 ("punishment" and "pound of flesh").<sup>5</sup> Ferrer is mistaken. Washington courts have repeatedly upheld the validity of fee forfeitures without regard to causation or damage. See, App. Op. Br., pp. 30-32. Ferrer does *not* cite, let alone distinguish, the leading Washington authorities on this issue, *i.e.*, *Eriks v. Denver, supra*; *Mersky v. Multiple Listing Bureau*, 73 Wn.2d 225, 437 P.2d 897 (1968); and *Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002). Indeed, Ferrer *concedes* that "fee denial or disgorgement in cases involving disputes over the attorney's fees" constitutes an "exception" that distinguishes breach of fiduciary duty and legal malpractice claims. Resp. Br., p. 23.

Accordingly, forfeiture of a fiduciary's fees does *not* constitute punitive damages.

**D. HIZEY DOES NOT PROHIBIT FEE FORFEITURES.**

Citing *Hizey v. Carpenter*, 119 Wn.2d 251, 259, 830 P.2d 646 (1992), Ferrer asserts that "[w]here the **breach of fiduciary duty** does not cause identifiable loss to the client, the remedy is a public one with the

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<sup>5</sup> Washington *prohibits* punitive damages on policy grounds. *Spokane Truck & Dray Co. v. Hoefler*, 2 Wash. 45, 50-56, 25 P. 1072 (1891). Washington *authorizes* fee forfeitures on policy grounds. *Eriks v. Denver*, 118 Wn.2d 451, 463, 824 P.2d 1207 (1992). No conflict exists between the policies that support each result.

Bar Association, rather than a private remedy.” Resp. Br., p. 23 (emphasis added). Ferrer misstates the holding of *Hizey*.

*Hizey* actually holds that “breach of an **ethics rule** provides only a public *e.g.*, disciplinary remedy and not a private remedy.” *Hizey, supra*, 119 Wn.2d at 259 (emphasis added). The distinction between a breach of fiduciary duty as distinguished from a breach of an ethics rule is important because fee forfeiture does indeed represent an appropriate remedy for an attorney’s breach of fiduciary duty and the breach of fiduciary duty *may* indeed result from the attorney’s breach of an ethics rule. See discussion, App. Op. Br., pp. 29-32. Accord, *In re: SRC Holding Corp.*, 364 B.R. 1, 42-43 (D. Minn. 2007)(“[A]n attorney’s violation of provisions of the Rules of Professional Conduct can inform the court’s decision on whether a breach [of fiduciary duty] has occurred.” Citing, *Restatement (Third) of the Law Governing Lawyers*, §1, cmt. B). *Hizey* thus expressly referenced and re-affirmed the Supreme Court’s commitment to *Eriks* (decided barely six months earlier) in which the Court had affirmed forfeiture of an attorney’s fee based upon the attorney’s conflict of interest. *Hizey, supra*, at 264 (“**our holding today does not alter or affect such use.**”)(Emphasis added). *Eriks*, in turn, affirmed the lower court’s fee forfeiture order despite the absence of evidence proving damage. *Eriks*,

*supra*, 118 Wn.2d at 462. Accord, *Mersky, supra*, 73 Wn.2d at 231; *In re: Marriage of Petrie*, 105 Wn. App. 268, 276, 19 P.3d 443 (2001).

Fee forfeiture thus represents an appropriate “private” remedy for a Washington fiduciary’s breach of duty, regardless of whether the client proves an “identifiable loss.”

**E. FEE FORFEITURE APPLIES TO ALL DISLOYAL FIDUCIARIES, NOT JUST ATTORNEYS.**

Mr. Ferrer complains that ordering the forfeiture of his contingent fee would “create a special damage rule for attorney defendants.” Resp. Br., p. 15. Fiduciaries, including attorneys when representing a client, are *not* just like any other business. See, App. Op. Br., pp. 26-29. Washington thus recognizes fee forfeiture as the appropriate remedy for *any* fiduciary’s breach of his/her duty of undivided loyalty to the beneficiary. See, App. Op. Br., pp. 31-32.

Washington also does *not* require proof of fraudulent, knowing, or intentional misconduct by the fiduciary as a prerequisite to fee forfeiture. *E.g., Eriks, supra*, 118 Wn.2d at 462, “[i]t is no answer to say that fraud or unfairness were not shown to have resulted.”, quoting *Woods v. City Nat’ls Bank & Trust Co.*, 312 U.S. 262, 268-9, 85 L. Ed. 820, 61 S. Ct. 493 (1941); *Mersky, supra*, 73 Wn.2d at 231 (“It is no consequence, in this regard, that the broker may be able to show that the breach of his duty of

full disclosure and undivided loyalty did not involve intentional or deliberate fraud...”).<sup>6</sup> Accord, 1 *Restatement (Third) of the Law Governing Lawyers, supra*, §49, cmt. d, p. 349. See discussion, *infra*, pp. 26-27. Washington also does *not* require the client to prove causation or damages arising from the fiduciary’s breach of duty as a prerequisite to fee forfeiture. See, App. Op. Br., p. 31. These well-established legal principles apply to *all* fiduciaries, and not just attorneys.

**F. FERRER, OF ALL PEOPLE, MAY NOT INVOKE EQUITY.**

Incredibly, Ferrer invokes *equity* in his defense, quoting (in bold print, no less) the holding of *Matson v. v. Weisenkopf*, 101 Wn. App. 472, 484, 3 P.3d 805 (2000) that “[i]t would be *inequitable* for the plaintiff to obtain a judgment, against the attorney, which is greater than the judgment that the plaintiff would have collected from the third party.” Resp. Br., p. 11 (emphasis added). Ferrer, an admitted liar who intentionally misled his clients for many years, may not take refuge in equity because Washington courts “will not intervene on behalf of a party whose conduct in

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<sup>6</sup> Clients need not prove fraud or intent as an element of the attorney’s breach of fiduciary duty because “[t]he doctrine of constructive fraud is necessary to protect those in a confidential relationship...In effect, intent is presumed because the attorney is in the dominant position.” *The Fiduciary Duty of Care: A Perversion of Words, supra*, at 192. Accord, 1 *Restatement (Third) of the Law Governing Lawyers, supra*, §49, cmt. a, p. 348 (“claim against a lawyer for breach of fiduciary duty, [is] sometimes described as constructive fraud”). See further, *Thompson v. Huston*, 17 Wn.2d 457, 461, 135 P.2d 823 (1943)(“Untrue statements amount to constructive fraud, even though made in entire good faith”).

connection with the subject matter or transaction in litigation has been unconscientious, unjust, or marked by lack of good faith, and will not afford him any remedy.” *Income Investors, Inc. v. Shelton*, 3 Wn.2d 599, 602, 101 P.2d 973 (1940). Accord, *Portion Pack, Inc. v. Bond*, 44 Wn.2d 161, 170, 265 P.2d 1045 (1954). Moreover, Mr. and Mrs. Shoemake request relief entirely consistent with *Matson* and other Washington cases that discuss damages in legal malpractice actions. See, App. Op. Br., p. 15.<sup>7</sup>

**G. THE FEES OF REPLACEMENT COUNSEL REPRESENT RECOVERABLE MITIGATION EXPENSES.**

Mr. and Mrs. Shoemake explained that the contingent fee incurred by Mr. and Mrs. Shoemake with replacement counsel “offsets Ferrer’s claim to a credit for his hypothetical contingent fee,” consistent with *Flint v. Hart*, 82 Wn. App. 209, 917 P.2d 590 (1996). App. Op. Br., pp. 17-18, 23-24. Ferrer summarily dismisses Mr. and Mrs. Shoemake’s analysis of *Flint v. Hart* as “simply misleading,” “inapplicable,” and “completely off the mark,” and asserts that *Flint* “does not stand for a ‘mitigation expense’ concept.” Resp. Br., pp. 20, 21, 43-44.

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<sup>7</sup> *Matson* awarded the clients the *full* amount of the promissory notes *without reduction for the attorney’s hypothetical fee*. *Matson, supra*, 101 Wn. App. at 474. The judgment that the Shoemakes “would have collected from the third party [*i.e.*, State Farm]” was \$100,000, *not* \$60,000. The Shoemakes nevertheless acknowledge that the precise issue presented here was *not* discussed in *Matson*. Ferrer agrees, having previously conceded that “[t]he Washington courts have not considered this issue.” CP 223.

Ferrer's argument depends, in the first instance, on his presumption that Mr. Gould did not replace Ferrer as counsel for Mr. and Mrs. Shoemake relative to the State Farm UIM matter. *Id.*, p. 21. Ferrer's presumption is mistaken as a matter of fact. CP 60-61 ¶3. Indeed, later in his Brief, Ferrer himself asserts that "not only was there no risk [to the Shoemakes' counsel], **plaintiffs' counsel already had the money [i.e., the State Farm UIM proceeds] in hand early in the case due to his contingent fee agreement.** (CP 60-61)." Resp. Br., p. 35. Ferrer thus recognizes that Mr. and Mrs. Shoemake did, in fact, incur the costs of replacement counsel to assist them in mitigating their damages.<sup>8</sup>

Ferrer also misunderstands "the distinction between attorney fees awardable as costs...and attorney fees recoverable *as damages*." *Meadow Owners Assoc. v. Plateau 44 II, LLC*, \_\_ Wn. App. \_\_, 162 P.3d 1153 ¶¶32-36 (2007)(emphasis added). This Court recognized in *Meadows* that Washington law does indeed allow recovery of a party's attorney fees, *as damages*, when those fees "flow as a natural and proximate consequence of a wrongful act." *Id.* In this context, Washington specifically allows an

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<sup>8</sup> Ferrer's statement that "[a]t the time State Farm's policy limits were paid, plaintiffs' counsel had expended a total of 6.4 hours on the case" [Resp. Br., pp. 5, 35] is misleading because the Shoemakes' counsel (as they were duty-bound to do) had specifically segregated out and *omitted* their time incurred in connection with the State Farm UIM recovery. CP 280 ¶5. The Shoemakes' counsel thereafter incurred most of their time due to Ferrer's denial of liability. CP 346 ¶¶4-5.

injured victim to recover, *as damages*, the victim's reasonable mitigation expenses incurred as a result of the tortfeasor's actions. *E.g.*, *Hyde v. Wellpinit Sch. Dist.*, 32 Wn. App. 465, 469, 648 P.2d 892 (1982); *Kubista v. Romaine*, 14 Wn. App. 58, 64, 538 P.2d 812 (1975), *aff'd*, 87 Wn.2d 62, 549 P.2d 491 (1976). Accord, 3 Mallen & Smith, *Legal Malpractice*, §20.6, pp. 20-21 (2007 ed.) ("The client's injury may be the expense of retaining another attorney. Such damages can result from an attempt to avoid or minimize the consequences of the former attorney's negligence."); 1 *Restatement (Third) of the Law Governing Lawyers*, *supra*, §53, cmt. f, p. 393 ("The rule barring recovery of fees does not prevent a successful legal-malpractice plaintiff from recovering as damages additional legal expenses reasonably incurred outside the malpractice action itself as a result of a lawyer's misconduct [including malpractice]"). The contingent fee of replacement counsel, considered as mitigation expenses, thus offsets Ferrer's hypothetical 40% contingent fee - an issue that *Moore v. Greenberg*, 834 F.2d 1105, 1109 n. 7 (1<sup>st</sup> Cir. 1987) recognized but left "for another day." Compare, Resp. Br., p. 17 (implying that *Moore* "rejected" the Shoemakes' analysis, when it did not) with App. Op. Br., p. 25.

The lower court therefore erred when it failed to recognize that the contingent fee of replacement counsel offsets the contingent fee of the

attorney who commits malpractice. Thus, no sound legal reasoning supports the conclusion that a negligent attorney should receive full credit in contract or *quantum meruit* when the attorney's negligence has caused the clients to retain replacement counsel and incur a *second* contingent fee. Mr. and Mrs. Shoemake were therefore also correct when they concluded that the lower court decision "rewards" Ferrer's malpractice and breaches of fiduciary duty, by allowing him credit for a fee *higher* than he could have recovered if he had been discharged *without* cause. See, App. Op. Br., pp. 17-18.

**H. WASHINGTON SHOULD NOT CREDIT AN ATTORNEY'S UNPAID FEES AGAINST THE CLIENT'S LEGAL MALPRACTICE DAMAGES.**

Mr. and Mrs. Shoemake, and Mr. Ferrer, *agree* that Washington has not decided this issue. CP 223; App. Op. Br., pp. 21-22. Mr. and Mrs. Shoemake further agree that resolution of this issue requires a fundamental policy choice concerning whether attorneys who commit legal malpractice should nevertheless receive credit against the legal malpractice damage award of their clients for the contingent fee they would otherwise have earned. App. Op. Br., pp. 20-26.

Ferrer relies heavily [Resp. Br., pp. 15-18] on *Horn v. Wooster*, 165 P.3d 69 (Wyo. 2007),<sup>9</sup> which adopted the minority rule that *allows* attorneys such a credit. More recent authority has already rejected *Horn*. *Akin, Gump, Strauss, Hauer & Feld, LLP v. National Development and Research Corp.*, \_\_S.W.3d \_\_\_, 2007 WL 2430020 \*\*10-12 (Tex. App. 8/29/07). Moreover, as the dissent in *Horn* explains (165 P.3d at 83)

In the final analysis, it does not appear that any court currently applies the rule adopted by the majority. I find the modern view regarding deductibility appropriate and the reasoning supporting that view persuasive. We should adopt the general rule that the contingent fee should not be deducted. However, in those cases where it would be inequitable to disallow the deduction, as exemplified by *Moore*, a *quantum meruit* approach would be more appropriate.

It is, however, not “inequitable” to deny Ferrer a fee under these circumstances, considering that equity will not rescue Ferrer. See discussion, *supra*, p. 11.

This Court should therefore adopt the modern and majority rule, and hold that an attorney who commits malpractice may *not* receive credit for a hypothetical contingent fee. The lower court thus erred, as a matter

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<sup>9</sup> Mr. and Mrs. Shoemake brought *Horn* to the attention of Respondent and the Court, very shortly after it was issued. See, Mr. and Mrs. Shoemake’s Statement of Additional Authority. *Horn* premised its analysis on Wyoming law, which holds that “damages recoverable for legal malpractice are those typically available for breach of contract.” *Horn, supra*, 165 P.3d at 73.

of law, when it determined the amount of Mr. and Mrs. Shoemake's damages.

**I. WASHINGTON DOES NOT EXCLUDE TIME INCURRED ON "UNSUCCESSFUL THEORIES" FROM THE LODESTAR CALCULATION.**

The lower court excluded part of the time incurred by Mr. and Mrs. Shoemake's counsel from the lodestar calculation for "unsuccessful damage theories and claims." CP 370 ¶¶1.6, 2.2. Mr. and Mrs. Shoemake won both of their causes of action for legal malpractice and breach of fiduciary duty; thus, they alleged *no* "unsuccessful claims." See, App. Op. Br., p. 36. In such situations, Washington courts do *not* reduce the lodestar calculation "simply because the...court did not adopt each contention raised," but instead focus on whether the plaintiff has won "substantial relief" on a "common core of facts and related legal theories." *Martinez v. City of Tacoma*, 81 Wn. App. 228, 242-43, 914 P.2d 86 (1996). Accord, *Pham v. City of Seattle*, 159 Wn.2d 527, 538, 151 P.3d 976 (2007). See further, App. Op. Br., pp. 35-37.

Ferrer nevertheless maintains, and the lower court agreed, that Washington courts *must* evaluate each motion to determine whether to reduce the lodestar calculation for "unsuccessful **theories**." Resp. Br., p. 30 (emphasis added). This Court should reject the lower court's change to the lodestar calculation for three reasons.

First, Ferrer’s “unsuccessful theories” argument conflicts with and detracts from the holdings of *Martinez* and *Pham* that courts should *not* reduce the lodestar for “unsuccessful claims” unless those claims involve “distinctly different claims for relief that are based on different facts and legal theories.” *Martinez, supra*, 81 Wn. App. at 242, quoting *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed.2d 40 (1983). Changing the lodestar calculation so that lower courts *must* (as Ferrer’s analysis would require) parse each and every motion to determine which “theories” the prevailing party lost, as opposed to merely which “distinct claims” they lost, adds an additional, unnecessary layer of complexity and contentiousness to the fee determination.

Second, Ferrer justifies the lower court exclusion based on his erroneous contentions that “[d]efendant’s liability for his negligence was obvious, and was **never contested** in this case,”<sup>10</sup> “the real driving force in the case was the plaintiffs’ damages theory, which the [lower] court rejected in its Order on summary judgment,”<sup>11</sup> and the “[t]he liability theories which plaintiffs now claim were the major point of their motion for summary judgment were foregone conclusions from the beginning.

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<sup>10</sup> Resp. Br., p. 1.

<sup>11</sup> Resp. Br., p. 30.

Defendant admitted liability for legal malpractice...”<sup>12</sup> The record directly contradicts Ferrer.

Ferrer *expressly denied* liability in the trial court *until after* the Shoemakes filed their motion for summary judgment. App. Op. Br., p. 9. Prior to filing that motion, the Shoemakes had notified Ferrer’s counsel, on November 22, 2006, of their intention to file such a motion, but Ferrer waited *until* the Shoemakes’ actually filed the motion in January--only then did he disclose his *intention* to, at long last, admit liability on the legal malpractice cause of action (only) for the first time. CP 346 ¶5; CP 12 ¶17. Ferrer thus forced Mr. and Mrs. Shoemake to take Ferrer’s deposition precisely because Ferrer continued to deny liability. CP 346 ¶4. As a result, “the vast majority of our time, certainly much more than ‘65%’ incurred in preparing the motion for summary judgment, arose out of defendant’s failure to concede liability.” *Id.* Furthermore, *if* Ferrer’s negligence “was obvious” and “never contested,” “from the beginning,” as he *now* claims, then *Ferrer’s* original Answer [CP 7-8] violated CR 11. In short, Ferrer himself caused the Shoemakes to incur the attorney time necessary to prepare a detailed motion for summary judgment on liability and should not escape responsibility to compensate their counsel for that amount of time.

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<sup>12</sup> Resp. Br., p. 31.

Third, the Division III opinion in *Zink v. City of Mesa*, 137 Wn. App. 271, 277, 152 P.3d 1044 (2007) represents the sole authority cited by Ferrer [Resp. Br., pp. 29, 30] for excluding time from the lodestar calculation based on “unsuccessful **theories** or claims.” There were, however, *no* “unsuccessful theories” in *Zink*. Instead, the plaintiffs in *Zink* had also “filed a separate public records suit against the City,” which subsequently resulted in a “combined hearing.” *Id.*, 137 Wn. App. at 274. The Court in *Zink* “reduced the amount to \$30,000 after insuring no hours were billed *for the public records case* and that no duplicate billings were submitted in the LUPA/OPMA case.” *Id.*, at 274-75 (emphasis added). In short, the unsuccessful “theories” in *Zink* consisted of a *separate lawsuit involving a distinct cause of action*. A distinct cause of action *does* represent a proper basis for excluding time from the lodestar, while an unsuccessful “theory” does not. *Martinez, supra*, 81 Wn. App. at 242. *Zink’s* reference to “unsuccessful theories” is thus meaningless and, at most, unsupported *dicta*. Furthermore, the only case *Zink* cites for this proposition, *Progressive Animal Welfare Soc’y v. Univ. of Washington*, 54 Wn. App. 180, 187, 773 P.2d 114 (1989), contains *no* reference to “unsuccessful theories” and instead reduced the lodestar because the plaintiff “refused to negotiate prior to resorting to litigation.” *Id.* (In contrast here, *Ferrer* made *no* effort to negotiate a settlement during the

time period between May, 2006 and January 12, 2007, and *Ferrer* made no settlement offers whatsoever. CP 347 ¶6).

This Court should reject the lower court's "unsuccessful theories" standard because it represents a substantial change in the lodestar methodology away from the more appropriate focus on whether the plaintiff obtained substantial relief on a common core of facts and related legal theories.

**J. TRIAL COURTS PROPERLY CONSIDER COLLECTIBILITY WHEN DECIDING WHETHER TO APPROVE A LODESTAR MULTIPLIER.**

The Court should reject Ferrer's analysis concerning award of a multiplier for two reasons. First, Mr. and Mrs. Shoemake's entitlement to recover attorney fees arose out of *this lawsuit* initiated against Mr. Ferrer to remedy Mr. Ferrer's breach of fiduciary duty. Their entitlement to recover attorney fees did *not* arise out of their claim against State Farm. The lower court denied Mr. and Mrs. Shoemake's request for a multiplier based on its conclusion that Mr. and Mrs. Shoemake did not encounter *any* risk because of their recovery *from* State Farm. However, the Shoemakes commenced this lawsuit on January 6, 2006, to remedy Ferrer's legal malpractice and breaches of fiduciary duty. CP 1. State Farm paid its UIM policy limits on April 28, 2006. See, App. Op. Br., p. 8. Ferrer *thereafter* denied Mr. and Mrs. Shoemake's allegations of legal

malpractice and breach of fiduciary duty in his Answer dated May 18, 2006. CP 8. Despite their earlier recovery against State Farm, Mr. and Mrs. Shoemake continued with this legal malpractice and breach of fiduciary duty lawsuit *despite the risk of no recovery against Ferrer*. Because Mr. and Mrs. Shoemake's entitlement to attorney fees arises out of their breach of fiduciary duty cause of action against Ferrer and *not* State Farm, the lower court should have focused on Mr. and Mrs. Shoemake's risk of recovery *in this litigation*, rather than the risk associated with their claim against State Farm.

Second, when deciding whether to award a lodestar multiplier, the courts properly consider the risk of "whether a judgment, once obtained, may be satisfied." *Morgan v. Kingen*, \_\_ Wn. App. \_\_, \_\_P.3d \_\_, 2007 WL 2909649 ¶67 (Div. I, 10/8/07). Accord, *Pham, supra*, 159 Wn.2d at 550 ("Fee enhancements are based on the notion that 'attorney[s] who take[] such [] case[s] on a contingent fee basis assume[] a substantial **risk that a fee will never materialize.**'")(emphasis added). Here, Ferrer himself conceded that Mr. and Mrs. Shoemake face the risk of "whether Defendant [*i.e.*, Ferrer] can pay [the] judgment...[because] Defendant is not covered by insurance for this claim." CP 370.

The lower court did not recognize the issue of collectibility against Ferrer, because it focused instead on the Shoemakes' recovery against

State Farm. See, App. Op. Br., pp. 39-40. The lower court erred a second time because it failed to recognize the issue of collectibility as against Ferrer, independent of any recovery against State Farm. The lower court thus abused its discretion when it denied Mr. and Mrs. Shoemake a multiplier, because it relied upon erroneous legal standards.

**III. REJOINDER TO FERRER'S STATEMENT OF THE ISSUE PRESENTED BY HIS CROSS-APPEAL**

Ferrer defines the issue presented by his cross-appeal as “[d]oes a finding of a breach of fiduciary duty in an attorney malpractice action *entitle* plaintiff to an award of attorney fees? Resp. Br., p. 39 §VII (emphasis added). Ferrer’s cross-appeal actually poses a very different issue: *May* Washington courts, in their discretion, award a client reasonable attorney fees to remedy for a bad faith breach of fiduciary duty by the client’s attorney? Ferrer thus appeals whether the lower court had discretion to make such an award, *not* whether the lower court properly exercised that discretion. See, App. Op. Br., pp. 32-33. Mr. and Mrs. Shoemake do *not* contend that an attorney’s breach of fiduciary duty automatically “entitles” the client to recover attorney fees, and the lower court did not so hold.

**Issue Pertaining to Assignment of Error on Cross-Review:**

1. If the lower court did not have discretion to award attorney fees to Mr. and Mrs. Shoemake in equity, as a remedy Ferrer's breaches of fiduciary duty, should this Court nevertheless affirm the fee award based upon the attorney fee clause in Ferrer's retainer agreement and RCW 4.84.330?

**IV. ARGUMENT IN RESPONSE TO CROSS-APPEAL**

**A. WASHINGTON COURTS HAVE INHERENT AUTHORITY TO AWARD REASONABLE ATTORNEY FEES TO CLIENTS AS A REMEDY FOR THEIR ATTORNEYS' BREACH OF FIDUCIARY DUTY.**

Mr. and Mrs. Shoemake's Opening Brief explained the basis for the lower court's *discretion* to award reasonable attorney fees as a remedy for Ferrer's breach of fiduciary duty [App. Op. Br., pp. 32-33], because the existence of that inherent discretion provides the foundation for the three attorney fee issues raised by the Shoemakes' appeal. *Id.*, pp. 34-41. Mr. and Mrs. Shoemake do *not* (and did not) contend that Ferrer's breach of fiduciary duty "entitle[s]" or "mandate[s]" an award of fees to the Shoemakes. Ferrer thus misstates the issue presented by his cross-appeal. Resp. Br., p. 39. This distinction, between whether a court *may* (in its discretion) award attorney fees, as compared to whether a court *must* award attorney fees, renders Ferrer's primary authorities inapposite.

*Perez v. Pappas*, 98 Wn.2d 835, 844-45, 659 P.2d 475 (1983) rejected the client's "assert[ion] that a defendant is **always liable** for attorney fees when a lawsuit results from the defendant's breach of fiduciary duties." (Emphasis added). *Kelly v. Foster*, *supra*, 62 Wn. App. at 153, similarly held that "[w]e reject Kelly's contention that *Allard* **mandates** an award of attorney's fees in this case." (Emphasis added).

Concerning the lower court's discretion to award fees, Mr. and Mrs. Shoemaker *agree* with Ferrer that Washington recognizes at least four equitable bases upon which a litigant may recover attorney fees from their opponent, including "[B]ad faith conduct of the losing party, preservation of a common fund, protection of constitutional principles, and private attorney general actions." Resp. Br., p. 41, quoting *Dempere v. Nelson*, 76 Wn. App. 403, 407, 886 P.2d 219 (1994) and *Miotke v. Spokane*, 101 Wn.2d 307, 338, 678 P.2d 803 (1984).

Relying heavily upon *Dempere* [Resp. Br., pp. 40-41, 42], Ferrer nevertheless maintains that "[n]one of the recognized equitable grounds supporting an award of fees encompasses breach of fiduciary duty or legal negligence." *Id.*, p. 41. Indeed, *Dempere*, describes attorney fees awarded on the basis of bad faith as "a sort of 'urban legend,'" and held that "[b]ad faith in the underlying tortious conduct is not a recognized equitable ground for awards of attorney fees in Washington." Subsequent to

*Dempere*, however, the Washington Supreme Court, this Court, and Division 2 have each recognized that equity does indeed authorize an award of attorney fees on the basis of bad faith. *E.g.*, *In re: Pearsall-Stipek*, 136 Wn.2d 255, 266-67 and n. 6, 961 P.2d 343 (1998) (“our inherent equitable powers authorize the award of attorney fees in cases of bad faith”), *as amended*, 141 Wn.2d 756, 783, 10 P.3d 1034 (2000); *Blueberry Place Homeowners Ass’n. v. Northward Homes, Inc.*, 126 Wn. App. 352, 362 n. 9, 110 P.3d 1145 (2005); *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 927-29 and n. 2, 982 P.2d 131 (1999) (recognizing that *Pearsall-Stipek* rejected *Dempere’s* analysis). See further, *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 37, 904 P.2d 731 (1995) (insured recovers attorney fees for insurer’s bad faith, in part because the “insurer acts in contravention to its enhanced fiduciary obligations”).

In this equitable context, bad faith includes “‘actual or *constructive fraud*’ or a ‘neglect or refusal to fulfill some duty...not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive.’” *In re: Estate of Mumby*, 97 Wn. App. 385, 394, 982 P.2d 1219 (1999) (emphasis added), *cited with approval*, *In re: Impoundment of Chevrolet Truck*, 148 Wn.2d 145, 160 n. 13, 60 P.3d 53 (2002) (“bad faith, as such refers to conduct involving ill will, fraud, or

frivolousness”). Accord, *Pearsall-Stipek, supra*, 141 Wn.2d at 783. It is no coincidence that an attorney’s breach of fiduciary duty is also characterized as a “constructive fraud.” See discussion, *supra*, p. 11, n. 6, citing, 1 *Restatement (Third) of the Law Governing Lawyers*, §49, cmt. a, p. 348; and *The Fiduciary Duty of Care—A Perversion of Words, supra*, at 192. *Green v. McAllister*, 103 Wn. App. 452, 467-68, 14 P.3d 795 (2000) thus defines “constructive fraud” as follows:

Constructive Fraud. Conduct that is not actually fraudulent but has all the actual consequences and legal effects of actual fraud is constructive fraud. Breach of a legal or equitable duty, *irrespective or moral guilt*, is “fraudulent because of its tendency to deceive others or violate confidence.” [Emphasis in original].

Accord, *Thompson v. Huston, supra*, 17 Wn.2d at 461 (“Untrue statements amount to constructive fraud, even though made in good faith”); *Li v. Tang*, 87 Wn.2d 796, 799-801, 557 P.2d 342 (1976) (court has the inherent power to award fees when the fiduciary’s breach is “tantamount to constructive fraud”). See further, App. Op. Br., pp. 29-30 (an attorney breaches the attorney’s fiduciary duties by lying to the client).

The lower court awarded attorney fees to Mr. and Mrs. Shoemake because Ferrer “repeatedly lied” to Mr. and Mrs. Shoemake and was guilty of “deceit, misrepresentation, and breach of fiduciary duty.” CP 270-71. Ferrer’s lying or “dissembling” (by whatever name), constitutes “constructive fraud,” as a matter of Washington law. Constructive fraud

constitutes bad faith, and bad faith through constructive fraud *allows* the courts to award reasonable attorney fees based on their inherent authority.

The lower court thus had the discretionary authority to award reasonable attorney fees to Mr. and Mrs. Shoemake as a remedy for Mr. Ferrer's "deceit, misrepresentation, and breach of fiduciary duty." CP 271. This Court should affirm the lower court on this issue and deny Ferrer's cross-appeal.

**B. THE COURT SHOULD AWARD MR. AND MRS. SHOEMAKE REASONABLE ATTORNEY FEES FOR DEFENDING FERRER'S CROSS-APPEAL PURSUANT TO RAP 18.1.**

RAP 18.1 requires a party seeking fees to devote a separate section of its brief to the fee request. The lower court, in its discretion, awarded Mr. and Mrs. Shoemake reasonable attorney fees for Ferrer's "deceit, misrepresentation, and breach of fiduciary duty." CP 271. Ferrer appealed the lower court's authority to make such an award. The lower court properly awarded Mr. and Mrs. Shoemake their reasonable attorney fees, as discussed above. This Court should therefore also award Mr. and Mrs. Shoemake their reasonable attorney fees for defending Ferrer's cross-appeal on this identical issue. See, App. Op. Br., pp. 32-33, 40-41. This conclusion is consistent with the principle that each case is considered "as an inclusive whole, rather than as atomized line-items," and a litigant who

is entitled to recover attorney fees should also recover attorney fees for the time reasonably incurred to recover those fees (*i.e.*, “fee-on-fees”). *E.g.*, *Commissioner of INS v. Jean*, 496 U.S. 154, 161-63, 110 S. Ct. 2316, 110 L. Ed. 2d 134 (1990) (“[D]enying attorneys’ fees for time spent in obtaining them would ‘dilute the value of a fees award by forcing attorneys into extensive, uncompensated litigation in order to gain any fees.’” *Quoting, Sullivan v. Hudson*, 490 U.S. 877, 888, 109 S. Ct. 2248, 104 L. Ed.2d 941 (1989)). In short, if the Court rejects Ferrer’s cross-appeal; the Court should also award Mr. and Mrs. Shoemake fees so that it does *not* “dilute” the lower court fee award.

**C. THE COURT MAY ALSO AFFIRM THE LOWER COURT ATTORNEY FEE AWARD PURSUANT TO RCW 4.84.330.**

Mr. Ferrer’s fee agreement with Mr. and Mrs. Shoemake contains a contractual attorney fee clause. CP 17 ¶12. Ferrer thus errs when he asserts that “there is no contract or statute authorizing an award of attorney fees in litigation between the parties.” Resp. Br., p. 40. RCW 4.84.330 entitles the prevailing party to recover attorney fees in an action that arises out a written contract which allows for one side to recover attorney fees. *Herzog Aluminum, Inc. v. General American Window Corp.*, 39 Wn. App. 188, 194-196, 692 P.2d 867 (1984). Accord, *Labriola v. Pollard Group*,

*Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004) (applying RCW 4.84.330); *Yuan v. Chow*, 96 Wn. App. 909, 918, 982 P.2d 647 (1999).

Mr. and Mrs. Shoemake properly raise this argument for the first time in answer to Ferrer's cross-appeal, as an alternative "ground for affirming a trial court decision [appealed by Ferrer] which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground." RAP 2.5(a). The issue has been sufficiently developed for presentation here because the applicability of RCW 4.84.330 represents an issue of law, which this Court would review *de novo* in any event. *E.g.*, *QFC v. Mary Jewell T, LLC*, 134 Wn. App. 814, 817, 142 P.3d 206 (2006). Furthermore, Ferrer himself introduced his fee agreement into evidence in the lower court. CP 9-18. The lower court already awarded attorney fees on an independent ground, and the issues concerning the appropriate amount of fees are also before this Court on appeal. Thus, consideration of this alternative basis on which to affirm the lower court would not require remand for introduction of additional evidence.

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~~*Hemenway v. Miller*, 116 Wn.2d 725, 743, 807 P.2d 863 (1991)~~  
held that a claim is "on a contract," within the meaning of RCW 4.84.330 if "the voluntary actions of the original makers of the note created the central issue of the legal effect of their actions,..." See, *Burns v.*

*McClinton*, 135 Wn. App. 285, 310-311, 143 P.3d 630 (2006). In this particular case, Mr. and Mrs. Shoemake did *not* assert claims “on a contract” against Ferrer in their original complaint. Thereafter, however, *Ferrer* voluntarily created the central issue concerning the legal effect of his fee contract when he asserted his right to reduce Mr. and Mrs. Shoemake’s damage claim based on his 40% contingent fee agreement. Ferrer thus chose to make his contingent fee contract “central” to the dispute between the parties, within the meaning of *Hemenway* and RCW 4.84.330.

Accordingly, if the Court disagrees with the lower court’s rationale for awarding reasonable attorney fees to Mr. and Mrs. Shoemake, the Court should nevertheless affirm the lower court on this alternative ground.

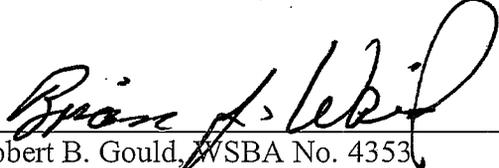
### CONCLUSION

Attorneys who breach their duty of loyalty to their clients should not get paid, and Washington courts may indeed impose attorney fees against fiduciaries who lie and deceive the beneficiaries of their trust. Mr. and Mrs. Keith Shoemake therefore request that the Court reverse the lower court’s damage calculation and direct that judgment be entered in their favor in the principal amount of \$117,591.31, plus interest, costs and reasonable attorney fees (including attorney fees on this appeal pursuant to

RAP 18.1). CP 320 ¶3, 323. Mr. and Mrs. Shoemake further request that the Court reverse the lower court's reduction of their attorney fee award for "unsuccessful claims" and the lower court's denial of their request for a 1.5 contingent risk multiplier. Finally, Mr. and Mrs. Shoemake request that the Court reject Ferrer's cross-appeal in all respects and award them their reasonable attorney fees for having defended against Ferrer's cross-appeal.

DATED this 18 day of October, 2007.

By: \_\_\_\_\_

  
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**DECLARATION OF SERVICE**

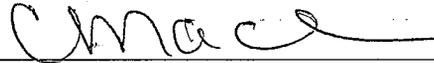
On October 18, 2007, I caused to be delivered via legal messenger a true and accurate copy of the attached document, to the following:

John Rankin, Esq.  
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and Jane Doe Ferrer*

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The original of this document was also sent via legal messenger to be filed in the Court of Appeals.

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



Charolette F. Mace, Paralegal  
LAW OFFICES OF ROBERT B. GOULD