72844-0

No. 72844-0-I

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

GEOFFREY CHISM,

Appellant,

vs.

TRI-STATE CONSTRUCTION, INC., and
LARRY AGOSTINO,

Respondents.

BRIEF OF APPELLANT

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A. INTRODUCTION

This case involves the compensation owed by a corporation to one of its executives who also served as its general counsel, compensation a jury determined the corporation owed to him, and the subsequent usurpation by the trial court of the jury's fact-finding function when that court did not like the jury's decision.

The jury here determined that Tri-State Construction, Inc. ("Tri-State") improperly withheld compensation in the form of bonuses due to its general counsel, Geoffrey Chism ("Chism"), who also served as a company executive, for his exemplary services to it that saved the company. Dissatisfied with the jury's decision, the trial court determined that Chism was obligated to forfeit a significant portion of the bonuses to which the jury determined he was entitled due to an alleged breach of fiduciary duty to Tri-State for putative professional rules violations.

In doing so, the trial court labored under a mistaken conception of the tort of breach of fiduciary duty and based its decision on a misapplication of the Rules of Professional Conduct ("RPCs"). Although the trial court had previously found that Chism had not violated RPC 1.5, because as a matter of law an in-house counsel/executive cannot violate RPC 1.5, and the reasonableness of his compensation was not an issue, the trial court nevertheless applied RPC 1.7, 1.8, and 8.4 to compel Chism to

disgorge compensation for his services as an in-house counsel/executive awarded him by the jury. In doing so, the trial court ignored that an in-house counsel's relationship with the employer is that of master-servant. In the compensation context, those RPC provisions and common law protections involve the typical attorney-client relationship of lawyers in private practice.

This Court should reverse the trial court's decision to reduce Chism's compensation, compensation he was promised and fully earned, as contrary to the jury's verdict and earlier trial court rulings, and it should order the trial court on remand to enter judgment on the jury's verdict.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in denying Chism's second motion for summary judgment on February 11, 2014.

2. The trial court erred in entering its order denying Chism's motion for reconsideration/clarification on March 11, 2014.

3. The trial court erred in making finding of fact number 16.

4. The trial court erred in making finding of fact number 17.

5. The trial court erred in making finding of fact number 22.

6. The trial court erred in making finding of fact number 23.

7. The trial court erred in making finding of fact number 24.

8. The trial court erred in making finding of fact number 25.

9. The trial court erred in making finding of fact number 38.

10. The trial court erred in making finding of fact number 41.

11. The trial court erred in making finding of fact number 43.

12. The trial court erred in making finding of fact number 44.

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55. The trial court erred in making finding of fact number 100.

56. The trial court erred in making finding of fact number 111.

57. The trial court erred in making finding of fact number 112.

58. The trial court erred in entering conclusion of law number 11.

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127. The trial court erred in entering conclusion of law number 84.

128. The trial court erred in entering conclusion of law number 85.

129. The trial court erred in entering conclusion of law number 87.

130. The trial court erred in entering conclusion number 3.

131. The trial court erred in entering conclusion number 4.

132. The trial court erred in entering the judgment on April 24, 2015.

(2) Issues Pertaining to Assignments of Error

1. Where the trial court dismissed a corporation's claim for common law breach of fiduciary duty against its in-house counsel/executive because it failed to establish its harm element, did the trial court err in retaining and deciding a claim for breach of fiduciary duty based on alleged violation of the Rules of Professional Conduct? (Assignments of Error Numbers 1, 2, 3-131, 132).

2. Where the jury determined that an in-house counsel/executive was entitled to bonuses pursuant to a compensation agreement with the corporation and that such agreement was based on a full and fair disclosure, was fair and reasonable, and was free from undue influence, did the trial court err in concluding that the in-house counsel/executive breached his fiduciary duty to his corporate employer in accepting bonuses pursuant to a compensation agreement in violation of RPC 1.7, 1.8, and 8.4, improperly applying those rules to an employment relationship? (Assignments of Error Numbers 1, 2, 3-131, 132).

3. Where the jury determined an employer willfully withheld compensation due to an in-house counsel/executive, but the trial court subsequently reduced the counsel's compensation based on alleged breach of fiduciary duty, did the court err in calculating the double damages award mandated by RCW 49.52.070 on the net compensation awarded rather than the actual compensation withheld? (Assignments of Error Numbers 129-32).

4. Is the in-house counsel/executive entitled to recover his attorney fees on appeal pursuant to RAP 18.1?

C. STATEMENT OF THE CASE

Geoffrey Chism has been licensed to practice law in Washington since 1977. CP 83. During his career,[1] Chism handled substantial disputes involving major construction claims and litigation, "workouts" on troubled projects, and surety/bonding matters including defaults on large

[1] Chism advised and represented clients almost exclusively on construction and development-related matters. CP 84. He spent the first decade of his career with Seattle's preeminent construction firm, now known as Oles Morrison & Baker, where he was a partner. CP 83-84. Chism then founded and was managing partner at Stanislaw, Ashbaugh, Chism Jacobson & Riper, as well as successor firms Chism, Jacobson & Johnson and Weinstein, Chism & Riley. CP 84. In September 2000, he joined the firm of Chism, Thiel, McCafferty & Campbell, where he remained until his retirement from private practice in 2009. CP 84; RP (5/12/14):44-46.

development projects; he also advised companies on internal management issues like succession planning and financial strategy. CP 84.[2] Owing to his depth of knowledge and experience, he also served as mediator and arbitrator on construction-related disputes. CP 85.

In private practice, Chism charged clients on an hourly basis, with the exception of his arrangement with Tri-State, discussed *infra*. CP 106. Like any other lawyer, he adjusted his hourly rate periodically to reflect market conditions and his rising skill and experience level. CP 106. Chism's hourly rate was never deemed unreasonable or excessive by any court or tribunal. CP 106-07.[3]

Tri-State's founder, Joe Agostino, retained Chism to serve as its outside lawyer in 1981. CP 85-86; RP (5/12/14):60. In the mid-1990s, Agostino chose his middle son, Ron, to take over Tri-State's operation. CP 86; RP (5/12/14):63. Ron Agostino, in turn, retained Chism as Tri-State's

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[2] Chism's clients were representative of the full spectrum of construction-related services he provided, including international outfits (ABB, the world's largest electrical contractor, Ledcor and Hensel Phelps Construction Company); local family-owned contractors (Tri-State, Rivera and Green, Versatile Drilling); government agencies (City of Seattle), development and construction lenders (Washington Federal), architects and engineers (John Graham Company). CP 84.

[3] In fact, after becoming Tri-State's general counsel, Chism's hourly rate was twice accepted as reasonable: (1) the Honorable Karen Overstreet granted fees based on Chism's then hourly rate of $325 per hour as special trial litigation counsel; and (2) arbitrator Christopher Soelling granted fees based on Chism's then hourly rate of $400 per hour. *Id.*; CP 113-25. Although Chism's rate had in fact increased to $500 per hour by 2008, Chism charged Tri-State $400 per hour. CP 107; RP (5/12/14):49.

chief legal advisor for the next two decades. CP 86; *see also*, CP 9. Over those three decades of representation, Chism was involved in numerous matters for Tri-State, and he developed an intimate knowledge of its business, the type of legal issues the company faced, and its personnel. Chism shared a relationship with Joe and Ron Agostino built on trust and loyalty – a fact that Tri-State did not dispute below. *Id.*[4]

Ron Agostino was Tri-State's president until March 7, 2012; he then became its secretary, treasurer, and chairman. CP 2, 8. Larry Agostino, Joe's youngest son, became the president and primary decisionmaker at Tri-State. *Id.* Prior to the instant dispute that arose on April 10, 2012 (just weeks into Larry Agostino's turn as President) the parties had not a single disagreement over compensation or any other aspect of Chism's representation. CP 105. Until Ron resigned his position as Tri-State's president, he negotiated and managed Chism's compensation and his work; Ron trusted Chism completely, and testified that Chism never took advantage of him. RP (5/20/14):93. Ron communicated financial matters to Tri-State's board, including Chism's compensation. RP (5/7/14):144.

Tri-State builds huge complex construction projects, including roads, highways, airports, landfills, and dams, moving dirt and setting utility lines. CP 85; RP (5/7/14):101-2. The nature of the work creates

[4] Chism described working for Tri-State as "an honor." CP 85.

complicated legal issues that must be successfully resolved: complex construction contracts, subcontractor agreements, construction claims, environmental and other regulatory compliance, disadvantaged business contracting requirements, employment, safety, and injury issues. The company experienced tremendous success over the years; Tri-State was one of the largest businesses of its kind in the Northwest, employing more than 300 employees during its peak. CP 85, 139.

Up until 2002 when Chism was in private practice, he charged Tri-State on an hourly basis, at his usual hourly rate, just as he did for all other clients. RP (5/12/14):76. Sometime in the fall of 2002, Joe and Ron Agostino and Chism met to discuss the company's growing legal needs. CP 87. The Agostinos expressed their desire to put Chism's skills to use more proactively by having him consult directly with Tri-State managers in order to reduce or eliminate problems altogether and to obtain his services on a priority basis. *Id.* The result was a new arrangement: Chism would continue to work in private practice and represent other clients, but he would make Tri-State his priority and would be paid a flat fee each month for all non-litigation (or, "general counsel") services. CP 87-88, 159-61.[5]

[5] Chism billed hourly and separately for any time spent on matters that were in litigation (or arbitration), as such time varied wildly from month to month. CP 87. The trial court did not conclude that this change in Chism's relationship with Tri-State violated the RPCs. CP 2468-98.

After this arrangement was in place, Chism limited taking on new clients or matters. RP (5/12/14):80. By this point in their relationship, the parties had a keen sense of the company's legal needs and the corresponding cost of legal services for an average month. CP 87-88. The parties arrived at a figure they deemed fair: $10,000 per month, the rough equivalent of a full day per week of Chism's time if he had he charged hourly at his then rate of $325, excluding litigation. CP 87; RP (5/12/14):78.

The arrangement worked as envisioned. Chism was generally available whenever and wherever the company needed him, up until the day he resigned in 2012.[6] CP 88-89, 138. Chism's efforts benefited Tri-State and minimized attorney fee expenditures because Tri-State was able to avoid having disputes ripen into litigation. CP 90. The arrangement was attractive to Chism, too. After decades of having to keep a time sheet billing every tenth of an hour, he could forgo it for this favored client. CP 87-88. It also allowed and, in fact, *required* Chism to scale back his hectic private practice to prioritize Tri-State's needs. CP 87-88.[7]

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[6] *E.g.*, CP 169 (Vice President referring to Chism as "Geoff 24/7"); CP 138 (attesting that Chism did what he was asked to do and was there when the company needed him).

[7] During his first twenty years in practice, Chism routinely billed at least 2200 hours per year and consistently brought in more business than he could handle by himself. CP 84.

Chism routinely worked at least 7 hours a week advising, counseling and trouble-shooting for Tri-State. CP 87; RP (5/12/14):79. Between 2002 and 2007, Tri-State agreed to three upward adjustments of Chism's general counsel fee to reflect the increased time he spent on Tri-State matters[8] and the increase in his hourly billing rate.[9] By the end of 2007, the monthly general counsel fee was $17,000. CP 90.

In the fall of 2008, Chism decided to retire from private practice at year's end, and he so advised Ron Agostino. CP 90; RP (5/12/14):82-83.[10] On hearing the news, Ron Agostino asked Chism to remain as Tri-State's general counsel. CP 90. From a business perspective, Tri-State would not have been able to find any other lawyer as experienced or as familiar with its operations as Chism. Although he would not have done so for any other client, Chism agreed to continue to serve Tri-State. CP 90-91; RP (5/12/14):83.

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[8] For example, in 2007, Tri-State increased the monthly amount paid to Chism for additional effort and time spent on one particularly complex project – namely, a $91 million dollar contract for the design and construction of a portion of Interstate 405. CP 89-90.

[9] By January 2005, Chism was charging $400 per hour to his hourly-paying clients and the general counsel fee increased to $12,000. CP 89.

[10] Chism had handed off primary responsibility for most of his clients to other lawyers in his office, and planned to limit his time to occasional arbitrations/mediations, and advising a handful of long-term clients on non-litigation matters and spending more time with his family. CP 90.

Ron Agostino and Chism discussed the option of: (a) continuing on as before with the flat monthly fee arrangement, or (b) employing Chism for the monthly general counsel fee, less the company's share of taxes and health care contributions. CP 91, 166.[11] Chism accepted the offer to become a Tri-State employee beginning January 1, 2009. CP 91.[12] As Chism's employer, Tri-State did not require him to keep track of the time spent working on Tri-State matters, just as it had never done in the seven years it paid him a flat monthly fee for general counsel services. CP 87, 91.

Chism was actively involved in Tri-State's key matters and he reported directly to its executives who oversaw his work; they knew what he was doing, whether it met their needs and made the company succeed, and they retained the right to discharge him for any reason. CP 89, 91. Just as before, he received his assignments from Ron Agostino. The two worked closely to review significant matters and they meet at least weekly. CP 91. Like Tri-State's other salaried employees, Chism was not required to enter into a formal written employment contract. RP (5/8/14):155.

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[11] Chism's initial salary was roughly commensurate with Chism's then hourly rate ($500) that he had been billing. CP 91; RP (5/12/14):83.

[12] Chism no longer charged Tri-State fees because he was an employee working for compensation. The arrangement did not, however, contemplate that Chism would work full time. Rather, the parties contemplated he would continue to provide part-time services as needed, similar to those that Tri-State had been receiving under the outside general counsel arrangement to its satisfaction. There was essentially no change in the compensation Tri-State paid and the services Chism provided. RP (5/12/14):83.

Beginning in 2010, Tri-State's demands on Chism's time steadily increased. CP 91. The economic downturn had impacted the local construction industry. Several matters bloomed into active litigation. CP 91-92. Partly in response to this economic pressure, Tri-State bid on a major hydroelectric project in Canada ("Bear Hydro"). CP 92. A foreign project was a first for Tri-State, and Chism was tasked with sorting out the legal, tax, accounting and many practical aspects of performing work in a remote area of western British Columbia. CP 93. What he was tasked to do on Bear Hydro went well beyond providing legal services; Chism performed the roles of counsel plus construction firm business executive. CP 96-100, 102-04; RP (5/8/14):10-20. The Bear Hydro matter was complex and its stakes were high for Tri-State; the project involved a demanding owner, a contentious design engineer, two other partners, four separate corporate entities, a Canadian lender, one bonding company, and, at any given time, 10 or more different lawyers from two countries. *Id.* This was a "bet the company" venture; it required an intense and large expenditure of resources and a singular focus. *Id.* From May to September 2010, negotiations over the Bear Hydro project contract (involving 127

pages plus 23 lengthy and technical exhibits) in addition to other Tri-State matters, kept Chism busy more than full-time. CP 93.[13]

One night in August 2010, Chism and Ron Agostino were in the office together hammering out Bear Hydro contract details, when Agostino suggested that they revisit Chism's compensation arrangement. CP 94. Agostino told Chism he thought it unfair that the Canadian lawyers were getting all the money when Chism was "doing all the work." *Id.* The limited, part-time (approximately 7-10 hours per week) general counsel arrangement of 2002 had evolved into a demanding, essentially full-time, position. CP 31; RP (5/12/14):90. Tri-State's work and legal requirements would require Chism to continue the very substantial work commitment well into the foreseeable future.

In September 2010, Tri-State and Chism entered into a new arrangement, memorialized in writing,[14] to balance out the inequity between the amount of hours Chism was working and his compensation. CP 94-95. At that point, Ron Agostino had dealt with employees and lawyers for decades. The change in compensation called for Tri-State to award Chism a "bonus/adjustment" for his effort at the end of the year after services were

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[13] Tri-State's Canadian counsel at the firm of Fasken Martineau alone billed over $400,000 to assist Tri-State in obtaining the contract. CP 93.

[14] Because the agreement was in writing, it was fully disclosed. Ex. 9.

performed, and it left to Ron Agostino's unfettered judgment as to what amount would be "appropriate." CP 95, 173. *See also*, CP 140-41 ("...I decide what he should get...I always had a choice.").[15] Thus, the employer was left with total discretion whether to pay a bonus, and if it did, to unilaterally determine the amount of the adjustment which would be determined at the end of each fiscal year and could be paid sometime the following year when it was convenient to the company. *Id.*[16]

As required by the agreement, at the end of FY 2010, Chism gave Ron Agostino a conservative estimate of how much he had worked during the prior year and trusted Ron to do what he thought was fair. CP 95, 175. To compensate Chism for his additional efforts, Ron approved a bonus/adjustment in the amount of $310,000 which was subsequently paid in installments over two years. CP 95, 176-79;[17] RP (5/13/14):108, 110-11.

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[15] This change in the compensation arrangement was the central event upon which Chism's contractual claims are submitted to the jury by the trial court. The change in the relationship was instituted by Ron Agostino, not Chism.

[16] Admittedly, this was an unusual arrangement: it is difficult to imagine any employee, especially a lawyer, to leave it in the hands of an employer to choose the amount of compensation and then defer payment of it until long *after* the work was performed, but Chism trusted Ron Agostino completely. CP 95.

[17] It was not unusual for Tri-State employees to receive very large bonuses; the controller's bonus, for example, made up to 25-50% of her salary and certain managers received 5% of profits on project, which in 2010 meant bonuses topping $250,000. CP 699-701, 706-07. Even when profits plummeted in 2011, Ron Agostino rewarded top employees with year-end bonuses. *Id.* Larry Agostino took substantial bonuses and a "loan" for $1 million in 2011 while the company was struggling to meet payroll. RP (5/22/14):111. The idea of taking good care of employees and rewarding them well was a touchstone of Joe Agostino's legacy. CP 708-09. It also demonstrates that

In FY 2011, Chism dedicated a significant amount of time assisting Tri-State in preparing a $15 million claim arising out of the I-405 project, defending a lawsuit filed by a departing manager who alleged fraud against Tri-State regarding this same claim, and advising the company on Bear Hydro-related and other project matters. CP 95-99. Chism worked for Tri-State on a more than full-time basis, confident in the knowledge that Tri-State would compensate his effort with a fair bonus/adjustment at the end of the fiscal year. CP 101.

By October 2011, Bear Hydro was significantly over budget and behind schedule. CP 96-103; RP (5/12/14):99. The project owner informed TRP, Tri-State's Canadian business entity, that no more payments would be made until the project was brought back on schedule and budget shortfalls were addressed. CP 98-99; RP (5/12/14):102. The project was headed toward default; Tri-State was at risk of bankruptcy. CP 100-03, 137; RP (5/12/14):105; (5/22/14):152. On October 12, 2011, Ron and Tom Agostino asked Chism to take over responsibility for the Bear Hydro project, and become TRP's president. CP 100; RP (5/12/14):108. This was an additional title for Chism with added stress and responsibility. Seeing no

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minimizing employee compensation was not a goal of the company, obviating any direct conflict with employee desire to be adequately compensated.

other alternative, Chism agreed to take on the role of TRP's president. CP 100.

Nine days later, Ron Agostino and Chism discussed the amount of time spent and results achieved for the prior fiscal year. CP 101. Chism told Ron Agostino what everyone already knew: he had been working full time in critical circumstances. *Id.* A bonus/adjustment in the amount of $500,000 was proposed by Ron Agostino, which Chism accepted as fair. *Id.* Chism memorialized the agreement in a November 1, 2011 memorandum and sent it to Ron Agostino who signed it and provided it to Kristi MacMillan, Tri-State's controller and CFO, to record as a company obligation. CP 185.

In late January 2012, the Agostino brothers, MacMillan, Tri-State's "workout" consultant Mike Moroney, and Tri-State's accountant Jeff Williamson met to discuss Tri-State's financial troubles and to consider various cost-cutting measures. It was at that point, Larry Agostino began his efforts to renege on paying Chism. Unbeknownst to Chism, the Agostinos concluded in the meeting that they would only pay Chism $400,000 of the $500,000 bonus promised to him. MacMillan was directed

to record the $400,000 obligation in the company's general ledger. CP 178;[18] RP (5/7/14):145-47.

While Tri-State was secretly cutting the compensation it promised him, Chism was busy staving off disaster on Bear Hydro. RP (5/8/14):22-26. On March 5, 2012, Chism finalized a global Bear Hydro agreement that would prevent a myriad of brutal financial consequences to Tri-State. Remarkably, and despite the odds, TRP avoided going into default on Bear Hydro; it met payroll every week, and eventually, it completed the hydroelectric project in Canada. CP 103-04. A default on the construction project would have had draconian consequences to Tri-State including the forfeiture of at least $27 million on the bond it posted on the Bear Hydro project and loss of its future bonding capacity. CP 103-04.[19] The five months leading up to the deal, were the most stressful, professionally challenging, and difficult period of Chism's legal career. CP 101.[20] Tri-

[18] Nobody told Chism that the company had reduced the compensation it had promised him. RP (5/7/14):147. He was busy working 80-hour workweeks expecting the company would honor the agreements already made and that likewise he would be compensated fairly in the future, just as before. After Chism resigned, Tri-State directed that the general ledger entry memorializing his compensation be revised. RP (5/7/14):148. Tri-State's conduct in this regard is a prime example of the fact that Tri-State lacked "clean hands" in invoking the trial court's equity jurisdiction.

[19] The trial court's findings only touch briefly on this amazing result noting that "Chism helped Tri-State stay in business, preserve its bonding capacity, and avoid default on that project, which in turn, could have cost Tri-State a minimum of 27 million dollars." CP 103, 2459, 4935.

[20] Chism took not a single day off in that period. CP 101.

State exists today because it survived Bear Hydro – an outcome that could not have occurred without Chism's efforts. RP (5/7/14):182.

On March 7, 2012, Larry Agostino took over as Tri-State's president. CP 104. The decision to step down as president was Ron Agostino's. Ron had received the crushing news that he had precursor symptoms to Alzheimer's disease. RP (5/8/14):48.

On March 28, 2012, Larry Agostino met with Chism to discuss his compensation. CP 104. In the meeting, Larry Agostino reaffirmed that the full $500,000 due for 2011 would be paid to Chism, and agreed to award a bonus/adjustment for the first six months of the 2012 fiscal year at the very same rate ($250,000). Exs. 20, 121-22; CP 105, RP (5/13/14):125-35. Agostino further proposed that they abandon the retroactive bonus arrangement and simply pay Chism every week at a rate of $300 per hour, starting April 1. CP 188. For a variety of reasons, Chism accepted the proposal as it was "cash-in-hand," would not significantly reduce his overall compensation, and it avoided having to rely on a new president's judgment and discretion. At the close of the meeting, Larry Agostino extended his

hand to Chism, looked him in the eye, and said "deal." Chism shook his hand in confirmation and said "deal." RP (5/13/14):129.[21]

Later that evening, Chism memorialized the agreement in a memorandum. CP 188. On receiving it the next morning, Larry Agostino voiced his disagreement with only one aspect of Chism's summary, the part relating to Chism's rights to a company car. CP 189. He took no issue with Chism's summary of the remaining terms. *Id.* Indeed, he began paying Chism at the hourly rate of $300 even prior to the effective date of the new arrangement on April 1. CP 191; RP (5/13/14):137-38.

After he implemented the terms of the new deal, Larry Agostino attempted to renege on it. CP 105. At an April 12 meeting, he told Chism that he would not honor the agreement, except for the $500,000 that had been promised for fiscal year 2011. *Id.* Chism resigned. RP (5/13/14):142. A month later, at the direction of its trial counsel,[22] Tri-State reversed the $400,000 accrual on its books. CP 192-93; RP (5/7/14):148.

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[21] The parties also discussed and agreed to a severance-type package in the event Chism left the company, which included a company car that Chism returned after his resignation. RP (5/13/14):146.

[22] Larry Agostino/Tri-State had already obtained other counsel relating to Chism prior to April 12 discussions with Chism. The purpose of hiring new counsel was to replace Chism. CP 2337-38. When the company booked the $400,000 it was going to pay Chism, as distinct from the promised $500,000, it realized he was a potential creditor. RP (5/23/14):85-88.

When Tri-State did not pay Chism the $500,000 for his work during the 2011 fiscal year or the $250,000 promised for his work during the first part of the 2012 fiscal year, Chism sued Tri-State and Larry Agostino on October 3, 2012 in the King County Superior Court to recover the compensation upon which the parties had agreed. CP 1-7. Tri-State answered and alleged numerous affirmative defenses, including that Chism exerted "undue influence" on Ron Agostino and that Chism breached his common law fiduciary duty and a second cause of action for breach of fiduciary duty based upon alleged violations of RPC 1.5, 1.7, 1.8, and 8.4 as well. CP 53. Tri-State sought a disgorgement of the $310,000 paid to Chism for FY 2010, and asked to be excused from paying the later bonuses to Chism. CP 53. The case was initially assigned to the Honorable Michael J. Trickey.

Chism moved for a partial summary judgment on the reasonableness of his fee agreement with Tri-State under RPC 1.5. CP 56-81. The trial court granted that motion on December 16, 2013, stating:

> The Court concludes as a matter of law that Plaintiff's status as in-house counsel renders the disgorgement of fees for breach of fiduciary duty based on alleged violations of RPC 1.5 unavailable as an affirmative defense or a counter-claim for the Defendants. No Washington case supports the Defendant's legal position on this issue. The Court's ruling does not affect the other alleged RPC violations in the case.

CP 606.

Chism moved for summary judgment as well on Tri-State's RPC 1.7 and 1.8 contentions. CP 615-33. The trial court denied that motion. CP 1142-43. The court also denied Chism's motion for reconsideration/clarification of that order. CP 1876-78.

With the elevation of Judge Trickey to this Court, the case was re-assigned to the Honorable Kenneth Schubert. Tri-State demanded a jury. CP 194. At no time below, from the denial of the summary judgment order, prior to and during trial, to the post-verdict fiduciary duty hearings did the trial court identify exactly what "duty" under the RPCs or otherwise Chism owed to Tri-State in negotiating his own employee compensation; the closest the trial court came to doing so was when it stated:

> And to me, at that point in time, when he renegotiated in 2010, and in 2011, and in 2012, at each of those intervals, he owed Tri-State a fiduciary duty. And he owed them that duty, and it was to fully and accurately apprise Tri-State as to all circumstances known to him affecting that arrangement.

RP (5/28/14):32.

The case was tried to a jury over a month. CP 2438. As discussed more *infra*, the jury was instructed on Chism's claims of breach of contract and willful withholding of wages and Tri-State's defense of undue influence. CP 2191-2224. The jury was not instructed on breach of

fiduciary duty because after having heard Tri-State put on its entire breach of fiduciary duty case before the jury, the trial court determined Tri-State had suffered no "harm," an element of the tort of fiduciary duty, thus effectively dismissing Tri-State's breach of fiduciary duty claim. RP (5/28/14):26. Indeed, although it proposed a breach of fiduciary duty instruction based on WPI 107.10, CP 2008, Tri-State never objected to any of the relevant instructions or the failure to give its breach of fiduciary duty instruction. RP (5/29/14):135-45.

The jury ruled entirely in Chism's favor rejecting any contention that the parties' employment agreement and attendant bonuses were the product of undue influence or overreaching. CP 2228-29. The jury specifically found the September 2010 modification of Chism's compensation was the subject of "a full and fair disclosure of the facts upon which the contract was predicated" by Chism to Tri-State. *Id.* It also found the contract was "fair and reasonable." *Id.* The jury further concluded that Chism was entitled to the $750,000 promised him by Tri-State that he earned. CP 2228-29. The jury also concluded Tri-State deliberately withheld Chism's wages under RCW 49.52.070 and Tri-State's withholding of the bonuses was not due to a bona fide dispute over the amount due to Chism. CP 2230.

Tri-State moved for judgment as a matter of law under CR 50(b) or a new trial, CP 2585-98, but the court denied that motion. CP 4340-43; RP (5/29/14):151-53. But rather than simply entering judgment on the jury's verdict, the trial court determined that it must decide as a matter of law whether there was a breach of fiduciary duty by Chism based on alleged RPC violations, which would then allow it to compel Chism to "disgorge" the compensation awarded him by the jury. CP 2439; RP (5/28/14):22, 23-25.

The court determined that it would make this decision based on evidence adduced at the trial and upon further briefing and argument of counsel, but the evidence the court considered was essentially the same as the jury. The trial court justified its deviation from the jury's verdict by claiming that it heard from two legal experts that the jury did not. CP 2439. But their testimony was essentially on duty; both experts offered opinions on the law, *e.g.*, RP (5/16/14):9-90, 91-124; (5/23/14):4-73, 74-112,[23] a matter exclusively within the courts' purview. *See, e.g., Stenger v. State*, 104 Wn. App. 393, 407-08, 16 P.3d 655 (2001). Neither expert testified to factual matters.[24]

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[23] The only other evidence the court considered was submitted by Chism, and, thus, was not supportive of the court's findings. CP 2413, 2336.

[24] On a key trial concern, expert witnesses testified as well that the ethical rules do not require specific time record keeping or reporting to the client unless an hourly fee

In the course of that hearing, the trial court repeatedly evidenced its disregard for the jury's decision. *See, e.g.,* RP (6/30/14):51, 77-79, 104-06. As but one example, in the June 30, 2014 hearing, the trial court criticized the jury's decision on the *Kennedy* factors, stating:

> ... I don't know why the jury didn't appreciate that. I don't know why the jury didn't understand that it wasn't a full and fair disclosure. I don't know why they didn't understand that that was actually a misrepresentation.

RP (6/30/14):106.

After the hearings on fiduciary duty, the court entered extensive findings and conclusions, CP 2438-2505, 4934-36, ruling that Chism was entitled to recover for Tri-State's breach of his employment agreement. However, it ruled that Chism had to disgorge $550,000 of the $1,060,000 to which he otherwise would have been entitled. In so doing, the trial court specifically overruled the jury in regard to the 2011 and 2012 bonuses.[25] For 2011, the jury awarded Chism $500,000; the trial court cut that by $165,000. For 2012, the jury awarded Chism $250,000; the trial court cut that by $113,000. The trial court even reached back and cut

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arrangement existed, which everyone agreed was not the case here. *See, e.g.,* RP (5/23/24):97.

[25] The Court's findings taken as a whole demonstrate that the Court really engaged in a thinly-disguised reasonableness analysis of Chism's "fee" rooted in an incomplete lodestar type calculation. Its finding of breach of fiduciary duty, a duty it could not or would not identify until after trial constantly rebuffing efforts to have it articulated, was merely a vehicle to collaterally attack Judge Trickey's RPC 1.5 ruling on summary judgment.

Chism's 2010 bonus from $310,000 to $38,000. Since Tri-State had already paid the $310,000, it was only required to pay $200,000 more under the trial court's decision. CP 2502-05. The court determined that Chism was entitled to double damages under RCW 49.52.070 in accordance with the jury's verdict and an award of reasonable attorney fees under RCW 49.48.030 and RCW 49.52.070. CP 2503-05. However, the court applied the doubling to the net wage award (after disgorgement) rather than the amount the jury determined was wrongfully withheld. CP 2712-13, 4991.

Upon the presentation of a judgment, Tri-State again asserted that Chism was not entitled to recover anything, despite the jury's verdict, based on the putative RPC 1.7 and 1.8 violations. The trial court rejected these arguments and entered findings of fact and conclusions of law on November 14, 2014. CP 2438-2505, 4934-36. Chism appealed to this Court. CP 2644-2714, 2741-2811. Tri-State cross-appealed.

Subsequently, the trial court entered findings of fact and conclusions of law on April 10, 2015 awarding Chism the overwhelming bulk of his fees incurred in this case. CP 4961-73. The court rejected Tri-State's contention that the fee award for its deliberate withholding of Chism's wages should be reduced in light of its fiduciary duty ruling. CP 4970-71. The court entered its judgment on April 24, 2015 to reflect its

fee decision. CP 4990-92. Both Chism and Tri-State filed amended notices of appeal from that judgment.

D. SUMMARY OF ARGUMENT

When an in-house counsel discusses his or her compensation with the employer, it is absurd to apply RPC provisions relating to conflict of interest, business transactions with a client, and misrepresentation. This is particularly so when a jury finds that there are no misrepresentations, the compensation arrangement is fully disclosed, and there is no undue influence or overreaching. To require employees to assume fiduciary obligations toward employers with respect their own pay is an unsustainable and unnecessary burden on the employment relationship. Here, Geoff Chism provided exemplary services over the years to Tri-State, first as its outside counsel, and later as its in-house counsel/executive. Serving outside his capacity as its general counsel, Chism handled Tri-State's potentially disastrous Bear Hydro project in British Columbia, effectively saving the company.

The jury here concluded that Tri-State deliberately withheld payment of bonuses that were an aspect of Chism's compensation package, rejecting any contention by Tri-State that Chism had not fully and fairly disclosed the facts upon which his contract with Tri-State providing for

such bonuses was based; the jury also rejected Tri-State's argument that Chism's compensation agreement was the product of undue influence.

Notwithstanding the jury's verdict, the trial court in a post-trial hearing found Chism breached fiduciary duties as its in-house counsel/executive when he negotiated a compensation agreement with Tri-State's president (an agreement that was ratified by its Board), and later, when he received bonuses pursuant to that agreement, in the amounts determined by the president, at the president's discretion.

The trial court, however, labored under the misconception that the RPCs apply to an employee lawyer's compensation negotiation with an employer, that the RPCs gave it the right to disgorge executive compensation for work as a non-lawyer, and that there is a separate fiduciary duty claim arising out of the RPCs that is different from a common law breach of fiduciary duty claim. There was no fiduciary duty breach in this case. In submitting the contract claim to the jury, the trial court instructed the jury that for a contract to be found, Chism had the burden to prove he had not engaged in conduct, such as misrepresentation of undue influence that is the essence of a breach of fiduciary duty claim. Chism also had to prove the contract was fair and reasonable. Answering specific interrogatories, the jury found Chism met all those burdens. Thus, the jury's contract findings precluded the trial court from making contrary

breach of fiduciary duty findings, whether based upon the RPCs or equity. Combined with the dismissal of any tort of breach of fiduciary duty because there was no harm, the jury's verdict foreclosed any right on the part of the trial court to order a disgorgement of Chism's compensation.

Even if there is a separate, RPC-based claim for breach of fiduciary duty here, the trial court erred in ordering the reduction of Chism's compensation after the jury's decision. The trial court found no ethical issues in Chism's change from being Tri-State's outside counsel to his assumption of duties as its in-house general counsel per se. Rather, the court determined that Chism breached RPC 1.7, 1.8, and 8.4 regarding the negotiation of his compensation package with the company while an employee. This was error.

The trial court had previously and properly concluded that Chism did not breach RPC 1.5 because the rule was inapplicable to in-house counsel. The trial court should similarly have concluded that RPC 1.7, 1.8, and 8.4 are inapplicable to in-house counsel's compensation negotiations with a corporate employer. RPC 1.7, 1.8, and 8.4 focus on the attorney-client relationship and not the master-servant relationship in negotiating compensation.

The Court should restore the jury's verdict, set double damages and pre-judgment interest, and award Chism his fees on appeal pursuant to RCW 49.48.030/49.52.070.

E. ARGUMENT

This lawsuit marks the unfortunate end to an otherwise remarkable story of a thirty-year attorney-client relationship built on trust and loyalty. Tri-State and its new president, Larry Agostino, deliberately refused to pay Chism, its in-house counsel/executive, compensation he was promised and then earned. Chism provided excellent counsel to Tri-State and, ultimately, helped rescue the company from legal and financial ruin. The company's allegations of unethical conduct by Chism, made in an attempt to avoid its obligation, represent an erroneous interpretation of RPC 1.7, 1.8, and 8.4.

(1) Tri-State Deliberately Withheld Wages to Which Chism Was Entitled, as the Jury Found

(a) The Jury's Decision on Tri-State's Willful Breach of Its Compensation Contract with Chism

The trial court summarized both Chism's and Tri-State's claims which were being submitted to the jury in Instruction 9 (*see* Appendix) to which there was no objection by Tri-State. RP (5/29/14):137.

The trial court then instructed the jury regarding the compensation arrangement upon which Chism's contract claims were predicated. The

Court's instruction, given without objection by Tri-State, RP (5/29/14):138, required Chism to carry the burden and to prove in the contract claim being submitted to the jury that the factors that could give rise to a breach of fiduciary claim did not exist. Instruction 10 states:

> As to the modification of Mr. Chism's compensation arrangement, based upon the events in or around September 2010, whether predicated on Exhibit 9 or otherwise, Mr. Chism has the burden of proving each of the following propositions:
>
> (1) That Tri-State entered into a contract with him; and
>
> (2) That the terms of the contract were fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts on which it is predicated.

CP 2202.[26]

The trial court, also without objection, instructed the jury on Tri-State's affirmative defense of undue influence. CP 2215. The jury was instructed that a party could rescind a contract if it was unfairly persuaded to enter into a contract by a person with whom there was a confidential relationship. The jury was instructed an attorney-client relationship was a confidential relationship. *Id.* It was also instructed that in determining whether there was "unfair persuasion" it could consider "such factors as

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[26] Thus, without any Tri-State objection, the trial court instructed the jury that breach of contract applied to the $500,000 bonus (October 2011 – Instruction 11); the $250,000 bonus (March 2012 – Instruction 12); mutual assent and consideration (Instructions 13, 14, 15, 16); contract interpretation is to give effect to the intent of the parties (Instruction 17); and breach (Instruction 18). CP 2203-10.

the unfairness of the content, if any, the availability of independent advice, and the experience or susceptibility of the party persuaded. *Id.*

The trial court required the jury to answer a series of questions in reaching its verdict. It found consistently for Chism on every point, including that he had proven his claims for breach of contract for $500,000 (Questions 4 and 5) and $250,000 (Questions 9 and 10). CP 2228-29.

The jury's answers to the first three questions are the most significant for present purposes. The jury specifically found the contract on which the bonuses were awarded was fair and reasonable, free of undue influence and made upon full disclosure of the facts, i.e., the *Kennedy* factors. CP 2228.[27] The jury also found Tri-state had failed to prove its

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[27] *Kennedy v. Clausing,* 74 Wn.2d 483, 445 P.2d 637 (1968). The *Kennedy* decision is of profound importance in this case. Our Supreme Court there addressed the circumstances under which an attorney could change the financial terms of the attorney-client relationship during that relationship. As will be discussed *infra*, the *Kennedy* factors inform the analysis of whether RPC 1.8 is violated. The Court held that agreements made during the attorney-client relationship must be fair and reasonable, free from undue influence, and made only after a fair and full disclosure of the facts upon which the agreement is predicated. *Id.* at 491. The Court affirmed a verdict for the attorney in *Kennedy* even though the instruction erroneously placed the burden of proof as to the *Kennedy* factors on the client. The *Kennedy* dissent contended that the jury was not fully apprised of the fiduciary duty owed by the attorney to the client, noting that the trial court failed to give a fiduciary duty instruction. *Id.* at 647-48. That did not persuade the *Kennedy* majority.

Instruction 10 here put the burden properly on Chism as to the factors, CP 2202, and the jury answered specific interrogatories establishing that he met his burden as to each *Kennedy* factor. CP 2228. The trial court's approach to breach of fiduciary duty effectively applied the rejected analysis of the *Kennedy* dissent.

affirmative defense of undue influence as a basis for contract rescission. CP 2229.

After the trial court upheld the jury's verdict and findings as to the contract claim, it then rejected the jury's findings as merely "advisory" on breach of fiduciary claim, CP 2439, asserting it could still make a decision on breach of fiduciary duty even though it had effectively dismissed that tort claim as a matter of law because Tri-State had suffered no harm (it had not paid the bonuses). In substituting its own factual findings for those of the jury, the trial court erred.

(b) The Jury's Decision Foreclosed the Trial Court's Revisitation of the Facts in Its Fiduciary Duty Ruling

The trial court here did not like the jury's verdict on Geoff Chism's entitlement to bonuses from Tri-State and it endeavored to undercut the jury's factual determination in the guise of fact-finding on the breach of fiduciary duty issue.[28] The trial court erred in doing so, usurping the constitutional function of the jury.

As noted *supra*, the trial court's handling of the breach of fiduciary duty issue was problematic. Tri-State demanded a jury under CR 38. CP

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[28] This is made clear in CL 82-84, CP 2460-61, 2502, where the trial court substituted its judgment on a fair bonus for that of Tri-State's president. The trial court even made up a theoretical contract that should have been entered into by the parties. CL 32; CP 2482.

194-95. The jury was properly instructed on the compensation contract-related issues. In rendering the verdict, the jury necessarily decided factual issues with profound implications for the breach of fiduciary duty issue, particularly in concluding Chism bore his burden under *Kennedy* factors.

Throughout the case, the trial court declined to identify with any particularity what duty to Tri-State Chism violated that gave rise to Tri-State's breach of fiduciary duty counterclaim. The court articulated a preference that all the evidence, including all evidence related to fiduciary duty claims, be adduced in the jury trial, thus reserving for itself post trial to consider disgorgement of "fees" on some equitable theory of breach of fiduciary duty. CP 2439.

The evidence was presented, the jury was properly instructed, and the jury rendered its verdict. The trial court did not specifically rule on the tort of breach of fiduciary duty in the context of Tri-State's counterclaim because Tri-State had failed to establish one of the legal elements necessary for it – harm. As noted above, the jury as part of its contract claim considered the *Kennedy* factors and ruled in favor of Chism finding he had proved every one of them. The only other evidence taken by the trial court after the verdict on breach of fiduciary duty was expert testimony on legal duty and a handful of deposition excerpts of Chism and

Tri-State's speaking agents. Since those reference Tri-State consulting with other counsel, they do not support the trial court's decision. Although Tri-State's counsel sought to re-argue questions the jury decided, the trial court's factual findings are based on the same evidence the jury heard. Moreover, the trial court *never* made clear how its decision to entrust certain issues to the jury and to retain certain issues for itself was made. The court *never* indicated, for example, the issues decided by the jury were "advisory" in any sense as contemplated by CR 39(c). The trial court was, therefore, bound by the jury's factual determinations in the fiduciary duty phase of the case.

Washington law is unambiguous that the right to a jury trial is "inviolate." Wash. Const., art. I, § 21; CR 38(a).[29] Washington law entrusts discretion to the trial court to decide when cases are predominantly at law, where juries are mandatory as opposed to predominantly equitable in nature where juries are not. *Auburn Mechanical, Inc. v. Lydia Constr., Inc.*, 89 Wn. App. 893, 897-98, 951

[29] *See generally, Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645-46, 771 P.2d 711 (1989) (jury fact finding role in damages); *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 224 P.3d 761 (2010). Indeed, that right is "jealously guarded by the courts." *Watkins v. Siler Logging Co.*, 9 Wn.2d 703, 710, 116 P.2d 315 (1941). The United States Supreme Court in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501, 79 S. Ct. 948, 3 L.Ed.2d 988 (1959) similarly observed "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

P.2d 311, *review denied*, 136 Wn.2d 1009 (1998). Our courts employ the factors articulated in *Scavenius v. Manchester Port District*, 2 Wn. App. 126, 467 P.2d 372 (1970), to make such a decision.[30] These factors were approved and adopted in *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 368, 617 P.2d 704 (1980).

The trial court here never addressed the *Scavenius* factors.[31] Plainly, the trial court's decision to entrust certain issues at law to the jury here fell within its discretion under CR 39(a) to designate issues at law for the jury's decision. *S.P.C.S.*, 29 Wn. App. at 934.

Once factual issues are entrusted to the jury and the jury decides

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[30] Those factors are:

> (1) who seeks the equitable relief; (2) is the person seeking the equitable relief also demanding trial of the issues to the jury; (3) are the main issues primarily legal or equitable in their nature; (4) do the equitable issues present complexities in the trial which will affect the orderly determination of such issues by a jury; (5) are the equitable and legal issues easily separable; (6) in the exercise of such discretion, great weight should be given to the constitutional right of trial by jury and if the nature of the action is doubtful, a jury trial should be allowed; (7) the trial court should go beyond the pleadings as to ascertain the real issues in dispute before making the determination as to whether or not a jury trial should be granted on all or part of such issues.

Id. at 129-30. Any doubt about whether an action is predominantly legal or equitable is "resolved in favor of a jury trial, in deference to the constitutional nature of the right." *S.P.C.S., Inc. v. Lockheed Shipbuilding & Constr. Co.*, 29 Wn. App. 930, 934, 631 P.2d 999, *review denied*, 96 Wn.2d 1019 (1981).

[31] Here, there is little question Chism's contract and wage claims, and Tri-State's contract defenses are legal in nature so that the parties had a right to have those claims decided by a jury. *See Green v. McAllister*, 103 Wn. App. 452, 462, 14 P.3d 795 (2000) (contract breach claim arises in law, not equity); *Gatudy v. Acme Constr. Co.*, 196 Wash. 562, 83 P.2d 889 (1938) (same as to oral employment contract).

them, the trial court is barred from usurping the jury's fact-finding function because the jury's fact-finding role is core to the article I, § 21 jury trial right. *State v. Montgomery*, 163 Wn.2d 577, 590, 183 P.3d 267 (2008). The jury has the ultimate power to weigh the evidence and determine the facts. *James v. Robeck*, 79 Wn.2d 864, 869, 490 P.2d 878 (1971).

The trial court is not free to substitute its judgment on the facts for that of the jury. *Green* is particularly apt on that point. There, the trial court empowered a single jury to make an advisory decision on a fiduciary breach claim, but a binding decision at law on a breach of contract claim. The court denied the fiduciary breach claim, and in post-trial motions, granted a remittitur as to the jury's damage award. Division III reversed and reinstated the jury's full verdict, observing that the trial court was foreclosed form substituting its factual determination on damages for that of the jury unless no evidence supported the jury's findings. 103 Wn. App. at 462. *See also, Behnke v. Ahrens*, 172 Wn. App. 281, 296-97, 294 P.3d 729 (2012), *review denied*, 177 Wn.2d 1003 (2013) (court could not award damages for breach of fiduciary duty by attorney in excess of those awarded by jury for malpractice).[32]

[32] In *Behnke*, after experiencing tax problems with the IRS, a client sued the attorney under the Consumer Protection Act and for fraud, malpractice, and breach of

Federal case law is even clearer that a trial court may not usurp the jury's fact-finding on legal issues in making equitable determinations in cases where mixed law and equity issues are present. *Los Angeles Police Protective League v. Gates*, 995 F.2d 1469, 1473 (9th Cir. 1993) ("[I]n a case where legal claims are tried by a jury and equitable claims are tried by a judge, and the claims are 'based on the same facts,' 'the Seventh Amendment requires the trial judge to follow the jury's implicit or explicit factual determinations.'") (citations omitted). *Accord, Acosta v. City of Costa Mesa*, 718 F.3d 800, 828-29 (9th Cir. 2013).[33]

A court is bound by not only the actual findings of the jury, but the findings implicit in the jury's verdict. *Gates,* 995 F.2d at 1473. Where

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fiduciary duty arising out of the attorney's failure to disclose his financial interest in recommending a tax shelter plan to that client. The trial court dismissed the CPA claim on summary judgment. The fraud, malpractice, and common law breach of fiduciary duty claims were tried to a jury. The jury rejected the fraud claim and found for the client on the malpractice and common law fiduciary duty breach claims, but made a very small award. The trial court reserved the RPC-based fiduciary duty breach claim to itself. It heard arguments after the jury was discharged on that issue and found the attorney violated RPC 1.7(a). The court ordered fee disgorgement but refused to award the client additional actual damages. Division I affirmed noting that the trial court's equitable decision on the RPC-based fiduciary duty breach claim was not meant to be "a second chance to obtain the damages the jury refused to award." 172 Wn. App. at 297. Similarly, in this case, the trial court could not convene an equitable proceeding for the purpose of undercutting the jury's compensation decision.

[33] Where a jury and judge arrive at irreconcilably inconsistent results on different claims arising out of the same transaction, the Seventh Amendment, in fact, commands that *the jury's decision on the facts takes precedence. Perdoni Bros, Inc. v. Concrete Systems, Inc.*, 35 F.3d 1, 5 (1st Cir. 1994). In the Seventh Amendment context, "[w]hen a party has a right to a jury trial on an issue involved in a legal claim, the judge is of course bound by the jury's determination of that issue as it affects his disposition of an accompanying equitable claim." *Lincoln v. Bd. of Regents of Univ. System of Ga.*, 697 F.2d 928, 934 (11th Cir. 1983).

there is no express finding, the court must determine whether a finding can be inferred from a jury's verdict. *Id.* To make this determination, courts look to information communicated to the jury in the court's instructions. *Id.*

Here, the trial court heard virtually no new *factual* evidence separate from the jury. The trial court fashioned the instructions to the jury so that it was required to consider the *Kennedy* factors in reaching its decisions on Chism's breach of contract claim. There is no ambiguity about what the jury found. The trial court required the jury to answer specific questions. In doing so, the jury specifically found the compensation arrangement to be fair and reasonable, fully disclosed, and not the product of undue influence. The trial court had no right, with no different factual evidence, to come to any other conclusions and nullify the jury's findings.

(2) The Trial Court Erred in Revisiting the Issue of the Reasonableness of Chism's Compensation in the Guise of a Decision on Breach of Fiduciary Duty

(a) Overview of Washington Law on Breach of Fiduciary Duty and Disgorgement

Washington's law on alleged breaches of fiduciary duty by lawyers to clients is not a picture of clarity generally nor as to its facets pertaining specifically to this case. Certain general principles are clear.

Under Washington's common law, a breach of fiduciary duty is actionable in tort and the elements of the claim are well-established.[34] Washington law has long recognized that an attorney owes a fiduciary duty to a client.[35] A breach of the Rules of Professional Conduct may constitute a basis for discerning a breach of such a fiduciary duty,[36] and the determination of whether an attorney violated the RPCs is a question of law for the court.[37]

But no Washington case has held that there are *distinct* claims for common law breach of fiduciary duty and a breach of fiduciary duty arising out of the violation of the RPCs. The claims are *one and the same*,

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[34] "The plaintiff must prove (1) existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately caused the injury." *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 433-34, 40 P.3d 1206 (2002). *See* WPI 107.10.

[35] *Liebergesell v. Evans*, 93 Wn.2d 881, 889-90, 613 P.2d 1170 (1980); *Perez v. Pappas*, 98 Wn.2d 835, 840, 659 P.2d 475 (1983); *Versuslaw v. Stoel Rives, LLP*, 127 Wn. App. 309, 333, 111 P.3d 866 (2005), *review denied*, 156 Wn.2d 1008 (2006); *Kelly v. Foster*, 62 Wn. App. 150, 155, 813 P.2d 598, *review denied,* 118 Wn.2d 1002 (1991).

[36] In an action for professional negligence, breach of the RPCs does not constitute an independent grounds for negligence and evidence of their breach is inadmissible as evidence of malpractice. *Hizey v. Carpenter*, 119 Wn.2d 251, 259-60, 830 P.2d 646 (1992). In fact, the RPCs themselves specifically provide that their breach may not establish a basis for civil liability. *See* [19] and [22] to Preamble to RPCs. As an action for breach of fiduciary duty seeks civil liability, it is difficult to reconcile the cases allowing breach of fiduciary duty to be established by an RPC violation with this principle.

[37] *Eriks v. Denver*, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992); *Cotton v. Kronenberg*, 111 Wn. App. 258, 266, 44 P.3d 878 (2002), *review denied*, 148 Wn.2d 1011 (2004); *Behnke,* 172 Wn. App. at 297-98.

as the elements are precisely the same. *Compare, Micro Enhancement, supra*, and WPI 107.10.

Another question relates to proof of the elements of a breach of fiduciary duty claim. There is a suggestion in *Eriks* that the causation and damage elements of a breach of fiduciary duty claim need not be proved where a violation of ethical rules is present, and the party is seeking an order that the attorney disgorge his/her fee. 118 Wn.2d at 462-63. However, in *Eriks,* there was actual harm because the clients had to obtain other counsel with the attendant expense.

But the notion that neither causation nor harm need be proved has not been the subject of discussion in case law since, particularly where, as here, a trial court has dismissed a client's breach of fiduciary duty claim at law. The better-reasoned rule is that harm must still be proved as a necessary element of a claim for breach of fiduciary duty arising out of the alleged violation of ethical rules, even if the only remedy sought is disgorgement. Disgorgement is a means of punishing a lawyer. That is the purpose of the disciplinary system operating under the auspices of our Supreme Court. The purpose of the civil justice system is to compensate injured persons. It makes no sense to allow a client to obtain a windfall (disgorgement of compensation) when that client has not been injured by the actions of the lawyer and, as here, the lawyer's exemplary efforts

saved the client from ruin, as even the trial court acknowledged. CP 2459. It is further troubling when, as here, the client corporation had been negotiating and managing the compensation arrangement with the lawyer for decades, placed a premium on the lawyer working for the corporation, agreed to the compensation arrangement, received the benefit of the arrangement, and only after all the work had been completed, claimed that the alleged misconduct should result in court discontinuing the agreed to compensation.

Washington law is also unclear as to the requisite predicate fiduciary duty breach to allow a court to order full or partial disgorgement of a fee earned by an attorney. For example, in *Kelly*, the court declined to order disgorgement because the attorney's misconduct did not rise to the level of fraudulent acts or gross misconduct. 62 Wn. App. at 156-57.[38] Indeed, the *Restatement (Third) of the Law of Governing Lawyers* § 49 states that any fiduciary duty breach must be both "clear" and "serious" before any fee reduction is authorized.[39] No Washington court since *Kelly* has described what the necessary predicate fiduciary duty breach must be

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[38] The Court based its conclusion on Supreme Court precedent. *Kane v. Klos*, 50 Wn.2d 778, 314 P.2d 672 (1957); *Dailey v. Testone*, 72 Wn.2d 662, 664, 435 P.2d 24 (1967); *Ross v. Scannell*, 97 Wn.2d 598, 610, 647 P.2d 1004 (1982).

[39] *See* comment d to § 49 (discussing what constitute "clear" and "serious" violations).

before a fee disgorgement is justified. Plainly, de minimis RPC violations or ethical lapses unrelated to the specific service of the attorney should not justify a reduction in employee compensation.

Finally, assuming that the necessary predicate fiduciary duty breach has been met, Washington law is clear that the remedy for such a breach is entirely discretionary with the trial court. *Cotton*, 111 Wn. App. at 275, and need not result in voiding the attorney-client agreement or disgorgement. In *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48, 87, 331 P.3d 1147 (2014), our Supreme Court explicitly stated: "We do not hold that every RPC violation necessarily renders every contract connected to the violation is [sic] voidable in all circumstances."[40] The court may require an attorney to disgorge his or her fees already received. *Eriks*, 118 Wn.2d at 462. In extreme circumstances, the breach of fiduciary duty may constitute a complete defense to an attorney's action against a client for fees. *Ross*, 97 Wn.2d at

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[40] Washington courts often upheld trial court decisions not to compel the disgorgement of an attorney's fee in the face of a breach of an RPC provision. *E.g., Kelly, supra* (attorney's disgorgement of fees not required where attorney failed to disclose attorney-client relationship with third parties recommended by attorney to estate executor for sale of property); *Forbes v. American Building Maintenance*, 148 Wn. App. 273, 294-95, 198 P.3d 1042 (2009), *aff'd, in part*, 170 Wn.2d 157, 240 P.3d 790 (2010) (attorney misconduct in representing client did not justify voiding contingent fee agreement and denying her fees where attorney provided exemplary service to client); *Bertelsen v. Harris*, 537 F.3d 1047 (9th Cir. 2008) (applying *Kelly* and upholding district court decision not to require disgorgement despite attorney's breach of fiduciary duty "when, after all the righteous furor is vented, the fees were eminently reasonable for the result produced.").

610; *Dailey*, 72 Wn.2d at 664-65. But Washington courts have declined to address the criteria to be applied by courts in exercising their discretion in connection with a breach of fiduciary duty. § 49 of the *Restatement* is again apt:

> In determining whether and to what extent forfeiture is appropriate, relevant considerations include the gravity and timing of the violation, the willfulness, its effect on the value of the lawyer's work for the client, any other threatened or actual harm to the client, and the adequacy of other remedies.

Trial courts, as here, should not be allowed free rein, in the absence of articulable criteria, to merely engage in a disguised "fee" (or compensation) reasonableness determination. That is particularly true when the trial court did not follow established criteria in RPC 1.5 in making such a reasonable fee calculation.

Here, the trial court erred in concluding that Chism breached a fiduciary duty to Tri-State, particularly given the jury's verdict on key factual issues.

(b) The Trial Court Erred in Addressing Reduction of Chism's Compensation Where It Effectively Dismissed Any Common Law Breach of Fiduciary Duty Claim Against Him and His Representation Did Not Harm Tri-State

Whether measured under *Kelly's* fraudulent act/gross misconduct standard or the *Restatement's* "clear and serious" test, the alleged breaches

of fiduciary duty by Chism here did not meet the standard for a reduction in his compensation owed by Tri-State, particularly where the ethical standards applicable to in-house counsel/executive as to corporate compensation are not clear.

Consideration must be given to overall purpose of breach of fiduciary duty and the policy purposes behind the RPC provisions. The purpose of the Rules and this tort is not to exalt technical requirements so that courts have free reign to whittle down attorney compensation clients decide they do not want to pay after receiving legal services and excellent results. *Kennedy*, 74 Wn.2d at 493 ("...the plaintiff attorney was unusually successful in the representation of his client, and his services pursuant to the contracts were remarkably valuable."). Here, the court ignored this important point made in *Kennedy*.

The purpose to be served here is to prevent lawyer overreaching and taking advantage of clients. That is why the essence of fiduciary duty and changes in fee arrangement with clients require that the *Kennedy* factors be met: (1) the arrangement be fully disclosed; (2) the arrangement be fair and reasonable; and (3) it not be the product of undue influence. To the extent employees have such a duty, Chism bore the burden of proving all three of these factors and the jury found in his favor

on them when it ruled in his favor on the contract breach claims. CP 2202, 2228.

In addition, the entire approach taken by the trial court equates compensation paid to in-house counsel to fees paid to outside counsel in private practice. Doing so ignores the reality that those situations are very different. Outside counsel is not an employee of the client, does not report to non-lawyer executives at the company as in-house counsel does, and plays a different role. Outside counsel obviously wants to obtain successful results and benefit the client. However, outside counsel only performs discrete tasks for the client and his/her services constitute an expense the client would like to minimize or avoid if possible.

An in-house counsel is different. As part of the company, in-house counsel's job is to bring value every day and to help the company succeed. In-house counsel not only supervises outside counsel, if possible they compete with outside counsel to build internal systems of lawyers and non-lawyers to obviate the need for outside counsel.

These clear differences are why compensation paid to in-house counsel is different than "fees" paid to outside counsel. Outside counsel's interest is to generate income to the law firm, an expense to the client.

An in-house counsel's interest is to have the client succeed. Therefore, the client company does not necessarily have an interest in

minimizing compensation to the in-house counsel. Like other executives, the company's interest is to motivate them to achieve greater corporate success. That is the reason why the ABA concluded that providing stock options or other ownership interests to in-house counsel is *not* analogous to paying outside counsel for services, and the RPC 1.8 is not applicable. *See ABA Task Force Report on the Independent Lawyer, Lawyers Doing Business With Their Clients: Identifying and Avoiding Legal and Ethical Dangers,* at 55-59 (2001); Dzienkowski and Peroni, *The Decline in Lawyer Independence: Lawyer Equity Investments in Clients,* 81 Tex L. Rev. 405, 518 (2002).

The difference in the roles played by in-house and outside counsel is particularly significant in this case for two reasons. First, Tri-State had a long history of paying large bonuses on the theory it wanted happy employees. Minimizing employee expense was not particularly its goal. Second, Chism was also functioning as a business executive as well as counsel, taking the title of President of Tri-State's Canadian subsidiary. CP 100.[41] The trial court nevertheless decided it had the right to severely reduce Chism's executive compensation merely because he was a lawyer. There is no authority for such a proposition.

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[41] Chism could not act as that Canadian subsidiary's lawyer in British Columbia in any event.

(c) The Trial Court's Decision on Reduction of Chism's Compensation

A review of the trial court's extensive findings and conclusions justifying its decision to reduce Chism's compensation only confirms that the trial court did not like the jury's verdict, thought Chism had been paid too much, and misapplied the applicable RPC provisions as a vehicle to impose the compensation the trial court adjudged to be proper.

The trial court concluded that Chism breached fiduciary duties under RPC 1.7, 1.8, and 8.4. CP 2468-2505. This was error. It is not that ethical duties under the RPCs do not apply to in-house corporate counsel. They do. Rather, the rules must apply differently in some instances, and with respect to certain RPCs are not triggered at all, such as with respect to compensation discussions between in-house counsel/executive and a corporation.

(d) Chism Did Not Violate RPC 1.7

Tri-State alleged that Chism had a personal interest in being paid that was at odds with Tri-State's interest in paying him, which triggered a conflict of interest in violation of RPC 1.7(a)(2) when he accepted or sought bonuses from his employer-client, Tri-State. The trial court agreed. CP 2679, 2695-96 (CL 6, 7, 42-43). The trial court erred in this conclusion, particularly in light of the court's earlier RPC 1.5 ruling.

As a threshold matter, the language of RPC 1.7 precludes its application in factual context of this case. RPC 1.7(a) provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest." Thus, undertaking or continuing a representation is prohibited if conflict elements are met. Unlike outside counsel in private practice, in-house counsel/executive cannot simply decline a representation. The job is the representation, so if applicable, under Tri-State's theory every time a compensation issue arises as to in-house counsel/executive, whether the amount of compensation, benefits like health insurance, or hours and conditions of employment, counsel must quit the employment, a nonsensical proposition. For that reason, the current conflict of interest provision is not applicable in the context of in-house counsel/executive compensation. Nor is there a "concurrent conflict of interest" under these facts and the rule.

RPC 1.7(a)(2) provides that a lawyer is conflicted if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

A lawyer's interest in being paid does not amount to a "conflict" under the ethics rules. *See* LA County Bar Assoc. Opinion No. 521 (2007) (noting that the tension between lawyer and client about fees always

exists, but such "conflict" is only a conflict in the "lay sense" of the word; not an ethical issue) (citing cases)). *See* Appendix. Were it so, the practice of law would be a non-profit industry, and no lawyer could go into business for himself. Tri-State's own expert, Professor David Boerner, did not support such a view. CP 739 ("Lawyers do not have an obligation to work for free.").

The inquiry under RPC 1.7(a)(2), is more complicated than Tri-State advanced below, though the application of the rule in this case is not. Rule 1.7(a)(2) does not start and end with identifying the lawyer's interest in being paid (hardly unique to Chism). Rather, a personal conflict of interest presents only where there is a "significant risk" that the lawyer's representation will be "*materially limited*" by the lawyer's personal interest. RPC 1.7(a)(2).[42] Having an interest in being paid for hard work is not a "material limitation."

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[42] In addressing RPC 1.7, our courts have offered examples of when a lawyer's representation is materially limited by the lawyer's personal interests. *See, e.g., In re Disciplinary Proceedings Against Holcomb*, 162 Wn.2d 563, 581-82, 173 P.3d 898 (2007) (attorney borrows money from client to finance baseless case on client's behalf); *LK Operating, LLC v. Collection Group, LLC*, 168 Wn. App. 866, 872-73, 279 P.3d 448 (2012), *aff'd*, 181 Wn.2d 48, 84, 331 P.3d 1147 (2014) (attorney had interest in business for which he acted as manager and counsel and relayed investment proposal in that business to another client). *See also,* comment [10] to RPC 1.7 in which various personal interests are iterated. *Nowhere* in the case law or the comments on RPC is there any indication that a lawyer's interest in being compensated for services performed or compensation discussions between an employee lawyer and his/her employer constitute a "material limitation."

At trial and throughout discovery, Tri-State did not offer any evidence whatsoever that Chism's representation of Tri-State on its various construction and business matters was *limited* – let alone *materially* limited – in any way by his desire to be paid. In fact, quite the opposite: Chism's loyalty to his client was undivided; he worked tirelessly for Tri-State as a lawyer and a non-lawyer, all the while *deferring his compensation* and ensuring that the company's significant assets were protected from default on a $55 million bond.

More significantly, the bonus to be paid to Chism was within the unfettered discretion of the client and determined *after* the legal work had been performed. Representation cannot be materially limited *after the fact*. RPC 1.7(a)(2) is inapplicable.

Tri-State also contended that once Larry Agostino (then, a board member, not Chism's boss) expressed disagreement with some aspect of Chism's compensation in December 2011, Chism was required to tell Tri-State to get independent advise and "withdraw" from future discussions about his own pay. CP 774. Under this theory, Chism was representing both himself and the company, and thus, by March 2012, represented two clients directly adverse to one another, in violation of RPC 1.7(a)(1).

First, as noted *supra*, RPC 1.7(a)(1) does not apply in the in-house counsel setting where the lawyer represents only one client.

Second, the trial court erred in concluding, as a matter of law, that an in-house lawyer "represents" the corporation with respect to what the corporation decides to pay the lawyer. Here, no Tri-State witness testified that he or she believed that Chism was the company's lawyer on matters regarding Chism's pay.[43] Even if Tri-State's counsel *had* elicited such testimony, Tri-State could not show that such a belief would have been objectively reasonable. Tri-State is a sophisticated employer and vendor; Chism was far from the first employee or attorney Tri-State paid; Tri-State presidents made countless, significant pay decisions all on their own over the course of many years; Chism did not advise the company on setting compensation for other employees; and there is no evidence that the company believed that Chism was acting in the *company's* interests when it came to wages he sought to support himself and his family. What is more, Tri-State knows how to engage a lawyer when it needs one. The company retained dozens of lawyers over the years; during Chism's employment, Tri-State spent over three million dollars on lawyers, *excluding* Chism. CP 2326-27. Larry, for his part, understood that Chism did not represent him

[43] Tri-State bears the burden to prove the existence of an attorney-client relationship with respect to the matter of Chism's compensation. *See Restatement (Third) of Law Governing Lawyers* § 16 ("A Lawyer's Duties to a Client") (2000) (lawyer duties are limited to matters covered by the representation); WPI 107.01 (setting forth the client's burden to show an attorney-client relationship). Such a burden includes a showing that the client's belief is both subjectively and *objectively* reasonable. WPI 107.01 (citing *Bohn v. Cody*, 119 Wn.2d 357, 364 P.2d 71 (2004)).

at all times, on all matters; rather, Chism's legal services had a beginning and end. CP 2332-33.

Even if the Court were to conclude that Chism was, in effect, a lawyer with two adverse clients in March 2012, he did not breach the standard of care in discussing the $500,000 and $250,000 bonuses with Larry. First, the bonuses were proposed by Larry, not Chism. There is no dispute on this fact. Even so, according to Tri-State's expert, there was a "conflict" that required Chism to advise Tri-State to seek independent advice. But when he was presented with the fact that Larry *had* separate counsel when he met with Chism in 2002,[44] Professor Boerner was then forced to admit in court that the duty to tell Larry to do so was rendered "satisfied." RP (5/23/14):88.[45]

Tri-State's assertion that such a "conflict" over compensation triggered a duty for Chism to withdraw under the RPCs is notable for its vagueness. As discussed above, it makes no sense to force a lawyer to quit

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[44] Much to the apparent surprise of Professor Boerner, RP (5/23/14):85-88, Larry had lawyer Greg Russell waiting in the wings to "paper" the deal with Chism. CP 2336-38, 2345. Indeed, Larry used Russell to draft three different employment agreements sometime in 2012. CP 2334-35.

[45] Professor Boerner was also forced to concede that his main criticism was that Larry was not advised to obtain independent counsel. RP (5/23/14):83. Professor Boerner, upon whom the trial court relies, also testified he did almost no legal research in the issue of in-house counsel and compensation, there was no Washington authority, and his conclusions were merely his academic opinion with no consultation with in-house counsel or the corporate community. RP (5/16/14):44, 47, 48, 50-51, 65. He admitted he was unaware of any lawyer actually performing the duty he claimed was present here. *Id.* at 50-51.

after the lawyer's services are already performed. If withdrawal relates only to the compensation issue, this argument finds no support in the rule, commentary on the rule, or case law. Taking Tri-State's theory to its logical conclusion, an in-house lawyer could *never* complain about compensation or ask for a raise without stepping into an ethical minefield. Further, outside counsel would presumably have to withdraw from the representation the minute the client complains that a bill is too high. No case says as much, and a thoughtful ethics opinion compels the opposite conclusion in the context of outside counsel fee disputes. LA County Bar Assoc. Op. No. 521 (2007) (collecting cases). The fact is that lawyers can and do ethically represent clients even when disagreement over money arises. CP 2341-42. Professor Boerner, who has not represented a client in decades, gave an opinion that Chism was supposed to withdraw and/or was conflicted out of further discussions about his own wages when Larry Agostino questioned the bonus granted to Chism by his brother Ron in late 2011 is simply not supported by *any* authority, as he acknowledged. RP (5/16/14):43, 47-48, 50-51.

The illogic of this view is re-enforced by Tri-State's economic reality at the time. Had Chism been required to withdraw in late 2011, at the height of the Bear Hydro debacle, Tri-State would have been ruined. It is highly likely Larry kept the decision to reduce Chism's 2011 bonus to

$400,000 a secret because Larry wanted Chism to keep working on Bear Hydro. RP (5/7/14):196-97; (5/8/14):22-26.

In sum, the trial court erred in concluding Chism violated RPC 1.7.

(e) Chism Did Not Violate RPC 1.8

The trial court found that Chism breached no fiduciary duties to Tri-State by accepting the general counsel job and the compensation package, when he came in-house.[46] However, it found that by agreeing to Ron Agostino's proposal to allow the company to pay a bonus entirely in

[46] No court in Washington or elsewhere has considered the lawyer's acceptance of employment to be an event that triggers application of RPC 1.8(a) (or the equivalent model rule), and Tri-State did not cite one. Perhaps not surprisingly, Tri-State's expert did not identify a single lawyer in Washington who has gone through the strictures of RPC 1.8 in applying for and accepting employment with a client. CP 2310 ("I can't think of one, no."). The most logical reason for this is that RPC 1.8(a) does not apply to a lawyer's hiring. Indeed, it is hard to imagine what purpose would be served in having job candidates get written informed consent *to the hiring* from the *employer* who is *doing the hiring*. Employers do not expect protection from the *job applicant* in deciding for themselves who to hire (or how much to pay them), nor should the law impose any such protection.

Notably, even if there were some theoretical duty triggered in connection with the hiring, there would be no basis in *fact* for granting relief to Tri-State on any alleged breach of RPC 1.8. The hiring event occurred, at the latest, on the first date of Chism's employment (January 1, 2009) – well over three years before Tri-State filed suit against Chism in October 2012. *See Meryhew v. Gillingham*, 77 Wn. App. 752, 755, 893 P.3d 692 (1995), *review denied,* 128 Wn.2d 1012 (1996) (applying three-year limitations period to claim against attorney for breach of fiduciary duty). Thus, any cause of action based on the hiring event is untimely. In any event, Tri-State has never alleged any harm arising from its decision to hire Chism as in-house counsel, nor prayed for disgorgement of the salary or benefits paid to him upon hiring. Thus, nothing about the change from outside to inside counsel in 2009 can serve as a basis to void agreements for bonuses awarded in 2010, 2011 or 2012.

its discretion (September 2010), and accepting the $500,000 and $250,000 bonuses awarded by Tri-State, Chism engaged in a prohibited business transaction under RPC 1.8(a). CP 2389-2404.[47] The trial court's conclusion that Chism violated RPC 1.8 cannot be reconciled with that rule RPC or the jury's verdict.

As a threshold matter, the purpose of RPC 1.8(a), the business transaction rule, is to protect clients from overreaching by counsel who are furthering their own interest, not that of the client. Indeed, the case law on RPC 1.8 largely applies the factors enunciated in *Kennedy*. *Compare Kennedy* with factors set forth in *Valley/50th Avenue, LLC v. Stewart*, 159 Wn.2d 736, 745, 153 P.3d 186 (2007) (quoting *In re Disciplinary Proceeding Against McMullen*, 127 Wn.2d 150, 164, 896 P.2d 1281 (1995) and *In re Disciplinary Proceeding Against McGlothlen*, 99 Wn.2d 515, 525, 663 P.2d 1330 (1983)).

Here the Rule formalities were met, as the jury found. The Rule requires the transaction be fair and reasonable; the jury found it was. The transaction had to be in writing; it was. The Rule requires the transaction be fully disclosed; the jury found full disclosure. It also found no undue

[47] Rule 1.8(a) prohibits a lawyer from entering into a "business transaction" with a client unless the lawyer satisfies certain criteria to protect the client's interest; namely: (1) fair and reasonable terms to the client, disclosed in writing, (2) advice to seek independent counsel, also in writing, and (3) informed consent (again, in writing) including identification of whether the lawyer represents the client in the transaction. RPC 1.8(a)(1)-(3).

influence. The only Rule requirement not addressed by the jury is that the client must be informed of a right to independent counsel. But as noted above, the Agostinos knew they had that option, and, in fact, had other counsel. Even for situations requiring "informed consent," Rule commentary makes clear: "A lawyer need not inform a client or other person of facts or implications already known for the client." RPC 1.0 cmt. [6]. A factor to be considered is whether the client is experienced in legal matters generally and in making decisions of the type involved. *Id.* Obviously both Ron and Larry Agostino fit that criteria to a tee.

Thus, if RPC 1.8(a) is applicable, Chism carried his burden, the jury found that its spirit and letter were met so that no breach of fiduciary duty is present.

But the Rule is not even applicable to this type of situation.[48] On its face, RPC 1.8(a) applies to loans, investments, sales transactions and the like; and not to compensation as an employee. *See, e.g.*, RPC 1.8 cmt. 1; *LK Operating, supra* (joint venture agreement involving client, attorney, and manager of trusts for attorney's children for formation of debt collection business); *Valley/50th Avenue, supra* (deed of trust

[48] Comment [1] to RPC 1.8 makes clear it is generally inapplicable to fee arrangements between lawyer and client ("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 the fee.").

obtained from client to secure fees and costs owed by another client); *Holmes v. Loveless*, 122 Wn. App 470, 94 P.3d 338 (2004) (attorneys receive ownership interest in joint venture of client).[49] No authority treats compensation paid to in-house lawyers as conflicted business transactions, and a WSBA's advisory opinion *rejects* such a notion, even when the compensation includes *shares* in the business. WSBA Adv. Op. 1045. *See* Appendix.

Here, Chism was paid or awarded bonuses in cash; he did not seek and was not awarded shares in the business or a lien on company real estate or assets – even when he assumed huge responsibility and risk over Tri-State's failing Canadian project, and even when he knew that there was a very real possibility that the company could go out of business. Given that RPC 1.8(a) does not apply to ordinary fee agreements, it should not, by analogy, apply to an employee's cash compensation. To construe the rule otherwise would mean that every raise, cost of living allowance, or other increase in benefits (e.g., sick-pay accruals) for every in-house or government lawyer would trigger RPC 1.8(a)'s requirements of a written

[49] Even payments to *outside* lawyers are not covered by RPC 1.8 (noting that "ordinary fee agreements" are not business transactions); *see also,* WSBA, *The Law of Lawyering in Washington* (2012) at 43 (noting that RPC 1.8(a) does not apply to ordinary fee agreements, but could "come into play when an attorney accepts forms of property or an interest in a business in which the client is involved as payment for services.").

disclosure and advice to the employer to seek independent counsel.[50] These are not the kinds of events covered by RPC 1.8, and the rule should not be construed to reach such absurd results.

Further, it would be absurd to interpret RPC 1.8 to apply to any and all circumstances where a general counsel seeks to alter his/her compensation package. This Court can only imagine the practical difficulties that come into play with the notion that any time an in-house counsel/executive seeks a change in his/her base compensation, bonuses, health insurance or child care benefits, 401(k) contributions or the like that the trial court's reasoning must apply and the full panoply of rule-related requirements under RPC 1.8 must be met.[51]

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[50] Even Tri-State's expert did not believe that an employee's request for an increase in compensation is a business transaction. CP 2317. Professor Boerner suggested, rather, that there is some "magnitude" where bonuses become "high" enough to trigger Rule 1.8(a), but concede he was not opining on "reasonableness" in this case, and had no suggestion for where to draw such a line. CP 2318-19. After drawing this imaginary line (that provides no guidance whatsoever to practicing lawyers), he appeared to concede that RPC 1.8 does not apply here. *Compare* CP 1080 (A: "And the business transaction is because Geoff Chism was the current lawyer for the client and then he said to his boss that 'Someday you can award me a bonus if you like'"? A."Yes.") with CP 1081 (Q: ..."[A]n in-house lawyer who is going in and negotiating compensation after they've been hired is engaging in a business transaction, right? A: "No I don't believe I testified to that.").

[51] The trial court attempted to limit its RPC analysis to the facts here while admitting that "strict application of ethical and fiduciary requirements to employee compensation negotiations, without regard for the facts and circumstances of the situation, could lead to absurd results." CP 2682 (CL 17). The scope of its erroneous RPC analysis, however, cannot be so blithely narrowed. Corporate counsel negotiating compensation with their corporate employers either are, or are not, subject to RPC 1.8.

More fundamentally, RPC 1.8(a) contemplates the interest of the lawyer being adverse to that of the client. Executive compensation is not necessarily adverse to the employer's interest. Well-compensated executives help the company succeed, as Chism did when he saved Tri-State from disaster. That is why in circumstances where general counsel have received stock options, giving the attorney an actual financial interest in the client, RPC 1.8 has been found inapplicable. *See ABA Task Force Report, supra.*

Chism did not violate RPC 1.8 in renegotiating his compensation with his corporate employer.

(f) Chism Did Not Violate Any Provision of Rule 8.4

In its pleadings, Tri-State did not allege with specificity which of the fourteen subsections of RPC 8.4 Chism supposedly violated. Its expert Professor Boerner, never made clear how Chism violated Rule 8.4 either. RP (5/16/14):9-90; (5/23/14):74-112.

To the extent Tri-State argued post-trial that Chism breached a separate duty owing under RPC 8.4, such an argument is unsupported. RPC 8.4(a) primarily incorporates the duties owing under the *other* RPCs. As to RPC 8.4(c), it appears that the only allegation is Tri-State's repeated invocation of the word "misrepresentation" or "deceit" in reference to the

September 20, 2010 memo which memorializes the change to the bonus system and Chism's estimation of hours worked.[52]

The gravamen of Tri-State's contention at trial was that Chism was mistaken (or rather, lying to his employer) about the basis for his $190,000 salary of 1.5 hours/day on average. Tri-State told this story at trial in an attempt to undermine the contracts, to cast the compensation arrangements in a sinister light, and to discredit Chism's testimony. But the jury flatly rejected Tri-State's contention. Indeed, the jury did not see the formation of the bonus agreements as Tri-State hoped they would. The jury heard the history of Chism's compensation as a lawyer, beginning with his outside hourly rates in the 1970s for all clients, to his flat fee arrangement with his favored client, to his salary, benefits, and bonuses. Against this backdrop, the jury found the September 20 memo to be fair, reasonable and fully disclosed. Whatever confusion Larry Agostino or Tri-State allege they have about whether Chism was supposed to work full-time for $190,000 (or, less than $100 per hour) was put to rest when Chism fully

[52] For example, Tri-State made much of the fact that Chism mistakenly referred to the general counsel agreement going back 10 years (as opposed to 8); likewise, Tri-State repeatedly suggested that Chism was working *more* than 1.5 hours per day, and thus invited the jury to find that he lied about his salary being tied to such limited hours. What Tri-State never understood (but the jury obviously did), is that Chism regularly worked more than what his flat fee, and later, his salary covered. The arrangement was entirely acceptable to Chism and to Tri-State until the system became so unbalanced in 2010 when he was working full-time.

disclosed the basis for his salary in a memo written in plain English, which the president then circulated to the entire board of directors.[53]

Calling something a "misrepresentation" (even repeatedly so) does not make it one. The jury's findings on the bonus arrangement is consistent with the fact that, throughout this litigation, Tri-State has never adduced evidence that Chism lied about any aspect of his work, his hours, his pay. To the extent the trial court adopted these rejected contentions, the trial court's findings are not sustained on substantial evidence.

A review of the trial court's findings of fact reveals it was trapped in the world of hourly billings common to lawyers in private practice. It is impossible to accept the proposition that Ron Agostino thought Chism was giving him concise statements of hours worked. He *knew* there were no time records kept and no requirement to do so.[54] He knew Chism would give him good faith estimates which he could use however he chose and in the context of his intimate familiarity with Chism's work and success for the company. When everyone knew that Chism was only providing an educated guess, and a conservative and discounted once at that, in this

---

[53] Even if Tri-State had concluded that it had a different view of how Chism had been previously paid, it was of no import with how the parties would treat the arrangement from this point on: the parties reached an agreement as to how Chism would be paid moving forward, an agreement the jury found to be fair to Tri-State.

[54] The September 20, 2010 agreement expressly stated Chism did not have to keep daily time records. He was only obliged to provide a yearly time "estimate."

context, there cannot be misrepresentation or deceit as to hours worked, the merits of a bonus, or any violation of RPC 8.4(c).

In sum, the trial court's determination that Chism breached fiduciary duties to Tri-State is unsupportable and should be reversed.

(3) The Trial Court Erred in the Calculation of Penalty to Which Chism Was Entitled under RCW 49.52.070 for Tri-State's Willful Refusal to Pay Wages Owed Him

The trial court here applied the double damages penalty of RCW 49.52.070 to the net judgment, rather than the jury's determination of what were the wages deliberately and wrongfully withheld by Tri-State. CP 2712-13, 4991. This was error as the trial court's decision blunted the thrust of the statutory double damages provision to prevent employers from wrongfully and deliberately withholding an employee's wage, as the jury determined Tri-State did here.

Just as disgorgement is seen as a penalty to prevent breaches of fiduciary duty, the double damages provision of RCW 49.52.070 is meant to be a deterrent to employers to prevent them from withholding compensation owed to employees. *Ellerman v. Centerpoint Prepress Inc.*, 143 Wn.2d 514, 519, 22 P.3d 795 (2001). The "fundamental purpose of the legislation, as expressed in both the title and the body of the act, is to protect the wages of an employee against any diminution or deduction there from by rebating, under payment, or false showing of overpayment

of any part of such wages." *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159, 961 P.2d 371 (1998). The statute must be liberally construed to protect employee wages and assure payment. *Id.*

Indeed, in assessing the statutory double damages remedy, courts have held that the remedy must apply to an employee's *gross wages*, not the wages after deduction for withholding taxes. *Morgan v. Kingen*, 141 Wn. App. 143, 160-62, 169 P.3d 487 (2007), *aff'd*, 161 Wn.2d 526, 210 P.3d 995 (2009).

In sum, the importance of double damages under RCW 49.52.070 is not their compensatory effect to Chism, but rather their punitive effect upon Tri-State/Agostino for their *willful* withholding of wages due to Chism. *Id.* at 161-62 ("the [RCW 49.52.070] damages are exemplary damages, not merely compensatory. As exemplary damages, they are intended to punish and deter blameworthy conduct."). Given the liberal construction imperative for the statute and its deterrent/punitive purpose, the better approach here was to apply the double damages to the jury's award, the *actual wages withheld by Tri-State/Agostino*. The trial court erred in applying RCW 49.52.070 only to Chism's net recovery.

(4) Chism Is Entitled to His Attorney Fees on Appeal

The trial court here awarded Chism fees under RCW 49.48.030/RCW 49.52.070. CP 4961-72, 4991. He is entitled to recover

his reasonable attorney fees on appeal. RAP 18.1; *Kohn v. Georgia-Pacific Corp.*, 69 Wn. App. 709, 727-28, 850 P.2d 517, *review denied*, 122 Wn.2d 1010 (1993) (RCW 49.48.030); *Schilling*, 136 Wn.2d at 166; *Brandt v. Impero*, 1 Wn. App. 678, 682-83, 463 P.2d 197 (1969) (RCW 49.52.070).

F. CONCLUSION

The jury properly concluded that Tri-State deliberately withheld compensation it had promised to pay Chism, and Chism then earned. Chism was entitled to that compensation, plus the double damages under RCW 49.52.070 and attorney fees allowed under RCW 49.48.030/RCW 49.52.070.

But the trial court erred when it concluded that Chism breached fiduciary duties to Tri-State and could thereby be deprived of the bonuses promised to him by Tri-State that the jury agreed he had earned. The trial court misapplied the provisions of RPC 1.7, 1.8, and 8.4. The trial court's decision usurped the jury's fact finding function, ignoring the jury's resolution of the *Kennedy* factors and glossing over the fact that Tri-State benefitted from Chism's extraordinary efforts that culminated in helping to save the company from financial ruin. The corporation and its management were fully informed of the compensation deal struck in 2010, and the bonuses awarded in all three years and benefitted from Chism's

work. Ron Agostino testified Chism never took advantage of him, that he appreciated Chism's work and every bonus he gave was solely his decision, after having first consulted with the board. The trial court disagreed with the compensation approved by the jury, but it had no basis to discount that compensation.

This Court should reverse the trial court's disgorgement decision and remand the case to the trial court for entry of a judgment based on the jury's verdict with exemplary damages as contemplated by RCW 49.52.070, and interest on the compensation from April 2012 when they were due. The Court should also affirm the trial court's fee decision. Costs on appeal, including reasonable attorney fees, should be awarded to Chism.

DATED this 29th day of June, 2015.

Respectfully submitted,

Philip A. Talmadge

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Attorneys for Appellant Chism

APPENDIX

Instruction 9:

> Plaintiff Geoff Chism's first claim is that following a modification of his compensation arrangement entered into in or around September 2010, Defendant Tri-State Construction, Inc. ("Tri-State") entered into contracts with him for two bonuses, one for $500,000 in or around October 2011, the other for an additional $250,000 in or around March 2012, and that Tri-State breached those contracts. Mr. Chism's second claim is that Defendants withheld wages from him.
>
> Defendants deny these claims. Defendants also assert an affirmative defense that Mr. Chism extended undue influence over Tri-State's agent, Ron Agostino. Defendants assert that as a result of this defense, Mr. Chism is not entitled to any of the amounts he seeks.

CP 2201.

Honorable Michael J. Trickey
Hearing Date: December 6, 2013
Hearing Time: 11:00 a.m.

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

GEOFFREY CHISM,

Plaintiff,

v.

TRI-STATE CONSTRUCTION, INC. and LARRY AGOSTINO,

Defendants.

No. 12-2-32541-3

ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER came before the Court on Plaintiff's Motion for Partial Summary Judgment. The Court heard oral argument on December 6, 2013. The Court took the matter under advisement.

The Court has considered oral argument and the records and files herein, including:

1. Plaintiff's Motion for Partial Summary Judgment;

2. Declaration of Lindsay L. Halm in Support of Plaintiff's Motion for Partial Summary Judgment and attachments thereto;

3. Declaration of Geoffrey P. Chism;

4. Defendants' Response to Plaintiff's Motion for Partial Summary Judgment;

SCHROETER, GOLDMARK & BENDER
500 Central Building • 810 Third Avenue • Seattle, WA 98104
Telephone: (206) 622-8000 • Fax: (206) 682-2305

5. Declaration of Jillian Barron in Support of Defendants' Response to Plaintiff's Motion for Partial Summary Judgment;

6. Declaration of Ronald Agostino in Support of Defendants' Response to Plaintiff's Motion for Partial Summary Judgment;

7. Declaration of Larry Agostino in Support of Defendants' Response to Plaintiff's Motion for Partial Summary Judgment;

8. Declaration of Kristi MacMillan in Support of Defendants' Response to Plaintiff's Motion for Partial Summary Judgment;

9. Declaration of Gordon Kamisar in Support of Defendants' Response to Plaintiff's Motion for Partial Summary Judgment;

10. Declaration of Allison Goodman in Support of Defendants' Response to Plaintiff's Motion for Partial Summary Judgment;

11. Declaration of Dr. Gregory Gorman in Support of Defendants' Response to Plaintiff's Motion for Partial Summary Judgment;

12. Declaration of Jillian Barron Regarding Late Filing of Defendants' Response to Plaintiff's Motion for Partial Summary Judgment;

13. Reply to Plaintiff's Motion for Partial Summary Judgment;

14. Declaration of Lindsay L. Halm in Support of Plaintiff's Reply to Motion for Partial Summary Judgment;

15. Declaration of George Johnson in Support of Plaintiff's Reply to Motion for Partial Summary Judgment; and

16. Declaration of Saul Gamoran.

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IT IS HEREBY ORDERED that Plaintiff's Motion for Partial Summary Judgment is GRANTED.

The Court concludes as a matter of law that Plaintiff's status as in house counsel renders the disgorgement of fees for breach of fiduciary duty based on alleged violations of RPC 1.5 unavailable as an affirmative defense or a counter-claim for the Defendants. No Washington case supports the Defendant's legal position on this issue. The Court's ruling does not affect the other alleged RPC violations in the case.

DATED this 16th day of December, 2013.

Judge Michael Trickey
KING COUNTY SUPERIOR COURT

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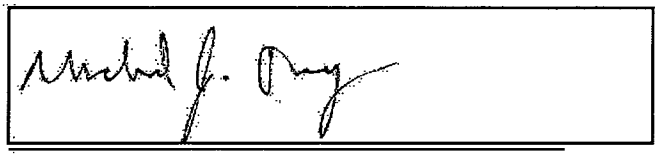
Case Number:	12-2-32541-3
Case Title:	CHISM VS TRI-STATE CONST INC ET ANO
Document Title:	ORDER GRANTING PLAINTIFF'S MTN PARTIAL SJ
Signed by Judge:	Michael Trickey
Date:	12/16/2013 9:00:00 AM



Judge Michael Trickey

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Honorable Michael J. Trickey
Hearing Date: February 11, 2014
Hearing Time: 10:00 a.m.

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

GEOFFREY CHISM,

Plaintiff,

v.

TRI-STATE CONSTRUCTION, INC. and LARRY AGOSTINO,

Defendants.

No. 12-2-32541-3

~~(PROPOSED)~~ ORDER ~~GRANTING~~ DENYING PLAINTIFF'S SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT

THIS MATTER comes before the Court on Plaintiff's Second Motion for Partial Summary Judgment. The Court having considered oral argument and the records and files herein, including:

1. Plaintiff's Second Motion for Partial Summary Judgment;

2. Declaration of Lindsay L. Halm in Support of Plaintiff's Second Motion for Partial Summary Judgment and attachments thereto;

3. Defendants' Response to Plaintiff's Second Motion for Partial Summary Judgment;

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500 Central Building • 810 Third Avenue • Seattle, WA 98104
Telephone: (206) 622-8000 • Fax: (206) 682-2305

4. Declaration of Jillian Barron in Support of Defendants' Response to Plaintiff's Motion for Partial Summary Judgment and attachments thereto;

5. Declaration of David Boerner in Support of Defendants' Response to Plaintiff's Motion for Partial Summary Judgment;

6. Reply to Plaintiff's Second Motion for Partial Summary Judgment; and

7. Declaration of Lindsay L. Halm in Support of Reply top Second Motion for Partial Summary Judgment.

IT IS HEREBY ORDERED that Plaintiff's Second Motion for Partial Summary Judgment is ~~GRANTED~~ DENIED. ~~Defendants' counterclaims against Mr. Chism alleging a violation of RPC 1.7, RCP 1.8, and breach of duties at common law are hereby dismissed with prejudice~~.

DATED this 11th day of Feb, 2014.

JUDGE MICHAEL J. TRICKEY

Presented by:

SCHROETER, GOLDMARK & BENDER

s/Lindsay L. Halm
LINDSAY L. HALM, WSBA #37141
THOMAS J. BREEN, WSBA #34574
Counsel for Plaintiff

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500 Central Building • 810 Third Avenue • Seattle, WA 98104
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The Honorable Michael J. Trickey
Hearing Date: March 3, 2014

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

GEOFFREY CHISM, Plaintiff, vs. TRI-STATE CONSTRUCTION, INC. and LARRY AGOSTINO, Defendants.	Case No. 12-2-32541-3 SEA ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION/CLARIFICATION

Plaintiff Geoffrey Chism has moved the Court for Reconsideration/Clarification. The Court, having considered the records and files herein, including:

1. Plaintiff's Motion for Reconsideration/Clarification;
2. Defendants' Response to Plaintiff's Motion for Reconsideration/Clarification;
3. Plaintiff's Reply;

IT IS HEREBY ORDERED that Plaintiff's Motion for Reconsideration/Clarification as to the common law counterclaim for breach of fiduciary duty is DENIED.

DATED this 11th day of March, 2014.

The Honorable Michael J. Trickey

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PRESENTED BY:

SEBRIS BUSTO JAMES

/s/ Jillian Barron
Jillian Barron, WSBA # 17964
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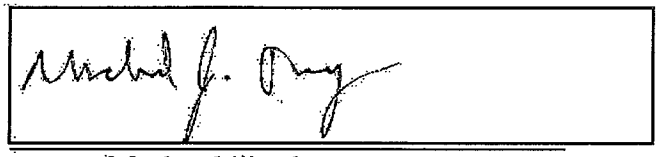
Case Number: 12-2-32541-3
Case Title: CHISM VS TRI-STATE CONST INC ET ANO

Document Title: ORDER DENYING MTN RECONSIDER

Signed by Judge: Michael Trickey
Date: 3/11/2014 10:49:34 AM



Judge Michael Trickey

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Honorable Ken Schubert

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

GEOFFREY CHISM,

Plaintiff,

v.

TRI-STATE CONSTRUCTION, INC. and LARRY AGOSTINO,

Defendants.

No. 12-2-32541-3 SEA

VERDICT FORM

ORIGINAL

VERDICT FORM

We, the Jury, answer the questions submitted by the Court as follows:

QUESTION 1: With respect to Mr. Chism's contention that an enforceable contract arose between himself and Tri-State in or around September of 2010 regarding a modification of his compensation arrangement, whether predicated on Exhibit 9 or otherwise, do you find that Mr. Chism has proven, by a preponderance of the evidence, that the contract was fair and reasonable?

ANSWER: X Yes ____ No

INSTRUCTION: Please proceed to answer the next question.

QUESTION 2: With respect to Mr. Chism's contention that an enforceable contract arose between himself and Tri-State in or around September of 2010 regarding a modification of his compensation arrangement, whether predicated on Exhibit 9 or otherwise, do you find that the Mr. Chism has proven, by a preponderance of the evidence, that the contract was free from undue influence?

ANSWER: X Yes ____ No

INSTRUCTION: Please proceed to answer the next question.

QUESTION 3: With respect to Mr. Chism's contention that an enforceable contract arose between himself and Tri-State in or around September of 2010 regarding a modification of his compensation arrangement, whether predicated on Exhibit 9 or otherwise, do you find that the Mr. Chism has proven, by a preponderance of the evidence, that he made a full and fair disclosure of the facts upon which the contract was predicated?

ANSWER: X Yes ____ No

INSTRUCTION: Please proceed to answer the next question.

QUESTION 4: Has Plaintiff Geoffrey Chism proven his claim for breach of contract for a $500,000 bonus for work he performed during Fiscal Year 2011?

ANSWER: X YES ____ NO

INSTRUCTION: If you answer YES to Question 4, please proceed to the next question. If you answer NO, please skip to Question 6.

QUESTION 5: What is the amount of damages you award to Mr. Chism for breach of contract for a $500,000 bonus?
Amount: $500,000

INSTRUCTION: Please skip to Question 7.

QUESTION 6: If you find there is no enforceable contract between the parties for a bonus for work Mr. Chism performed during Fiscal Year 2011, what is the value of the services he performed during that time subtracting the reasonable value of amounts received him during that time:
Amount: $_____

INSTRUCTION: Please proceed to the next question.

QUESTION 7: Have Defendants proven their affirmative defense of undue influence so as to rescind a contract for a $500,000 bonus for work performed during Fiscal Year 2011?

ANSWER: _____ YES _X_ NO

INSTRUCTION: If you answer YES to Question 7, please proceed to the next question. If you answer NO, please skip to Question 9.

QUESTION 8: Has Plaintiff proved Defendants are estopped from asserting the affirmative defense of undue influence relating to the contract for a $500,000 bonus for work performed during Fiscal Year 2011?

ANSWER: _____ YES _____ NO

INSTRUCTION: Please proceed to the next question.

QUESTION 9: Has Plaintiff Geoffrey Chism proven his claim for breach of contract for a $250,000 bonus for work performed during Fiscal Year 2012?

ANSWER: _X_ YES _____ NO

INSTRUCTION: If you answer YES to Question 9, please proceed to the next question. If you answer NO, please skip to Question 11.

QUESTION 10: What is the amount of damages you award to Mr. Chism for breach of contract for a $250,000 bonus for Fiscal Year 2012?

Amount: $250,000

INSTRUCTION: Please skip to Question 12.

QUESTION 11: If you find there is no enforceable contract between the parties for a bonus for work Mr. Chism performed during Fiscal Year 2012, what is the value of the services he

performed during that time subtracting the reasonable value of amounts received him during that time:
Amount: $_____

INSTRUCTION: Please proceed to the next question.

QUESTION 12: Has Plaintiff proven his claim of willful withholding of wages?

ANSWER: X YES ____ NO

INSTRUCTION: If you answer YES to Question 12, please proceed to the next question. If you answer NO, please skip to the end.

QUESTION 13: Have Defendants proven that their nonpayment of wages to Plaintiff was the result of a bona fide belief that they are not obligated to pay.

ANSWER: ____ YES X NO

INSTRUCTION: Upon completion, the Presiding Juror should sign this verdict form and notify the bailiff.

DATE: 5/30/2014 SIGNATURE: _____
Presiding Juror KELLEY E. MASCHER

The Honorable Ken Schubert

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

GEOFFREY CHISM,

Plaintiff,

vs.

TRI-STATE CONSTRUCTION, INC. and LARRY AGOSTINO,

Defendants.

NO. 12-2-32541-3 SEA

ORDER DENYING RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendants timely renew their motion for judgment as a matter of law. The parties agree on the legal standard applicable to their motion: the trial court may grant such a motion if there is no legally sufficient evidence to sustain the verdict for the non-moving party, but may not grant such a motion if there is any justifiable evidence upon which reasonable minds might reach conclusions that sustain the verdict. [1] Further, all of the non-moving party's evidence is admitted as true as are all reasonable inferences that can be drawn from that evidence. As explained below, the application of that legal standard to the evidence at trial results in the denial of Defendants' motion.

[1] *See* Defs.' Renewed Mtn, 3:11-19 (citations omitted); Plt.'s Opp., 2:2-11 (citations omitted).

JUDGE KEN SCHUBERT
KING COUNTY SUPERIOR COURT
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Defendants contend that there was insufficient evidence to allow the jury to find the existence of a contract to pay Plaintiff either $500,000 or $250,000. They argue that the promise of Tri-State's president to pay Plaintiff a discretionary bonus was vague, illusory and without consideration. Plaintiff counters by identifying evidence sufficient to support a finding by the jury as to each of the elements necessary to establish a contract between Tri-State and Plaintiff. As for the $500,000 bonus, Plaintiff cites the trial testimony of Tri-State's president regarding the oral contract to pay Plaintiff, the signed November 2011 email, Tri-State's ledger (recording 80% of the bonus as owed), and Tri-State's successor president's confirmation of that agreement. In terms of the $250,000 bonus, Plaintiff cites his trial testimony, which contrasted with that of Tri-State's current president, and notes that the jury presumably found his testimony to be more credible, as well as a March 28 correspondence, Ms. Kristi Middleton's testimony, and Tri-State's current president's actions that were consistent with the existence of that agreement. Plaintiff also cites evidence of consideration to support both agreements.

Viewing that evidence in the light most favorable to Plaintiff, this Court holds that substantial evidence exists to support the verdict as to the existence of two enforceable contracts with Tri-State to pay him $500,000 and $250,000 respectively. Thus, Defendants have not met their burden of showing their entitlement to judgment as a matter of law.

Defendants other primary argument is that there was insufficient evidence to allow the jury to find that Defendants willfully withheld Plaintiff's wages within the meaning of RCW 49.52.050. Again, Plaintiff points to evidence that there was no bona fide dispute over the existence of an obligation to pay him those wages at the time Tri-State made the decision to withhold those wages. Tri-State entered into two enforceable contracts to pay Plaintiff $500,000 and $250,000 respectively. Even Tri-State's current president testified that Tri-State owed

JUDGE KEN SCHUBERT
KING COUNTY SUPERIOR COURT
516 3RD AVE, SEATTLE, WA 98104
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Plaintiff some amount; he was concerned Tri-State's cash position would not allow for full payment and he wanted to negotiate payment of less than the full $750,000.[2] Plaintiff also argues persuasively that Defendants sought to have this question decided by the jury, which it did.[3] Finally, Plaintiff contends correctly that the equitable and RPC claims this Court determined are not defenses to a determination of willfulness under RCW 49.52.070.

Viewing that evidence in the light most favorable to Plaintiff, this Court holds that substantial evidence exists to support the jury's verdicts: Plaintiff proved his claim of willful withholding of wages and Defendants failed to prove their defense that the nonpayment of wages was the result of a bona fide belief that they are not obligated to pay. Again, Defendants have not met their burden of showing their entitlement to judgment as a matter of law as to those verdicts. This Court denies Defendants' motion in its entirety.

Dated this 21st day of January, 2015.

[E-signature on following page]

Honorable Ken Schubert
King County Superior Court Judge

[2] Defendants cite *Chelan County Deputy Sheriffs' Assn. v. Chelan County*, 109 Wn.2d 282, 300-03, 745 P.2d 1 (1987) as an example of a court overturning a jury's finding of willfulness. The Supreme Court held that judgment as a matter of law was proper because the conflicting testimony of the mayor and various city council members did not constitute evidence that the City Council, as a governing body, had formally made a determination that the city owed wages; rather that conflicting testimony actually constituted evidence of a bona fide dispute. In contrast, the testimony of Tri-State's former and current president that Tri-State owed Plaintiff additional wages supports the jury's verdict because those witnesses had authority to bind and speak on behalf of Tri-State.

Defendants' reliance on *Belli v. Shaw*, 98 Wn.2d 569, 570, 578, 657 P.2d 315 (1983) is also misplaced. In *Belli*, the Supreme Court held that an attorney did not have an enforceable contract relating to the first trial. That attorney based his claim on a referral fee for his share in the award from the second trial. The Supreme Court held that the fee agreement violated the Rules of Professional Conduct, making it against public policy and unenforceable. That case did not address the willful withholding of wages and does not otherwise support Defendants' contention that this Court's finding that Plaintiff violated other RPCs must overturn the jury's finding of willfulness.

[3] Defendants complain that they were not able to have their ethics expert testify to the jury regarding Plaintiff's breaches of his fiduciary duty. But defendants offered no evidence that their expert's opinion had any relevance to the decision Tri-State made not to pay Plaintiff's wages upon his termination.

JUDGE KEN SCHUBERT
KING COUNTY SUPERIOR COURT
516 3RD AVE, SEATTLE, WA 98104
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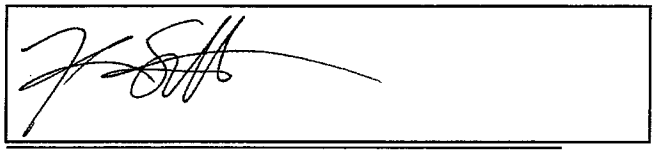
Case Number: 12-2-32541-3
Case Title: CHISM VS TRI-STATE CONST INC ET ANO

Document Title: ORDER DENYING MTN FOR JDGMT AS MTR OF LAW

Signed by: Ken Schubert
Date: 1/21/2015 1:57:29 PM



Judge/Commissioner: Ken Schubert

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The Honorable Ken Schubert

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

GEOFFREY CHISM, Plaintiff, vs. TRI-STATE CONSTRUCTION, INC. and LARRY AGOSTINO, Defendants.	NO. 12-2-32541-3 SEA FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING FIDUCIARY DUTY COUNTERCLAIM AND AFFIRMATIVE DEFENSES

I. INTRODUCTION

This Court presided over a month-long jury trial in this matter. Plaintiff Geoffrey Chism ("Mr. Chism") claimed breach of contracts for wages in the amount of $750,000, and willful withholding of those wages. Defendants Larry Agostino ("Larry")[1] and Tri-State Corporation ("Tri-State") asserted contractual defenses of undue influence, a bona fide dispute defense to the claim of willful withholding, and put on evidence supporting their allegation that Mr. Chism, as Tri-State's General Counsel, owed and breached fiduciary duties to the Corporation.

[1] Because there are multiple individuals involved in this case who share the Agostino last name, this Court refers to them by their first name without intending any disrespect.

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The jury rendered a verdict in Plaintiff's favor on the contracts and wage clams; it rejected Defendants' undue influence contract defense and determined there was no bona fide dispute to justify non-payment of wages. On the fiduciary duty claim, the jury provided an advisory opinion pursuant to CR 39(c) – without the benefit of testimony from the parties' experts – that the bonus awards were based on an arrangement that was fair and reasonable, free of undue influence, and based on a full and fair disclosure of the facts.

The Court previously determined that Tri-State's fiduciary duty claim is for the Court to resolve, not the jury; namely, deciding whether Mr. Chism owed a fiduciary duty to Tri-State under the Rules of Professional Conduct ("RPCs") or common law, the contours of that duty, and determining whether disgorgement of wages is appropriate for any alleged breach. As explained in detail below, this Court now finds and concludes that Mr. Chism owed a fiduciary duty, that he breached that duty and the duty he owed under the common law, that he violated the applicable RPCs, and that he should disgorge a portion of the bonuses he received as a result.

In making the findings of fact and conclusions of law set forth below, the Court has considered the evidence and the arguments from counsel throughout trial and in post-trial hearings on June 30, 2014 and September 30, 2014. The Court finds and concludes as follows:

II. FINDINGS OF FACT

1. Founded in 1957, Tri-State Construction is a family-owned construction firm that provides general contractor services. Ron, Tom, and Larry Agostino are the current owners of Tri-State. Their father, Joe Agostino, formed the company in the early 1960's, and the brothers worked their way up in the company from being laborers to project foremen to eventually holding management positions. Joe eventually turned the company over to his three sons, appointing Ron, the middle son, as President in 1996. Larry and Tom joined Ron as

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members of Tri-State's Board of Directors ("Board") sometime in the mid-2000s, about the time Joe died. As Directors, Larry and Tom shared responsibility for running the company, but they focused primarily on their particular areas—Tom overseeing Tri-State's equipment and Larry dealing with labor, safety, and real estate issues. Although the brothers spoke informally on an ongoing basis, Larry and Tom generally relied on Ron for guidance of the company as a whole.

2. Mr. Chism began working with Tri-State as outside counsel in the early 1980s.[2] Over the next three decades, Mr. Chism developed relationships of mutual trust and loyalty with Joe Agostino, and Ron.[3] During that time, Mr. Chism became Tri-State's primary attorney, performed the majority of the company's general legal work, and was perceived by himself and Tri-State as the company's General Counsel. He initially reported to Joe, and later reported to Ron, who became President in about 1996.

3. Ron and his two brothers, Thomas and Larry, currently serve as Tri-State's three corporate directors; the brothers are also Tri-State shareholders.[4]

4. Mr. Chism's financial arrangement with Tri-State changed several times over his long relationship with the company.

5. For the first two decades, Mr. Chism billed Tri-State for legal services on an hourly basis under a conventional billing arrangement.[5]

6. In late 2002, Mr. Chism began charging a flat monthly fee for non-litigation matters while continuing to bill litigation matters separately on an hourly basis.[6] The non-litigation matters

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[2] Exhibit 9 (Mr. Chism email to Ron, Sep. 22, 2010) ("I trust you know how much I have appreciated and enjoyed working for you and Tri-State for these last 26 years.")
[3] Plaintiff's Amnd. Compl. ¶¶ 3.1, 3.3; Defendants' Answ. To Amnd. Compl. ¶¶ 3.1, 3.3.
[4] *E.g.*, Exhibit 352 (March 2012 board resolution listing Ron, Tom, and Larry as directors, shareholders, and shareholder-trustees for several Agostino family trusts).
[5] Amnd. Compl. ¶ 3.4; Answ. ¶ 3.4.
[6] Exhibit 6.

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were characterized as "General Counsel" ("GC") services that were expected to be "far-reaching and broadly encompassing" and included "all of [Mr. Chism's] personal time on all matters... other than matters that are in formal dispute resolution."[7] Mr. Chism "encourage[d] the officers and project management personnel for Tri-State to contact [him] on any matter at any time."[8]

7. Mr. Chism repeatedly testified that he would "do whatever it takes" and "whatever Tri-State asked" under the flat monthly fee billing arrangement.

8. Mr. Chism's flat fee began at $10,000/month in November 2002.[9] At the time, his hourly fee was $325 per hour.[10] However, the December 2002 letter did not refer to Mr. Chism's hourly rate or indicate whether his services under the retainer were expected to be limited to a specified number of hours or in any other way, other than that they would not include litigation and other matters in formal dispute resolution ("litigation"), for which Mr. Chism would continue to bill by the hour.

9. After the inception of the monthly retainer in December 2002, Mr. Chism continued to track his time spent on Tri-State litigation matters and to submit detailed monthly invoices showing time worked and tasks performed on those matters.

10. In or about February 2003, Mr. Chism raised his hourly rate for Tri-State's litigation matters to $350, effective for work he had performed in January 2003.[11]

11. In or about March 2004, Mr. Chism raised his hourly rate for Tri-State's litigation matters to $375, effective for work he had performed in February 2004.[12]

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[7] Exhibit 6.
[8] *Id.*
[9] Exhibit 401.
[10] Exhibit 300.
[11] Exhibit 29A.
[12] Exhibit 30A.

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12. In January 2005, Mr. Chism increased the monthly GC retainer to $12,000/month.[13]

13. In or about March 2007, Mr. Chism raised his hourly rate for Tri-State's litigation matters to $400, effective for work he had performed in February 2007.[14]

14. By July 2007, Mr. Chism also began charging a separate monthly flat fee for "Joint Venture/Design Build/405 General Counsel Services" ("JV"). The fees for those were $2,000/month as of July 2007[15] and $5,000/month as of October 2007.[16] Thus, as of October 2007, Mr. Chism's total flat monthly fee was $17,000, comprising of $12,000 (for general GC services) and $5,000 (for JV GC services).

15. In June 2008, Mr. Chism raised his hourly rate for Tri-State litigation matters from $400 to $500.[17]

16. Mr. Chism did not create any documentation similar to the December 2002 letter regarding the increase in his GC retainer, the initiation of the JV I-405 retainer, or the increase in that retainer. He testified that the scope of his work under both retainers was always that he would do whatever it took and whatever he was asked to do. In addition, Mr. Chism testified that all the retainer amounts since 2002 were intended to be a good deal for Tri-State—that is, they were supposed to cover more hours than a simple division of the retainer by Mr. Chism's hourly rate.

17. There was no credible or persuasive evidence that Mr. Chism's flat monthly fee arrangement was ever tied to him working an average number of hours per day, week, or month. From the beginning of this retainer relationship to its end (when he went in-house), Mr. Chism repeatedly testified that his monthly retainer was not tied to a number of hours that he would

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[13] Exhibit 301.
[14] Exhibit 303.
[15] Exhibit 305.
[16] Exhibit 307.
[17] Exhibits 311A, 402A.

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work, rather he would "do whatever it took" and "whatever Tri-State asked" in exchange for a dependable monthly retainer and the benefit of not having to account or bill for his time.

18. Mr. Chism continued to bill hourly for litigation matters, which encompassed "any matter… which there is a formal demand for arbitration, mediation, or litigation."[18] For these matters, Mr. Chism provided contemporaneous monthly statements with detailed descriptions of the work performed.[19]

19. In summary, over a six-year period Mr. Chism's hourly billing rate increased by 54%, beginning at $325/hour in December 2002,[20] rising to $350/hour by February 2003,[21] $375/hour by March 2004[22] and through at least February 2005,[23] $400/hour by March 2007[24] and through May 2008,[25] and $500/hour in June 2008.[26]

20. During that same period of time, other members of Mr. Chism's firm worked on Tri-State matters and charged substantially lower rates; for instance, $225/hour (versus $325/hour) in December 2002[27] and $175/hour and $265/hour (versus $500/hour) in June 2008.[28]

21. During the entire time Mr. Chism represented Tri-State as outside counsel, Tri-State did not once pay him a bonus.

22. Sometime in 2008, Mr. Chism told Ron he was planning to leave his law firm and work for a few existing clients out of his home. Mr. Chism proposed that he become a Tri-State employee and provide his services to the company as in-house GC. Mr. Chism preferred

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[18] Exhibit 6.
[19] See Exhibits 300, 29A, 30A, 302A, 303, 304, 311A, 402A.
[20] Exhibit 300.
[21] Exhibit 29A.
[22] Exhibit 30A.
[23] Exhibit 302A.
[24] Exhibit 303.
[25] Exhibit 311A.
[26] Exhibit 402A.
[27] Exhibit 300.
[28] Exhibit 402A.

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becoming an employee to continuing as outside counsel because he wanted healthcare coverage and did not want to deal with obtaining coverage on his own. He considered it important that he not be required to keep timesheets.

23. Mr. Chism proposed that he be paid a salary of $190,000. He testified that he came up with that number by multiplying the monthly total of his two retainers-$17,000-by 12, then reducing the $204,000 annual total by $14,000 to reflect the extra costs of healthcare and taxes he estimated the company would have to pay for him as an employee. Mr. Chism testified the proposal was supposed to give Tri-State effectively the same deal it had under his two retainers: he was going to continue doing what he had done under the retainers, and coming in house was a change only in format, not substance. Mr. Chism also testified the arrangement was going to continue being a good deal for Tri-State.

24. Mr. Chism told Ron he would continue to do "whatever it takes" other than litigation work, for which Tri-State would need to hire outside counsel. Mr. Chism also told Ron his becoming an employee and in-house GC would save Tri-State money, and Ron accepted the proposal for that reason.

25. At the time of hiring, the parties did not discuss the number of hours Mr. Chism would be expected to work.

26. Although Mr. Chism testified he believes documenting new arrangements is good practice, he admits he did not document the terms of the new employment arrangement. He also did not advise Ron to document the new arrangement or to consult with anyone else about it. Mr. Chism failed to do these things because he and Ron understood that there would be no significant changes in the general parameters of his arrangement established in the December

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2002 letter, other than that Mr. Chism would now be an employee and be paid a salary and basic benefits rather than monthly retainers.

27. Ron informed Tri-State's Controller, Kristi MacMillan, that Mr. Chism was coming on as a full-time Tri-State employee. Ms. MacMillan understood that meant Mr. Chism would generally be working 40 hours a week, and she enrolled him to receive Tri-State healthcare coverage, showing him as working 40 hours per week.[29] Tri-State's health plan requires employees to work at least 32 hours a week to be eligible. Ms. MacMillan testified that she would not have enrolled Mr. Chism for healthcare benefits nor shown him as working 40 hours per week had she known he was only expected to work part time.

28. Mr. Chism is the only in-house lawyer that Tri-State has ever hired. Similar to his work as outside counsel, Mr. Chism's employment arrangement with Tri-State did not provide for or otherwise contemplate the payment of any bonuses to him, annual or otherwise.

29. Mr. Chism continued to invite Tri-State employees to contact him with any legal questions.[30] As in-house GC, Mr. Chism did not track his hours because his salary covered all of his work -- litigation and non-litigation tasks, legal and non-legal tasks, and paralegal/associate and partner-level tasks.

30. As in-house General Counsel for Tri-State, Mr. Chism did not track or record the matters he worked on or the time he spent on them. He did not work a regular schedule, such as from 9:00 a.m. to 5:00 p.m., Monday through Friday. For the first couple of years as an employee, Mr. Chism worked primarily from his home or other locations, and he continued to do so throughout his employment with Tri-State.

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[29] Exhibit 371.

[30] *E.g.*, Exhibit 14, Chism email to several Tri-State employees ("Don't feel shy about calling me for anything.")

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31. Mr. Chism used a laptop and his home desktop computer for his Tri-State work. He saved his Tri-State work on those computers, not to Tri-State's computer server. He also used his own email address and did not use a Tri-State email address or Tri-State's email server for his email correspondence.

32. During the time he served as in-house GC for Tri-State, Mr. Chism continued to do some work for other clients.

33. Mr. Chism advised on legal matters ranging from contract disputes to employee termination, and his job included hiring and oversight of outside lawyers, including informing Tri-State when outside counsel was needed, reviewing outside lawyers' fees, and advising Tri-State as to which fees to pay.[31]

34. Ron did not write letters for Tri-State, and Mr. Chism drafted or "ghosted" letters, emails, and other documents for Ron's signature or transmission. Ron did not draft contracts, and he relied on Mr. Chism and his project managers to review contracts that would go to Ron for his signature. Mr. Chism was the person to whom Ron and Tri-State's project managers went for advice when they had questions about contract issues. Mr. Chism testified he was aware of these things, and he hoped Ron would rely on him to advise whether agreements were acceptable and whether they protected Tri-State's interests.

35. As in-house GC, Mr. Chism determined and recommended when Tri-State needed lawyers other than himself. Mr. Chism also recommended specific attorneys with the appropriate expertise, retained those individuals, oversaw their work, and reviewed their invoices. Ron trusted Mr. Chism to advise him when Tri-State needed other counsel, and trusted and deferred to Mr. Chism's judgment regarding the need for and choice of other counsel.

[31] *E.g.*, Exhibit 326.

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36. Mr. Chism conceded that his work as in-house GC included tasks that a first-year or third-year lawyer or even a non-lawyer could do.

37. In September 2009, the Tri-State Board of Directors ratified the fiscal year 2009 salaries and bonus payments for "key employees including certain officers"; the three Agostino brothers, who were also Tri-State's directors and shareholders, received salaries between $101,000 and $103,000, and each received a bonus of $525,000.[32] The Board ratified bonuses for four additional employees, who were each corporate Vice Presidents: Loren Hatfield received a salary of $89,664 and a bonus of $7,000; Larry Thompson received a salary of $123,820 and a bonus of $25,000; Greg Ritke received a salary of $126,260 and a bonus of $142,000; and Greg Cearley received a salary of $121,000 and a bonus of $230,000.[33] Mr. Chism did not receive a bonus for fiscal year 2009.

38. In September 2010, after about twenty months as an in-house lawyer, Mr. Chism raised the concept of his receiving a bonus. He proposed a new arrangement with Ron whereby he would receive a retroactive discretionary bonus structure to his base salary of $190,000 plus benefits, "effective as January 1, 2010."[34] He testified that he presented the new arrangement to Ron as more beneficial to Tri-State than simply raising his salary because he would be paid for only the time he actually worked and he would only be paid for his extra hours at the end of the fiscal year, and the amount of the bonus would be up to Ron's discretion.

39. Ron agreed to this arrangement and Mr. Chism drafted their agreement and emailed it to Ron ("September 2010 Memo").[35] Ron initialed a copy,[36] and Ron also forwarded the email to his brothers, the other two Tri-State directors.[37]

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[32] Exhibit 7, p.2-3.
[33] Exhibit 7, p.2-3.
[34] Exhibit 9.
[35] Exhibit 9.
[36] Exhibit 57

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40. The September 2010 Memo began by clarifying that Mr. Chism's $190,000 annual salary was based on working part-time at 1.5 hours/day, not full-time:

> My current compensation, which believe it or not we originally set over ten years ago, is based on me spending an average of less than an hour and a half a day on Tri-State matters, or about seven hours a week. It has always taken a little more than that to get things done but, until the last year or two, I think the arrangement worked well for both of us. Needless to say, for the past couple of years the time requirements have been a little more demanding.[38]

41. That memo was the first time Mr. Chism ever stated that his compensation covered a particular number of hours.

42. For the first time in the 25+ year history of his representation of Tri-State, as either outside or in-house counsel, Mr. Chism's arrangement also added a bonus structure:

> 2. Immediately prior to the end of Tri-State's fiscal year I will give you my best estimate of the total amount of time I spent during that year on Tri-State matters. I will defer to your judgment as to what bonus/adjustment you feel is appropriate to compensate for any effort over the 1.5 hour a day base. You can make the bonus/adjustment any time you want so as to include it in either the past or upcoming fiscal year. I am a calendar year taxpayer so the timing doesn't make any difference to me.[39]

43. Under the new bonus structure, at the end of each fiscal year (September 30), Mr. Chism would submit an annual estimate of the time he spent on all Tri-State matters and Ron would use his judgment to determine an "appropriate" "bonus/adjustment" to compensate Mr. Chism for work done over the "1.5 hour a day base."[40]

44. Ron was not aware at the time he received Mr. Chism's September 2010 memo of a seven or 7.5-hour (referred to for convenience as "7.5" hour) base for Mr. Chism's salary. According to Ms. MacMillan, Ron asked her to calculate how much per hour Mr. Chism was being paid

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[37] Exhibits 58.
[38] Exhibit 9.
[39] Exhibit 9.
[40] Exhibit 9.

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if his salary of $190,000 only covered 7.5 hours a week. Ron would not have needed to obtain such a calculation if he had agreed to such an arrangement prior to September 2010.

45. Despite the deference provided by these terms, the bonuses were, in practice, calculated by simply multiplying Mr. Chism's best guess at the end of Tri-State's fiscal year as to the number of excess hours over 1.5 hours/day by the $500/hour outside rate that Mr. Chism had charged during the six months prior to moving in-house. Like the salary, the bonus structure applied to all of Mr. Chism's work; it did not distinguish between litigation and non-litigation tasks, legal and non-legal tasks, or paralegal/associate and partner-level tasks.

46. As part of the September 2010 agreement, Mr. Chism and Ron also agreed that Tri-State would award a bonus to Mr. Chism for his past work during the previous fiscal year (FY 2010.)[41] This bonus was calculated under the new bonus structure. Mr. Chism provided the hours estimate and referenced his $500/hour rate in a September 30, 2010 email:

> As per our recent discussion regarding my compensation, we agreed that I would provide you with an estimate of the actual time I spent on Tri-State matters at the end of your fiscal year, September 30. ***
>
> The reference to the 1.5 hour a day base is to the fact that my base compensation was originally set on the assumption that I would average about 1.5 hours a day, or 380 hours a year on Tri-State matters at my old hourly billing rate of $500 per hour.
>
> This has been, as you know, a pretty busy year. In addition to the routine issues, I have spent a considerable amount of time on several somewhat out-of-the-ordinary matters including the Ploegsma grievance/arbitration, the Ritke matter, the DEA claim/litigation, and, of course, Canada.
>
> As we discussed this morning, realistically I have probably been averaging something over 60% of a normal work day on your matters. To be conservative, let's call it 50%. That translates into 1,000 hours of time, of which 380 hours have been covered by my base compensation.
>
> As I have said, I defer to you and your sense of fairness to make whatever adjustment you think is right. [42]

[41] Exhibit 11.

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47. Although not actually stated, Mr. Chism's memo essentially requested a $310,000 bonus: 1,000 hours minus 380 hours times $500 an hour.

48. In addition, according to the September 2010 memo, Tri-State would pay for/reimburse, retroactively for the FY 2010 year and going forward, Mr. Chism's bar dues, professional insurance premiums, cell phone and email data charges, and continuing legal education expenses. Tri-State would also provide Mr. Chism a company car – a new Mercedes Benz and, until the car was provided, would reimburse him for his gas, maintenance, repairs, and insurance for use of his own vehicle. Mr. Chism had not charged Tri-State for any of those expenses when he was outside counsel or during the prior 20 months of working in-house.

49. The underpinnings cited by Mr. Chism for both the bonus structure and the actual bonus he proposed to Tri-State were inaccurate in several key respects. First, Mr. Chism's claim that his current compensation had been set over ten years ago was not accurate. Mr. Chism's retainer arrangement did not even begin until late 2002, or eight years prior to September 2010. But more importantly, Mr. Chism's "current compensation" of $17,000 a month was based on his monthly retainer set in October 2007, which was only 15 months before he went in-house. During those fifteen months, Tri-State only paid him $500 an hour for the last six months – a $100 an hour increase, i.e., an increase of 25%, from the highest rate Tri-State had previously ever paid him. Mr. Chism was far more familiar with his rate history than Tri-State.

50. Second, Mr. Chism's claim that his retainer arrangement with Tri-State equated to him spending an average of less than an hour and a half a day on Tri-State matters, or about seven hours a week was contrary to his repeated testimony that in exchange for the retainer, he would do whatever Tri-State wanted no matter how long it would take. That Mr. Chism's

[42] Exhibit 10.

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retainer was not based on an expectation of his spending less than an average of an hour and a half a day or about seven hours a week on Tri-State matters finds further support in the fact that there is no correlation between his hourly rate and his monthly retainer. As the following chart shows, Mr. Chism's hourly rate would increase without a commensurate increase in the retainer, and his retainer would increase without a commensurate increase in his hourly rate:

DATE	Retainer	Rate	"Hours" per month
November 2002	$10,000	$325	30.77
February 2003	same	$350	32
March 2004	same	$375	26.66
January 2005	$12,000	same	32
March 2007	same	$400	30
July 2007	$14,000	same	35
October 2007	$17,000	same	42.5
June 2008	same	$500	34

51. Even assuming that he based his monthly retainer on the assumption that he would work a certain number of hours a day, he never worked less than an average of an hour and a half a day or about seven hours a week, with the exception of a ten month period from March 2004 to January 2005. And during the critical time when his "current compensation" was $17,000 a month, dividing that retainer by his hourly rate would mean that Mr. Chism worked anywhere from 2.13 hours per day/10.6 hours a week to 1.7 hours per day/8.5 hours a week.

52. Finally, Mr. Chism mischaracterizes his salary as "originally set on the assumption that I would average about 1.5 hours a day, or 380 hours a year on Tri-State matters at my old hourly billing rate of $500 per hour." Were the cost of his benefits included, Mr. Chism would actually owe 408 hours a year ($204,000 ÷ $500/hour), not 380 hours. Mr. Chism subtracts his salary, not his salary with benefits, when he subsequently provides his estimate

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of hours worked for the bonuses described below, thus effectively double-charging Tri-State for benefits.

53. Mr. Chism crafted his September 2010 memo and September 30, 2010 emails as though the new arrangement he sought was a direct outgrowth of his and Tri-State's longstanding practice, which convinced Ron that Tri-State owed Mr. Chism more money for the same work that Mr. Chism had earlier agreed to perform for a fixed salary—including the work Mr. Chism had already performed in FY 2010. In so doing, Mr. Chism laid the foundation for seeking compensation that exceeded even what he would have been paid as outside counsel, while enjoying the guaranteed income, benefits, and freedom from timekeeping of his inside-counsel position.

54. Neither Tri-State's nor Mr. Chism's respective experts were aware of a single instance in the country when an in-house attorney was paid a bonus at his or her former outside counsel hourly rate based on the number of hours over a certain number of hours a day he or she worked, which hours he or she would estimate at the end of the year.

55. Mr. Gordon Kamisar, an expert in the field of placing attorneys in in-house positions and one that this Court found to be credible and knowledgeable, testified that Mr. Chism's modified arrangement resulted in compensation far in excess of the market range for his GC position. Mr. Kamisar testified the market range for similarly-situated in-house GC positions in the Seattle area is $150,000 to $250,000 for full-time work. Mr. Kamisar's testimony also established that the reasonable range for bonuses for such in-house GC positions is between zero and 20 percent of the lawyer's base salary. None of the experts testified to bonuses being given to reward an in-house lawyer for merely working full time or even less than full time.

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56. Mr. Chism's $190,000 salary was within the customary range for in-house GC working full time. In addition to the healthcare coverage and 401(k) contributions he was already being provided, under his modified compensation arrangement Mr. Chism obtained reimbursement of a number of expenses he had previously borne himself. Yet in FY 2010, Mr. Chism also convinced Ron to pay him a bonus of $310,000 for working what Mr. Chism said had been half-time work. This was 163 percent of Mr. Chism's base salary, which according to Mr. Kamisar would be more than eight times the upper limit of typical bonuses for an in-house GC working full time.

57. In an effort to put his bonus in context, Mr. Chism cited Tri-State's gross revenue during a couple of good years and the bonuses the Agostinos gave themselves in those years-FY 2009 and 2010-implying that his requested bonuses were similar in size and reasonable given the company's income. But Mr. Chism's proposed compensation scheme was wholly inconsistent with Tri-State's compensation practices, giving him the benefits of being an employee and even an owner, with none of the risks or downside to which the owners and other employees were subject. Bonuses aside, Mr. Chism's $190,000 salary significantly exceeded the salaries of the Agostinos and the company's officers, all of whom worked full time.[43] The owners intentionally kept their salaries fairly low, averaging about $101,700 in 2009 and $111,000 in 2010. They took the risk of receiving small or no bonuses in less profitable years, which was balanced by the possibility of receiving good bonuses in more profitable years.

58. Ron's practice was to give bonuses to employees only when the company was profitable. The few bonuses he gave to employees that exceeded their salary were based on a percentage of individual project managers' net profit produced for the company-that is, any

[43] Exhibits 7 and 322.

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losses from a project reduced the profit made from others. The numbers were calculated by Ms. MacMillan. In stark contrast, Mr. Chism's proposed bonus arrangement was founded on his outside-counsel hourly litigation rate and his "estimate" of hours worked, with no requirement that he track his time in any way, make a profit for the company, or even that the company be profitable. Under his proposed arrangement, if he worked full time like all other salaried Tri-State employees, he would have been entitled to ask for a bonus that would have resulted in total compensation of one million dollars a year, well in excess of anyone at Tri-State.

59. Mr. Chism knew that Tri-State had never employed in-house counsel before Mr. Chism, and Ron had no knowledge about how in-house counsel are typically paid. Mr. Chism did not advise Ron that he was acting in his own personal interest and not as Tri-State's attorney in proposing the new compensation arrangement. Mr. Chism did not advise Ron to seek independent review of the September 2010 memo or the arrangements it described. Ron accepted Mr. Chism's representations about their past arrangements as true. As Mr. Chism could have predicted, Ron never considered obtaining independent review of the memo or the proposed modified arrangement, because he completely trusted Mr. Chism and assumed the proposed arrangement must be reasonable and in Tri-State's interest.

60. Mr. Chism did not explain that the September 2010 modified compensation arrangement was very different than his prior retainers, litigation charges, and salary, and that whereas it had made sense for Tri-State employees to call him as much as they wanted when he was on a flat retainer or salary for all hours worked, he was now asking to be paid $500 an hour for everything he did over 1.5 hours a day, including tasks he would not have charged at that rate or at all as outside counsel, without tracking his time as he had done for litigation. Mr.

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Chism did not advise Ron that this new arrangement could result in Tri-State paying him more than if he served as outside counsel and simply charged by the hour. To the contrary, Mr. Chism testified he told Ron the new arrangement would be cheaper than raising his salary, because Tri-State would only pay him for hours actually worked.

61. Ron forwarded this email to his brothers[44] as well as to Ms. MacMillan.[45]

62. Tri-State calculated Mr. Chism's bonus using the identical numbers provided by Mr. Chism in his September 30, 2010 email: 620 excess hours (1000 - 380) x $500/hour rate, or $310,000.[46] Tri-State paid the $310,000 bonus to Mr. Chism over three installments.[47]

63. Mr. Chism's 2010 proposed new compensation arrangement provided for potential bonuses based on his reported "best estimate" of hours worked in the past year. He interpreted that language as leaving him free not to track or record his time in any way, and he did not do so. Although he kept an electronic calendar, he testified he did not include all his activities in it. He testified that he deleted documents, including whole email files, when he considered a matter complete. Mr. Chism also worked at home much of the time, maintained a separate email account, and worked on computers that were not tied to Tri-State's server. As a result, the company did not have a complete record of his work, but only what he chose to share with it, leaving any assessment of the time he spent on Tri-State matters and the tasks he performed practically entirely within his own control. Mr. Chism testified that he "just knew" how much he was working on Tri-State matters. At trial he was unable, without reviewing records, to recall details such as how much he worked on a particular project, how

[44] Exhibits 58 and 59.
[45] Exhibit 57.
[46] Exhibit 11.
[47] Exhibit 372.

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much he worked in any week, month, or year, or whether he actually went on the vacations listed on his calendar.

64. By proposing that he would report his time only once a year, with no requirement of keeping records, Mr. Chism further added to the likelihood that his "best estimate" would be neither reliable nor subject to challenge. He also limited his client's ability to anticipate its potential exposure for the cost of his work on an ongoing basis inasmuch as, unless Tri-State proactively sought the information from him, the company would not know until the end of the year how many hours Mr. Chism claimed to have worked.

65. Mr. Chism's estimate of his hours for FY 2010, offered in his September 30, 2010 email to Ron as justification for a $310,000 bonus, is not reliable. Mr. Chism provided Ron no documentation or details about his work, other than to say it included four "out-of-the-ordinary" matters: the Ploegsma grievance/arbitration; the Ritke matter; the DEA claim/litigation; and the Canadian project. Tri-State was represented by outside counsel on each of those matters. Mr. Chism admitted at trial that one of those matters, the Ploegsma arbitration, did not take much of his time, and he deleted his email file on it at an unspecified time after the arbitration decision was issued. In an email to Ron in December 2010, Mr. Chism stated that any bonus he was awarded for FY 2010 could be attributed to the DEA claim-and all his other work was covered by his "base compensation."[48]

66. Mr. Chism testified that he did not work a regular schedule during FY 2010. His calendar shows a number of multiple-day personal trips to New York, Palm Springs, Los Angeles, Vail, Hawaii, and Whistler during the year, as well as work for other clients than Tri-State, making it even more likely that, without records tracking his time, he could not say with any accuracy how many hours he actually worked.[49]

[48] Exhibit 325.

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67. Mr. Chism testified that he did not recall if he went on some of those trips, which demonstrates the unreliability of his assertions about past events and the time he spent on Tri-State matters. To the extent his memory is so weak that he cannot recall significant events on his calendar, his proposal that he be given substantial bonuses based on only an estimate of his time, with no tracking to ensure its accuracy, was neither fair nor reasonable, and certainly was not in Tri-State's interests.

68. Mr. Chism's proposal that he should be paid $310,000 for FY 2010 was also not fair, because it was based on his misrepresentations about the 7.5 hour a week and $500 an hour foundations for his "base" salary. By starting from those erroneous numbers, he increased the amount of the bonus he proposed as appropriate and was actually paid.

69. At the time Mr. Chism proposed the 2010 modified arrangement, FY 2010 was ending. He had already performed the work on which any additional compensation, i.e., a "bonus," for FY 2010 was based, and had done so under his original salary arrangement, which did not provide for a bonus or reimbursement for the expenses included in the new arrangement. Mr. Chism did not offer or promise to do anything new, nor did he do anything new, in exchange for the $310,000 bonus. He testified that he did not commit to staying at Tri-State for any length of time in exchange for the new, more lucrative arrangement. He also admitted that his agreement under the original salary arrangement was to do whatever it took as far as Tri-State's non-litigation work, and that did not change under the modified arrangement.

70. At its annual meeting, Tri-State's Board of Directors did not discuss Mr. Chism new bonus structure/compensation arrangement. The minutes for that meeting state only generally that "all corporate activity since the last annual meeting and business decisions of the

[49] Exhibit395 (GC 000233-244).

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Corporation's officers, directors and shareholders, while acting for the Corporation are hereby ratified and confirmed."[50]

71. In early 2011, Mr. Chism began to advocate for a change in Tri-State leadership, in particular to provide more support to Ron or replace him as President.

72. By July 2011 Mr. Chism was concerned both that Ron's health condition and memory lapses were impacting his ability to run Tri-State and that everyone at Tri-State knew about the problem.[51] Mr. Chism expressed those concerns in a memo he emailed to Tri-State's accountant on August 4, 2011. In the memo, Mr. Chism said:

> [I]t is widely known that Ron has some issues that are affecting his ability to run the company on a daily basis. . . . [T]he Company needs to acknowledge that he has some health issues (which is [sic] obvious to almost everyone within senior management already) that are going to limit his ability to continue carrying the torch as before . . .

73. Mr. Chism acknowledged he also told the Agostino brothers that Tri-State had a fiduciary duty to tell its partners in the Canadian project about Ron's health. Mr. Chism also said Ron would need to step down as President of Tri-State due to his condition.

74. Mr. Chism testified that despite his own expressed concerns about Ron's health throughout 2011, he did not observe Ron's memory or judgment to be impaired at any time during Chism's employment by Tri-State. However, others, including Ms. MacMillan, Larry, and Tom, all testified that Ron exhibited noticeable memory loss that got worse over time.

75. Ron testified that he had increasing problems with concentration, attention, and memory over time, which, among other things, adversely impacted his ability to follow and understand what he read, including financial documentation.

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[50] Exhibit 322.

[51] Exhibits 332, 333, and 339.

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76. Ms. MacMillan confirmed that Mr. Chism was aware of Ron's impairment and its negative impact on Tri-State both because they spoke about the issue. Her email to Mr. Chism upon his departure from the company in April 2012 also confirmed that he "helped me so much over this past 2 years in dealing with Ron's illness."[52]

77. The evidence demonstrates that Mr. Chism believed Ron's impairment was impacting his ability to run Tri-State. Mr. Chism's testimony to the contrary was not credible.

78. Ron and Tom testified that Mr. Chism offered to replace Ron as President of TRP, the joint venture running the Canadian project. In early October 2011, Ron and Tom decided to accept his offer.[53] Tri-State understood that Mr. Chism's assumption of the role of TRP President meant he might not be able to perform all his usual in-house counsel work, which in fact occurred. Mr. Chism did not request any additional compensation for taking the TRP President position.

79. During FY 2011, Tri-State had a net loss of approximately 27 million dollars, largely attributable to the Canadian project. Mr. Chism helped Tri-State stay in business, preserve its bonding capacity, and avoid default on that project, which in turn, would have cost Tri-State a minimum of 27 million dollars. Tri-State's bonding company representative, Eric Mausolf, testified that Tri-State's risk of failure on the Canadian project was substantial and that Mr. Chism capably handled the troubled project on behalf of Tri-State. The project was a disaster, the owners of the dam involved in the project were ruthless, the work was intense, and the fate of Tri-State was on the line.

80. By mid-October 2011, Mr. Chism was fully aware of the severity of the problem and believed the company was within days of possibly having to shut down. Tri-State exists

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[52] Exhibit 356.

[53] *See, e.g.*, Exhibit 99 (letter to TRP Contractors Limited Partnership, addressing Mr. Chism as "President").

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today because it survived the crisis associated with the Canadian project and it survived that crisis in large part due to Mr. Chism's efforts and hard work.

81. On October 21, 2011, when Mr. Chism and Ron were in the car on the way back from a meeting in Vancouver, B.C. related to the Canadian project, Mr. Chism raised the issue of a bonus for FY 2011. According to Mr. Chism, he did a spontaneous calculation in his head of the hours he had worked during the previous year, multiplied them by $500, subtracted his salary from his total, and came up with a proposed bonus of $500,000, to which Ron agreed.

82. Ron testified, however, that Tri-State was in financial trouble and he could not pay Mr. Chism anything like that. Ron testified that Mr. Chism brought up that he was going to get Tri-State as much as fifteen million dollars on the DEA claim. Ron testified that he told Mr. Chism that Ron could not pay Mr. Chism anything until Tri-State got money out of the DEA claim.

83. Mr. Chism drafted an agreement memorializing their discussion, which Ron signed ("November 2011 Memo").[54] In the agreement, Mr. Chism acknowledged that Tri-State's cash availability was such that he didn't "expect any accrued supplement/bonus" to be paid until the following year and that he was "happy to wait until cash is available."[55] The November 2011 memo, which referred back to the October 21 discussion in the car, said that Mr. Chism's bonus arrangement, which was meant to "account for the additional time spent which was not anticipated in our longstanding flat compensation arrangement," had been operating for "the last couple of years."[56] That statement, apparently intended to give greater weight to the new bonus system, was not accurate: Mr. Chism had just initiated the arrangement regarding a possible bonus one year earlier.

[54] Exhibit 16.
[55] Exhibit 16.
[56] *Id.*

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84. In the November 2011 memo, Mr. Chism claimed that Ron had already indicated he thought a $500,000 bonus was fair. Rather than writing the email to state that Mr. Chism would not receive the bonus until the DEA money came in, the memo instead said that Mr. Chism did not expect any bonus to be paid until the next year, "maybe out of the DEA settlement."[57]

85. The November 2011 memo went on to say Ron should let Mr. Chism know if he recalled their conversation in the car differently. But Mr. Chism testified that he fully expected Ron to sign the memo. He knew that Ron trusted and relied on him, and that Ron was a man of his word. Once Mr. Chism told Ron they had already agreed to the terms of the November 2011 Memo, Mr. Chism would not have expected Ron to say that Mr. Chism had gotten their agreement incorrectly. Neither Mr. Chism nor any other witness identified any occasion on which Ron disputed Chism's account of events or agreements they purportedly had made.

86. Mr. Chism did not advise Ron that despite Mr. Chism's role as Tri-State's General Counsel, he was acting solely in his own interest and not as Tri-State's attorney in drafting up the November 2011 memo. He did not advise Ron to consult anyone else, including an attorney, about the memo. Trusting and relying that Mr. Chism was acting in Tri-State's best interest, Ron did not believe it was necessary to obtain an independent review of the November 2011 memo and he did not do so.

87. At the time Mr. Chism prepared the November 2011 Memo, Tri-State was losing money. Ron's practice was to give bonuses only when the company made money. The Agostinos did not give themselves any bonus for FY 2011, and Tri-State gave only five other employees bonuses, which were much reduced by 40-50% from what those individuals had received in the past.

88. Tri-State never paid the bonus memorialized in the November 2011 Memo.

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[57] *Id.*

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89. As with his request for a $310,000 bonus for FY 2010, Mr. Chism has not demonstrated he had a reliable basis for estimating his hours worked in FY 2011. He did not track his time. When asked his basis for saying in the November 2011 Memo that he had worked "full time, plus," he testified only that he knows when he is working full time. Yet, he did not work a regular schedule, but rather addressed issues as they came up, sometimes working at night, other days not working at all. He has testified that following the execution of the Canadian contract at the end of August 2010, his work on that project subsided for several months.

90. Mr. Chism testified he first came up with his figures for calculating the FY 2011 bonus in his head during the car ride in which he proposed the bonus to Ron. Mr. Chism's estimate of his hours worked in FY 2011 was nothing more than an educated guess.

91. Mr. Chism's proposal that he should be paid $500,000 for FY 2011 was also not fair to Tri-State because he based it on his underlying premises about the 7.5-hours-a-week and $500-an-hour foundations for his "base" salary, set forth in his September 2010 memo and emails. By starting from those erroneous numbers, he increased the amount of the bonus he proposed was appropriate in his November 2011 memo, on which he based his contract claim in this case.

92. In a meeting in mid-January 2012 regarding the company's financial issues, Ms. MacMillan and Tri-State's accountant said something needed to be put on the books reflecting Mr. Chism's bonus so that the FY 2011 financial statement could be completed. Up to that time, the Agostinos had not agreed to book any amount for a FY 2011 bonus for Mr. Chism, but they agreed to book $400,000 as a liability owed to Mr. Chism.

93. In follow up to the January 2012 meeting, on February 6, 2012, Ms. MacMillan recorded $400,000 as "wages" owed to Mr. Chism in Tri-State's general ledger.[58]

[58] Exhibit 150, p. 2.

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94. Around this same time period, Larry hired attorney Greg Russell. Mr. Chism cites page 139 of the deposition transcript from Tri-State's CR 30(b)(6) deposition and pages 113 and 167 of the deposition of Larry for the contention that Tri-State hired Mr. Russell to advise it regarding Mr. Chism's status as a potential "creditor."[59] None of those pages support that contention nor was there any other evidence that did.

95. Tri-State's 30(b)(6) designee testified that Mr. Williamson suggested that they "think about getting another attorney for corporate matters because now Mr. Chism is a creditor of Tri-State or possible creditor of Tri-State."[60] Larry testified that Tri-State hired Mr. Russell "to replace [Mr. Chism] as our legal counsel, because Mr. Chism, the whole premise was he's going to retire and he would only work on a limited time."[61] Larry confirmed Tri-State hired Mr. Russell to be its lawyer "[o]nly dealing with corporate matters."[62]

96. In short, Tri-State hired Mr. Russell to *replace* Mr. Chism not to advise Tri-State how to resolve the dispute with Mr. Chism. There is no evidence that Tri-State sought or received any advice from Mr. Russell regarding the dispute with Mr. Chism.

97. In March 2012, Larry met with Mr. Chism to discuss his 2011 and a 2012 bonus. Larry had just become President[63] and, according to Mr. Chism, this was the first time Larry negotiated his compensation. Mr. Chism did not provide Larry copies of the September 2010 memos or emails or explain the history of his compensation arrangement with Tri-State. Mr. Chism did not inform Larry that under his September 2010 arrangement with Ron, any bonuses were to be determined at the end of the fiscal year, not mid-year. Mr. Chism did not inform Larry

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[59] *See* Plaintiff's Proposed Findings of Fact and Conclusions of Law, ¶ 79 (citing Sub. No. 213 (Halm. Decl.), Exhibit B (30(b)(6) Dep.), 139; Sub. No. 210 (Halm Decl.), Exhibit E (L. Agostino Dep.), 113, 167).

[60] Sub. No. 213 (Halm Decl.), Exhibit B (30(b)(6) Dep.), 139:16-19.

[61] Sub. No. 210 (Halm Decl.), Exhibit E (L. Agostino Dep.), 168:5-8. Page 113 of Larry's deposition merely discusses when Tri-State hired Mr. Russell, which was in approximately March of 2012.

[62] *Id.*, 168:19.

[63] Exhibit 352.

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that under his arrangement he was to provide his best estimate of his hours for that year, and any bonus was entirely discretionary. Mr. Chism also did not inform Larry that the foundation for his arrangement with Ron, including the 7.5 hour week and $500 an hour premises for his bonuses, was inaccurate.

98. As with his previous estimates of his hours, Mr. Chism's estimate regarding how many hours he had worked in the first half of FY 2012 was not reliable.

99. Larry told him that he would have a hard time collecting the $500,000 because he took advantage of Ron. Mr. Chism admitted he understood Larry's statement to refer to Mr. Chism having taken advantage of Ron's medical condition and the stress of the last year to obtain his agreement to the $500,000 bonus. Mr. Chism testified that he began to walk out of the room because if Larry felt that way then Mr. Chism should not be serving as Tri-State's lawyer or providing legal advice to Larry as Tri-State's President.

100. Although Mr. Chism admits he perceived Larry's accusation as creating a conflict in his continued representation of Tri-State, he continued to negotiate his compensation with Larry without advising him, orally or in writing, that he had a conflict of interest. Mr. Chism also did not advise Larry that he was acting in own personal interest in negotiating his compensation, not as Tri-State's General Counsel, and he did not obtain Larry's consent to Mr. Chism acting in that role. Mr. Chism also did not inform Larry, prior to, during, or in the follow up to their March 28, 2012 negotiation, that Tri-State should consider consulting independent counsel about the proposed terms of Mr. Chism's compensation before any agreement was finalized.

101. Shortly thereafter, Mr. Chism said he had worked a lot of hours during the last six months, for which he would have been paid $500,000 to $700,000 at his $500 hourly rate.

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Those estimates translate to Mr. Chism working 1,190 to 1,590 hours during those six months (1,000 to 1,400 hours plus half of his faulty 380 annual hour estimate). But he eventually said he would accept a $250,000 bonus for that time and $300 an hour going forward if he was paid a minimum salary of $1,500 a week. Mr. Chism also wanted his company computer, cell phone, and the Mercedes Benz when he left Tri-State. Mr. Chism did not commit to continue working for any length of time. Larry agreed to those parameters, but he believed there would be no final agreement until he had a chance to review and sign a written document setting forth all the agreed-upon terms.

102. Mr. Chism had told Ms. MacMillan that he and Larry had reached an agreement to change his compensation from a salary to an hourly rate of $300. Before putting that into effect, Ms. MacMillan told Larry what Mr. Chism said. Larry agreed that Mr. Chism could start being paid by the hour.

103. Mr. Chism was leaving on vacation the next day and said he would prepare a memo of what they had discussed for Larry's review before he left. Mr. Chism drafted the agreement and submitted it to Larry for confirmation.[64]

104. Mr. Chism sent a revised memo on March 29, 2012, which contained a new version of paragraph 6, which Mr. Chism pointed out in his email.[65] Mr. Chism testified that he and Larry had not discussed the substance of paragraph 6, which related to the circumstances in which the agreement could be terminated. Mr. Chism's emails both ended by saying that if Larry found them consistent with his and Mr. Chism's discussion, he should initial two copies of the memo.

[64] Exhibit 20.
[65] Exhibit 21.

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105. Larry reviewed that email and wrote back to object only to paragraph 7, which stated that upon Mr. Chism's departure from the company, Tri-State would give him the computer, cell phone, and the Mercedes Benz that Mr. Chism was using for work.[66] Larry disputed that he had agreed to the transfer of the car and other property. He told Mr. Chism that he would have to deduct $50,000 from the payment they had discussed if Mr. Chism wanted the car. Larry did not object to any of the other terms.

106. On April 4, Mr. Chism responded, "Let's get this resolved first thing Monday when I get back."[67]

107. On April 10, 2012, Mr. Chism and Larry met to follow up on the issue of Mr. Chism's compensation. Mr. Chism said they should get the matter settled. Larry responded that there was no need to talk about it, as Tri-State was not willing to provide Mr. Chism the additional compensation they had discussed. When Mr. Chism asked about the $500,000, Larry said he understood that was still an open issue. Mr. Chism said that under the circumstances, he would have to resign, which he did that same day.[68] Tri-State never paid the $500,000 or $250,000 bonus.

108. Mr. Chism sued Tri-State and Larry Agostino for recovery of $750,000 in unpaid bonuses and damages for Tri-State's willful withholding of wages. Tri-State counterclaimed for breach of fiduciary duty and violation of RPCs 1.5, 1.7, 1.8, and 8.4; however, Tri-State did not bring any claims for legal malpractice. Tri-State also asserted undue influence as a defense and presented evidence to show that Ron suffered from early onset Alzheimer's and that Mr. Chism had known that Ron's judgment was impaired since at least August 2011.[69]

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[66] Exhibit 132.
[67] Exhibit 133.
[68] Exhibit 135.
[69] Exhibit 413.

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109. Prior to trial, then-Superior Court Judge Michael Trickey dismissed the claim on RPC 1.5 (fees).[70]

110. During the period of the month-long trial, the Court heard testimony from Mr. Chism's expert witness, Arthur Lachman, and Tri-State's expert witness, Professor David Boerner, on the subject of lawyers' fiduciary duties. The jury did not hear any testimony from Mr. Lachman or Professor Boerner, and the court did not provide instructions to the jury regarding fiduciary duties.

111. At the end of trial, the parties discussed outside the presence of the jury what instructions and questions the Court would submit to the jury. Tri-State proposed that the Court ask the jury to decide whether the September 2010 arrangement and the $310,000 bonus were enforceable. Mr. Chism objected, arguing that Tri-State could only seek disgorgement in the event it prevailed on its theory and disgorgement was an equitable issue for the court rather than for the jury to decide. Although Mr. Chism was steadfast in his objection to any instruction on that matter being submitted to the jury, his counsel suggested that the Court could ask advisory questions to jury as to whether that arrangement was fair and reasonable, free from undue influence, and made with a full and fair disclosure of the facts upon which the contract was predicated.

112. This Court noted that the commentary to the instruction on restitution, from which disgorgement is derived, allows the court to submit the issue to the jury to obtain an advisory ruling.[71] This Court took Mr. Chism's counsel's suggestion and asked the jury the following three advisory questions as allowed by CR 39(c):

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[70] Sub. No. 90 ("The Court concludes as a matter of law that Plaintiff's status as in house counsel renders the disgorgement of fees for breach of fiduciary duty based on alleged violations of RPC 1.5 unavailable as an affirmative defense or a counter-claim for the Defendants. No Washington case supports the Defendant's legal position on this issue. The Court's ruling does not affect the other alleged RPC violations in this case.")

[71] WPI 303.08 ("Although generally an equitable remedy, the court may elect to submit the issue to a jury because

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QUESTION 1: With respect to Mr. Chism's contention that an enforceable contract arose between himself and Tri-State in or around September of 2010 regarding a modification of his compensation arrangement, whether predicated on Exhibit 9 or otherwise, do you find that Mr. Chism has proven, by a preponderance of the evidence, that the contract was fair and reasonable?

QUESTION 2: With respect to Mr. Chism's contention that an enforceable contract arose between himself and Tri-State in or around September of 2010 regarding a modification of his compensation arrangement, whether predicated on Exhibit 9 or otherwise, do you find that the Mr. Chism has proven, by a preponderance of the evidence, that the contract was free from undue influence?

QUESTION 3: With respect to Mr. Chism's contention that an enforceable contract arose between himself and Tri-State in or around September of 2010 regarding a modification of his compensation arrangement, whether predicated on Exhibit 9 or otherwise, do you find that the Mr. Chism has proven, by a preponderance of the evidence, that he made a full and fair disclosure of the facts upon which the contract was predicated?[72]

The jury answered in the affirmative to all three questions. The jury also found Mr. Chism had proven his contract claims for the FY 2011 bonus of $500,000 and the FY 2012 bonus of $250,000, awarding $750,000 to Mr. Chism, and that Tri-State had willfully withheld these wages, subjecting it to double damages and attorney's fees under RCW 49.52.070 and attorney's fees under RCW 49.48.030. The jury was instructed on, and did not find, undue influence that would have voided these two contracts.

113. On October 1, 2014, the parties appeared for the conclusion of the non-jury portion of the trial. Mr. Chism submitted additional evidence prior to that hearing which the jury did not consider.[73]

III. CONCLUSIONS OF LAW

A. Fiduciary Duties Owed in General.

there is a mixture of equitable and legal issues in the case, or in order to obtain an advisory ruling.").

[72] Jury Verdict form.

[73] Sub. No. 213 (Halm Decl.), Exhibits B, C, D, and E.

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1. As a matter of law, the attorney-client relationship is a fiduciary relationship; an attorney "owes the highest duty" to his client.[74] An attorney must act in and for his client's best interests at all times.[75] An attorney must also act "in complete honesty and good faith" so that he may "honor the trust and confidence" which his client has placed in him.[76] "These duties require full communication and candor."[77]
2. When a lawyer is retained by an organization, his client is the organization "acting through its duly authorized constituents."[78] An in-house lawyer's client is the organization who employs him.[79] An in-house lawyer is still a lawyer; he is subject to the RPCs and "all other laws and rules governing lawyers admitted to the active practice of law in this state."[80]
3. The RPCs capture many of the fiduciary duties that are owed by attorneys. However, the RPCs are not complete; as both sides' experts testified, the fiduciary duties under common law are broader than the RPCs, and a lawyer may breach his fiduciary duty without expressly violating an RPC.
4. Tri-State's expert witness, Professor Boerner, described the history of the fiduciary relationship as arising long before the RPCs,[81] and he characterized the RPCs as "simply a set of rules… that give lawyers guidance as to how they're to perform their obligations"[82] that were "narrower than the fiduciary obligations that lawyers owe."[83]

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[74] *Perez v. Pappas*, 98 Wn.2d 835, 841, 659 P.2d 475 (1983).
[75] *Kelly v. Foster*, 62 Wn. App. 150, 154-155, 813 P.2d 598 (1991).
[76] *Id.* at 155.
[77] *Id.* (citing Black's Law Dictionary 753 (4th rev. ed. 1968))
[78] RPC 1.13(a).
[79] *Id.*
[80] See APR 8(f) (describing limited license to practice for in-house lawyers who are admitted in other jurisdictions).
[81] Fiduciary Duty Proceedings, May 16, 2014, p.13.
[82] *Id.*, p.15, lines 1-3.
[83] *Id.*, p.15, lines 6-7.

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5. Mr. Chism's expert witness, Mr. Lachman, opined that in applying common law and RPCs, the principles that apply to outside lawyers will "apply differently when we're talking about… compensation of employees."[84]

6. RPC 1.7 addresses, among other things, conflicts between a lawyer's personal interest and his client's interest. Under RPC 1.7(a)(2), a lawyer cannot represent a client if "there is a significant risk that the representation of [the client] will be materially limited… by a personal interest of the lawyer" unless certain requirements, such as the client's informed consent in writing, are met.[85] Several comments discuss relationships with organizational clients, but the language is again biased towards outside lawyers.[86] One comment contemplates the conflict of interest that arises when a lawyer seeks employment with his client's opponent or the opponent's law firm, but it addresses the conflict is between the lawyer and his current client, not the lawyer and his potential future employer.[87]

7. Both sides' experts testified to the inherent conflict of interest that exists in matter of legal compensation. As Mr. Lachman stated, "[T]he employee wants to make as much as possible, and the outside lawyer wants to make as possible, and the client, the employer, wants to pay as little as possible."[88]

8. RPC 1.8 provides specific rules for conflicts of interest. RPC 1.8(a) addresses transactions outside of the "ordinary fee arrangements… governed by Rule 1.5."[89] Under this rule, "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 certain

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[84] *Id.*, p.104, line 12-14.
[85] RPC 1.7(b).
[86] *See, e.g.*, RPC 1.7, cmt 35 (suggesting that under certain circumstances, "the lawyer and the lawyer's firm" may need to decline representation of a corporate client if the lawyer sits on the board of directors).
[87] RPC 1.7, cmt 10.
[88] Fiduciary Duty Proceedings, May 16, 2014, p.100, lines 9-15. *See also id.* at p.37 (Boerner testimony).
[89] RPC 1.8, cmt 1.

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requirements are met. For instance, the terms must be fair and reasonable, the client must be advised and given the opportunity to seek independent counsel, and the client must give informed consent. Neither the rule nor its comments specifically address inside counsel.

9. In addition to the RPCs, there are numerous cases in Washington State that discuss an attorney's obligations as *outside* counsel; however, Washington case law is silent as to an attorney's obligations as *inside* counsel. There appear to be no Washington cases addressing even the typical dispute that has arisen in other jurisdictions, whether a former lawyer-employee may sue his former client-employer for wrongful discharge. Thus, this issue appears to be one of first impression in Washington.

10. Whether an attorney's conduct violates the RPCs is a question of law.[90] However, there may be material questions of fact as to the exact circumstances and conduct that occurred.[91] The trial court may consider the RPCs in determining whether an attorney breached his fiduciary duty to his client.[92] The trial court or the jury may decide common law breach of fiduciary duty when a client has brought suit against an attorney for legal malpractice.[93]

11. Attorney fee agreements that violate the RPCs are against public policy and unenforceable.[94] The courts give "particular attention and scrutiny" to attorney fee contracts that are "made or altered during the attorney-client relationship."[95] When a lawyer and a client already have an existing relationship and the lawyer seeks to change their fee agreement on "terms more favorable to the lawyer than originally agreed upon," then the new agreement may be void or

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[90] *Eriks v. Denver*, 118 Wn.2d 451, 457-458, 824 P.2d 1207 (1992); *see also Behnke v. Ahrens*, 172 Wn. App. 281, 297, 294 P.3d 729 (2012).

[91] *See Valley/50th Ave., LLC v. Stewart*, 159 Wn.2d 736, 746-747, 153 P.3d 186 (2007).

[92] *See Cotton v. Kronenberg*, 111 Wn. App. 258, 266, 44 P.3d 878 (2002).

[93] See Behnke v. Ahrens, 172 Wn. App. 281, 297, 294 P.3d 729 (2012) (stating that trial court's ruling and written findings "made clear" that the trial court intended jury verdict on "common law breach of fiduciary issue" and damages to be binding, not advisory); WPI 107.09-11 (Washington Pattern Jury Instructions for attorney's fiduciary duty, burden of proof, and damages).

[94] *Valley/50th Ave.*, 159 Wn.2d at 743 (citations omitted).

[95] *Perez*, 98 Wn.2d at 841 (quoting R. Mallen & V. Levit, Legal Malpractice § 132, at 235 (2d ed. 1981)).

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voidable "unless the attorney shows that the contract was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts on which it is predicated."[96] An attorney must satisfy the requirements of the RPCs even when dealing with a sophisticated client, although the client's sophistication may be relevant to the satisfaction of those requirements.[97]

B. Mr. Chism Owed Fiduciary Duties to Tri-State

12. Mr. Chism claims that because he was an employee of Tri-State, he had no conflicts of interest, engaged in no business transactions, and owed no fiduciary duty when he negotiated his in-house compensation, because in those matters, his relationship with Tri-State was that of employee-employer rather than attorney-client. Mr. Chism presents two primary arguments to support his position. This Court does not find either persuasive.

13. First, Mr. Chism argues that a lawyer does not represent his employer in personnel matters related to his employment as in-house counsel. Mr. Chism cites to the only Washington State authority on this issue, a 1986 advisory opinion from the WSBA Ethics Committee. The full advisory states:

> A lawyer negotiated with corporate management over an employment contract to serve as legal counsel. The contract provided that part of the lawyer's compensation would be shares in the publicly traded corporation. The Committee was of the opinion that negotiations as described by you in working out an employment contract for the full time job of legal counsel for a corporation does not violate RPC 1.8. It appeared to be an arm's length transaction, and it did not appear that you were in any way giving legal advice to the corporation.

WSBA Ethics Adv. Op. 1045 (1986).[98] Because Tri-State is a corporation that has experience hiring outside lawyers, Mr. Chism claims that, like the subject of this advisory

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[96] *Valley/50th Ave.*, 159 Wn.2d at 743-744 (*citing Kennedy v. Clausing*, 74 Wn.2d 483, 491, 445 P.2d 637 (1968)).
[97] *Valley/50th Ave.*, 159 Wn.2d at 745.
[98] This Court makes three observations regarding the weight it gives this 1986 advisory opinion. First, the Washington Supreme Court has emphasized that that ethics opinions issued by the Bar Association are advisory only, and that the Court is the ultimate arbiter of the RPCs. *See In re Disciplinary Proceeding Against DeRuiz*, 152

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opinion, his own negotiations with Tri-State were arm's length transactions and not subject to any heightened duty.

14. Mr. Chism refers to the Restatements to bolster his position. Under Rest. 3d of Lawyering § 16 ("A Lawyer's Duties to a Client"), a lawyer's duties to his client are limited to "matters within the scope of the representation." Mr. Chism also cites to out-of-state authority for the proposition that "[f]or matters of compensation, promotion, and tenure, inside counsel are ordinarily subject to the same administrative personnel supervision as other company employees."[99] Thus, so the argument goes, when an in-house lawyer negotiates his compensation, this is merely a personnel matter; the lawyer acts as an employee, not as a lawyer, during these discussions, and the lawyer is not subject to the same duties as an outside lawyer negotiating fee agreements. Mr. Chism argues that it would be unreasonable for a sophisticated employer to believe that the lawyer-employee was acting on behalf of the employer, not himself, when discussing his own compensation.

15. Second, Mr. Chism argues that for reasons of public policy, a lawyer-employee should not owe a heightened duty to his employer over his own compensation negotiations. Generally, the employer, not the employee, holds superior information and the superior bargaining

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Wn.2d 558, 99 P.3d 881 (2004). Second, the RPCs were substantially revised in 2006. The language and citations in any advisory opinion issued prior to 2006 may not be consistent with the current rules. That is true for RPC 1.8, the RPC at issue in the advisory opinion relied upon by Mr. Chism. Since the current RPCs' effective date of January 1, 2009, the wording of RPC 1.8(a), (a)(1), (a)(2), (a)(3), (b), (c), (d), (f), (f)(1), (g), (h)(1-2), (l), (i)(1), and (i)(3) has changed compared to the pre-2006 version. Third, and perhaps most importantly, the Opinion stated only that an attorney's act, as described to the WSBA, of "working out an employment contract for the full time job of legal counsel for a corporation" did not implicate RPC 1.8(a), because, again as described to the WSBA, the negotiations "appeared to be an arm's length transaction," and it "did not appear" the attorney was in any way giving legal advice to the corporation. Id. (emphasis added). The advisory opinion provided no information regarding the factual circumstances involved—for example, the lawyer's role with the company at the time he/she negotiated the contract, or the role he/she was going to take in the company. The advisory opinion also said nothing about the modification of existing fee arrangements after the in-house employment had already begun, the circumstances when those modifications would invoke RPC 1.8(a), or the application of RPC 1.8(a) to negotiations that were other than at arm's length.

[99] *Nordling v. N. State Power Co.*, 478 N.W.2d 498, 502 (Minn. 1991).

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position in employment negotiations, and therefore, a corporate client-employer does not need the protection of a court-made fiduciary duty. Mr. Lachman testified that he had never heard of any in-house counsel owing a heightened fiduciary duty on matters of his own pay, nor that he could find any authority for this duty.[100] Mr. Chism speculates on the burdens that such a duty would place on the employee -- "to negotiate down from a generous offer, to ensure that no better deal could be had, to tank an interview in favor of another candidate."[101] According to Mr. Chism, "a Corporation could pay the lawyer whatever it chooses; work the lawyer as hard as it chooses; fire the lawyer; and then sue the lawyer alleging breach of fiduciary duty to recover some or all of the money already paid" -- in effect, encouraging companies to "game the system."[102]

16. Tri-State counters Mr. Chism's argument as a misrepresentation of its position. Professor Boerner agreed that the employer would know that a lawyer-employee who is discussing matters of his own pay would be negotiating on his own behalf, "but what he would believe... in a context like this.... Is that this lawyer wouldn't ask for something that wasn't fair and reasonable to the company; they wouldn't ask for that, because I trust them implicitly."[103] Tri-State refers to Mr. Chism's long relationship with Tri-State, including over twenty-five years as outside counsel, and it is undisputed that there was a deep relationship of trust and loyalty between Mr. Chism and Ron. Tri-State observes that an attorney-client relationship "[does] not wink on and off" when a lawyer acts as both attorney and non-attorney for a client.[104]

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[100] Fiduciary Duty Proceedings, May 16, 2014, p.96-97.
[101] Plaintiff's Trial Brief, p.6.
[102] Plaintiff's Summation Brief, p.13, fn.16.
[103] Fiduciary Duty Proceedings, May 16, 2014, p.68, lines 12-17.
[104] Defendants' Summation brief, p.8 (quoting *Kukla v. Perry*, 361 Mich. 311, 316, 105 N.W.2d 176 (1960)).

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17. Mr. Chism is correct that strict application of ethical and fiduciary requirements to employee compensation negotiations, without regard for the facts and circumstances of the situation, could lead to absurd results. For instance, a lawyer-employee who works for a company with an established in-house legal department should not need to inform his manager that he has a personal conflict of interest and that his manager should seek the advice of independent counsel when he negotiates a bonus or raise. Under the facts of a typical in-house employment situation, any duties regarding compensation, if existent, are easily discharged. In those situations, the client-employer is likely to have a well-staffed internal legal department such that the employer is essentially already represented by independent counsel due to this legal infrastructure. Further, that employer is likely sophisticated in hiring inside counsel and both parties will truly be bargaining at arm's length. Additionally, the lawyer-employee may have narrow responsibilities under the terms of employment, like real estate transactions, compliance, or litigation, such that there can be no confusion that the lawyer represents himself in matters of his own pay.

18. But there are two critical distinctions that make Mr. Chism's reliance on the normal in-house compensation structure wholly inapplicable. First, the unique bonus structure Mr. Chism proposed, and the extraordinary bonuses he requested are readily distinguishable from the typical in-house paradigm. None of the experts could cite a single instance when an in-house attorney sought a bonus based on his or her former hourly rate. Nor could they cite a single instance when an in-house attorney sought a bonus based on his or her former hourly rate regardless of whether the work done was that which a legal assistant, paralegal, first year associate, mid-year associate, senior associate, junior partner, or equity partner might do. Nor could they cite a single instance when an in-house attorney sought a bonus based on his

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or her year-end guesstimate as to how many hours he or she worked during the entire prior year. Nor could they cite a single instance when an in-house attorney sought such a bonus for hours worked in excess of a 1.5 hour workday. Finally, none of them could cite a single instance when an in-house attorney used those or even similar factors to request and receive bonuses totaling in excess of a million dollars covering two and a half years (FY 2010, FY 2011, and half of FY 2012), which bonuses could lead to total compensation equally or exceed one million dollars a year if that employee simply worked full-time.

19. Second, although Tri-State had experience hiring outside counsel, Mr. Chism was its first, and only, inside counsel. Before becoming inside counsel, Mr. Chism was Tri-State's primary outside counsel for over twenty-five years; during this period, Mr. Chism developed a relationship of trust and loyalty with Tri-State's president, and Mr. Chism owed fiduciary and ethical duties in all matters relating to his client, including his charging of fees. When Mr. Chism became a Tri-State employee, the change in the form of his compensation from fees, both hourly and a monthly retainer, to a salary with benefits was the only change to this relationship; Mr. Chism's fiduciary and ethical duties to Tri-State did not disappear. Mr. Chism's role as inside GC was truly general; he advised on all matters ranging from contract disputes to employee termination, he made decisions about hiring outside counsel, and he was responsible for reviewing outside counsel fees. Tri-State trusted Mr. Chism to represent its interests in all legal matters, including ensuring that Mr. Chism charged only fair and reasonable fees when he acted both as outside and inside counsel.

20. Given the extremely unique circumstance of Mr. Chism's bonus structure, the extremely large bonuses he received, and Mr. Chism's unique relation to Tri-State, Mr. Chism's

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concern that imposing a duty on him will have application and consequences to other in-house counsel appears unfounded.

21. Imposing a fiduciary duty on an attorney when he or she seeks a midstream compensation modification, especially one as unique as Mr. Chism's, is appropriate when that attorney is (1) the corporation's General Counsel; (2) the corporation's sole in-house counsel; (3) the only in-house counsel that the corporation has ever hired; and (4) the corporation relies on that sole in-house counsel to recommend when outside attorneys should be retained, hire other attorneys, review the reasonableness of most other attorney's fees, and advise the corporation on which attorneys' fees to pay. These circumstances make an in-house GC like Mr. Chism susceptible to overreaching while the client may reasonably trust that the lawyer represents the client's best interests in all legal matters, including not only the legal fees of outside lawyers, but the inside lawyer's own compensation as an employee.

22. Other jurisdictions have held that an in-house counsel is not exempt from state ethics rules in his conduct towards his client-employer merely because he is an employee.[105] Due to the nature of Mr. Chism's long history with Tri-State, the mutual trust and loyalty in their relationship, and Tri-State's limited internal legal infrastructure and inexperience with hiring inside counsel, Mr. Chism owed a fiduciary duty and was subject to the RPCs in matters including his own compensation with Tri-State, even as an employee.

23. Mr. Chism owed that fiduciary duty to Tri-State each time he negotiated a favorable change to his compensation structure: (1) when Mr. Chism negotiated adding an additional bonus structure to his base salary in September 2010; (2) when Mr. Chism negotiated the $310,000

[105] *See, e.g., Kaye v. Rosefielde*, 432 N.J. Super. 421, 478-9, 75 A.3d 1168 (New Jersey 2013) (rejecting attorney's argument that New Jersey's RPC 1.8(a) applied only to traditional attorney-client relationships, not in-house counsel); *Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Williams*, 675 N.W.2d 530, 533 (Iowa 2004) (revoking license of attorney who "took advantage of positions of trust" to defraud "two separate employers" over a period of seven years, violating Iowa ethics rules).

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bonus with Ron Agostino in September 2010; (3) when Mr. Chism negotiated the $500,000 bonus with Ron Agostino in November 2011; and (4) when Mr. Chism negotiated the $250,000 bonus with Larry Agostino in March 2012. Specifically, when Mr. Chism negotiated the additional bonus structure in September 2010, he owed a duty to ensure that the agreement was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts upon which the agreement was predicated. Likewise, when Mr. Chism negotiated the $500,000 and $250,000 bonuses, he owed a duty to ensure that there was a full and fair accounting of the basis for these bonuses.

C. Mr. Chism Breached his Fiduciary Duties and the RPCs When he Modified his Compensation to Include a Bonus for FY 2010, Sought a Bonuses for FY 2010, FY 2011, and half of FY 2012.

C(1). Mr. Chism's Breaches in Relation to the September 2010 Modification.

24. Mr. Chism's modification in September 2010 was a major deviation from his prior fee arrangements. The September 2010 modification contained terms that were much more favorable to Mr. Chism than either his original inside or his previous outside agreement, and the new arrangement resembled neither a typical outside lawyer's fee structure nor a typical inside lawyer's compensation.

25. Under the outside arrangement, Mr. Chism received a $17,000 flat monthly fee for GC services and billed litigation matters on an hourly basis with detailed contemporaneous monthly statements. Mr. Chism's base salary was fairly equivalent to the flat monthly GC fee; however, the new bonus structure differed significantly from the hourly litigation billing. Although the bonus and the litigation matters were both based on hours, the frequency of accounting, detail, scope, and rates were quite different and each favored Mr.

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Chism. These differences were unfair and unreasonable to Tri-State, and Mr. Chism did not fairly and fully disclose facts to Tri-State about these differences, nor their implications.

26. First, Mr. Chism's bonus was calculated based on his best guess, i.e., a guesstimate of hours provided annually by him, rather than based on actual hours worked as provided contemporaneously through monthly invoices that contained a description of the work he did. This was favorable to Mr. Chism because it reduced his recordkeeping and tracking of his own hours. This difference was also unfair and unreasonable to Tri-State. By relying on an annual guesstimate of hours, rather than a monthly statement, Tri-State effectively received a single unpredictable bill for Mr. Chism's excess legal services at the end of each fiscal year, rather than receiving monthly invoices that would allow Tri-State to monitor and adjust its budget for legal expenses. That method was more susceptible to error because at the end of the year, Mr. Chism would simply guess how much he worked based solely on his memory of the entire previous year. Mr. Chism's seemingly spontaneous request for a bonus while in the car on the way back from Canada exemplifies the guesswork employed by Mr. Chism. Further, Mr. Chism never provided any back-up or data to support his request other than generally mentioning a few projects he worked on during the prior fiscal year. Finally, because Mr. Chism was the sole source of this information, Tri-State had limited data to assess or challenge his guesstimate.

27. Mr. Chism argued that Tri-State had more control and visibility over his work activities when he became an employee and could therefore assess whether the hours were accurate. That argument ignores the fact that Mr. Chism often worked from home and had little to no direct supervision at work. If oversight was possible, such oversight adds a burden on Tri-State to actively monitor Mr. Chism's activities if it wanted to confirm his accuracy, and Mr.

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Chism neither disclosed this consequence to Tri-State nor suggested that he provide contemporaneous accounting.

28. Second, Mr. Chism provided no detail about his work compared to when he billed litigation matters. Under his outside billing arrangement, Mr. Chism provided detailed information for each hour worked; a typical entry reads, "Telephone conference R. Thiel; review Summary Judgment orders; telephone conference client re same; review Discovery & open claims."[106] Under the bonus, Mr. Chism was not required to, and did not, provide any details other than to make passing reference to a few things he did during the prior year.

29. Third, Mr. Chism's bonus included all matters; it was not constrained to litigation. This was favorable to Mr. Chism because he would now seek a bonus for non-litigation tasks that would have been included in the flat monthly GC fee under the outside arrangement. Mr. Chism was now also entitled to a bonus for litigation tasks that would previously have been performed by lower-level members or even non-billing staff of his outside firm. In comparison, Mr. Chism's outside litigation billing included work by paralegals and junior attorneys who charged substantially lower rates; as of June 2008, several members of the firm billed litigation matters to Tri-State at $175/hour and $265/hour.[107] This difference dramatically increased the potential compensation that Tri-State owed to Mr. Chism under the new inside agreement; Mr. Chism's bonus now included non-legal work as well as legal, non-litigation matters as well as litigation, and staff, paralegal, or junior attorney tasks as well as partner-level tasks. Mr. Chism did not explain the change in scope and he did not disclose its implications. Mr. Chism, in effect, bargained for overtime under the guise of a bonus and without the infrastructure provided by overtime accounting. As a result, Mr.

[106] Exhibit 402A, p.2.
[107] Exhibit 402A.

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Chism convinced Tri-State to adopt an arrangement that appeared to resemble his outside agreement but was actually an expansion that put Tri-State in a worse position, without clarifying or explaining this difference to Tri-State.

30. Finally, Mr. Chism's bonus was based on a single rate, his "old hourly billing rate of $500 per hour," which he implied had been in place for 10 years. In reality, he had billed that rate for only six months before coming in-house.[108] During the prior six years of his outside work, Mr. Chism's own hourly rate averaged at $400/hour or less; his rate began at $325/hour in December 2002[109] and jumped 25% from $400/hour to $500/hour in June 2008.[110] Mr. Chism became a Tri-State employee in January 2009; it is misleading to characterize $500/hour as his "old hourly billing rate" when Mr. Chism only charged this rate for the final six months of a six year period, and when this rate was at least 25% higher than any of his previous rates. Mr. Chism did not explain the difference or disclose its implications, and Mr. Chism did not provide his rate history, which he would know far more readily than Tri-State. With Mr. Chism's base employee salary of $190,000 (really, $204,000) for 1.5 or 1.7 hours/day, Tri-State would not have appreciated that under the bonus structure, Mr. Chism was effectively entitled to compensation of over $1 million a year by simply working 40 hours a week for fifty weeks. Mr. Chism should have disclosed this information to Tri-State; it would be in his client's best interest to understand its potential exposure in agreeing to this compensation structure. Mr. Chism himself acknowledged that he was "probably not the lowest cost provider"[111] but apparently did nothing to mitigate costs for his client, such as

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[108] Exhibit 10.

[109] Exhibit 300.

[110] Exhibits 311A, 402A.

[111] Exhibit 64. This email, dated February 4, 2011, was sent from Geoff Chism to Jeff Williamson, Tri-State's CPA, and suggests that five months after negotiating the September 2010 agreement, Mr. Chism was still concerned about his compensation: "Frankly, the compensation issue probably should get on the table during these discussions. I am already putting in a great deal more time than was anticipated when this General Counsel

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hiring an additional junior attorney or paralegal to assist him in-house. Whether Tri-State had access to all of his old invoices and could have checked his rate history if it wanted, and whether Tri-State was under an obligation to use Mr. Chism's suggestion of $500/hour is irrelevant; Mr. Chism had a duty to fairly and fully disclose these facts, not expect his client to fact-check his representations.

31. In short, the September 2010 Agreement differed significantly from Mr. Chism's prior arrangements; as compared to the outside arrangement with hourly litigation billing, the new bonus structure was more favorable to Mr. Chism in frequency of accounting, detail, scope, and rates. The terms of the new arrangement were ambiguous and unreasonable; even Mr. Chism is unsure whether he had added a "bonus" (which would be discretionary) or an "adjustment" (which would be owed), as he refers to it as a "bonus/adjustment" in the September 2010 Memo.

32. Mr. Chism had worked with Tri-State for decades, and Mr. Chism had recent experience upon which to estimate the amount of his work. Mr. Chism should have negotiated a simple, common, and customary salary raise, overtime structure, performance-based bonus, arrangement based on his outside fee structure, or other compensation that was more fair and predictable to Tri-State.

33. Mr. Chism should have recommended that Tri-State seek independent counsel to review his proposed bonus/adjustment. Had he done so, no reasonable independent counsel would have advised Tri-State to agree to Mr. Chism's proposal. Independent counsel would have recommended that Tri-State consider raising Mr. Chism's salary and putting in place a

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arrangement was set up more than ten years ago. I have no doubt Ron would be fair and generous as usual, which is part of the reason I am even willing to consider this... Again, I am probably not the lowest cost provider, which needs to figure into the discussion."

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performance-based bonus program similar to how companies normally pay their in-house counsel.

34. In addition to Mr. Chism's common law duty under *Kennedy*, Mr. Chism owed Tri-State a duty arising under RPC 1.8(a), pursuant to which Mr. Chism was prohibited from entering into any "business transaction" with Tri-State, his client, unless (a) "the transaction and terms on which the lawyer acquires the interest [were] fair and reasonable to the client and [were] fully disclosed and transmitted in writing in a manner that [could] be reasonably understood by the client", (b) Tri-State was "advised in writing of the desirability of seeking and [was] given a reasonable opportunity to seek the advice of independent legal counsel on the transaction", and (c) Tri-State gave "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."[112]

35. The comments to RPC 1.8 state that "ordinary" fee agreements are exempted from RPC 1.8(a).[113] However, the Washington Supreme Court recently made clear that this is a narrow exception, and "business transactions" under RPC 1.8 should be viewed broadly: "anything reasonably characterized as an attorney-client business transaction is subject to [RPC 1.8(a)'s] requirements unless specifically exempted."[114]

36. The Court concludes that Mr. Chism's proposed modified fee arrangement with Ron in September 2010 was not an "ordinary" fee agreement, because the proposal involved a

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[112] RPC 1.8(a).

[113] RPC 1.8, comment 1.

[114] *LK Operating, LLC v. Collection Grp., LLC*, 181 Wash.2d 48, 76, 331 P.3d 1147 (2014) ("A 'business transaction' may be defined as '[a]n action that affects the actor's financial or economic interests, including the making of a contract'" (quoting BLACK'S LAW DICTIONARY 227 (9th ed. 2009). Under this definition, because "transactions" include "contracts," "transactions" necessarily represents a broader set of arrangements than "contracts"—in the same sense that all squares are rectangles but not all rectangles are squares. If former RPC 1.8(a) were intended to apply only to the narrower set of discrete "contracts," the rule would use the word "contract," rather than the broader term "transaction."). Current RPC 1.8(a) still uses the broad phrase "business transaction."

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significant change in the parameters of Mr. Chism's compensation, was made after the representation had already begun and after an existing fee agreement had already been in place for more than a year, and the new provisions benefitted only Mr. Chism. As already discussed at length above, such proposed modifications during ongoing representation have long been recognized as extraordinary and deserving of heightened scrutiny.[115] One of Chism's own expert witnesses, Mr. Lachman, has opined that the concerns involved in such midstream modifications, alone, may be sufficient to trigger the requirements of RPC 1.8(a):

> [A]uthorities strongly suggest the Washington Supreme Court, when faced with the issue, may well decide that a change to a fee agreement midstream benefiting the lawyer constitutes a business transaction with a client (and therefore a prohibited conflict of interest) unless the rigorous requirements of RPC 1.8(a) are met.[116]

37. Mr. Chism's procurement of Ron's agreement to the new compensation arrangement in September 2010 was a "business transaction" that was subject to the requirements of RPC 1.8(a).

38. Mr. Chism has not demonstrated he satisfied any of the requirements of RPC 1.8(a) in connection with his dealings with Ron regarding the new arrangement.

39. Because Mr. Chism has not proven that the new September 2010 compensation arrangement was fair and reasonable, predicated upon a fair and full disclosure of the facts, and free from undue influence, Mr. Chism breached his common law duty to Tri-State, in violation of *Kennedy* and its progeny, by negotiating this arrangement. Mr. Chism also breached RPC 1.8(a) and his fiduciary duty to Tri-State.

C(2). Mr. Chism's Breaches in Relation to the Bonus for FY 2010.

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[115] *Valley/50th Ave.*, 159 Wn.2d at 743-44; *Kennedy*, 74 Wn.2d at 490-91.

[116] LAWYERING, Ch. 9 at 5-6 (WSBA 2012).

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40. Mr. Chism also breached his fiduciary duty to Tri-State by suggesting and proceeding under this September 2010 modification by failing to prove this new arrangement was made after a fair and full disclosure of the facts on which it was predicated. Instead, Mr. Chism made numerous misrepresentations and omissions to Ron when requesting these new payment terms, specifically by: (a) misrepresenting that his "current compensation" was "set over ten years ago," when Mr. Chism knew his true "current" compensation—i.e., his $190,000 salary—had just been set a year-and-a-half previously, and his General Counsel retainer, which Mr. Chism now says the memo was meant to reference, had been initiated in 2002, less than eight years prior, when Mr. Chism was working as outside counsel; (b) misrepresenting that Mr. Chism's "base compensation was originally set on the assumption" of the applicability of his "old hourly billing rate of $500 per hour," when Mr. Chism knew that his private practice rate did not become $500 per hour until sometime in 2008 (at which time he did not raise his retainers), and Mr. Chism had not proposed, when he came in house at Tri-State, that his salary be set higher than his retainers to reflect a $500 rate; (c) misrepresenting that his compensation, including his retainers and his salary, had always been "based on me spending an average of less than an hour and a half a day on Tri-State matters, or about seven hours a week," when Mr. Chism knew that his existing salary and the retainers that preceded it were always meant to compensate him for all of the non-litigation hours that he worked for Tri-State, and that he had raised his retainer several times to reflect that the amount of work had increased over time; and (d) failing to explain material aspects of the new arrangement, including that it was unique, extraordinary, and atypical for inside counsel, that Mr. Chism was not the lowest-cost provider, that Tri-State was largely giving up control of this element of its legal expenses, and that, in fact, the new arrangement would

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result in Tri-State paying Mr. Chism more (health benefits, personal expenses, and one rate for all work regardless of skill level involved) than if Tri-State went back to paying him and his firm as outside counsel.

41. Mr. Chism failed to provide a fair and accurate accounting of the basis for calculating those bonuses under the new 2010 compensation arrangement, a further violation of his fiduciary duty to Tri-State.[117] Washington courts have held that to seek fees calculated on an hourly basis, attorneys should maintain contemporaneous records documenting the hours worked and the matters worked on.[118] Courts have noted the unreliability of attorneys' after-the-fact "reconstructed" hours, and expressed concern about using them to justify fees.[119] As discussed above, Mr. Chism kept no contemporaneous or other records of his hours and the matters he worked on during them, and the evidence shows his "estimates" of his hours were unreliable. By seeking payment of $500 an hour at the end of the year for hundreds of hours he could only guess he worked – especially considering that Mr. Chism had no expectation of asking for or receiving such a bonus throughout the year when he performed that work and thus no reason to keep track of those hours, Mr. Chism breached his fiduciary duties to his client.

(C)(3). Mr. Chism Breached his Fiduciary Duty and the RPCs in Relation to the 2011 $500,000 Bonus.

42. RPC 1.7 embodies and provides specific procedures for dealing with a lawyer's more general common law duty of loyalty to his client.[120] Under RPC 1.7, Mr. Chism's fiduciary

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[117] *See, e.g., Perez v. Pappas*, 98 Wn.2d 835, 839, 659 P.2d 475 (1983).

[118] *See, e.g., Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998); *Johnson v Dept. of Transportation*, 177 Wn. App. 684, 699, 313 P.3d 1197 (2013).

[119] *See Johnson*, 177 Wn. App. at 699-700 (affirming denial of fees for reconstructed hours where trial court expressed "skeptic[ism] that anyone can recollect how much time she spent on correspondence more than 18 months prior to the reconstruction of the time"); *In re Disciplinary Proceeding Against VanCamp*, 171 Wn.2d 781, 807-08, 257 P.3d 599 (2011) (review of reconstructed billing statements was "extremely troubling and illustrate[d] the unreasonableness of [the attorney's] fee").

[120] *See, e.g.*, RPC 1.7, Comment 1.

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duty to Tri-State prohibited him from, among other things, providing legal representation to Tri-State if that representation would be materially limited by his own personal interests, including his personal financial interests, unless Mr. Chism took steps to ensure that his personal interests did not have an adverse effect upon the representation.[121] Those steps included, among other things, obtaining Tri-State's informed consent before continuing the representation.[122]

43. A lawyer breaches RPC 1.7(b) if the lawyer fails to fully disclose to the client the full the nature of the lawyer's self-interest in the transaction and the potential risks to the client in entering into the transaction.[123]

44. Mr. Chism breached his fiduciary duty to Tri-State, in violation of RPC 1.7, by requesting that Tri-State pay him $500,000 for FY 2011and indicating that was reasonable, where: (a) Mr. Chism, as Tri-State's GC and only in-house lawyer, was also advising Tri-State in connection with the company's severe financial difficulties; (b) paying such an amount of money to Mr. Chism would have been counter to Tri-State's best interests given its financial straits; (c) the bonus in question served to further only Chism's personal financial interest; (d) Mr. Chism knew that Ron trusted him and would believe anything he proposed was reasonable and in Tri-State's interest; (e) Mr. Chism took no steps to advise Tri-State that it was not legally obliged to pay him a bonus at all and had the discretion to reject his request in its entirety; (f) given the unique, extraordinary, and atypical bonus/adjustment Mr. Chism proposed, Mr. Chism took no steps to advise Ron or anyone else at Tri-State that he was acting in his own personal interest, which created a conflict; (g) and Mr. Chism did not seek

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[121] RPC 1.7(a)(2) and (b).

[122] RPC 1.7(b)(4), and Comment 18.

[123] *See In re McMullen*, 127 Wn.2d 150, 165, 896 P.2d 1281 (1995) (lawyer violated RPC 1.7 by accepting loan from elderly client at below-market rates without adequately explaining lawyer's own poor financial situation or alternate investment opportunities available to client).

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Tri-State's informed consent to continued representation or advise Ron or anyone else to consult independent counsel regarding his proposed bonus.

45. Mr. Chism also breached his fiduciary duty to Tri-State, in violation of RPC 1.7, by advising Larry during the winter of 2011 and the spring of 2012 that the company owed Mr. Chism the $500,000 he had supposedly been promised by Ron and attempting to obtain Larry's independent written agreement that Tri-State would pay Mr. Chism that amount after: (a) Larry had specifically stated his belief that Mr. Chism took advantage of Ron's impairment in the manner in which Mr. Chism procured the supposed approval for this bonus; (b) Mr. Chism recognized that Larry's belief in that regard created a conflict in Mr. Chism's continued representation of Tri-State and working for Larry; (c) Mr. Chism's seeking of a new agreement with Larry to secure the $500,000 purportedly agreed to by Ron served only Mr. Chism's own personal financial interests and no interest of Tri-State; (d) Mr. Chism did not disclose to Larry that Ron had been under no obligation to pay Mr. Chism anything at the time Mr. Chism sought the bonus, and that the underlying premises for the bonus were inaccurate and unfair; (e) Mr. Chism took no steps to advise Larry that he was acting in Mr. Chism's own personal interest, not that of Tri-State, which created a conflict; and (f) Mr. Chism did not advise Larry or anyone else at Tri-State of Chism's personal interest or conflict, seek Tri-State's informed consent to continued representation in negotiating a new agreement, or advise Larry or anyone else at Tri-State to consult independent counsel.

46. Mr. Chism's citation to Los Angeles County Bar Association Op. No. 521 (2007) is not persuasive. In that matter, the Bar Association found, under dissimilar facts and under California's ethics rules, that a fee dispute, by itself, did not create a conflict of interest preventing continued representation in litigation by a law firm whose client disputed its fees.

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The firm served as outside counsel and only represented the client in the single litigation matter in which the fees were at issue.

47. Here, by contrast, Mr. Chism served as Tri-State's General Counsel and only in-house attorney, and advised the company on virtually all matters, including Tri-State's financial problems and the company's need for and representation by outside counsel. Thus, unlike the outside counsel in the L.A. Bar Association Opinion, Mr. Chism's personal interest in a discretionary $500,000 bonus—more than twice his salary—was in direct conflict with his continued representation of and advice to the company regarding its financial difficulties and legal representation, as in those capacities he should have informed Tri-State of the unreasonableness of and absence of any obligation to pay him the requested bonus.

48. That Larry had accused Mr. Chism of taking advantage of Ron regarding the bonus and that Mr. Chism continued to negotiate with Tri-State despite that accusation is yet another fact not present in the California opinion. Whether Mr. Chism may have continued to sufficiently or even successfully represent the company regarding other matters does not change this analysis. Mr. Chism breached RPC 1.7 in seeking the $500,000 bonus for FY 2011.

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(C)(3) Mr. Chism Breached his Fiduciary Duty During the March 2012 Negotiations.

49. A lawyer's efforts to settle a claimed past-due fee obligation is a business transaction that is subject to the requirements of RPC 1.8(a).[124] In addition, the official comment to RPC 1.8 states that the ordinary exclusion of fee agreements from RPC 1.8 does not apply if "the

[124] *Valley/50th Ave*, 159 Wn.2d at 746; *see also In re Discipline of Haley*, 157 Wn.2d 398, 407-08,138 P.3d 1044 (2006) (lawyer violated RPC 1.8(a) by entering into agreement with client that changed their compensation arrangement, among other things to reflect their creditor-debtor status, without making required disclosures).

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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, comment 1 (emphasis added).

50. Mr. Chism's negotiations with Larry and the resulting putative agreement were not ordinary fee discussions. Mr. Chism was not merely proposing payment under the parameters of the September 2010 arrangement, he was negotiating the payment of what Mr. Chism believed to be an outstanding debt to him for a $500,000 unpaid bonus for FY 2011, plus for the first time, payment of a *mid*-year bonus (in the amount of $250,000). Moreover, the particular transaction that Mr. Chism proposed, and later claimed Larry had agreed to, included a transfer of nonmonetary property of Tri-State—a Mercedes Benz owned by Tri-State worth at least $50,000, a computer, and a cell phone—as partial payment for Mr. Chism's services. These circumstances made Mr. Chism's negotiations with Larry in March 2012, and the putative "contract" that Mr. Chism argued and the jury concluded resulted therefrom, a business transaction within the scope of RPC 1.8(a).

51. Under RPC 1.8(a), "an attorney-client transaction is prima facie fraudulent."[125] To overcome this presumption of fraud the lawyer "must prove strict compliance with the safeguards of RPC 1.8(a); full disclosure, opportunity to consult outside counsel, and consent must be proved by the communications between the attorney and the client." *Id.* Mr. Chism has the burden to establish these elements, not Tri-State.[126]

52. Mr. Chism failed to meet his burden of proving that the transaction he proposed to Larry in March 2012 was fair and reasonable to Tri-State. Mr. Chism withheld information from Larry that would have shown paying Mr. Chism the $500,000 purportedly agreed to by Ron plus an additional $250,000 was neither in Tri-State's interest nor legally required (let alone

[125] *Valley/50th Ave.*, 159 Wn.2d at 745 (*quoting In re Disciplinary Proceeding Against Johnson*, 118 Wn.2d 693, 704, 826 P.2d 186 (1992)).

[126] *Id.* ("The burden of proving compliance with RPC 1.8 rests with the lawyer.").

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contemplated by the 2010 agreement, which made no reference to a mid-year bonus). Specifically, Mr. Chism discussed nothing with Larry about the history of his bonus arrangement, including that Mr. Chism had procured the arrangement by making inaccurate representations to Ron about Mr. Chism's compensation history, which were the basis for the calculation of the FY 2011 $500,000 bonus. Mr. Chism did not disclose that payment of a bonus under his arrangement was entirely discretionary, and even then any bonuses were not to be discussed until the end of the fiscal year. Mr. Chism also did not disclose that he had no documentation tracking the work he claimed to have performed and the hours he said he had worked were only a guess based on his own unreliable memory. Instead, Mr. Chism told Larry, consistent with Mr. Chism's own personal pecuniary interest, that the $500,000 payment was an absolute and non-negotiable obligation of Tri-State, specifically for the purpose of inducing Larry to pay it.

53. Mr. Chism also failed to prove the transaction he proposed to Larry in March of 2012 was fully disclosed and transmitted in writing in a manner that could be reasonably understood by Tri-State. Indeed, Mr. Chism admittedly presented *nothing* in writing to Larry about the terms of the supposed agreement until *after* the meeting on March 28, 2012 had ended, by which time Mr. Chism contended (and continued to contend at trial) that an enforceable oral agreement had already been reached.

54. Mr. Chism failed to prove that he advised Tri-State in writing of the desirability of seeking the advice of independent legal counsel with respect to the proposed transaction. Indeed, Mr. Chism admits he took no steps to advise Larry or anyone else at Tri-State to seek independent legal counsel concerning the transaction that Mr. Chism claims was negotiated and finalized on March 28, 2012.

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55. Mr. Chism relies heavily on Tri-State's hiring of Mr. Russell in approximately March of 2012. Mr. Chism's counsel questioned Professor Boerner about that hiring.[127] Mr. Chism's counsel paraphrased page 138 of the CR 30(b)(6) deposition of Tri-State, during which Mr. Chism's counsel had questioned Tri-State about the hiring of Mr. Russell. Those questions made clear that the reason for hiring Mr. Russell was due to the fact that Tri-State might need a new corporate attorney, i.e., to replace Mr. Chism, given the apparent conflict with Mr. Chism. Nothing in that deposition suggested that anyone advised Tri-State to retain Mr. Russell to advise Tri-State about how to resolve that conflict with Mr. Chism or that seeking such advice from Mr. Russell was ever contemplated by Tri-State. Mr. Chism's counsel then questioned Professor Boerner about whether the hiring of Mr. Russell satisfied Mr. Chism's obligation to tell Tri-State to hire an attorney regarding the dispute over his $500,000 bonus. Professor Boerner opined: "Certainly if they already knew what Mr. Chism in my opinion was obligated to tell them, he wouldn't need to tell them. They already knew that . . . The duty has been satisfied."[128] Because Tri-State did not already know what Mr. Chism was supposed to tell them, Mr. Chism still had the duty to tell Tri-State to get independent counsel to advise Tri-State about how to resolve the dispute over the $500,000 bonus.

56. Mr. Chism failed to prove he gave Larry a reasonable opportunity to seek independent legal advice before agreeing to the March 2012 transaction. Mr. Chism proposed terms for the first time during their March 28 meeting, including that he be paid a minimum of $1,500 a week even if he did no work, and, by Mr. Chism's account, that he be allowed to keep the Mercedes Benz that Tri-State allowed him to drive, a computer, and a cell phone when he left. By proposing those terms for the first time at that meeting, Larry had no opportunity to

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[127] Sub. No. 213 (Halm Decl.), Exhibit A, 86:8-87:19.
[128] *Id.*, 87:15-19.

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have independent counsel review them before the meeting, even if Mr. Chism suggested that he do so. Then, when Larry disagreed with Mr. Chism's memo that sought to memorialize their discussion, Mr. Chism insisted (as he did at trial) that it was too late to disagree, because an enforceable agreement to pay him $750,000 came into existence at the conclusion of their meeting on March 28, an argument the jury appears to have accepted (without the benefit of any testimony regarding Mr. Chism's fiduciary duties and his violations of the RPCs).

57. Mr. Chism was obligated to comply with the independent legal advice provisions of RPC 1.8(a) even if this Court considers Larry to be a sophisticated businessman who already had access to outside lawyers other than Mr. Chism. While a client's sophistication can be relevant to the particular manner in which the lawyer complies with RPC 1.8, Mr. Chism must still meet the requirements of that rule.[129] Regardless of whether Larry had access to and was aware he *could* seek independent counsel does not mean he knew he *should* do so especially when he never received such advice from Mr. Chism, Tri-State's trusted GC. Nor does any of that negate Mr. Chism's responsibility when engaging in a business transaction with that client.[130]

58. Further, "[t]he opportunity to seek independent advice must be real and meaningful. It is not enough that at some moment in time an opportunity existed, no matter how brief or fleeting that opportunity might have been."[131] The disclosures and notices required by RPC 1.8 are meaningless unless Mr. Chism gave Larry a reasonable amount of time to act upon the

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[129] *Valley/50th Ave.*, 159 Wn.2d at 745 ("A client's sophistication does not relax the requirements of RPC 1.8.").
[130] *See In re Discipline of Haley*, 157 Wn.2d at 407-08 (breach of RPC 1.8 where lawyer failed to advise client to consult independent counsel about revised fee agreement, even though client had just recently consulted other counsel about a second agreement presented by the lawyer); *Liebergesel*, 93 Wn.2d at 891 (that individual is shrewd and successful businessman does not negate the impact of his trust and confidence in one acting as fiduciary).
[131] *Id.* at 746.

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information disclosed and seek independent counsel. The definition of a 'reasonable opportunity' may depend on the circumstances of any given case, but it will always mean more than the mere physical ability to contact an attorney.[132] Mr. Chism has the burden to demonstrate that he afforded Tri-State a real and meaningful opportunity to seek independent counsel.[133]

59. In this case, whether Larry had other lawyers with whom he *could* have discussed Mr. Chism's proposal (and the record is clear that Tri-State did not hire an attorney for such purpose) does not excuse Mr. Chism's failure to advise him that he *should* discuss the proposed transaction with another lawyer. Nor did Mr. Chism give Larry an opportunity to do so. Accordingly, Mr. Chism has not proven he satisfied any of the requirements of RPC 1.8(a). He failed to overcome the presumption of fraud as to the transaction with Larry in March 2012 and he violated his duty to Tri-State under RPC 1.8(a) by entering into it.[134]

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D. Mr. Chism Breached RPC 8.4(c) with Respect to Each Transaction.

60. Pursuant to both RPC 8.4(c) and Washington's common law, Mr. Chism further owed a fiduciary duty to be fully honest in all of his dealings with Tri-State.[135] A lawyer violates this duty not merely by lying to a client, but also by failing to disclose all relevant information to

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[132] *Id.; see also Haley*, 157 Wn.2d at 408 (violation of RPC 1.8 where lawyer had client sign revised fee agreement the same day it was presented, providing no opportunity for the client to consult with independent counsel).
[133] *Valley/50th Ave.*, 159 Wn.2d at 746.
[134] *Id.* at 745; *Johnson*, 118 Wn.2d at 704.
[135] *See* RPC 8.4(c) (prohibiting lawyers from "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation); *In re Discipline of Huddleston*, 137 Wn.2d 560, 573, 974 P.2d 325 (1999) ("[l]awyers are expected 'to exhibit the highest standards of honesty and integrity' and not to engage in dishonest, fraudulent or deceitful conduct"); *In re Disciplinary Proceedings Against Dann*, 136 Wn.2d 67, 77, 960 P.2d 416 (1998) ("Lying to clients is an assault upon the most fundamental tenets of attorney-client relations"); *Perez v. Pappas*, 98 Wn.2d at 841-42 (lawyer breached common law fiduciary duty by, among other things, misrepresenting "contingencies" that supposedly justified an increase in his fee, when lawyer knew the contingencies were "illusory"); *Kelly*, 62 Wn. App. at 154-55 (a lawyer's fiduciary duty to a client includes the "duty to act in and for the client's best interests at all times and to act in complete honesty and good faith to honor the trust and confidence placed in them").

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the client concerning a contract or other business transaction between them.[136] A lawyer also violates this duty by representing something as a fact when the lawyer does not really know if the "fact" is true.[137] A lawyer may also violate this duty by seeking payment from a client for legal services based upon reconstructed billing records created long after the services in question were rendered, and that thus will necessarily overstate and understate the amount of time actually expended by the lawyer on those services.[138]

61. Mr. Chism violated his duty of honesty and forthrightness to Tri-State under RPC 8.4(c) and Washington common law by misrepresenting to Ron in September 2010 that his then-current compensation was "based on me spending an average of less than an hour and a half a day on Tri-State matters, or about seven hours a week," when Mr. Chism knew at the time he made this statement that his existing salary and the retainers that preceded it were always meant to compensate him for all of the non-litigation hours that he worked for Tri-State and that he had raised his retainer several times to reflect that the amount of work had increased over time.

62. Mr. Chism violated his duty to Tri-State under RPC 8.4(c) and Washington common law by misrepresenting to Ron, in that same communication, that his "current compensation" was "set over ten years ago," when Mr. Chism knew at the time he made this statement that his true "current" compensation—i.e., his $190,000 salary—had just been set a year-and-a-half previously. The same is true even if Mr. Chism meant the memo to reference the GC retainer, which had been initiated in 2002. Not only was that compensation initiated eight

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[136] *See Liebergesel*, 93 Wn.2d 881, 889-90.

[137] *In re Disciplinary Proceeding Against Boelter*, 139 Wn.2d 81, 99, 985 P.2d 328 (1999) (lawyer violated RPC 8.4(c) by suggesting to client that he would disclose taped recordings of a particular confidential conversation with the client, where in fact lawyer did not know if the tapes even existed).

[138] *In re Disciplinary Proceedings Against Dann*, 136 Wn.2d at 78 (disciplining lawyer for seeking payment based upon reconstructed billing records; "reconstructed records generally represent an overstatement or understatement of time actually expended") (*quoting Ramos v. Lamm*, 713 F.2d 546, 553 n.2 (10th Cir. 1983)).

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years ago, rather than ten, his compensation of $500 an hour had only been set during the preceding six months or so before he went in-house.

63. Mr. Chism violated his duty to Tri-State under RPC 8.4(c) and Washington common law by stating to Ron in September 2010 that during the prior fiscal year, "realistically I have probably been averaging something over 60% of a normal workday on your matters. To be conservative, let's call it 50%. That translates into 1,000 hours of time, of which 380 hours have been covered by my base compensation." Mr. Chism knew at the time he made this statement that he had kept no records of the time he spent on Tri-State work and had no other reliable basis to say how many hours he had worked during the prior fiscal year, and yet he misrepresented these figures to Ron as reasonable estimates. Mr. Chism also knew at the time he made this statement that there had been no agreement that his salary covered only 380 hours a year; rather, he had agreed to do "whatever it takes" in exchange for his salary just as he had agreed to do whatever it takes in exchange for his GC retainer.

64. Mr. Chism violated his duty to Tri-State under RPC 8.4(c) and Washington common law by misrepresenting to Ron in November 2011 that Mr. Chism's bonus arrangement had been in effect "[f]or the last couple of years," when Chism knew at the time he made this statement that he had only received one prior bonus and that the arrangement had been in effect for just barely over one year.

65. Mr. Chism violated his duty to Tri-State under RPC 8.4(c) and Washington common law by stating to Ron in November 2011 that during the prior fiscal year, Mr. Chism had "actually been working full time, plus, on your matters … conservatively call it 70%, or 1,400 hours," when Mr. Chism knew at the time he made this statement that he had kept no records of the time he spent on Tri-State work and had no other reliable basis to say how many hours he

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had worked during the prior fiscal year, and yet he misrepresented these figures to Ron as reasonable estimates.

66. Mr. Chism violated his duty to Tri-State under RPC 8.4(c) and Washington common law by misrepresenting to Ron in November 2011 that they had agreed Mr. Chism would get paid a $500,000 bonus the following year, whether out of the DEA claim or some other matter, when Mr. Chism knew at the time he made this statement that Ron had told him Tri-State could and would not pay Mr. Chism any bonus until the money from the DEA claim, in particular, came in.

67. Mr. Chism violated his duty to Tri-State under RPC 8.4(c) and Washington common law by advising Larry in March 2012 that Tri-State was obligated to pay Mr. Chism a bonus for work performed during the first half of FY 2012, when Mr. Chism knew at the time he made this statement, by reason of the very terms of the memo he had presented to Ron in September 2010, that whether or not any bonus was ever to be paid to Mr. Chism was purely discretionary on Tri-State's part, and that no obligation to pay a bonus existed.

E. Tri-State Did Not Ratify the Transactions Mr. Chism Seeks to Enforce.

68. Mr. Chism has failed to prove that his breaches of fiduciary duty were cured, ameliorated, or otherwise excused on the grounds of ratification. Under the common law of Washington, "[a] party ratifies an otherwise voidable contract if, after discovering facts that warrant rescission, [the party] remains silent or continues to accept the contract's benefits."[139] But for ratification to apply, the party supposedly engaged in the ratification "must act voluntarily and with full knowledge of the facts."[140] Further, a client cannot ratify a breach of fiduciary duty arising out of certain violations of the RPCs.[141]

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[139] *Snohomish County v. Hawkins*, 121 Wn. App. 505, 510-11, 89 P.3d 713 (2004).

[140] *Ebel v. Fairwood Park II Homeowners' Ass'n*, 136 Wn. App. 787, 794, 150 P.3d 1163 (2007); *Ward*, 51 Wn. App. 423, 433, 754 P.2d 120 (1988) (same; approval of award disbursement to attorney and acceptance of benefits

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69. Mr. Chism has not proven that Tri-State ever had full knowledge of the facts concerning Mr. Chism's breaches of fiduciary duties or Tri-State's right to repudiate any of Mr. Chism's bonus- or expense-related arrangements with Ron prior to Mr. Chism's departure from the company.

70. Specifically, Mr. Chism has not proven that at the time Tri-State paid installments on the $310,000 bonus to Mr. Chism in 2011 and 2012, or allegedly agreed to and allocated a $500,000 bonus to Mr. Chism for FY 2011, or allegedly agreed to pay a $250,000 bonus to Mr. Chism for 2012, or continued to accept Mr. Chism's legal services, Tri-State had knowledge or understanding (1) of the unreasonable and unfair nature of the bonus arrangement itself; (2) of the misrepresentations made by Mr. Chism in the course of requesting the arrangement; (3) that Mr. Chism maintained no records or other accounting whatsoever of how much time he was spending on Tri-State's work; (4) that Mr. Chism continued representing Tri-State in the face of a direct pecuniary conflict of interest; (5) that Tri-State was entitled to have been cautioned by Mr. Chism to seek the advice of independent counsel and given the opportunity to do so before entering into any particular transaction with him; or (6) that Tri-State was entitled to any of the other protections required by RPC 1.7, 1.8, and 8.4(c) as discussed above.

71. The minutes from an annual meeting are the only evidence Tri-State cites to support its ratification claim. Those minutes do not mention the payment of the bonus or any discussion

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from agreement without challenge for almost six years does not establish ratification of alleged breaches of fiduciary duty; mere passage of time does not establish ratification). *See, e.g., Peterson v. Neal*, 48 Wn.2d 192, 193-94 (1956) (to find ratification of fraudulent contract, circumstances constituting ratification must have occurred *after* discovery of fraud); *Geoghegan v. Dever*, 30 Wn.2d 877, 898, 194 P.2d 397 (1948) (ratification requires "full knowledge of all the facts and a reasonable opportunity to repudiate the transaction"); *F. T. Larrabee Co. v. Mayhew*, 135 Wash. 214, 221, 237 P. 308 (1925) ("There can be no ratification without full knowledge").

[141] *See, e.g., In re Disciplinary Proceeding Against Egger*, 152 Wn.2d 393, 407, 98 P.3d 477 (2004) ("a client's acquiescence to an unreasonable fee does not absolve misconduct").

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about its merits. Even more critically, those minutes do not suggest that Tri-State was aware at any time of any of the facts set forth in the preceding paragraph.

72. For these reasons, even if it were possible for Tri-State to have ratified violations of the RPCs at issue, Mr. Chism failed to prove that the doctrine could or did apply under the circumstances here.

D. Mr. Chism Must Disgorge Some of his Compensation.

73. Based on the findings and conclusions above, the Court determines that Tri-State has established its counterclaim for breach of fiduciary duty, as well as its affirmative defenses to Mr. Chism's claims based on his breaches of that duty and the RPCs.

74. A breach of ethical duties may result in denial of fees or disgorgement of fees already paid.[142] A trial court may consider the RPCs when a client seeks to recover attorney fees for the attorney's alleged breach of fiduciary duty.[143] The court is not required to find causation and damages to support an order of disgorgement.[144] Disgorgement due to a violation of the RPCs or a breach of an attorney's fiduciary duty "is within the inherent power of the trial court to fashion judgments."[145]

75. Notably, Mr. Chism argued repeatedly that disgorgement was an issue for the trial court rather than the jury to decide. Disgorgement is an equitable claim.[146] As a result, and as Mr. Chism repeatedly argued, this Court could not allow the jury to rule on that issue absent the

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[142] *Eriks*, 118 Wn.2d at 462.

[143] *Behnke*, 172 Wn. App. at 297-298 (citing *Cotton*, 111 Wn. App. at 266).

[144] *Id.* at 298 (citing *Eriks*, 118 Wn.2d at 462). In his Proposed Findings of Fact and Conclusions of Law, at paragraph 202, Mr. Chism cites *Luna v. Gillingham*, 57 Wn.App. 574, 582-84 (1990) for the proposition that the trial court improperly reduced fees by 25% without evidence to support that determination. *Luna* is inapplicable – it is not a case involving disgorgement.

[145] *See Eriks*, 118 Wn.2d at 463.

[146] Disgorgement appears to be one of the remedies available for a claim of restitution. Black's Law Dictionary 1339–40 (8th ed.2004) (defining restitution to mean either disgorgement of something that has been taken or compensation for injury done). Restitution is an equitable remedy. *In re Proceedings of King County for Foreclosure of Liens*, 123 Wn.2d 197, 205, 867 P.2d 605 (1994). Thus, disgorgement is likewise an equitable remedy.

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consent of all parties.[147] Here, Mr. Chism objected to the jury deciding whether he should have to disgorge any fees. Accordingly, the jury's verdict on the fiduciary duty claim as to whether the September 2010 arrangement was fair and reasonable, free of undue influence, and based on a full and fair disclosure of the facts was and could only be an advisory opinion under CR 39(c). Mr. Chism failed to address CR 39(c) in his efforts to argue, now that the jury ruled in his favor, that this Court is bound by those verdicts. His arguments are not persuasive.

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76. Disgorgement of fees is a reasonable way to remediate specific breaches of professional responsibility and to deter future misconduct of a similar type.[148] It is also "well within the court's discretion" to deny disgorgement even though a fiduciary duty has been breached.[149]

77. Where, as here, the lawyer's breach of fiduciary duty is pled as a defense to a lawyer's demand for payment, the breach may reduce or bar the lawyer's claim for an unpaid fee.[150]

78. Based on the $310,000 Tri-State already paid Mr. Chism for FY 2010 and the $750,000 the jury awarded him, Mr. Chism would receive bonuses totaling $1,060,000 for two and a half years of work.

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[147] *See Kim v. Dean*, 133 Wn.App. 338, 135 P.3d 978 (2006) (reversing trial court's denial of motion to strike jury demand for a trial involving a purely equitable claim absent the parties' agreement under CR 39(c)); *Anderson*, 94 Wn.2d at 731, 620 P.2d 76 ("In an equity case the court may empanel a jury only for advisory purposes, unless both parties consent to be bound by the verdict[.]" (citing CR 39(c)).

[148] *Eriks v. Denver*, 118 Wn.2d at 462-63; *Ross v. Scannell*, 97 Wn.2d 598, 610, 647 P.2d 1004 (1982); *Behnke v. Ahrens*, 172 Wn. App. 281, 298, 294 P.3d 729 (2012).

[149] *Kelly*, 62 Wn. App. at 157.

[150] *Ross*, 97 Wn.2d at 610. *See also Shimko v. Goldfarb*, No. CV-04-78, 2008 U.S. Dist. LEXIS 121424, *11 (D. Ariz., Jun. 27, 2008) (lawyer's breach of fiduciary duty "may reduce or bar any claim for fees"); *Pringle v. La Chapelle*, 73 Cal. App.4th 1000, 1005, 87 Cal. Rptr. 2d 90 (1999) ("an attorney's breach of a rule of professional conduct may negate an attorney's claim for fees").

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79. In considering whether Mr. Chism should have to disgorge all or a portion of those bonuses, this Court finds the Washington Supreme Court's decision in *Eriks v. Denver* to be instructive. In that case, the trial court found that the attorney had represented both investors and promoters despite the inherent conflict of interest. In ordering disgorgement, the trial court relied on *Woods v. City Nat'l Bank & Trust Co.*,[151] and *Silbiger v. Prudence Bonds Corp.*[152] In affirming the trial court, the Washington Supreme Court quoted from *Woods*:

> Where [an attorney] ... was serving more than one master or was subject to conflicting interests, he should be denied compensation. It is no answer to say that fraud or unfairness were not shown to have resulted....
> ... A fiduciary who represents [multiple parties] ... may not perfect his claim to compensation by insisting that, although he had conflicting interests, he served his several masters equally well.... Only strict adherence to these equitable principles can keep the standard of conduct for fiduciaries "at a level higher than that trodden by the crowd." See Mr. Justice Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458, 464; 164 N.E. 545 [(1928)].

80. The Washington Supreme Court affirmed the disgorgement of all of Denver's fees, plus prejudgment interest, paid by his investor clients *even though the trial court made no finding of damages and causation.* Denver's violation of the RPCs and breach of his fiduciary duty to his clients sufficed considering that disgorgement of fees is a reasonable way to "discipline specific breaches of professional responsibility, and to deter future misconduct of a similar type."[153]

81. Here, Mr. Chism breached his fiduciary duties and the RPCs when he modified his compensation to include a bonus for FY 2010, and sought bonuses for FY 2011 and half of FY 2012. Each of those individual breaches of Mr. Chism's fiduciary duties owed to Tri-

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[151] 312 U.S. 262, 61 S.Ct. 493, 85 L.Ed. 820 (1941).
[152] 180 F.2d 917 (2d Cir.1950), cert. denied, 340 U.S. 831, 71 S.Ct. 37, 95 L.Ed. 610 (1950).
[153] *Eriks v. Denver*, 118 Wn.2d at 463. In paragraph 204 of his Proposed Findings of Fact and Conclusions of Law, Mr. Chism appears to argue that only fraud or gross misconduct can support disgorgement. Notably, Mr. Chism fails to discuss *Eriks* in that paragraph, which involved disgorgement due to a conflict of interest just as here.

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State and each individual breach of the RPCs as set forth above warrant disgorgement of a significant portion of the amounts Tri-State paid him and the jury found he was owed.

82. As for his $310,000 bonus for FY 2010, Mr. Chism is entitled to receive a bonus that which an experienced in-house counsel would expect to receive, which is at most 20% of his salary. Mr. Chism's salary was $190,000. Accordingly, he shall disgorge all but $38,000 of the $310,000 bonus he received leaving him with total compensation and benefits for FY 2010 of $242,000.

83. As for his $500,000 bonus for FY 2011, Mr. Chism is entitled to receive a bonus of $335,000, which takes into account the significant contributions he made as president of TRP to help Tri-State stay in business, preserve its bonding capacity and avoid default which, in turn, would have cost Tri-State a minimum of $27 million. Accordingly, he shall disgorge $165,000 of his $500,000 bonus, leaving him with total compensation and benefits for FY 2011 of $539,000.

84. As for his $250,000 bonus for half of FY 2012, Mr. Chism negotiated this bonus despite the absence of any prior agreement that he would be entitled to a bonus based on six months' worth of work. He also negotiated that bonus despite acknowledging the conflict stemming from Larry's accusation that Mr. Chism took advantage of Ron. But Mr. Chism's valuable work on the Canadian project continued into FY 2012, and Tri-State survived in large part due to that work. Accordingly, Mr. Chism is entitled to a bonus of $137,000 and he shall disgorge the remaining $113,000 of the $250,000 bonus, leaving him with total compensation and benefits for half of FY 2012 of $239,000.

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85. In total, Mr. Chism must disgorge $550,000 of the $1,060,000 to which he would otherwise be entitled leaving him with $510,000.[154] Because Tri-State already paid Mr. Chism $310,000, Tri-State owes Mr. Chism $200,000.

86. As found by the jury, Tri-State and Larry are obligated to pay compensation to Mr. Chism pursuant to a contract and their failure to pay him compensation was willful. Accordingly, Tri-State and Larry owe that compensation pursuant to RCW 49.52.050(2).

87. Tri-State and Larry's violation of RCW 49.52.050(2) entitles Mr. Chism to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, i.e., $400,000, together with costs of suit and a reasonable sum for attorney's fees pursuant to RCW 49.52.070.

88. In addition, Mr. Chism's success in recovering judgment for wages or salary owed to him entitles him to an award of his reasonable attorney's fees, in an amount to be determined by the court, to be paid by Tri-State pursuant to RCW 49.48.030.

CONCLUSION

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED THAT:

1. On Mr. Chism's First Cause of Action (Breach of Contract), judgment shall be, and hereby is, entered in favor of the PLAINTIFF.

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[154] Mr. Chism argues in paragraph 207 of his Proposed Findings of Fact and Conclusions of Law that "under the doctrine of account stated, Tri-State is legally barred from asking the Court to return the $310,000 already paid." (citations omitted). In *Sunnyside Valley Irr. Dist. V. Roza Irr. Dist.*, 124 Wn.2d 312, 318, 877 P.2d 1283 (1994), which Mr. Chism cites, the Washington Supreme Court favorably cited the Restatement's definition of that an account stated: "The Restatement (Second) of Contracts § 282(1) (1981) defines an account stated as 'a manifestation of assent by debtor and creditor to a stated sum as an accurate computation of an amount due the creditor.' The Restatement explains further that '[a] party's retention without objection for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent.'" It cannot be said that Mr. Chism and Tri-State were in a debtor and creditor relationship when Tri-State agreed to pay the $310,000 bonus. The doctrine of account statement does not apply by its terms to the facts of this case nor has Mr. Chism cited a case in which that doctrine barred the disgorgement of fees or compensation in general or in circumstances similar to those present here.

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2. On Mr. Chism's Second Cause of Action (Willful Withholding of Wages), judgment shall be, and hereby is, entered in favor of the PLAINTIFF.
3. On Tri-State's Counterclaim, the Court finds for the DEFENDANTS, which results in the disgorgement of $550,000 of the $1,060,000 to which Mr. Chism would otherwise be entitled. That leaves Mr. Chism with compensation owed of $510,000. Tri-State previously paid him $310,000 leaving $200,000 unpaid.
4. Judgment against Tri-State and Larry Agostino shall be, and hereby is, entered in favor of the PLAINTIFF in the amount of $400,000 plus reasonable attorney's fees and costs in an amount to be determined by the court.

Dated this 14th day of November, 2014.

[E-signature on following page]

Honorable Ken Schubert
King County Superior Court Judge

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Case Number: 12-2-32541-3
Case Title: CHISM VS TRI-STATE CONST INC ET ANO

Document Title: ORDER

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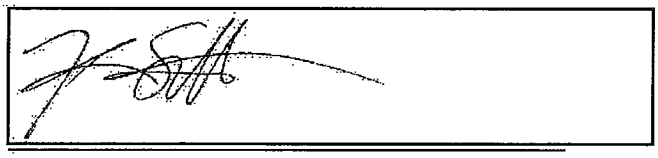
Date: 11/14/2014 4:18:31 PM



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Certificate expiry date: 7/29/2018 12:37:57 PM
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The Honorable Ken Schubert

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

GEOFFREY CHISM,

Plaintiff,

vs.

TRI-STATE CONSTRUCTION, INC. and LARRY AGOSTINO,

Defendants.

NO. 12-2-32541-3 SEA

ORDER ON MOTION FOR AMENDMENT OF FINDINGS

Defendants ask this Court to amend its Findings of Facts, Conclusions of Law, and Judgment. As a preliminary matter, both parties have already filed an appeal of those findings, conclusions, and judgment. Accordingly, Rule of Appellate Procedure (RAP) 7.2(e)(2) appears to limit this Court's ability to now amend its findings of facts and conclusions.[1] This Court is willing to amend certain findings as set forth below. But because those amendments will change a decision then being reviewed by the appellate court, the parties should obtain the permission of

[1] Neither of the parties addressed the impact their appeal might have on this Court's ability to amend its findings pursuant to CR 52(b). This Court's Findings of Fact, Conclusions of Law, and Judgment is reviewable by the Court of Appeals as a matter of right pursuant to Rules of Appellate Procedure (RAP) 2.2(a). Accordingly, under RAP 6.1, the appellate court accepted review upon their timely filing of their notices of appeal/cross-appeal.

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that court prior to the entry of the trial court's decision. Whichever party wants to have the revised findings set forth below before the Court of Appeals should be the one to file the motion requesting that permission.

Both parties suggest that this Court revise Finding of Fact No. 78, which states as follows:

> Ron and Tom testified that Mr. Chism offered to replace Ron as President of TRP, the joint venture running the Canadian project. In early October 2011, Ron and Tom decided to accept his offer.[2] Tri-State understood that Mr. Chism's assumption of the role of TRP President meant he might not be able to perform all his usual in-house counsel work, which in fact occurred. Mr. Chism did not request any additional compensation for taking the TRP President position.

Defendants object to this Court's finding that Mr. Chism became president of TRP in early October 2011 and contend that mid-October 2011 would be accurate. Plaintiff has no objection to changing the word "early" to "mid"[3] and this Court will do so pending approval from the Court of Appeals.

Defendants suggest that this Court change Finding of Fact No. 79, which states as follows:

> During FY 2011, Tri-State had a net loss of approximately 27 million dollars, largely attributable to the Canadian project. Mr. Chism helped Tri-State stay in business, preserve its bonding capacity, and avoid default on that project, which in turn, would have cost Tri-State a minimum of 27 million dollars. Tri-State's bonding company representative, Eric Mausolf, testified that Tri-State's risk of failure on the Canadian project was substantial and that Mr. Chism capably handled the troubled project on behalf of Tri-State. The project was a disaster, the owners of the dam involved in the project were ruthless, the work was intense, and the fate of Tri-State was on the line.

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[2] *See, e.g.*, Exhibit 99 (letter to TRP Contractors Limited Partnership, addressing Mr. Chism as "President").

[3] Plaintiff suggested a number of other changes Finding of Fact No. 78. The evidence supports the findings made by this Court, and thus, this Court declines to make those additional changes.

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Defendants' primary complaint is that Mr. Chism's work on the project occurred in FY 2012, not in FY 2011. Defendants also contend that it would be more accurate to say that the default "could have cost Tri-State as much as $27 million."[4] Plaintiff believes that there is ample evidence to support a finding that his work in both FY 2011 and 2012 greatly assisted Tri-State stem its losses and avoid default. Plaintiff suggests that if any change is to be made, that this Court simply add the phrase "During FY 2011 and FY 2012" to the beginning of the second sentence.

This Court agrees with Plaintiff regarding the timing of the work relating to the second sentence in Finding of Fact No. 79. This Court also agrees with Defendants that it is more accurate to replace the word "would" with "could" in that same sentence. With those two changes made, that sentence would read: "During FY 2011 and FY 2012, Mr. Chism helped Tri-State stay in business, preserve its bonding capacity, and avoid default on that project, which in turn, could have cost Tri-State a minimum of 27 million dollars." This Court will make that change upon approval from the Court of Appeals.

Defendants next identify a typographical error in Conclusion of Law No. 71, wherein the Court stated that Tri-State cited to the minutes of an annual meeting to support its ratification claim. As Defendants correctly point out and Plaintiff does not dispute, Mr. Chism, not Tri-State, was the one to assert such a claim. This Court would correct that typo should the Court of Appeals approve.

Next, Defendants argue that this Court should change its Conclusion of Law Nos. 81, 83, and 84. Defendants contend that this Court's findings and conclusions that Plaintiff breached various the Rules of Professional Conduct warranted it holding that his contracts with Tri-State are unenforceable. But Defendants also acknowledge that the impact of attorney misconduct on

[4] Mtn. to Amend, 4:5.

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the attorney's fees is a matter of discretion.[5] This Court agrees; it exercised that discretion by not voiding Plaintiff's contracts with Tri-State for the reasons stated in its Findings of Fact and Conclusions of Law. Based on those same findings and conclusions, this Court also declines to lower the bonus awarded to Plaintiff in Conclusion of Law No. 83.

Finally, Defendants contend this Court erred by doubling the amount still owed to Plaintiff after disgorgement based on the jury's finding that Tri-State's nonpayment of his wages was willful. As explained in this Court's denial of Defendants' Renewed Motion for Judgment as a Matter of Law, there was a legally sufficient evidentiary basis for the jury to conclude that Tri-State willfully nonpaid Plaintiff's wages.[6] That remains true despite this Court's findings of Plaintiff's ethical violations. Accordingly, this Court denies Defendants' Motion to Amend in all other respects.

Dated this 21st day of January, 2015.

[E-signature on following page]

Honorable Ken Schubert
King County Superior Court Judge

[5] Defs.' Reply, 3:14-16 ("Where a court finds an attorney has breached his fiduciary duties relating to his compensation agreement, it is *the court* that has discretion to determine the remedy.") (citations omitted) (emphasis in original).

[6] Plaintiff suggests that if this Court revisits its Conclusion of Law Nos. 86 and 87 that it leave the "non-discretionary exemplary damages of $750,000 intact, and add that amount to any remaining unpaid wages, after disgorgement." Plt.'s Opp., 8:5-8. In other words, Plaintiff contends that it would be proper to give him double-damages pursuant to RCW 49.52.070 on the amount that the jury found Tri-State owed him, even though this Court found and held that Tri-State owed him substantially less. Notably, the jury did not award him ***any*** exemplary damages. The jury made the requisite finding of willfulness and rejected the defense of a bona fide dispute, which in turn now entitles Plaintiff to exemplary damages under RCW 49.52.070. That statute limits the "judgment for twice the amount of the wages unlawfully rebated or withheld . . ."
Putting aside the fact that this Court is not revisiting those conclusions and that Plaintiff is seeking affirmative relief in its response, Plaintiff is improperly putting the cart (the calculation of exemplary damages) before the horse (the amount owed by Defendants). This Court has found and held that Tri-State owed Plaintiff $200,000, not $750,000. Two hundred thousand dollars is the amount of wages Defendants have not paid, i.e., the amount they unlawfully withheld. Accordingly, $200,000 is the only amount to which RCW 49.52.070 could apply. Plaintiff's proposed outcome would allow him to recover exemplary damages based on an amount Defendants do not owe, i.e., a jury verdict that did not factor in disgorgement due to his breaches of fiduciary duty. That result finds no support in either the plain language of RCW 49.52.070 or equity.

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Case Title:	CHISM VS TRI-STATE CONST INC ET ANO
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LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE

OPINION NO. 521
May 21, 2007

DOES A LAWYER OR LAW FIRM HAVE AN ETHICAL CONFLICT OF INTEREST WHEN A FEE DISPUTE ARISES WITH A CLIENT DURING THE REPRESENTATION?

Summary

Fee disputes between attorneys and clients are a fact of life. In Committee Opinion No. 476, the Committee opined that it is improper for an attorney to sue a client for unpaid fees while remaining counsel of record for the client. This Opinion addresses whether a lawyer or law film has an ethical conflict of interest in continuing to represent a client after a fee dispute arises during the course of the representation. The Committee concludes: (1) a fee dispute does not require a lawyer or law firm to seek to withdraw; (2) a fee dispute, by itself, does not create an ethical conflict of interest; and (3) a fee dispute, where the lawyer does not have any lien rights, is not an adverse pecuniary interest in a client's property.

TABLE OF AUTHORITIES

Cases

Aldasoro v. Kennerson (S.D.Cal. 1995) 915 F.Supp. 181
Barnard v. Langer (2003) 109 Cal.App.4th 1453
Flatt v. Superior Court (1994) 9 Cal.4th 275
Fletcher v. Davis (2004) 33 Cal.4th 61
Floro v. Lawton (1960) 187 Cal.App.2d 657
Hawk v. State Bar (1988) 45 Cal.3d 589
In re Friedman (2002) 100 Cal.App.4th 65
Manfredi & Levine v. Superior Court (1998) 66 Cal.App.4th 1128
People v. McKenzie (1983) 34 Cal.3d 616
Pineda v. State Bar (1989) 49 Cal.3d 753

Ramirez v. Sturdevant (1994) 21 Cal.App.4th 904
Santa Clara County Counsel Attys. Assn' v. Woodside (1994) 7 Cal.4th 525
Setzer v. Robinson (1962) 57 Cal.2d 213
Vann v. Shilleh (1975) 54 Cal.App.3d 192
Walton v. Broglio (1975) 52 Cal.App.3d 400

Statutes

Business and Professions Code § 6201
Civil Code § 2235
Probate Code § 16004

Rules of Professional Conduct

Rule 3-110
Rule 3-300
Rule 3-310
Rule 3-700
Rule 4-200

Opinions

COPRAC Formal Opinions 2006-170
LACBA Formal Opinions 212
LACBA Formal Opinions 476

Misc

Cal. Rules of Court, rule 3.1362

FACTS AND ISSUES PRESENTED

Client retained Law Firm to defend it in connection with an action filed in state court (the "Litigation"). They entered into a standard written retainer agreement, calling for Law Firm to provide legal services on an hourly basis. The written retainer agreement informs Client of its right to discharge Law Firm at any time. The written retainer agreement does not give Law Firm a lien on, or any other security interest in, any of Client's property.

During the Litigation, disputes arose between Client and Law Firm over Law Firm's billings. Client, through it general counsel, contends Law Firm's bills are too high and refuses to pay the bills. At no time during the representation were claims made by the Client regarding the quality of legal services provided.

Law Firm does not represent Client in any other matter.

ISSUES

Can Law Firm continue to represent Client in the Litigation after the fee dispute arises? Is a fee dispute during legal representation an ethical conflict of interest? Is a lawyer's fee claim against a client an adverse pecuniary interest?

I. IT IS NOT AN ETHICAL CONFLICT OF INTEREST FOR LAW FIRM TO CONTINUE WITH THE REPRESENTATION IN LIGHT OF FEE DISPUTE.

A. Introduction.

None of the California Rules of Professional Conduct[1] specifically addresses whether a lawyer or law firm has an ethical conflict of interest when a dispute arises with the client over the attorney's compensation. Instead, the Rules address specific issues regarding the attorney-client relationship, some of which may have a bearing on the attorney's compensation, such as Rule 3-300's requirement that an attorney not obtain an "interest adverse to a client" unless certain criteria are satisfied (discussed in Section D below). Another example is Rule 3-3 10(b)(4), which provides that a lawyer may have an ethical conflict of interest where the lawyer has a "financial . . . interest in the subject matter of the representation." However, that Rule, by its

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[1] Hereafter, any reference to a "Rule" or "Rules" is to the California Rules of Professional Conduct, unless otherwise indicated.

plain terms, does not apply to the facts presented in this Opinion because Law Firm does not have any financial interest in the Litigation.

None of the specific prohibitions in the Rules regarding an attorney's compensation agreement with a client provide that in the event of a dispute with the client over the attorney's compensation, the attorney has an ethical conflict of interest. Nor does case law hold that a fee dispute creates an ethical conflict of interest.

In reaching this conclusion, it is important to keep two points in mind. First, this Opinion only addresses ethical conflicts of interest under the Rules of Professional Conduct. Although Law Firm and Client may have a "conflict" in the lay sense of that phrase, such "conflicts" do not raise ethical issues under the Rules, unless they escalate to a level where one of the other ethical rules becomes an issue. Thus, the Committee concludes that the Rules do not compel Law Firm to take any affirmative steps merely because of the fee dispute. As one court has noted, "the tension between lawyer and client about fees always exists . . . ."[2] Second, so long as Law Firm stays as counsel of record in the Litigation it must continue to "perform legal services with competence."[3]

B. Rule 3-700 Permits The Law Firm To Remain Counsel Of Record During The Litigation, Notwithstanding A Fee Dispute.

Once the fee dispute arises, the fee dispute by itself does not require Law Firm to seek to withdraw as counsel of record in the Litigation. Withdrawal is governed by Rule 3-700, which

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2 *Barnard v. Langer* (2003) 109 Cal.App.4th 1453, 1459.

3 Rule 3-110(A) reads in relevant part:

> (A) A member shall not intentionally, recklessly, or repeatedly fail to perfolin legal services with competence.

provides that withdrawal is mandatory in some instances (subparagraph (B)) and permissive in other instances (subparagraph (C)). Rule 3-700(C)(1)(0 provides that withdrawal may be permissive in the event the "client breaches an agreement or obligation" to an attorney regarding fees. Therefore, when a fee dispute arises, withdrawal can be permissive, not mandatory, although a lawyer may not abandon a client[4] or withdraw "at a critical point and thereby prejudic[e] the client's case."[5]

The implication in making withdrawal permissive, rather than mandatory, is that an attorney *may* continue to represent a client notwithstanding the existence of a fee dispute and, hence, no ethical conflict of interest exists under the Rules. Therefore, by making withdrawal permissive when a fee dispute arises, Rule 3-700 effectively permits an attorney or law firm to make a "business judgment" about whether to remain counsel of record and continue representation of the client or to seek to withdraw. Inherent in such a decision is the lawyer's and/or law firm's pecuniary and self-interest.

The Committee's conclusion is also drawn from other factors. Generally, the negotiation of fees, including retainer agreements, between an attorney and a client is an arms-length transaction.[6] While there is a statutory presumption that transactions between an attorney and a client entered into during an attorney-client relationship "is presumed to be a violation of the trustee's fiduciary duties,"[7] that statutory presumption does *not,* by its plain terms, apply to

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4 *See Pineda v. State Bar* (1989) 49 Cal.3d 753, 758-759.

5 *Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 915, citing Rules Prof. Conduct, rule 3-700(A)(2) and *Vann v. Shilleh* (1975) 54 Cal.App.3d 192, 197; *see also* L.A. County B. Ass'n Prof. Resp. Ethics Committee (1994) Opinion No. 476, electronically available at <http://www.lacba.org/showpage.cfm?pageid=456>.

6 *Setzer v. Robinson* (1962) 57 Cal.2d 213, 217.

7 Prob. Code § 16004(c).

attorney-client fee agreements.[8] Therefore, attorneys are generally permitted to negotiate their fees with their clients on an arms-length basis, subject to the general rule that a lawyer may not "enter into an agreement for, charge, or collect an illegal or unconscionable fee."[9]

However, the Committee's conclusion that Law Firm is not *required* to file a motion to withdraw is not the end of the matter. So long as Law Firm remains counsel of record, it must not "fail to perform legal services with competence," under Rule 3-110(A), or otherwise breach its ethical duties. The fee dispute does not relieve Law Firm of those obligations so long as it remains counsel of record.[10] If the fee dispute reaches a point where Law Firm believes that it can no longer adequately represent Client's interests in the Litigation, then it should file a motion to withdraw." Moreover, if the fee dispute becomes sufficiently contentious or adversarial, the attorney may seek to withdraw, not because of the mere existence of the fee dispute, but because the nature of the consequences of the fee dispute are such that it is "unreasonably difficult . . . to carry out employment effectively," under Rule 3-700(C)(1)(d). Such issues are not raised by the facts of this Opinion.

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8 *Walton v. Broglio* (1975) 52 Cal.App.3d 400, 404; *see also Ramirez v. Sturdevant* (1994) 21 Cal.App.4th 904, 917.

9 Rules Prof. Conduct, rule 4-200(A). The facts of this Opinion do not implicate any such issues.

10 Nothing in this Opinion should be interpreted as suggesting that the nonpayment of fees by a client results in the lawyer or law firm rendering legal services below the standard of care. This Opinion does not address standard of care issues, which are outside the jurisdiction of this Committee.

See Manfredi & Levine v. Superior Court (1998) 66 Cal.App.4th 1128, 1135 ["unpaid fees to counsel" may constitute grounds for a motion to withdraw; decision discusses other situations where an attorney may seek withdrawal].)

Accordingly, the Committee believes that a fee dispute, by itself, does not require a lawyer or law firm to seek to withdraw as counsel of record.[12]

C. A Fee Dispute, By Itself, Does Not Create An Ethical Conflict Of Interest Within The Scope Of Rule 3-310.

The general definition of a conflict of interest is "when in behalf of one client, it is [the lawyer's] duty to contend for that which another client requires him to oppose."[13] Conflicts of interest are usually governed by Rule 3-310. Rule 3-310, however, generally involves "conflicts of interest" that arise by virtue of the attorney's relationship among various clients.[14] Nothing in Rule 3-310 addresses fee disputes between an attorney and a client and no case has ever held that a fee dispute, by itself, constitutes a conflict of interest under Rule 3-310.

As noted, Rule 3-310(b)(4) does not apply because Law Firm does not have any financial interest in the Litigation. Moreover, the California Supreme Court has held that Rule 3-310(b)(4) "addresses not the existence of general antagonism between lawyer and client, but tangible conflicts between the lawyer's and client's interests in the subject matter of the representation."[15] The Committee believes that the fee dispute between Law Firm and Client falls within the rubric of "general antagonism between lawyer and client" which does not implicate Rule 3-310.[16]

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12 A fee dispute may also form part of the basis for an attorney seeking mandatory withdrawal under Rule 3-700(B), but the facts of this Opinion do not implicate such issues.

13 *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282, fn.2.

14 *See* Rules of Prof. Conduct, rule 3-310(C).

15 *Santa Clara County Counsel Attys. v. Woodside* (1994) 7 Cal.4th 525, 547.

16 *Ibid.; see also Barnard v. Langer, supra,* 109 Cal.App.4th at p. 1459 [rejecting contention that a fee dispute between a law firm and client created a conflict of interest, citing *Santa Clara County Counsel Attys. Ass'n v. Woodside, supra,* 7 Cal.4th at p. 547].

The Committee's opinion is supported by other considerations. Attorneys by their very nature act in a dual role: as an advocate for their client and as a business for themselves." As noted, the *potential* for a "conflict" (in the lay, not ethical, sense) between the lawyer's financial interests and those of the client exists in *every* attorney-client relationship, whether on a contingency basis or for an hourly fee, just as they do in any other commercial transaction.[18] Fee disputes arise in a variety of contexts. A client may simply call a lawyer and ask for a $500 reduction in an invoice for no reason at all. Or a client may be experiencing financial difficulties and is asking for a reduction in fees for that reason. Once a dispute is created, the amount is irrelevant. In the experience of the members of the Committee, the vast majority of "fee disputes" are resolved amicably between the client and the lawyer/law firm with little if any acrimony. Some do not resolve amicably and the client has legal options available. However, the Committee does not believe that a fee dispute, by itself, creates a conflict of interest under Rule 3-310.

Therefore, the Committee concludes that a fee dispute, by itself, is not an ethical conflict of interest under Rule 3-310. This conclusion is consistent with Rule 3-700 because, as discussed above, that Rule permits a lawyer to remain as counsel of record, notwithstanding a fee dispute. Because the Committee concludes that Rule 3-310 is not implicated, it follows that Law Firm does not have to make any disclosures, obtain Client's written, informed consent to

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17 "The lawyer occupies an anomalous position. *He practices a profession but in doing so he carries on a business;* he is an officer of the court and as such he should not attempt to evade or impede the orderly administration of justice; he is the agent of a citizen in matters of dispute between citizens or between the citizen and the state; and at the same time and in all things he must pursue the course which is consistent with recognized professional conduct." *(Floro v. Lawton* (1960) 187 Cal.App.2d 657, 673, italics added.)

18 *Barnard v. Langer, supra,* 109 Cal.App.4th at p. 1459.

continue with the representation, or otherwise comply with any of the procedural requirements in Rule 3-310(C).[19]

D. A Fee Dispute Is Not An Adverse Pecuniary Interest To A Client Within The Scope Of Rule 3-300.

Rule 3-300 provides that an attorney shall not "enter into a business transaction with a client, or knowingly acquire an ownership interest, possessory or other pecuniary interest adverse to a client," unless the criteria of paragraphs (A)-(C) of the Rule are satisfied. The Discussion Note to Rule 3-300 clearly states that Rule 3-300 is not intended to apply to "the agreement by which the member is retained by the client, unless the agreement confers on the member an ownership, possessory, security or other pecuniary interest adverse to the client."

In *Fletcher v. Davis* (2004) 33 Cal.4th 61, 67-69, the California Supreme Court held that a charging lien contained in an attorney's retainer agreement was an adverse pecuniary interest within the meaning of Rule 3-300.[20] The Court based its ruling upon the fact that a

> "charging lien could significantly impair the client's interest by delaying payment of the recovery or settlement proceeds until any disputes over the lien can be resolved. For example, when there is a dispute over the existence or amount of an attorney's charging lien, the attorney can prevent the judgment debtor or the settling party from remitting the recovery to the client until the dispute is resolved."

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19 It is difficult to see what practical effect requiring Law Firm to obtain written, informed consent would have, or how Client is prejudiced by the lack thereof Once the fee dispute arose, Client is undoubtedly aware of the fee dispute, has an in-house general counsel representing its interests, was informed in the retainer agreement of its right to discharge Law Firm, and impliedly consents to the representation continuing. *(Cf. In re Friedman* (2002) 100 Cal.App.4th 65, 71; *Ramirez v. Sturdevant, supra,* 21 Cal.App.4th at p. 918.) In addition, if obtaining written, informed consent were mandated, if the client withheld such consent, the lawyer would then be forced to seek to withdraw, contrary to Rule 3-700, which makes withdrawal pei missive rather than mandatory.

20 *Cf.* Cal. State Bar Form. Opn. No. 2006-170 [opining that rule of *Fletcher v. Davis, surpa,* 33 Cal.4th 61, does not apply to contingent fee agreements].

(Id. at pp. 68-69.) The Court, however, contrasted a charging lien with a with an unsecured promissory note, which

> "gives an attorney only a right to proceed against the client's assets in a contested judicial proceeding at which the client may dispute the indebtedness. The note allows the attorney to obtain a judgment, and to seek to enforce the judgment against the client's assets, if any. *It does not give the attorney a present interest in the client's property which the attorney can summarily realize."*

(Id. at p. 68, italics added.)

Here, Law Firm's retainer agreement does not give Law Firm any lien rights. Instead, Law Firm's billing statements sent to Client are simply a demand for payment. Like an unsecured promissory note, the billing statements do "not give the attorney a present interest in the client's property which the attorney can summarily realize."[21] Law Firm would have to bring a judicial action against Client for unpaid fees, which Client could contest. Law Firm would have to reduce its claim to fees to a judgment after an adversarial proceeding.[22] Thus, Law Firm's unsecured demand for payment of fees is similar to an unsecured promissory note, which *Fletcher* and *Hawk* held did not implicate Rule 3-300.

As noted, in Committee Opinion No. 476, the Committee opined that it is improper for an attorney to sue a client for unpaid fees while remaining counsel of record for the client. Opinion No. 476 also noted that in Opinion No. 212, the Committee opined that an attorney should withdraw from all matters in which representation is being provided to the client *prior to* commencing litigation for costs or fees. The Committee reaffirms these Opinions and believes that is where the "line should be drawn" in the context of fee disputes between attorneys and

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21 *Hawk v. State Bar* (1988) 45 Cal.3d 589, 600-601.

22 Even then, a judgment under California law does not create lien rights. *(Aldasoro v. Kennerson* (S.D.Cal. 1995) 915 F.Supp. 181, 191 ["A judgment does not automatically constitute a lien on anything in California, absent further actions by the judgment creditor"].)

clients, *i.e.* Law Firm cannot sue Client for unpaid fees *during* the representation.[23] Because Law Firm's demand for payment cannot be reduced to a judgment or lien without first filing a judicial action, it follows that the fee dispute itself is not obtaining an adverse pecuniary interest to Client within Rule 3-300 and does not require compliance with the requirements of that Rule.

This opinion is advisory only. The committee acts on specific questions submitted *ex parte,* and its opinion is based on the facts set forth in the inquiry submitted.

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23 Although outside the scope of this Opinion, the reader is reminded that prior to suing a client for fees, an attorney must send a notice of right to arbitrate under California Business & Professions Code section 6201, et seq.

WSBA

Advisory Opinion: 1045
Year Issued: 1986
RPC(s): RPC 1.8
Subject: Conflict of interest; negotiation of employment contract for legal services

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A lawyer negotiated with corporate management over an employment contract to serve as legal counsel. The contract provided that part of the lawyer's compensation would be shares in the publicly traded corporation. The Committee was of the opinion that negotiations as described by you in working out an employment contract for the full time job of legal counsel for a corporation does not violate RPC 1.8. It appeared to be an arm's length transaction, and it did not appear that you were in any way giving legal advice to the corporation.

Advisory Opinions are provided for the education of the Bar and reflect the opinion of the Rules of Professional Conduct Committee. Advisory Opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official position of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The Committee's answer does not include or opine about any other applicable law than the meaning of the Rules of Professional Conduct. Advisory Opinions are based upon facts of the inquiry as presented to the committee.

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Postal Service for service a true and accurate copy of the Motion for Leave to File Over-length Brief of Appellant and the Brief of Appellant in Court of Appeals Cause No. 72844-0-I to the following:

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Original and one copy sent by legal messenger for filing with:
Court of Appeals, Division I
Clerk's Office

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

DATED: June 29th, 2015, at Seattle, Washington.

Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick/Tribe