

**FILED**

JUL 19 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
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OF THE STATE OF WASHINGTON  
NO. 297411-III

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LK OPERATING, LLC, a Washington limited liability company,

Appellant,

vs.

THE COLLECTION GROUP, LLC, a Washington limited liability company; and BRIAN FAIR and SHIRLEY FAIR, husband and wife, and their marital community composed thereof,

Respondents.

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BRIEF OF APPELLANT

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JAMES A. PERKINS, WSBA #13330  
Larson Berg & Perkins PLLC  
105 North Third Street  
Yakima, WA 98901  
(509) 457-1515

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## TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR .....	1
<i>Assignments of Error</i> .....	1
<i>Issues Pertaining to Assignments of Error</i> .....	2
B. STATEMENT OF THE CASE .....	3
C. ARGUMENT .....	14
1. Argument Summary. ....	14
2. Appellate Review Standards and Procedures.....	19
3. The Trial Court Erred in Ruling that Powers “Represented” either LKO or Fair with Regard to the Investment Contract. ....	19
4. The Court Erred in Ruling an RPC 1.7 Violation, if Existing, Would Allow Contract Rescission. ....	26
5. The Court Erred by Failing to Consider All Equitable Factors Before Ruling as a Matter of Law that Rescission Remedy Applied. ....	31
6. The Trial Court Erred By Ordering Summary Judgment For Issues Where Material Fact Disputes Existed. ....	37
7. Even Assuming an RPC 1.7 Violation Occurred, an Action Against Powers Not Contract Rescission Harming Innocent Party LKO, is the Proper Legal Remedy.....	41
D. CONCLUSION.....	43

**TABLE OF AUTHORITIES**

**Cases**

*Atherton Condo. Ass’n v. Blume Dev. Co.*, 115 Wn.2d 506,  
516, 799 P.2d 250 (1990)..... 37

*Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992) ..... 20, 21, 25, 26, 45

*C.B. & T. Co. v. Hefner*, 98 N.M. 594, 651 P.2d 1029 (1982) ..... 28, 29, 45

*Capital Sav. & Loan Ass’n v. Convey*, 175 Wash. 224, 27 P.2d  
136 (1933)..... 29

*Disciplinary Proceeding Against Egger*, 152 Wn.2d 393, 98  
P.3d 477 (2004)..... 40

*Douglas v. Jepson*, 88 Wn. App. 342, 945 P.2d 244 (1997)..... 19

*Erckenbrack v. Jenkins*, 33 Wn.2d 126, 204 P.2d 831 (1949)..... 31

*Hansen v. Wightman*, 14 Wn. App. 78, 88, 538 P.2d 1238  
(1975)..... 33

*Harrington v. Pailthorp*, 67 Wn. App. 901, 841 P.2d 1259  
(1992)..... 16, 33

*Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992).. 16, 32, 33, 34,  
41, 42, 45

*In Re: Disciplinary Proceeding Against Botimer*, 166 Wn.2d  
759, 215 P.3d 133 (2009)..... 35

*Marrazzo v. Orino*, 194 Wash. 364, 78 P.2d 181 (1938)..... 29

*Matter of McGlothlen*, 99 Wn.2d 515, 663 P.2d 1330 (1983)..... 41

*Micro Enhancement Int’l, Inc. v. Coopers & Lybrand, LLP*,  
110 Wn. App. 412, 433-434, 40 P.3d 1206 (2002)..... 42

*Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864  
(1980)..... 37

<i>Nishikawa v. U.S. Eagle High, LLC</i> , 138 Wn. App. 841, 158 P.3d 1265 (2007).....	36
<i>Ramsey v. Mading</i> , 36 Wn.2d 303, 217 P.2d 1041 (1950) .....	29
<i>Scott v. Pac. West Mountain Resort</i> , 119 Wn.2d 484, 502-03, 834 P.2d 6 (1992).....	37
<i>Sherry v. Diercks</i> , 29 Wn. App. 433, 437, 628 P.2d 1336, <i>rev. denied</i> , 96 Wn.2d 1003 (1981) .....	33
<i>Thoma v. C.J. Montag &amp; Sons, Inc.</i> , 54 Wn.2d 20, 26, 337 P.2d 1052 (1959).....	37
<i>TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.</i> , 134 Wn. App. 819, 825, 142 P.3d 209 (2006).....	19
<i>Vallandigham v. Clover Park Sch. Dist. No. 400</i> , 154 Wn.2d 16, 26, 109 P.3d 805 (2005).....	19
<i>Valley/50<sup>th</sup> Ave. L.L.C. v. Stewart</i> , 159 Wn.2d 736, 153 P.3d 186 (2007).....	14, 24, 30

### Rules

RPC 1.7 1, 2, 12, 13, 14, 15, 16, 17, 21, 23, 24, 25, 26, 28, 29, 32, 33, 34, 35, 36, 38, 40, 41, 42, 43, 44, 46, 47, 48, 49, 50	
RPC 1.8.....	11, 12, 32, 34, 50
RPC 1.13.....	15, 24, 26, 42, 48, 50

## **A. ASSIGNMENTS OF ERROR**

### *Assignments of Error*

1. The court erred in ruling in its March 31, 2009 Memorandum Decision that Fair or LKO asked Powers to “represent” either Fair or LKO in connection with the LKO/TCG contract.

2. The court erred in ruling in its March 31, 2009 Memorandum Decision that Powers violated RPC 1.7 and by entering summary judgment on that issue by its order dated June 11, 2009.

3. The court erred in ruling in its September 25, 2009 Memorandum Decision that a contract between a lawyer and a client is rendered void rather than voidable, if it involved the lawyer’s violation of RPC 1.7.

4. The court erred in ruling in its September 25, 2009 Memorandum Decision that a lawyer’s violation of RPC 1.7 renders an otherwise valid contract between persons other than the lawyer, either void or voidable, where no party fraud or overreaching exists and no damages occurred.

5. The court erred by issuing partial summary judgment by its order dated June 11, 2009, and by its order dated November 16, 2009, on issues where material fact disputes were presented by the record.

6. The court erred by limiting LKO's trial remedy to that of rescission, in its Memorandum Decision dated September 25, 2009, and by its order dated November 16, 2009.

*Issues Pertaining to Assignments of Error*

1. Did Fair ask Powers to "represent" Fair or TCG with regard to the LKO/TCG investment contract? (Assignment of Error 1, 2).

2. Since Fair was acting for TCG as its manager in seeking investors, and since the proposition that TCG was a Powers' client at the relevant time is a disputed issue of fact, was there an RPC 1.7 violation as a matter of law? (Assignment of Error 1, 2).

3. Assuming *arguendo* that Powers violated RPC 1.7, absent party fraud, overreaching or damages, can an otherwise lawful contract between LKO and TCG be held void or voidable as a consequence? (Assignment of Error 2, 3, 4).

4. Did the trial court err by issuing summary judgment on issues where material fact disputes existed? (Assignment of Error 2, 3, 4, 5).

5. Did the court err by limiting LKO at trial to only a rescission remedy? (Assignment of Error 6).

## **B. STATEMENT OF THE CASE**

In 2003, irrevocable trusts were created for the two adult children of Keith Therrien (Therrien) and the three adult children of Leslie Powers (Powers). (CP 844, 965, 969). Each adult child has at all times been the trustee of his or her trust. Each trust subsequently owned all of the voting stock in its own separately created Washington corporation. The corporations jointly owned LK Operating, LLC, a statutorily manager managed limited liability company (“LKO”) formed with the settling of the trusts and the incorporation of the corporations in December, 2003. Half of the interests in LKO were owned beneficially by the trusts for each family. (CP 502, 1756; RP 360). Powers and Therrien never had any ownership interest in 1) any child’s trust, 2) any trust-owned corporation, or 3) LKO. (CP 498, 501, 845, 965; RP 100-101). As an entity, LKO had its own capital and other business investments prior to becoming involved with The Collection Group, LLC (TCG). (CP 844, 969).

Initially, LKO was managed by a separate Washington corporation, Powers & Therrien Enterprises, Inc. (PTE). (CP 502, 845; RP 14). PTE was initially formed in 1979 and had its own assets and business. PTE provides management services for a number of other companies besides LKO. Powers and Therrien are officers of PTE.

Although PTE managed LKO as its statutory manager along with other management and administrative duties, for investment purposes, Powers and Therrien or companies in which they had an ownership interest, could have invested in TCG. (RP 365). They did not.

TCG is a statutorily manager managed limited liability company. It was formed and initially owned by Brian Fair (Fair) a CPA, and his wife Shirley Fair. (CP 179, 195). TCG was formed on May 10, 2004. (CP 179, 195). Fair is the statutory manager of TCG. (CP 179, 195). Fair formed TCG for the purpose of purchasing and liquidating discounted debt placed for sale on the open market. (CP 178-180, 195).

In approximately September 2004, while preparing tax returns for certain joint clients of Fair and Powers & Therrien, P.S., Fair spoke to Powers about Powers and/or Therrien possibly participating in this new business venture. (CP 179-180, 195). Powers and Therrien both rejected Fair's September proposal, choosing not to become involved. (CP 1113). A few weeks later in October 2004, Fair again asked Powers and Therrien to consider becoming involved in the new business venture. (CP 195). The proposal was conveyed by an email dated October 27, 2004 which was followed by a phone call from Fair. (CP 196, 1113; RP 284). Fair proposed an equal investment of funds, Fair's contribution of administrative and management and Powers and Therrien's contribution of

legal services involved in pursuing the business of liquidating credit card debt. (CP 216). Both the investment of funds and provision of legal services were conditioned upon acceptance of the proposal. (CP 216). In the phone call, Powers and Therrien again declined to invest personally or through any corporation which they owned, but told Fair their adult children had a company with funds available to invest, which might be interested. (CP 125-126, 1113).

Before Fair solicited Powers and Therrien about investing in the debt collection business, Fair solicited two other lawyers about investing in the business without success. (CP 1575-1576).

Fair's October 27, 2004 email solicitation to Powers included a model contract used by Unifund (a vendor of credit card debt) for use in Powers and Therrien's review of the investment proposal. (CP 196-197). Powers later reviewed this contract for LKO, and forwarded proposed changes to Fair to transmit to Unifund as part of PTE's due diligence investigation of the investment proposal, since LKO's investment decision had not yet been made and actual debt payment purchase terms would likely influence LKO's decision. (CP 485, 1113, 1411; RP 191). Fair was not charged for Powers' contract review. (CP 950). Fair later admitted at deposition, he did not know on whose behalf Powers did this work. (CP 954-955). In short, Fair admitted that he did not have a subjective

belief that Powers reviewed the Unifund contract for Fair or for TCG. (CP 954-955). He testified it was actually his lawyers, post-suit, who told him Powers had been acting as his lawyer in doing this work. (CP 955).

As of January 26, 2005, there was no final decision by LKO as to whether LKO would invest in TCG. (CP 195, 967, 1113). On that date, Fair sent an email to Powers informing him that Unifund would not make any more of his changes and the decision to invest or not invest would have to be made on that basis. Since no investment decision was made, on February 1, 2005, Fair caused TCG to invest in the Unifund contract. (CP 181, 195, 197).

Subsequently, between February 1, 2005 and February 8, 2005, Fair and Powers spoke by phone. Powers told him LKO had decided to accept the terms of Fair's investment proposal. (CP 1114). The persons who actually made the decision to invest in TCG were Powers and Therrien's adult children. (CP 501, 522, 543-547, 565).

By email on February 8, 2005, for the first time, Fair told Powers the company formed to purchase the debt was TCG. (CP 1115). After being informed that LKO would invest capital and provide legal services, on February 8, 2005 Fair emailed Diane Sires ("Sires"), a legal assistant of Powers & Therrien, P.S., for TCG asking for the first investment check in the amount of half of the cost of the debt portfolio TCG had just

purchased. Fair sent the same email to Ms. Reider, LKO's bookkeeper, on February 18, 2005. (CP 126, 502).

The requested check sent to Fair for TCG, was an LKO check. (CP 126, 502-505). Fair admitted knowing that the investment check was issued by LKO. (CP 197). He denied knowing the identity of LKO. (CP 197). Sires however, testified that beginning in February 2005, and on many later occasions, Fair joked with her about the fact that LKO was Powers and Therrien's children's company, and that the "children's company" not Powers and Therrien or Powers & Therrien, P.S., had invested in TCG. (CP 498-499, 2304; RP 193-194). Subsequently, other LKO checks were sent to TCG on March 3, 2005 in the amount of \$13,015.39, on December 23, 2005 in the amount of \$10,000.00, and on September 11, 2006 in the amount of \$25,000.00, all at Fair's request. (CP 502-505; RP 852-853).

Addressing what Fair knew, post-trial the court found as fact, that because TCG received the cash and free legal services it requested, Fair both personally and as manager of TCG did not care who Powers chose to make the investment in TCG. (CP 2303; RP 417-418). Also, when rendering his bench decision post-trial, Judge Small said he believed Sires had told Fair that LKO was the investor, but he equally believed Fair had ignored this information, because he did not care who the investor was, so

long as the money and legal services desired were provided for TCG in the manner requested. (RP 417-418, 422).

Since Fair had already formed TCG months before he presented the investment proposal to Powers, Fair did not request that Powers draft an Operating Agreement for TCG. (RP 342). Similarly, there is no evidence that Fair or TCG asked for or received any legal “representation” from Powers regarding Fair’s business proposal or the LKO/TCG contract. (CP 385-386, 855-856, 954-955, 1117, 1128). Indeed, Fair admitted that he did not know who Powers “represented” in the review of the Unifund contract. (CP 954, 955) Consistent with this testimony, the trial court concluded whether Powers “represented” TCG prior to LKO’s investment was a disputed issue of fact. (CP 1979).

Despite being on notice that LKO had made the investment in TCG, (CP 197), neither Fair nor TCG issued a K-1 to LKO (nor was one issued to Powers or Therrien, or Powers & Therrien, P.S.) in 2005, 2006 or 2007. (RP 27, 46) Instead, all capital invested in TCG was falsely identified by Fair on TCG’s tax returns as having been solely contributed by Brian and Shirley Fair. (RP 27-28, 30, 45-46). Fair however, in financial statements prepared for TCG, did identify the monies paid by LKO were “capital contributions” in TCG. (CP 129; RP 42, 44). He also admitted holding interests for the capital contributors as nominees in

communications with TCG's bank. (RP 81-82). Since there was no net profit from TCG's debt collection business in 2005, 2006 and 2007, prior to the dispute, (CP 277) LKO was not initially concerned about not receiving K-1s. (RP 118).

In early 2007, Fair asked Powers to draft an operating agreement for a new entity, OPM I, LLC (OPM), a statutorily manager managed limited liability company formed by TCG and Fair for purposes of collecting delinquent debt in states other than Washington. (RP 315). TCG was a member of OPM, and TCG and Fair were its managers. (CP 499, 885). The OPM operating agreement includes a waiver of "conflict of interest" paragraph which in part states: "Members of counsel's family have an interest in the manager and through it, the company [referring to OPM]." (CP 499). Fair, personally and as TCG's manager, signed this OPM operating agreement containing the waiver of conflict clause without objection. (CP 499; RP 74).

By April 2007, TCG had become successful to the point where Fair valued the company's worth at approximately \$1.5 million. (CP 276, 1026). Apparently as a consequence, on or about April 21, 2007, Fair proposed that the original 50/50 ownership agreement which Fair had confirmed in an email dated February 23, 2005, (CP 1666) be modified so as to make Brian and Shirley Fair the majority owners in TCG, and to

provide his mother with an ownership interest, because of money she had provided to TCG. (CP 238). LKO objected to this proposed change in the parties' contract relationship. (CP 199, 241, 260). At the time of the letter, LKO had invested the majority of the funds in TCG and had made or caused to be made all required contributions of funds and services. (CP 1662). Without notice to LKO however, Fair had previously withdrawn approximately \$20,000 of their investment. (CP 276-277). Although the parties negotiated over potential modified contract terms, no agreement was reached, at which point Fair, for the first time, alleged that LKO was not an owner of TCG. (CP 175).

Concurrent with this assertion, Fair formed several new limited liability companies. The purpose for one new limited liability company, Fair Resolutions, was to conduct for a fee, the TCG debt collecting work which Brian and Shirley Fair had previously been performing for TCG under the investment proposal for no fee. (CP 1414). A second company was also formed to independently purchase new debt in substitution for TCG. (CP 374). When Fair questioned LKO's ownership in TCG, LKO retained independent counsel to protect its rights and member interest in TCG. When no deal could be reached, on or about July 10, 2007, LKO filed suit asking that the court declare what LKO's ownership interest was in TCG, asking for an accounting, asserting a claim against Fair for breach

of fiduciary duty, and asserting a breach of contract claim. (CP 1-10). An Amended Complaint containing the same claims and seeking the same relief was subsequently filed on August 7, 2007. (CP 176-177).

On October 22, 2007, Fair in part responded to LKO's Complaint by filing a Complaint against Powers and Therrien personally for legal malpractice and for breach of the Consumer Protection Act. As grounds for the alleged malpractice, Fair claimed that Powers and Therrien had violated Rules of Professional Conduct (RPC) 1.8.

Subsequently, both matters were consolidated (CP 416-417) and after consolidation, cross-motions for summary judgment were filed by Powers and Therrien against Fair, and by TCG and Fair against LKO. (CP 179-193, 683-698, 752-771).

On March 31, 2009, the court issued a first memorandum decision which addressed some of the summary judgment issues the parties had raised. (CP 1248-1262). The court first ruled that Fair, personally, was at all times a Powers & Therrien, P.S. client. (CP 1258). Based in part upon this conclusion, the court next ruled that any attempted purchase of an interest in TCG by Powers or Therrien personally, would be against public policy and void as being a violation of RPC 1.8. (CP1259). Although no party and no pleading had previously asserted that RPC 1.7 applied, the court next ruled that because Powers & Therrien represented Fair

personally, because Fair was selling an ownership interest in TCG, and because Powers & Therrien also represented LKO, a conflict of interest existed under RPC 1.7. (RP 1260). Since the court did not know the appropriate remedy for this RPC 1.7 violation, the court requested additional briefing. (CP 1261).

Before final order entry, a further summary judgment hearing about this and other unresolved motion issues was scheduled. Before that next hearing was held, LKO moved the court to reconsider its rulings. (CP 1754-1772). Powers and Therrien also moved for reconsideration. (CP 1369-1375). The court subsequently refused to reconsider all but one of its rulings. The one ruling the court did modify was to find there was a question of fact about whether Therrien had violated RPC 1.7, precluding summary judgment against him. (CP 1828-1829).

Subsequently, at a discovery hearing held on July 9, 2009, Fair stipulated the contract at issue was not a sale of personal equity, but was a direct transaction with TCG. (CP 1977). Also, it was stipulated that Fair had acted at all times solely as an agent for TCG, and not personally. (CP 1977; RP 416).

On July 20, 2009, a final hearing on summary judgment motion issues was held and on September 25, 2009, a second memorandum decision issued. (CP 1976-1982). In the second memorandum decision,

the court acknowledged there were material fact disputes about whether TCG was Powers' client at the time the disputed contract was consummated. (CP 1979). The court also acknowledged there was no controlling authority in Washington holding that if Powers had violated RPC 1.7 as to Fair, in connection with LKO's investment in TCG, and if the contract was between TCG and LKO, that TCG had any right to void the contract over LKO's objection. (CP 1981). The court then cited to a single New Mexico case to support its final "first impression" ruling, that TCG could void its transaction with LKO because Powers had violated RPC 1.7. (CP 1981). The court then ruled the remedy of rescission was appropriate and would apply. (CP 1981-1982).

The court made clear the rescission of LKO's investment in TCG was based solely upon Powers' alleged RPC 1.7 violation arising from Fair's status as a client, and not upon the basis of any act of fraud or misrepresentation by LKO. (CP 1982).

LKO moved to reconsider the court's additional rulings affecting LKO. (CP 2003-2026).

The court denied the motion for reconsideration (CP 2094-2095) and ordered the two lawsuits bifurcated for trial. (CP 2096-2098). The LKO/TCG trial to determine rescission damages was then held on August 16-18, 2010.

At trial conclusion, the court entered judgment in LKO's favor for the principal amount of all sums which LKO had invested with TCG, together with interest, in an amount which the court found commercially reasonable, from the dates of LKO's investments to the date of repayment. (CP 2310-2312).

LKO subsequently filed a Notice of Appeal, claiming that a number of trial court orders were in error. (CP 2314-2406). TCG and Fair subsequently cross-appealed on March 9, 2011.

In June, 2011, in the companion case of Fair against Powers and Therrien, the court granted Powers and Therrien's motion for summary judgment and dismissed Fair's complaint on the basis that he had no cognizable damages from Powers' putative violation of RPC 1.7.

### **C. ARGUMENT**

#### **1. Argument Summary.**

This case essentially involves four parties – Powers, LKO, Fair, and TCG. Carefully analyzing each party's rights and duties is critically important. (See, RPC 1.13, RPC 1.7 Comment 34; *Valley/50<sup>th</sup> Ave. L.L.C. v. Stewart*, 159 Wn.2d 736, 153 P.3d 186 (2007)). The trial court ruled that LKO was Powers' client and that Fair was also Powers' client when the TCG investment proposal was made. (CP 1258). The court found however that a material fact dispute existed as to whether TCG was

Powers' client on the date at which the investment agreement was consummated. (CP 1979).

Fair stipulated that he was acting at all times as the managing agent for TCG when presenting the investment proposal to Powers. (CP 1977). Accordingly, the facts show Fair was not presenting a business proposal personally to Powers. Fair was also not personally a later party to the business agreement reached with LKO. That party was TCG. (CP 1977).

The other party to the TCG business transaction was not Powers. (CP 125-126, 1113). The record shows unequivocally that Powers and Therrien both declined the TCG business proposal. (CP 125-126, 1113). Rather, LKO was the only party who made the investment in TCG. (CP 502-505; RP 852-853). That is why ultimately the trial court returned to LKO those monies which it had invested in TCG. (CP 2310-2312).

Because the trial court agreed that material fact disputes prevented the court from finding that TCG was a Powers' client prior to the LKO/TCG agreement being formed, (CP 1979), the court could not and did not rule that Powers violated a RPC 1.7 obligation owed to TCG. Because Fair was not personally a party to the LKO/TCG agreement and did not ask that Powers personally represent him with regard to the transaction in which Fair personally was not a party, the court erred in ruling that Powers violated any RPC 1.7 obligation owed to Fair.

Furthermore, for an RPC 1.7 violation to have even hypothetical relevancy, that violation would necessarily have to involve an aggrieved contracting party. In this case, only TCG could be that party, (CP 1977), but as noted, as a consequence of material fact disputes, it has not yet been determined that TCG was a Powers' client when the LKO/TCG agreement was consummated. (CP 1979).

Powers has testified that he did not even know TCG existed until after the LKO/TCG agreement was reached. (CP 1115). It follows that the trial court's use of RPC 1.7 to make substantive legal rulings was fundamentally wrong.

The preamble to the RPCs makes expressly clear that as ethical rules, an RPC violation, even if existing, is not intended to be used to impose civil liability upon a party. (*See*, RPC preamble, ¶ 20).

Consistent with the RPC's stated purpose, Washington courts have repeatedly held that while an RPC violation may give rise to a disciplinary remedy, it does not give rise to a private legal remedy. *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992); *Harrington v. Pailthorp*, 67 Wn. App. 901, 841 P.2d 1259 (1992). Here, the trial court did precisely what Washington case law and the RPC rules say can not and should not be done. It used a purported RPC violation as a basis for granting TCG (not found to be Powers' client) relief in the form of the

private remedy of rescission against LKO, found to be a Powers' client. (CP 1981).

Had the trial court not used RPC 1.7 improperly as its sole basis for approving a private rescission remedy, no other facts would show that TCG had a rescission right. For example, the court specifically held that rescission was not being awarded because LKO had engaged in any fraud or misrepresentation when contracting with TCG. (CP 1982). Similarly, no fiduciary duties were owed by LKO to TCG and even had there been, there is no evidence that by reason of the LKO/TCG contract, any such duties were breached. To the contrary, at the time LKO provided the investment monies which TCG requested, TCG's assets consisted principally of an approximate \$7,000 debt portfolio which TCG (at Fair's direction) purchased. (CP 181, 195, 197). Only after LKO agreed to provide TCG with substantial additional money and arranged to provide TCG with the free legal services it needed and requested, did TCG flourish. (CP 276, 1026).

Approximately three years after LKO provided the capital and legal services TCG wanted, in the summer of 2007, Fair estimated that TCG was worth \$1.5 million. (CP 276, 1026).

The record further shows that Fair independently developed the investment terms for TCG which TCG deemed to be reasonable and

appropriate. (CP 196-197). The record shows Fair, for TCG, also asked others to invest before ever speaking to Powers, but those efforts were unsuccessful. (CP 1575-1576). It follows that the terms of TCG's business proposal were provably fair to TCG and TCG suffered no damages by contracting with LKO.

Since the facts show LKO engaged in no fraud or misrepresentation, committed no contract breach, and caused no damages to TCG by simply accepting TCG's proposal and providing the consideration TCG requested, there is no legal basis for the trial court to rescind the LKO/TCG business deal.

Rescission is also an equitable remedy. Here, LKO is an innocent party. That means its legitimate business interests should be protected by the courts, not lightly cast aside because the trial court, in a consolidated case involving contested malpractice claims against third party lawyers, failed to accurately assess both factually and legally, what the discrete rights and obligations of each party were.

Unfortunately, as the subsequent sections will explain, the trial court did err both factually and legally in making the rulings now contested, as a consequence of which reversal and remand is both just and appropriate.

2. **Appellate Review Standards and Procedures.**

On appeal, the standard of review for summary judgment orders is de novo and the court accepts as true, all facts most favorable to the non-moving party. *TransAlta Centralia Generation LLC v. Sicklesteel Cranes, Inc.*, 134 Wn. App. 819, 825, 142 P.3d 209 (2006); *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005); *Douglas v. Jepson*, 88 Wn. App. 342, 945 P.2d 244 (1997). Pursuant to RAP 9.12, the appellate court considers only the evidence and issues called to the attention of the trial court before any summary judgment order appealed from, was entered.

3. **The Trial Court Erred in Ruling that Powers “Represented” either LKO or Fair with Regard to the Investment Contract.**

Under RPC 1.7 (a), a lawyer shall not “represent” a client if the requested “representation” would involve a concurrent conflict of interest. This rule, by its terms, is transactional, not relationship dependent (*i.e.* there must be something specific for a client which the lawyer is being asked to do). This is confirmed by Comment 3 to the rule, which states:

A conflict of interest may exist before representation is undertaken, in which event the representation must be declined...

Obviously, it is not possible for a lawyer to “decline to do something,” unless the lawyer has first been asked to do something properly characterized as providing legal services.

Here the record shows Fair himself formed TCG. (CP 179, 195). Fair also admittedly independently developed the terms of the investment offer set forth in Fair’s October 27, 2004 email to Powers. (CP 196, 790-791; RP 284). Accordingly, the record shows no act of representation which Fair asked Powers to perform for either Fair or TCG, pertaining to the formation of TCG or the contract it ultimately entered with LKO. (CP 785, 789, 794-795, 802, 808, 849). In fact, Fair did not even disclose TCG’s existence until February 8, 2005 after the investment decision and LKO’s subscription in TCG was confirmed. (CP 1412). Also, the record shows Fair shopped that investment proposal unsuccessfully to others before soliciting Powers and Therrien, conclusively evidencing its terms cannot be considered unfair to TCG. (CP 1575-1576).

No Washington case specifically identifies precisely when a lawyer’s “representation” commences for an existing client on a new matter. In *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992) however, the Supreme Court confirmed that the essence of an attorney/client relationship is whether the attorney’s advice or assistance is sought and received on legal matters. *Bohn*, 119 Wn.2d at 363.

Here, Fair sought no legal advice from Powers or Therrien with respect to the formation of TCG, the investment proposals of September and October 2004, or the investment of LKO in TCG. (CP 1411-1412). Applying the test of *Bohn, supra*, the essence of a legal representation was not present.

Consistent with this fact (although not dispositive) the record also shows no time was ever billed by Powers or Therrien pertaining to Fair's independently conceived business proposals involving TCG. Also consistent with this fact, the record shows that Fair did not act for himself, but for TCG throughout the solicitation process, and had no personal stake in any representation involving the investment. Finally, consistent with the fact is the lower court's determination that there were not adequate facts to provide a basis to determine that Powers represented TCG, the investee and person for which the investment was solicited and in which it was made, at any time prior to the investment. (CP 1979).

Because Fair never asked Powers to provide any legal advice or assistance pertaining to the investment proposal which Fair independently developed and because Fair's involvement in the investment was representational and not personal, there is no record act of "representation" undertaken by Powers for Fair (or for TCG) which would

make the provisions of RPC 1.7 applicable. (CP 849, 1116-1117, 1128; RP 321-323).

In concluding otherwise, the trial court seemed to focus on the fact that Fair sent Powers the Unifund vendor contract for review and comment in the fall of 2004. This, the court seemed to think, was sufficient evidence to conclude that, as a matter of law, Powers “represented” TCG in all dealings involving LKO.

However, the trial court’s conclusion is incorrect. There is no evidence that Fair “hired” Powers to perform any legal services connected to this document. (CP 1128). Powers, by declaration, has testified that he reviewed this contract on LKO’s behalf, not Fair’s. (CP 849, 1114, 1411). This testimony is again supported by the admitted fact Fair was not charged a fee by Powers for doing this review work. (CP1128, 1412). Fair himself later testified he did not know on whose behalf Powers did this work.<sup>1</sup> (CP 954-955). Further, a personal representation could not have arisen from contract review because any representation was contingent upon there being an investment decision. No investment decision was made until after the review of the Unifund contract and after

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<sup>1</sup> Any review for TCG does not count; since there is no finding that TCG and Fair are identical. In fact Valley/50 Ave. LLC, *infra*, , consistent with and further clarified by RPC 1.13 and comment 34 to RPC 1.7 compel the conclusion that an entity is treated as separate from its owners and representatives for purposes of identifying both the client and the matter. The court did not find that TCG became a client before LKO subscribed to become an investor and was accepted by TCG on February 8, 2005.

the results were mooted by TCG's decision to purchase the Unifund contract "as is" on February 1, 2005. Finally, Fair had no personal stake in Powers contract review because he acted only as agent and representative of TCG, "our company" as he disclosed it on February 8, 2005. (CP 1649).

Assuming arguendo Fair could establish that Powers had reviewed this Unifund contract on either his behalf or TCG's, those facts would still not establish an RPC 1.7 violation. Under RPC 1.7, a particular "representation" is a conflict of interest only if the specific work requested would be adverse or potentially adverse to another client's interests. RPC 1.7(1). Here, the specific Unifund contract review work Powers performed for LKO was not adverse to Fair. First, Fair had no personal interest in Powers' contract review.<sup>2</sup> Furthermore, even if Fair had a personal interest, each party facially had a common coordinate interest (real or potential) in buying debt from Unifund under the best possible terms. Accordingly, Powers performing this discrete work could not be a predicate for a RPC 1.7(2) violation. Further, LKO did not contract with TCG prior to February 8, 2005 after TCG's purchase of the Unifund debt

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<sup>2</sup> Because TCG as undisclosed principal for Fair was the beneficiary of the information and because the interests of TCG and LKO were parallel and coordinate as to its incorporation in the Unifund contracts, the representation relating to the review of the Unifund contracts could not give rise to a conflict under RPC 1.7.

under the Unifund contract. The court below concurred this was insufficient evidence to provide a basis for determining that the representation of TCG began prior to LKO's subscription and proposal acceptance on February 8, 2005. (CP 1979). It follows that any Powers' work done before February 2005 even if either Fair or TCG were beneficiaries could not have created a "conflict" in violation of RPC 1.7 because party interests were coordinate, TCG was not a client, and Fair had no personal interest in the subject matter.

It is also dispositive that when Fair presented proposed contract terms to Powers and Therrien, and when Fair sent the form Unifund contract to Powers for review, he stipulated he was acting solely as the manager/agent for TCG, and not personally. (CP 1977). Thus he could not have personally been seeking legal representation. (CP 1977; RP 416).

This is critical because, as articulated by RPC 1.13, consistent with and clarifying *Valley/50th Ave., infra*, a legal entity is a client completely separate and distinct from an individual. Powers testified that he did not even know TCG existed until first informed by Fair on February 8, 2005. (CP 1115). It follows that prior thereto when the investment proposal was made and reviewed by Powers, there could be no potential conflict between LKO and TCG because TCG was not a Powers client.

Common sense dictates that for an attorney/client relationship to exist, there must first be an identified client. It is also not possible to send a conflict of interest letter as discussed by RPC 1.7(b)(4) to a potential client whom the lawyer does not even know exists or which has not been identified to the lawyer.

Dispositively, Fair eventually admitted the only legal service Powers even arguably performed for Fair or TCG, was the Unifund contract review. (CP 954-955).

Also, whether for a particular matter, an attorney/client relationship exists, is a question of fact.

Determining whether an attorney/client relationship exists necessarily involves questions of fact. [Citation.] Summary judgment is proper on a factual issue only if reasonable minds could reach but one conclusion on it.

*Bohn* at 363.

Here, Powers has testified he did not provide assistance or advice to Fair (or to TCG) about the contract TCG was proposing, and did not even know TCG existed until after the LKO/TCG contract was formed. (CP 1115). Likewise, Fair admitted that he did not know whether the only legal services ostensibly provided – the Unifund contract review – were actually provided for TCG or Fair. (CP 954-955). Since this testimony must be accepted as true for summary judgment motion purposes, there was at minimum, a material fact dispute about whether Powers did

transactionally “represent” Fair or TCG with regard to the LKO/TCG contract.

Moreover, if Fair individually and in a representative capacity for TCG did not know the identity of the person for which the contract review “legal services” were performed, then neither Fair nor TCG could obviously have a subjective belief that the services were being performed for Fair or TCG.

Under *Bohn*, a subjective belief reasonable under the circumstances is the sine qua non to a client status in connection with a “matter” for which there is representation. Because Fair denied having any belief that Powers represented him or TCG, Powers’ review of the Unifund contract simply cannot be seen as representation of Fair or TCG. Moreover, the central issue for RPC 1.7 purposes is not Unifund contract review, it is instead whether any transactional legal services were sought from Powers for the LKO/TCG agreement. Because none were by either Fair or TCG, the trial court erred in ruling as a matter of law that an RPC 1.7 violation had occurred.

4. **The Court Erred in Ruling an RPC 1.7 Violation, if Existing, Would Allow Contract Rescission.**

LKO, Powers and Therrien produced evidence that a contract was formed between LKO and TCG. (CP 273-274, 501, 522, 543-547, 565,

1114). For summary judgment purposes, Sires' and Powers' testimony that Fair knew LKO was the contracting party, must also be accepted as true. (CP 498-499). It is not denied by any ruling below and the court below found, that Fair was on notice of LKO, he just did not care about its specific identity.

LKO, in accepting TCG's investment proposal, never sought to change the terms. LKO simply accepted TCG's terms by subsequently paying TCG the requested funds and by arranging for Powers & Therrien, P.S. to provide the legal services TCG requested. (RP 418). It has never been alleged nor is there any evidence that LKO acted unlawfully in contracting with TCG. Indeed, in the trial court's September 25, 2009 memorandum opinion, the trial court made clear LKO had committed no fraud or misrepresentation in forming the contract. Instead, the trial court voided the contract and granted rescission based solely on its erroneous conclusion that an RPC 1.7 violation by Powers had occurred. (CP 1982).

The trial court acknowledged that under Washington law, there is no authority for rescinding an otherwise lawful contract, because a lawyer for the owner of an interest in one of the contracting parties, is a client of the lawyer who provided legal services for a transaction between another client and the investee. (There is not even authority for the proposition that a contract between two clients in which a lawyer provided legal

services in violation of RPC 1.7 is void) (CP 1981). The trial court nevertheless created that new Washington law by applying a New Mexico case, *C.B. & T. Co. v. Hefner*, 98 N.M. 594, 651 P.2d 1029 (1982) which it said allegedly supports that conclusion, to facts completely inapposite thereto. (CP 1981).

*Hefner, supra*, and other applicable Washington case law however, do not support the court's decision. In *Hefner*, the party seeking rescission established the terms of the contract it entered into were prejudicially unfair to the party seeking rescission. No such facts exist here, where LKO accepted without modification the contract terms TCG offered. Indeed Fair has admitted that he shopped the investment proposal to others before presenting it to Powers and Therrien without success. (CP 1575-1576). If the proposal was unfair to TCG, someone certainly would have accepted it. Another distinguishing factor is that the *Hefner* court allowed rescission in part based upon the breach of a fiduciary duty owed by one of the contracting parties to the other. *Hefner* at 600. Here, LKO owed no duty whatsoever to TCG. It certainly breached no fiduciary duties to TCG. Also, the attorney in *Hefner* was specifically hired to draft the sales transaction documentation for both parties. *Hefner* at 601. In contrast, Powers was neither asked to nor did he provide any party legal services for the transaction.

In *Hefner*, the facts also establish the attorney knew about a material fact which he failed to disclose, thereby causing one party a potential financial loss. *Hefner* at 601. Here, Powers knew no undisclosed material information pertinent to the transaction. The transaction was instead based entirely on Fair's investment proposal. In short, the facts in *Hefner*, are completely dissimilar from the case facts here.

In applying *Hefner*, the trial court ignored not only that it is factually inapposite, but that it conflicts Washington precedent. Under Washington law, legally to justify rescission, the party seeking rescission must establish that a substantial injury was sustained. *Ramsey v. Mading*, 36 Wn.2d 303, 217 P.2d 1041 (1950). If there are no damages, there are no grounds for rescission. *Marrazzo v. Orino*, 194 Wash. 364, 78 P.2d 181 (1938); *Capital Sav. & Loan Ass'n v. Convey*, 175 Wash. 224, 27 P.2d 136 (1933). Concluding no damages were caused by Powers' action, the court below recently dismissed Fair's claim of malpractice

Consistent with this later finding, motion facts do not show that any injury was sustained by reason of TCG securing LKO's investment, let alone a substantial one. TCG instead got in full, the money and free legal services it asked for. Moreover, as a proximate cause of LKO's investment, TCG's value by Fair's admission increased from the \$103,000

invested in TCG by LKO, Fair, and Fair's mother to \$1,500,000 as of April 21, 2007.

The trial court also ignored Washington law as set forth in *Valley/50<sup>th</sup> Ave., supra*. In that case, the Supreme Court ruled that even an agreement which violates the provisions of RPC 1.8 (which, unlike RPC 1.7, applies to the lawyer client relationship and not to a matter in which a representation could create a violation) is not automatically void, but is only "void or voidable," because the attorney has the right to show the contract was "fair and reasonable, free from undue influence, and made after a fair and full disclosure on the facts on which it is predicated." *Id.* at 742.

Applying this exculpatory rule to a RPC 1.7 case in which the lawyer is not a contracting party, the record proves that it was TCG who proposed those contract terms which it wanted an interested third party to accept, and LKO simply accepted those terms without change or amendment, thereby forming the LKO/TCG contract. The record also shows the investment proposal was shopped to others for TCG, before it was presented to Powers and Therrien who also declined it. How can an investment proposal created solely by its solicitor and which has been declined by others, be deemed unfair to the solicitor when finally accepted by another person?

Because these undisputed facts support the contract when formed, was “fair and reasonable, free from undue influence, and made after a full and fair disclosure of the facts upon which it was predicated,” it was legal error for the court to automatically allow contract rescission as a form of “disgorgement” by a party (LKO) who owed no RPC 1.7 duties to anyone.

In summary, the trial court erred by ignoring the facts and Washington law on rescission, and by applying distinguishable foreign authority to justify summary rescission of the TCG/LKO contract.

**5. The Court Erred by Failing to Consider All Equitable Factors Before Ruling as a Matter of Law that Rescission Remedy Applied.**

Because the remedy of rescission is equitable, before applying the remedy, equitable principles must be considered. *Erckenbrack v. Jenkins*, 33 Wn.2d 126, 204 P.2d 831 (1949).

Here, there is no evidence LKO at any time breached the contract it reached with TCG. There is similarly no evidence LKO committed any fraud. Absent fraud or contract breach by LKO, the application of rescission has inequitably harmed the interests of an innocent party. LKO is not a lawyer. The court nevertheless issued an order that by design is intended to penalize a lawyer if a RPC 1.8 violation can be shown. The court found no RPC 1.8 violation. As to RPC 1.7, this type of disciplinary order cannot lie against LKO who, as a non-lawyer, owed no RPC duties.

The court failed to reasonably consider that the professional ethical obligations imposed by the RPCs are simply not obligations LKO owed.

Ignoring that no equitable grounds exist for harming LKO's business interests, the court purportedly based its rescission ruling solely upon the conclusion that a third party's putative ethical violation (Powers) otherwise justified injuring LKO. Pertinent Washington case law does not support that conclusion.

Specifically, in the case *Hizey v. Carpenter, supra*, the court considered a case factually similar to this one. In that case, one claim made was that the defendant lawyer had violated RPC 1.7 because the lawyer's wife was on one side of a financial transaction, which another client had entered into and for which the lawyer prepared the contracting documents. As in this case, in *Hizey*, no conflict-of-interest waiver or disclosure had occurred.

Addressing the RPC 1.7 violation issue, the *Hizey* court held that while the RPCs may give rise to a disciplinary remedy, they do not give rise to a private remedy.

The result of such holdings, with which we concur, has been that breach of an ethics rule provides only a public e.g. disciplinary remedy and not a private remedy. *Hizey* at 259. [Emphasis added].

The RPC preamble in Paragraph 20 also makes this legal limitation clear:

Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other non-disciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability...

[Emphasis added]. *See also, Harrington*, 67 Wn. App. 901.

Accordingly, a breach of RPC 1.7, even if existing, simply does not support a private rescission remedy for TCG. *Harrington* at 909-910.

The court in *Hizey* also made clear why there are significant differences between a private legal action and a disciplinary proceeding. Specifically, a lawyer may be disciplined even if his misconduct does not cause the client any damage. *Hizey* at 262. To differently support a private remedy right however, a plaintiff must show that malpractice occurred, and that requires proof of four discrete elements. Those are:

(1) the existence of an attorney/client relationship, which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred.

*Hizey* at 260 [Emphasis added]; *See also, Hansen v. Wightman*, 14 Wn. App. 78, 88, 538 P.2d 1238 (1975); *Sherry v. Diercks*, 29 Wn. App. 433, 437, 628 P.2d 1336, *rev. denied*, 96 Wn.2d 1003 (1981).

Consistent with this legal distinction, in *Hizey* despite there being a proven RPC 1.7 violation, the contract prepared by the lawyer involving a client and his wife, was not rescinded, nor did a damages judgment issue. Neither remedy applied because the client was unable to show the lawyer's conduct proximately caused the client damages.

The same is true in this case. First, there was no act or omission by Powers, which violated RPC 1.7, since neither Fair nor TCG asked Powers to do anything as a lawyer with regard to LKO's investment in TCG. Secondly, there were no damages caused to TCG by LKO's investment. It follows that the factual predicate required to support a private legal rescission remedy does not exist in this case.

As the *Hizey* court noted:

Although some of the evidence was disputed, when viewed in the light most favorable to defendants, it is clear the jury rejected plaintiffs' testimony that they were unaware Mr. Carpenter was representing all parties, or that they would have proceeded with the transaction differently had they received independent advice, or that they were under extreme financial pressure to sell the property.

*Id.* at 658. [Emphasis added].

In summary, without proof that something a lawyer did caused a client any damage, the Supreme Court in *Hizey* did not require one client (the bank employing the attorney's wife) to give back the property

belonging to the complaining client, simply because an otherwise non-damaging RPC violation had occurred.

As additional support, LKO would also cite the court to *In Re: Disciplinary Proceeding Against Botimer*, 166 Wn.2d 759, 215 P.3d 133 (2009). In that case, an attorney (Botimer) represented numerous members of the same Reinking family. In that capacity, Botimer both advised and prepared numerous documents pertaining to interfamily financial transactions over the course of many years. The court found as fact, the following:

Botimer did not obtain conflict waivers in the course of his assistance of the various members of the Reinking family. Further, he did not discuss the advantages and disadvantages of joint representation. Botimer did not use a written client engagement agreement or any other method to obtain consent in writing to the conflict.

*Id.* at 763. [Emphasis added].

Notwithstanding the court found that RPC 1.7 had been violated, none of the many contested financial transactions between the family members were held void by the court. Rather, a trial was held, and a money judgment ultimately issued to resolve the parties' various substantive contract disputes.

If rescission were, as a matter of law, applicable to any contract ostensibly formed involving an RPC 1.7 violation, no damages trial in *Botimer* would have been necessary.

LKO would also refer the court to *Nishikawa v. U.S. Eagle High, LLC*, 138 Wn. App. 841, 158 P.3d 1265 (2007). In that case, one party to a real estate purchase and sale contract argued that a sales contract should be held unenforceable because a “dual agent” had allegedly violated certain professional duties owed to one contracting party under RCW 18.86.060(2)(a)-(b). The court refused to grant this relief however stating:

And U.S. Eagle presents no authority, and we have found none, to show that an appropriate remedy for such violations is to rescind the underlying contract when fraud is not alleged.

*Nishikawa* at 850. [Emphasis added].

Here, if Powers breached any non-RPC legal duties owed to either Fair or TCG, which would justify a malpractice claim, then defendants had the right to pursue such damages claims against Powers (and they did pursue such claims, although those claims were recently dismissed on the basis that there were no cognizable damages). As to LKO however, the defendants occupy the same business positions as the parties in *Nishikawa, supra*. Specifically, neither LKO nor TCG engaged in any misrepresentation or fraud. Therefore, it was not appropriate for the court to cancel the parties’ contract, just because an ethical duty allegedly owed by a professional to one of them may have been violated. The parties had no such ethical duty inter se.

Rather than follow applicable Washington case law and require proof that a non-RPC duty owed by Powers to Fair or TCG was breached, which lead to consequential damages, the court erred by finding an alleged RPC violation alone, with no resulting damages, could support a private legal remedy. This error by the court requires remand and reversal.

**6. The Trial Court Erred By Ordering Summary Judgment For Issues Where Material Fact Disputes Existed.**

Under CR 56, the moving party is required to show no material fact disputes exist pertaining to any issue which the court is asked to resolve as a matter of law. *Scott v. Pac. West Mountain Resort*, 119 Wn.2d 484, 502-03, 834 P.2d 6 (1992). All doubts about the existence of a disputed material fact must be resolved against the moving party. *Atherton Condo. Ass'n v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). Importantly, the summary judgment procedure should not be used to try an issue of fact. *Thoma v. C.J. Montag & Sons, Inc.*, 54 Wn.2d 20, 26, 337 P.2d 1052 (1959). Summary judgment must be denied if the record shows even a reasonable hypothesis which would create a genuine issue of material fact. *Mostrom v. Pettibon*, 25 Wn. App. 158, 162, 607 P.2d 864 (1980).

Here, material facts are in dispute. There is a factual dispute about whether Powers violated RPC 1.7. The court's March 31, 2009

Memorandum Decision makes clear the court ruled Powers violated RPC 1.7 solely because the court concluded LKO was a current Powers' client and Fair was a current Powers' client, at the time the LKO/TCG contract was entered into. (CP 1258). The court apparently believed, erroneously, or did not properly consider that Fair was not the actual party in interest, that Fair acted solely as agent and representative of TCG in the matter, that TCG was not a client of Powers as of the time the matter occurred, and that no violation of RPC 1.7 could accordingly arise solely because of Fair's relationship with TCG and his client relationship with Powers where there was no representation of Fair on a "matter."

As noted previously, RPC 1.7 is a transactional rule. It follows that unless the facts show Powers was asked by Fair to perform legal services (*i.e.* actively "represent" Fair or TCG, ignoring for this purpose that TCG was not a client of Powers or even known to him) with regard to the parties' specific proposed contract (*i.e.* some act which Powers could either agree to perform or decline to perform) there can be no RPC 1.7 violation.

To further illustrate by example, if two existing clients of a particular lawyer independently agree to contract with one another, they are clearly free to do so. If neither client asks their common lawyer to provide legal advice about contract terms, nor to scaven any transactional

contract documents for them, is the lawyer nevertheless “representing” either client for RPC 1.7 purposes? The answer is “no.”

For summary judgment purposes, when considering whether a lawyer was asked to “do something,” (*i.e.* represent either party on a “matter”) all facts on that issue most favorable to the non-moving party must be accepted as true. Here, Powers’ declaration testimony disputes that Fair ever asked him to provide legal services with regard to Fair’s independently formed contract proposal. Since that testimony must be accepted as true for motion purposes, the trial court erred in ruling as a matter of law that Powers ever “represented” Fair with regards to the subject contract proposal “matter,” in violation of RPC 1.7.

The trial court also improperly ignored that Fair personally was not involved in the LKO/TCG contract. As held in (*50/Ave* case) and as confirmed by RPC 1.13, just because an officer, owner or director for an organization consults with a lawyer for the entity, that does not make the individual the client of the lawyer, (*See*, RPC 1.13, Cmt. 2) nor does consultation personally with the lawyer even on matter concerning the individual’s relationship with the entity, make the entity the client of the lawyer.

The reverse is also true. Just because Fair, an arguably current client, may have spoken to Powers about seeking an investor for the new

business he intended to pursue, that alone would not factually establish that TCG, a separate company, formed a client relationship with Powers prior to the date at which the LKO/TCG contract was formed.

For there to be an RPC 1.7 conflict, the facts would instead have to show that TCG, as a distinct entity, asked Powers to do some representational act connected to the proposed LKO/TCG contract. Here however, Powers denies providing TCG with legal services, or even knowing that TCG existed, until after the LKO/TCG contract was formed. (CP 1115). Simply passing LKO's money over to TCG is not an RPC 1.7 conflict-of-interest act.

As relevantly noted by our Supreme Court in the recent case *Disciplinary Proceeding Against Egger*, 152 Wn.2d 393, 98 P.3d 477 (2004):

To determine whether Egger violated this rule [1.7(b)] this court must first establish whether Kirkham was a client to whom Egger had responsibilities at the time of the Kuniholm loan.  
Egger at 409.

In more general terms, before deciding whether a lawyer has committed an RPC 1.7 violation, a court must first establish whether the lawyer even had an attorney/client relationship with both parties to a transaction.

Therefore, in light of the parties' factual disputes, the court's legal ruling that an RPC 1.7 violation had occurred was at minimum, procedurally incorrect and must be reversed.

7. **Even Assuming an RPC 1.7 Violation Occurred, an Action Against Powers Not Contract Rescission Harming Innocent Party LKO, is the Proper Legal Remedy.**

LKO breached no fiduciary duty to TCG. LKO owed no RPC ethical obligation to TCG. The trial court ruled that LKO had engaged in no fraud or misrepresentation when entering into the disputed LKO/TCG contract. (CP 1982). Absent a breach of fiduciary duties, and because there are no illegal acts of fraud or misrepresentation by LKO, there is no legal basis for the court to rescind the LKO/TCG contract.

The legal remedy available to TCG if the predicate lawyer/client relationship could be proven, is an action against Powers for malpractice, further assuming that TCG could prove harm. (Here there was such an action which the trial court recently dismissed for lack of cognizable damages, *i.e.* "harm"). Although the court in *Hizey, supra*, made clear the RPCs do not establish the legal duty owed by a lawyer to a client for private claim purposes, in a decision partially relied upon by the trial court, *Matter of McGlothlen*, 99 Wn.2d 515, 663 P.2d 1330 (1983), the Supreme Court did hold that a client might show an attorney owed non-RPC fiduciary duties to a client for legal claim purposes.

Outside the attorney discipline setting, however, the fiduciary of an attorney extends beyond the immediate attorney-client relationship.

Where a relation of confidence is once established, either some positive act or some complete case of abandonment must be shown in order to determine it. The rule must be applied as long as the influence arising from the relationship exists, although this may extend beyond the continuance of the relationship itself, . . .

*Id.* at 523-524.

To lawfully establish such a private fiduciary duty breach claim however, the four elements of malpractice liability must all be established.

Those elements are (1) the existence of an attorney/client relationship, which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of duty and the damage incurred. *Hizey* at 260; *See also, Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 433-434, 40 P.3d 1206 (2002).

Analyzed accurately, what these decisions establish is that even an RPC violation by Mr. Powers would not alone support the remedy of rescission, just as it does not alone support a legal claim against Powers.

Possibly, if Fair or TCG could establish that because of an attorney/client relationship with Powers, non-RPC fiduciary duties existed, and if it was proven Powers acted in some manner to breach his

duties, and if actual damages could also be shown to have resulted from that conduct, a legal claim against Powers (not LKO) might exist under Washington law.

There is no evidence, and certainly no undisputed evidence, that Fair or TCG suffered any injury as a consequence of anything Powers did. (In fact, the trial court recently held that there was none). There is no evidence that Powers was actually ever asked to do anything by Fair or TCG related to LKO's investment in TCG.

Whatever the merits of any claims by Fair/TCG against Powers may be, a putative RPC 1.7 violation, not proven to cause damages cannot support rescinding an otherwise valid contact between two arm's-length parties not involved in the putative violation, particularly where enforcing that remedy would result in a potential \$750,000 loss to one completely innocent contracting party, LKO.

#### **D. CONCLUSION.**

Were LKO and Fair both Powers' clients in the fall of 2004, there is no evidence Powers was asked by Fair or by TCG to "represent" either of them with regard to the proposed investment contract. Whether Powers was asked by either defendant to provide legal services pertaining to the proposed investment contract is an issue of material fact dispute, given the declarations filed. A client relationship is insufficient to create an

RPC 1.7 violation. There must, in addition, be some act of “representation” actually taken by the lawyer at one client’s request, on a specific “matter,” in which two clients would have differing interests potentially giving rise to a conflict.

The record shows no representational act taken by Powers for Fair or TCG connected to the Fair-developed and proposed investment deal. Communicating to Fair that LKO had agreed to be an investor or approving and forwarding LKO’s checks in the amounts Fair requested, are facially not representational or even legal services. The court accordingly erred both substantially and procedurally in ruling that Powers violated RPC 1.7. Absent such violation, there is no basis for rescission.

By Fair’s stipulation, the party contracting with LKO was TCG, not Fair. (CP 1977). The trial court correctly agreed, whether Powers represented TCG in advance of the LKO/TCG contract being formed, was for summary judgment purposes, an unresolved material fact dispute. (CP 1979). As confirmed by current RPC 1.13, consistent with prior law, particularly the *50 Ave.* case, individuals and legal entities in which they have ownership are considered separate clients; the attorney/client relationship should not be conflated on the basis of ownership or agent representation with legal representation of the owner or representative. RPC 1.7 and 1.13 are clear. If TCG was not a Powers client until after

February 8, 2005, then there could not be a RPC 1.7 violation which precluded LKO/TCG contract formation.

The minimal act of sending LKO's money to TCG does not establish an RPC 1.7 violation; it fails to establish the capacity of the person making the remittance. This is clear in *Bohn*. There must be a request for advice and substantive legal services, when the ministerial act of approving the issuance of a check in an administrative capacity is requested, advice is neither solicited nor given. Were RPC 1.7 violated, the Supreme Court in *Hizey, supra*, made clear that while an RPC duty breach could support disciplinary proceedings, such a breach would not support a private legal claim or cause of action; a private legal claim must be grounded upon an independent non-RPC breach by the lawyer.

It follows that the trial court erred in ruling that an RPC 1.7 breach by Powers, were it to exist, could support a private legal claim by Fair or TCG against LKO, a party owing RPC duties to no one.

While the New Mexico *Hefner* case relied upon by the court does say that a fiduciary duty breach, if proven, could support a rescission remedy, to establish a fiduciary duty breach, client damages proximately resulting from the breaching party's conduct would first have to be proven. *Hizey* at 260.

Here, the existence of any damage to Fair or TCG resulting from anything Powers did, is at worst the subject of material fact dispute. It was accordingly legal error for the court to hold that an RPC 1.7 violation alone, even if existing, authorized the private rescission remedy which the court applied.

Properly analyzed, the court, for motion purposes, should have held 1) that it had to accept as true, no damages were caused to Fair or TCG by reason of the LKO contract, 2) that absent damage, no fiduciary duty breach by Powers was established, and 3) that where no fiduciary duty breach exists, the court cannot rescind an otherwise lawful contract between LKO and TCG (which again, for motion purposes, the court must assume existed).

What the record on appeal instead shows is that the trial court conflated RPC 1.7, which is a transactional rule, and RPC 1.8, which is a relationship rule. The court also failed to properly analyze whether Powers was asked to transactionally represent anyone (current client or not) with regard to the material investment contract which the pleadings placed at issue.

Ignoring the provisions of RPC 1.13 and prior consistent case law, the trial court also failed to properly distinguish between those ethical obligations owed by Powers to Fair, with those Powers might or might not

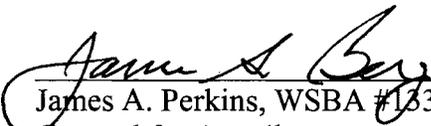
owe to TCG, depending upon whether TCG could be shown to be a Powers' client prior to LKO/TCG formation.

Particularly critical, the court failed to consider that the RPCs under Washington law are not to be used as a basis for granting a non-lawyer party a legal remedy against another non-lawyer party. In short, the trial court erred by focusing on RPC obligations which Powers might or might not owe to someone, as being somehow relevant to the legal rights or claims which LKO and TCG were asserting against each other. They are not. While they might have some relevance to the malpractice claims alleged against Powers, they were not relevant to the LKO/TCG third party business deal.

Finally, by failing to appropriately differentiate between each party's rights and obligations to each other, the trial court failed to correctly recognize that material fact disputes at minimum, prevented the trial court from issuing the subsequent erroneous legal rulings which are now on appeal. Unfortunately, the court's legal errors effectively prevented LKO from being able to try all of its complaint claims on the merits. As an innocent party potentially damaged in the sum of \$750,000 or more by the court's flawed motion rulings, reversal and a remand of this case back for trial is both just and necessary.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of July, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on the 18<sup>th</sup> day of July, 2011, I caused to be served by forwarding via Federal Express Standard Overnight service, a true and correct copy of the Brief of Appellants to:

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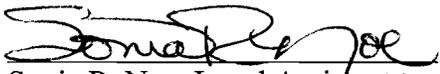
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