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SUPREME COURT
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No. 88846-9
Consolidated with No. 88123-4

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SUPREME COURT
OF THE STATE OF WASHINGTON

BRIAN FAIR and SHIRLEY FAIR and the marital community composed
thereof,

Appellants,

v.

POWERS & THERRIEN, P.S., LESLIE ALAN POWERS and
PATRICIA POWERS, husband and wife, and KEITH THERRIEN and
MARSHA THERRIEN, husband and wife,

Respondents.

BRIEF OF RESPONDENTS-CROSS APPELLANTS LES POWERS,
PATRICIA POWERS, KEITH THERRIEN, AND MARSHA THERRIEN

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ORIGINAL

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A. INTRODUCTION

Appellant Brian Fair caused litigation to be commenced against himself and TCG by diverting business away from TCG and attempting to increase his own profit from TCG to the detriment of an investor, LK Operating, LLC (“LKO”). When LKO sued to establish its contractual 50% ownership in TCG, Fair defended the action by arguing that LKO’s contractual rights should be rescinded because LKO was managed by P&T Enterprises, an entity owned by Fair’s attorneys, Les Powers and Keith Therrien (“Powers”).¹ Fair was successful, and the defense resulted in approximately a \$700,000 windfall to Fair personally, as he became 100% owner of TCG.

In a malpractice action against Powers, Therrien, and Powers & Therrien, P.S., Fair and TCG sought to recover the attorney fees TCG incurred to achieve Fair’s windfall in the action against LKO under a theory of equitable indemnification. The trial court ruled as a matter of law that Fair and TCG could not meet their burden of demonstrating any equitable right to recover those fees.

¹ There has never been any evidence or argument that Keith Therrien ever committed malpractice or had any personal involvement in the events in question. He should have been separately dismissed from the malpractice action below, but was not because the trial court’s summary judgment dismissal rendered the issue moot. Therrien respectfully notes that he has had clean hands throughout this litigation and has done nothing to warrant the negative impact this action has had on his reputation.

On appeal, Fair and TCG challenge the trial court's ruling dismissing their equitable claim to attorney fees. A party without clean hands or who directly caused litigation against him to commence, cannot claim a right to attorney fees as damages under a theory of equitable indemnification. The litigation in question resulted in a windfall to Fair, the purported "client" against whom the alleged ethical violations were committed. The trial court ruled correctly in dismissing the malpractice claim.

The arguments in support of the claim of malpractice against Powers were that, with respect to LKO's investment in TCG, he violated either RPC 1.7 prohibiting a lawyer from representing two clients in the same matter, or RPC 1.8 prohibiting lawyers from engaging in business transactions with clients.

On cross-appeal, Powers challenges the finding of the trial court as a matter of law that Powers violated RPC 1.7, and findings of the Court of Appeals that, as a matter of law, Powers violated RPC 1.7 *and* RPC 1.8 with respect to the LKO-TCG investment.

B. ASSIGNMENTS OF ERROR ON CROSS-APPEAL

1. The trial court erred in concluding that as a matter of law, Powers violated RPC 1.7 in its partial summary judgment order dated March 31, 2009.

2. The trial court erred when it stated as a matter of “undisputed” fact that there was any contractual “agreement” between Powers and Fair in its memorandum ruling dated June 27, 2011.

3. The Court of Appeals erred in concluding that Powers violated RPC 1.7 and RPC 1.8(a) in its amended opinion dated October 11, 2012.²

C. ISSUES PRESENTED

(1) Restatement of Issues on Appeal

1. May a party recover attorney fees incurred in a separate action as damages under a theory of equitable indemnity when that party caused that separate action to be initiated?

2. May a party recover attorney fees incurred in a separate action as damages under a theory of equitable indemnity without meeting the legal test to qualify for equitable relief?

² This case is in an unusual procedure posture. It was initially brought by LKO as an action for declaratory relief as to its investment in TCG and as a breach of fiduciary duty against Fair for diverting its ownership interest and looting TCG. Fair/TCG defended on the basis of RPC 1.8. Fair then filed a separate malpractice action against Powers, Therrien, and Powers & Therrien, P.S. based on a putative violation of RPC 1.8. The actions were consolidated on motion by LKO. The court then bifurcated the malpractice action from the declaratory judgment action on motion by Fair. This Court has now reconsolidated the actions. Given that the appellants here have relied upon the Court of Appeals’ RPC 1.8 finding extensively in their brief, and given that the Court of Appeals was the first judicial body to find Powers in violation of RPC 1.8(a), Powers has little choice but to assign error to the Court of Appeals’ ruling. The trial court did not find a violation of RPC 1.8(a) on summary judgment and did not so find at the bench trial between TCG and LKO, review of which was initially accepted by this Court on LKO’s and Powers’ et. al. petition for review. Powers et. al. did not participate as parties or witnesses in the bench trial of the case between TCG and LKO.

3. May a party seek equitable relief when that party does not have clean hands with respect to the precise matter for which he seeks that relief?

(2) Issues Relating to Assignments of Error on Cross-Appeal

1. Does an attorney violate RPC 1.7 prohibiting representation of two clients in the same transaction when the attorney does not undertake to give legal advice, draft documents, or any other action that constitutes legal representation? (Assignment of Error 1)

2. Does an attorney violate RPC 1.8(a) prohibiting business transactions between lawyers and clients when he does not, in fact, do business with that client, but instead passes along a business opportunity to a separate LLC which was managed by a corporation of which he was an officer and shareholder, but does not own, profit from, or otherwise financially benefit? (Assignment of Error 2, 3)

D. STATEMENT OF THE CASE³

Respondents Les Powers and Keith Therrien are attorneys that work for, and are principals in, the law firm of Powers & Therrien, P.S. In January 2004, Brian Fair contacted Diane Sires, a legal assistant with

³ Some of the facts recited herein are part of the record in the contract appeal, which this Court is reviewing in conjunction with this appeal. References to those clerk's papers are designated here as "CP1." References to the clerk's papers in this appeal are designated here as "CP2." Key documents are also included in the Appendix.

Powers & Therrien, P.S., and asked her to assist him in incorporating a Nevada corporation. Appendix A at 5.⁴ Sires did so. *Id.*

In May 2004, Fair organized a different entity, The Collection Group LLC, (hereinafter “TCG”) to operate a debt collection business. *Id.* at 4. Neither Powers nor Powers & Therrien, P.S, represented Fair in incorporating TCG. *Id.* at 6. In October 2004, Fair contacted Powers – acting as an agent for TCG and not in his personal capacity – and solicited Powers and Therrien to invest in a debt portfolio. Appendix B at 4.⁵ Fair proposed that he would provide administrative services and cash and that Powers and Therrien would provide limited legal services and cash. *Id.*

Neither Powers & Therrien P.S., nor the individual attorneys invested in TCG. *Id.* Powers passed along the investment opportunity to LKO, a company beneficially owned by their adult children. Appendix A at 3, 9-10.⁶ Powers was an officer of the manager of LKO, Powers & Therrien Enterprises, Inc. LKO accepted the offer without negotiation or alteration, and neither party asked for or signed any written agreement. As Fair requested, LKO contributed \$52,000 and third party legal collection

⁴ Appendix A can be found at CP2 31-45.

⁵ Appendix B may be found at CP2 932-37.

⁶ An entity owned by Powers and Therrien, Powers & Therrien Enterprises, Inc., manages the business of LKO, but neither that corporation nor the individual lawyers have any ownership or other pecuniary interest in the LLC. Appendix A at 5.

services to TCG in exchange for a 50% membership in TCG. *Id.* at 7. Fair was the principal of TCG, and entered into the contract on TCG's behalf. *Id.* at 4. Fair was the manager of TCG. Fair and his wife invested \$27,000 in TCG. *Id.* at 5.

After TCG had become a valuable asset, in April 2007, Fair sent a letter requesting to change the parties' ownership interests in TCG. Fair suggested that LKO's ownership be reduced from 50% to 37% and Fair's share be increased. *Id.* at 7. Fair had recently begun diverting TCG assets to another debt collection entity he wholly owned. CP2 684. On tax forms, Fair was declaring himself and his wife as 100% owners of TCG, allowing them to claim 100% of any losses against their tax obligations. CP2 63, 656.

LKO objected to Fair's reduction of its contractual ownership interest and the diversion of TCG assets to another entity owned exclusively by Fair. Through independent counsel, not Powers, Therrien, or Powers & Therrien, P.S., LKO filed a lawsuit against Fair in Chelan County Superior Court for declaratory judgment, breach of contract, and breach of fiduciary duty. TCG was a nominal party because it was a subject of the dispute, but none of LKO's claims alleged that TCG had committed wrongdoing. Fair and TCG sued Powers and Therrien personally for alleged malpractice connected to LKO's investment in

TCG. *LK Operating, LLC v. Collection Grp., LLC*, 168 Wn. App. 862, 870, 279 P.3d 448, 452 (2012) *amended on reconsideration*, 287 P.3d 628 (2012), *review granted*, 176 Wn.2d 1027, 301 P.3d 1048 (2013).⁷

In a partial summary judgment letter ruling, the trial court concluded that Powers had represented both Fair and LKO in the LKO-TCG contract, and, therefore, had a conflict of interest under RPC 1.7. Appendix A at 13.⁸ Because it appeared the contract at issue was *not* between Powers and a client, but between LKO and TCG, the trial court reserved ruling on the issue of whether Powers violated RPC 1.8(a). *Id.*

The malpractice claims were bifurcated from the action for Fair's breach of contract/fiduciary duty. Appendix B at 3. Ultimately in the action against Fair, the trial court ruled that even though LKO and not Powers was the contracting party with TCG, Fair was entitled to rescission of the LKO-TCG contract, based on the claim that Powers "represented" both LKO and Fair in forming the contract. *LK Operating*, 168 Wn. App. at 870. Thus, the trial court rested its rescission ruling on its summary judgment conclusion about the RPC 1.7 violation. The trial court did *not*

⁷ The Court of Appeals' decision in the related action is included at Appendix C.

⁸ Therrien was not found to have committed any RPC violations. Appendix A at 8.

find that Powers violated RPC 1.8(a) by engaging in a business transaction with a client. *Id.*

LKO appealed the judgment in the breach of contract/fiduciary duty action against Fair to Division III of the Washington Court of Appeals, arguing that RPC 1.7 had not been violated, and that even if it had, rescission was an inappropriate remedy to impose against LKO, an innocent party. *Id.* In its response to that appeal, TCG argued that even if there was no RPC 1.7 violation, that court could uphold the trial court's rescission ruling on the alternate grounds that Powers violated RPC 1.8(a), arguing that Powers himself had entered into a business transaction with a client. *Id.* at 877.

When TCG revived the RPC 1.8(a) argument in the contract appeal – which the trial court never ruled upon – Powers and Therrien intervened in that appeal. *Id.* Powers, as the accused attorney, defended himself against the possibility that the Court of Appeals would conclude, for the first time in this litigation, that he had violated RPC 1.8(a).

The Court of Appeals in the contract action concluded that Powers had violated *both* RPC 1.7 *and* RPC 1.8 with respect to the LKO-TCG contract formation. *Id.* at 876, 881. Both LKO and Powers petitioned this Court for review of that decision, and review was granted. *LK Operating v. The Collection Grp., LLC*, 176 Wn.2d 1027, 301 P.3d 1048 (2013).

While the appeal was proceeding in the contract action, the malpractice action was litigated separately. Appendix B at 3. The only damages Fair could conceivably claim in the malpractice action were fees incurred in the contract action between TCG and LKO. *Id.* at 5. The only theory under which Fair claimed a right to fees was the theory of equitable indemnity. *Id.* Powers moved for summary judgment in that matter, arguing that the undisputed facts demonstrated Fair and TCG had no equitable claim to the attorney fees as a matter of law. *Id.* at 3. Powers also argued that the windfall Fair received by gaining 100% ownership of TCG based on claims of ethical violations by Powers was a net gain. *Id.*

The trial court concluded that Fair could not prove entitlement to attorney fees from the contract action under a theory of equitable indemnity as a matter of law. *Id.* at 6. Citing *Tradewell Grp., Inc. v. Mavis*, 71 Wn. App. 120, 857 P.2d 1053 (1993), the court found that *regardless* of any alleged malpractice committed,⁹ the undisputed facts showed that Fair's own actions were at least partly responsible for the resulting litigation between TCG and LKO. *Id.* at 4, 6. The court found "while it was not wrongful for Mr. Fair to attempt to renegotiate the

⁹ The court noted that Powers and Therrien "vehemently" denied having committed malpractice, and made no ruling on that issue because of the lack of a legal foundation for the claim of damages. Appendix B at 5. The issue of whether any RPC was violated, giving rise to a malpractice claim, is addressed in the cross-appeal arguments, *infra*.

agreement he previously entered into with Powers,¹⁰ it definitely contributed to the filing of the declaratory judgment action.” The court also found that TCG paid all of the attorney fees in the LKO action, in which Fair disputed LKO’s ownership rights with him. The court entered summary judgment in favor of Powers. Appendix B at 6. Fair and TCG appealed. Powers cross-appealed challenging the trial court’s 2009 ruling that he had violated RPC 1.7 as a matter of law.¹¹ This Court accepted the parties’ joint request for transfer of the malpractice appeal to this Court, and consolidation of the malpractice appeal with the contract appeal.

E. SUMMARY OF ARGUMENT

Summary judgment on a tort claim is proper when the plaintiff has demonstrated neither causation nor damages. Under the ABC rule, as well as the rules that circumscribe all claims to equitable damages and tort claims, Fair and TCG cannot recover attorney fees for the alleged malpractice as a matter of law. Fair and TCG seek attorney fees incurred in the LKO action. However, Fair caused that litigation to commence, and

¹⁰ The trial court’s statement that the agreement was with Powers is contradicted by its own findings that LKO, not Powers, was the contracting party. Appendix D at 8 (“Les Powers violated RPC 1.7 by not obtaining the informed consent of *LKO and Brian Fair* to represent *each of the contracting parties* with regard to the transaction”).

¹¹ The trial court’s finding of an RPC violation was not germane to its summary judgment ruling on damages. Appendix B at 5. Given that the contract and malpractice actions were bifurcated at trial *after* the RPC 1.7 ruling was entered, and that the issue was on appeal in the contract action, the cross-appeal in the malpractice action was filed primarily to avoid any possibility that issue would be deemed waived.

LKO was connected with the original transaction upon which litigation was based. Also, Fair received a windfall and Fair, not Powers, caused TCG to incur attorney fees to secure that windfall for Fair personally.

On cross appeal, Powers also challenges that he breached any duty to Fair or TCG under RPC 1.7 or 1.8. LKO and TCG entered into a business transaction without ever seeking or receiving any legal advice, counsel, or representation. With respect to the transaction at issue, Powers did not “represent” either party, let alone both parties. And the notion that Powers himself did business with TCG is contradicted by all of the facts and evidence in the record. The Court of Appeals, which found an RPC 1.8 violation for the first time on appeal, erred in conflating separate legal entities with individual officers.

F. ARGUMENT

(1) Standard of Review

The standard of review on summary judgment is de novo. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Brown v. Snohomish County Physicians Corp.*, 120 Wn.2d 747, 752, 845 P.2d 334

(1993) (quoting CR 56(c)). Where there are no disputed material facts, the question is whether judgment is appropriate as a matter of law. *Id.*

However, the trial court's findings based upon undisputed facts are not wholly irrelevant. Here, the issue decided on summary judgment is whether a recognized ground in equity authorized an award of attorney fees. This inquiry, like the summary judgment decision, is a legal question. *Tradewell Grp., Inc. v. Mavis*, 71 Wn. App. 120, 126-27, 857 P.2d 1053, 1056-57 (1993). When equitable grounds are relied on, however, the analysis is more complicated. *Id.* In order to award fees under the theory of equitable indemnification, the evidence must satisfy all three elements of that doctrine. *Id.*

Thus, this Court reviews the trial court's factual findings to determine whether they support the court's legal decision to deny fees because the elements were not met. *American Nursery Prods., Inc. v. Indian Wells Orchards*, 115 Wn.2d 217, 222, 797 P.2d 477 (1990) (appellate court reviews factual findings to see if they support trial court's legal conclusions).

(2) Fair and TCG May Not Avoid the American Rule and Claim an Equitable Right to Attorney Fees Because Their Own Actions Caused Litigation to Commence

The rule in Washington is that absent a contract, statute, or recognized ground of equity, attorney fees will not be awarded as part of

the costs of litigation. *Pennsylvania Life Ins. Co. v. Department of Employment Sec.*, 97 Wn.2d 412, 413, 645 P.2d 693 (1982). One of the recognized equitable grounds under which fees can be awarded as damages rather than costs is the theory of equitable indemnity. Under this theory, the court may award fees where the natural and proximate consequences of a defendant's wrongful act put the plaintiff in litigation with others. *Manning v. Loidhamer*, 13 Wn. App. 766, 769, 538 P.2d 136 (1975). The original suit generating the expenses must be instituted by a third party not connected with the original wrongdoing. *Armstrong Constr. Co. v. Thomson*, 64 Wn.2d 191, 195, 390 P.2d 976 (1964). In general, three elements are necessary to create liability: (1) A wrongful act or omission by A [Powers] toward B [Fair]; (2) such act or omission exposes or involves B in litigation with C [LKO]; and (3) C was not connected with the initial transaction or event, viz., the wrongful act or omission of A toward B. *Tradewell*, 71 Wn. App. at 126. This formulation of the equitable indemnification exception to the American Rule is called the "ABC" rule.¹²

Critical to proper application of the ABC rule is the issue of sole causation. Washington courts have "consistently held that a party may not

¹² Although this Court did not originate the "ABC" formulation of the rule, the Court of Appeals extrapolated it from a long line of this Court's decisions in equitable indemnity attorney fee cases dating back to 1907. *Manning v. Loidhamer*, 13 Wn. App. 766, 769, 538 P.2d 136, 138, rev. denied, 86 Wn.2d 1001 (1975).

recover attorney fees under the theory of equitable indemnity if, in addition to the wrongful act or omission of A, there are other reasons why B became involved in litigation with C.” *Id.* at 128 (citing *Stevens v. Security Pac. Mortg. Corp.*, 53 Wn. App. 507, 768 P.2d 1007, review denied, 112 Wn.2d 1023 (1989) and *Western Community Bank v. Helmer*, 48 Wn. App. 694, 740 P.2d 359 (1987)).

In *Tradewell*, Tradewell grocery store leased space from Wedgwood. *Id.* at 123. Tradewell and Wedgwood negotiated an extension to the lease, which only Tradewell signed. *Id.* When Tradewell met with a prospective purchaser of the grocery store, Craig Mavis, Tradewell falsely represented to Mavis that Wedgwood had signed the lease extension. *Id.* When Wedgwood expressed concerns about Tradewell's prospective buyer, Tradewell agreed Wedgwood could negotiate directly with Mavis. *Id.* Tradewell then told Mavis to make a written offer to purchase the grocery store. *Id.* at 124. Mavis submitted a written offer of \$500,000 and Tradewell accepted. *Id.* When Mavis met with Wedgwood, he told Wedgwood that he had an agreement with Tradewell to purchase the store. *Id.* After Mavis and Wedgwood signed a long-term lease, Mavis reduced his offer to Tradewell to \$250,000. *Id.* Tradewell rejected the reduced offer and the parties never reached agreement. Tradewell sued Mavis and Wedgwood. *Id.*

Tradewell's claims against Mavis included breach of the agreement to purchase the store, promissory estoppel, unjust enrichment, and tortious interference. *Id.* Tradewell's claims against Wedgwood included breach of the lease extension agreement, promissory estoppel, unjust enrichment, and tortious interference. *Id.* at 124-25. At the conclusion of trial, the court dismissed Tradewell's claims and ruled in favor of Mavis and Wedgwood. Wedgwood then sought an award of costs and attorneys' fees against Tradewell and Mavis under the doctrine of equitable indemnity. The trial court ordered Mavis to pay a portion of Wedgwood's fees. The court found that Mavis misrepresented the status of his agreement with Tradewell, which was a proximate cause of Tradewell's decision to sue Wedgwood. The trial court's award did not include the fees and costs Wedgwood incurred in defending against Tradewell's claims for promissory estoppel, tortious interference, and undue influence.

The Court of Appeals reversed the trial court's decision to award Wedgwood the attorneys' fees and costs related to Mavis' misrepresentation based on an equitable indemnity theory, because Mavis's conduct was not the *only* reason that Tradewell sued Wedgwood:

[W]e have consistently held that a party may not recover attorney fees under the theory of equitable indemnity if, in addition to the wrongful act or omission of A, there are

other reasons why B became involved in litigation with C. . . . In our view, the critical inquiry under the causation element of equitable indemnity is whether, apart from A's actions, B's own conduct caused it to be "exposed" or "involved" in litigation with C.

Id. at 128-29.

The Court of Appeals again had opportunity to apply the ABC rule in *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 359, 110 P.3d 1145 (2005), reaching the same result ("As in *Tradewell*, Northward is not entitled to the attorneys' fees and costs it incurred in defending claims related to the defective heating system based on equitable indemnity because the homeowners sued Northward for independent and separate defective construction claims").

Thus, under the theory of equitable indemnity, Fair may only claim an equitable right to attorney fees stemming from the LKO-Fair action if actions by Powers alone caused Fair to become involved in litigation with LKO. *Id.*

Fair disputes this well-established equitable rule, arguing that TCG is entitled to recover the fees TCG expended in the LKO-Fair litigation under the rule. Br. of Appellant at 14. Fair tries to distinguish *Tradewell* by arguing that the "wrongful act" that was the sole cause of the litigation was "the failure of the defendant attorneys to meet the standard of care for transactions involving clients." *Id.* Fair suggests that Powers' failure to

procure a signed agreement between TCG and LKO solely caused the contract litigation. *Id.*

Fair's logic collapses upon examination of the undisputed facts that: (1) Fair initially agreed to a 50/50 ownership arrangement with LKO, and (2) Fair later wanted to increase his own ownership percentage to LKO's detriment. Appendix B at 4. Assuming *arguendo* Powers had drafted a written agreement between LKO and TCG, that agreement would have reflected Fair's proposal, which LKO accepted without alteration: a 50/50 ownership. Thus, the notion that lack of a written agreement "caused" LKO to sue TCG is unsustainable. Furthermore, Fair *acknowledged* that the letter in which he attempted to alter the ownership interests in his favor "ignited the dispute." Appendix B at 4.

Also, Fair neglects to mention the other conduct that spawned litigation, his diversion of TCG business into another entity in an effort to render worthless LKO's 50% share of TCG, and keep all of the profit from TCG for himself. Appendix E at 4.

It is indisputable that Fair's actions not only contributed to the litigation between LKO and Fair, they were the sole cause. Because Fair was acting as agent for TCG, as well as on his own behalf, his actions are imputed to TCG. *Deep Water Brewing, LLC v. Fairway Res. Ltd.*, 152 Wn. App. 229, 268, 215 P.3d 990 (2009).

Far from *causing* TCG to have to defend against LKO, Powers' alleged wrongdoing was TCG's key to victory against LKO's claims for breach of fiduciary duty, breach of contract, and declaratory judgment.

The admission that Fair's own actions "ignited the dispute" is sufficient to defeat his claim for equitable indemnification under the ABC rule. *Id.* at 4. However there is also ample additional evidence that Fair, not Powers, caused the litigation between LKO and Fair. Moreover, LKO's claim that Fair breached his fiduciary duty by looting TCG is independent of LKO's claim for declaratory relief against Fair that LKO was entitled to its fifty percent (50%) member interest in TCG. Under these circumstances, Fair and TCG cannot claim an equitable right to attorney fees in Fair's victory over LKO.

(3) Fair and TCG Cannot Meet the Test for Equitable Indemnity Under the ABC Rule Because LKO Was Connected with the Complained-of Transaction

Assuming *arguendo* Powers violated RPC 1.7 by "representing" TCG and LKO in forming their agreement or violated RPC 1.8 by entering into a business transaction with TCG,¹³ Fair and TCG have not met the test for equitable indemnification. Equitable indemnification is only available if the opposing party in the litigation was unconnected with the

¹³ These propositions are challenged *infra* on cross-appeal.

original transaction that gave rise to the claim of indemnification. *Tradewell*, 71 Wn. App. at 126.

The analysis under RPC 1.8 is simple: if Powers, not LKO, was the true party in interest to the business transaction, then the litigation was between Powers and TCG, and there is no unconnected party “C” under the ABC rule. There can be no claim of equitable indemnity for Powers having caused TCG to become involved in litigation with Powers himself. *Id.*

Thus, Fair must rely on the RPC 1.7 finding in order to have a party “C” under the ABC rule. Fair argues that LKO qualifies. Fair insists that viewing LKO as party “C,” he met the test for the ABC rule because LKO was not involved in the original transaction, citing *Flint v. Hart*, 82 Wn. App. 209, 224, 917 P.2d 590, 598 (1996). In *Flint*, a law firm prepared purchase and sale documents connected to the sale of a funeral home business. 82 Wn. App. at 212. When the buyers defaulted, the seller sued. The buyers declared bankruptcy. *Id.* When bankruptcy proceedings commenced, the seller learned for the first time that the law firm neglected to perfect his security interest in the business. *Id.* Thus, rather than being listed as a secured creditor to be paid in regular order, he was forced to become entangled in the bankruptcy proceedings as he tried to be made whole on his unsecured claim. *Id.*

Eventually, Flint sued the law firm for malpractice for failing to perfect his security interest. *Id.* As one measure of damages, the trial court awarded him the fees he expended in the bankruptcy proceedings. *Id.* at 213-14. He was *not* awarded attorney fees relating to the underlying litigation he initiated with the buyers before their bankruptcy. *Id.* The Court of Appeals affirmed the award of attorney fees relating to the bankruptcy, citing *Tradewell*. *Id.* at 224. It reasoned that, but for the law firm's actions in neglecting to perfect his security interest, he would not have become entangled in the bankruptcy proceedings. *Id.* No wrongful action by Flint himself caused him to have intervene in that action. *Id.*

Flint is precisely in line with the well-established case law that prohibits an award of attorney fees based on equitable indemnity unless the actions of one party was the sole cause of litigation between the second and third parties, and that the third party must be unconnected with the original transaction.

Fair's factual basis for claiming that this case is like *Flint* is his claim that the initial agreement was not with LKO, but with Powers, and that Powers later "gifted" the business venture to LKO. Br. of Appellant at 13-14. Fair argues that "but for" Powers' action "gifting" to LKO the decision to invest in TCG, LKO would not have sued TCG for breach of contract. *Id.*

Fair's creative reading of the facts – a new argument on appeal – is not supported by the record below, nor by the Court of Appeals' opinion in the LKO-TCG contract action upon which Fair exclusively relies. There was no “gifting” of an agreement. The trial court found, and the Court of Appeals concurred based on undisputed evidence, that the investment was made by LKO, and that LKO, not Powers, was the only investor in TCG. Appendix B at 5; *LK Operating*, 168 Wn. App. at 866. Fair himself, as agent for TCG stated that he “did not care” from whom TCG got its capital. Appendix B at 4. He just wanted an investment. *Id.*

LKO also did not seek a formalized agreement with TCG, and thus was connected to the alleged wrongdoing that TCG claims gave rise to the litigation. *Id.* The crux of Fair and TCG's argument that Powers “caused” litigation is not that he caused LKO to invest in TCG, or that he failed to disclose his representation of LKO, but that he failed to document the agreement. Br. of Appellant at 6. Fair admits, and there is documentary proof, that the agreement was for 50/50 ownership. Br. of Appellant at 5. Fair and TCG do not, and cannot, now claim that had they known they were doing business with LKO, rather than Powers himself, that they could have avoided litigation for breach of contract. Nor do they make any claim that, had they known TCG was going into business with LKO, they would have changed the terms of their proposal, which LKO accepted

without negotiation. This is revisionist history, and is not supported by the record.

Also, far from *causing* the litigation between LKO and TCG, the alleged “malpractice” became Fair’s *defense* to LKO’s claim: that Fair had agreed with LKO on 50/50 ownership of TCG and was trying to breach that agreement. Appendix B at 4. What caused the litigation with LKO, by Fair’s own admission, was Fair’s attempt to unilaterally increase his own ownership share. *Id.* What also caused the litigation was Fair’s diversion of TCG’s assets, its going concern, book of business and employees, to an entity he wholly owned also caused the litigation.

(4) Fair’s Public Policy Argument that the ABC Rule Should Not Apply in These Circumstances Based on Comparative Fault Principles Is Flawed

Fair argues that even if he cannot meet the ABC test, this Court should discard it here because its application violates a tort claimant’s right to at least recover damages on a comparative fault basis. Br. of Appellant at 16-19. Fair argues that application of the ABC rule is inappropriate in RPC 1.7 or 1.8 cases because “the other litigant will never be a stranger and wholly unconnected to the lawyer’s wrongful act.” *Id.* at 16. Fair suggests that this Court create a new subcategory of malpractice cases where attorney fees are shifted as of right, rather than using the traditional balancing of the equities that the ABC rule envisions.

The notion that it is somehow manifestly inequitable to deny an award of attorney fees to a client in malpractice action is questionable in light of the action of both this Court and the Court of Appeals in the recent case of *Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 197, 225 P.3d 990 (2010). In that case, an attorney committed egregious malpractice – including missing critical deadlines regarding the statute of limitations and failing to show up for the first day of trial – that caused his client’s legitimate tort claims to be dismissed. *Shoemake*, 168 Wn.2d at 196-97. After he had destroyed his client’s case, he lied to them about it for years, claiming that the lack of progress was due to a court “backlog.” *Id.* The trial court awarded the client attorney fees incurred in bringing the malpractice action as a “sanction” for the attorney’s breach of fiduciary duty. *Id.* The Court of Appeals reversed that award of attorney fees, concluding that “breach of fiduciary duty was not a recognized ground in equity allowing such an award in the absence of a statute or contract...” *Id.* With respect to a separate issue, the attorney petitioned this Court for review. *Id.* The clients cross-petitioned, asking this Court to reinstate their attorney fee award. This Court *denied* the client’s cross-petition, but granted the attorney’s. *Id.*

Thus, even when client is forced into litigation *directly and solely because* of the actions of the attorney, this Court has not ruled that equity

demands the client be awarded attorney fees incurred in vindicating his or her rights.

Generally, a court applying equitable principles will not “balance the equities between the parties when they are both in the wrong, nor give the complainant relief against his own vice and folly.” *J.L. Cooper & Co. v. Anchor Sec. Co.*, 9 Wn.2d 45, 72, 113 P.2d 845 (1941); 15 Karl B. Tegland, *Washington Practice: Civil Procedure* § 44.16, at 239 (1st ed. 2003). Thus, equitable relief is not available where *both* parties have unclean hands. In such cases, equity leaves the parties *in pari delicto* to fight out their own salvation and remedy their own wrongs in the law court. *Id.* at 72.

Fair’s suggestion that, unlike in all other claims for attorney fees based on equity, this Court should impose a *per se* attorney fee award in RPC 1.7 and 1.8 cases, is a matter for the Legislature, not the courts. If the Legislature seeks to amend malpractice statutes to do so, it obviously has that authority. Until then, principles of equity should apply on a case-by-case basis, as is the purpose equitable relief.

Fair’s suggestion that the trial court’s ruling threatens comparative fault principles or violates the 1986 Tort Reform Act is unfounded. The ABC rule is strictly an equitable exception to the American rule on

attorney fee shifting, it does not implicate other traditional tort damages to which comparative fault applies.

Finally, the adjunct rule to the ABC analysis – that the misconduct must be the sole cause of the litigation – comports with the general rule in malpractice cases that damages are limited to “the amount of loss actually sustained as a proximate result of the attorney’s conduct.” *Matson*, 101 Wn. App. at 484. If the attorney’s conduct does not *cause* the litigation, but instead affects litigation that would have occurred regardless of the attorney’s conduct, then there is no rationale for carving out an ABC rule exception.

Here, Powers did not cause the dispute between Fair and LKO, Fair did. Appendix B at 4. Also, Fair did not sustain any loss as a result of the attorney’s conduct. In fact, the alleged “misconduct” was the key to Fair’s success against LKO’s action, which Fair admitted he caused to be filed. He produced no evidence beyond speculation that the alleged malpractice of which he complains – failure to secure informed consent between two clients or failure to disclose the ethical restrictions on business between clients and lawyers – would have prevented the litigation from occurring, or caused him harm.

(5) This Court Can Affirm on the Alternate Grounds that the Complained of Conduct Did Not Cause Fair Damage, But

Instead Created a Windfall for Him, and that That Fair, Not Powers, Caused TCG to Pay Attorney Fees

The measure of damages for legal malpractice is the amount of loss actually sustained as a proximate result of the attorney's conduct. *Matson v. Weidenkopf*, 101 Wn. App. 472, 484, 3 P.3d 805 (2000). Courts consider collectability of the underlying judgment to prevent the plaintiff from receiving a windfall: “[I]t would be inequitable for the plaintiff to be able to obtain a judgment against the attorney, which is greater than the judgment that the plaintiff could have collected from the third party[.]” *Id.*

Fair and TCG argue that Powers’ alleged violations of RPC 1.7 and 1.8(a) caused TCG to incur attorney fees in the litigation between Fair and LKO and damaged TCG. Br. of Appellant at 13-15. They suggest that but for Powers’ actions, TCG would not have incurred those fees, and that TCG is entitled to be made whole.

The guiding principle of tort law is to make the injured party as whole as possible through pecuniary compensation. *Shoemaker*, 168 Wn.2d at 198. A plaintiff is entitled to that sum of money that will place him in as good a position as he would have been but for the defendant's tortious act. *Id.* The plaintiff should be made whole without conferring a windfall. *Id.* at 180 n. 1. When a plaintiff seeks prejudgment interest, the

award should compensate “the plaintiff for the ‘use value’ of his damage amount from the time of loss to the date of judgment.”

Neither Fair nor TCG can claim the attorney fees as damages for malpractice because Fair was not damaged and no malpractice was committed against TCG. Fair was never damaged personally, he caused TCG to pay his own attorney fees in his action to establish 100% ownership rights in TCG. TCG was not alleged to have violated any of LKO’s rights, only Fair. Yet Fair caused TCG to pay attorney fees to pursue his rights to the LKO interests at issue, rights in which TCG had no substantive interest. Also, as a result of the alleged “malpractice,” Fair went from 50% ownership of TCG to 100%. Fair estimated that TCG was worth \$1.5 million in April 2007. Appendix B at 4 . Thus, Powers’ alleged malpractice created a windfall to Fair on the order of seven hundred thousand dollars at least. Also, during the time Fair worked on TCG, he claimed tax benefit from 100% of any losses on his tax return. He admitted that had he disclosed LKO’s 50% ownership stake, he may have been forced to reduce by half his claimed tax losses. CP2 366.

Fair has not only been “made whole,” he is in a better position that he would have been had it not been for the alleged misconduct of Powers. He has thus not been “damaged” by any actions of Powers, and cannot sustain his malpractice claims at trial.

TCG cannot claim a right to the attorney fees for a simpler reason: Fair is exclusively responsible for having caused TCG to incur fees in the LKO-Fair action. LKO brought the action alleging Fair was trying to personally enrich himself, TCG's rights and assets were never in jeopardy.¹⁴ TCG was always indifferent to the claim. It had no interest in the constituency of its membership. Fair caused LKO to pay attorney fees to defend Fair from LKO's claims. Thus Powers caused no damage to TCG.

Dismissal was proper.

(6) Argument on Cross-Appeal

Because Fair and TCG suffered no compensable damages as a matter of law, the trial court did not address the question of whether Powers was liable for malpractice as a result of violating an RPC. However, on appeal, Fair and TCG rely on the trial court's RPC 1.7 finding and the Court of Appeals' RPC 1.8 findings as part of their equitable arguments. As the trial court noted, Powers¹⁵ has consistently and vehemently denied any wrongdoing as defined by the RPCs. Appendix B at 5. Although he prevailed in the malpractice action, the

¹⁴ This Court must distinguish Fair from TCG in its analysis. *Valley*, 159 Wn.2d at 747; RPC 1.7 comment 34 (*see* discussion on cross-appeal *infra*).

¹⁵ Again, neither the trial court nor the Court of Appeals ever concluded that Therrien had committed any RPC violations.

finding of any ethical violation has serious implications that extend beyond the current litigation. Thus, Powers has cross-appealed the trial court's finding that he violated RPC 1.7. Now that the two appeals are consolidated, Powers also challenges the Court of Appeals' finding in the contract appeal that he simultaneously violated RPC 1.7 and RPC 1.8.

(a) Powers Could Not Have Violated RPC 1.7 Because He Did Not Provide any Legal Advice or Service, or Anything Resembling "Representation" to LKO or TCG With Respect to the LKO-TCG Contract

Under RPC 1.7(a), a lawyer shall not "represent" a client if the requested "representation" would involve a concurrent conflict of interest. A conflict of interest arises if the representation would be directly adverse to the client, or the representation would limit the lawyer's responsibilities to represent either client. RPC 1.7(a)(1)-(2). Unless the lawyer's loyalty or independent judgment is threatened by a particular representation, a conflict of interest is not at issue. RPC 1.7 comment [1], [6].

Thus, the foundation of a conflict of interest violation is establishment of some kind of "representation," in which the lawyer is asked to perform legal tasks for the client or clients in a way that might divide the lawyer's loyalties in the performance of those duties. *Id.*

Both the trial court and the Court of Appeals concluded that Powers "represented" both LKO and Fair in their investment agreement in

violation of RPC 1.7. Appendix A at 13; *LK Operating*, 168 Wn. App. at 873.

No Washington case discussing RPC 1.7 specifically defines what constitutes “representation” with respect to a particular matter. However, this and other Washington courts have defined the point at which an attorney-client relationship is established, and equated it with the point at which representation begins. For example, in *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992) this Court confirmed that the essence of an attorney-client relationship is whether the attorney’s advice or assistance *is sought and received on legal matters*. *Bohn*, 119 Wn.2d at 363. The Court of Appeals has similarly ruled that the attorney client privilege attaches “to any information generated by a request for legal advice.” *Soter v. Cowles Publ'g Co.*, 131 Wn. App. 882, 130 P.3d 840, *aff'd*, 162 Wn.2d 716, 174 P.3d 60 (2007).

In the context of analyzing RPC 1.9 regarding conflicts of interest involving former clients, Washington courts analyzing when representation begins also point to the test of whether the client “sought or received legal advice.” *Teja v. Saran*, 68 Wn. App. 793, 795-97, 846 P.2d 1375, *review denied*, 122 Wn.2d 1008, 859 P.2d 604 (1993). Applying the *Bohn* standard, the *Teja* court concluded that an attorney’s actions in addressing legal matter with a client are a critical in determining whether

there was “representation.” *Id.* In *Teja*, an existing criminal client sought advice from his attorney about possibly bringing a claim against his business partner. *Teja*, 68 Wn. App. at 794. The client specifically averred that he showed the attorney bills, receipts, and other documentation, and discussed the proposed litigation in detail. *Id.* at 794-95. The critical fact for finding “representation” in *Teja* was that the attorney responded to the client by *giving him legal advice*, i.e., the claim was too small to warrant attorney involvement, and that he should file a claim in small claims court. *Id.* at 794. The client followed that advice, and when the business partner responded, the attorney appeared for the partner and filed a cross-claim in superior court. *Id.* The Court of Appeals focused on the attorney’s words and actions as the critical facts upon which the client formed a reasonable belief of representation:

Pandher's advice to Teja, viewed in light of their existing professional relationship, demonstrates behavior consistent with an attorney/client association. *Pandher's actions* were sufficient to support Teja's reasonable belief that such a relationship existed. Teja acted consistently with Pandher's suggestion and filed suit in small claims court against Saran.

Teja, 68 Wn. App. at 796. It is not enough for a client to boldly claim a reasonable belief of representation, that client must present evidence that he or she sought and received legal advice to support that belief of representation. *Id.*

Thus, legal “representation” with respect to a particular matter exists when the purported client has sought and/or received legal advice or assistance regarding that matter.

Regarding who constitutes a “client” for the purposes of RPC 1.7, it is important to distinguish between an individual officer or owner and a corporate entity. RPC 1.7 comment 34.¹⁶ Conflating individuals with connected entities, or conflating different legal entities with one another, can result in wholly inappropriate application of the RPCs. *Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 747, 153 P.3d 186 (2007).

Both the trial court and the Court of Appeals found – without any evidence to support the finding – that Powers “represented” both LKO and Fair in the investment LKO made in TCG. There is no evidence that Powers “represented” LKO or Fair in the formation of a business relationship at all, let alone in any way that raised a conflict of interest. Fair, *acting as agent for TCG*, proposed the terms of the investment offer in his October 27, 2004 email to Powers. *LK Operating*, 168 Wn. App. at 865. Powers, acting as a business manager for LKO, simply passed that

¹⁶ Comment 34 provides: “A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. *See* Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client’s affiliates, or the lawyer’s obligations to either the organizational client or the new client are likely to limit materially the lawyer’s representation of the other client.”

offer along to LKO, and it was accepted without negotiation, alteration, advice, or even comment. *Id.* Fair and TCG offered no evidence to support the notion that Powers was acting as Fair's legal representative with respect to the formation of the LKO-TCG contract.

Also, there was no contract between Fair and LKO. The contract was between LKO and TCG. Accordingly, the only "client" Powers could conceivably have "represented" to give rise to a conflict of interest was TCG. The record shows no act of Fair *or* TCG seeking or obtaining legal advice from Powers pertaining to transaction between TCG and LKO, nor can a claim that Powers represented Fair in the TCG-LKO transaction (of which Fair was not a part) give rise to an RPC 1.7 violation with respect to the LKO investment in TCG.

Fair admitted the *only* legal service Powers even arguably performed for Fair or TCG was the review of a contract for TCG to purchase debt from Unifund. CP1 954-955. However, there is no evidence that reviewing of a contract for TCG to purchase debt from a third party raised any issues of loyalty or conflict between LKO and TCG.

Neither legal advice nor legal service was sought or received by any party with respect to the terms of the LKO-TCG agreement. CP1 1411-1412. Any work allegedly done for TCG was not in adverse to LKO's interests. Applying the standard from *Bohn* and similar cases —

that representation means the provision of legal services – Powers did not “represent” Fair, TCG, or LKO in any way to raise a conflict of interest under RPC 1.7. CP1 849, 1116-1117, 1128; RP 321-323.

Because Fair never asked Powers to provide any legal advice or assistance pertaining to the investment proposal which Fair independently developed and because Fair’s involvement in the investment was representational and not personal, there is no record act of “representation” undertaken by Powers for Fair (or for TCG) which would make the provisions of RPC 1.7 applicable.

The central issue for RPC 1.7 purposes is whether “representation” was sought or performed in connection with the LKO-TCG agreement that would have raised a conflict of interest. Because none was, Powers did not violate RPC 1.7.

(b) There Was No Violation of RPC 1.8 Here; LKO Is an Independent LLC in Which Powers Has No Pecuniary Interest

The Court of Appeals – for the first time in the case, concluded that Powers also violated RPC 1.8(a) with respect to formation of the contract between LKO and TCG. *LK Operating*, 168 Wn. App. at 881. The court did not expressly find that the transaction benefited Powers, but implied that a business deal between Fair-TCG and LKO, an entity owned by Powers’ adult children which P&T Enterprises managed, was of

sufficient interest to Powers to qualify as a transaction between a lawyer and client. *Id.*

RPC 1.8 provides in relevant part: “(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client. . . .” RPC 1.8(a). The rest of the rule discusses what steps a lawyer may take to engage in a business transaction with a current client and still comply with the rule. RPC 1.8(a)(1)-(3).

Although many cases discuss whether a lawyer engaging in such a transaction took the proper steps to comply with RPC 1.8(a), few interpret what it means to “engage in business transaction” under this RPC. Here, whether Powers engaged in “business transaction” with a client is the crux of the matter. Regarding that issue, a few decisions issued by this Court reveal that a business transaction must confer or potentially confer some advantage or pecuniary benefit on either the lawyer or client or both in order to qualify as an RPC 1.8 violation.

This Court, in a similar manner to RPC 1.7 comment 34, has warned that courts examining business transactions under RPC 1.8 must not conflate LLCs and other business entities with the individuals who manage or own them. *Valley*, 159 Wn.2d at 747. In *Valley*, a law firm performed legal services for several entities closely held by an individual

client, Rose, without obtaining a representation agreement from the particular corporate entity, Valley/50th Avenue LLC. *Id.* at 741. When concern arose about the fees due, Rose signed an agreement and cause Valley to execute a promissory note and deed of trust on its property to secure the fees Rose owed, as well as future fees. *Id.* at 742. The lower courts considering the case treated Rose and Valley as one and the same when examining whether the firm had given proper RPC 1.8 disclosures to Valley. *Id.* at 747. This Court warned against such conflation, noting:

The courts below mistakenly treated Rose and Valley as one. Washington law defines legal persons to include limited liability companies. RCW 1.16.080(1). A limited liability company like Valley is “an artificial entity or person created under chapter 25.15 RCW.” *Dickens v. Alliance Analytical Labs., L.L.C.*, 127 Wn. App. 433, 440, 111 P.3d 889 (2005). Like a corporation, a limited liability company is an independent legal entity to whom a lawyer owes a separate duty of loyalty and is entitled to the notice, disclosure, and opportunity to seek independent counsel required by RPC 1.8.

Id. at 747.

Here, despite affirming the trial court’s express findings that LKO was a distinct entity from Powers which he did not own (*LK Operating*, 168 Wn. App at 879-80) the Court of Appeals concluded that Powers had a “significant personal and financial interest in LKO as a parent, as an owner/office manager, and as its attorney.” Appendix C at 23.

There is no authority for the proposition that a business transaction between two distinct legal entities becomes a business transaction *between* a client and a lawyer simply because the lawyer is employed by one or the other entity, or because the lawyer is related to persons who own that entity. Nor is there any prohibition in RPC 1.8(a) against persons related to an attorney investing in businesses that are represented by the attorney. The Court of Appeals here made the same error in analysis as the lower courts in *Valley*, conflating the entities with the owners.

Regarding the issue of what qualifies as a “business transaction,” this Court has repeatedly defined it as one that confers some benefit on either the lawyer or client or both. This Court in *Valley* concluded that obtaining a promissory note and deed of trust against property owned by the client were business transactions under the rule, noting:

Though described as a fee agreement by the Firm, it was, in fact, relevant to a significant existing debt. A standard fee agreement involves *anticipated* legal fees and an agreement to pay them; in this case substantial fees were already owed. The relationship was not merely attorney-client; it was also creditor-debtor. Although it was clothed as a fee agreement between an attorney and a client, it was in reality an agreement between a creditor and a debtor.

Valley, 159 Wn.2d at 744 (emphasis in original). Thus, an agreement between a lawyer and a client in which the lawyer or the client becomes the creditor to the other pre-existing debt is a business transaction.

This Court reached a similar conclusion in *In re Disciplinary Proceeding Against Miller*, 149 Wn.2d 262, 66 P.3d 1069, 1073 (2003), when an attorney violated RPC 1.8(a) by obtaining an ownership interest in a current client's certificate of deposit. *Miller*, 149 Wn.2d at 279. Again, a lawyer who wants to avoid doing business with a client should not assume a pecuniary interest in something the client owns. *Id.*

An attorney arranging to receive the profits from a client's joint venture, even in the context of a fee agreement, is also a business transaction. *Holmes v. Loveless*, 122 Wn. App. 470, 475, 94 P.3d 338 (2004). When a law firm gave a discounted fee rate in return for a future interest in the venture, this Court found that despite their decline of an actual ownership stake in the venture, "its compensation was directly linked to the joint venture's profits. This is sufficient evidence to conclude that the fee agreement falls within the scope of the business transaction rule." *Id.*

The decision in *In re Disciplinary Proceeding Against Holcomb*, 162 Wn.2d 563, 173 P.3d 898 (2007), and the later decision in *Valley*, *supra*, established the second prong of the business transaction analysis: that the "transaction" must be between the lawyer and client, and not some independent legal entity. In *Holcomb*, this Court found that a lawyer obtaining loans from the revocable trust of a client violates RPC 1.8(a)'s

prohibition against business transactions. *Holcomb*, 162 Wn.2d at 578-79. The lawyer defended against the action by arguing that the loans were paid from the client's revocable trust, and that attorney-client relationship was between the client and lawyer, not the trust and the lawyer. However, the trust was not formed in a manner so as to be legally distinguishable from the client. *Id.* Also, the client benefited from the trust and used funds from the trust to pay daily expenses. This Court concluded that the trust was legally indistinguishable from the client. *Id.* Thus, taking loans from the trust was taking loans from the client, which the court concluded was a business transaction. *Id.*

In *Valley*, a father managed an LLC that was owned almost entirely by his sons. *Valley*, 159 Wn.2d at 747. The father used assets from the LLC, the member interests in which were substantially owned by the sons, to secure the father's personal indebtedness. *Id.* The lower courts in looking at this transaction treated the father and his sons' LLC as "one in the same." *Id.* This Court concluded that treating the two as the same was a mistake, and that the LLC is a distinct legal entity and must be treated as such for the purposes of RPC 1.8 analysis. *Id.*

Here, there is simply no business transaction between Powers and any client, as the findings of fact and conclusions of law establish. Powers did not invest in TCG, but instead passed along the opportunity to LKO,

an entity that is distinct and separate from Powers, from which Powers receives no benefit and in which he has no interest. Appendix A at 3, 8. LKO contributed its own funds to TCG, at which time LKO entered into a contract and became a member of TCG. Appendix A at 5, 8-9. The trial court found LKO to be the investor, not Powers. Appendix B at 936-37. The trial court found that LKO was a distinct legal entity and not the “alter ego” of Powers, as TCG had repeatedly argued. Appendix A at 8. All of these findings have ample support in the record.

Powers is legally distinguishable from LKO, and the Court of Appeals erred in conflating him with that legal entity from which he does not benefit. *Valley*, 159 Wn.2d at 747. The trial court’s findings of fact and conclusions of law make plain that the business transaction was between LKO and TCG, that Powers had no right or interest in the contract, and that he received no benefit from it. Appendix D.¹⁷ There is no RPC 1.8(a) violation here.

The Court of Appeals’ RPC 1.8 finding is unsustainable given the trial court record as recited by the Court of Appeals. Powers was removed as a party in the LKO action. The trial court ultimately rescinded that contract in Powers’ absence and returned the original \$52,000 investment to LKO. If the agreement was really between Powers and TCG, and the

¹⁷ Appendix D can be found at CP2 58-67.

trial court rescinded that contract *after* bifurcating the case and removing Powers as a party in the contract action, the trial court affected the substantial rights of parties not before it and gave LKO a \$52,000 windfall. If Powers, not LKO, was the contracting party, then the trial court should have brought Powers back in as a party and should not have granted any remedy to LKO.

The trial court specifically ruled that LKO was not an alter ego of Powers, and that LKO benefited and was solely owned by Powers and Therrien's adult children. Appendix A at 3, 8. Thus under *Valley*, it cannot be equated with Powers himself for RPC 1.8 purposes. LKO and TCG were the parties to the contract. Powers had no business arrangement with Fair or with TCG with respect to membership in TCG. If Powers were the contracting party with TCG, the court would not have granted the rescission remedy to LKO.

Also, the trial court indicated in a pretrial ruling that if at trial, TCG proved that Powers was the contracting party, the TCG agreement would also violate RPC 1.8(a). Appendix A at 12. Thus, the court was fully aware that, if it found Powers to be the contracting party as a matter of fact, RPC 1.8 would apply. The trial court did not so rule. Appendix D. The only reasonable conclusion is that the trial court did not find

Powers to be the contracting party, despite any ambiguous findings of fact TCG might cite.

Thus, Court of Appeals misapplied RPC 1.8(a). There was in fact no “business transaction” between Powers and TCG, and also no attorney-client relationship between Powers and TCG.

(c) Application of the RPCs Has Quasi-Criminal Implications and Must Provide Clear Guidance Based on Concrete Facts and Law

This Court is the final word on both the structure and the application of the RPCs to the practice of law. In that role, this Court scrupulously interprets the RPCs in order to protect the interests of clients and the integrity of the legal system: “We have ‘the inherent power to promulgate rules of discipline, to *interpret them*, and to enforce them.’” *In re Disciplinary Proceeding Against Haley*, 156 Wn.2d 324, 333, 126 P.3d 1262 (2006) (emphasis in original) quoting *In re Disciplinary Proceeding Against Stroh*, 97 Wn.2d 289, 294, 644 P.2d 1161 (1982).

In drafting and upholding the standards of conduct for lawyers, this Court has for decades acknowledged that enforcement of the RPCs has serious professional and personal implications. *In re Little*, 40 Wn.2d 421, 430, 244 P.2d 255 (1952). Lawyer discipline is quasi-criminal in nature, and thus due process dictates that an attorney will only be found to have violated an RPC based upon proper due process and a finding of that

violation by a clear preponderance of evidence. *Id.*, see also, *In re Greenlee*, 82 Wn.2d 390, 393, 510 P.2d 1120 (1973).

Although this is not a disciplinary proceeding, the policies informing this Court's handling of lawyer discipline are relevant here. The Court of Appeals here did not properly analyze and apply the RPCs to the facts and case law, and reached an unsustainable result. The confusion that the erroneous decision will affect lawyers, clients, and courts alike. For example, if a lawyer introduces two clients at a party, and those clients later decide to go into business together, will disciplinary proceedings commence? If an uncle retains his nephew to represent him in a property dispute, and the uncle later invests in a corporation whose CEO happens to also be a client of his nephew, will his contract be nullified? Will future courts begin to conflate corporations with their managers and/or investors when determining who are the "clients" in a "transaction?"

This confusion can be avoided by rejecting the Court of Appeals' unsustainable conclusions and scrupulously applying the facts to the law here. Nothing Powers did violated the letter *or* the spirit of the RPCs. Powers passed along a business opportunity between two parties with whom he was in communication. He undertook no legal services, violated no duty of loyalty, and procured no benefit. Instead, one of the parties to

the contract reaped a massive windfall from the other, by the improper application of the RPCs. This Court should reverse that error.

G. CONCLUSION

Whether based on the fact that Powers caused Fair and TCG no damages, or that Powers obeyed the RPCs, the trial court correctly concluded that Fair and TCG could not maintain a malpractice claim against Powers as a matter of law.

DATED this 28th day of July, 2013.

Respectfully submitted,



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APPENDIX

APPENDIX A

**Superior Court of the State of Washington
For Chelan County**

Lesley A. Allan, Judge
Department 1
T.W. Small, Judge
Department 2



John E. Bridges, Judge
Department 3
Bart Vandegriff
Court Commissioner

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March 31, 2009

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**Re: *LK Operating, LLC v. The Collection Group, LLC*
*Chelan County Superior Court Cause No. 07-2-00652-9***

Court's Memorandum Decision

Dear Counsel:

This matter came before the court on August 25, 2008, October 31, 2008 and December 11, 2008, for hearing defendants' Motions for Partial Summary Judgment, plaintiff's Cross-Motion for Summary Judgment and related motions to strike, for in camera review, to seal and for a protective order. The court previously ruled orally to strike the Declaration of John A. Strait filed as Exhibit D to the Declaration of Brian Fair. The court took the remaining issues under advisement on January 12, 2009.

The court has now had the opportunity to review the following documents:

1. Defendants' Motion for Partial Summary Judgment
2. Defendants' Memorandum in Support of Motion for Partial Summary Judgment
3. Declaration of Brian Fair In Support of Motion for Partial Summary Judgment
4. Declaration of Brian Fair

March 31, 2009

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5. Declaration of Kenneth S. Kagan
6. Defendants' Response to Powers and Therrien's Motion for Partial Summary Judgment
7. Declaration of Brian Fair in Support of Defendants' Response to Powers and Therrien's Motion for Partial Summary Judgment
8. Defendants' Fairs' Motion to Strike Plaintiff's Cross-Motion for Summary Judgment and Strike LK Operating, Powers' and Therrien's Materials served July 15, 2008
9. Declaration of Stewart R. Smith in Support of Motion to Strike Cross Motion and Materials of July 15, 2008
10. Defendant The Collection Group, LLC's Motion for Partial Summary Judgment
11. Memorandum in Support of The Collection Group, LLC's Motion for Partial Summary Judgment
12. (Second) Declaration of Kenneth S. Kagan
13. Declaration of Brian Fair in Support of The Collection Group LLC's Motion for Partial Summary Judgment
14. The Collection Group, LLC's Memorandum in Opposition to LK Operating LLC's Motion for Partial Summary Judgment
15. Cross Motion for Partial Summary Judgment
16. Memorandum by Powers and Therrien: (1) In Opposition to Fair's Motion for Partial Summary Judgment; and (2) In Support of Cross Motion
17. Declaration of Brian C. Huber in Support of Cross Motion for Partial Summary Judgment
18. Declaration of Leslie A. Powers (1) In Opposition to Fair's Motion for Partial Summary Judgment and (2) In Support of Cross Motion for Partial Summary Judgment
19. Declaration of Thomas M. Fitzpatrick
20. Supplemental Memorandum in Opposition to Motions by Brian and Shirley Fair and The Collection Group, LLC
21. Declaration of Leslie A. Powers
22. Declaration of Keith Therrien
23. Declaration of Craig Homchick
24. Powers' and Therriens' Motion to Strike Affidavit of John Strait
25. Supplemental Declaration of Kenneth S. Kagan
26. Reply of The Collection Group, LLC to P&T's Supplemental Memorandum in Opposition to Motions by Brian and Shirley Fair and The Collection Group, LLC
27. Defendants' Fairs' Reply Memorandum in Support of Fairs' Motion for Partial Summary Judgment
28. Second Declaration of Brian C. Huber in Support of Cross Motion for Partial Summary Judgment
29. Declaration of Brian Fair in Support of Reply Memorandum
30. Powers' and Therriens' Memorandum in Opposition to Fair's Motion to Strike
31. Powers and Therrien's Reply Memorandum in Support of Motion for Partial Summary Judgment
32. Defendants' Fairs' Joinder in The Collection Group, L.L.C.'s, Memorandum in Opposition to Powers' and Therrien's Motion to Strike Affidavit of John Strait
33. The Collection Group LLC's Memorandum in Opposition to Powers' and Therriens' Motion to Strike Affidavit of John Strait
34. Declaration of Ronald J. Trompeter in Opposition to Motion to Strike
35. Motion for In-Camera Review, or Alternatively, to Seal Records and for Protective Order
36. Defendants' Fairs' Objection to Motion for In Camera Review
37. Declaration of Ronald J. Trompeter in Support of The Collection Group LLC's Opposition to Motion for In-Camera Review, or Alternately, to Seal Records and for Protective Order
38. Opposition of The Collection Group LLC to Motion for In-Camera Review, or Alternately, to Seal

- Records, and for Protective Order
39. Declaration of Danae C. Klitski Powers
 40. Declaration of Aron L. Powers-McAllister
 41. Declaration of Nina F. Powers
 42. Declaration of Sarah B. Therrien
 43. Declaration of Seth R. Therrien
 44. Trustees' Reply Supporting Motion for In-Camera Review or Alternately to Seal Records and for Protective Order
 45. Declaration of Ken Meissner
 46. LK Operating, LLC's Joinder Memorandum Re: Motion by Trusts
 47. Stipulation and Order Re Protective Order\
 48. Declaration of Ronald J. Trompeter
 49. Declaration of David B. Petrich
 50. Memorandum of The Collection Group, LLC Regarding Trust Agreements and Pending Motion for Summary Judgment
 51. Defendants' Fairs' Memorandum Re Effect of Trust Documents/Meissner Declaration
 52. Powers and Therrien's (1) Motion to Strike, and (2) Memorandum Re Trusts
 53. Beneficiaries' Reply Memorandum
 54. The Collection Group, LLC Response to Plaintiff's Motion to Strike
 55. Reply Memorandum Re Motion to Strike or for Additional Time to Respond
 56. Joinder Memorandum
 57. Third Declaration of Brian C. Huber in Support of Cross Motion for Partial Summary Judgment
 58. Declaration of Leslie A. Powers
 59. Declaration of Seth R. Therrien
 60. Declaration of Thomas M. Fitzpatrick Regarding Confidentiality Issues
 61. Supplemental Memorandum in Support of Cross Motion for Summary Judgment
 62. Declaration of Brian Fair in Support of TCG Reply to LKO Supplemental Memo Dated December 29, 2008
 63. The Collection Group Response to Supplemental Memo Re Cross Motion for Partial Summary Judgment Dated December 29, 2008
 64. Redacted Copy Declaration of Brian Fair
 65. Stipulation and Order Re Redaction
 66. Declaration of Diane Sires
 67. Aron L. Powers Intervivos Trust
 68. Danae C. Klitski Powers Intervivos Trust
 69. Nina F. Powers Intervivos Trust
 70. Sarah B. Therrien Intervivos Trust
 71. Seth R. Therrien Intervivos Trust
 72. Valley/50th Avenue, LLC v. Stewart, 159 Wn.2d 736 (2007)
 73. In re Corporate Dissolution of Ocean Shores Park, Inc., v. Jordan, 132 Wn.App. 903 (2006)
 74. Danzig v. Danzig, 79 Wn.App. 612 (1995)

Contentions of the Parties

This case is a dispute about who owns The Collection Group, LLC (hereinafter referred to as TCG). Plaintiff, LK Operating, LLC (hereinafter referred to as LKO), claims that it owns at least a 50% interest in TCG.

Defendants deny plaintiff has any ownership interest in TCG. Defendants claim that if anyone associated with LKO owns part of TCG, it is Leslie Powers and Keith Therrien individually.

Because Defendant Brian Fair alleges he was a client of Powers and Therrien when he formed TCG and had discussions with Powers and Therrien regarding them owning a portion of TCG, Defendants argue Powers and Therrien failed to follow the Rules of Professional Conduct when going into business with their client, Brian Fair.

Consequently, Defendants allege any agreement between LKO and TCG is void because it violates public policy.

Plaintiff alleges that LKO is the entity that owns 50% of TCG, not attorneys Powers and Therrien. Plaintiff further alleges LKO is an entity owned by various trusts set up for the benefit of the adult children of Powers and Therrien.

Consequently, the agreement between LKO and Brian Fair regarding the ownership of TCG does not violate the Rules of Professional Conduct, is not a violation of public policy and is not void.

Issues

May the court rule as a matter of law that Brian Fair was a current client of Powers & Therrien, P.S. between October, 2004 and February 21, 2005?

If so, may the court rule as a matter of law that any agreement between Brian Fair and Les Powers and Keith Therrien or Brian Fair and LKO is void as against public policy?

Facts

Undisputed Facts

The Collection Group

TCG is a corporate entity formed and originally owned by Brian (a CPA) and Shirley Fair. TCG purchases outstanding consumer debt portfolios from various companies and collects on those debts. TCG was incorporated on May 10, 2004 by Brian Fair as a limited liability company. He created this company without the assistance of any legal counsel. He is the manager of TCG.

LK Operating

The purpose of LKO was to involve the adult children of Les Powers and Keith Therrien in the management of the families' business affairs and to provide a basis for the children to share in them. LKO has no employees and the source of its income is unknown.

There are five trusts for each of the adult children of Les Powers and Keith Therrien. These trusts owned LK Partners, a partnership, at the time they were created on December 23, 2003. The Grantors of the trusts are the wives of Les Powers and Keith Therrien: Patricia Powers and Marsha Therrien. The wives also signed the SS-4's in 2004. None of the trusts have employees. The beneficiaries and trustees of each trust are the adult children of Les Powers and Keith Therrien.

The trusts are shareholders of related corporations. For example, the Seth Therrien trust is the sole shareholder of SRT Enterprises, Inc. Marsha Therrien and Michelle Briggs are the only authorized signers on the accounts of SRT Enterprises, Inc. and SBT Enterprises, Inc.. Marsha Therrien is the president of SRT Enterprises, Inc. and SBT Enterprises, Inc.. Patricia Powers and Michelle Briggs are the only authorized signers on the accounts of NFP Enterprises, Inc., DCP Enterprises, Inc. and ALP Enterprises, Inc.. Patricia Powers is the president of NFP Enterprises, Inc., DCP Enterprises, Inc. and ALP Enterprises, Inc.. Each of the adult children of Powers and Therrien are the vice-presidents of the related corporations.

LKO is composed of five member corporations: NFP Enterprises, Inc., DCP Enterprises, Inc., ALP Enterprises, Inc., SRT Enterprises, Inc., and SBT Enterprises, Inc.. LKO was formed by Les Powers and Keith Therrien. LKO is managed by Powers & Therrien Enterprises, Inc. which is owned by Les Powers and Keith Therrien. Les Powers is the president of Powers & Therrien Enterprises, Inc. and Keith Therrien is the vice-president of Powers & Therrien Enterprises, Inc. LKO is represented by the law firm of Powers & Therrien, P.S. and Les Powers is LKO's registered agent.

Operative Facts

Shortly before Brian Fair formed TCG, he hired the law firm of Powers & Therrien, P.S. to form, renew and ultimately close a Nevada corporation known as BF Trading. Powers & Therrien, P.S. drafted BF Trading's articles of incorporation on January 8, 2004. Powers & Therrien, P.S. billed Brian Fair for this legal work on April 6, 2004. Thereafter, the firm continued to provide services to Brian Fair by maintaining the existence of his wholly-owned corporation, BF Trading, until it was dissolved in 2006. The business contemplated to be done by BF Trading was unrelated to the business of TCG. The last time Powers & Therrien, P.S. billed Brian Fair for services rendered to his company, BF Trading, was March 15, 2006.

On October 27, 2004, Brian Fair sent an e-mail to Powers & Therrien "[r]egarding an agreement between myself and you two." The e-mail indicated Brian Fair wanted Powers & Therrien to split the cost of purchasing debt portfolios and contribute legal services to TCG. The e-mail included an attachment which was a copy of the standard Unifund agreement. On December 6, 2004, Les Powers sent an e-mail with an attached mark-up of the Unifund agreement. Powers & Therrien, P.S. never billed Brian Fair or TCG for this legal service. LKO is not a law firm, and is not in the business of providing legal services.

No e-mail or any other written communication was sent to Brian Fair from Powers & Therrien advising him that they would not enter into such an agreement. Eventually, a counter check dated February 21, 2005 written on the account of LKO payable to TCG was sent to Brian Fair in the amount of exactly one-half of the first debt portfolio already purchased by TCG by Brian Fair. This check came after a fax from Brian Fair was sent on February 8, 2005, to Diane at Powers & Therrien, P.S. Diane Sires is a legal assistant at Powers & Therrien, P.S.

Ms. Sires states in her declaration that: "Mr. Fair at all times knew that LK Operating, LLC was the investor in The Collection Group, LLC and that LK Operating, LLC was owned by Mr. Powers' and Mr. Therrien's adult children and not Mr. Powers, Mr. Therrien, or Powers & Therrien, P.S. I spoke with Mr. Fair on a regular basis concerning The Collection Group, LLC's collection activities. He repeatedly confirmed to me and made jokes about the fact that LK Operating, LLC was Les' and Keith's children's company."

All checks sent to TCG were LKO checks. No checks were sent on the account of Powers & Therrien, P.S. or on the personal accounts of Les Powers or Keith Therrien. The first reference to TCG in LKO's records was on February 7, 2007.

At all times relevant herein Powers & Therrien, P.S. represented LKO. Les Powers, Keith Therrien and Michelle Briggs, an employee of Powers & Therrien, P.S., were the only authorized signers on LKO checks. LKO did not have any employees.

Powers & Therrien, P.S. provided legal services to TCG after Brian Fair received the first check written on the LKO account dated February 21, 2005.

On April 21, 2007 a letter from TCG signed by Brian Fair was sent to Les Powers and Keith Therrien indicating he wanted to formalize their ownership in TCG. The letter suggested a stock ownership split between Brian and Shirley Fair (55%), Les Powers and Keith Therrien (38%), and Dorothy Fair (7%). Thereafter, LKO filed this lawsuit.

Neither Les Powers nor Keith Therrien ever advised Brian Fair in writing of the desirability of seeking the advice of independent legal counsel regarding Brian Fair's proposal to them. Neither Les Powers nor Keith Therrien ever obtained written consent from Brian Fair to represent LKO in any purchase of an ownership interest in TCG from Brian Fair.

Les Powers, Keith Therrien and employees of Powers & Therrien, P.S. were the only individuals Brian Fair communicated with when he attempted to sell an interest in TCG. He never spoke with Marsha Therrien, Patricia Powers or any of the adult children of Les Powers and Keith Therrien when negotiating the sale of an interest in TCG.

Brian Fair and TCG never entered into a written agreement with anyone acknowledging a third party's ownership interest in TCG.

Disputed Facts

Primary

Did Brian Fair enter into an agreement to sell an ownership interest in TCG with Powers and Therrien or LKO?

What are the terms of LKO's limited liability company agreement regarding the management powers of Powers & Therrien Enterprises, Inc.?

The extent of ownership in TCG by those persons/entities other than Brian and Shirley Fair is disputed.

Secondary

Whether Les Powers and/or Keith Therrien ever told Brian Fair that they, personally, and Powers & Therrien, P.S., their law business, declined to invest in TCG is disputed.

Why Les Powers and Keith Therrien never advised Brian Fair in writing of the desirability of seeking the advice of independent legal counsel regarding his proposal to them is disputed. Why they never obtained Brian Fair's consent in writing to represent LKO is disputed.

Whether Les Powers and/or Keith Therrien told Brian Fair that the children of Powers and Therrien had a company with funds to invest is disputed. Whether they told Brian Fair between February 1 and February 8, 2005 that LKO wanted to invest in TCG is disputed.

Why Mr. Powers red-lined a contract Mr. Fair was negotiating with Unifund on behalf of TCG after Mr. Fair first offered to sell Mr. Powers an interest in TCG is disputed.

Principles of Law

Summary Judgment

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits show no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends, in whole or in part. Vacova v. Farrel, 62 Wash.App. 386, 395 (1991).

Once a moving party establishes no genuine issue of material fact exists, the burden shifts to the non-moving party to show "specific facts showing that there is a genuine issue for trial." CR 56(e). "Unsupported conclusory allegations are not sufficient to defeat summary judgment." Vacova, 62 Wash.App. at 395, citing Stringfellow v. Stringfellow, 53 Wash.2d 639, 641 (1959). "Unsupported argumentative assertions are not sufficient to defeat summary judgment." Vacova at 395, citing Blakely v. Housing Auth. Of King Cy., 8 Wash. App. 204 210 review denied, 82 Wash.2d 1003 (1973). An affidavit does not raise a genuine issue for trial unless it sets forth facts evidentiary in nature, i.e.,

information as to 'what took place, an act, an incident, a reality as distinguished from supposition or opinion.'" *Id.* At 395, citing Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 359 (1988).

Rules of Professional Conduct

Rule 1.8 of the Rules of Professional Conduct states, in pertinent part, as follows:

(a) *A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:*

(1) *the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;*

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

(3) *the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.*

The comments to RPC 1.8 clarify the rule and emphasize the duty imposed on lawyers. In particular, the comments state, as follows:

A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business...or financial transaction with a client...*RPC 1.8, comment 1*

The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation...*RPC 1.8, comment 1.*

The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyers' representation of the client will be materially limited by the lawyer's financial interest in the transaction. *RPC 1.8, comment 2*

Under these circumstances, the lawyer must also comply with RPC 1.7, which requires the lawyer to disclose the risks associated with the dual role as both legal advisor and participate in the transaction, "such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client." *RPC 1.8, comment 2.*

The lawyer must obtain the client's informed consent. *RPC 1.8, comment 2.*

The prohibition on conduct by an individual lawyer under (a) also applies to all lawyers associated in a firm with the personally prohibited lawyer. *RPC 1.8, comment 20.*

The rule that a lawyer must not use information relating to representation of a client to the disadvantage of the client applies when the information is used to benefit either the lawyer or a third

person, such as another client or business associate of the lawyer. *RPC 1.8, comment 5.* (Emphasis added.)

Washington cases further elaborate on the rule. "The burden of proving compliance with RPC 1.8 rests with the lawyer; 'an attorney-client transaction is prima facie fraudulent.'" Valley/50th Avenue, LLC v. Stewart, 159 Wn.2d 736, 745 (2007), citing In re Disciplinary Proceeding Against Johnson, 118 Wn.2d 693, 704 (1992). "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 communications between the attorney and the client. *Id.* In Corporate Dissolution of Ocean Shores Park, Inc., v. Jordan, 132 Wn.App. 903, (2006), review denied Corporate Dissolution of Ocean Shores v. Rawson-Sweet, 154 P. 3d 918 (2007), the court explained,

[t]o justify a transaction between an attorney and 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.

132 Wn.App. at 911-12.

A client's sophistication does not relax the requirements of RPC 1.8. *Id.* In addition, corporate entities are legal persons as much as an actual person. Valley, supra; RCW § 1.16.080(1).

Rule 1.8(b) of the Rules of Professional Conduct states, in pertinent part, as follows:

A lawyer who is representing a client in a matter shall not use information relating to representation of a client to the disadvantage of the client unless the client consents in writing after consultation.

Rule 1.7 of the Rules of Professional Conduct states, in pertinent part, as follows:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. 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 or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to

provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

Statute

RCW 25.15.150(2) provides in pertinent part:

If the certificate of formation vests management of the limited liability company in one or more managers, then such persons shall have such power to manage the business or affairs of the limited liability company as is provided in the limited liability company agreement.

Analysis

Brian Fair Was a Current Client of Powers & Therrien

Powers and Therrien argue that the attorney-client relationship between Powers & Therrien, P.S. and Brian Fair ended when BF Trading was formed. See Declaration of Thomas M. Fitzpatrick.

With all due respect to Mr. Fitzpatrick, the court respectfully disagrees with his analysis. Once an attorney-client relationship is established, it continues until it is either terminated by some action of the parties or abandoned, In Re McGlothlen, 99 Wn. 2d 515 (1983).

In this case, Brian Fair hired Powers & Therrien, P.S. to form a corporation for him: BF Trading. After his lawyers created this corporation, wholly owned by Brian Fair, the law firm continued to make sure Mr. Fair's corporation continued to exist by paying the appropriate fees. The law firm regularly billed Mr. Fair for these services and eventually assisted Mr. Fair in dissolving BF Trading. However, long before BF Trading was dissolved, Mr. Fair offered Mr. Powers and Mr. Therrien the opportunity to purchase an interest in Mr. Fair's other corporation, TCG. They acknowledge that event occurred by their own declarations that say they emphatically rejected his offer.

At that time, Powers & Therrien, P.S. continued to represent Mr. Fair regarding BF Trading, and continued to bill him for those services. They did not expressly terminate the attorney-client relationship with Mr. Fair in 2004 or 2005.

Indeed, Mr. Powers even red-lined a contract Mr. Fair was negotiating with Unifund on behalf of TCG after Mr. Fair first offered to sell Mr. Powers an interest in TCG. While Mr. Powers never billed TCG or Mr. Fair for this advice, an attorney-client relationship does not require the payment of a fee or formal retainer, Ibid, at 522.

Where a relation of confidence is established, either some positive act or some complete case of abandonment must be shown in order to end it, Conner v. Hodgson, 120 Wash. 426, 431-432 (1922). No such positive act occurred between Mr. Fair and Powers & Therrien, P.S. and it certainly was not abandoned since the law firm continued to provide him legal advice and continued to maintain his corporation.

More importantly, when our Supreme Court was faced with the issue of whether to limit the application of the rules of professional conduct to clearly defined attorney-client relationships or whether to include less well defined relationships, Supreme Court Justice Utter answered the question as follows: "To more effectively protect the public, we choose to paint with the broader brush.", McGlothlen at 517.

The fact that Mr. Powers now states he was only reviewing the Unifund contract to determine if TCG would be a good investment for his children is immaterial for purposes of determining whether the attorney-client relationship existed. The existence of the relationship is based upon the client's subjective belief, provided that it is reasonably formed based upon the attending circumstances, Bohn v. Cody, 119 Wn.2d 357, 363 (1992).

Even assuming Mr. Powers and Mr. Therrien, individually and on behalf of Powers and Therrien, P.S., rejected Mr. Fair's offer to sell an ownership interest in TCG, there is no evidence of a positive act that terminated the ongoing attorney-client relationship Powers & Therrien, P.S. had with Brian Fair.

Therefore, this court concludes as a matter of law that Brian Fair was a client of Powers & Therrien, P.S. at all times material hereto.

There Is a Dispute of Fact Regarding Whether Brian Fair Knew or Should Have Known He Was Dealing with a Representative of LKO, Powers & Therrien, P.S. or Powers and Therrien, Individually

Diane Sires declaration does not create an issue of fact about who Brian Fair was negotiating with regarding the sale of a portion of his interest in TCG. The first sentence of paragraph 9 of her declaration is not admissible evidence. She may not testify about what Brian Fair knew. She may testify about what she told him and what he told her, but not what he knew.

The last sentence of paragraph 9 of her declaration is immaterial to the issues in this case. The reasonable inference is Brian Fair knew the children of Powers and Therrien had an ownership interest in LKO. So what?

The fact that LKO was the source of the funds used by Les Powers and Keith Therrien to purchase an interest in TCG does not create a reasonable inference that LKO entered into any agreement with Brian Fair. His only communications were between Les Powers, Keith Therrien, Powers & Therrien, P.S. and Diane Sires, a legal assistant for Powers & Therrien, P.S. He 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 Bank of America, or LKO is immaterial to the issue of who Brian Fair entered into an agreement with regarding the ownership of TCG. No legal

authority is cited by counsel to the contrary. Nor does receiving an LKO check from them legally impose a duty to inquire about the source of the funds. All Brian Fair would reasonably care about would be whether the check would clear, not whose account it was drawn on. In short, there is no documentary evidence that Brian Fair knew or should have known LKO was the entity investing in TCG.

However, Leslie Powers declaration states that he and Keith Therrien "rejected the September proposal outright. . . . We declined to invest either personally or through our professional services corporation. We did, however, mention that our children had a company that had funds it was looking to invest." Mr. Powers declaration further states: ". . . I spoke with Brian Fair by telephone and informed him that LK Operating, LLC did wish to make the proposed investment."

In addition, Keith Therrien's declaration stated: "In late 2004 Brian Fair was advised that neither Powers & Therrien, P.S., the law firm in which I am a principal, nor myself or Leslie A. Powers would be investors in The Collection Group, LLC, and that the investor would be a company owned by our children."

Mr. Powers' declaration does *not* state that he told Brian Fair that Powers, Therrien and their professional services corporation declined to invest. Mr. Therrien's declaration states that Brian Fair was advised of this fact, but does *not* state it was Mr. Therrien who told Brian Fair. If both declarants are relying on Ms. Sires statements to Brian Fair to establish his knowledge, then as discussed above, her declaration does not create such knowledge in Mr. Fair.

However, viewing these attorneys' declarations in a light most favorable to plaintiff, for purposes of defendants' motion for partial summary judgment, they do create a reasonable inference that Brian Fair knew or should have known he was dealing with a representative of LKO. Consequently, there is a question of fact about this issue at this time.

Les Powers, Keith Therrien, and Powers & Therrien, P.S. May Not Own an Interest in TCG

The court has ruled as a matter of law that Brian Fair was a client of Powers & Therrien, P.S. at all times material hereto.

The court has also found as an undisputed fact that neither Les Powers nor Keith Therrien ever advised Brian Fair in writing of the desirability of seeking the advice of independent legal counsel regarding Brian Fair's proposal to them.

Consequently, any agreement by Brian Fair to sell an interest in TCG to Les Powers, Keith Therrien and/or Powers and Therrien, P.S. would be a violation of RPC 1.8.

Therefore, any agreement to purchase an interest in TCG by Les Powers, Keith Therrien and Powers & Therrien, P.S. would be against public policy and void, Valley/50th Avenue, LLC, supra.

LKO May or May Not Own an Interest in TCG

There is a question of fact about who Brian Fair entered into an agreement with: Powers and Therrien or LKO. The court has ruled if Brian Fair entered into an agreement with Powers and Therrien, then it is against public policy and void.

The next question is whether any agreement between Brian Fair and LKO is also void against public policy.

Les Powers and Keith Therrien Violated RPC 1.7

While Brian Fair was a client of Powers & Therrien, P.S., he approached his attorneys about whether they wanted to invest in another one of his companies. Brian Fair was a seller of an ownership interest in TCG.

Powers & Therrien, P.S. represented LKO at this time. LKO was a potential buyer of an ownership interest in TCG.

Consequently, the representation of Brian Fair, seller, is directly adverse to representation of LKO, purchaser. Furthermore, Les Powers and Keith Therrien had a personal interest in the success of their children's trusts which created a significant risk that their continued representation of Brian Fair would be materially limited.

Notwithstanding these conflicts, RPC 1.7(b) allows Powers & Therrien, P.S. a method of allowing Powers & Therrien, P.S. to represent both the buyer and seller in this transaction. However, there is no evidence Powers & Therrien, P.S. ever obtained informed consent from LKO or Brian Fair in writing pursuant to RPC 1.7(b)(4).

Consequently, Les Powers and Keith Therrien violated RPC 1.7.

They had the opportunity to either terminate their attorney-client relationship with Brian Fair before proceeding further or follow the provisions of RPC 1.7 and/or 1.8. As officers of the court, it was their responsibility to make certain the rules of professional conduct were complied with, not the duty of Brian Fair, regardless of his degree of sophistication.

A fee agreement between a lawyer and a client may be void or voidable unless the attorney shows that the contract was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts, *Ibid*, citing Kennedy v. Clausing, 74 Wn.2d 483 (1968). It has also been noted that agreements violating the RPC are contrary to public policy, Ocean Shores Park v. Gloria Rawson-Sweet, *supra*, citing Danzig v. Danzig, 79 Wn.App. 612 (1995).

These cases generally involve agreements between attorneys and their clients and the application of RPC 1.8. This court is unaware of any case that holds a contract entered into by a buyer and seller, who are both represented by the same lawyers who violated RPC 1.7, is voidable. However, assuming LKO was the party that entered into an agreement with Mr. Fair, because LKO is managed by Powers & Therrien Enterprises, P.S. which is owned by Powers and Therrien, and LKO was formed for the

purpose of benefiting Powers and Therrien's adult children, then there may be an argument that whatever agreement entered into between LKO and Mr. Fair is voidable.

Because the parties have not briefed the consequence of a violation of RPC 1.7, the court will defer ruling on this issue at this time.

LKO Is Not Owned by Les Powers and Keith Therrien

Because LKO is owned by corporations that are owned by trusts set up for the benefit of the children of Les Powers and Keith Therrien, LKO is not owned by attorneys Powers and Therrien. Thus, it appears that RPC 1.8 would not apply to void any agreement between LKO and Brian Fair.

Is LKO Controlled by Les Powers and Keith Therrien such that RPC 1.8 Should Apply?

Powers & Therrien, P.S. represented LKO at all times material hereto. LKO was established to benefit Mr. Powers' and Mr. Therrien's children. Powers & Therrien Enterprises, Inc. managed LKO at all times material hereto and Les Powers and Keith Therrien own Powers & Therrien Enterprises, Inc..

Because LKO is managed by Powers & Therrien Enterprises, Inc., (a corporation owned by attorneys, Powers and Therrien), LKO has vested its management powers in Powers & Therrien Enterprises, Inc. pursuant to RCW 25.15.150. The exact extent of its control, however, is unknown because the court does not believe LKO's limited liability company agreement has been made part of the record.

Because that information is not available at this time, the court must defer ruling on the issue of whether RPC 1.8 should be applied to void any transaction between LKO and Brian Fair, based on the extent of control attorneys, Powers and Therrien, had over LKO through their corporation Powers & Therrien Enterprises, Inc.

RPC Was Violated

RPC 1.7 has been violated. RPC 1.8 may also have been violated. Consequently, LKO's cross motion for partial summary judgment based upon the allegation there were no ethical violations must be denied.

Summary

Brian Fair was a client of Powers & Therrien, P.S. at all times material hereto. Les Powers and Keith Therrien violated RPC 1.7. Any agreement between Powers and Therrien and Brian Fair is against public policy and void.

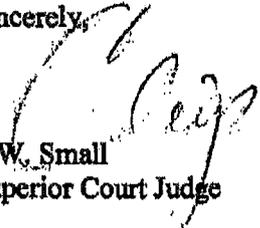
Any agreement between LKO and Brian Fair may be against public policy and void due to the violation of RPC 1.7 and/or RPC 1.8 depending upon the briefing by counsel and the provisions of the limited liability company agreement between LKO and Powers & Therrien Enterprises, Inc. respectively.

March 31, 2009

• **Page 15**

Therefore, the plaintiff's motion for partial summary judgment is denied, and the defendants' motion for partial summary judgment is granted in part and denied in part without prejudice. Counsel for defendants should prepare and present the appropriate order in conformance with this court's decision herein.

Sincerely,



T.W. Small
Superior Court Judge

cc: Superior Court file

APPENDIX B

Superior Court of the State of Washington
For Chelan County

Lesley A. Allan, Judge
Department 1
T.W. Small, Judge
Department 2



401 Washington Street
P.O. Box 680
Wenatchee, Washington 98807-0880
Phone: (509) 667-6210 Fax (509) 667-6588

John E. Bridges, Judge
Department 3
Bart Vandegriff
Court Commissioner

June 27, 2011

FILED
JUN 27 2011
Kim Morris
Chelan County Clerk

Steve Lacy
Lacy & Kane, P.S.
P.O. Box 7132
Wenatchee, WA 98807-7132

Bradley Keller
Joshua Selig
Byrnes Keller Cromwell, LLP
1000 2nd Avenue, FL 38
Seattle, WA 98104-1094

**Re: Brian Fair et al v. Leslie Powers and Keith Therrien
Chelan County Superior Court Cause No. 07-2-00652-9**

Court's Memorandum Decision

Dear Counsel:

This matter came before the court for oral argument on cross motions for summary judgment on May 31, 2010. The court has reviewed the following:

1. Defendants' Motion for Summary Judgment RE Lack of Compensable Damages
2. Declaration of Joshua Selig in Support of Defendants' Motion for Summary Judgment RE lack of Compensable Damages

June 27, 2011

• Page 2

3. Plaintiffs' Response to Defendants' Motion for Summary Judgment RE Lack of Compensable Damages
4. Declaration of Brian Fair In Response to Defendants' Motion for Summary Judgment
5. Defendants' Reply In Support of Their Motion for Summary Judgment Re Lack of Compensable Damages
6. Second Declaration of Joshua Selig In Support of Defendants' Motion for Summary Judgment RE Lack of Compensable Damages
7. Plaintiffs' Motion for Summary Judgment on Liability
8. Declaration of Brian Fair In Support of Summary Judgment on Issue of Liability
9. Defendants' Opposition to Plaintiff's Motion for Summary Judgment on Liability
10. Declaration of Joshua Selig In Support of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment on Liability
11. Declaration of Les Powers In Support of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment on Liability
12. Declaration of Mark Fucile In Support of Defendants' Opposition to Plaintiffs' Motion for Summary Judgment on Liability
13. Plaintiffs' Reply Memorandum Requesting Summary Judgment on Issue of Defendants' Liability
14. Declaration of Brian Fair In Support of Reply to Motion for Summary Judgment on Issue of Liability
15. Defendants' Motion to Strike Portions of Declaration of Brian Fair In Response to Defendants' Motion for Summary Judgment and Exhibits A & B Thereto or, Alternatively, to Compel Production of Relevant Documents
16. Declaration of Joshua B. Selig In Support of Defendants' Motion to Strike Portions of Declaration of Brian Fair In Response to Defendants' Motion for Summary Judgment and Exhibits A & B Thereto or, Alternatively, to Compel Production of Relevant Documents
17. Tradewell Group v. Mavis, 71Wn.App. 120 (1993)

June 27, 2011

• **Page 3**

18. Blueberry Place v. Northward Homes, 126 Wn.App. 352
(2005)

Introduction

The court bifurcated the trials of the declaratory judgment action and the legal malpractice action in this matter. The court entered judgment after the first trial on January 31, 2011, against The Collection Group in favor of LK Operating, LLC in the amount of \$78,431.61.

The remaining trial on the legal malpractice action is set to begin July 25, 2011. Both parties have moved for summary judgment.

Contentions of the Parties

Plaintiffs, Brian and Shirley Fair and The Collection Group (TCG), seek attorney's fees incurred defending the declaratory judgment action filed by LK Operating, LLC (LKO) solely on the basis of equitable indemnification. They ask the court to rule as a matter of law that defendants, Les Powers (Powers) and Keith Therrien (Therrien), committed malpractice.

Defendants deny equitable indemnification is available to plaintiffs for reimbursement of their attorney's fees. Alternatively, defendants allege that because plaintiffs Brian and Shirley Fair now own 100% of TCG, they received a windfall that exceeds the amount of the attorney's fees they incurred defending the declaratory judgment action.

Issues

May plaintiffs recover attorney's fees against Powers and Therrien under the theory of equitable indemnity?

If so, may plaintiffs recover fees if the value of TCG they obtained as a result of the rescission exceeded the amount of attorney's fees incurred?

June 27, 2011

• Page 4

Pertinent Undisputed Facts

Brian Fair and Les Powers entered into an agreement¹ whereby TCG would be provided one-half the investment capital needed by TCG to purchase debt and that Powers and Therrien, P.S. would provide free legal services to help prepare initial pleadings to allow TCG to collect the debt purchased by TCG in exchange for 50% ownership of TCG.

Brian Fair authorized Les Powers to document the above agreement however Les Powers wished. Fair made it clear that he was not concerned about who Powers chose to provide the money.

Les Powers never documented this agreement, but he arranged for LKO to provide TCG investment capital in the amount of \$52,000 and for Powers and Therrien, P.S. to provide the free legal services to TCG.

There was never any direct written communications from LKO to TCG or from TCG to LKO.

Later Fair desired to form another entity with Powers and Therrien to own real estate that would be leased to TCG. Consequently, Fair sent a letter dated April 21, 2007, to Powers and Therrien proposing to formalize the ownership agreement. Fair's proposal reduced the ownership of the entity chosen by Powers from the 50% previously agreed to by Fair and Powers.

Powers and Therrien objected to this proposed modification to the agreement. LKO subsequently filed this lawsuit to establish a 50% ownership interest in TCG.

Fair acknowledged his letter of April 21, 2007 ignited the dispute that caused the declaratory judgment action to be filed by LKO.

Fair believed TCG had a value of "around \$1.5" million dollars on April 21, 2007.

¹ There has never been a ruling that this agreement was enforceable. Indeed, it was this agreement that the court allowed the parties to rescind. Ultimately, Mr. Fair chose to rescind which resulted in he and his wife owning 100% of TCG at a cost of \$78,431.61, the amount of the judgment entered after the rescission, paid by TCG, not the Fairs.

June 27, 2011

• Page 5

As of June 4, 2007, Powers and Therrien no longer represented TCG. On July 1, 2007, TCG contracted with Fair Resolutions.

The attorney's fees incurred by Fair in the declaratory judgment action were all paid by TCG without any obligation on the part of Fair to reimburse TCG.

Principles of Law

The only damages sought by plaintiffs in the legal malpractice case are attorney's fees incurred in the declaratory judgment action. The only theory plaintiffs pursue these fees is under the theory of equitable indemnity.

"Under this theory, the court may award fees where the natural and proximate consequences of a defendant's wrongful act put the plaintiff in litigation with others and the action is instituted by a third party not connected with the original transaction." Tradewell, supra at 126.

A party may not recover attorney fees under this theory if there are other reasons they became involved in litigation with the third party, Tradewell, supra at 128.

Analysis

Here plaintiffs allege the legal malpractice of defendants Powers and Therrien to fail to properly document the original agreement between Fair and Powers resulted in the filing of the declaratory judgment action by LKO which resulted in defendants incurring attorney's fees.

First, while it was not wrongful for Mr. Fair to attempt to renegotiate the agreement he previously entered into with Mr. Powers, it definitely contributed to the filing of the declaratory judgment action. Assuming defendants committed malpractice², it can be concluded as a matter of law that such malpractice was not the sole reason for the declaratory judgment litigation.

Second, the money ultimately paid to TCG undisputedly came from LKO. Fair had constructive notice of this fact by the checks he

² The court acknowledges defendants vehemently deny this allegation and plaintiffs claim defendants did so as a matter of law, the court's decision herein makes determination of this issue moot.

June 27, 2011

Page 6

received drawn on LKO's account, if not actual notice. Like it or not, LKO was connected with the initial agreement between Powers and Fair each time it provided funds to TCG.

Conclusion

As a matter of law, plaintiffs cannot show the alleged malpractice of defendants was the sole reason they were involved in the original declaratory judgment action.

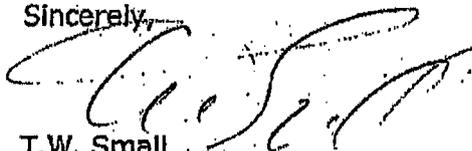
Furthermore, as a matter of law, LKO was connected to the original agreement.

Consequently, equitable indemnification is not available to the plaintiffs.

Therefore, defendants' motion for summary judgment is granted. Mr. Selig should prepare the appropriate order for presentment.

Given the court's ruling herein, the summary judgment motion set for hearing tomorrow is moot and the hearing is stricken.

Sincerely,



T.W. Small
Superior Court Judge

C: Superior Court file
Ron Trompeter

APPENDIX C

168 Wash.App. 862
Court of Appeals of Washington,
Division 3.

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 their marital community composed
thereof, Respondents and Cross-Appellants,
Leslie Alan Powers and Patricia Powers, husband
and wife, and Keith Therrien and Marsha
Therrien, husband and wife, Intervenor.

No. 29741-1-III. | June 19, 2012.

Synopsis

Background: Manager of trusts for the children of law firm's principles brought action against law firm's clients, from whom manager had purchased an interest in a debt collection business, for a judicial declaration of the ownership rights of the parties, breach of fiduciary duty, and breach of contract. Clients brought action against attorneys for legal malpractice and breach of the Consumer Protection Act. Actions were consolidated. The Superior Court, Chelan County, Ted W. Small, Jr., J., entered partial summary judgment in favor of clients and, following trial as to damages, entered judgment for approximately \$78,400. Attorneys appealed and clients cross-appealed.

Holdings: The Court of Appeals, Sweeney, J., held that:

[1] attorneys had a duty to disclose their personal interest in manager, legal duties as principals of manager, and professional duties as attorney for manager;

[2] Rule of Professional Conduct governing conflicts of interest did not provide the basis for rescission of agreement; but,

[3] Rule of Professional Conduct that prohibited attorneys from entering into business transactions with clients unless certain conditions were met provided a basis to rescind purchase agreement.

Affirmed.

West Headnotes (11)

[1] **Appeal and Error**

↔ Cases Triable in Appellate Court

Court of Appeals reviews a trial court's order granting summary judgment de novo and engages in the same inquiry as the trial court.

[2] **Appeal and Error**

↔ Judgment

Court of Appeals considers facts and reasonable inferences in the light most favorable to the party who is not moving for summary judgment. CR 56(c).

[3] **Appeal and Error**

↔ Cases Triable in Appellate Court

Court of Appeals reviews de novo whether an attorney's conduct violates the Washington Rules of Professional Conduct, RPC 1.1 et seq.

[4] **Attorney and Client**

↔ Miscellaneous particular acts or omissions

Attorney and Client

↔ Dealings Between Attorney and Client

Attorneys who represented a debt collection client in an unrelated matter and then represented a manager of trusts for attorneys' children in a purchase of an interest in the debt collection business had a conflict of interest that resulted in application of attorneys' duty under the Rules of Professional Conduct to disclose their personal interest in manager, legal duties as principals of manager, and professional duties as attorney for manager. RPC 1.7 comment.

[5] **Attorney and Client**

☞ Skill and care required

Attorney and Client

☞ Acts and omissions of attorney in general

The Rules of Professional Conduct are not intended to serve as a basis for civil liability, nor do they establish the appropriate standard of care in a civil action. RPC 1.1 et seq.

[6] **Attorney and Client**

☞ Grounds for Discipline

The Rules of Professional Conduct simply establish the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. RPC 1.1 et seq.

[7] **Attorney and Client**

☞ Dealings Between Attorney and Client

Rule of Professional Conduct governing conflicts of interest did not provide the basis for rescission of agreement for manager of trusts for the children of attorneys to purchase interest in debt collection business of attorneys' client; application of rescission could easily fall on an innocent client. RPC 1.7.

[8] **Attorney and Client**

☞ Dealings Between Attorney and Client

An attorney-client transaction is prima facie fraudulent. RPC 1.8.

[9] **Attorney and Client**

☞ Dealings Between Attorney and Client

The burden is on the lawyer who has entered into a business transaction with a client or acquires an interest adverse to a client to show that there was no undue influence. RPC 1.8.

[10] **Attorney and Client**

☞ Dealings Between Attorney and Client

The lawyer who enters into a business transaction with a client or acquires an interest adverse to a client must show that he or she gave

the client the same information or advice as a disinterested lawyer would have given and that the client would have received no greater benefit had he or she dealt with a stranger. RPC 1.8.

[11] **Attorney and Client**

☞ Dealings Between Attorney and Client

Attorneys who represented a debt collection client in an unrelated matter and then represented a manager of trusts for attorneys' children in a purchase of an interest in the debt collection business violated Rule of Professional Conduct that prohibited attorneys from entering into business transactions with clients unless certain conditions were met, where attorneys had interest in transaction as parents, their spouses headed corporate members that controlled manager, and at least one attorney was officer of manager as well as acting as manager's attorney, and, thus, Rule provided a basis to rescind the agreement. RPC 1.8.

Attorneys and Law Firms

**449 James A. Perkins, Larson Berg & Perkins PLLC, Yakima, WA, for Appellant.

Ronald James Trompeter, Hackett Beecher & Hart, Catherine Wright Smith, Smith Goodfriend PS, Seattle, WA, Steven Craig Lacy, Attorney at Law, East Wenatchee, WA, for Respondents and Cross-Appellants.

Sidney Charlotte Tribe, Talmadge/Fitzpatrick, Tukwila, WA, for Intervenor.

Opinion

SWEENEY, J.

*863 ¶ 1 Rules of professional conduct have been used to prohibit lawyers from enforcing agreements with clients that lawyers were a party to. But those same rules have not been applied to support actions for legal malpractice or for equitable relief or damages based on a lawyer's ethical lapses. Here, the court refused to enforce a business agreement between two limited liability companies (LLCs) after concluding that the lawyer representing the parties

represented both sides at the same time and therefore violated Rule of Professional Conduct (RPC) 1.7 (prohibiting lawyers from representing clients if there is a conflict of interest). We conclude that the remedy of rescission cannot *864 be based on a violation of RPC 1.7. We, however, also conclude based on the court's findings that the interests of the lawyer and one of the LLCs were sufficiently aligned to warrant rescission of the agreement based on a violation of RPC 1.8 (prohibiting lawyers from entering into business agreements with their clients). We therefore affirm the superior court's judgment ordering rescission.

FACTS

Background

¶ 2 Leslie Powers and Keith Therrien practiced law as Powers & Therrien, P.S. in **450 Yakima, Washington. Together they formed **LK Operating, LLC** (LKO) in December 2003. LKO managed irrevocable trusts for the benefit of Mr. Powers' and Mr. Therrien's adult children. Each of the five adult children of Mr. Powers and Mr. Therrien is the sole trustee and the beneficiary of a separate trust. Each trust is the sole shareholder of a corporation and the five corporations are the sole members of LKO. Powers & Therrien Enterprises Inc. manages LKO. Mr. Powers and Mr. Therrien are the officers of that management corporation.

¶ 3 Brian Fair was a client of Powers & Therrien, P.S. in 2004. That same year, Mr. Fair and his wife formed The Collection Group LLC (TCG) to engage in the business of debt collection. Powers & Therrien, P.S. had no role in the formation of TCG. TCG is managed by Mr. Fair. Mr. Fair asked Mr. Powers whether he or Mr. Therrien would be interested in his new business venture. Mr. Fair proposed an equal investment of funds and ownership. Mr. Fair proposed that he would contribute administrative and management services and that Mr. Powers and Mr. Therrien would contribute legal services. Mr. Fair outlined his joint venture proposal in an October 2004 e-mail regarding the purchase of debt from Unifund, a debt vendor:

Les, Keith,

...

*865 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:

- A. We will split the purchase price and other out of pocket costs, including legal services that your firm cannot provide.
- B. You will contribute legal services you can provide (review the purchase agreement contract, legal doc for this JV [joint venture] (if needed), demand letter, ask smart questions, kick the tires, etc.)
- C. My contribution will include no charge for finding this debt, negotiations with debtor and debt seller (unless you prefer to do this), and keeping you informed.

Clerk's Papers (CP) at 216.

¶ 4 Mr. Powers later reviewed the attached Unifund purchase agreement and returned it to Mr. Fair marked up with extensive suggested changes. Mr. Powers did not respond to Mr. Fair's inquiry about an agreement. Mr. Fair continued to negotiate with Unifund; TCG was eventually named as the prospective purchaser of the debt. Mr. Fair sent an e-mail to Mr. Powers in January 2005 asking whether he was still interested in the deal with Unifund. Mr. Powers did not respond. Mr. Fair then caused TCG to invest in the Unifund debt portfolio with \$7,969.23 of its own money. Mr. Fair began work to collect the debt that TCG had purchased.

¶ 5 Mr. Fair exchanged e-mails with Powers & Therrien, P.S. that discussed the legal services required to collect the debt. The law firm drafted legal documents for TCG and TCG made progress collecting the accounts in the Unifund portfolio. In early February 2005, Mr. Powers apparently indicated in a telephone conversation with Mr. Fair that LKO, the company owned by the adult children, was interested *866 in making the proposed investment. Mr. Fair sent a fax to Mr. Powers' legal assistant asking her to arrange for a check for \$3,984.61 (one-half the cost of the Unifund portfolio) made out to "The Collection Group, LLC." CP at 1153. Mr. Fair again sent the fax to the firm's bookkeeper several days later after he did not receive the funds.

¶ 6 TCG received a check in the amount requested on February 21, 2005. The check was signed by Michelle Briggs, whom Mr. Fair knew to be an employee of Powers & Therrien, P.S. The check was a "counter check" with the name "**LK Operating LLC**" handwritten in the upper left-hand

corner. CP at 197, 441. Mr. Fair did not know the identity of LKO but assumed it was an account owned by Les and Keith (LK) of Powers & Therrien, P.S. Mr. Fair faxed an accounting to Powers & Therrien, P.S. that stated: "Les, this gives you guys 1/2 ownership **451 in the company. You can formalize however you wish." CP at 311. Neither Mr. Powers nor Mr. Therrien formalized any agreement.

¶ 7 Mr. Fair continued to expand the business and when an opportunity to purchase additional debt portfolios arose, he contacted Powers and Therrien, P.S. for additional funds. They responded and sent three additional checks: one on March 3, 2005, for \$13,015.39; one on December 23, 2005, for \$10,000; and one on September 11, 2006, for \$25,000. Each check was a "LK Operating LLC" counter check. Mr. Powers and Mr. Therrien still had not proposed any formal agreement to spell out the relationship among the parties.

¶ 8 Mr. Fair asked Mr. Powers to draft an operating agreement for a new entity, OPM I, LLC (OPM), in early 2007. OPM was a limited liability company formed by TCG and Mr. Fair to collect delinquent debt in states other than Washington. TCG was a member of OPM, and TCG and Mr. Fair were its managers. The OPM operating agreement drafted by Mr. Powers included a waiver of "legal conflict": "Members of Counsel's family have an interest in the Manager and through it the Company [OPM]." CP at 1478-79. Mr. Fair signed the OPM operating agreement personally and as TCG's manager.

*867 ¶ 9 Mr. Fair again requested that Mr. Powers and Mr. Therrien formalize their ownership interest in TCG in April 2007. This time Mr. Fair proposed that Mr. Powers and Mr. Therrien would own a 38 percent interest, that Mr. Fair's mother would own a 7 percent interest, and that he and his wife would own a 55 percent interest. The percentages were based on both the financial and service related contributions of the parties. Mr. Fair estimated that the value of TCG had grown to approximately \$1.5 million. Mr. Powers and Mr. Therrien rejected the proposal and insisted that they were entitled to a 50 percent ownership interest in TCG.

Procedural History

¶ 10 Mr. Powers and Mr. Therrien caused LKO to sue TCG and Mr. Fair for a judicial declaration of the ownership rights of the parties, for breach of fiduciary duty, and for breach of contract. The Fairs responded by suing Mr. Powers and Mr. Therrien personally for legal malpractice and breach of the Consumer Protection Act, chapter 19.86 RCW. Both

matters were consolidated. TCG and the Fairs moved for partial summary judgment against LKO on the ground that RPC 1.8 prohibits business dealings between an attorney and his client unless the client gives informed consent. LKO also moved for summary judgment against the Fairs on the ground that Mr. Fair was not a client of Powers & Therrien, P.S. at the time of the disputed transaction, and neither Mr. Powers, Mr. Therrien, nor Powers & Therrien, P.S. had any ownership or financial interest in LKO.

¶ 11 The court ruled in a memorandum decision that Mr. Fair personally was at all times a client of Powers & Therrien, P.S. The court ruled that any attempted purchase of an interest in TCG by Mr. Powers and Mr. Therrien personally or through Powers & Therrien, P.S. would be against public policy and void because it violated RPC 1.8. The court, however, also concluded that a question of fact remained about whom Mr. Fair actually entered into the agreement with, Powers & Therrien, P.S. or LKO.

*868 ¶ 12 The court went on to conclude, sua sponte, that Mr. Powers and Mr. Therrien had a conflict of interest under RPC 1.7 (concurrent conflict of interest). This was because Powers & Therrien, P.S. represented LKO, and LKO was a potential purchaser of an ownership interest in TCG, and neither entity consented to the representation. The court denied LKO's motion for summary judgment, partially granted TCG's motion for summary judgment, and requested additional briefing on whether rescission was an appropriate remedy for a violation of RPC 1.7.

¶ 13 LKO and Mr. Powers and Mr. Therrien each moved to reconsider. The court granted LKO's motion in part by ruling that a question of fact remained as to whether Mr. Therrien had violated RPC 1.7, but denied the balance of the motions. Mr. Fair later stipulated at a discovery hearing that **452 the contract at issue was not a sale of personal equity, but was a direct transaction with TCG. He stipulated that he acted as an agent for TCG, and not personally. LKO then again requested that the court reverse the previous ruling on the ground that the stipulations effectively meant the contract at issue was solely between LKO and TCG, not with Mr. Fair personally, and therefore there could not be the basis for a RPC 1.8 violation by Powers & Therrien, P.S. LKO also again argued that a question of fact remained as to whether there was an attorney-client relationship between TCG and Powers & Therrien, P.S. at the time they contracted with LKO. The court rejected those arguments in a second memorandum decision:

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.

*869 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 1.7 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, LLC** 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.

*870 CP at 2371-72. The court acknowledged the absence of controlling authority in Washington on whether a violation of RPC 1.7 made the transaction voidable but cited the New Mexico case of *C.B. & T. Co. v. Hefner*¹ in support of its ultimate conclusion that it did. The court also dismissed the question of whether Mr. Powers violated RPC 1.8 as moot.

¶ 14 The court bifurcated the malpractice action from the contract action in preparation for trial limited to the appropriate amount of **453 damages that should follow from the rescission. Following trial, the court entered judgment in favor of LKO for the principal amount of all sums which LKO invested with TCG plus interest, \$78,431.61. The court entered findings of fact and conclusions of law. LKO appeals and TCG and Mr. Fair cross-appeal. In June 2011, the court summarily dismissed Mr. Fair's malpractice action on the basis that there were no cognizable damages from Mr. Powers' violation of RPC 1.7.

DISCUSSION

VIOLATION OF RPC 1.7 AND REMEDY OF RESCISSION

¶ 15 LKO contends that the court's conclusion that Mr. Powers represented either LKO or Mr. Fair in this investment agreement is wrong. LKO admits that Mr. Fair personally was a client of Powers & Therrien, P.S., but contends that when Mr. Fair presented the investment proposal to Mr. Powers he was acting as the managing agent for TCG. LKO contends that Mr. Fair never acted in his personal capacity. LKO argues that it, not Mr. Powers, invested in TCG. LKO argues that is precisely why the trial court could not, and did not, rule that Mr. Powers violated any RPC 1.7 obligation owed to TCG, only to Mr. Fair. But, again, LKO contends that because Mr. Fair was not personally a party to the investment agreement and also did not ask for personal representation, there can be no finding *871 that Mr. Powers violated any RPC 1.7 obligation owed to Mr. Fair.

¶ 16 LKO contends that the court's use of RPC 1.7 to impose civil legal obligations was wrong because the RPCs are ethical rules, not intended to be used to impose civil liability. LKO argues that RPC 1.7 was the only basis for approving rescission here since the court refused to find fraud or misrepresentation, breach of fiduciary duties, or breach of contract. LKO contends it is a nonlawyer and therefore owed no ethical duties and should not have been subject to this civil sanction based on violation of a RPC.

¶ 17 TCG responds that Powers & Therrien, P.S. represented LKO at the time of the investment proposal and worked on LKO's behalf to make it a member of TCG. TCG contends that Powers & Therrien, P.S. also represented Mr. Fair. TCG argues that it is irrelevant whether a lawyer's two clients are both involved in the same transaction for purposes of a RPC 1.7 violation. RPC 1.7 bars a lawyer from representing a client in a negotiation with someone who is a client of the lawyer in an unrelated matter. TCG argues that the investment opportunity was offered directly to Mr. Powers and Mr. Therrien, and that Mr. Fair did not even know who LKO was. Indeed, Mr. Fair assumed that because the initials were "LK," it was Les's and Keith's company. So, TCG urges that the court was correct in holding that Powers & Therrien, P.S. simply could not ethically represent LKO in a negotiation when Mr. Fair was still a client. And TCG says that the court's remedy, rescission, is proper. *See C.B. & T. Co. v. Hefner*, 98 N.M. 594, 651 P.2d 1029 (1982).

[1] [2] [3] ¶ 18 We review a trial court's order granting summary judgment de novo and engage in the same inquiry as the trial court. *Hubbard v. Spokane County*, 146 Wash.2d 699, 706-07, 50 P.3d 602 (2002) (quoting *Ellis v. City of Seattle*, 142 Wash.2d 450, 458, 13 P.3d 1065 (2000)). Summary judgment is appropriate when the pleadings and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *872 CR 56(c). We consider facts and reasonable inferences in the light most favorable to the nonmoving party. *Hubbard*, 146 Wash.2d at 707, 50 P.3d 602. And we review de novo whether an attorney's conduct violates the Washington Rules of Professional Conduct. *See Gustafson v. City of Seattle*, 87 Wash.App. 298, 302, 941 P.2d 701 (1997).

CONFLICT OF INTEREST (RPC 1.7)

¶ 19 A lawyer shall not represent a client if the representation of that client may be directly adverse to another client or materially limited by the lawyer's responsibilities to another client, third person, or by the lawyer's own interests unless the

lawyer reasonably believes that the representation will not be adversely affected, and the client consents in **454 writing after consultation and a full disclosure of material facts. RPC 1.7(a), (b). Direct conflicts can even arise in transactional matters involving the representation of multiple clients in unrelated matters. RPC 1.7 cmt. 7 ("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.").

¶ 20 LKO does not dispute that Mr. Powers represented Mr. Fair prior to the formation of TCG in an unrelated matter. And this record supports that this attorney-client relationship had not ended at the time of the agreement that is the center of the dispute. LKO also does not dispute that Mr. Powers represented LKO, his children's company. Mr. Powers managed LKO through a separate corporation. Mr. Fair solicited investments from Mr. Powers and Mr. Therrien, not LKO. The initial proposal is set out in an e-mail with an attached sample purchase agreement from a debt vendor. Mr. Powers marked up that sample agreement with suggestions and returned it to Mr. Fair. Mr. Powers performed those legal services for Mr. Fair, not LKO. Mr. *873 Powers later created legal documents for Mr. Fair and his new company, TCG. We are led then to conclude, as the trial judge did, that Mr. Powers simultaneously represented both Mr. Fair and LKO.

[4] ¶ 21 LKO contends, nonetheless, that such simultaneous representation still does not give rise to a RPC 1.7 violation because the representations occurred in unrelated matters and not the transaction at issue. We disagree. There is a conflict of interest even when a lawyer represents a client in another unrelated matter and then represents a second client in a business transaction with the current client. RPC 1.7 cmt. 7. And that is what we have here.

¶ 22 Mr. Powers represented both Mr. Fair and LKO in separate unrelated matters and then represented LKO in the business transaction with Mr. Fair by relaying the investment proposal and forwarding the funds. Mr. Powers had a duty to disclose his personal interest in LKO, his legal duties as manager of LKO, and his professional duties as an attorney for LKO. The representation of Mr. Fair was directly adverse to the representation of LKO in the transaction and there is no evidence that either client gave informed consent in writing. Mr. Powers violated RPC 1.7.

RPC AS BASIS FOR RESCISSION

¶ 23 LKO next contends that, even if Mr. Powers violated RPC 1.7, LKO's agreement with TCG should not be subject to rescission.

[5] [6] ¶ 24 The Supreme Court adopted the RPCs pursuant to its power to regulate the practice of law in Washington. *Hizey v. Carpenter*, 119 Wash.2d 251, 261, 830 P.2d 646 (1992). The RPCs are not intended to serve as a basis for civil liability, nor do they establish the appropriate standard of care in a civil action. *Id.* at 259–61, 830 P.2d 646. The RPCs simply establish the “‘minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.’ ” *Id.* at 261, 830 P.2d 646 (quoting former RPC Preliminary Statement (1985)). But agreements that violate RPCs or, at least, *874 RPC 1.8, have been held to be contrary to public policy and the courts of this state have refused to enforce agreements based on a violation of RPC 1.8. *In re Corp. Dissolution of Ocean Shores Park, Inc.*, 132 Wash.App. 903, 910, 134 P.3d 1188 (2006); *Danzig v. Danzig*, 79 Wash.App. 612, 616–17, 904 P.2d 312 (1995); *Marshall v. Higginson*, 62 Wash.App. 212, 217–18, 813 P.2d 1275 (1991). Here LKO sued for a judicial declaration of its understanding of the agreement with Mr. Fair and TCG.

¶ 25 In *Hizey*, clients sued their attorney and alleged legal malpractice based on the lawyer's conflict of interest. *Hizey*, 119 Wash.2d at 256–57, 830 P.2d 646. The trial judge refused to let an expert testify on rules of professional conduct and refused to instruct the jury on those rules. *Id.* at 257–58, 830 P.2d 646. The Supreme Court affirmed. The court held that a violation of ethics rules must be pursued through a disciplinary proceeding. *Id.* at 259, 830 P.2d 646. And the court held that such violations may not serve **455 as the basis for a private cause of action. *Id.* at 259, 261, 830 P.2d 646. The court reasoned that a claim for legal malpractice focuses on the duty of care owed to the client, which is established by the relationship and not by the RPCs. *Id.* at 260–62, 830 P.2d 646.

¶ 26 The *Hizey* decision, however, addressed application of the RPCs only in the legal malpractice setting. The court did not answer whether the court would also separate the ethics and potential civil liability in other suits, such as fee disgorgement, breach of contract, or disqualification motions. Indeed, the court noted that other courts had “relied on the CPR [Code of Professional Responsibility] and RPC for reasons other than to find malpractice liability and our holding

today does not alter or affect such use.” *Hizey*, 119 Wash.2d at 264, 830 P.2d 646 (citing *Singleton v. Frost*, 108 Wash.2d 723, 742 P.2d 1224 (1987) (relying on disciplinary rule to determine reasonableness of attorney fees); *Eriks v. Denver*, 118 Wash.2d 451, 824 P.2d 1207 (1992) (holding violation of CPR is a question of law, not fact); *Walsh v. Brousseau*, 62 Wash.App. 739, 815 P.2d 828 (1991) (holding contract for sale of law *875 practice, which included duty on part of selling attorney to refer clients as consideration for the sale, violated RPC)). At least one legal scholar has suggested that the court did not need to be so cautious, as many of the other cases are distinguishable. Stephen E. Kalish, *How to Encourage Lawyers To Be Ethical: Do Not Use the Ethics Codes as a Basis for Regular Law Decisions*, 13 GEO. J. LEGAL ETHICS 649, 672 (2000) (“None of the cases that [the court] cites suggests that a judge in his instructions or an expert in his opinion may explicitly refer to ethics law.”).

¶ 27 The courts of this state have applied RPC 1.8 (restricting business transactions with a client) to refuse to enforce fee agreements with attorneys as being against public policy. *See Valley/50th Ave., LLC v. Stewart*, 159 Wash.2d 736, 743, 153 P.3d 186 (2007); *Ocean Shores Park*, 132 Wash.App. 903, 134 P.3d 1188; *Holmes v. Loveless*, 122 Wash.App. 470, 475, 94 P.3d 338 (2004); *Cotton v. Kronenberg*, 111 Wash.App. 258, 270–71, 44 P.3d 878 (2002). The application of the RPC and result in these cases was not however categorical. The lawyer could show that the contract was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts before the court would hold any agreement void or voidable. *Valley/50th Ave.*, 159 Wash.2d at 743–44, 153 P.3d 186.

¶ 28 The issue in *Valley/50th Avenue* was the enforceability of a promissory note and fee agreement a client executed in favor of a law firm to secure a fee and cost bill owed by another client. 159 Wash.2d at 740–41, 153 P.3d 186. The court concluded that “the note and deed of trust was more like a business transaction than a fee agreement, [so] the issue then is whether [the law firm] satisfied the minimum notice, disclosure, and reasonable opportunity to seek the advice of independent counsel.” *Id.* at 745, 153 P.3d 186. The court ultimately concluded that there were material issues of fact as to whether the law firm discharged its duty under RPC 1.8 and remanded for further proceedings. *Valley/50th Ave.*, 159 Wash.2d at 747, 153 P.3d 186.

¶ 29 Here, the court concluded that Mr. Powers had violated RPC 1.7 and based on the New Mexico case, *876 *C.B. &*

T. Co., it held that the agreement between LKO and TCG was voidable.

[7] ¶30 We conclude, however, that RPC 1.7 cannot provide the basis for rescission. RPC 1.8, which has provided the legal basis for rescission, is different in its wording and its effect from RPC 1.7. A lawyer violates RPC 1.8 when the lawyer enters into a business transaction with his or her client without the minimum notice, disclosure, and without giving the client the opportunity to seek the advice of independent counsel. We will then generally refuse efforts by the lawyer to enforce those agreements. *Valley/50th Ave.*, 159 Wash.2d at 743, 153 P.3d 186; *Ocean Shores Park*, 132 Wash.App. at 912–13, 134 P.3d 1188.

¶31 What we have with RPC 1.7 is a rule to regulate the attorney-client relationship and ensure that an attorney's representation is not materially limited by conflicting interests. *In re Disciplinary Proceeding Against Marshall*, 160 Wash.2d 317, 336, 157 P.3d 859 (2007) (“The rule assumes that multiple representation **456 will necessarily require consultation and consent in writing, reasonably so since the rule imposes these requirements anytime there is a *potential* conflict.”). The differences are important.

¶32 The problem with applying RPC 1.7 here is that the remedy, rescission, could easily fall on an innocent client. And it is not the client who should pay for the sins of its lawyer. Even if the lawyer breached his or her fiduciary duties, it is the lawyer who should suffer the consequences not the client. It is not the client(s) who did anything wrong; it is the lawyer by representing clients on both sides. The appropriate remedy is to file a disciplinary action with the Washington State Bar Association.

¶33 In sum, we agree Mr. Powers violated RPC 1.7. But that violation cannot be grounds to rescind any investment agreement between LKO and TCG.

*877 CROSS-APPEAL

¶34 TCG cross-appeals and urges that we affirm the court's decision to rescind the contract based on a violation of RPC 1.8 since we may affirm on any ground argued at the trial court. TCG argues essentially that there was sufficient evidence of a *de facto* contract between Mr. Powers and TCG and Mr. Fair, a contract sufficient to invoke the strictures of RPC 1.8. Mr. Powers again responds that the agreement was

between LKO and TCG, not LKO and Mr. Powers and so he did not enter into this business relationship with a client. LKO responds that it accepted the investment offer and it provided the investment funds. Mr. Powers also urges that the court's conclusions show that there was not the commonality of interest between Powers & Therrien, P.S. and LKO that TCG and Mr. Fair suggest. CP at 2307 (Conclusion of Law F) (“LKO is not the ‘alter ego’ of Powers or Therrien, nor is there a basis to pierce the corporate veil of LKO's independent existence.”).

BUSINESS TRANSACTION WITH CLIENT (RPC 1.8)

¶35 TCG became a client of Powers & Therrien, P.S. in February 2005, when the firm drafted legal pleadings for TCG to use to collect debt. Accordingly, TCG argues that the resulting agreement between Mr. Powers and TCG is voidable as a violation of public policy pursuant to RPC 1.8.

[8] [9] [10] ¶36 RPC 1.8 sets out rigorous requirements a lawyer must meet before he enters into a business transaction with a current client or knowingly acquires an ownership, or possessory, security, or other pecuniary interest adverse to a client. RPC 1.8. “[A]n attorney-client transaction is *prima facie* fraudulent.” *Valley/50th Ave.*, 159 Wash.2d at 745, 153 P.3d 186 (quoting *In re Disciplinary Proceedings Against Johnson*, 118 Wash.2d 693, 704, 826 P.2d 186 (1992)). The burden is on the lawyer who has entered into a business transaction with a client or acquires an interest adverse to a client to show that there *878 was no undue influence. The lawyer must show that he or she gave the client the same information or advice as a disinterested lawyer would have given. And the lawyer must show that client would have received no greater benefit had he or she dealt with a stranger. *In re Disciplinary Proceeding Against Haley*, 157 Wash.2d 398, 406, 138 P.3d 1044 (2006) (quoting *In re Disciplinary Proceeding Against McMullen*, 127 Wash.2d 150, 164, 896 P.2d 1281 (1995)).

¶37 It is undisputed that Powers & Therrien, P.S. represented Mr. Fair, the manager of TCG, in 2004 on a separate matter. After Mr. Fair formed TCG in 2004, Powers & Therrien, P.S. drafted legal documents for TCG to facilitate collecting the debt TCG had purchased. The documents included promissory notes, mutual releases, and a summons and complaint. Powers & Therrien, P.S. then represented TCG and performed legal services on TCG's behalf.

¶38 The matter proceeded to a bench trial after the court ordered rescission of the contract and the court entered

findings and conclusions following that bench trial that are helpful here.

FINDINGS OF FACT

13. On or about October 27, 2004, an email was sent from Brian Fair to the Powers & Therrien, P.S. email account **457 addressed to "Les, Keith" setting forth Brian Fair's proposal.

....

19. The proposed terms were accepted by Les Powers when the money was sent to TCG.

....

30. Professional legal services sought by TCG as part of the Proposal were provided by Powers & Therrien, P.S.

....

41. Powers caused the issuance of the LKO check to TCG in February 2005.

*879 CONCLUSIONS OF LAW

F. LKO is not the "alter ego" of Powers or Therrien, nor is there a basis to pierce the corporate veil of LKO's independent existence.

....

H. Les Powers was both a principal in the law firm of Powers & Therrien, P.S., and an officer of LKO's manager, PTE.

....

J. The terms of the Proposal by Fair as agent for TCG were accepted by Les Powers.

K. Ultimately, Les Powers, pursuant to his agreement with Brian Fair, as agent for TCG, chose to enter into the Investment Agreement with TCG.

L. Les Powers made sure at all times that performance of the terms of the Proposal, including investing \$52,000 from LKO to TCG, and Powers & Therrien, P.S. providing legal services to TCG was accomplished. The

court makes no ruling regarding whether LKO was involved in the unauthorized practice of law.

M. Les Powers accepted the business offer by having LKO provide the sum of \$17,000 to TCG, which occurred beginning February 21, 2005.

CP at 2303-08.

¶ 39 Mr. Fair and TCG were clients of Powers & Therrien, P.S.; the attorneys provided legal services for them. And, the October 2004 e-mail from Mr. Fair was an offer to Mr. Powers and Mr. Therrien to invest in TCG and provide legal services as part of the deal. Mr. Powers and Mr. Therrien were the only persons who could accept the specific investment offer from Mr. Fair because the offer was a bilateral offer to them. *Dorsey v. Strand*, 21 Wash.2d 217, 224, 150 P.2d 702 (1944) ("[W]hen an offer is made, it can be accepted only by the offeree."). The trial court concluded that LKO is not the "alter ego" of Mr. Powers or Mr. Therrien. But Mr. Powers is both a principal in the law firm of Powers & Therrien, P.S., and a controlling officer of LKO's manager, *880 Powers & Therrien Enterprises, Inc. There is no finding that Mr. Powers acted in any other capacity than a lawyer when he accepted the deal and forwarded the funds. In fact, TCG contends that the court specifically struck such agency language from the findings because it was unsupported. Br. of Resp'ts to Br. of Intervenors at 8-9.

¶ 40 Mr. Powers and Mr. Therrien organized LKO as part of their estate planning for their adult children. It is controlled by five corporate members headed by the spouses of Mr. Powers and Mr. Therrien and the shareholders of those corporate members are trusts for their children. Mr. Powers then had a significant personal and financial interest in LKO as a parent, as an owner/officer of its manager, and as its attorney. The court concluded that he alone chose to enter into the business deal with Mr. Fair. CP at 2308 (Conclusions of Law J, K, L) Those conclusions are supported by the fact that Mr. Powers personally received the offer and he forwarded the funds from his law office. Mr. Powers may not have been the "alter ego" of LKO but that is not dispositive. He accepted the offer to invest in TCG in his capacity as an attorney and then caused LKO to contribute the funds. He had a substantial interest in the success of LKO—it was his family.

¶ 41 Mr. Powers and Mr. Therrien contend that a business transaction between a lawyer and a client must confer some benefit to the attorney or client. See *Valley/50th Ave.*, 159 Wash.2d at 747, 153 P.3d 186; *In re Disciplinary Proceeding Against Miller*, 149 Wash.2d 262, 66 P.3d 1069 (2003); *In*

re Disciplinary Proceeding Against Holcomb, 162 Wash.2d 563, 173 P.3d 898 (2007); **458 *Holmes*, 122 Wash.App. at 475, 94 P.3d 338. Neither the cases cited nor RPC 1.8 seems to require that an actual benefit be conferred. In *Holmes*, an attorney's ownership stake in a client's joint venture actually declined and the court still found that the accompanying fee agreement fell within the scope of the business transaction rule. 122 Wash.App. at 475, 94 P.3d 338. Regardless, there is evidence in this record that Mr. Powers stood to benefit from LKO's success in many ways. Again, it was his family.

[11] *881 ¶ 42 We are led to conclude that Mr. Powers entered into a business transaction with a client (TCG) in violation of RPC 1.8. See *Valley/50th Ave.*, 159 Wash.2d at 745, 153 P.3d 186 (quoting *Johnson*, 118 Wash.2d at 704, 826 P.2d 186) (“ [A]n attorney-client transaction is prima facie fraudulent.”). The fact that the trial court ruled LKO was entitled to the return of the \$52,000 investment does not

necessarily mean it was the contracting party. Mr. Powers entered into the transaction and then used funds from his children's company, a company he also controlled. We then conclude that RPC 1.8 provides an alternative basis to rescind the agreement because it was against public policy. *Ocean Shores Park*, 132 Wash.App. at 912–13, 134 P.3d 1188 (business deal between attorney and client void as against public policy).

¶ 43 We affirm the superior court's judgment ordering recession.

WE CONCUR: KULIK, J., and SIDDOWAY, A.C.J.

Parallel Citations

279 P.3d 448

Footnotes

1 98 N.M. 594, 651 P.2d 1029 (1982).

APPENDIX D

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SUPERIOR COURT OF WASHINGTON
IN AND FOR CHELAN COUNTY

LK OPERATING, LLC, a Washington
Limited Liability Company,

Plaintiff,

vs.

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

Defendants.

BRIAN FAIR and SHIRLEY FAIR and the
marital community composed thereof,

Plaintiffs,

vs.

LESLIE ALAN POWERS and PATRICIA
POWERS, husband and wife, and KEITH
TERRIEN and MARSHA TERRIEN,
husband and wife,

Defendants.

NO. 07-2-00652-9
(Consolidated)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

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COPY

1 THIS MATTER came on for a bench trial on August 16-18, 2010, in this
2 consolidated proceeding, Cause No. 07-2-00652-9, which was bifurcated for trial
3 purposes only. The case first tried by the court was the proceeding *LK Operating,*
4 *LLC, a Washington limited liability company vs. The Collection Group, LLC, a*
5 *Washington limited liability company.* The court previously dismissed individual
6 defendants Brian and Shirley Fair from this first case by order filed in November 2009
7 and by reconsideration order filed February 1, 2010. The plaintiff, LK Operating, LLC
8 (LKO), appeared by and through its attorney of record, James A. Perkins of Larson
9 Berg & Perkins PLLC, the defendant The Collection Group (TCG) appeared by and
10 through its attorney of record, Ronald J. Trompeter of Hackett, Beecher & Hart. Brian
11 and Shirley Fair, appeared by and through their attorney of record Stewart Smith of
12 Lacy Kane P.S., for pretrial motions.

13 **EVIDENCE CONSIDERED**

14 The following witnesses were called and testified at trial:

- 15 • Brian Fair: one of TCG's owners and its manager;
- 16 • Kenneth Meissner: LKO's accountant;
- 17 • Eva Reider: A Sands Leasing, Inc. (Sands) employee; Sands provides
18 bookkeeping services to LKO using Ms. Reider.
- 19 • Diane Sires - Legal Assistant/Secretary for Powers & Therrien, P.S.;
- 20 • Craig Homchick: LKO's accountant/expert witness.

21 LKO's exhibits in Plaintiff's Notebook 1, Nos. 1-6, 8, 45-48, 49 in part
22 (paragraph 10 only), 50, and 52-56 were admitted and considered by the court.

23 TCG's notebook exhibits numbered 10-25, 27, 28, 44, 63, 64, and 66-68 were
24 admitted and considered by the court.

25 After carefully considering the testimony of the witnesses, the exhibits and the
26 arguments of counsel, the court makes the following:

27 **FINDINGS OF FACT**

28 **THE PARTIES**

29 1. TCG is a Washington limited liability company (LLC) with its principal
30 place of business in Wenatchee.

31 FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 2

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1 2. TCG was formed by Brian and Shirley Fair in May 2004. It was formed to
2 engage in the business of debt collection.

3 3. Brian and Shirley Fair were TCG's original members. Brian Fair also
4 served as TCG's manager.

5 4. In addition to being identified as the two members on TCG's formation
6 documents, TCG's 2004 tax return identifies the business as a 2-member LLC, with
7 Brian Fair a 50 percent owner and Shirley Fair a 50 percent owner.

8 5. Brian Fair was a certified public accountant (CPA). He practiced as a
9 CPA through an entity, Fair & Associates, P.S., from late-1995 through 2007. Brian
10 Fair's wife Shirley is also a CPA and also practiced through Fair & Associates, P.S.

11 6. Plaintiff LKO is a Washington limited liability company with its principal
12 place of business in Yakima.

13 7. LKO was formed in December 2003. Each of the five adult children of
14 Leslie Powers (Powers) and Keith Therrien (Therrien) is the sole trustee and the
15 beneficiary of a separate trust. Each trust was the sole shareholder of a corporation.
16 The five corporations were the sole members of LKO

17 8. Powers & Therrien Enterprises, Inc. (PTE) was the manager of LKO and
18 provided LKO the management services the company required through its officers and
19 employees.

20 9. LKO had assets prior to any involvement with TCG.

21 10. Leslie Powers and Keith Therrien (non-parties to this first-trial) are
22 licensed Washington attorneys who are the principals in the law firm Powers &
23 Therrien, P.S. which is not a party to the litigation. They are also both officers of PTE.
24 PTE is the manager of LKO under Chapter 25.15, RCW.

25 LKO'S INVESTMENT IN TCG

26 11. Prior to the fall of 2004, Brian Fair had become acquainted with Powers
27 through shared common-clients. (The Court has previously ruled Brian Fair was a
28 client of Powers & Therrien, P.S. at all times material hereto).

31
FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 3

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1 22. Fair later revised that fax on February 18, 2007, sending it to Eva Reider,
2 a bookkeeper for LKO. (Ex. 27).

3 23. On February 23, 2005, a second request was made by Fair for an
4 additional \$17,000, less any monies previously sent. The request confirmed that with
5 payment the investor would have half ownership in the company. (Ex. 28). The name
6 of the company was TCG according to Fair's solicitation of funds on February 8, 2005
7 (Plaintiff's Trial Ex 20).

8 24. TCG received an LKO check signed by Michele Briggs in the amount of
9 \$3,984.61 dated February 21, 2005. The amount represented one-half the purchase
10 price of the Unifund portfolio purchased on February 1, 2005 by TCG. (Ex. 1).

11 25. On March 3, 2005, Powers' secretary sent a check signed by Michele
12 Briggs in the amount of \$13,015.39 to TCG.

13 26. On December 23, 2005, Brian Fair again asked for another \$10,000
14 contribution for TCG. On that date, Les Powers had a third LKO check in this amount
15 sent to TCG.

16 27. Subsequently, in September 2006, a final request for a \$25,000
17 investment was made by Brian Fair, and Les Powers had sent to TCG, an LKO check
18 in this amount.

19 28. Checks were drawn on LKO's account and sent to TCG in the amounts
20 of \$10,000 about December 23, 2005 and \$25,000 on September 11, 2006. (Exs. 3
21 and 4).

22 29. In total, \$52,000 was invested in TCG.

23 30. Professional legal services sought by TCG as part of the Proposal were
24 provided by Powers & Therrien, P.S.

25 31. Brian and Shirley Fair contributed \$27,000 to TCG.

26 TREATMENT OF THE INVESTMENT BY LKO

27 32. LKO's internal bookkeeping showed the monies were paid to TCG, which
28 was unknown to Brian Fair until after suit was filed.

29 33. Diane Sires, Powers' assistant, testified that she communicated to
30 Brian Fair that LKO was the investor in TCG. Fair denied this in his testimony. Fair
31

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 5

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1 did make it clear that he was not concerned about who Les Powers chose to provide
2 the money and services, as long as the desired funds and legal services were being
3 supplied.

4 TREATMENT OF THE INVESTMENT BY FAIR AND TCG

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

7 35. Fair never requested that Powers draft an operating agreement for TCG.

8 36. Brian Fair prepared TCG's tax returns for 2004, 2005, 2006, and 2007.

9 37. As a certified public accountant, Brian Fair estimates that he has
10 prepared between 1,000 to 2,000 tax returns for individuals, partnerships, corporations
11 and limited liability companies during his career as a CPA.

12 38. On TCG's 2005 through 2007 tax returns, Brian and Shirley Fair
13 continued to be listed as the only investors/members of TCG.

14 39. Despite knowing that a third party had made an investment in TCG, Fair
15 and TCG did not issue a K-1 in 2005, 2006, nor 2007, to either LKO, Powers, Therrien,
16 or Powers & Therrien, P.S. Instead, all capital invested in TCG was identified on

17 TCG's tax returns as having been solely contributed by Brian and Shirley Fair. *Les Powers*
18 *signed with the pleading indicating that Brian Fair was the*

19 40. In contrast to TCG's tax returns, the financial statements prepared by
20 Brian Fair for TCG identified at various times those monies provided by LKO's checks
21 to be "capital contributions" or equity in TCG.

side member of TCG

21 OTHER FACTS RELATED TO THE LKO INVESTMENT IN TCG

22 41. Powers caused the issuance of the LKO check to TCG in February 2005.

23 42. Powers had no role in the formation of TCG, as TCG was formed more
24 than four months before Fair made his first approach regarding the investment
25 opportunity.

26 43. In early 2007, Brian Fair requested that Powers draft an operating
27 agreement for OPM I, LLC (OPM). OPM was an entity formed for purposes of
28 collecting delinquent debt in states other than Washington. TCG was both a member
29 of OPM and its manager. *OPM was formed for the purpose of collecting delinquent debt*

TCG

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FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 6

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1 44. Powers drafted an OPM Operating Agreement. That agreement includes
2 a "conflict of interest" provision that states, in part:

3 Counsel who has prepared this Agreement and formed the Company
4 has represented the Manager and certain of the Members and
5 continues to do so. Members of Counsel's family have an interest in
6 the Manager and through it the Company.

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45. Brian Fair, ^{personally and} as TCG's manager, signed the OPM Operating Agreement.

FAIR'S PROPOSAL TO MODIFY THE AGREEMENT

46. There were never any direct written communications from LKO to TCG,
or from TCG to LKO.

47. On April 21, 2007, Fair sent a letter to Powers and Therrien proposing to
formalize the ownership agreement. Fair's proposal reduced the ownership of the
entity chosen by Les Powers from the 50% confirmed by Fair's email of February 23,
2005 (Plaintiff's Trial Ex. 39).

48. Powers and Therrien objected to this proposed agreement modification.

49. LKO subsequently filed this lawsuit to establish a 50% ownership interest
in TCG a matter of law.

INTEREST RATES

50. TCG was paying interest on a bank line of credit, which it was
subsequently able to arrange, at the prime rate of interest plus 3 percent.

51. Applying a prime rate plus 3 percent formula, through August 15, 2010,
interest in the sum of \$23,164.63 was calculated to be owed on LKO's \$52,000
investment.

52. The trial testimony on the issue of interest was not disputed or rebutted
by TCG.

FINDINGS OF FACT SUPPORT FINAL JUDGMENT

53. The court finds that a final judgment on the claims between LKO and
TCG should issue, because there is no further relationship between the claims
adjudicated by trial and those unadjudicated claims remaining to be tried between the
other parties to this consolidated proceeding. Also the issues, if any, an appeal would

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 7

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1 address are not to be determined as part of trying the unadjudicated claims remaining
2 between other lawsuit parties. Finally, it is unlikely that TCG's appeal rights will be
3 mooted by any future trial court developments.

4
5 **CONCLUSIONS OF LAW**

6 **PREVIOUS RULINGS INCORPORATED HEREIN**

7 A. Prior to trial, as set forth in its Memorandum Decision dated March 31,
8 2009, the court ruled as a matter of law that Brian Fair was a client of Les Powers.
9 The court also held as a matter of law that Powers also represented LKO, as counsel,
10 at the time of the proposed investment discussion. As a consequence of these legal
11 rulings, the court previously held, as a matter of law, that Les Powers violated RPC 1.7
12 by not obtaining the informed consent of LKO and Brian Fair to represent each of the
13 contracting parties with regard to the transaction.

14 B. The court ruled that rescission of the alleged contract was the
15 appropriate remedy, considering Powers' RPC violation.

16 C. Rescission was not based on the finding of fraud or misrepresentations
17 by either LKO or Powers.

18 **CONCLUSIONS OF LAW FOLLOWING THE TRIAL**

19 D. LKO is a Washington limited liability company. It exists and operates as
20 an independent legal entity.

21 E. LKO was not formed for the purpose of becoming involved with TCG's
22 debt collection business.

23 F. LKO is not the "alter ego" of Powers or Therrien, nor is there a basis to
24 pierce the corporate veil of LKO's independent existence.

25 G. Brian Fair was the authorized agent of The Collection Group due to his
26 capacity as Manager of that LLC.

27 H. Les Powers was both a principal in the law firm of Powers & Therrien,
28 P.S., and an officer of LKO's manager, PTE.

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FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 8

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1 I. Prior to February 23, 2005, both Brian Fair and The Collection Group
2 were clients of Les Powers due to the fact that he had been performing legal services
3 for both prior to that date. (See Ex. 15).

4 J. The terms of the Proposal by Fair as agent for TCG were accepted by
5 Les Powers.

6 K. Ultimately, Les Powers, pursuant to his agreement with Brian Fair, as
7 agent for TCG, chose to enter into the Investment Agreement with TCG.

8 L. Les Powers made sure at all times that performance of the terms of the
9 Proposal, including investing \$52,000 from LKO to TCG, and Powers & Therrien, P.S.
10 providing legal services to TCG was accomplished. The court makes no ruling
11 regarding whether LKO was involved in the unauthorized practice of law.

12 M. Les Powers accepted the business offer by having LKO provide the sum
13 of \$17,000 to TCG, which occurred beginning February 21, 2005, (See Findings of
14 Fact Nos. 21 and 22 and Ex. 1 and 2), and by having Powers & Therrien, P.S. provide
15 the legal services to TCG ~~on behalf of LKO~~ as requested in Fair's October 27, 2004
16 email. *Les Powers did NOT draft any agreement between the Parties*

17 N. The fax sent by Brian Fair on February 23, 2005 (Ex. 28) was an offer to
18 Les Powers and Keith Therrien to contribute \$17,000 of capital to TCG for half
19 ownership in that company. The Court finds that the statement on the bottom of this
20 fax "Les, this gives you guys 1/2 ownership in the company. You can formalize
21 however you wish. . . ." provided Les Powers and Keith Therrien the option to name
22 the investor of their choosing. Subsequent to that fax, Powers made sure that TCG
23 received the \$17,000. It is clear that \$52,000 in funds came from LKO, and therefore
24 TCG must return \$52,000 to LKO.

25 O. When a two or more member LLC tax return is filed, K-1 notices are
26 required to be delivered to each of the tax partners. However, Fair, as TCG tax return
27 preparer did not issue a K-1 to LKO (or any other party he may have believed made
28 the investment). Instead, Fair prepared and filed TCG tax returns which inaccurately
29 represented that he and his wife Shirley were the only member/investors in TCG and
30 that all TCG's capital had been contributed solely by him and his wife. Any
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FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 9

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1 uncertainty over the identity of the contracting party was not resolved by Fair In order to
2 prepare accurate tax returns for TCG.

3 P. In April 2007, Fair proposed to modify the initially agreed to 50/50%
4 equity structure of TCG. Powers and Therrien rejected the modification, and LKO filed
5 this suit.

6 Q. Having granted rescission, LKO is entitled to a return of its \$52,000
7 investment, with interest.

8 R. The appropriate rate of prejudgment interest is prime rate plus 3 percent.

9 S. Applying the prime rate plus 3 percent formula to LKO's investments the
10 interest accrued through August 15, 2010 is \$23,164.63. Interest continues to accrue
11 daily at the rate of 11.25 percent until entry of judgment.

12 T. Post-judgment interest will accrue at the legal rate of 12 percent.

13 U. Because all claims between LKO and TCG have been adjudicated by the
14 trial, the court will enter a final and appealable judgment for the money judgment which
15 the court has ruled should now issue in LKO's favor against TCG.

16
17 Consistent with these findings of fact and conclusions of law, a final form of
18 judgment shall be entered by the court setting forth the accurate principal and interest
19 judgment amounts through the date the judgment is entered.

20
21 DATED this 31 day of January, 2011.

22
23 cfb Ted Small
24 TED W. SMALL, Judge

25
26 Presented by:

27 LARSON BERG & PERKINS PLLC
28 Attorneys for LK Operating, LLC

29
30 By: [Signature]
James A. Perkins, WSBA #13330

31
FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 10

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DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited with the U.S. Postal Service a true and accurate copy of the Brief of Respondents-Cross Appellants Les Powers, Patricia Powers, Keith Therrien, and Marsha Therrien in Supreme Court Cause No. 88846-9 to the following:

Catherine Wright Smith
Smith Goodfriend PS
1619 8th Avenue North
Seattle, WA 98109-3007

Steven Craig Lacy
Stewart Robert Smith
Lacy Kane, P.S.
300 Eastmont Avenue
East Wenatchee, WA 98802-4845

Bradley S. Keller
Joshua Bacon Selig
Byrnes Keller Cromwell LLP
1000 2nd Ave., Floor 38
Seattle, WA 98104-1094

Original efiled with:
Washington Supreme Court
Clerk's Office
415 12th Street West
Olympia, WA 98504-0929

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

Dated July 22, 2013 at Tukwila, Washington.


Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

To: Paula Chapler
Subject: RE: Brian Fair, et al. v. Powers & Therrien, et al. -- Cause No. 88846-9

Rec'd 7/22/2013

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Paula Chapler [<mailto:paula@tal-fitzlaw.com>]
Sent: Monday, July 22, 2013 1:49 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Brian Fair, et al. v. Powers & Therrien, et al. -- Cause No. 88846-9

Per Ms. Tribe's request, attached is the Brief of Respondents-Cross Appellants Les Powers, Patricia Powers, Keith Therrien, and Marsha Therrien for filing in the following case:

Case Name: Brian Fair, et al v. Powers & Therrien, P.S., et al.
Cause No. 88846-9
Consolidated with Cause No. 88123-4
Attorney: Sidney C. Tribe, WSBA #33160
Talmadge/Fitzpatrick
18010 Southcenter Parkway
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Sincerely,

Paula Chapler
Legal Assistant
Talmadge/Fitzpatrick
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