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## I. RESPONSE TO CROSS-APPEAL

### A. Respondent Has Not Assigned Error To Findings Necessary To Argue His Cross-Appeal.

“A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number.” RAP 10.3(g). Respondent has not assigned error to Finding of Fact No. 25, in which the trial court found “that the calculation set forth in Finding of Fact No. 20 above includes the value of Dixon’s interest in all assets of the Crawford Firm including, but not limited to, accounts receivable, furniture, fixtures and equipment and goodwill.” (CP 368) Nor has respondent “clearly disclosed” the claimed error in *any* “associated issue pertaining thereto.” RAP 10.3(g). This court should therefore refuse to consider respondent’s cross-appeal, which is directed to the trial court’s failure to award him an additional \$36,000 to \$47,000 for tangible assets in addition to the court’s award of \$332,102.51 for his interest in the Crawford firm. ***State v. Kindsvogel***, 149 Wn.2d 477, 69 P.3d 870 (2003); ***First Pioneer Trading Co. v. Pierce County, Inc.***, 146 Wn. App. 606, 617 n.5, 191 P.3d 928 (2008), *rev. denied*, 165 Wn.2d 1053 (2009).

**B. The Trial Court's Valuation Of Respondent's Interest Encompassed The Firm's Tangible Assets.**

If considered on the merits, this court must reject respondent's argument that substantial evidence does not support the trial court's inclusion of the value of the tangible assets of the business in an award that exceeded the range of values given for those assets by at least eightfold. (Resp. Br. 35) The trial court's award was within the range of evidence presented for the valuation of the business as a whole. (See e.g. CP 124 (parties' experts calculated "Total Steve Dixon Net Tangible and Intangible Assets" at \$37,900 to \$340,000); CP 353-54; RP 116, 186, 191, 198; Exs. 30, 32-34) Respondent does not cite a single legal authority in support of his argument on cross-appeal that the award was not supported by substantial evidence. To the contrary, the case law is clear that damage awards are discretionary with the trial court and that the appellate court will not disturb an award that is within the range of the evidence, including expert valuation evidence. See, e.g., **Washington Beef, Inc., v. County of Yakima**, 143 Wn. App. 165, 177 P.3d 162 (2008); **Kobza v. Tripp**, 105 Wn. App. 90, 18 P.3d 621 (2001); **Foley v. Smith**, 14 Wn. App. 285, 539 P.2d 874

(1975); **Highlands Plaza, Inc. v. Viking Inv. Corp.**, 2 Wn. App. 192, 467 P.2d 378 (1970).

Without conceding the analytical, legal, and ethical errors in the calculations made by both respondent's experts and the trial court, as argued in the opening brief and below, the trial court did not abuse its discretion in finding that the valuation of respondent's interest encompassed the Crawford firm's tangible assets.

## II. REPLY ARGUMENT

"Generally, the appropriate measure of damages for a given cause of action is a question of law, reviewed de novo." **Shoemake ex rel. Guardian v. Ferrer**, 168 Wn.2d 193, 199, 225 P.3d 990 (2010), quoting **Womack v. Von Rardon**, 133 Wn. App. 254, 263, 135 P.3d 542 (2006) (citing **Fisher Props., Inc. v. Arden-Mayfair, Inc.**, 106 Wn.2d 826, 843, 726 P.2d 8 (1986)). Thus, although the amount of damages would be discretionary if the trial court applied the proper measure of damages, this court reviews de novo the trial court's conclusion that appellant was entitled to force a buyout of his interest in the partnership including an award of "goodwill" calculated on the value of the Crawford firm's indigent defense contracts.

As a matter of professional ethics, and of the principles governing both business valuation and the distinctly different division of marital estates at dissolution, respondent's arguments in support of the trial court's award confirm the fundamental errors in the trial court's reasoning. First, the fact that Kitsap County was not the firm's public defender client does not excuse, but exacerbates, the ethical impropriety of awarding Mr. Dixon goodwill value based on the Crawford firm's public defense contracts. Second, respondent utterly fails to either address the unsupported, and illogical, use of individual partners' "excess earnings" to calculate a firm's goodwill, or to explain why his own "excess earnings" would not be relevant to that calculation. Third, respondent continues to rely upon dissolution goodwill analysis without confronting the reasons that professional goodwill became a recognizable asset in the division of marital estates, even though it is not salable – reasons that have nothing to do with the valuation of a professional practice upon dissociation.

**A. The Forced Sale Of The Firm's Public Defense Contracts Is Not Excused By The Fact That Kitsap County Is Not The Firm's Client.**

Respondent argues that the ethical prohibitions against selling law firm goodwill did not apply because Kitsap County, the

jurisdiction with which the Crawford firm had public defense contracts that were the basis for the trial court's valuation and award of goodwill, is not the firm's client. (Resp. Br. 5-6) Respondent suggests that as a consequence Kitsap County's approval therefore was not necessary before Mr. Dixon was awarded a share of the contract's value, and that whether "the relationship between Kitsap County, a non-lawyer, non-client, would be subject to the RPC is questionable." (Resp. Br. 5) This argument, the underpinning for respondent's entire claim to a \$330,000 damage award against his former partners, premised on the value of the Crawford firm's (illusory) ongoing public defense contracts, both misses the point of the prohibition against sale of law firm goodwill and demonstrates why the prohibition is well-founded. (App. Br. 17-21)

The Rules of Professional Conduct prohibit transfers of a law practice's goodwill unless the *client* has been notified and does not object. RPC 1.17(c). The clients here were the indigent defendants the Crawford firm remained obligated to serve as counsel, who respondent summarily dismisses as "referrals," and then "only if arrest and prosecution by Kitsap County can be considered a "referral." (Resp. Br. 6) Respondent is correct that Kitsap County was not the firm's client. Instead, it was a third party

payor of constitutionally-required indigent defense costs. See RPC 1.8(f). But that does not change the parties' ethical obligations to the clients it served under those contracts, which regardless of their "day-to-day" practice remained the responsibility of the remaining Crawford firm partners under RPC 5.1 – a responsibility Mr. Dixon did not share, and that RCW 25.05.250(4) obligated the partnership to indemnify him against when he dissociated from the firm – and its contracts.

It was precisely the "professional duties" to these criminal defendant clients that were wholly ignored in the trial court's treatment of the Kitsap County defense contracts as a commodity. The trial court ordered a split of profits that accounting "experts" calculated would be earned through the contracts with Mr. Dixon, in direct violation of RPC 1.5(e)(1), which allows division of fees between lawyers who are not in same firm only if in proportion to services provided and only if the client agrees to the arrangement in writing. Although the forced sale's violation of the requirement that Kitsap County approve any assignment (Ex. 12) should also have prevented the trial court from valuing and dividing the contracts as well, respondent's claimed excuse that the Rules of Professional Conduct were inapplicable because the parties' ethical

obligations were not embodied in the contract (Resp. Br. 4), or because Kitsap County was not the client (Resp. Br. 5), actually exacerbates the ethical violations that prohibited the trial court's award.

Contrary to respondent's argument on appeal, these ethical prohibitions on sale of goodwill were pointed out to the trial court, formed the continuing basis of the remaining partners' objections to Mr. Dixon's calculations of the "value" of the contracts, and are properly preserved for review. (CP 375-79; 571-75) Even were this issue raised for the first time on appeal, this court should address the issue under RAP 2.5(a). As a matter of public policy, the court should insure that the award of a partnership interest based on a forced sale of law firm goodwill in violation of the parties' ethical obligations does not stand. See ***Marshall v. Higginson***, 62 Wn. App. 212, 813 P.2d 1275 (1991) (addressing issue whether release of attorney from malpractice liability was contrary to public policy, raised for first time on review, because of the serious public policy questions raised), *rev. granted*, 118 Wn.2d 1008, *rev. dismissed*, 119 Wn.2d 1013 (1992).

**B. The Trial Court's Use Of Individual Excess Earnings To Calculate A Partnership Buyout Price Makes No Sense.**

Respondent's argument that excess earnings can provide a basis for calculating goodwill does not address the fundamental flaw in the trial court's reasoning in establishing this measure of damages – as argued in the opening brief, *individual* excess earnings provide no basis for calculating the *partnership's* goodwill. (App. Br. 26-27) And if they could, the trial court erred in refusing to allow discovery on and consider Mr. Dixon's individual excess earnings as a partner, thus allowing him to "double dip" in its award. (App. Br. 28-30)

Respondent relies heavily on Mr. Vander Hamm's analysis of the public defense contracts' value to support the trial court's award. (Resp. Br. 11-14) Besides violating the parties' ethical obligations by placing a goodwill value on the public defense contracts as though the Crawford firm's indigent clients were a commodity, the fact is that the trial court did not adopt Mr. Vander Hamm's analysis, and instead undertook a valuation of goodwill based on individualized assessments of the individual partners' excess earnings. The trial court used Mr. Vander Hamm's analysis only as a "check" on the conclusions it independently reached by

calculating individual excess earnings of each of Mr. Dixon's former partners, the defendants in this case. (CP 341-42, 367-68) In doing so, the trial court essentially rewrote the parties' oral partnership agreement to share profits equally, determining for itself the "worth" of each partner despite the fact that the *partners* indisputably had agreed they were equally worthy of the firm's profits. (FF 9, 16, CP 365, 366)

As discussed below and in the opening brief (App. Br. 22-24), this error was premised on inapplicable principles governing the equitable division of a professional spouse's marital estate on dissolution. Contrary to the trial court's analysis, in the absence of any express agreement by the parties to pay a departing lawyer for his interests in the firm's ongoing business, the courts will not value and divide a law firm's intangible assets, including any professional goodwill.

**C. Dissolution Goodwill Analysis Has No Place In Establishing The Buyout Price Of A Dissociating Legal Professional, Where Absent Express Agreement No Payment Is Due.**

Finally, respondent utterly fails to address the historical and equitable reasons for development of professional goodwill as a recognized asset when a professional entrepreneur divorces, and

the fact that these justifications for valuing goodwill in dissolution actions have no application when a professional dissociates from a law partnership and takes his “goodwill,” and the earning capacity it represents, with him. (App. Br. 21-24) None of the parties’ experts identified a non-dissolution case in which the goodwill valuation method proposed by Mr. Dixon, and adopted (as modified) by the trial court, had been used, and at trial and on appeal neither party cites a single non-dissolution case valuing or awarding goodwill in a law practice in the manner undertaken by the trial court here.

Indeed, one of the cases cited by respondent clearly demonstrates the courts’ unwillingness to require the remaining professionals in a firm to buyout a dissociating colleague. ***McCormick v. Dunn & Black, P.S.***, 140 Wn. App. 873, 167 P.3d 610 (2007), *rev. denied*, 163 Wn.2d 1042 (2008) (Resp. Br. 22). The holding in ***McCormick*** was not that “the holders of shares in a legal professional services corporation could provide by express agreement to redeem the shares of a departing lawyer/shareholder,” (Resp. Br. 22) but that in the *absence* of such an express agreement, the departing lawyer was not entitled to any

“redemption” or payment for his shares. This holding compels reversal here:

This court in **McCormick** considered the claim of a lawyer practicing in a personal services corporation he had formed with two other lawyers. The lawyer claimed he was wrongfully ousted from the firm 10 years after it was formed. This court rejected the lawyer’s claims for, among other things, dissolution of partnership, breach of fiduciary duty, and dissolution of corporation, primarily analyzing the plaintiff’s rights under the statutes governing corporations because the parties had incorporated the firm. **McCormick**, 140 Wn. App. at 884, ¶ 16.

In addressing plaintiff’s claim to “the fair value of his one-third interest in the law firm,” 140 Wn. App. at 890, ¶ 33, this court noted that “[n]either party cites, nor could we find, a Washington case deciding whether a departing law firm member is entitled to a buyout of shares absent an express agreement.” **McCormick**, 140 Wn. App. at 890, ¶ 35. Recognizing that allowing a departing lawyer to retain shares under these circumstances “could create ethical and confidential issues,” (the same ethical and confidential issues that prevent the sale of a legal practice), this court nevertheless held that “this does not justify judicial intervention

where the parties failed to execute a stock redemption agreement.” **McCormick**, 140 Wn. App. at 894, ¶ 43. See also **Lubov v. Horing & Welikson, P.C.**, 21 Misc.3d 896, 902, 865 N.Y.S.2d 510, 515 (N.Y.Sup. 2008), *judgment affirmed*, 72 A.D.3d 752, 898 N.Y.S.2d 244 (2010).

Despite this holding, and despite the parties’ failure to execute an agreement establishing a buyout price, the trial court here reached a result analytically inconsistent with that in **McCormick**, undertaking a “judicial intervention” to place a price on the value of Mr. Dixon’s interest in the Crawford firm when he and his partners, the defendants, had not. (See App. Br. 20) There remains no authority for the court’s goodwill analysis in these circumstances. It makes no difference that the parties here had a partnership, rather than a professional services corporation. The ethical rules prohibiting the forced sale of goodwill apply regardless of the legal entity formed to operate the firm; see RPC 1.0(c); 5.1(a) comment [1]; judicial valuation and forced sale of goodwill cannot be justified in a partnership if it could not be ordered in a professional services corporation. Far from justifying the use of the dissolution goodwill analysis in dissociations among legal professionals, the decision in **McCormick** provides additional

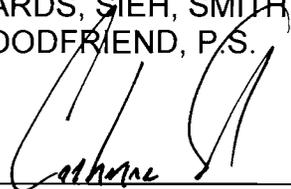
support for the rejection of valuation and forced sale of goodwill among legal professionals, regardless of the manner in which their previous association was structured.

### III. CONCLUSION

The court should reject the improperly-presented cross-appeal and, for the reasons set out in this and the opening brief, reverse the judgment and direct the trial court on remand to establish a buyout price based only on the firm's divisible tangible assets.

Dated this 29th day of October, 2010.

EDWARDS, SIEH, SMITH  
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10/29/10 10:58 AM

**DECLARATION OF SERVICE**

10/29/10 10:58 AM

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

BY \_\_\_\_\_  
PERJURY

That on October 29, 2010, I arranged for service of the Reply Brief of Appellants, to the court and to the parties to this action as follows:

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**DATED** at Seattle, Washington this 29th day of October, 2010.



Tara D. Friesen