893341-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

NO. _____

(Court of Appeals No. 68339-0-I)

RAFEL LAW GROUP PLLC,

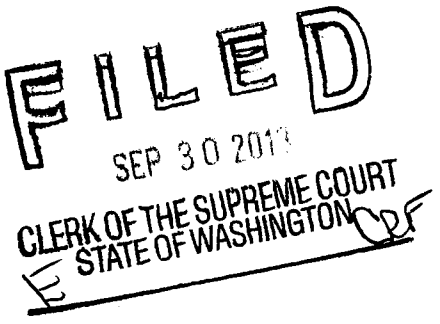
Respondent,

v.

STACEY DEFOOR,

Petitioner.

PETITION FOR REVIEW



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I. INTRODUCTION AND IDENTITY OF PETITIONER

Petitioner Stacey Defoor seeks review of the decision designated in Part II of this Petition.

This Court has a unique responsibility for overseeing attorney conduct and regulation in Washington. Because attorneys enjoy a privileged position of trust, the Court adopted RPC 1.8(a), which imposes strict disclosure requirements on attorney-client transactions. Nevertheless, the Court of Appeals instead embraced an erroneous *caveat emptor* standard—ruling in a published decision that as long as there is no existing attorney-client relationship at the time of the transaction, a lawyer is free to demand compensation for legal services under any non-monetary business terms without disclosing his own adverse interests, and may also require the client to guarantee payment of past and future fees by granting a security interest in ***any*** of her property, regardless of its connection to the litigation. This Court should accept review under RAP 13.4(b)(1), (2), and (4) for three reasons:

First, the Court of Appeals misapplied this Court's precedents and rules regarding attorney-client ***business transactions***. An agreement renegotiating a client's prior fee obligations to the substantial benefit of the attorney is a "business transaction." *Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 744-45, 153 P.3d 186 (2007). And contrary to

the conclusion of the lower courts, RPC 1.8 applies to non-monetary business transactions included as part of a new client engagement. *See, e.g.*, RPC 1.8 cmt. 1; *Holmes v. C.E. Loveless*, 122 Wn. App. 470, 475, 94 P.3d 338 (2004).

Second, RPC 1.8 also applies to ***security interests*** acquired by attorneys as part of their engagement agreement. *See, e.g.*, RPC 1.8(a), (i), & cmts. 1, 16. As concurring Judge Ann Schindler observed in urging this Court to accept review, the Court of Appeals' decision directly conflicts with authority from other jurisdictions and with opinions by the WSBA and ABA regarding this rule. Op. ¶ 75.

Third, the Court of Appeals applied the wrong standard for summary judgment under CR 56 to the parties' additional claims.

II. COURT OF APPEALS DECISION

Defoor seeks review of the opinion filed on August 19, 2013, by Division I of the Court of Appeals ("Op."), affirming the Superior Court's summary judgment of dismissal. *See* Appendix at A-1 to A-22.

III. ISSUES PRESENTED FOR REVIEW

1. Does RPC 1.8(a)'s disclosure requirement apply to an engagement agreement where the attorney requires the client to enter into a concurrent business transaction with the attorney in exchange for providing legal services?

2. Does RPC 1.8(a) apply to an engagement agreement where the attorney purports to acquire a security interest in ***all*** of the client's property, regardless of its connection to the litigation?

3. Did the Court of Appeals improperly weigh the evidence where disputed factual issues precluded summary judgment on the reasonableness of RLG's fee claim and on Defoor's counterclaims?

IV. STATEMENT OF THE CASE

A. Factual Background

1. RLG's Engagement and Re-Engagement.

Petitioner-Defendant Stacey Defoor was the plaintiff in the underlying Defoor Litigation, which involved the dissolution of her 19-year committed intimate relationship with Terry Defoor. After the couple separated, Terry[1] ran off with the couple's lucrative real estate business and over $8 million in cash, leaving Defoor holding only encumbered residences, few other assets, and all of the couple's debt. CP 1638.

Respondent-Plaintiff Rafel Law Group PLLC ("RLG") represented Defoor during two periods in the Defoor Litigation. In Matter 1, RLG took over from Defoor's original counsel and agreed to represent Defoor on a contingent fee basis through trial and appeal. CP 1668. Instead, RLG withdrew on the eve of trial. CP 1671-74.

[1] Defoor's dispute with Terry was before the Court of Appeals in *Defoor v. Defoor*, 157 Wn. App. 1033, 2010 WL 3220165 (Wn. App. Div. 1 Aug. 16, 2010).

Attorneys who withdraw with good cause from a contingent fee representation may assert a *quantum meruit* claim reflecting the relative contribution from their services in the event the client eventually obtains a recovery—but the withdrawing attorney foregoes any contract claim or risk premium.[2] Nevertheless, RLG filed notices of attorney's lien under RCW 60.40.010 asserting a huge purported claim against Defoor. CP 1681, 1688 (App. at A-30). RLG contended she was contractually obligated to pay $775,000 for a few months' work in Matter 1, without disclosing how it calculated the amount of its fee. CP 1795.

Before RLG sued Defoor, ***no one*** had actually reviewed the raw time entries that are the basis of the Matter 1 judgment and lien notices. CP 999-1000. Discovery in this case eventually revealed that the claimed amount was based on secret premium contingent-fee rates rather than RLG's normal billing rates, CP 1646, and included admittedly unreasonable charges, Op. ¶ 65, and disputed expert fees, CP 1704. The claim also included much higher costs than RLG had promised Defoor. CP 1640. The total claim tripled the other side's legal expenses for the same period. CP 1792, 1940. Even after RLG's long-delayed exercise of billing judgment (reducing its original WIP by 1.6% for purposes of summary judgment), excessive time remains. For example, the final

[2] *See Ross v. Scannell,* 97 Wn.2d 598, 608, 647 P.2d 1004 (1982); *Ausler v. Ramsey*, 73 Wn. App. 231, 238, 868 P.2d 877 (1994).

judgment amount for Matter 1 includes over $1,000 for 2.4 hours spent on February 12, 2008—when RLG supposedly no longer represented Defoor—to "draft re-engagement agreement and promissory note." CP 1775.[3] *See also* CP 2908 (additional examples of excessive time entries).

RLG's lavish lien filing prevented Defoor from obtaining new counsel for trial. CP 1630-31. She had no alternative to signing the Settlement & Re-Engagement Agreement demanded by RLG as a condition of representing her in Matter 2. CP 1647. The Agreement required Defoor to pay the full $775,000 that RLG contended she had an "obligation" to pay for Matter 1, regardless of whether she obtained any recovery. App. at A-24 (CP 1846). Unlike RLG's prior unliquidated *quantum meruit* claim, Defoor's now-contractual obligation included $505,000 for unidentified legal services and $270,000 in alleged costs for Matter 1, as well as interest at 12% from January 10, 2008—even for services that had not yet been performed, CP 1775, and for costs that ***still*** are unpaid and disputed. A-25. The Agreement also granted RLG a right to fees and a broad lien covering both the full claim amount for Matter 1 and additional fees incurred going forward in Matter 2, with RLG demanding a security interest in "***any assets***

[3] The Court of Appeals characterizes this contention as new. Op. ¶¶ 36-37. In fact, Defoor repeatedly objected to RLG's charging her for legal services while denying it represented Defoor. App. Br. 30; RP 103 ("On its face that's evidence that she was a current client"); *see also McKinney v. City of Tukwila,* 103 Wn. App. 391, 400-01, 13 P.3d 631 (2000) (argument preserved when brought to trial court's attention at summary judgment hearing).

of Defoor, whether awarded in the Litigation, obtained in settlement, ***or otherwise***." A-24, 28 (emphasis added). There is no dispute that ***if*** RPC 1.8 applies to the Settlement & Re-Engagement Agreement, RLG did ***not*** satisfy its disclosure requirements. *See, e.g.*, Op. ¶ 81 n.6 (citing *In re Disciplinary Proceeding Against McGlothlen*, 99 Wn.2d 515, 525, 663 P.2d 1330 (1983)).

2. RLG's Failure to Track Community Assets After the Defoors' Separation.

One day after first being engaged by Defoor, RLG's "list of things to do" included hiring a forensic accountant to "track the money since the date of separation." CP 1924. RLG represented to the court under oath that hiring "accountants to ***analyze*** ... Mr. Defoor's ***disposition of millions of dollars*** in community assets ***following the parties' separation***" was "***absolutely essential*** to assure that Ms. Defoor's interests are properly protected." CP 1927-31 (emphasis added). Expert testimony confirms an attorney's standard of care requires such post-separation tracing. CP 2064-67.

Nevertheless, RLG and its accounting expert inexplicably failed to trace Terry's post-separation disposition of community assets, including over $8 million in cash. One glaring example of RLG's failure involves a $1,050,000 payment of community funds Terry received in Fall 2007,

most of which he immediately placed into a new UBS bank account. The Court of Appeals erroneously credited RLG's assertion that it was "unaware" Terry had "transferred a substantial portion of the Camwest $1,050,000 assignment fee ($950,000) to a UBS bank account No. 0248335," concluding as a matter of law RLG did not commit malpractice because Defoor could claim a share of these funds as "undisclosed" community-like assets. Op. ¶¶ 11, 45; *see also* CP 3709 (RLG asserted Terry "did not produce bank statements for this account in response to requests for production"). To the contrary, while the second UBS account statements cannot be found in RLG's own records that it turned over to Defoor at the conclusion of its representation in 2009, files produced in this case by the expert RLG hired in the Defoor litigation reveal that ***Terry himself*** disclosed the UBS records in discovery. CP 1653. RLG forwarded the bank statements to its expert—but failed to include them in its analysis or retain a copy in its files. *Id.*; CP 2093-2108, 2110-19.

At trial, Judge Inveen expressly refused to allocate Defoor any value from millions of dollars in undisputed community assets because RLG failed to provide the court with an adequate record tracing those same assets—including the $950,000 UBS account. CP 2303-04. Judge Inveen instead entered a Judgment confirming Defoor's ownership of property already in her possession, awarding limited additional property

and a share in any future income from (now abandoned) real estate projects, and entered a money judgment in the amount of $2,223,368.60 calculated based on the balance in another UBS account. CP 3588.

During Terry's largely unsuccessful appeal, he and his companies each declared bankruptcy. CP 1639. This foreclosed most opportunities for Defoor to collect from Terry, other than obtaining title to a single commercial property in SeaTac that is the subject of competing creditor claims. *Id.* Since engaging RLG in 2007, Defoor herself has yet to recover a dime from Terry. CP 1648.

B. Procedural History

RLG filed its Complaint in this action on June 10, 2010, seeking the same $505,000 in attorneys' fees and $270,000 costs for Matter 1 referred to in its liens and the Re-Engagement Agreement, an additional $509,212.63 in fees and costs for Matter 2, and prejudgment interest. CP 1-8, 27-53, CP 55-126. RLG's attorney informed Defoor that "[s]ince you are [re]presenting yourself in this new lawsuit, we are required to serve you under CR5(b)," and "will do so both by mail and by email." CP 169. Nevertheless, RLG instead obtained an ex parte Order of Default and a Default Judgment against Ms. Defoor in the amount of $1,599,995.92. CP 214-15, 216-18.

Defoor engaged counsel who moved to vacate the Order of Default

and Default Judgment. CP 127-39. On November 5, 2010, then-Judge Steven González granted the motion to vacate. CP 245-46.

Defoor challenged RLG's fee claim and asserted various counterclaims against RLG. CP 485-88. Defoor filed a motion for partial summary judgment contending the Settlement & Re-Engagement Agreement was invalid under RPC 1.8. CP 617-42. RLG moved for a determination of the validity of the Agreement, for entry of judgment on a newly-recalculated claim for payment in Matter 1 and Matter 2, and for dismissal of Defoor's counterclaims. CP 869-94, 591-616.

On December 6, 2011, Judge Mary Yu entered orders ruling in favor of RLG on each motion. CP 2843-47, 2848-52, 2953-57, 2858-62. The trial court concluded that "RPC 1.8 does not apply as a matter of law" because "Defoor was not a client at the time the subject Agreement was negotiated and signed." CP 2851. Judge Yu later granted RLG's motion for $490,563.81 in prejudgment interest, CP 3121, and awarded RLG $279,749.03 in contractual attorney's fees and costs under the fee-shifting provisions of the Settlement & Re-Engagement Agreement, CP 3466, bringing the total judgment amount against Defoor to **$2,027,316.13**.

The Court of Appeal affirmed each of Judge Yu's orders, concluding that RPC 1.8 does not apply to business transactions included in an engagement agreement because if the non-lawyer "is dissatisfied

with the terms of the proposed engagement agreement, the prospective client is free to decline representation or seek representation elsewhere." Op. ¶ 25. The Court of Appeals also found that "Defoor did not proffer sufficient evidence" to avoid summary judgment. *Id.* ¶ 68. Judge Ann Schindler filed a separate concurrence, urging this Court to accept review "to address whether RPC 1.8(a) should apply to a security interest acquired during the negotiation of the initial fee agreement." *Id.* ¶ 75.

V. ARGUMENT

A. This Court Should Grant Review under RAP 13.4(b)(1), (2), and (4) to Correct the Court of Appeals' Misinterpretation of the "Business Transaction" Provision of RAP 1.8.

Lawyers may 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" the terms are "fair and reasonable" and "fully disclosed" to the client. RPC 1.8(a), (1) (emphasis added). The Court of Appeals held that this rule does not apply to transactions with an attorney when they are "agreed upon during the relationship's formation." Op. ¶ 23. The court's decision conflicts with rulings of this Court and the Court of Appeals, and presents an issue of substantial public interest warranting review by this Court.

First, the Court of Appeals erroneously held the Settlement

Agreement and Note "constitutes nothing other than an accord, the satisfaction of which has not been performed by Defoor." Op. ¶ 28. This odd theory was never briefed by the parties. *See, e.g.*, Resp. Br. 42 ("Rafel does not claim accord and satisfaction"). It is inconsistent with black letter law regarding accord and satisfaction, a doctrine which involves the agreement to accept ***less*** than the amount due, not ***more***. *See, e.g., U.S. Bank Nat'l Ass'n v. Whitney,* 119 Wn. App. 339, 351, 81 P.3d 135 (2003) (citations omitted). Most significantly, the Court of Appeals' ruling directly conflicts with *Valley/50th Ave*, where this Court held that obtaining a promissory note and deed of trust to secure payment of previously accrued fees and costs ***is*** a "business transaction" for purposes of RPC 1.8(a). 159 Wn.2d at 744-45.

In a dramatic departure from both the parties' original contingent fee arrangement and the *quantum meruit* claim that replaced it when the firm withdrew, RLG significantly improved its position by demanding Defoor obligate herself to pay $505,000 in legal fees and $270,000 in alleged costs for Matter 1, irrespective of whether she ever actually recovered anything as a result of the Defoor Litigation. RLG obtained a contractual fee-shifting provision, A-28, resulting in the award of hundreds of thousands of dollars it previously had no right to receive. CP 2466, Op. ¶ 73. RLG also required Defoor to pay interest on the full

$775,000 from January 10, 2008—even for services that had not been provided by that date, CP 1775, and for expert fees Rafel had not paid, CP 1796, and in some cases continues to contest. CP 3075. Contrary to the conclusion of the Court of Appeals, the provision of the Settlement & Re-Engagement Agreement resolving the parties' dispute over Matter 1 fees and costs to the substantial benefit of RLG in exchange for the firm's agreement to provide legal services going forward constitutes a "business transaction" for purposes of RPC 1.8(a). *Valley/50th Ave.*, 159 Wn.2d at 744-45. Indeed, the Agreement on its face comes within the "exception" to Court of Appeals' own holding regarding RPC 1.8(a) that the court recognized applies to any initial client engagement agreement where the attorney accepts "nonmonetary property *as payment* for all or part of a fee." Op. ¶¶ 38, 27 (emphasis in original) (citing RPC 1.8 cmt. 1).[4]

Second, the Court of Appeals decision conflicts with established Washington precedent holding that RPC 1.8(a) applies to business transactions—in contrast with ordinary monetary fee agreements—that are included as part of the terms of an attorney's engagement. *Holmes*, 122 Wn. App. at 475. In *Holmes*, a law firm entered into an engagement agreement to represent a joint venture called "Loveless/Tollefson

[4] RLG demanded Defoor accept its terms regarding Matter 1 as a condition for providing legal services in Matter 2. A-23. The terms of the Settlement and the Re-Engagement Agreement are interdependent and cannot be severed from one another. CP 1714.

properties"[5] developing a real estate project. 122 Wn. App. at 473. As part of the engagement agreement, the parties agreed the firm would charge discounted hourly rates for two years and full rates thereafter. In exchange its agreement to provide legal services on these terms, the law firm would receive five percent of the cash distributions produced by the venture. *Id.* When the client later stopped making payments, the lawyers sued to enforce the agreement. The Court of Appeals affirmed summary judgment in favor of the client, holding that the transaction terms were not fair and reasonable under RPC 1.8(a). The court concluded that the engagement agreement at issue "falls within the scope of the business transaction rule" of RPC 1.8. 122 Wn. App. at 473. The Court of Appeals' decision in this case directly conflicts with *Holmes.*

Third, the Court of Appeals erroneously contended that the "structure and organization of the rules" limits the scope of RPC 1.8 because its heading refers to "Current Clients." Op. ¶ 24. But as this Court has recognized, the provisions of RPC 1.8 govern the formation of the attorney-client engagement, and not merely the subsequent conduct of an attorney. *See, e.g., State v. A.N.J.,* 168 Wn.2d 91, 100, 225 P.3d 956

[5] Like the present case, *Holmes* involved an initial attorney-client engagement agreement. The attorneys had previously provided legal services to C.E. Loveless, 122 Wn. App. at 473, but there is no suggestion they represented either the joint venture itself, co-venturer Tollefson, or any other joint venture between them. In any event, in evaluating an attorney's compliance with RPC 1.8, courts must consider the identity of the actual client, not affiliates. *Valley/50th Ave.*, 159 Wn.2d at 747.

(2010) (RPC 1.8 governs terms of public defense engagements); *see also* RPC 1.8(i) (governing acquisition of interests in subject matter of litigation); RPC 1.8(h) (prohibiting engagement agreements prospectively limiting the lawyer's liability to a client for malpractice).

RPC 1.8(a) applies when there is an "[o]verlap between fee agreements and business transactions." Andrews et al., LAW OF LAWYERING IN WASHINGTON (WSBA 2012) at 7-44. The Court of Appeals itself previously recognized that RPC 1.8(a) applies to business transaction terms that are agreed ***concurrently with the engagement agreement***:

> [A]lthough the 'business transaction' of making an ordinary fee agreement with a client is regulated by Rule 1.5 (fees) rather than by Rule 1.8(a), both rules are applicable when a lawyer contracts to receive all or part of her fee in the form [of] an interest in the client's venture.

Cotton v. Kronenberg, 111 Wn. App. 258, 272, 271 n.33, 44 P.3d 878 (2002) (quoting GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 12.5 (3rd ed. 2001)). This Court should accept review of the Court of Appeals' conflicting decision in this case.

B. The Court Should Clarify The Application of RAP 1.8 to Attorneys' Acquisition of Security Interests in Client Property.

A security interest is a valuable property right, with great "potential for economic coercion by attorneys." *Ross*, 97 Wn.2d at 606. RPC 1.8(a)

therefore requires full disclosure and informed consent before an attorney acquires a security interest adverse to a client. As ABA Formal Opinion 02-427 regarding this Model Rule of Professional Conduct states, regardless of whether a security interest in client property is acquired "before, during, or following the representation," it is covered by the requirements of Rule 1.8—either RPC 1.8(i) (which governs an attorney's interest in the subject matter of the litigation itself), or RPC 18(a) (which governs interests in other property).[6] A-43.

The Court of Appeals ignored these authorities. Instead, the court confused Defoor's contention that the lien provision in Paragraph 5 of the Agreement, A-25, was a "security agreement" covered by RPC 1.8(a) with her ***separate*** argument (discussed in the previous section of this Petition) that the provisions of the Settlement & Re-Engagement Agreement converting RLG's unliquidated and contingent *quantum meruit* claim for Matter 1 into a $775,000 note constituted an attorney-client "business transaction" under this Court's controlling authority in *Valley/50th Ave.* *See* Op. ¶ 27. But the plain language of RPC 1.8(a) refers ***both*** to business

[6] *See also* Caryl, WASH. ETHICS DESKBOOK at § 2.4(6)(b); WSBA Advisory Op. 1044 (1986) (law firm must meet RPC 1.8 requirements in accepting security interest in the form of a deed of trust and promissory note as part of engagement terms); WASHINGTON LAW OF LAWYERING at 7-44 (agreement "interjecting a creditor-debtor relationship between the lawyer and client before the lawyer-client relationship has even commenced" is "not fair and reasonable to the client") (citing WSBA Advisory Op. 2178) (attorney may not acquire a "promissory note for a sum certain from a prospective client prior to work being performed or fees being earned").

transactions and to security interests.

As Judge Schindler observed in her concurrence urging this Court to take review, Comment 16 to RPC 1.8 provides that when "a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of" RPC 1.8(a). Op. ¶ 80. Although no opinion of this Court directly addresses this issue, authorities from Washington and other jurisdictions recognize that attorneys should comply with RPC 1.8(a) when they include a security interest in their initial engagement agreement. *Id.* ¶¶ 76-77 (citing WSBA Advisory Op. 2209 (2012)). This Court should accept review to provide attorneys and courts with guidance in this important area of the law and legal practice.

C. The Court of Appeals' CR 56 Decision Also Conflicts with Prior Case Law and Presents an Issue of Substantial Public Interest.

If the Court grants review and reverses the lower courts' RPC 1.8 ruling, the Settlement & Re-Engagement Agreement would be void, and the parties' claims would be remanded for further proceedings consistent with the Court's ruling. It therefore may be unnecessary for this Court to delve into the parties' additional factual disputes in detail. Nevertheless, to promote consistent resolution of all claims, and because the lower

courts' rulings demonstrate the need for guidance regarding the proper standards for valid attorney' liens, malpractice proof, and the reasonableness of attorney's fees, Defoor respectfully requests that the Court also accept review at this time of the unpublished portion of the Court of Appeals' decision. The ruling on its face disregards established standards for summary judgment under CR 56. *See, e.g.,* Op. ¶ 68 (weighing whether proffered evidence was "sufficient," rather than drawing all inferences in favor of Defoor as the non-moving party).

First, courts may not summarily determine that an attorney's charges are reasonable when the client provides controverting evidence of ***unreasonableness***. Here the lodestar total was calculated with unique premium "contingent" rates that conflict with the firm's reasonable normal billing rates. CP 1646. Defoor was entitled to the inference from RLG's ***normal*** billing rates—and from the rates actually charged by Terry's counsel—that it would be unreasonable to charge Defoor the premium "contingent fee" rates referred to in the Settlement & Re-Engagement Agreement in a case where RLG's alleged contractual entitlement to payment was no longer "contingent on the outcome of the matter" pursuant to RPC 1.5(c). *See* CP 1718 (Rafel's regular rate was $350, not $450); CP 1940 (Stokes Lawrence's senior attorneys charged less than Rafel's normal rates); *Ausler*, 73 Wn. App. at 238 n.6 (attorney

withdrawing from contingent fee engagement foregoes claim for premium rates). RLG's fee claim also includes numerous unreasonable charges identified by both parties. *See, e.g.,* CP 2908 (identifying erroneous time entries); CP 1704-05 (acknowledging expert charges were unreasonable). And RLG's $2 million-plus total claim for both matters is grossly out of proportion to the limited benefit ultimately provided to the client herself. *See* CP 1648 (Defoor obtained no recovery from Terry).

Second, the Court of Appeals' ***prejudgment interest*** ruling flatly conflicts with *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 442 P.2d 621 (1968) and its progeny. The trial court necessarily exercised its judgment when at RLG's request the court calculated fee and cost amounts in its summary judgment order, CP 2859-60, that substantially differ from the attorney's original claim, CP 1-8, and that continued to shift even after the summary judgment ruling, CP 3461-63. *See, e.g., Tri-M Erectors, Inc. v. Donald M. Drake Co.*, 27 Wn. App. 529, 537, 618 P.2d 1341 (1980) (until "question of reasonableness of the attorneys' fees expended" in underlying litigation "was resolved by the jury, the claim was unliquidated"); *Styrk v. Cornerstone Invs., Inc.*, 61 Wn. App. 463, 810 P.2d 1366 (1991).

Third, material factual disputes should have precluded summary judgment on Defoor's ***malpractice*** counterclaim. The Court of Appeals

improperly inferred that the second UBS account was "undisclosed," Op. ¶¶ 11, 45, even though Defoor presented evidence Terry ***had*** produced those account statements in discovery. CP 1653. Expert testimony established that RLG breached the standard of care by failing to trace Terry's post-separation disposition of millions of dollars in community cash. CP 2065. As Judge Inveen acknowledged in reducing the judgment amount RLG proposed, the failure to trace assets resulted in Terry receiving sole title to extensive community property. CP 2303-04; *see also* CP 1653, 2482-2503 (court allowed Terry to stay enforcement of the money judgment without a bond, relying on Terry's unrebutted—and false—representations regarding his use of community funds).

Finally, the Court of Appeals' ***fiduciary duty*** ruling also conflicts with this Court's controlling precedent, and disregarded material factual disputes. This Court has never overruled its longstanding holding that attorneys may assert an attorney's lien only for costs that have actually been paid. *See* 27 WASH. PRAC. § 4.29 (citing *Gust v. Judd*, 88 Wash. 536, 153 P. 309 (1915)); CP 1704-05 (at time of January 2008 lien filing, RLG had not paid at least half of its $270,000 cost claim). RLG and its ethics expert also acknowledge it is improper for an attorney to assert an attorney's lien claim in bad faith or for an unreasonable amount. *See* CP 886, 888; RP 81:22-25. RLG's lien filings—based on raw time entries—

included numerous admittedly excessive charges. Op. ¶ 65. For purposes of summary judgment, Defoor was entitled to the inference that RLG knew or should have known its characterization of Defoor's purported "obligation" to pay $505,000 in fees and $270,000 in alleged costs after withdrawing from Matter 1 was unreasonable and excessive.

This Court devotes an extraordinary proportion of its own energies to ensuring Washington attorneys act ethically and professionally. That effort is undermined when trial courts fail to apply ordinary summary judgment standards to claims against overreaching attorneys, and when the Court of Appeals lends its further imprimatur in cursory unpublished opinions. To ensure a fair and complete review and remand, this Court should accept review of the Court of Appeals decision in its entirety.

VI. CONCLUSION

Defoor requests that the Court grant review of the Court of Appeals' decision.

RESPECTFULLY SUBMITTED September 18, 2013.

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CERTIFICATE OF SERVICE

I, Crystal Moore, the undersigned, hereby certify and declare under penalty of perjury under the laws of the State of Washington that the following statements are true and correct. I am over the age of 18 years and not a party. I am employed by the law firm of Davis Wright Tremaine LLP, at 1201 Third Avenue, Suite 2200, Seattle, Washington 98101-3045.

On September 18, 2013, I caused to be served the attached document entitled **PETITION FOR REVIEW** to the following:

Michael R. Caryl Michael Caryl, P.S. 200 First Avenue West, Suite 402 Seattle, WA 98119-4923 E-mail: michaelc@michaelcaryl.com	☐ Messenger X U.S. Mail, postage prepaid ☐ Federal Express ☐ Facsimile X Electronic
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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 18th day of September, 2013, at Seattle, Washington.

Crystal Moore

APPENDIX

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(Cite as: 2013 WL 4432173 (Wash.App. Div. 1))

C

Only the Westlaw citation is currently available.

Court of Appeals of Washington,
Division 1.
RAFEL LAW GROUP PLLC, Respondent,
v.
Stacey DEFOOR, Appellant.

No. 68339–0–I.
Aug. 19, 2013.

Background: Law firm brought action against client, seeking compensation for attorney fees and costs incurred on behalf of client in action to obtain an equitable distribution of property. Client counter-claimed, asserting breach of fiduciary duty and legal malpractice. The Superior Court, King County, Mary I. Yu, J., entered summary judgment in favor of law firm. Client appealed.

Holdings: The Court of Appeals, Dwyer, J., held that:
(1) rule of professional conduct governing business transactions between lawyers and clients did not apply to settlement and re-engagement agreement entered into before an attorney-client relationship had commenced;
(2) agreement did not come within scope of exception to general rule by reason that law firm obtained a lien against prospective client's assets to secure payments previously due; and
(3) Court would not consider argument raised for the first time at oral argument on appeal.

Affirmed.

Schindler, J. filed concurring opinion.

West Headnotes

[1] Appeal and Error 30 ⚿893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate Court
30k893(1) k. In General. Most Cited Cases

Review of orders granting or denying summary judgment is de novo, and the appellate court engages in the same inquiry as the trial court. CR 56(c).

[2] Judgment 228 ⚿181(2)

228 Judgment
228V On Motion or Summary Proceeding
228k181 Grounds for Summary Judgment
228k181(2) k. Absence of Issue of Fact. Most Cited Cases

A "material fact," for purposes of summary judgment, is one upon which the outcome of the litigation depends. CR 56(c).

[3] Judgment 228 ⚿185(2)

228 Judgment
228V On Motion or Summary Proceeding
228k182 Motion or Other Application
228k185 Evidence in General
228k185(2) k. Presumptions and Burden of Proof. Most Cited Cases

Upon motion for summary judgment, all facts and

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reasonable inferences must be considered in the light most favorable to the nonmoving party. CR 56(c).

[4] Attorney and Client 45 ⚿129(3)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k129 Actions for Negligence or Wrongful Acts
45k129(3) k. Trial and Judgment. Most Cited Cases

Whether an attorney's conduct violated the rules of professional conduct is a question of law.

[5] Attorney and Client 45 ⚿123(1)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k122 Dealings Between Attorney and Client
45k123 In General
45k123(1) k. In General. Most Cited Cases

Business transactions are considered prima facie fraudulent if within the scope of rule of professional conduct prohibiting an attorney from entering into a business transaction with a client or acquiring an interest adverse to the client unless the attorney satisfies certain disclosure requirements designed to protect the client's interest. RPC 1.8(a).

[6] Attorney and Client 45 ⚿143

45 Attorney and Client
45IV Compensation
45k142 Contracts for Compensation
45k143 k. Making, Requisites, and Validity. Most Cited Cases

Attorney fee agreements that violate the rules of professional conduct are against public policy and are therefore unenforceable.

[7] Attorney and Client 45 ⚿123(1)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k122 Dealings Between Attorney and Client
45k123 In General
45k123(1) k. In General. Most Cited Cases

Rule of professional conduct governing business transactions between lawyers and clients did not apply to law firm's and prospective client's settlement and re-engagement agreement following termination of prior attorney-client relationship, where an attorney-client relationship had not yet commenced at time of agreement. RPC 1.8(a).

[8] Attorney and Client 45 ⚿123(1)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k122 Dealings Between Attorney and Client
45k123 In General
45k123(1) k. In General. Most Cited Cases

Rule of professional conduct governing business transactions between lawyers and clients applies to transactions entered into during the course of the attorney-client relationship; the rule does not apply to transactions entered into prior to the creation of the attorney-client relationship or those agreed upon during the relationship's formation. RPC 1.8(a).

[9] Attorney and Client 45 ⚿123(1)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client

45k122 Dealings Between Attorney and Client
45k123 In General
45k123(1) k. In General. Most Cited Cases

In applying rule of professional conduct governing business transactions between lawyers and clients, the Court of Appeals will not import language into the rule to create a broader application than that warranted by the text of the rule. RPC 1.8(a).

[10] Attorney and Client 45 ⚿64

45 Attorney and Client
45II Retainer and Authority
45k64 k. What Constitutes a Retainer. Most Cited Cases

Attorney and Client 45 ⚿123(1)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k122 Dealings Between Attorney and Client
45k123 In General
45k123(1) k. In General. Most Cited Cases

When an attorney negotiates with a prospective client the terms of the initial fee agreement, the attorney-client relationship has not yet been established, and thus, the attorney does not owe the same duty that he or she owes to a current client under rule of professional conduct governing business transactions between lawyers and clients; if the prospective client is dissatisfied with the terms of the proposed engagement agreement, the prospective client is free to decline representation or seek representation elsewhere. RPC 1.8(a).

[11] Attorney and Client 45 ⚿123(1)

45 Attorney and Client
45III Duties and Liabilities of Attorney to Client
45k122 Dealings Between Attorney and Client
45k123 In General
45k123(1) k. In General. Most Cited Cases

Attorney and Client 45 ⚿144

45 Attorney and Client
45IV Compensation
45k142 Contracts for Compensation
45k144 k. Construction and Operation. Most Cited Cases

Settlement and re-engagement agreement and promissory note entered into between law firm and prospective client did not come within scope of rule governing business transactions between lawyers and clients under exception to general rule requiring an on-going attorney-client relationship applicable when the lawyer accepts an interest in the client's business or nonmonetary property as payment of a fee, even though the agreement granted a lien to law firm against client's assets to secure payments previously due; note securing payment was but an accord, the satisfaction of which had not been performed, and law firm's obtaining security interest to protect against nonpayment of fees previously incurred did not constitute "payment" of fees. RPC 1.8(a).

[12] Attorney and Client 45 ⚿143

45 Attorney and Client
45IV Compensation
45k142 Contracts for Compensation
45k143 k. Making, Requisites, and Validity. Most Cited Cases

Any modification of a fee arrangement after an attorney-client relationship has been established is subject to particular attention and scrutiny; if the re-

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negotiation results in greater compensation than counsel was entitled to under the original agreement, courts may refuse to enforce the renegotiation unless it is supported by new consideration.

[13] Appeal and Error 30 ⇐173(1)

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(A) Issues and Questions in Lower Court
30k173 Grounds of Defense or Opposition
30k173(1) k. In General; Asserting New Defense or Grounds of Opposition. Most Cited Cases

Appellate court, considering client's appeal from grant of summary judgment in favor of law firm in law firm's action to recover attorney fees, would not consider client's argument that an attorney-client relationship continued to exist at the time the parties entered settlement and re-engagement agreement, bringing agreement within scope of rule of professional conduct governing business transactions between lawyers and clients, where argument was first presented at oral argument in the appellate court, and was neither previously addressed in client's briefing on appeal nor in her pleadings in the trial court. RAP 9.12; RPC 1.8(a).

Appeal from King County Superior Court; Honorable Mary I. Yu, J.Roger Ashley Leishman, Davis Wright Tremaine LLP, Zachary Tomlinson, Pacifica Law Group, Seattle, WA, for Appellant.

Michael Robert Caryl, Michael Caryl PS, Kelly Patrick Corr, Paul R. Raskin, Corr Cronin Michelson Baumgardner & Pree, Seattle, WA, for Respondent.

PUBLISHED IN PART OPINION

DWYER, J.

*1 ¶ 1 Rule of Professional Conduct 1.8(a) prohibits an attorney from entering into a business transaction with a client or acquiring an interest adverse to the client unless the attorney satisfies certain requirements designed to protect the client's interest. However, with one exception not applicable herein, business transactions entered into with prospective clients or in anticipation of establishing an attorney-client relationship do not fall within the scope of the rule. Here, Stacey Defoor's attorney-client relationship with Rafel Law Group had not yet commenced at the time the parties entered into a settlement and re-engagement agreement and promissory note. Thus, Rule of Professional Conduct 1.8(a) does not apply to the agreement and note. Accordingly, we affirm the trial court's order granting summary judgment in favor of Rafel Law Group and giving effect to the agreement and note.

¶ 2 In the unpublished portion of this opinion, we conclude that the trial court neither erred by granting Rafel Law Group partial summary judgment awarding attorney fees and costs, nor by dismissing on summary judgment Defoor's claims for legal malpractice and breach of fiduciary duty.

I [FN1]

¶ 3 Stacey Defoor's committed intimate relationship with Terry Defoor ended in 2006.[FN2] During their time together, Terry and Defoor developed G.W.C. Inc. (GWC), a successful real estate company. Following the termination of their relationship, Terry removed Defoor as an officer and registered agent of GWC and seized control of GWC and its assets. Defoor filed suit, seeking a determination of her committed intimate relationship with Terry and an equitable distribution of property. In June 2007, Defoor requested that Anthony Rafel of Rafel Manville PLLC, now known as Rafel Law Group PLLC (RLG), substitute as her counsel in the suit. On June 29, 2007, Defoor signed a contingency fee agreement with RLG, specifying that RLG would be paid only upon Defoor's recovery in the underlying litigation.[FN3]

¶ 4 Disputes arose between Defoor and RLG re-

garding, in part, RLG's attorney fees and costs. As a result, shortly before trial, RLG moved for leave to withdraw as counsel for Defoor. The trial court granted RLG's motion on January 7, 2008. The trial court found good cause for RLG's withdrawal, which became effective on January 10, 2008.[FN4]

¶ 5 RLG filed several attorney's claims of lien in the underlying litigation. The firm filed its first attorney's claim of lien on December 26, 2007, prior to its withdrawal. This lien claimed 30 percent of the total amount recovered by Defoor in the action, plus costs, and, in the alternative, a lien in the amount of the value of RLG's services, totaling $475,921, plus costs totaling no less than $200,000. RLG filed several updated liens thereafter. By January 14, 2008, after RLG's withdrawal, its updated claimed lien was for 30 percent of Defoor's total recovery, plus costs, and, in the alternative, the value of RLG's services rendered to Defoor, totaling $505,000, plus costs in the amount of $270,000.

***2** ¶ 6 Following RLG's withdrawal, RLG and Defoor continued communicating with one another, and eventually began to negotiate RLG's re-engagement as trial counsel for Defoor in the underlying litigation. Rafel informed Defoor that RLG would represent her again under these conditions: that she acknowledge the $775,000 in past fees and costs due for RLG's services performed on her behalf prior to its withdrawal; that she agree to pay attorney fees going forward on an hourly basis; and that she secure her obligations by signing a promissory note.[FN5] The parties thereafter reached an agreement memorialized in a settlement agreement and attorney re-engagement agreement and promissory note.[FN6]

¶ 7 The Agreement included the following provisions:

> 4. *Fees and Costs for Re–Engagement.* Defoor shall pay RLG for its representation of Defoor pursuant to this Agreement, and shall reimburse RLG for any and all costs advanced by RLG on Defoor's behalf in the Litigation.... RLG's fees for services rendered pursuant to this Agreement shall be determined on an hourly fee basis using RLG's regular fee schedule for contingent litigation, rather than as a percentage of the recovery. The fees so computed shall be ... treated as Additional Advances under the promissory note.... Defoor shall be obligated to pay said fees regardless of the outcome in the Litigation or Defoor's recovery therein. In addition, RLG will advance the costs needed to bring the Litigation to trial.... Defoor agrees to reimburse RLG for all costs advanced, regardless of the outcome in the Litigation or Defoor's recovery therein, and the amounts so advanced shall be treated as Additional Advances under the promissory note.
>
> 5. *Lien.* Defoor hereby grants RLG a lien for the total amount of the past fees and costs for which she is obligated ($775,000), plus the amount of additional fees and costs incurred by or on behalf of Defoor pursuant to this Agreement. This lien shall apply and be enforceable against any recovery by Defoor in the Litigation and any assets of Defoor, whether awarded in the Litigation, obtained in settlement, or otherwise.

¶ 8 In addition, the Note designated the sum of $775,000 as being owed to RLG by Defoor, accompanied by interest on the unpaid principal accruing as of January 10, 2008.[FN7]

¶ 9 Before she signed the Agreement and Note, Defoor sought the advice of the attorneys who had first represented her in the underlying litigation. After reviewing the terms of the Agreement and Note, these attorneys recommended against Defoor's re-engagement with RLG. Notwithstanding this advice, Defoor signed the Agreement and Note on February 14, 2008, while in Florida.[FN8] She did so in the presence of witnesses and a notary public.

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¶ 10 RLG reappeared as counsel for Defoor on February 20, 2008. The trial of the dissolution dispute took place over 19 days in March 2008. RLG retained the services of Paul Sutphen to testify as an expert witness at trial. Sutphen is a forensic certified public accountant. He created a balance sheet and supporting schedule showing the parties' assets and liabilities as they existed around the time of separation.[FN9] Sutphen testified at trial and presented the balance sheet to the trial court.

*3 ¶ 11 RLG also presented to the trial court evidence of proceeds that GWC received from pending projects after Defoor and Terry separated, including a $1,050,000 assignment fee that was paid to GWC byin October 2007. RLG did not, however, inform the trial court that Terry had transferred $950,000 of the $1,050,000 Camwest Development assignment fee to a new UBS bank account immediately after he had received the fee. RLG did not do so because it was unaware that Terry had transferred the money to a new account, despite its efforts to identify all community assets.[FN10]

¶ 12 Following trial, the trial court distributed to the parties draft findings of fact and a draft property award, which did not specifically award Defoor the $1,050,000 Camwest assignment fee. As a result, RLG submitted to the trial court a redline of the draft findings of fact and property award, in which RLG identified the $1,050,000 assignment fee and requested that the trial court allocate half of those funds to Defoor.

¶ 13 On November 20, 2008, the trial court entered judgment in the underlying litigation. Although the trial court's award to Defoor was substantially in her favor,[FN11] the judgment did not specifically identify the $1,050,000 assignment fee. However, Defoor was awarded substantial interest in contract rights to property and, significantly, half of any undisclosed assets. Moreover, the trial court awarded all GWC liabilities to Terry. Terry thereafter appealed the trial court's ruling [FN12] and filed for bankruptcy.[FN13]

¶ 14 In accordance with its terms, the Note became due and payable on June 15, 2008. RLG had issued regular invoices to Defoor since March 2008 for the amount of principal and interest owing on the $775,000 sum incurred for Matter 1, before RLG's withdrawal, as well as for services rendered and costs advanced for Matter 2, since RLG's re-engagement. Because no payment had been made, on June 22, 2010, RLG brought suit against Defoor, seeking compensation for attorney fees and costs incurred on behalf of Defoor, pursuant to the Agreement and Note.

¶ 15 Defoor counterclaimed, asserting breach of fiduciary duty and legal malpractice. The trial court dismissed these claims on summary judgment, finding that Defoor presented no evidence to support her counterclaims. Moreover, in holding enforceable the Agreement and Note, the trial court granted RLG's motion for summary judgment regarding the Agreement. Contrary to Defoor's assertion that RLG violated Rule 1.8 of the Rules of Professional Conduct (RPC), the trial court found that "Ms. Defoor was not a client at the time the subject Agreement was negotiated and signed. Thus, RPC 1.8 does not apply as a matter of law."

¶ 16 The trial court additionally granted RLG's motion for partial summary judgment on attorney fees and costs, awarding RLG $497,117.50 for attorney fees for Matter 1 and $405,860.42 for attorney fees for Matter 2, totaling $902,977.92.[FN14] In that same order, the trial court awarded RLG judgment for costs RLG incurred and paid on behalf of Defoor in the amount of $383,184.29. The trial court thereafter awarded RLG prejudgment interest in the amount of $490,563.81.

*4 ¶ 17 Defoor appeals.[FN15]

II

¶ 18 Defoor's principal contention is that the Agreement and Note are void as a matter of law because RLG failed to comply with RPC 1.8(a). This argument is premised on the assertion that RPC 1.8(a) applies to the Agreement and Note. This is so, Defoor avers, because (1) RPC 1.8 governs transactions entered into concurrently with the attorney's engagement, during the formation of the attorney-client relationship, and (2) the Agreement and Note involved a "business transaction" and a "security interest" that implicate RPC 1.8(a). We disagree.

[1][2][3] ¶ 19 This court's review of orders granting or denying summary judgment is de novo, and we engage in the same inquiry as the trial court. *Aba Sheikh v. Choe*, 156 Wash.2d 441, 447, 128 P.3d 574 (2006). Summary judgment is proper when there is no genuine issue of 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. *Cotton v. Kronenberg*, 111 Wash.App. 258, 264, 44 P.3d 878 (2002) (citing *Greater Harbor 2000 v. City of Seattle*, 132 Wash.2d 267, 279, 937 P.2d 1082 (1997)). All facts and reasonable inferences must be considered in the light most favorable to the nonmoving party. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wash.2d 337, 341, 883 P.2d 1383 (1994).

[4][5][6] ¶ 20 Whether an attorney's conduct violated the RPC is a question of law. *Eriks v. Denver*, 118 Wash.2d 451, 457–58, 824 P.2d 1207(1992). Business transactions within the scope of RPC 1.8(a) are considered prima facie fraudulent. *In re Disciplinary Proceeding Against Holcomb*, 162 Wash.2d 563, 580, 173 P.3d 898 (2007); *In re Disciplinary Proceeding Against Johnson*, 118 Wash.2d 693, 704, 826 P.2d 186 (1992) (citing *In re Disciplinary Proceeding Against McGlothlen*, 99 Wash.2d 515, 525, 663 P.2d 1330 (1983)). Attorney fee agreements that violate the Rules of Professional Conduct are against public policy and are therefore unenforceable. *Simburg, Ketter, Sheppard & Purdy, LLP, v. Olshan*, 109 Wn.App. 436, 445, 988 P.2d 467, 33 P.3d 742 (1999).

¶ 21 RPC 1.8(a) governs business transactions between lawyers and clients. It prohibits an attorney from participating in business transactions with a client unless the attorney satisfies certain disclosure requirements designed to protect the client's interests. In pertinent part, RPC 1.8 provides:

¶ 22 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

> (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.[FN16]

***5** [7][8][9] ¶ 23 Defoor asserts that RPC 1.8(a) applies to the Agreement and Note because they were entered into concurrently with the new attorney-client engagement. Defoor's contention is mistaken. RPC 1.8(a) governs transactions entered into during the course of the attorney-client relationship. The rule does not apply to transactions entered into prior to the creation of the attorney-client relationship or those agreed upon during the relationship's formation.[FN17] Such application is made clear by the plain language of RPC 1.8, which expressly prohibits an attorney from entering into "a business transaction with a client." The language of the rule makes no reference to transactions with prospective clients or transactions entered into in anticipation of representation. The rule itself is thus limited to conflicts of interests with *current* clients. Given that this rule was enacted by our Supreme Court, which is charged with rule oversight

of attorney discipline and regulatory matters, *In re Disciplinary Proceeding Against Greenlee*, 158 Wash.2d 259, 266–67, 143 P.3d 807 (2006), it would be improper for us to import language into the rule to create a broader application than that warranted by the text of the rule.

¶ 24 Moreover, the structure and organization of the rules provide further indication that RPC 1.8 does not apply to transactions with prospective clients or those entered into in anticipation of formation of an attorney-client relationship. The rules are organized and categorized, in part, according to an attorney's duties to prospective, current, and former clients. In particular, the heading of RPC 1.7 is entitled, "Conflict of Interest: Current Clients," and thus concerns a lawyer's duties to current clients. RPC 1.8 sets forth the obligations owing to current clients, as demonstrated by its heading, "Conflict of Interest: Current Clients: Specific Rules." Further, RPC 1.9 sets forth "Duties to Former Clients," while RPC 1.18 specifies "Duties to Prospective Client[s]." Thus, the structure of the rules is consistent with the conclusion that RPC 1.8(a) does not apply to transactions entered into with prospective clients.

[10] ¶ 25 In addition, the principle underlying RPC 1.8(a) is consistent with our determination. The Official Comments to the Rules are instructive in this regard. Comment 1 explains that "[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, property or financial transaction with a client." RPC 1.8 cmt. 1. RPC 1.8(a) is therefore designed to prevent an attorney, who likely benefits from a considerable advantage when dealing with a client, from exploiting the attorney-client relationship, given that the client should be free to repose a great deal of trust and confidence in the attorney. Conversely, when an attorney negotiates with a prospective client the terms of the initial fee agreement, the attorney-client relationship has not yet been established. Thus, the attorney does not owe the same duty that he or she owes to a current client. If the prospective client is dissatisfied with the terms of the proposed engagement agreement, the prospective client is free to decline representation or seek representation elsewhere.

***6** ¶ 26 Here, it is undisputed that at the time Defoor and RLG reached agreement on the Agreement and Note, an attorney-client relationship had not yet commenced. To the contrary, their previous relationship had been terminated, as evident by the trial court's order granting RLG's leave to withdraw. At the time the Agreement and Note were negotiated, Defoor was not a "current client" of RLG for purposes of RPC 1.8(a).

[11] ¶ 27 Notwithstanding that Defoor was not a current client of RLG at the time the Agreement and Note were negotiated, Defoor insists that RPC 1.8(a) applies because the Agreement grants a lien to RLG against "any assets of Defoor" securing payments due for work on Matters 1 and 2. This grant of a security interest, Defoor asserts, brings the Agreement within the scope of RPC 1.8(a). This is so, Defoor contends, because an official comment to RPC 1.8(a) states that the rule "does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property *as payment* of all or part of a fee." RPC 1.8 cmt. 1 (emphasis added). Defoor maintains that the security interest granted in the Agreement constitutes "payment," within the meaning of the comment. Thus, Defoor asserts, RPC 1.8(a) applies to the Agreement. We disagree.

¶ 28 First, the Note securing payment for $775,000—as settlement for Defoor's obligation to RLG for its services and costs for Matter 1—constitutes nothing other than an accord, the satisfaction of which has not been performed by Defoor because she has not paid the amount owed.[FN18] Be-

cause of this and the absence of an attorney-client relationship at the time the Agreement and Note were negotiated, RPC 1.8 is inapplicable to the grant of a lien securing payment of fees for work done on Matter 1.

¶ 29 Second, contrary to Defoor's contention, the cited lien provision does not constitute payment for RLG's legal services. Comment 1 pertains to circumstances in which an attorney acquires an interest in the property of a client *as payment* of fees, such as a total or partial ownership in a client's business. It does not pertain to a security interest designed to protect the attorney against *nonpayment.*

¶ 30 A case relied upon by Defoor is actually consonant with this view. *See Holmes v. Loveless,* 122 Wash.App. 470, 94 P.3d 338 (2004). Attorney Holmes and his law firm began performing legal services for Loveless in 1970. Two years later, Loveless and his business partner, Tollefson, launched a joint venture. In 1972, Holmes and his law firm entered into a fee agreement with the joint venture in which the law firm, in exchange for charging a reduced hourly fee for work performed, would receive five percent of the joint venture's cash distributions. [FN19] *Holmes,* 122 Wash.App. at 473, 94 P.3d 338. The court concluded that RPC 1.8(a) and RPC 1.5(a) governed the 1972 agreement because the law firm's "compensation was directly linked to the joint venture's profits." *Holmes,* 122 Wash.App. at 475–76, 94 P.3d 338.

*7 ¶ 31 In contrast to *Holmes,* here, RLG obtained no direct interest in Defoor's property as payment for the work it performed. Instead, the Agreement stipulated that payment would be calculated on an hourly basis for services performed after RLG's re-engagement. RLG billed Defoor monthly for services rendered on Matter 2; all amounts unpaid were added to the sum due on the promissory note. The value of the compensation earned by RLG was measured by its rates and the hours it worked. It was neither increased nor decreased by the value of the property to which a lien attached, securing unpaid amounts due. The grant of an interest to secure payment is not the same as payment.

¶ 32 Similarly unavailing is Defoor's reliance on *Cotton v. Kronenberg,* 111 Wash.App. 258, 44 P.3d 878, for what she claims reflects longstanding Washington precedent that RPC 1.8(a) applies to business transactions that are included as part of the terms of the lawyer's engagement. In fact, *Cotton* set forth no such rule.

[12] ¶ 33 Courts have applied RPC 1.8(a) to modifications or renegotiations of fee arrangements made *during* the representation. "[A]ny modification of a fee arrangement after an attorney-client relationship has been established is subject to 'particular attention and scrutiny.' " *Cotton,* 111 Wash.App. at 272 n. 34, 44 P.3d 878 (internal quotation marks omitted) (quoting *Perez v. Pappas,* 98 Wash.2d 835, 841, 659 P.2d 475 (1983)). "[I]f the renegotiation results in greater compensation than counsel was entitled to under the original agreement, courts may refuse to enforce the renegotiation unless it is supported by new consideration." *Perez,* 98 Wash.2d at 841, 659 P.2d 475.

¶ 34 *Cotton* involved the modification of a fee agreement with an existing client. In that case, we determined that the second fee agreement, requiring the exchange of real property for legal services, violated RPC 1.8(a). 111 Wash.App. at 262, 44 P.3d 878. The second fee agreement, signed a few days after the first, transferred Cotton's real property and mobile home to his attorney, Kronenberg, in full satisfaction of Kronenberg's fees earned in the case. The second fee agreement was entered into after Kronenberg and Cotton's attorney-client relationship had commenced. The challenged fee agreement superseded the initial fee agreement.

¶ 35 Nothing like that happened here. The Agreement and Note were negotiated before RLG and Defoor re-established an attorney-client relationship. The court had explicitly permitted and supervised the severing of the first attorney-client relationship. Because an attorney-client relationship was nonexistent at the time the Agreement and Note were negotiated and entered into, Defoor's reliance on *Cotton* is misplaced.

[13] ¶ 36 Defoor's next contention involves a theory that she first presented at oral argument in this court; a theory that was neither previously addressed in her briefing on appeal nor in her pleadings in the trial court. She asserts that even after RLG's withdrawal and before its re-engagement, an attorney-client relationship continued to exist, thereby subjecting the Agreement and Note to RPC 1.8(a). The existence of this relationship, Defoor argues, is reflected in RLG's billing records, which indicate that RLG performed legal services on behalf of Defoor in preparation for their re-engagement.[FN20] Further, following appellate oral argument, Defoor submitted a statement of additional authorities, in which she argues that "Rafel Law Group's provision of legal services between January 11 and February 14, 2008 creates at least an issue of fact regarding the existence of an attorney-client relationship."

***8** ¶ 37 We decline to evaluate the merits of this tardily-raised argument. In reviewing an order granting or denying a motion for summary judgment, we "will consider only evidence and issues called to the attention of the trial court." RAP 9.12. Defoor's contention was not raised in her pleadings to the trial court, thus denying RLG the opportunity to offer evidence or argument designed to rebut the contention. Nor did Defoor address this theory in her briefing on appeal, similarly denying RLG the opportunity to respond. Finally, Defoor sought to argue her case in its statement of additional authorities, in contravention of RAP 10.8. Defoor's contention, raised for the first time on appeal, is not properly before this court. It will not be further addressed. [FN21]

¶ 38 The terms of the Agreement and Note do not fall within the scope of RPC 1.8(a). Defoor was not a current client at the time Defoor and RLG contracted for the Agreement and Note. In addition, the lien securing an interest in Defoor's assets does not fall within Official Comment 1's exception to the general rule. The trial court did not err in giving effect to the Agreement and Note.[FN22]

¶ 39 The remainder of this opinion has no precedential value. It will, therefore, be filed for public record in accordance with the rules governing unpublished opinions.

******UNPUBLISHED TEXT FOLLOWS******

III

¶ 40 Defoor next contends that the trial court erred by dismissing her legal malpractice claim, asserting that disputed factual issues preclude summary judgment. We conclude that no genuine issues of material fact were established to preclude summary judgment and that the trial court did not err by summarily adjudicating Defoor's malpractice claim. [FN23]

¶ 41 Defoor first argues that a question of fact exists as to whether RLG breached the applicable standard of care because RLG failed to track Terry's postseparation disposition of community assets. In support of this argument, Defoor points to the expert testimony of attorney Ted Billbe, in which he opined:

> [D]uring the time that Mr. Rafel represented Ms. Defoor, he did not do a proper job of tracking the assets that were quasi-community and that resulted in him not being able to put on a proper case to present to the judge all of the assets ... that constituted the quasi-marital property to be divided.[[FN24]

¶ 42 To establish a legal professional negligence claim, Defoor must prove: (1) the existence of an

attorney-client relationship giving rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred. *Hizey v. Carpenter*, 119 Wash.2d 251, 260–61, 830 P.2d 646 (1992). Expert testimony is often required to determine whether an attorney's duty of care was breached in a legal professional negligence action. *Geer v. Tonnon*, 137 Wash.App. 838, 851, 155 P.3d 163 (2007).

***9** ¶ 43 Defoor fails to raise a material question of fact as to whether RLG breached its duty of care. The record reveals that, in the underlying litigation, RLG did, in fact, present to the trial court evidence of Terry's postseparation disposition of assets. RLG's expert provided the court a balance sheet and schedule showing Terry's assets and liabilities that existed when Terry and Defoor separated. Further, although RLG did not prove to the trial court that Terry transferred $950,000 of the $1,050,000 Camwest assignment fee to a new UBS account, it did present evidence to the trial court of GWC's receipt of the $1,050,000 assignment fee.

¶ 44 Nor does Defoor demonstrate that RLG's alleged failure to track postseparation disposition of community assets proximately harmed Defoor. To prove proximate cause, the complainant must prove both cause in fact and legal causation. *Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S.*, 112 Wash.App. 677, 682–83, 50 P.3d 306 (2002). "Cause in fact refers to the 'but for' consequences of an act," *City of Seattle v. Blume*, 134 Wash.2d 243, 251, 947 P.2d 223 (1997), which requires the complainant to show that he or she would have prevailed or achieved a better result but for the attorney's gence. *Halvorsen v. Ferguson*, 46 Wash.App. 708, 719, 735 P.2d 675 (1986).

¶ 45 Here, Defoor puts forward no evidence indicating that the trial court would have awarded her a larger judgment had RLG differently accounted for the disposition of assets. Instead, Defoor maintains that she was injured by RLG's alleged failure to track the disposition of assets because it led to the trial judge's refusal to allocate to her value from such assets. However, *Defoor was awarded 50 percent of any undisclosed assets.* Thus, even if it were true that RLG failed to identify concealed assets, Defoor would nonetheless be entitled to recover half of them upon their disclosure.

¶ 46 Moreover, when asked the extent to which Defoor had been damaged by RLG's failure to track assets, Defoor's expert could not provide an answer. Thus, Defoor's assertions are merely speculative; she provided no evidence—through expert testimony or otherwise—to establish that but for RLG's asserted negligence, she would have been awarded a greater judgment or have been able to collect on it. [FN25] Absent such evidence, Defoor's claim for legal malpractice is insufficient to withstand RLG's motion for summary judgment.

¶ 47 Accordingly, even viewing the evidence in the light most favorable to Defoor, no material factual disputes precluded summary judgment on her legal malpractice claim.

VI

¶ 48 Defoor next contends that the trial court erred by dismissing her breach of fiduciary duty claim. We disagree. The evidence she proffers does not demonstrate such a breach on the part of RLG.

¶ 49 Violation of the Rules of Professional Conduct may not be used as evidence of legal malpractice. *Hizey*, 119 Wash.2d at 265–66, 830 P.2d 646. A trial court can, however, consider the RPCs when determining whether an attorney breached his or her fiduciary duty to a client. *See Cotton*, 111 Wash.App. at 266, 44 P.3d 878. A claim for breach of fiduciary duty requires the claimant to prove: (1) the existence of a

duty owed; (2) breach of that duty; (3) resulting injury; and (4) that the claimed breach caused the injury. *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wash.App. 412, 433–34, 40 P.3d 1206 (2002).

***10** ¶ 50 First, Defoor's argument to the trial court in opposition to RLG's motion for summary judgment was identical to that asserted on behalf of her legal malpractice claim. Because there are no genuine issues of material fact precluding her legal malpractice claim, her fiduciary duty claim likewise fails.

¶ 51 Defoor nonetheless asserts that because the trial court erred by determining that no breach of RPC 1.8(a) had occurred, the trial court also erred by dismissing Defoor's breach of fiduciary duty claim as it related to the Agreement. This claim fails for the reasons previously given.

¶ 52 Defoor next maintains that RLG breached its fiduciary duty because it filed excessive and unreasonable attorney's liens before, during, and after its engagement and falsely informed Defoor that she owed an "obligation" to pay such fees. This claim is not well taken. Defoor offered no evidence establishing that RLG breached its duty in such a manner. Expert witness Billbe's opinion that RLG breached its duty by failing to track community assets does not substantiate a claim for breach of fiduciary duty based on the filing of allegedly excessive liens or the asserted charging of unreasonable fees. Conversely, RLG's expert, Jeffrey Tilden, opined that the Matter 1 and Matter 2 fees ($505,000 and $425,500, respectively)—upon which the lien amounts were based—were reasonable. Such expert testimony was unrebutted by Defoor.

¶ 53 Defoor also argues that RLG's assertion of an attorney's lien for costs that had not actually been paid by RLG at the time of filing the lien was unlawful. The trial judge granted summary judgment in favor of RLG for the total costs RLG paid on Defoor's behalf, amounting to $274,250.28. In addition, the trial court awarded RLG $108,934.01 in costs RLG incurred, which remained outstanding at the time. However, the $274,250.28 in costs paid on behalf of Defoor is more than the $270,000 claimed in the attorney's lien. Further, both the initial contingency fee agreement and the Agreement require Defoor to pay RLG for all costs advanced on her behalf. Thus, Defoor fails to raise questions of material fact as to whether RLG breached its fiduciary duty by asserting an attorney's lien for costs incurred and paid.

¶ 54 Defoor contends that the filing of purportedly excessive liens caused her injury because they compromised her ability to find other counsel shortly before trial, thus resulting in economic harm. However, because Defoor fails to raise a material question of fact as to whether RLG breached its fiduciary duty, this contention as to resulting injury is immaterial.

¶ 55 Finally, Defoor argues that she suffered emotional distress as a result of the lien claims, insisting that she is entitled to compensation for serious emotional distress flowing from RLG's breach of fiduciary duty. Even if emotional distress damages were available for a breach of fiduciary duty claim, [FN26] we need not address this claim because Defoor is unable to show disputed factual issues regarding the existence of such a breach.

***11** ¶ 56 No genuine issue of material fact was shown to exist on this claim. The trial court properly granted summary judgment dismissing Defoor's breach of fiduciary duty claim.

V

¶ 57 Defoor next asserts that material factual disputes exist regarding the reasonableness of RLG's billing rates and the hours expended on the underlying litigation, thus precluding summary judgment. Again, we disagree.

¶ 58 In its motion for partial summary judgment on attorney fees and costs, RLG argued that if the trial court found enforceable the Agreement and Note, then RLG would be entitled to an award of attorney fees for Matters 1 and 2. RLG alternatively argued that if the court did not find them enforceable, then it should utilize the lodestar method to determine the amount of a quantum meruit recovery. Notably, in its order granting plaintiff's motion for partial summary judgment on attorney fees and costs, the trial court stated: "The Court finds that the same reasonable fee amounts are properly payable whether the basis for recovery is the Re–Engagement Agreement and Promissory Note between Plaintiff and Defendant or *quantum meruit.*"

¶ 59 Defoor challenges RLG's application of the lodestar methodology in computing its award. Particularly, Defoor argues that there are material factual disputes involving the rates, hours, and reasonableness of RLG's fee request that should preclude summary judgment.

¶ 60 The lodestar methodology requires that attorney fees be calculated based on the total number of hours *reasonably* expended, multiplied by a *reasonable* hourly rate of compensation. *Morgan v. Kingen*, 166 Wash.2d 526, 539, 210 P.3d 995 (2009) (emphasis added). After determining the lodestar, the trial court may then adjust the award to reflect factors not already taken into consideration. *Bowers v. Transamerica Title Ins. Co.*, 100 Wash.2d 581, 598, 675 P.2d 193 (1983). Such factors include the time expended on the case, the difficulty of the questions involved, the skill required, the customary rates of other attorneys, the amount involved, the benefit resulting to the client, the contingency or certainty in collecting the fee, and the character of the employment. *Scott Fetzer Co. v. Weeks*, 122 Wash.2d 141, 150, 859 P.2d 1210(1993). The trial court should also "discount hours spent on unsuccessful claims, duplicated or wasted effort, or otherwise unproductive time." *Chuong Van Pham v. Seattle City Light*, 159 Wash.2d 527, 538, 151 P.3d 976 (2007) (citing *Bowers*, 100 Wash.2d at 597, 600, 675 P.2d 193).

¶ 61 To support its motion for partial summary judgment on attorney fees and costs, RLG offered expert witness Tilden's deposition testimony as well as his written declaration. Attorney Tilden opined as to the reasonableness of the attorney fees and costs sought by RLG. [FN27]

¶ 62 Tilden provided the following opinions: the end result in the case was excellent; RLG's time keeping was more than adequate; the legal services described in the hourly time records and monthly invoices were necessary and appropriate; Rafel's hourly rate of $450 was reasonable, and in fact low, and that Tilden "would never have taken this case on these terms for a number approaching $450/hour"; [FN28] the rates charged by RLG's attorneys and staff were reasonable; and, the total fees sought for legal services in both matters were reasonable given the risks involved in accepting representation in a hotly contested case. Tilden also disagreed with Defoor's contention that RLG's fees were unreasonable and excessive in light of the 2008 recession and economic downturn. He stated that the impact of the recession "cannot be laid at the feet of the lawyers."

***12** ¶ 63 Although Defoor offered the testimony of experts Billbe and Mark Fucile regarding Rafel's alleged breach of fiduciary duty and the standard of care, Defoor offered no such expert testimony to refute Tilden's statements regarding the reasonableness of the fees and costs. Defoor instead asserts that Rafel never charged or collected on its "premium contingent fee" rates other than in Defoor's case. However, we are not persuaded that this contention is material to the reasonableness of the fee.

¶ 64 In addition, Defoor's trial court pleadings maintained that there were flaws in Tilden's testimony that established the existence of disputed factual is-

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sues. She asserted, for example, that Tilden's testimony indicated that he had not reviewed each time entry to determine whether it involved wasteful, duplicative, or unsuccessful efforts. However, Tilden's testimony and declaration indicate that he was adequately prepared to offer an opinion concerning the reasonableness of the fees sought by RLG. Defoor also argued that Tilden failed to consider each RPC 1.5 factor in evaluating the reasonableness of the fee. Contrary to this assertion, however, the factors enumerated in RPC 1.5 "are not exclusive. Nor will each factor be relevant in each instance." RPC 1.5, cmt. 1. Further, Tilden's opinion was, in fact, based on an application of a majority of these factors. Tilden's testimony contained no inconsistencies or defects establishing a genuine issue of material fact.

¶ 65 In its motion for partial summary judgment on attorney fees, RLG argued that it was entitled to a determination under CR 56(d) that all of the services identified on its hourly billings for both matters were actually performed. [FN29] In support of this claim, Rafel's declaration presented testimony that he performed all of the services charged in the billing records for both matters. However, he stated that there were some time entries for which he determined "Defoor should not have been billed." As a result, Rafel deducted several time entries from RLG's total amount claimed in attorney fees. [FN30] For example, he removed a billing entry charging Defoor for work done researching and drafting a notice of attorney's lien performed in connection with RLG's motion for leave to withdraw. Rafel also removed an entry charging Defoor for time spent communicating with her regarding RLG's re-engagement.

¶ 66 In her briefing on appeal, Defoor contends that excessive time was claimed even after Rafel removed billing entries. As an example, on appeal Defoor points out that RLG charged her $1,000 for drafting the Agreement and Note at a time when RLG no longer represented her. However, although this particular entry was included in the exhibits submitted to the trial court, Defoor's trial court pleadings did not specifically identify any such excessive time entries. Rather, her trial court's pleadings merely alluded to general exhibits containing numerous pages of billing records. [FN31]

*13 ¶ 67 Moreover, Defoor's contention that she gained no benefit from RLG's representation is unavailing. Defoor unquestionably gained value from RLG's representation in the underlying litigation. Defoor's judgment against Terry—which included interests in real property valued at over $2 million, a cash sum in the amount of $2,223,368.60, substantial interest in contract rights to property, and half of any undisclosed assets—is largely indicative of such benefit.

¶ 68 Defoor did not proffer sufficient evidence in the trial court to substantiate the existence of any dispute of material fact regarding the reasonableness of RLG's attorney fees. Therefore, the trial court did not err in granting RLG's motion for partial summary judgment.

VI

¶ 69 Defoor next contends that the trial court erred in awarding over $490,000 in prejudgment interest on RLG's collection claims against Defoor. She asserts that courts may only award prejudgment interest when a claim is liquidated. Because the claim was unliquidated, Defoor argues, the court erred in awarding prejudgment interest. We disagree.

¶ 70 A prevailing party is generally entitled to prejudgment interest. *Lakes v. von der Mehden*, 117 Wash.App. 212, 217, 70 P.3d 154 (2003). Prejudgment interest is awardable "(1) when an amount claimed is 'liquidated' or (2) when the amount of an 'unliquidated' claim is for an amount due upon a specific contract for the payment of money and the amount due is determinable by computation with reference to a fixed standard contained in the contract,

without reliance on opinion or discretion." *Prier v. Refrigeration Eng'g Co.*, 74 Wash.2d 25, 32, 442 P.2d 621 (1968). A liquidated claim is "one where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion." *Prier*, 74 Wash.2d at 32, 442 P.2d 621.

¶ 71 Here, the trial court awarded attorney fees to RLG in the amount of $497,117.50 for Matter 1 and $405,860.42 for Matter 2, and determined that "[s]aid sums are liquidated." These sums were determined "with exactness, without reliance on opinion or discretion." *Prier*, 74 Wash.2d at 32, 442 P.2d 621. Thus, the trial court properly awarded RLG prejudgment interest as based on liquidated sums.

VII

¶ 72 Defoor next contends that because the trial court erred in granting summary judgment in favor of RLG regarding the Agreement and Note, this court should reverse the order awarding RLG attorney fees and instead grant Defoor an award of such fees. Here, the Note contains a provision that requires Defoor to pay for all legal fees and costs incurred in collecting or enforcing the Note, including on appeal. The trial court did not err in granting summary judgment in favor of RLG; thus, the trial court did not err in awarding RLG fees and costs pursuant to the fee shifting provision set forth in the Note.

VIII

¶ 73 Defoor requests an award of attorney fees on appeal. Rule of Appellate Procedure 18.1(a) permits us to award attorney fees and costs on appeal "[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses." Because we conclude that RLG prevails on appeal and because the Note specifies an award of attorney fees on appeal, RLG is entitled to an award of attorney fees and costs. Upon proper submission, a commissioner of our court will enter an appropriate order.

***14** ¶ 74 Affirmed.

******END OF UNPUBLISHED TEXT******

We concur: LAU, J.

SCHINDLER, J. (concurring).

¶ 75 Because the limited case law interpreting RPC 1.8(a) only addresses application of the rule to current clients, I agree with the conclusion that RPC 1.8(a) does not apply. But I write separately to urge the Supreme Court to address whether RPC 1.8(a) should apply to a security interest acquired during the negotiation of the initial fee agreement. While the Court has not addressed the application of RPC 1.8(a) to the acquisition of a security interest during negotiation of a fee agreement, recent Washington State Bar Association (WSBA) Advisory Opinion 2209, "Lawyer Taking Security Interest in Client Property" (2012), states that best practice would include compliance with the requirements of RPC 1.8(a) in those circumstances.

¶ 76 In WSBA Advisory Opinion 2209, the WSBA Rules of Professional Conduct Committee (Committee) recognizes RPC 1.8(a) only applies to current clients, but notes that the Supreme Court has not squarely addressed whether RPC 1.8(a) applies to the negotiation of a security interest as part of the initial fee agreement. Based on authority from other jurisdictions and American Bar Association (ABA) Formal Opinion 02–427, "Contractual Security Interest Obtained by a Lawyer to Secure Payment of a Fee" (2002), the Committee states that best practice would include compliance with the requirements of RPC 1.8(a) when acquiring a security interest, such as a lien, during the negotiation of the initial fee agreement. WSBA Advisory Op. 2209.

¶ 77 WSBA Advisory Opinion 2209 states, in pertinent part:

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The negotiation of the terms of the initial fee agreement is not generally considered a "business transaction" with a client. This is because at the time of the negotiation of the initial fee agreement, the attorney-client relationship is not yet formed. Thus the attorney does not owe the same duty to a prospective client as she would to an existing client. Additionally, the prospective client can walk away from the transaction. On the other hand, any subsequent modification of the fee agreement is generally considered a business transaction. See Comment [1] to RPC 1.8 ("[RPC 1.8] does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee.").

However, there is some authority from other jurisdictions that RPC 1.8(a) applies even to security interests acquired during the negotiation of the initial fee agreement. See ABA Formal Opinion 02–427. Thus, it is the Committee's opinion that the best practice would include compliance with RPC 1.8(a).

....

Under RPC 1.8(i), an attorney may accept a contractual security interest in a client's real property. Washington courts have not squarely addressed the application of RPC 1.8(a) to the acceptance of a security interest during the initial negotiation of the fee agreement, but the careful attorney would comply with its provisions. If the security interest is created pursuant to a modified fee agreement, the attorney must comply with RPC 1.8(a).[FN1]

***15** ¶ 78 ABA Formal Opinion 02–427 states that "[a] lawyer who acquires a contractual security interest in a client's property to secure payment of fees earned *or to be earned* must comply with [ABA] Model Rule 1.8(a)." [FN2] ABA Formal Opinion 02–427 also states that transactions to secure a fee are "regarded in most state and local bar opinions and court decisions as ... business transaction[s]" subject to the disclosure requirements of ABA Model Rule 1.8(a).[FN3]

¶ 79 Here, the Agreement provides, in pertinent part:

> 5. *Lien.* Defoor hereby grants RLG a lien for the total amount of the past fees and costs for which she is obligated ($775,000), plus the amount of additional fees and costs incurred by or on behalf of Defoor pursuant to this Agreement. *This lien shall apply and be enforceable against any recovery by Defoor in the Litigation and any assets of Defoor, whether awarded in the Litigation, obtained in settlement, or otherwise.* Any payment and/or transfer of property to Defoor or for Defoor's benefit in the Litigation shall be paid or given, as the case may be, to RLG in trust for Defoor, and RLG may use said funds or property to discharge, in whole or in part, any amounts due to RLG under this Agreement or the Promissory Note.[FN4]

¶ 80 RPC 1.8(i) prohibits a lawyer from acquiring a lien "to secure the lawyer's fee or expenses." RPC 1.8(i)(1).[FN5] Comment 16 to RPC 1.8 states that where "a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a)." RPC 1.8(a) requires a lawyer to meet strict requirements before entering into a business transaction with a client or acquiring "an ownership, possessory, security or other pecuniary interest adverse to a client."

¶ 81 If RPC 1.8(a) applied to the Agreement,

there is no question that the disclosure requirements were not met.[FN6] A fee agreement that violates RPC 1.8(a) is against public policy and unenforceable. *Valley/50th Ave., LLC v. Stewart*, 159 Wash.2d 736, 743, 153 P.3d 186(2007).

FN1. In her briefing, Defoor frequently cites to portions of her supplemental declaration. However, several portions of this pleading were ordered stricken by the trial court. Moreover, although Defoor assigns error to the trial court's order striking these portions, she states in a footnote that "it is unnecessary for this Court to reach the trial court's order," because "other evidence in the record establishes material factual disputes." Br. of App. at 41. In fact, Defoor fails to provide a basis for us to conclude that the trial court erred by striking portions of her supplemental declaration. Therefore, we affirm the trial court's order to strike and ignore Defoor's references to portions that were stricken.

FN2. We will refer to Stacey Defoor, a party to this appeal, as Defoor. For clarity, we will refer to Terry Defoor as Terry.

FN3. The agreement also contained a provision in which RLG promised to advance all costs throughout the litigation, for which Defoor would be ultimately liable.

FN4. The trial court's order was conditioned on RLG taking steps to protect Defoor's interests, including continuing with ongoing mediation attempts at Defoor's option, and turning over her files to substitute counsel should Defoor engage the services of a new attorney. The trial judge also continued the trial to March 3, 2008.

FN5. The parties refer to services rendered and costs incurred on behalf of Defoor before RLG's withdrawal as "Matter 1." Likewise, the parties refer to services rendered and costs incurred after RLG's re-engagement as "Matter 2." This nomenclature is adopted herein.

FN6. The settlement and re-engagement agreement and promissory note are hereafter referred to as "Agreement" and "Note," respectively.

FN7. The Note required that Defoor pay the principal and interest upon the earliest occurrence of any of the following events: (a) receipt of funds by Defoor in connection with the underlying litigation; (b) the sale by Defoor of any residential properties in which Defoor had a title interest; or (c) June 15, 2008.

FN8. These attorneys memorialized their advice in a letter to Defoor, which was received by her several days after she signed the Agreement and Note. There is no indication in the record, however, that Defoor's receipt of the letter motivated her to attempt to either rescind the agreement or modify its terms.

FN9. The balance sheet identified bank accounts, real properties, boats, and other assets that existed at the time of the Defoor separation, which were held by Defoor, Terry, and GWC.

FN10. RLG's interrogatories requested identification of all bank accounts. In response to RLG's interrogatories, Terry and GWC failed to identify the new UBS bank account containing the $950,000 portion of the $1,050,000 Camwest assignment fee. RLG

also issued several document subpoenas in an effort to identify all of the community assets. One of these subpoenas was to UBS in Montana, where the new UBS account was opened. UBS disclosed the existence of two accounts, which did not contain the Camwest assignment fee, and stated that it had not found other accounts in the name of Defoor or GWC.

FN11. The trial court's award included the following: the cash sum of $2,223,368.60; interests in real property valued by the court at over $2 million; three Porsche vehicles valued at $140,000 total; a boat valued at $100,000; jewelry valued at $46,400; and certain contract rights to which the court did not assign a cash value.

FN12. The decision on appeal is *Defoor v. Defoor,* noted at 157 Wn.App. 1033 (2010). We reversed in part, holding that the trial court counted twice the proceeds from the sale of the Defoors' Costa Rica condominium. We also remanded for further inquiry into whether the trial court allocated to Terry a line of credit debt as part of its fair and equitable property distribution. Following proceedings on remand, Terry, GWC, and Merrilee A. MacLean, the chapter 7 bankruptcy trustee for Terry's estate, appealed. The unpublished consolidated decision on appeal is *Defoor v. Defoor,* Nos. 67457–9–I, 67458–7–I, 2013 WL 1164772 (Wash.Ct.App. March 18,2013).

FN13. At the time of this appeal, Defoor had not recovered any cash as the result of the award against Terry.

FN14. The trial court made an arithmetic error and entered judgment in the amount of $902,978.22.

FN15. RLG submitted a motion requesting that this court, pursuant to RAP 10.3(c) and RAP 10.7, strike Defoor's reply brief, or, in the alternative, permit RLG to file a response to the reply brief pursuant to RAP 10.1(h). RLG argues that Defoor's reply brief contains "new arguments, authorities and evidence." Defoor's reply brief substantially comports with RAP 10.3(c) insofar as it responds to issues raised in RLG's respondent's brief. Accordingly, we deny RLG's motion to strike Defoor's reply brief.

FN16. Defoor does not challenge RLG's compliance with RPC 1.8(a)(2) and (a)(3). RPC 1.8(a)(2) prescribes that the client be advised "in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction." RPC 1.8(a)(3) requires that the client give "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."

FN17. The sole exception to this general rule is discussed *infra.*

FN18. Black's Law Dictionary defines an accord as "[a]n offer to give or to accept a stipulated performance in the future to satisfy an obligor's existing duty, together with an acceptance of that offer. The performance becomes what is known as a *satisfaction.*" *BLACK'S LAW DICTIONARY* 18 (9th ed.2009). *See Dep't of Fisheries v. J–Z Sales Corp.,* 25 Wash.App. 671, 676, 610 P.2d 390 (1980).

FN19. Although the facts of the case clearly indicate that Loveless was represented by Holmes and his law firm two years prior to the joint venture's fee agreement with the firm, the court did not expressly address whether Loveless, Tollefson, or the joint venture, were "current clients" at the time the joint venture agreement or the fee agreement were signed.

FN20. Such services included drafting the Agreement and Note, communicating with Defoor regarding the possibility of re-engagement, and serving and filing an updated attorney's lien claim. As discussed *infra,* Rafel later removed some of these billing entries, excluding the work performed from the list of work from which RLG calculated its damages stemming from Defoor's breach of the Agreement.

FN21. RLG filed a motion to strike Defoor's statement of additional authorities, noting that the statement violates RAP 10.8. The rule provides that a statement of additional authorities "should not contain argument, but should identify the issue for which each authority is offered." RAP 10.8. RLG is correct that Defoor improperly presented argument in its statement of additional authorities. However, because we decline to consider Defoor's new argument for the reasons set forth above, we need not rule on RLG's motion to strike.

FN22. RLG contends that Defoor should be estopped from asserting her claims because she fraudulently induced RLG to enter into the Agreement. In support of this argument, RLG points to Defoor's deposition, in which she testified that when she signed the Agreement, she did not, in fact, agree to its terms and that her acknowledgement of some of its terms was "totally false." Defoor also testified that at the time she signed the Agreement, she had plans to later bring suit against Rafel, contesting her duty to pay legal fees. Although she discussed this intention with her former attorney and Terry's counsel, she did not make Rafel aware of her plan because she believed he would not have accepted representation. It appears, therefore, that Defoor had no intention to honor the Agreement and Note at the time she signed them. However, because the Agreement is valid and enforceable, we need not address this claim.

> Similarly, the trial court did not adjudicate RLG's amended claims for common law fraud and fraudulent inducement. After the trial court granted RLG's motion for summary judgment re: re-engagement agreement and RLG's motion for summary judgment dismissing negligence, breach of fiduciary duty and other damages claims, RLG sought leave to amend its complaint to withdraw its claims for common law fraud and fraudulent inducement. The trial court granted RLG's motion to dismiss the fraud claims without prejudice.

FN23. In discussing this claim on appeal, Defoor relies in her briefing on portions of the supplemental declaration that were stricken pursuant to the trial court's order. As earlier stated, we affirm this order.

FN24. Defoor also refers to statements made by Rafel that purportedly reveal his acknowledgement of the duty to track assets. However, such evidence has no relevance to the question of whether Rafel in fact breached the duty.

FN25. RLG asserts that Defoor's claim fails as a matter of law because Defoor cannot prove that she would be able to collect on the judgment even had she been awarded a larger judgment. "[C]ollectibility of the underlying judgment is a component of damages in a legal malpractice action." *Matson v. Weidenkopf*, 101 Wash.App. 472, 484, 3 P.3d 805 (2000). Here, Defoor faced and faces considerable impediments to full collection on the judgment in the underlying litigation because Terry and his two companies declared bankruptcy.

FN26. Defoor asserts that *Nord v. Shoreline Sav. Ass'n*, 116 Wash.2d 477, 805 P.2d 800 (1991), provides for such damages. This is not at all clear, and need not be decided by us in order to resolve this dispute.

FN27. In particular, Tilden was asked to opine on the reasonableness of the hourly rates charged to Defoor by RLG, whether the work performed in light of the amount at stake and the end result was necessary and appropriate, whether the time entries of the billings of RLG and other time records were sufficiently detailed to judge the reasonableness of the attorney fees charged, and whether the total hourly fees charged were reasonable under the circumstances. Tilden was also asked to opine as to whether the costs incurred were reasonable. All of his testimony was favorable to RLG.

FN28. Tilden evaluated the reasonableness of Rafel's hourly rate based on several factors, stating that, "[Rafel] took over a case in which: (a) the client had fired her prior lawyer; (b) he would have to conclude the case to get paid; (c) he would have to win to get paid; (d) he would have to prevail on appeal to get paid; (e) he would have to enforce the judgment to get paid; (f) his client would then have to pay him; and (g) he would have to pay or forestall payment of hundreds of thousands of dollars in costs—that he might never recover ...."

FN29. CR 56(d) provides:

> **Case Not Fully Adjudicated on Motion.** If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.
>
> This claim was asserted in the alternative—in the event that full recovery was not granted on summary judgment.

FN30. After removal of several time entries, the total amount of RLG's claim, excluding interest, was $1,286,162.21, which included $497,117.50 for fees in Matter 1 and $405,860.42 for fees in Matter 2. Notably, Defoor testified at deposition that she did not know if the services recorded in the time

records were performed or not.

FN31. In addition, Defoor's briefing on appeal cites to the record for additional examples of what she assumes to be excessive charges. However, her citation is to a supporting document and its attached exhibits that were submitted to the trial court in connection with a later motion, after the trial court entered partial summary judgment on attorney fees and costs. Therefore, in accordance with RAP 9.12, we decline to consider such evidence, as it was not called to the attention of the trial court prior to its summary judgment ruling.

FN1. *See also* WSBA Advisory Opinion 2178, "Client signing judgment for estimated attorney's fees in dissolution case" (2008) (A lawyer violates RPC 1.8(a) by obtaining a stipulated judgment to secure anticipated fees in advance of undertaking representation. The Committee "question[ed] whether it would be proper under any circumstances to obtain a negotiable promissory note for a sum certain from a prospective client prior to work being performed or fees being earned."); WSBA Advisory Opinion 1044, "Conflict of interest; receipt of deed of trust to secure future fees" (1986) (Where a law firm "received a deed of trust and promissory note to secure legal fees for *future* representation," the law firm was required to comply with RPC 1.8(a) "if [the deed and note] were a security interest." (Emphasis added.)).

FN2. (Emphasis added.)

FN3. ABA Formal Opinion 02–427 states, in pertinent part:

Considerations in Securing a Fee Obligation

Most state and local bar opinions and court decisions have looked to [ABA] Model Rule 1.8(a) when considering this issue. That rule applies to business transactions with clients. Although a fee agreement with a client is not generally considered to constitute a business transaction, the transaction with a client to secure a fee is itself regarded in most state and local bar opinions and court decisions as a business transaction. The [ABA] Committee [on Ethics and Professional Responsibility] agrees.

(Footnotes omitted.)

FN4. (Second emphasis added.)

FN5. RPC 1.8(i) states:

A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

FN6. RLG did not establish:

(1) there was no undue influence; (2) he or she gave the client exactly the same information or advice as would have been given by a disinterested attorney; and (3) the client would have received no greater benefit had he or she dealt with a stranger.

> *In re Disciplinary Proceeding Against McGlothlen*, 99 Wash.2d 515, 525, 663 P.2d 1330 (1983).

Wash.App. Div. 1,2013.
Rafael Law Group PLLC v. Defoor
--- P.3d ----, 2013 WL 4432173 (Wash.App. Div. 1)

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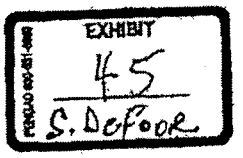

Settlement Agreement and
Attorney Re-Engagement Agreement

This Settlement Agreement and Attorney Re-engagement Agreement is entered into between Stacey Defoor ("Defoor") on the one hand and Anthony L. Rafel and Rafel Law Group PLLC (individually and collectively "RLG") on the other. The effective date of this Agreement is February 15, 2008.

Recitals

A. On June 29, 2007, Defoor engaged RLG to provide legal representation to her on a contingent fee basis in a case that was then (and is now) pending in the Superior Court of Washington for King County under Consolidated Case Nos. 06-2-32531-1 and 06-2-33145-1 (the "Litigation"). In the Litigation, Defoor seeks a determination that she had a meretricious relationship with Terry Mark Defoor and seeks a just and equitable distribution of property incident to the termination of the relationship.

B. In December 2007, differences arose between Defoor and RLG that led RLG to file a motion for leave to withdraw as counsel for Defoor. By order dated January 7, 2008, the court found good cause for withdrawal and granted RLG's motion to withdraw, effective January 10, 2008. The differences between RLG and Defoor included a dispute over Defoor's obligation to RLG for attorney's fees and costs pursuant to the June 29, 2007 contingent fee agreement and the relief that Defoor could lawfully seek in the Litigation based on the available evidence.

C. As of January 10, 2008, RLG has incurred attorney's fees on Defoor's behalf in the amount of $505,000 and has advanced costs or obligated itself for costs, primarily for experts, in the amount of $270,000.

D. The Litigation is currently scheduled for trial on March 3, 2008. Defoor desires to re-engage RLG to represent her in the Litigation and RLG is willing to represent Defoor again in the Litigation, on the terms and conditions set forth herein.

Now, therefore, in consideration of the mutual promises set forth herein, the parties agree as follows:

Agreement

1. Recitals. The foregoing recitals are incorporated into this Agreement.

2. Representation. Upon execution and delivery of this Agreement and of the promissory note described herein, RLG shall file a notice of appearance for Defoor in the Litigation and shall thereafter represent Defoor in the Litigation. This agreement shall obligate RLG to represent Defoor from the date of appearance through completion of trial in the superior court, if the Litigation goes to trial, but shall not obligate RLG to represent Defoor in any appeal

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(whether by Defoor or by Terry Defoor or GWC, Inc.) from a judgment of the superior court. Representation on appeal, if any, will have to be separately agreed upon between Defoor and RLG. Nor shall this Agreement obligate RLG to advise Defoor or take any actions on her behalf with respect to her mortgage or insurance obligations or the litigation in Missouri involving Defoor's parents; RLG's representation is limited to the Litigation.

3. Acknowledgement of Past Fees and Costs. Defoor hereby acknowledges her obligation to RLG for attorney's fees through January 10, 2008 in the amount of $505,000 and in addition for costs advanced by RLG (or for which RLG obligated itself) through January 10, 2008 in the amount of $270,000. Defoor shall execute and deliver to RLG, with this Agreement, a promissory note in the form attached hereto as Exhibit A. The promissory note will bear interest as provided therein. The execution and delivery of such promissory note is a condition precedent to this Agreement. RLG shall have no obligation to represent Defoor unless and until this Agreement and the promissory note described herein are fully executed and delivered to RLG.

4. Fees and Costs For Re-Engagement. Defoor shall pay RLG for its representation of Defoor pursuant to this Agreement, and shall reimburse RLG for any and all costs advanced by RLG on Defoor's behalf in the Litigation. Because Defoor is unable to pay fees or costs on a current basis, and because of the prior disputes over the contingent fee agreement, RLG's fees for services rendered pursuant to this Agreement shall be determined on an hourly fee basis using RLG's regular fee schedule for contingent litigation, rather than as a percentage of the recovery. The fees so computed shall be billed to Defoor monthly and the amount thereof shall be treated as Additional Advances under the promissory note described in paragraph 3. Defoor shall be obligated to pay said fees regardless of the outcome in the Litigation or Defoor's recovery therein. In addition, RLG will advance the costs needed to bring the Litigation to trial. This may include, among other things, additional fees for experts, photocopy costs, online legal research database charges, service of subpoena fees, witness fees, mediation fees, and other customary expenses. Defoor agrees to reimburse RLG for all costs advanced, regardless of the outcome in the Litigation or Defoor's recovery therein, and the amounts so advanced shall be treated as Additional Advances under the promissory note described in paragraph 3.

5. Lien. Defoor hereby grants RLG a lien for the total amount of the past fees and costs for which she is obligated ($775,000), plus the amount of additional fees and costs incurred by or on behalf of Defoor pursuant to this Agreement. This lien shall apply and be enforceable against any recovery by Defoor in the Litigation and any assets of Defoor, whether awarded in the Litigation, obtained in settlement, or otherwise. Any payment and/or transfer of property to Defoor or for Defoor's benefit in the Litigation shall be paid or given, as the case may be, to RLG in trust for Defoor, and RLG may use said funds or property to discharge, in whole or in part, any amounts due to RLG under this Agreement or the Promissory Note.

6. Cooperation. Defoor agrees to cooperate with RLG in the Litigation and to refrain from demanding or requesting that RLG seek recovery of amounts or assets for which there is no written proof. Defoor understands and agrees that RLG cannot ethically pursue assets for which there is no written proof and must limit its demands before and at trial to those assets for which there is adequate proof. Defoor thus agrees that RLG will be contending that the

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"universe" of assets available for division in the Litigation consists of the assets described and listed in the Balance Sheet prepared by Paul Sutphen and marked at his deposition. In the Litigation, Defoor will not seek or seek to have RLG contend for assets other than the assets listed in said Balance Sheet. Defoor will not initiate any contact with Terry Defoor, Mr. Defoor's family members or Mr. Defoor's counsel during the pendency of the Litigation, and will not respond to any contact initiated by Mr. Defoor, his family members or his counsel. All communication of any kind by Defoor with Mr. Defoor or his counsel during the term of this Agreement shall be conducted exclusively through RLG. Defoor shall act reasonably and in good faith with respect to settlement of the Litigation and shall attend and participate in any further mediation ordered by the court or arranged by agreement of counsel.

7. Transportation of Witnesses for Trial. Defoor shall be solely responsible for arranging the attendance of any out of state witnesses she would like to testify at trial, and shall be solely responsible for the costs of transportation, lodging, meals etc. for said witnesses.

8. Non-circumvention. No attempt to circumvent or avoid the obligations imposed by this Agreement, whether through the use of a "side" or other agreement with Terry Defoor or by means of any artifice or device or otherwise, shall be valid.

9. Free and Voluntary Act. Defoor hereby certifies that she is of sound mind and has fully read this agreement, that she understands it, that she has been given the opportunity to consult with independent legal counsel of her choosing and has either so consulted or waived her right to consult, and that she has executed this Agreement and the accompanying promissory note as her free and voluntary act and deed, without coercion, duress or undue influence of any kind.

Agreed to this 14th day of February, 2008.

Stacey Defoor

Stacey Defoor

1st Witness (signature)

Betty Lea

Print 1st witness name

Betty LEA

Print 1st witness address

8175 Celeste DR. #1131 Naples, FL 34115

2nd Witness (signature)

WALLACE LEA
Print 2nd witness name

8175 CELESTE DR. #131 NAPLES, FL 34113
Print 2nd witness address

RAFEL LAW GROUP PLLC

By _____
Anthony L. Rafel, Managing Partner

State of FLORIDA }
} ss.
County of COLLIER }

On this 14TH day of February, 2008, before me, the undersigned Notary Public in and for the State of FLORIDA, duly commissioned and sworn, personally appeared Stacey J. Defoor, to me known to be, or having shown satisfactory evidence of being the person who executed the foregoing instrument, and on oath acknowledged in the presence of the two witnesses named above said instrument to be her free and voluntary act and deed, for the uses and purposes therein mentioned.

WITNESS my hand and official seal hereto affixed the day and year in this certificate above written.

Susan M. Starr
Notary Public in and for the State of FLORIDA
Residing at COLLIER COUNTY, FLORIDA
My appointment expires 11-06-2011

SUSAN M. STARR
MY COMMISSION #DD731730
EXPIRES: November 6, 2011

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ds130503.02

PROMISSORY NOTE

DATE:	February 15, 2008
BORROWER:	Stacey J. Defoor 24633 NE 133rd Street Duvall, WA 98109
LENDER:	Rafel Law Group PLLC 999 Third Ave., Ste. 1600 Seattle, WA 98104
LOAN AMOUNT:	$775,000.00

FOR VALUE RECEIVED, Stacey J. Defoor ("Borrower") promises to pay to the order of Rafel Law Group PLLC ("Lender"), at 999 Third Avenue, Suite 1600, Seattle, Washington 98104, or such other place as Lender may from time to time designate in writing, the sum of Seven Hundred Seventy Five Thousand and no/100 Dollars ($775,000.00) (the "Loan"), in lawful money of the United States of America, together with interest on the unpaid principal balance from time to time outstanding hereunder from January 10, 2008 until paid at the applicable rate set forth below.

1. Settlement Agreement and Re-Engagement Agreement. This Note is given by Borrower in connection with the Settlement Agreement and Re-Engagement Agreement entered into between Borrower and Lender dated effective as of February 15, 2008 (the "Agreement").

2. Repayment. Borrower shall repay principal and interest due under this Note upon any of the following events, until the principal and all accrued interest is paid in full:

a. Receipt of funds by or on behalf of Borrower in connection with that certain action pending in the Superior Court of Washington for King County under the case name Stacey J. Defoor v. Terry Mark Defoor, Consolidated Case Nos. 06-2-32531-1 and 06-2-33145-1,

b. The sale by Borrower of any residential properties in which Borrower has a title interest.

c. June 15, 2008.

3. Additional Advances. Under the Agreement, Lender is continuing to provide services to and advancing costs on behalf of Borrower. The value of all additional services rendered, determined as set forth in the Agreement, and the amount of all additional costs advanced by Lender to or on behalf of Borrower as provided in the Agreement, shall be added to the principal amount of this Note, treated as Additional Advances hereunder, and payable in accordance with the terms hereof. Borrower hereby agrees to execute any further documentation requested by

EXHIBIT A
PAGE 1

S.D

Lender to confirm the amounts of such Additional Advances and to confirm that such amounts have been added to the principal due under this Note.

4. Interest Rate. The principal amount of this Note shall bear interest at the rate of one (1) percent per month from and after January 10, 2008 until paid in full. Interest shall not accrue on any Additional Advances unless there is an Event of Default as defined below, in which case interest shall accrue on all Additional Advances at the rate of one (1) percent per month from and after the date of such Event of Default until the Default is cured or the Note is paid in full, whichever shall first occur.

5. Prepayment. Borrower may prepay Borrower's obligations under this Note in full or in part at any time or from time to time without premium or penalty.

6. Application of Payments. Payments received by Lender from or on behalf of Borrower may be applied, at the sole discretion of Lender, in any order to any amounts due and owing hereunder.

7. Events of Default. The occurrence of any of the following shall constitute an "Event of Default" under this Note:

a. The failure by Borrower to make any payment under this Note within seven (7) days after its due date.

b. A material breach by Borrower of any of the terms of the Agreement.

c. Borrower files a petition in bankruptcy or for an arrangement, reorganization or any other form of debtor relief, or a petition is filed against Borrower.

d. A decree or order is entered for the appointment of a trustee, receiver or guardian for Borrower or the property of Borrower.

e. Borrower makes an assignment for the benefit of her creditors.

f. There is an attachment, execution, or other judicial seizure of any property of Borrower.

8. Remedies. Upon any Event of Default, Lender may declare the entire principal balance and all accrued interest immediately due and payable. Whether or not Lender exercises such option to accelerate, the entire principal balance, all accrued interest, and all other amounts payable under this Note shall bear interest from the date of the Event of Default at the Interest Rate specified above.

9. Costs and Fees of Collection. Borrower shall reimburse Lender on demand for all legal fees and other costs and expenses incurred in collecting or enforcing this Note. Such fees, costs and expenses shall include those incurred with or without suit and in any appeal, any proceeding or enforcement of rights under any present or future federal bankruptcy act or state receivership, and any post-judgment collection proceeding. Any judgment recovered by Lender shall bear interest at the Interest Rate specified above.

EXHIBIT A
PAGE 1

S.D.

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10. **Waiver of Presentment.** Borrower hereby waives diligence, demand, presentment for payment, notice of protest, and notice of nonpayment of this Note.

11. **Applicable Law.** This Note is made with reference to and is to be construed in accordance with the laws of the State of Washington, without regard to that state's choice of law rules.

NOTICE: ORAL AGREEMENTS OR ORAL COMMITMENTS TO LOAN MONEY, EXTEND CREDIT, OR TO FORBEAR FROM ENFORCING REPAYMENT OF A DEBT ARE NOT ENFORCEABLE UNDER WASHINGTON LAW.

Borrower:

Stacey J. Defoor

State of FLORIDA }
} ss.
County of COLLIER }

On this 14th day of February, 2008, before me, the undersigned Notary Public in and for the State of FLORIDA, duly commissioned and sworn personally appeared Stacey J. Defoor, to me known to be, or having shown satisfactory evidence of being the person who executed the foregoing instrument, and having on oath acknowledged said instrument to be her free and voluntary act and deed, for the uses and purposes therein mentioned.

WITNESS my hand and official seal hereto affixed the day and year in this certificate above written.

Notary Public in and for the State of FLORIDA
Residing at COLLIER County FL
My appointment expires 11-6-2011

SUSAN M. STAHR
MY COMMISSION # DD 751720
EXPIRES: November 6, 2011

EXHIBIT A
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db13D504

Hon. Laura Inveen

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

STACEY DEFOOR, Petitioner, v. TERRY MARK DEFOOR, Respondent.	No. 06-2-32531-1 SEA 06-2-33145-1 SEA Consolidated ATTORNEY'S CLAIM OF LIEN (UPDATED)
TERRY DEFOOR and G.W.C., INC., Plaintiffs, v. STACEY DEFOOR, Defendant.	

TO: The Clerk of the Court

AND TO: Gail Wahrenberger, Thomas Lerner and Stokes Lawrence, P.S., attorneys for Terry Defoor and G.W.C., Inc.

AND TO: Terry E. Thomson and Sternberg, Thomson, Okrent & Scher, PLLC, attorneys for Terry Defoor and G.W.C., Inc.

AND TO: Stacey Defoor

RAFEL LAW GROUP...
999 3rd Ave., Ste. 1600, Seattle, WA 98104
main 206.838.2660 fax 206.838.2661

cl220502.002

Ex. 28 Date 7-11-11
Witness Rafel
Kelli Copeland 522-6361

1. Claim of Lien

Please take notice that attorney Anthony L. Rafel and Rafel Law Group PLLC ("Attorneys") claim a lien, pursuant to RCW 60.40.010, for the value of the services performed by Attorneys in this action, and for all costs advanced by Attorneys on behalf of Stacey Defoor in connection with this action, in accordance with the agreement between Attorneys and Stacey Defoor dated June 29, 2007.

2. Items to Which Lien Attaches

The lien is claimed against the following: (1) money in the hands of Terry Defoor and/or G.W.C., Inc.; (2) this action and its proceeds; and (3) any judgment entered in this action.

3. Amount of Lien

The amount of the aforementioned lien is for the sum due under Attorneys' agreement with Stacey Defoor, which sum is thirty (30) percent of the total amount recovered by Stacey Defoor in this action, plus the total amount of all costs advanced on behalf of Ms. Defoor by Attorneys in this action. For purposes of said agreement, the "total amount recovered" includes both cash and the fair market value of any and all noncash assets awarded or distributed to Ms. Defoor pursuant to agreement or judgment. Alternatively, Attorneys claim a lien in the amount of the value of their services rendered to Stacey Defoor, which amount is not less than $505,000, plus costs in an amount of not less than $270,000.

DATED this 14th day of January, 2008.

RAFEL LAW GROUP PLLC

By: _____
Anthony L. Rafel, WSBA #13194
Cynthia B. Jones, WSBA #38120
Attorneys for Petitioner Stacey Defoor

RAFEL LAW GROUP PLLC
999 3rd Ave., Ste. 1500, Seattle, WA 98104
main 206.838.2660 fax 206.838.2661

RULE 1.8 CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(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 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.

* * *

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

* * *

(m) A lawyer shall not:

(1) make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm:

(i) to bear the cost of providing conflict counsel; or

(ii) to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law firm personnel; or

(2) knowingly accept compensation for the delivery of indigent defense services from a lawyer who has entered into a current agreement in violation of paragraph (m)(1).

COMMENTS

Business Transactions Between Client and Lawyer

[1] 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, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's

business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] 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 lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant 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. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact

that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

* * *

Limiting Liability and Settling Malpractice Claims

[14] [Washington revision] Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless permitted by law and the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particularly if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

[15] Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

Acquiring Proprietary Interest in Litigation

[16] Paragraph (i) states the traditional general rule that lawyers are prohibited from acquiring a proprietary interest in litigation. Like paragraph (e), the general rule has its basis in common law champerty and maintenance and is designed to avoid giving the lawyer too great an interest

in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be more difficult for a client to discharge the lawyer if the client so desires. The Rule is subject to specific exceptions developed in decisional law and continued in these Rules. The exception for certain advances of the costs of litigation is set forth in paragraph (e). In addition, paragraph (i) sets forth exceptions for liens authorized by law to secure the lawyer's fees or expenses and contracts for reasonable contingent fees. The law of each jurisdiction determines which liens are authorized by law. These may include liens granted by statute, liens originating in common law and liens acquired by contract with the client. When a lawyer acquires by contract a security interest in property other than that recovered through the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a). Contracts for contingent fees in civil cases are governed by Rule 1.5.

Indigent Defense Contracts

[25] Model Rule 1.8 does not contain a provision equivalent to paragraph (m) of Washington's Rule. Paragraph (m) specifies that it is a conflict of interest for a lawyer to enter into or accept compensation under an indigent defense contract that does not provide for the payment of funds, outside of the contract, to compensate conflict counsel for fees and expenses.

[26] Where there is a right to a lawyer in court proceedings, the right extends to those who are financially unable to obtain one. This right is affected in some Washington counties and municipalities through indigent defense contracts, i.e., contracts entered into between lawyers or law firms willing to provide defense services to those financially unable to obtain them and the governmental entities obliged to pay for those services. When a lawyer or law firm providing indigent defense services determines that a disqualifying conflict of interest precludes representation of a particular client, thelawyer or law firm must withdraw and substitute counsel must be obtained for the client. See Rule 1.16. In these circumstances, substitute counsel is typically known as "conflict counsel."

[27] An indigent defense contract by which the contracting lawyer or law firm assumes the obligation to pay conflict counsel from the proceeds of the contract, without further payment from the governmental entity, creates an acute financial disincentive for the lawyer either to investigate or declare the existence of actual or potential conflicts of interest requiring the employment of conflict counsel. For this reason, such contracts involve an

inherent conflict between the interests of the client and the personal interests of the lawyer. These dangers warrant a prohibition on making such an agreement or accepting compensation for the delivery of indigent defense services from a lawyer that has done so. See ABA Standards for Criminal Justice, Std. 5-3.3(b)(vii) (3d ed. 1992) (elements of a contract for defense services should include "a policy for conflict of interest cases and the provision of funds outside of the contract to compensate conflict counsel for fees and expenses"); People v. Barboza, 29 Cal.3d 375, 173 Cal. Rptr. 458, 627 P.2d 188 (Cal. 1981) (structuring public defense contract so that more money is available for operation of office if fewer outside attorneys are engaged creates "inherent and irreconcilable conflicts of interest").

[28] Similar conflict-of-interest considerations apply when indigent defense contracts require the contracting lawyer or law firm to pay for the costs and expenses of investigation and expert services from the general proceeds of the contract. Paragraph (m)(1)(ii) prohibits agreements that do not provide that such services are to be funded separately from the amounts designated as compensation to the contracting lawyer or law firm.

[29] Because indigent defense contracts involve accepting compensation for legal services from a third-party payer, the lawyer must also conform to the requirements of paragraph (f). See also Comments [11][12].

[Amended effective September 1, 2006; April 24, 2007; September 1, 2008; September 1, 2011.]

AMERICAN BAR ASSOCIATION
STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 02-427 **May 31, 2002**
Contractual Security Interest Obtained by a Lawyer to Secure Payment of a Fee

A lawyer who acquires a contractual security interest in a client's property to secure payment of fees earned or to be earned must comply with Model Rule 1.8(a). A lawyer may acquire such a security interest in the subject matter of litigation in which the lawyer represents the client; however, the acquisition of such a security interest must be authorized by law as required by Model Rule 1.8(i).[1]

This opinion addresses considerations that pertain to a lawyer's obtaining a contractual security interest in property of a client to secure payment of the lawyer's fee.[2]

Propriety of a Security Interest, Generally

In Informal Opinion 593[3], this Committee, interpreting the ABA Canons of Professional Ethics, stated that: "[I]t is not per se improper for an attorney to take security for the payment of a fee earned or to be earned." Since that time, state and local bar opinions relying on the ABA Code of Professional Responsibility and on the Model Rules of Professional Conduct generally have supported the conclusion that there is nothing inherently unethical in a lawyer asking a client to provide security for payment of fees.[4] In this opin-

1. This opinion is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates in February 2002 and, to the extent indicated, the predecessor Model Code of Professional Responsibility of the American Bar Association. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in the individual jurisdictions are controlling.

2. Taking a security interest for the payment of a reasonable fee is not itself reason to call into question the reasonableness of the fee under Model Rule 1.5.

3. ABA Comm. on Ethics and Professional Responsibility Informal Op. 593 (Oct. 25, 1962) (Mortgage Note to Secure Future Fee), *in* 1 INFORMAL ETHICS OPINIONS 184 (ABA 1975).

4. *See, e.g.*, Iowa Sup. Ct. Bd. of Professional Ethics & Conduct Op. 82-14 (Nov. 11, 1982); Los Angeles County Bar Ass'n Formal Op. 398 (May 6, 1982); Michigan

ion, we reaffirm Informal Opinion 593 and discuss further issues under the Model Rules on the subject of securing payment of a fee.

Considerations in Securing a Fee Obligation

Most state and local bar opinions and court decisions have looked to Model Rule 1.8(a)[5] when considering this issue.[6] That rule applies to business transactions with clients. Although a fee agreement with a client is not generally considered to constitute a business transaction, the transaction with a client to secure a fee is itself regarded in most state and local bar opinions and court decisions as a business transaction.[7] The Committee agrees. Indeed, Comment [16] to Rule 1.8 states: "[w]hen a lawyer acquires by contract a security interest in property other than that recovered by the lawyer's efforts in the litigation, such an acquisition is a business or financial transaction with a client and is governed by the requirements of paragraph (a)."

Informal Ethics Op. RI-27 (May 19, 1989), Connecticut Bar Ass'n Informal Op. 99-24 (May 14, 1999); New Hampshire Bar Ass'n Ethics Committee Advisory Op. 1986-87/4 (Jan. 13, 1987).

5. Rule 1.8(a) states:

> (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 interests 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 independent 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 quoted text is that adopted by the ABA House of Delegates February 2002, and is a modification of the rule prior to that date. Aside from certain clarifying requirements concerning client consent, the Committee believes the 2002 version of the rule does not differ substantively from the prior version.

6. There is limited case law or opinion on a lawyer's taking a security interest to secure a fee under the Code of Professional Responsibility.

7. *See, e.g.*, New York City Committee on Professional & Judicial Ethics Formal Op. 1988-7 (July 14, 1988), which concluded that a mortgage on a client's home to secure a fee was a business transaction governed by DR 5-104(A), *citing* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 8.11, at 482 (1986). *Cf.*, New York State Bar Ass'n Committee on Professional Ethics Op. 550 (Apr. 15, 1983) (lawyer may take a mortgage but not a deed as security for payment of fees; the risk of the lawyer's putting pressure on the client with respect to price may bring the transaction within DR 5-104(A) as a business transaction between the lawyer and the client). *See also* Gersten v. Statewide Grievance Committee, Superior Court, No. 565949, 19 Conn. L.

Accordingly, the client must be afforded the protections provided by Rule 1.8(a) in the structuring of a secured obligation.[8] The terms of the mortgage or security agreement granting the security interest in property for the performance of the obligation to pay fees must therefore be fair and reasonable.

The Committee recognizes that taking possession of client property to secure payment of a fee can be regarded as a possessory security interest.[9] When a lawyer takes possession of property, Model Rule 1.15(a) also charges the lawyer with the duty of safekeeping of that property[10] and requires the property to be identified as client's property and appropriately safeguarded. Comment [1] to this rule begins with the statement that "[a] lawyer should hold property of others with the care required of a professional fiduciary." The Committee is of the opinion that Rule 1.15 is not meant to establish a fiduciary duty of a lawyer who is a secured party beyond the rule's stated mandate to keep sepa-

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Rptr. 554, 1997 WL 339123 *2 (Conn. Super. Ct. June 10, 1997); Weiss v. Statewide Grievance Committee, 227 Conn. 802, 813-15, 633 A.2d 282, 288-89 (Conn., 1993), applying 1.8(a) to acquisition of an equity interest in client property for a fee and referencing prior Code applications.

8. Comment b to RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 126 (2000) (hereinafter "RESTATEMENT") sums this up well:

> Rationale: A lawyer's legal skill and training together with the relationship of trust that arises between client and lawyer, create the possibility of overreaching when a lawyer enters into a business transaction with a client. Furthermore, a lawyer who engages in a business transaction with a client is in a position to arrange the form of the transaction or give legal advice to protect the lawyer's interests rather than advancing the client's interests. Proving fraud or actual overreaching might be difficult. Hence, the law does not require such a showing on the part of a client.

See also WOLFRAM, *supra* note 7. We note that some opinions and discussions of this subject consider the application of Rule 1.7 and whether the obtaining of a contractual security interest for fees is a conflict of the lawyer's own interests with those of the client. Although it is possible that the lawyer's conduct in enforcing a security interest may deserve scrutiny for such a conflict, in our view Rule 1.8(a) exclusively addresses the obtaining of a security interest.

9. The principles underlying Rule 1.8(a) do not apply to a lawyer's taking a cash retainer to secure payment of fees. That subject is more appropriately considered under Rule 1.5. However, until the fee is earned, a cash retainer is property of the client, and Rule 1.15 will apply.

10. Rule 1.15(a) states:

> (a) A lawyer shall hold property of clients or third persons that is in the lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

rate, identify, safeguard, and account for property in possession of the lawyer-secured party. Rights and duties of a secured party are prescribed adequately by other applicable law, including well-developed commercial law.[11]

Security Interest in Property That Is the Subject of the Representation in Litigation

We next address under what circumstances, if any, a lawyer may take a security interest in client property when the property is the subject of litigation in which the lawyer represents the client. Model Rule 1.8(i)[12]—formerly Rule 1.8(j)—prohibits a lawyer from acquiring a proprietary interest in the subject matter of litigation, although it permits the lawyer to acquire a lien "authorized" by law to secure the lawyer's fees or expenses. By use of the word "authorized" in place of the word "granted" under former Rule 1.8(j), Rule 1.8(i) is intended to permit any legally recognized lien to secure fees to be acquired in property that is the subject of litigation. Comment [16] to the Rule provides: ". . . [L]iens . . . authorized by law . . . may include liens granted by statute, liens originating in common law and *liens acquired by contract with the client.*" (Emphasis added). Sources of authorization also may include court rules and orders of a court, subject to applicable law.

The revision of this rule resolves previous uncertainty in applying former Rule 1.8(j) evidenced by conflicting lines of court decisions, state and local bar opinions, and commentary.[13] We conclude that former Rule 1.8(j) should

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11. *See, e.g.*, U.C.C. § 9-207 (2001) (Rights and Duties When Collateral Is in Secured Party's Possession); § 9-208 (Request for Statement of Account or List of Collateral); and § 9-611 (Notification before Disposition of Collateral). In addition to secured transactions law such as the Uniform Commercial Code, applicable law includes the considerable body of law generally referred to as lender liability law as well as general corporate law that considers obligations of persons exercising control of property and entities to protect a secured position.

12. Rule 1.8(i) states:

> (i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:
>
> (1) acquire a lien authorized by law to secure to secure the lawyer's fee or expenses; and
>
> (2) contract with a client for a reasonable contingent fee in a civil case.

The Committee notes that the rule pertaining to acquiring interest in the subject of litigation formerly was designated as Rule 1.8(j). All precedent state and local bar opinions and court decisions under the Model Rules as of the date of this opinion refer to Rule 1.8(j), and to Comment [7] under the former Model Rule.

13. One line of case decisions and opinions under former Rule 1.8(j) (or under DR 5-103(A) of the former Model Code, which was substantially identical in text), concludes that a contractual lien on the subject matter of litigation granted by the client to secure the lawyer's fees either (1) is not a "proprietary" interest in the subject of litigation, or (2) satisfies the condition of the former rule that the lien be "granted by law." Skarecky & Horenstein v. 3605 North 36th Street Co, 825 P.2d 949, 952 (Ariz. Ct.

not be applied to prohibit acquisition of an otherwise legally and ethically obtained lien and that Rule 1.8(i) expressly permits such a lien to be acquired.

As indicated by Comment [16], it is the intent of Rule 1.8(i) to permit a contractual lien in the subject of litigation to be acquired independently of Rule 1.8(a), as long as acquiring such a lien is not inconsistent with an applicable statute or rule.[14] Rule 1.8(a) should not be regarded as a rule that is inconsistent with Rule 1.8(i) and we conclude that it does not apply to the acquisition by contract of a security interest in the subject of litigation for fees.[15]

Realization of the Benefit of the Security Interest

The Model Rules provide some specific guidance about how the lawyer must treat the collateral or his secured interest. Further guidance appears in

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App. 1991); Twachtman v. Hastings, No. CV-95-57307, 20 Conn. L. Rptr. 145, 1997 WL 433878 (Conn. Super. Ct. 1997), *aff'd*, 52 Conn. App. 661, 727 A.2d 791 (Conn. App. Ct. 1999), *cert. denied*, 249 Conn. 930, 733 A.2d 851 (Conn. 1999); In re May, 96 Idaho 858, 861, 538 P.2d 787, 790 n.2 (Idaho 1975) (dictum); Iowa Committee on Prof. Ethics and Conduct v. McCullough, 468 N.W.2d 458, 461 (Iowa 1991); Burk v. Burzynski, 672 P.2d 419, 423-24 (Wyo. 1983); Connecticut Bar Ass'n Informal Ops. 87-3 (June 18, 1987), 96-11 (Apr. 26, 1996), and 97-4 (Mar. 4, 1997); Georgia Formal Advisory Op. 86-7(86-R10) (Dec. 17, 1987); North Carolina State Bar Ass'n RPC 186 (Apr. 14, 1995), *originally published as* RPC 186 (Revised); Oklahoma Bar Ass'n Adv. Op. 297 (May 16, 1980); Cleveland Bar Ass'n Professional Ethics Committee Op. 151 (May 11, 1983). A contrary line of cases and opinions finds that the taking of a security interest in property that is related to or the subject of litigation is a "proprietary" interest and, because the lien has been granted by contract or consent, is not "granted by law." Lee v. Gadasa Corp., 714 So. 2d 610, 612 (Fla. Dist. Ct. App. 1998); People v. Franco, 698 P.2d 230, 231-32 (Colo. 1985); *compare* North Carolina State Bar Ass'n RPC 187 (Oct. 21, 1994) (Propriety Interest in Domestic Client's Suppport Payments) *with* North Carolina State Bar Ass'n RPC 186 (July 21, 1994) (Security Interest in Real Property Which is Subject of Domestic Litigation); Maine Professional Ethics Commission of the Bd. of Overseers of the Bar Ops. 97 (May 3, 1989) and 117 (June 7, 1991); Massachusetts Bar Ass'n Op. 91-1; South Carolina Bar Op. 96-25 (Dec. 1996); Philadelphia Bar Ass'n Professional Guidance Committee Op. 98-18 (Dec. 1998); North Dakota Bar Ass'n Ethics Committee Op. 00-08 (Oct. 4, 2000).

14. Comment [16] states: "The law of each jurisdiction determines which liens are authorized by law." The subject of lawyer's liens is addressed in RESTATEMENT § 43, of which subsection (2) deals with "charging liens" created by contract between the lawyer and a client on the client's property involved in the representation.

15. The Colorado Bar Association Ethics Committee concluded that the filing of a lien to secure on property that was the subject of litigation pursuant to a Colorado statute authorizing charging liens did not require compliance with Rule 1.8(a) because it was not a business transaction with the client. Colorado Bar Ass'n Ethics Committee Formal Op. 110 (Jan. 10, 2002), addendum Mar. 16, 2002, *printed in* THE COLORADO LAWYER, May 2002 (citing Utah State Bar Ethics Advisory Opinion Committee Op. 01-01 (Jan 26, 2001) in accord, but noting Pennsylvania Bar Ass'n Committee on Legal Ethics and Professional Responsibility Op. 94-35 (May 12, 1994) to the contrary in the context of *enforcing* the lien acquired).

court decisions and state and local bar opinions.[16] As demonstrated by cases such as *People v. Franco*[17] and *Vander Weert v. Vander Weert*,[18] a lawyer must not seek to establish a right greater or superior to the client's interest in the security property. For example, a lawyer may not claim an interest in the whole of the property when the client is entitled only to half. Nor may a lawyer take a lien to secure a fee solely as a device to thwart the legitimate rights of third persons to the client's property.[19]

In realizing upon security (by enforcement means in conformity with applicable law), a lawyer may receive no more than a reasonable fee, plus the costs incurred by the lawyer in maintaining the security property and enforcing the security interest, and legally permissible interest. Under applicable state law, a secured party may be entitled to retain the collateral if the debtor does not redeem the property from the secured party by paying the amount of the debt or the bid price on foreclosure. It is the view of the Committee, however, that unless the property has been transferred voluntarily to the lawyer in satisfaction of the fee,[20] a lawyer may not retain the value of the collateral exceeding the reasonable fee plus the reasonable costs of preserving and realizing on the security. The excess value should be considered as property of the client in possession of the lawyer under Rule 1.15.[21]

Conclusion

A lawyer may acquire a security interest in client's property to secure a fee. A security interest may secure a fee meeting the requirements of Rule 1.5. Acquisition of such a security interest must meet the requirements of Rule 1.8(a) or Rule 1.8(i). Under the Model Rules, a security interest may be acquired in the subject matter of the representation, including litigation, before, during, or following the representation.

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16. *See particularly* those cases and opinions cited in note 13, *supra.*

17. 698 P.2d at 231-32.

18. 304 N. J. Super Ct. 339, 349, 700 A.2d 894, 899 (N.J. Super. Ct. App. Div. 1997).

19. In Opinion 87-13, the Vermont Bar Association stated that if a lawyer takes a mortgage on a client's property for the purpose of frustrating the efforts of judgment creditors, apart from any purpose of collecting a fee or expenses, the action would be a violation of DR 7-101(B)(2) and DR 7-102(A)(7). *See also* Model Rules 4.4 and 1.16(b).

20. In some jurisdictions, the enforcement of a lien may require compliance with Rule 1.8(a). *See, e.g.*, Pennsylvania Bar Ass'n Formal Op. 94-35, *supra* note 15. In this Committee's view, enforcement in accordance with applicable law of the rights and remedies provided for in the security agreement or provided under applicable law does not require further compliance with Rule 1.8(a). When the realization on the security requires independent action on the client's part at the time of realization, the considerations of Rule 1.8(a) may well be applicable, and the action regarded as a business transaction.

21. The subject of the lawyer's obtaining property for a fee is treated generally in ABA Comm. on Ethics and Professional Responsibility Formal Op. 00-418 (July 7, 2000) (Acquiring Ownership in a Client in Connection with Performing Legal Services), which specifically examines the issues presented in obtaining and exercising an ownership interest in a client's business.