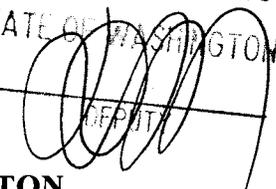


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II, AT TACOMA**

VALLEY/50TH AVENUE, LLC,

Appellant

**RANDALL STEWART, Trustee and MORSE and BRATT, a
professional service corporation,**

Respondent

BRIEF OF APPELLANT

Case No. 39939-3-II

**Steven B. Tubbs
WSBA #7239
Attorney at Law
7001 SE Evergreen Hwy.
Vancouver, WA 98664
(360) 993-0729
Attorney for Appellant**

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INTRODUCTION

This appeal arises from trial on remand from *Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 153 P.3d 186 (2007); CP 109. The purpose of trial, and the central question of this appeal, is whether the Defendant Morse & Bratt, a law firm, hereinafter cited as the “Firm”, fulfilled its ethical obligations to Plaintiff, a client, (hereinafter cited as “Valley”) in negotiating and completing a business transaction between the Firm and Valley. The Trial Court erred in determining that the Firm met its ethical obligations to Valley, and therefore erred in sustaining the enforceability of the challenged deed of trust, and entry of Judgment in the Firm’s favor, including an award of fees and costs. CP 168.

ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: The Trial Court erred in ruling that the Firm was not required to comply with RPC 1.7.

ISSUE:

1. For the purposes of RPC 1.7, Valley’s status as a client of the Firm is not subject to challenge.
 - a. Valley was the Firm’s client under the rule of the case.

b. Valley was the Firm's client under the facts of the case.

c. The Firm did not sever its attorney/client relationship with Valley before undertaking activity in conflict with its duties owed to Valley as counsel for Valley.

2. The Firm was required to meet the requirements of RPC 1.7, and failed to do so.

ASSIGNMENT OF ERROR NO. 2: The Trial Court erred in ruling that the Firm complied with RPC 1.8.

ISSUE:

1. The Firm failed to fulfill its obligations to Valley which it owed to Valley under RPC 1.8.

a. The transaction, apart from the literal terms of the security instrument, was not adequately discussed or disclosed to Valley.

b. Valley was not given the same advice by the Firm which a disinterested attorney would provide.

c. The terms and conditions of the secured transaction were not proven to be fair and reasonable.

2. The Firm did not document its efforts to comply with the requirements of RPC 1.8.

3. The obligations of the Firm owing to Valley under RPC 1.8 were not excused.

a. There is no legal authority which excepts the Firm from its obligations owing to Valley under RPC 1.8.

b. The alleged meeting wherein an alleged conversation occurred between the Firm and Neil Rose in which the Firm informed Mr. Rose of its conflict was not established by clear, cogent and convincing evidence.

ASSIGNMENT OF ERROR NO. 3: The Trial Court erred in limiting the application of the testimony of Plaintiff's expert.¹

ISSUE: Valley's expert witness was qualified; her testimony was relevant; and no objection to foundation was raised during trial.

ASSIGNMENT OF ERROR NO. 4
AND ISSUES PERTAINING THERETO:

The Trial Court erred in entry of the following Findings of Fact:

1. Finding of Fact No. 4. CP 167.
2. Finding of Fact No. 16. *Id.*

¹ The Trial Court made numerous and conflicting rulings, first allowing her testimony; then disallowing it; then allowing it; then considering and dismissing it. Appellant does not have a clear understanding of the treatment of this evidence, and is compelled to preserve the argument.

3. Finding of Fact No. 28. *Id.*
4. Finding of Fact No. 29. *Id.*
5. Finding of Fact No. 30. *Id.*
6. Finding of Fact No. 33. *Id.*
7. Finding of Fact No. 34. *Id.*

ASSIGNMENT OF ERROR NO. 5
AND ISSUES PERTAINING THERETO:

The Trial Court erred in entering Judgment in favor of the Firm, determining that the subject deed of trust was valid and enforceable; and awarding the Firm its legal fees and costs.

STATEMENT OF THE CASE

Neil Rose became a client of the law firm of Morse and Bratt, where his girlfriend practiced law. CP 45, p. 1; When he first became a client, he had an estate worth over ten million dollars. Exhibit 1. The Firm recommended creation of entities to transfer wealth to avoid federal estate tax consequences. *Id.* One of those entities included a Family Residence Trust. Exhibit 2. Rose created the Trust at year end, 1997, as a part of his estate plan. *Id.* One of Rose's three sons, Alexander, was designated as the beneficiary of the trust. *Id.*; RP 12. At that time, Alexander was nine years old. Exhibit 2. Another entity created as a part of his estate plan was Valley/50th Ave., LLC, the Plaintiff below and Appellant herein.

CP 45, p. 1-2; Exhibit 4. Valley was created two months after the Trust was established, in response to the Firm's recommendations. *Id.*; Exhibit 1. The Firm represented Valley from its inception until well after the subject transaction of this litigation was completed. RP 81; RP 90.

The Company's formation documents vested management control of the LLC in Rose. Exhibit 4. Rose then transferred title to real property to the LLC. Exhibit 8. One month later, he assigned 98% of the economic value of the LLC to his other two sons, Brett and Scott, as a part of his estate plan. CP 45, p. 1-2; Exhibit 10. This assignment was completed without the involvement of the Firm.

Rose and his family then became embroiled in commercial litigation. RP 97. The Firm undertook representation of Neil Rose. After some time, the Firm became concerned about the extent of its receivable with Rose, and the prospect of that receivable growing. RP 102. It first ordered a preliminary title commitment regarding Valley's property (Exhibit 11) and then obtained a deed of trust (Exhibit 19) in Valley's real estate as collateral for the personal debts of Neil Rose to the Firm. Neither of Rose's sons was advised of, much less consented to, the creation of the security interest. Exhibit 16; Exhibit 19; RP 159. The validity of the deed of trust is the underlying issue in the instant case. If created unethically, it is invalid. *Valley/50th Ave., L.L.C. v. Stewart, supra.*

When Rose's trial ended, he lacked funds to pay the One Million Dollars-plus (\$1,000,000+) judgment and all of his legal fees. After payment of Seventy-Five Thousand Dollars (\$75,000) to the Firm, further payments ceased. He proceeded into bankruptcy.² RP 212; RP 151; CP 45, p. 2.

In bankruptcy proceedings, remarkably, the trustee in bankruptcy successfully voided one of the entities created by the Firm, the Family Residence Trust, on the grounds that it was a fraudulent transfer! RP 212. The bankruptcy trustee also attacked the assets of Valley/50th Ave, LLC. However, Brett Rose, co-owner of Valley, paid the trustee Ten Thousand Dollars (\$10,000) in exchange for the Trustee's release of the property. RP 157.

With Valley's assets no longer a subject of the bankruptcy proceedings, the Firm made demand through the Trustee on the Deed of Trust for over Four Hundred Seventy Thousand Dollars (\$470,000).³ Exhibit 28. Receiving no further payment, the Trustee sent a Notice of Sale to Valley, and Valley responded with this challenge to the validity of the Deed. Exhibit 29; CP 1. The parties filed cross motions for summary judgment, and the Trial Court granted the Firm Judgment in part. On

² Although Rose's debt to the Firm was dischargeable, Valley was liable as a maker on the note and grantor under the deed.

³ The Trial Court held that only 44% of this demand was owed by Valley. CP 168.

appeal from that decision, the Court of Appeals affirmed the decision in an unpublished opinion, but remanded for determination of the scope of the debt secured by the Deed. On appeal from that decision, the Supreme Court reversed, remanding the matter for trial. CP 109; *Valley/50th Ave., L.L.C. v. Stewart, supra*.

At trial, no one called to the stand at trial could remember who negotiated the terms of the security with Mr. Rose. See, e.g., RP 15-18; RP 191. The Firm called only one witness, Mr. John Nellor. Mr. Nellor had no record of his interaction with Mr. Rose relating to Valley. He produced no calendar records for himself or the Firm; he had no notes of any anticipated discussions with Rose; he had no notes of the alleged meeting; he did not create any memo of his alleged meeting; he did not follow up with a letter confirming the alleged meeting; and, critically, although members of the Firm confirmed that its attorneys were expected to keep time records⁴, no such records regarding meetings to discuss collateralization were ever made.

Only one expert was called to the stand, Ms. Ellen Dial. She attested to the standard of care expected of an attorney confronted with the terms of the note, deed and Representation Agreement, raising numerous questions regarding the fairness and reasonableness of the transaction and

⁴ RP 12; RP 18; CP 162, pp. 7, L. 18 – 9, L. 25.

its terms. RP 125-134. No evidence was offered to show that Valley was given the same advice as a disinterested attorney regarding the secured transaction. Further, no evidence was offered to show that Valley as an independent entity was ever advised to consult another lawyer about the secured transaction. Rose was allegedly told that he needed to do so, a finding in serious question. However, Valley was not. In fact, the evidence is to the contrary. RP 37; RP 66; RP 264. Valley was never told that a conflict of interest existed between it and Rose. Valley was never told, throughout the negotiation and preparation of various drafts of documents regarding the secured transaction that there was a conflict, or a potential conflict, between Valley and its legal counsel, or between Valley and Rose.

Notwithstanding, trial resulted in Judgment in favor of the Firm that was essentially identical to that granted by summary judgment a number of years ago.

ARGUMENT

Standard of review.⁵ An appellate court independently determines whether findings of fact supported by substantial evidence are sufficient to support a conclusion of law. *American Nursery Prods., Inc. v. Indian*

⁵ The Trial Court correctly ruled that the evidence offered by the Firm to overcome the presumption of fraud was subject to the 'clear, cogent and convincing' standard. RP 262. See also, Conclusion of Law #8 (CP 167). This ruling has not been appealed.

Wells Orchards, 115 Wn.2d 217, 797 P.2d 477 (1990). Substantial evidence is the quantum of evidence sufficient to persuade a rational fair-minded person the premise is true according to the ‘clear and convincing’ standard.⁶ *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). A finding that a matter has been proven by ‘clear and convincing evidence’ is not binding. *First Interstate Bank v. Nelco Enters*, 64 Wn. App. 158, 822 P.2d 1260, (1992); *Korst v. McMahon*, 136 Wn. App. 202, 148 P.3d 1081 (2006). For a proposition to be established by this burden, it must be “highly probable”. *Douglas Northwest v. O’Brien & Sons*, 64 Wn. App. 661, 678, 828 P.2d 565, (1992); *Marriage Of Schweitzer*, 132 Wn.2d 318, 329-330, 937 P.2d 1062 (1997).

ISSUES PERTAINING TO ASSIGNMENT OF ERROR NO. 1:

1. *For the purposes of RPC 1.7, Valley’s status as a client of the Firm is not subject to challenge.*

a. *Valley was the Firm’s client under the rule of the case.*

⁶ While deference to the conclusions of the trier of fact is oft-cited, it does not preclude weighing and analysis by the reviewing court so as to arrive at a just result. See, e.g., *Plancich v. Williamson*, 57 Wn.2d 367, 357 P.2d 693 (1960) (“We arrive at this result convinced that the trial judge ascertained the physical or other facts accurately; but that he nevertheless erred in evaluating the facts and in the inferences or conclusions he deduced from the facts. In other words, the trial judge erred in the value judgment implicit in his conclusion of law that the appellants had no reasonable cause for arresting or taking the respondent into custody.”)

Valley was a client of the Firm at all material times, pursuant to the rule of the case. The rule of the case requires that the Court adhere to the facts and rule of law previously established. *Roberson v. Perez*, 156 Wn.2d 33, 41, 123 P.3rd 844 (2005). The facts established in *Valley/50th Ave., L.L.C. v. Stewart, supra*, included the legal status of Valley as the Firm's client. As Valley's status as a client was established in prior proceedings, it may not be revisited. The decision in *Valley/50th Ave., L.L.C. v. Stewart, supra*, is replete with references to Valley as a 'client'. See, e.g., the first sentence: "A law firm, Morse & Bratt (Firm), obtained a deed of trust from a client, Valley/50th Avenue, L.L.C. (Valley), in part to secure existing attorney fees and costs owed by another client, Neil Rose."

That issue was not properly before the Trial Court, and its contrary finding is error.⁷

b. *Valley was the Firm's client under the facts of the case.*

It was established at trial that Valley was a client as a matter of fact, as well as a matter of law. The Firm had recommended the creation of Valley (Exhibit 1; CP 45); prepared the documents to organize

⁷ Although characterized as a 'Conclusion', the content of Conclusion No. 2 is or contains findings: Conclusion No. 2: "There was no attorney-client relationship between Valley... and [the Firm] for the purpose of negotiating and/or executing the [critical documents]". CP 167.

Valley (Exhibits 4,5,6 & 7); handled the transfer of real estate from Rose to Valley (Exhibit 8); became Valley's registered agent (Exhibit 5), and maintained that status until well after the deed of trust was signed (RP 89); and charged Valley fees for its services (Exhibit 34).

Valley's status as an ongoing client was recognized by the Court in its ruling. See, e.g., Hon. Judge Warning, RP 266.⁸ There is insufficient evidence to support any finding to the contrary.

c. *The Firm did not sever its attorney/client relationship with Valley before undertaking activity in conflict with its duties owed to Valley as counsel for Valley.*

At all times, the Firm was required to be cognizant of and ask the critical question, 'Who is the client'. Washington Legal Ethics Deskbook, Chapter 10⁹; WSBA, "Advising the Small Business Client – Ethical Considerations", Barry Althoff, Feb., 2003;¹⁰ RP 125; Comment EC 5-18 to Former DR 5-105.

⁸ Hon. Judge Warning, RP 266, L 1-9: "There is no question but what Valley/50th had an ongoing relationship with Morse and Bratt. The fact that all they were doing at this point was keeping the corporate books, I don't think changes that. If you've got that corporate book on your shelf and you're sending that in every year and you're the registered agent, I think your rational expectation is and the client's rational expectation is that if a problem arises, this is the law firm or the lawyer that I'm going to go to."

⁹ "This chapter looks at what is often called the 'who is the client?' question in organizational settings." §10.1.

¹⁰ "The lawyer need to take particular attention when forming a business entity to determine who is the lawyer's client and make it clear to the others involved in the transaction that the lawyer does not represent them... . Before undertaking any

The potential for a conflict initially arose when Neil Rose created Valley at the Firm's recommendation. CP 45; Exhibit 1. Rose, of course, was a client. His company then became a client. See, e.g., Exhibit 5; CP 45. Within that company, Rose became manager. Exhibit 4. This presented a long-standing and 'classic' potential problem for the Firm.

If, at any time, Rose developed a conflict with Valley, or if his role as manager was compromised by his personal interests, the Firm had an obligation at that time to ask the critical basic question, and then disclose and discuss the actual conflicts of interest involved. The question of client identification, or consideration of 'can we or should we do this' was never discussed within the Firm. RP 34.

Ethical concerns about conflicts can arise when it is merely the potential for the same. *In re Botimer*, 166 Wn.2d 759, 214 P.3d 133, 139 (2009). At that time, full disclosure and consent in writing to the conflict is required.

The need to obtain informed consent in writing arises when there exists a "likelihood that a difference in interests will eventuate" that may "materially interfere with the lawyer's independent professional judgment." ABA ANNOTATED MODEL RULES OF PROF'L CONDUCT rule 1.7 cmt. 8, at 109 (5th ed.2003); see former RPC 1.7. In *In re Disciplinary Proceeding Against Marshall*, 160

representation, a lawyer should ask the most basic questions: who do I represent; who is the client?" Chapter III, CONFLICTS OF INTEREST.

Wash.2d 317, 157 P.3d 859 (2007), this court reasoned that former RPC 1.7(b) " assumes that multiple representation will necessarily require consultation and consent in writing, reasonably so since the rule imposes these requirements anytime there is potential conflict." *Id.* at 336, 157 P.3d 859. Further, " former RPC 1.7(b) applies even absent a direct conflict."

Id. at 337. (emphasis added)

Obviously, when the potential conflict matures into an actual conflict¹¹, RPC 1.7 mandates that 'informed consent in writing be obtained.

Actual conflicts arose when, in a conversation with Mr. Thacker of the Firm some time in February, 1999, Mr. Rose raised the prospect of using Valley's property as collateral for his personal debt. Exhibit 11; Exhibit 12. The issue was compounded by the Firm's own interest in the transaction. Several conflicts among all of the parties were immediately and directly involved: between Rose and Valley; between the Firm and Rose; and between the Firm and Valley.

Accordingly, an actual conflict of interest existed between Valley and Rose. The Firm was aware of this conflict. RP 204. The Firm had an ethical duty to so advise both Valley and Rose. In addition, an actual conflict of interest existed between the Firm and Valley. The Firm

¹¹ "...[A] lawyer represents conflicting interests...when it becomes his duty, on behalf of one client, to contend for that which his duty to another client would require him to oppose." *The Florida Bar v. Moore*, 194 So.2d 264, 269 (Fla., 1966).

was also aware of this.¹² The Firm had an independent ethical duty to so advise Valley.

Although Valley was a client and had reason to believe that the Firm was acting on behalf of Valley¹³, the Firm proceeded with negotiations with Rose, the latter ostensibly wearing ‘two hats’ and acting simultaneously on his own behalf and on behalf of Valley(!), to develop the details of the proposal whereby Valley would pledge its principal asset to the Firm as security for Rose’s debts.

Valley’s status as a client existed for over eight months before any alleged conversation occurred between Rose and Nellor regarding execution of the Documents. During that time, the transaction, including specific terms and conditions of the Agreement, Note and Deed were negotiated, drafted, and exchanged. Clearly, those terms were

¹² RP 204:

Q (Tubbs): You would agree that Rose had a potential conflict of interest in using Valley's real estate as collateral for his own debt; right?

A (Nellor): Yes.

Q: And that conflict was with Valley of course?

A: Well, there's more than that. I mean, there was a conflict between the firm and -- the interest of the firm and Rose.

Q: Right.

A: And then there was Rose's potential conflicts with Valley. Of course, in many respects that's academic since he was at that time the sole manager and sole owner.

¹³ Hon. Judge Warning, RP 266, L 1-9: “There is no question but what Valley/50th had an ongoing relationship with Morse and Bratt. The fact that all they were doing at this point was keeping the corporate books, I don't think changes that. If you've got that corporate book on your shelf and you're sending that in every year and you're the registered agent, I think your rational expectation is and the client's rational expectation is that if a problem arises, this is the law firm or the lawyer that I'm going to go to.”

inherently contrary to Valley's interests. See, e.g., RP 130-132. The Firm did not deny that its interests were in conflict with Valley's interests or that its ability to advise Valley was or could be adversely affected. Instead, it defended solely by arguing that Valley was not its client, and the Firm therefore was not required to consider the matter.

2. *The Firm was required to meet the requirements of RPC 1.7, and failed to do so.*

Given Valley's status as a client when the Firm undertook actions in direct conflict with Valley's interests, it had an obligation to inform Valley of the conflict, and secure written consent to the same. It failed to do so. Any alleged attempt to steer Valley away was untimely.

Finding of Fact #29: "Neil Rose was told that Morse & Bratt would not represent or advise Valley/50th Avenue for purposes of negotiating and/or executing the [critical documents]." There is no testimony to support this finding. It is contrary to the testimony of Mr. Nellor, the only person claiming personal knowledge of this alleged conversation. RP 35; RP 37; RP 66; RP 264. Negotiation of the arrangement, and terms and conditions of the critical documents, had occurred well before any disclaimer had allegedly been given. Exhibit 11; CP 167, Finding #25. The finding is not supported by the evidence under the 'clear, cogent, and convincing' standard.

Finding of Fact #30: “Neil Rose was told that Valley/50th Avenue could not rely on Morse & Bratt for legal advice regarding those documents and that transaction at the time he signed each of the Agreement Regarding Representation, Promissory Note, and Deed of Trust [*sic*]”. Aside from the fact that this Finding conflicts with other Findings of the Court regarding the dates of execution of the critical documents, it is not supported by any testimony, and is refuted by the testimony of Mr. Nellor. See comment, *supra*, regarding Finding of Fact #29. Neil Rose was not told this. The Finding is not supported by sufficient evidence under the ‘clear, cogent, and convincing’ burden imposed upon the Firm.

The Firm therefore violated its ethical duty to independently inform both Rose and Valley of the conflicts, and obtain separate written consents from each client. RPC 1.7. *Valley/50th Ave., L.L.C. v. Stewart, supra*. The Firm’s failure to fulfill their ethical obligations voids the critical documents.¹⁴ *Valley/50th Ave., L.L.C. v. Stewart, supra*.

Curiously, the Trial Court first concluded that Valley was not a client for the purposes of RPC 1.7. Conclusion No. 6, CP 167. The Trial Court then ruled that the Firm had met the requirements of RPC 1.7.

¹⁴ The Note and Deed of Trust, and Representation Agreement.

Conclusion No. 7.¹⁵ This Conclusion is squarely at odds with Conclusion No.'s 6 and 8. If Valley was not a client for the purposes of the Rule, then the Rule perforce could not apply. In such case, it is a *non sequitur* to apply it and then determine that it was not violated. By contrast, in Conclusion No. 8, the Court found that Valley was a client, and required to meet and did in fact meet the requirements of RPC 1.8. The Conclusions are inherently and logically inconsistent.

The circumstances in the instant case are indistinguishable from those in *In Re Holcomb*, 162 Wn.3d 563, 173 P.3d 898, 908 (2007)(Held): “We conclude the findings of fact support the hearing officer's and Board's conclusions of law that Holcomb violated former RPC 1.7(b) by representing Schiffner while using him as a source of funds for his own purposes.”). In the instant case, the Trial Court allowed the Firm to abandon one client in favor of another, for its own gain, a circumstance that the Rules of Ethics were expressly designed to prohibit.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR NO. 2:

1. *The Firm failed to fulfill its obligations to Valley which it owed to Valley under RPC 1.8.*

The Trial Court ruled that the Firm owed ethical obligations to its client, Valley, but determined that it had met those

¹⁵ “The actions of Morse & Bratt did not violate the requirements of former RPC 1.7(b).”

obligations by 'clear, cogent and convincing evidence'. This determination is erroneous for several reasons.

a. *The transaction, apart from the literal terms of the security instrument, was not adequately discussed or disclosed to Valley.*

The rule of the case also required the Trial Court to apply the ethical standards for doing business with a client under RPC 1.8 as pronounced by the Supreme Court in *Valley/50th Ave., L.L.C. v. Stewart, supra*. The ruling of the Supreme Court is straightforward, requiring that the client be informed as to both the transaction as well as the specific terms of the critical documents themselves.

...[W]e note the Firm advised its own client on a method of paying the debt owed to it--a method a disinterested attorney might not have encouraged. Because we conclude the note and deed of trust was more like a business transaction than a fee agreement, the issue then is whether the Firm satisfied the *minimum notice, disclosure, and reasonable opportunity to seek the advice of independent counsel* required by RPC 1.8.

Under this rule, the lawyer must establish, "(1) there was no undue influence; (2) he or she gave the client exactly the same information or advice as would have been given by a disinterested attorney; and (3) the client would have received no greater benefit had he or she dealt with a stranger." *In re Disciplinary Proceeding Against McMullen*, 127 Wash.2d 150, 164, 896 P.2d 1281 (1995) (quoting *In re Disciplinary Proceeding Against McGlothlen*, 99 Wash.2d 515, 525, 663 P.2d 1330 (1983)). *The disclosure which accompanies an attorney-client transaction must be complete.* Attorneys, to defend their actions, must prove they complied with the "stringent requirements imposed upon an attorney dealing with his or

her client." *McGlothlen*, 99 Wash.2d at 525, 663 P.2d 1330.
Valley/50th Ave., L.L.C. v. Stewart, supra. (emphasis
added)

This Supreme Court ruling mandates ‘complete disclosure’.
One reason for the same is a matter of policy with particular application in
this case. Clients need ‘complete disclosure’ because they may feel a
particular bond with their counsel and decline to heed a simple expression
of conflict. “Indeed, one of the reasons the client desires to hire this
particular lawyer might be that the client believes that the lawyer is
especially trustworthy and loyal and will not permit her judgment to be
skewed.” It is undisputed that Mr. Rose and a member of the Firm were
romantically involved at all material times. RP 6, L. 21-23; , RP 104,
L. 18-20; CP 45. These circumstances heighten, not diminish, the need for
‘complete disclosure’.

GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF
LAWYERING: HANDBOOK ON THE MODEL RULES OF
PROFESSIONAL CONDUCT §10.8 (3d ed. 2001 & Supp.2004).

Because the conflict of interest rules are designed chiefly for the
protection of clients and former clients, however, the consent
regime itself contains several protective devices. The most
important of these is that for any consent to be valid, it must be
given only after the client is armed with sufficient information
about the situation to make a rational choice. *Id.*

Making a ‘rational choice’ can involve many questions,
such as: Should I consult another lawyer? Why should I? Is the cost

worth it? What would I discuss? Do I understand the problem sufficiently to explain why I am consulting the lawyer? How do I select the lawyer? The purpose of full disclosure is to assist the client in formulating and answering those questions.

What is full disclosure? It is a significant burden, in keeping with the status of the lawyer as a fiduciary:

Elements of proper disclosure include such elements as:

- All relevant circumstances of the transactions known to the lawyer...;
- The nature of the transaction, the lawyer's interest in the transaction, and any potential adverse effects the transaction could have on the client...;
- The nature of the lawyer's interests and the effect they could have on the lawyer's efforts...;
- Specific advice about the need to seek independent counsel and detailed explanation of all risks associated with the business transaction...;
- A clear statement of the risks and disadvantages to the client, and agreement that if future circumstances affecting the lawyer's independent judgment change, renewed disclosure and consent must precede continued representation...;
- The kind of advice the client would have received if he or she had been a stranger.”

ABA/BNA Lawyer's Manual on Professional Conduct, §51.504, pp. 6-7 (citations omitted).

RPC 1.8 therefore requires proof that both the terms and the transaction are transmitted to the client to ensure the client's understanding. RPC 1.8. Accordingly, 'full disclosure' of the transaction requires far more than a literal reading of terms of the critical documents.

For example, the viability of Valley as a legal entity and the prospect for future litigation was potentially involved. Any business lawyer with any experience will understand and recognize the importance of maintaining the ‘corporate veil’. As counsel for Rose, where Rose was acting as manager for Valley, his use of company assets for his personal benefit exposed him to a claim of breach of fiduciary duty by Valley, and a claim by creditors that he had disregarded the corporate veil, with attending consequences, including a claim that the transfer of property to Valley was fraudulent. See, e.g., *Grayson v. Nordic Constr. Co.*, 92 Wn.2d 548, 599 P.2d 1271 (1979).

Rose’s self-dealing threatened the status of Valley. Exhibit 4, ¶5.1.1 (Management powers of manager restricted to actions “on behalf of the Company”). Both Rose and Valley were entitled to advice regarding this concern, whether Rose signed the documents or not. However, the Firm was unconcerned, treating, as the Supreme Court recognized, Rose and Valley as ‘one and the same’. RP 204, L. 14-16. Accordingly, Valley as an independent entity was never told that it, Valley, needed to consult independent counsel. Even if the conversation had occurred as Nellor eventually recalled, the ethical obligation to specifically advise Valley was not fulfilled.

Valley was an entity and client that was independent from Rose, “to whom a separate and independent duty of advice” was owed. *Valley/50th Ave., L.L.C. v. Stewart, supra*. Nellor did not warn Rose that Valley needed independent advice. RP 35, L. 20-23.

The Firm failed to discuss or advise Valley regarding any of the matters outlined above. There was essentially no disclosure, much less full disclosure, and the Firm clearly failed to meet the rigorous burdens imposed by RPC 1.8. There was no evidence adduced at trial to establish that the Firm entertained, much less complied, with this requirement. To the extent that the Trial Court’s Finding #33 purports to find that the Firm fulfilled its obligation of disclosure as imposed by law, it is clearly erroneous.¹⁶

b. *Valley was not given the same advice by the Firm which a disinterested attorney would provide.*

The Firm made no pretense that it attempted to fulfill this legal requirement. It admitted that it had not. See, *e.g.*, RP 120, L. 8-12. The choice not to provide advice that a disinterested attorney would provide was apparently deliberate. RP 200. This failure is fatal to the

¹⁶Finding of Fact #33: “The terms of the Agreement Regarding Representation, the Promissory Note, and the deed of Trust were fully disclosed to Valley/50th Avenue and were transmitted to Valley/50th Avenue in writing in a manner that could be clearly understood by Valley/50th Avenue.”

validity of the challenged deed of trust. *Valley/50th Ave., L.L.C. v. Stewart, supra*.

None of this information was provided. What kind of advice would a disinterested attorney provide? See the testimony of Ms. Dial. RP 128-132. Her testimony was not rebutted, and establishes the standard of care required. *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992).¹⁷ The Trial Court dealt with the matter by carving out a judicial exclusion, allowing the Firm to avoid this obligation. See Argument, *infra*, at pp. 25-26.

c. *The terms and conditions of the secured transaction were not proven to be fair and reasonable.*

The terms of the note and Deed of Trust were proven. Exhibits 16 and 19. However, the Firm offered no additional evidence for the Court to consider regarding the reasonableness or fairness of the arrangement. In contrast, Ms. Dial questioned a number of the provisions, taking issue with the treatment of Valley in the context of assuring payment of Rose's personal debts. RP 128-132.

In fact, the only testimony regarding this subject came from Ms. Dial, who raised numerous concerns regarding the reasonableness of

¹⁷ "To comply with the duty of care, an attorney must exercise the degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in [Washington]."

the arrangement. RP 125-134.¹⁸ Her expert testimony was not rebutted; no other testimony was offered on the issue.

The Firm bore the burden of proving this proposition. It made no attempt to meet that burden. The presumption of fraud which permeates the transaction negates this conclusion. Simple matters such as limiting Valley's exposure or allowing it to avail itself of a discharge by Rose of the underlying debt for any reason, can and should have been addressed. Ms. Dial's testimony, the only evidence offered, establishes that the terms were neither fair nor reasonable to Valley's interests.

The Trial Court's determination that the terms and transaction were fair and reasonable is not supported by the evidence, given that the Firm bore the burden of proof, and it was error to rule otherwise.¹⁹

2. *The Firm did not document its efforts to comply with the requirements of RPC 1.8.*

In addition, this Court has held that, pursuant to RPC 1.8 standards, for the Firm "*to meet [its] burden of proof, the attorney is responsible for documenting the transaction and preserving this documentation to protect himself in the future*", citing *In re the*

¹⁸ E.g., RP 132: "I would recommend a number of changes to the note to reflect all of those facts and circumstances, and also recommend that they, again, if they choose to do this, that they limit their obligation to collection rather than payment." L. 6-10.

¹⁹ See Conclusion No. 5. CP 167.

Disciplinary Proceeding Against Gillingham, 126 Wn.2d 454, 462-63, 896 P.2d 656 (1995). *In Re Ocean Shores Park*, 132 Wn. App. 903, 911-912, 134 P.3d 1188 (2006).

The importance of documentation is highlighted by the potential for miscommunication and disagreement regarding content. The Trial Court erred in finding that a referral had been given. Treating the referral as effective requires unwarranted inferences: (1) that Rose was aware that he did not have absolute authority to deal with Valley as his personal asset; (2) that Rose had not transferred any interest in Valley to any of his children or others; (3) that Rose was aware that he was ‘wearing two hats’ when he allegedly inquired, and was asking for the benefit of both himself and for Valley; (4) that Rose understood Nellor’s alleged response to refer to both Valley and himself. It is precisely this problem that gives rise to the duty to document. *In Re Ocean Shores Park, supra*. It was error and improper to make any inferences in favor of the Firm in the face of the presumption of fraud, where no documentation of their attempts to comply with RPC 1.8 was made.

3. *The obligations of the Firm owing to Valley under RPC 1.8 were not excused.*

The Supreme Court 's mandate²⁰ detailing the requirements imposed by RPC 1.8 was deliberately ignored. The specific element requiring the Firm to prove that it provided Valley with the same advice as would be given by a disinterested attorney was not established, but disregarded. The Trial Court made no material ruling regarding it, and the Conclusion that the Firm had proven the requirements of the Rule by clear, cogent and convincing evidence appears to be a pretext to justify the end result. Instead of following this language, unambiguously required as a part of the law of the case, the Trial Court judicially carved out its own exception to this long-established element.²¹

a. *There is no legal authority which excepts the Firm from its obligations owing to Valley under RPC 1.8.*

The Trial Court has no authority to create its own judicial exception to a mandate of long-standing in common law jurisprudence. The doctrine of *stare decisis* mandates that the Trial Court adhere to the ruling of the Supreme Court and other prior decisions. *Roberson v. Perez, supra*.

²⁰ See also, *In Re Ocean Shores Park*, 132 Wn. App. 903, 911-912, 134 P.3d 1188 (2006).

²¹ See, e.g., *In re McMullen*, 127 Wash.2d 150, 164, 896 P.2d 1281 (1995); *In re McGlothlen*, 99 Wash.2d 515, 525, 663 P.2d 1330 (1983); *In re Lovell*, 41 Wn.2d 457, 458-59, 250 P.2d 109 (1952); *In re Beakley*, 6 Wn.2d 410, 423-24, 107 P.2d 1097 (1940); 7 C. J. S., Attorney and Client, 127.

The doctrine of *stare decisis* allows for certainty in application of the law. It compels all lower Courts to adhere to the prior rulings of a higher Court. “The doctrine of *stare decisis* "requires a clear showing that an established rule is incorrect and harmful before it is abandoned." *In re Rights to Waters of Stranger Creek*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970).” *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004). The element of advice as would be given by a disinterested attorney is mandated by case law, and cannot be disregarded.

b. *The alleged meeting wherein an alleged conversation occurred between the Firm and Neil Rose in which the Firm informed Mr. Rose of its conflict was not established by clear, cogent and convincing evidence.*

Even if the exception created by the Trial Court did exist,²² the Court’s ruling thereunder is not supported by sufficient evidence. The rule adopted by the Trial Court purports to excuse the Firm from compliance with the RPC 1.8 requirements regarding full disclosure and advice as a disinterested attorney, so long as the client is referred elsewhere.

²² Appellant does not concede this point in any manner whatsoever. This argument is advanced solely in the hypothetical, to establish that the Firm did not prove its claim even the hypothetical circumstance had merit.

In the context of the foregoing, the proof offered by the Firm that a meeting between Nellor and Rose occurred, a meeting denied by Rose (CP 45), wherein the alleged referral occurred, did not meet the requisite evidentiary standard.

i. The critical meeting did not occur. The Firm has the burden to prove that the meeting between Rose and Nellor when the alleged referral to independent counsel occurred, by clear, cogent and convincing evidence. There was no effort to document the meeting. No record maintained by the Firm's front desk that such a meeting took place was offered, whether in the context of meeting to discuss the pending litigation or otherwise. Mr. Nellor's calendar did not reflect such a meeting. Remarkably, Mr. Nellor had no notes regarding the alleged meeting, made either contemporaneously or thereafter. Most extraordinarily, however, is the absence of any time record regarding the alleged meeting. Members of the Firm testified that contemporaneous record keeping was expected of the lawyers within it. RP 12; RP 18. Given the wholesale absence of documentation, and considered in light of Mr. Rose's testimony that the meeting never occurred, the quantum of evidence is such that the Plaintiffs proved affirmatively that the meeting did not occur!

ii. There is no documentation regarding the content of this alleged meeting. Notwithstanding the lack of documentation, and even given the testimony of Nellor regarding the alleged referral, however, that is insufficient to discharge the Firm's ethical obligations to Valley. See Argument, *supra*, regarding the ethical burdens upon the Firm, and their failure to discharge the same.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR NO. 3:

Valley's expert witness was qualified; her testimony was relevant; and no objection to foundation was raised during trial.

The Trial Court's treatment of the testimony of Plaintiff's expert is unclear. At first, the Court allowed the testimony for limited purposes. RP 120; L 20-23. The Court then sustained an objection to 'relevance'. RP 122, L 21- 123, L 5. RP 124, L 18-22. However, the Court then allowed the testimony 'to make a record'. RP 125, L 2-5. There was no motion to strike at the conclusion of her testimony. In its oral ruling, the Court then assessed her testimony, but appears to have ruled *sua sponte* that there was an inadequate foundation as a matter of law. RP 265, L 3-15.

Certainly, her testimony was admitted over the Defendant's objection. However, to the extent that the Court may have limited the application of her testimony, exception is taken. Her testimony was

relevant to establish the standard of care expected of the Firm. *Hizey v. Carpenter, supra*. Her testimony was admissible to show what advice should have been given as a disinterested attorney. It was admissible to establish how the Firm ought to have approached the problem, including review of the Company's records, and inquiry into whether Rose had made any transfers or changes. Nellor attested that he did not even examine the Company's books. RP 205.

Ms. Dial's qualifications were impeccable and unassailable. CP 113-114; Exhibit 38. Her testimony was uncontroverted. Her testimony regarding the advice expected was unchallenged. Compare, CP 162, P. 118, l. 6-9. There is no basis for restricting or limiting her testimony, if in fact that occurred.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR NO. 4:

Certain Findings of Fact were not supported by the evidence adduced at trial.

Entry of the following Findings of Fact was erroneous under the standard of proof imposed upon the Firm.

Finding of Fact #4: "Outside of ...Exhibit 1... and the Rose Personal Residence Trust..., no actual completed estate plan by Morse & Bratt was shown." This is clear error. Much more than these two items "was shown". Valley was created at the suggestion of the Firm at

approximately the same time. Exhibit 1; Exhibit 2; Exhibit 6. Rose formed Valley in response to the Firm's recommendations. CP 45; Exhibit 1. All of the documents creating Valley's existence were drafted by the Firm (Exhibits 4, 5, 6 & 7), and the Firm prepared the documents transferring property from Rose to Valley pursuant to that plan. Exhibits 8, 9. Rose transferred 98% of the economic interest in Valley to his two other sons as a part of his estate planning. Exhibit 10.

The finding that this evidence was not 'shown' is clearly erroneous.

Finding of Fact #16: Rose transferred 98% of the economic units to two of his sons. However, "...Morse & Bratt had no reason to make ... inquiry [*sic*]" regarding any such transfers. This finding has no support in fact or in law. The Firm had a duty to inquire pursuant to the standard of care owed to Valley and Rose. RP 126. The Firm was also on notice to inquire by virtue of the preliminary title commitment that it had received. The amount of coverage requested was for Three Hundred Thousand Dollars (\$300,000), although the amount actually owed was considerably less. The title company advised the Firm that it needed to confirm "the authority of the officers [of Valley] to execute" the deed of trust. Exhibit 11, page 6. The Firm was also aware of Rose's intentions to provide for his three sons. Exhibit 1. The Firm was aware that the Family

Residence Trust provided for only one of those three. Exhibit 2. The Firm was also aware that Rose personally handled transfers of interests in assets without Firm involvement. Exhibit 22. The Firm furthermore had reason to ask by virtue of its experience with many of its clients, as “more than one business person” needed help with “corporate cleanup,” in reference to keeping books up to date. CP 162, p. 128, L. 13-23.

These were abundant reasons for the Firm to inquire. Despite these alarms, the Firm did not consider the question, or inquire of Rose regarding his status, or that of Valley. As a consequence, the Firm did not discover that Rose had transferred 98% of the economic interest in Valley to two of his sons until after the deed of trust had been signed. However, based solely upon the standard of care imposed upon the Firm, it was required to make inquiry before any documents were executed. RP 126.²³

As a practical matter, however, as noted above, the Firm was not concerned with ethical considerations, and had no plans to address them, either internally or specifically with Rose. Their sole concern was with collecting a fee.

Finding of Fact #28: Rose “possessed the authority to execute these documents and bind Valley/50th Ave.” This finding fails to

²³ “I would ... ask if the documents...are current. ... I would want to know if there have been any amendments, if there have been any updates to the documents, if there have been any transfers of interest or new members, whether there have been assignments of interest that are not represented in the documents that I have.”

distinguish between apparent authority and actual authority. As manager of Valley, Rose had apparent authority to bind Valley. RCW 25.15.150. However, the Firm, as drafters of Valley's operating agreement (Exhibit 4) had knowledge that Rose did not have actual authority to use Valley's assets for his personal debts. Exhibit 4, ¶ 5.1.1. Rose was treating Valley as his own property; the Firm in turn treated Valley and Rose as 'one and the same', improperly.²⁴ The finding is contrary to the law on agency and 'authority', and is clearly erroneous under the facts of this case. See Argument, *supra*, at pp. 15-16 regarding Findings of Fact #29 and #30.

Finding of Fact #34: "By the signature of its manager, and with full knowledge of the terms of the Agreement Regarding Representation, Valley/50th Avenue consented to the terms of the Promissory Note, and Deed of Trust." To the extent that this Finding purports to hold that any 'consent' of Valley manifested by the signature of Neil Rose, signed solely as member and not as manager, was 'informed', it is clearly erroneous. See Argument, *supra*, at pp.17-23.

Conclusion No. 3 [sic]: "...Valley/50th Avenue ...had been advised to seek counsel independent of Morse and Bratt at the time Neil Rose signed the Promissory Note and Deed of Trust on behalf of Valley/50th Avenue." This 'conclusion' is actually a Finding of Fact

²⁴ *Valley/50th Ave., L.L.C. v. Stewart, supra*, at 191.

(“Valley...had been advised to seek counsel independent of [the Firm] at the time ... Rose signed [the critical documents]”), and exception is taken. See Argument, *supra*, at pp. 15-16 regarding Findings of Fact #29 and #30.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR NO. 5:

The Trial Court erred in entry of Judgment in favor of the Firm.

Valley was entitled to Judgment that the Deed of Trust at issue was invalid, with an attendant award of attorneys’ fees and costs. The note and Deed of Trust were invalid by virtue of the Firm’s failure to discharge its ethical obligations to Valley in the negotiation, creation, and execution of said documents.

For the foregoing reasons, the Trial Court erred in ruling that the Deed of Trust challenged by Valley was valid. The Firm was obligated to consider, address and fulfill its obligation to Valley, its client, under both RPC 1.7 and 1.8. These Rules were ignored. The evidence adduced at trial clearly established that the Firm failed to fulfill the requirements of either Rule. Accordingly, the Deed of Trust in question is invalid.

Valley/50th Ave., L.L.C. v. Stewart, supra.

The Court should have entered Judgment in favor of Plaintiffs, with an attendant award of fees and costs based upon the fees provisions in the critical documents. Exhibit 19, p. 4.

FEES REQUEST

Appellant requests an award of fees and costs for this litigation, pursuant to the contractual provision for the same,²⁵ under RAP 18.1.

CONCLUSION

When the lawyers of Morse & Bratt became concerned about the ability of their client, Neil Rose to pay his bill, they made demand upon him for financial reassurances. At that time, the lawyers represented Mr. Rose. At the same time, they also represented another, independent and separate client, Valley/50th Avenue, LLC. The discussion came around to the prospect of using Valley's property as collateral for Rose's debt. At that moment, the lawyers had to ask of themselves, 'who is our client?'

If the question had been asked, the answer is transparent. The Firm had two clients: Neil Rose, and Valley/50th Ave. Of course, they could have and should have looked at their corporate records to confirm the status of Valley, but they did not. They could have and should have asked Rose about updating those records, but they did not. Instead, they treated Valley and Rose as 'one and the same'. They proposed a deed of

²⁵ Exhibit 19, p. 4

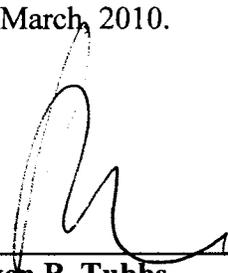
trust, with a promissory note as a “retainer”, and a Representation Agreement, without ever disclosing or discussing conflicts of interest between the Firm and each of its clients, and between the clients themselves, even though they were aware of them.

Eventually, final terms were established. At an alleged meeting between Rose and Mr. Nellor, a member of the Firm, Mr. Rose allegedly asked if ‘he’ should sign it! Nellor allegedly told him ‘I can’t tell you’. There was no discussion of the reasons why; or the problems that the documents presented; or alternatives that might be considered. Mr. Rose was never told that Valley should get independent advice. Remarkably, there is no documentation at all that Mr. Rose and Mr. Nellor met; or that they had the discussion described by Mr. Nellor.

This is a classic case of multiple conflicts of interest. These conflicts impose a number of obligations on the Firm as lawyers for both Rose and Valley. The Firm fulfilled none of them. The Trial Court, reviewing these circumstances, failed to acknowledge Valley’s status as a client, contrary to the law and facts of the case. It failed to follow the Supreme Court’s mandate given to it to apply a legal standard regarding ‘disclosure’, carving out an exception not recognized in jurisprudence. This is wrong, and the Court of Appeals must correct that error.

The Appellant prays that the Judgment in favor of Defendant be reversed, and that Judgment upon this appeal be entered in favor of Plaintiff, declaring that the deed of trust sought to be foreclosed by Defendants is void, and further granting Plaintiff an award of its legal fees and costs incurred in this litigation from the date of initial filing.

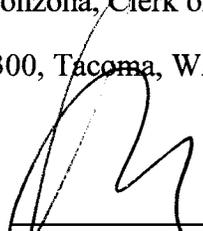
Respectfully submitted this 1st day of March, 2010.



Steven B. Tubbs
WSBA #7239
7001 SE Evergreen Hwy.
Vancouver, WA 98664
(360) 993-0729
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Steven B. Tubbs, certify that I hand delivered a copy of the above Brief of Appellant to Mr. James Hamilton, Attorney for Respondents Morse and Bratt, at 201 NE Park Plaza Dr. Suite 285, Vancouver, WA 98684-5881; and deposited the original and one copy in the US Mail, postage prepaid, to David C. Ponzoha, Clerk of the Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402-4454, on the 1st day of March, 2010.



STEVEN B. TUBBS
WSBA #7239
Attorney for Appellant

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