

FILED

No. 297411-III

MAR 28 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LK OPERATING, LLC, a Washington limited liability company,

Appellant,

v.

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.

BRIEF OF INTERVENORS OR BRIEF OF AMICI
LES POWERS AND KEITH THERRIEN

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A. INTRODUCTION

In its appeal from this bifurcated action, The Collection Group (“TCG”) has revived an issue that was not decided by the trial court. It is arguing that this Court should decide – for the first time on appeal – that Les Powers, a non-party, somehow violated RPC 1.8(a) by “doing business” with TCG.

The undisputed findings of fact – now verities on appeal – establish that Powers did *no* business with TCG. TCG tried unsuccessfully to persuade the trial court on this issue. The trial court was not persuaded for good reason: the notion that an attorney violated RPC 1.8(a) despite engaging in no business transaction is absurd.

This Court should decline TCG’s invitation to find an RPC 1.8(a) violation here. The trial court correctly rejected the argument, and TCG has not challenged the relevant findings of fact that are dispositive of the issue.

B. INTEREST OF INTERVENORS/AMICI

The appellant in this matter, LKO LLC, (“LKO”) had a contract with the respondent, The Collection Group LLC (“TCG”). Appendix A at 9. When TCG’s agent, Brian Fair, suggested altering TCG’s contract with LKO in Fair’s favor, LKO filed suit against TCG and Fair to protect its rights under the agreement. *Id.* at 7.

TCG and Fair answered and cross-claimed against movants Powers and his law partner, Keith Therrien, and their marital communities. TCG answered that Powers and Therrien, in their capacities as attorneys, had committed an RPC violation with respect to the contract in question, and that the LKO-TCG contract should be rescinded.¹ TCG and Fair also cross-claimed against Powers and Therrien for malpractice.²

During complex pre-trial proceedings, the trial court concluded that Les Powers had violated RPC 1.7, and that any alleged agreement between Powers and TCG or Powers and Brian Fair would be void as a matter of law. Although TCG and Fair strenuously argued the matter, the trial court declined to rule on an alleged violation of RPC 1.8(a), which governs business transactions between lawyers and clients. *Id.*

Later, the trial court bifurcated the contract action between LKO and TCG from the malpractice action between Fair and Powers and Therrien, and the two matters moved forward in consolidated proceedings.

¹ There was no finding that Keith Therrien committed any RPC violation in this case. Although the trial court initially ruled that both attorneys had violated RPC 1.7, he later vacated that ruling as to Keith Therrien. Appendix C at 2. The final conclusions of law confirm that the RPC 1.7 violation finding applied to Les Powers only. Appendix A at 8.

² Fair lost his malpractice action because, *inter alia*, he failed to prove he had incurred any damages. He has appealed, (Washington State Court of Appeals Cause No. 30161-3-III); that appeal has been stayed pending a ruling in this case.

Appendix A at 7. However, the trial court made clear that there were no overlapping claims or parties in the two matters. *Id.*

In the contract action, the trial court concluded that the business deal was in fact between *LKO* and TCG, not Powers and TCG or Powers and Fair. *Id.* at 8-10. Nonetheless, the trial court rescinded the LKO and TCG contract based on an alleged RPC 1.7 violation that Powers committed by “representing” both LKO and Fair in the transaction.³ This appeal by LKO followed.

Powers and Therrien were concerned about the trial court’s interlocutory ruling regarding a violation of RPC 1.7. Such a ruling is a stain on Powers’ reputation and the reputation of their firm, and has other implications that reach beyond the confines of this litigation. However, they have no personal interest in this contract action, and the malpractice action was still ongoing when LKO appealed from the rescission order.

³ The trial court’s RPC 1.7 ruling is also troubling. In order to find an RPC 1.7 violation, the trial court was required to find that Powers represented both LKO and TCG in the formation of the LKO-TCG contract without obtaining the informed consent of both parties. This is true because (a) RPC 1.7 focuses on the transaction that is at issue, and because after the LKO-TCG agreement was formed, LKO became part of TCG and thus became the same entity. However, the trial court found that “Les Powers did *not draft any agreement between the parties.*” Appendix A at 9 (emphasis added). Thus, the finding of an RPC 1.7 violation is incorrect as a matter of law.

Powers and Therrien therefore could not join in this appeal as of right to challenge the trial court's earlier ruling regarding RPC 1.7.⁴

However, this appeal has taken a turn that has prompted this motion. Powers and Therrien recently learned that Fair and TCG seek in this appeal to have this Court find, for the first time in this case, that Powers also violated RPC 1.8(a). Such a ruling, like the RPC 1.7 ruling, would have potentially serious personal consequences for Powers and Therrien totally separate from the outcome of this or any litigation.

A judicial finding that an attorney violated an ethics rule has implications that extend beyond this appeal. Powers could be subjected to actions against his license to practice law, as well as suffer harm to his personal and professional reputation. Therrien, as Powers' law partner, could likewise be prejudiced personally and professionally by any new finding of a new RPC 1.8(a) violation by this Court.

These potential consequences give Powers and Therrien a powerful and very personal interest in the outcome of this appeal.

C. STATEMENT OF THE CASE

⁴ The malpractice action is now over; Powers and Therrien have prevailed. TCG has appealed from that judgment, and Powers and Therrien have cross-appealed the trial court's RPC 1.7 ruling. Recently, TCG sought and received a stay from that appeal pending the outcome of the present appeal. Powers and Therrien sought to have their appeal joined with this appeal rather than have it stayed, but their motion was denied. Thus, this brief is the only way they can defend their substantial interests in the present appeal.

Intervenors/amici Les Powers and Keith Therrien are attorneys that work for, and are principals in, the law firm of Powers & Therrien, P.S. In January 2004, Brian Fair contacted Diane Sires, a legal assistant with the Powers & Therrien, P.S., and asked her to assist him in incorporating a Nevada corporation. Appendix B at 5. Fair provided Sires the information necessary to complete the preprinted Nevada articles of incorporation, identifying the incorporator as Fair and the name of the corporation as BF Trading, Ltd. Sires continued to forward to BF Trading its annual reports for completion and filing to maintain its corporate existence until its dissolution in 2006. *Id.*

In May 2004, Fair established a corporation, The Collection Group LLC, (hereinafter "TCG") to operate the debt collection business. Appendix A at 4. He did not ask Powers & Therrien, P.S, to incorporate TCG. *Id.* at 6. In October 2004, Fair solicited Therrien and Powers as individuals to purchase a debt portfolio. *Id.* at 4. Fair proposed that he would donate administrative services and Powers & Therrien, P.S. would donate limited legal services and cash. *Id.*

Therrien and Powers did not invest in TCG. Appendix A at 9-10. Instead, they passed along the investment opportunity to LKO, a company owned by their adult children who are its sole beneficiaries. *Id.* at 3, 9-10. Eventually, a contract was formed between LKO and TCG wherein LKO

contributed \$52,000 to TCG in exchange for a 50% membership in TCG. *Id.* at 7. Fair was the principal of TCG, and entered into the contract on TCG's behalf. Fair and his wife were each members of TCG and Fair was its manager. In his capacity as manager he entered into the contract on TCG's behalf. *Id.* at 4. Fair and his wife invested \$27,000 in TCG. *Id.* at 5.

In April 2007, Fair sent a letter purporting to "formalize" the ownership interests in TCG. Despite LKO's substantial initial investment and the existing contract, Fair suggested that LKO's ownership be reduced below 50%. *Id.* at 7. LKO objected to the reduction of its contractual ownership interest.

LKO filed this lawsuit in Chelan County Superior Court to establish its contractual 50% membership rights in TCG. The case was assigned to the Honorable T.W. Small.

In a motion for partial summary judgment, Fair and TCG contended that the TCG-LKO agreement was void because of an alleged RPC 1.8 violation by Powers. Appendix B at 4. They alleged that at the time the LKO membership in TCG was established, Fair was a current client of Powers & Therrien, P.S., and that Powers had violated RPC 1.8(a), the rule prohibiting attorneys from entering into business transactions with clients. *Id.*

In a partial summary judgment letter ruling, the trial court concluded that Powers had represented both Fair and LKO in the LKO-TCG contract, and therefore had a conflict of interest. Appendix B at 13.⁵ However, the trial court did not find that Powers had violated RPC 1.8(a). *Id.* Instead, the trial court concluded *sua sponte* that Powers had violated RPC 1.7, and that any alleged agreement between Powers and Fair would be void as a matter of public policy. *Id.* However, the contract at issue was *not* between Powers and Fair, but between LKO and TCG. Therefore, the trial court reserved ruling on the issue of whether RPC 1.8(a) was also violated. *Id.*

Ultimately, the trial court's judgment rested solely on its conclusion about the RPC 1.7 violation. Appendix A at 8. The trial court never made a ruling regarding the alleged RPC 1.8(a) issue.

In this appeal, in its response brief, TCG has argued that even if there was no RPC 1.7 violation, this Court may uphold the trial court's rescission ruling on the alternate grounds that Powers violated RPC 1.8(a). Br. of Resp'ts at 33-43. Again, the trial court did not rule on this issue. TCG and Fair are asking this Court to make the RPC 1.8(a) finding for the first time.

⁵ Again, the initial finding that Therrien had violated RPC 1.7 was vacated, Appendix C at 2, and the ultimate findings confirm that Therrien committed no RPC violations. Appendix A at 8.

D. SUMMARY OF ARGUMENT

This Court should decline TCG's invitation to rule, for the first time on appeal, that there was an RPC 1.8(a) violation here. Reading the findings of fact and conclusions of law as a whole, and looking at the record of the trial court's decisions, it is clear that the business transaction here was between two independent business entities, LKO and TCG, and not between any lawyer and client.

The trial court made several rulings. LKO was the sole investor in TCG. Appendix A at 9. LKO was an independent entity from Powers, and Powers received no benefit from LKO. *Id.* at 3. Any part Powers had in the LKO-TCG contract was not as an investor with a direct pecuniary interest, but essentially as the conveyor of the offer and acceptance between LKO and TCG. *Id.* at 9-10. Les Powers did not draft or negotiate the LKO-TCG contract, but simply accepted TCG's offer by causing LKO to convey its sole funds to TCG. *Id.* at 9.

Put simply, an attorney cannot violate the rule prohibiting unfair business transactions between lawyers and clients if the attorney does not engage in a business transaction with the client.

E. ARGUMENT

TCG has argued that Powers violated RPC 1.8(a) with respect to the transaction between LKO and TCG. Br. of Resp'ts at 33-43. They

argue, citing several ambiguous findings of fact, that the trial court “found” that Powers, not LKO, was the contracting party with TCG. They then conclude that Powers engaged in business with a current client in violation of the rule. *Id.*

RPC 1.8 provides in relevant part: “(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client....” RPC 1.8(a). The rest of the rule discusses what steps a lawyer may take to engage in a business transaction with a current client and still comply with the rule. RPC 1.8(a)(1)-(3).

Although many cases discuss whether a lawyer engaging in such a transaction took the proper steps to comply with RPC 1.8(a), few interpret what it means to “do business” under this RPC. Typically in such cases, whether the attorney and client did business is not in dispute.

One RPC 1.8(a) case that does discuss what constitutes “doing business” is *Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 153 P.3d 186, 188 (2007). In *Valley*, a law firm performed legal services for several entities closely held by an individual client, without obtaining a representation agreement from the particular corporate entity, Valley/50th Avenue LLC. 159 Wn.2d at 741. When concern arose about the fees due, the individual client signed an agreement and required Valley to execute a

promissory note and deed of trust on his property to secure the fees owed, as well as future fees. *Valley*, 159 Wn.2d at 742. Our Supreme Court concluded that obtaining the promissory note and deed of trust were business transactions under the rule, noting:

Though described as a fee agreement by the Firm, it was, in fact, relevant to a significant existing debt. A standard fee agreement involves *anticipated* legal fees and an agreement to pay them; in this case substantial fees were already owed. The relationship was not merely attorney-client; it was also creditor-debtor. Although it was clothed as a fee agreement between an attorney and a client, it was in reality an agreement between a creditor and a debtor.

Valley, 159 Wn.2d at 744 (emphasis in original). Thus, an agreement between a lawyer and a client in which the lawyer or the client becomes the creditor to the other pre-existing debt is a business transaction.

Valley also stands for the proposition that a corporate entity and an individual person are considered separately in the analysis of who is the “client.” *Valley*, 159 Wn.2d at 747. “Like a corporation, a limited liability company is an independent legal entity to whom a lawyer owes a separate duty of loyalty and is entitled to the notice, disclosure, and opportunity to seek independent counsel required by RPC 1.8.” *Id.* Therefore, even if an individual is a current client, and that individual is the sole manager and owner of a closely held corporation, there can be no

RPC 1.8 violation unless the corporate entity is also a current client of the lawyer. *Id.*

Our Supreme Court reached a similar conclusion in *In re Disciplinary Proceeding Against Miller*, 149 Wn.2d 262, 66 P.3d 1069, 1073 (2003), when an attorney violated RPC 1.8(a) by obtaining an ownership interest in a current client's certificate of deposit. *Miller*, 149 Wn.2d at 279. Again, a lawyer who wants to avoid doing business with a client should not assume a pecuniary interest in something the client owns. *Id.*

The decision in *In re Disciplinary Proceeding Against Holcomb*, 162 Wn.2d 563, 173 P.3d 898, 906 (2007), also sheds some light. There, the Supreme Court found that a lawyer obtaining loans from a client violates RPC 1.8(a)'s prohibition against business transactions. *Holcomb*, 162 Wn.2d at 578-79. The lawyer defended against the action by arguing that the loans were paid from the client's revocable trust, and that attorney-client relationship was between the client and lawyer, not the trust and the lawyer. However, the trust was not formed in a manner so as to be legally distinguishable. *Id.* Specifically, it did not have a separate tax identification number, instead using the client's social security number. Also, the client benefited from the trust and used funds from the trust to pay daily expenses. The Court concluded that because the trust

was legally indistinguishable from the client. *Id.* Thus, taking loans from the trust was taking loans from the client, which the Court concluded was a business transaction. *Id.*

An attorney arranging to receive the profits from a client's joint venture, even in the context of a fee agreement, is also a business transaction. *Holmes v. Loveless*, 122 Wn. App. 470, 475, 94 P.3d 338, 341 (2004). When a law firm gave a discounted fee rate in return for a future interest in the venture, this Court found that despite their decline of an actual ownership stake in the venture, "its compensation was directly linked to the joint venture's profits. This is sufficient evidence to conclude that the fee agreement falls within the scope of the business transaction rule." *Id.*

What the Supreme Court's analysis in these cases reveals is that a "business transaction," between a lawyer and client must confer some benefit to the attorney and/or the client arising from a legal obligation incurred between them, such as a contract, debtor-creditor relationship, share in business profits, or other beneficial financial arrangement.

Other states' ethics rules similarly characterize "business transactions." *See, e.g., In re Conduct of O'Byrne*, 298 Or. 535, 548, 694 P.2d 955, 963 (Or. 1985) ("A loan from a client to a lawyer of a substantial sum of money is a 'business transaction.'"); *Comm'n on Prof'l*

Ethics & Conduct of Iowa State Bar Ass'n v. Mershon, 316 N.W.2d 895, 898 (Iowa 1982) (“business transaction” is “making a contract with a client”); *Matter of Pappas*, 159 Ariz. 516, 523, 768 P.2d 1161, 1168 (Az. 1988) (entering into limited partnership agreement with clients is “business transaction”).

Here, there is simply no business transaction between Powers and any client, as the findings of fact and conclusions of law establish. Appendix A. Fair approached Powers and Therrien and asked the attorneys to purchase a debt portfolio with him. Powers and Therrien did not do so, but Powers passed along the opportunity to LKO, an entity which is distinct and separate from Powers, from which Powers receives no benefit and in which he has no interest. Appendix A at 3, 8. LKO agreed to contribute to TCG, at which time LKO entered into a contract and became a member of TCG. Appendix A at 5, 8-9. The trial court chose to rescind that contract, and returned the funds to LKO. The trial court found that LKO was not the “alter ego” of Powers, as TCG had argued. Appendix A at 8. All of these findings have ample support in the record.

The findings of fact and conclusions of law makes plain that the business transaction was between LKO and TCG, that Powers had no right

or interest in the contract, and that he received no benefit from it. An RPC 1.8(a) violation here is a logical and factual impossibility.

TCG's reading of the findings of fact is utterly illogical given the trial court's other rulings. Powers was removed as a party in the LKO-TCG contract action. The trial court ultimately rescinded that contract in Powers' absence and gave returned the original \$52,000 investment to LKO. If the agreement was really between Powers and TCG, and the trial court rescinded that contract *after* bifurcating the case and removing Powers as a party in the contract action, the trial court affected the substantial rights of parties not before it and gave LKO a \$52,000 windfall. If Powers, not LKO, was the contracting party, then the trial court should have brought Powers back in as a party and should not have granted any remedy to LKO.

There was in fact no business transaction between Powers and TCG, and thus the trial court ruled correctly in refusing to find an RPC 1.8(a) violation. The trial court specifically ruled that LKO was not an alter ego of Powers, and that LKO benefited and was solely owned by Powers and Therrien's adult children. Appendix A at 3, 8. It bifurcated the Powers/Fair malpractice matter from the LKO/TCG contract matter, because that was the correct status of the parties. LKO and TCG were the

parties to the contract. Powers had no business arrangement with Fair or with TCG with respect to membership in TCG.

Despite the factual impossibility and logical absurdity of the proposition, Fair and TCG attempt to persuade this Court that the trial court found that the agreement was really between Powers and TCG. Br. of Resp'ts at 33-43. To accomplish this Herculean feat, they cherry-pick certain ambiguous factual findings to suggest to this Court that the trial court really believed Powers was the contracting party. *Id.* However, they can cite no express finding of fact that Powers was the contracting party, nor any conclusion of law that RPC 1.8 was violated.

TCG ignores the totality of the findings, and renders the trial court's actions utterly illogical. For example, if Powers was the contracting party with TCG, the trial court would not have removed Powers as a party from the contract action before ruling on contract rescission. Appendix A at 3. If Powers was the contracting party, the court would not have granted the rescission remedy to LKO.

Also, the trial court indicated in a pretrial ruling that if at trial, TCG proved that Powers was the contracting party, the TCG agreement would also violate RPC 1.8(a). Appendix B at 12. Thus, it was fully aware that, if it found Powers to be the contracting party as a matter of fact, RPC 1.8 would apply. The trial court did not so rule. Appendix A.

The only reasonable conclusion is that the trial court did not find Powers to be the contracting party, despite any ambiguous findings of fact TCG might cite.

This Court should not be deceived by TCG's attempt to obfuscate the record. The contract was between LKO and TCG, and solely benefited those entities. Powers did not benefit from LKO, and it was not his alter ego. There was no business transaction between a lawyer and client, and therefore there can be no RPC 1.8 violation here.

F. CONCLUSION

The trial court did not find that Powers was the contracting party. Absent any basis for claiming that the LKO-TCG transaction here was between an attorney and client, TCG's claim of an RPC 1.8(a) violation cannot be sustained. This Court should reject TCG's argument regarding RPC 1.8(a).

DATED this 27th day of March, 2012.

Respectfully submitted,



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APPENDIX

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SUPERIOR COURT OF WASHINGTON
IN AND FOR CHELAN COUNTY

LK OPERATING, LLC, a Washington
Limited Liability Company,

Plaintiff,

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,

Defendants.

BRIAN FAIR and SHIRLEY FAIR and the
marital community composed thereof,

Plaintiffs,

vs.

LESLIE ALAN POWERS and PATRICIA
POWERS, husband and wife, and KEITH
TERRIEN and MARSHA TERRIEN,
husband and wife,

Defendants.

NO. 07-2-00652-9
(Consolidated)

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 1

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COPY

1 THIS MATTER came on for a bench trial on August 16–18, 2010, in this
2 consolidated proceeding, Cause No. 07-2-00652-9, which was bifurcated for trial
3 purposes only. The case first tried by the court was the proceeding *LK Operating,*
4 *LLC, a Washington limited liability company vs. The Collection Group, LLC, a*
5 *Washington limited liability company.* The court previously dismissed individual
6 defendants Brian and Shirley Fair from this first case by order filed in November 2009
7 and by reconsideration order filed February 1, 2010. The plaintiff, LK Operating, LLC
8 (LKO), appeared by and through its attorney of record, James A. Perkins of Larson
9 Berg & Perkins PLLC, the defendant The Collection Group (TCG) appeared by and
10 through its attorney of record, Ronald J. Trompeter of Hackett, Beecher & Hart. Brian
11 and Shirley Fair, appeared by and through their attorney of record Stewart Smith of
12 Lacy Kane P.S., for pretrial motions.

13 **EVIDENCE CONSIDERED**

14 The following witnesses were called and testified at trial:

- 15 • Brian Fair: one of TCG's owners and its manager;
- 16 • Kenneth Meissner: LKO's accountant;
- 17 • Eva Reider: A Sands Leasing, Inc. (Sands) employee; Sands provides
18 bookkeeping services to LKO using Ms. Reider.
- 19 • Diane Sires – Legal Assistant/Secretary for Powers & Therrien, P.S.;
- 20 • Craig Homchick: LKO's accountant/expert witness.

21 LKO's exhibits in Plaintiff's Notebook 1, Nos. 1–6, 8, 45–48, 49 in part
22 (paragraph 10 only), 50, and 52-56 were admitted and considered by the court.

23 TCG's notebook exhibits numbered 10-25, 27, 28, 44, 63, 64, and 66-68 were
24 admitted and considered by the court.

25 After carefully considering the testimony of the witnesses, the exhibits and the
26 arguments of counsel, the court makes the following:

27 **FINDINGS OF FACT**

28 **THE PARTIES**

29 1. TCG is a Washington limited liability company (LLC) with its principal
30 place of business in Wenatchee.

31 FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 2

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1 2. TCG was formed by Brian and Shirley Fair in May 2004. It was formed to
2 engage in the business of debt collection.

3 3. Brian and Shirley Fair were TCG's original members. Brian Fair also
4 served as TCG's manager.

5 4. In addition to being identified as the two members on TCG's formation
6 documents, TCG's 2004 tax return identifies the business as a 2-member LLC, with
7 Brian Fair a 50 percent owner and Shirley Fair a 50 percent owner.

8 5. Brian Fair was a certified public accountant (CPA). He practiced as a
9 CPA through an entity, Fair & Associates, P.S., from late-1995 through 2007. Brian
10 Fair's wife Shirley is also a CPA and also practiced through Fair & Associates, P.S.

11 6. Plaintiff LKO is a Washington limited liability company with its principal
12 place of business in Yakima.

13 7. LKO was formed in December 2003. Each of the five adult children of
14 Leslie Powers (Powers) and Keith Therrien (Therrien) is the sole trustee and the
15 beneficiary of a separate trust. Each trust was the sole shareholder of a corporation.
16 The five corporations were the sole members of LKO

17 8. Powers & Therrien Enterprises, Inc. (PTE) was the manager of LKO and
18 provided LKO the management services the company required through its officers and
19 employees.

20 9. LKO had assets prior to any involvement with TCG.

21 10. Leslie Powers and Keith Therrien (non-parties to this first-trial) are
22 licensed Washington attorneys who are the principals in the law firm Powers &
23 Therrien, P.S. which is not a party to the litigation. They are also both officers of PTE.
24 PTE is the manager of LKO under Chapter 25.15, RCW.

25 LKO'S INVESTMENT IN TCG

26 11. Prior to the fall of 2004, Brian Fair had become acquainted with Powers
27 through shared common-clients. (The Court has previously ruled Brian Fair was a
28 client of Powers & Therrien, P.S. at all times material hereto).

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FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 3

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1 12. In late-September 2004, Fair communicated to Powers that he had
2 started a business to purchase and collect on delinquent debt. Fair was trying to find
3 interested partners/investors who could provide legal services and cash.

4 13. On or about October 27, 2004, an email was sent from Brian Fair to the
5 Powers & Therrien, P.S. email account addressed to "Les, Keith" setting forth Brian
6 Fair's proposal.

7 14. Pursuant to an earlier stipulation in the litigation, Brian Fair was acting
8 solely as an agent of TCG in sending this October 27, 2004 email proposal relating to
9 the investment opportunity.

10 15. The investment proposal ("Proposal") required that the investor
11 contribute one-half of the investment capital for purchase of debt and other expenses
12 and to contribute at its own expense, and at no cost to the venture, legal services to
13 help prepare any initial legal pleadings that the venture would need to file to collect on
14 that debt. *TCG would provide legal services*
and to provide legal documents for the venture.

15 16. The Proposal also required Fair to contribute one-half of the investment
16 capital for purchase of debt and other expenses, and Fair would contribute at no
17 charge, his services in finding debt and negotiating with debtors and debt sellers.

18 17. The Proposal provided that such an investor would be a 50 percent
19 (50%) owner of the venture.

20 18. Provided TCG received the cash and free legal services as requested,
21 Fair both personally and as manager of TCG, did not care who Les Powers chose to
22 make the investment in TCG.

23 19. The proposed terms were accepted by Les Powers when the money was
24 sent to TCG.

25 20. On February 1, 2005, The Collection Group, LLC made its second
26 purchase of defaulted accounts from the company Unifund for \$7,969.23. (Ex. 17, #2
27 to p. 1 of PSA)(Brian Fair testimony, p. 297).

28 21. On February 8, 2005, Brian Fair asked that the sum of \$3,984.61 be sent
29 to TCG. (Ex. 1)

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FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 4

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by KLB
TCG would provide legal services
and to provide legal documents for the venture.
Therrien P.S.
to provide
to
TCG

1 22. Fair later revised that fax on February 18, 2007, sending it to Eva Reider,
2 a bookkeeper for LKO. (Ex. 27).

3 23. On February 23, 2005, a second request was made by Fair for an
4 additional \$17,000, less any monies previously sent. The request confirmed that with
5 payment the investor would have half ownership in the company. (Ex. 28). The name
6 of the company was TCG according to Fair's solicitation of funds on February 8, 2005
7 (Plaintiff's Trial Ex 20).

8 24. TCG received an LKO check signed by Michele Briggs in the amount of
9 \$3,984.61 dated February 21, 2005. The amount represented one-half the purchase
10 price of the Unifund portfolio purchased on February 1, 2005 by TCG. (Ex. 1).

11 25. On March 3, 2005, Powers' secretary sent a check signed by Michele
12 Briggs in the amount of \$13,015.39 to TCG.

13 26. On December 23, 2005, Brian Fair again asked for another \$10,000
14 contribution for TCG. On that date, Les Powers had a third LKO check in this amount
15 sent to TCG.

16 27. Subsequently, in September 2006, a final request for a \$25,000
17 investment was made by Brian Fair, and Les Powers had sent to TCG, an LKO check
18 in this amount.

19 28. Checks were drawn on LKO's account and sent to TCG in the amounts
20 of \$10,000 about December 23, 2005 and \$25,000 on September 11, 2006. (Exs. 3
21 and 4).

22 29. In total, \$52,000 was invested in TCG.

23 30. Professional legal services sought by TCG as part of the Proposal were
24 provided by Powers & Therrien, P.S.

25 31. Brian and Shirley Fair contributed \$27,000 to TCG.

26 TREATMENT OF THE INVESTMENT BY LKO

27 32. LKO's internal bookkeeping showed the monies were paid to TCG, which
28 was unknown to Brian Fair until after suit was filed.

29 33. Diane Sires, Powers' assistant, testified that she communicated to
30 Brian Fair that LKO was the investor in TCG. Fair denied this in his testimony. Fair
31

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 5

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1 did make it clear that he was not concerned about who Les Powers chose to provide
2 the money and services, as long as the desired funds and legal services were being
3 supplied.

4 TREATMENT OF THE INVESTMENT BY FAIR AND TCG

5 34. Because Fair did not care who the investor was, he was leaving it up to
6 Les Powers to determine who would be the investor.

7 35. Fair never requested that Powers draft an operating agreement for TCG.

8 36. Brian Fair prepared TCG's tax returns for 2004, 2005, 2006, and 2007.

9 37. As a certified public accountant, Brian Fair estimates that he has
10 prepared between 1,000 to 2,000 tax returns for individuals, partnerships, corporations
11 and limited liability companies during his career as a CPA.

12 38. On TCG's 2005 through 2007 tax returns, Brian and Shirley Fair
13 continued to be listed as the only investors/members of TCG.

14 39. Despite knowing that a third party had made an investment in TCG, Fair
15 and TCG did not issue a K-1 in 2005, 2006, nor 2007, to either LKO, Powers, Therrien,
16 or Powers & Therrien, P.S. Instead, all capital invested in TCG was identified on
17 TCG's tax returns as having been solely contributed by Brian and Shirley Fair.

18 40. In contrast to TCG's tax returns, the financial statements prepared by
19 Brian Fair for TCG identified at various times those monies provided by LKO's checks
20 to be "capital contributions" or equity in TCG.

21 OTHER FACTS RELATED TO THE LKO INVESTMENT IN TCG

22 41. Powers caused the issuance of the LKO check to TCG in February 2005.

23 42. Powers had no role in the formation of TCG, as TCG was formed more
24 than four months before Fair made his first approach regarding the investment
25 opportunity.

26 43. In early 2007, Brian Fair requested that Powers draft an operating
27 agreement for OPM I, LLC (OPM). OPM was an entity formed for purposes of
28 collecting delinquent debt in states other than Washington. TCG was both a member
29 of OPM and its manager.

30
31
FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 6

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*Les Powers
is the
sole
member
of
TCG*

1 44. Powers drafted an OPM Operating Agreement. That agreement includes
2 a "conflict of interest" provision that states, in part:

3 Counsel who has prepared this Agreement and formed the Company
4 has represented the Manager and certain of the Members and
5 continues to do so. Members of Counsel's family have an interest in
6 the Manager and through, if the Company.

6 45. Brian Fair, ^{individually and} as TCG's manager, signed the OPM Operating Agreement.

7
8 FAIR'S PROPOSAL TO MODIFY THE AGREEMENT

9 46. There were never any direct written communications from LKO to TCG,
10 or from TCG to LKO.

11 47. On April 21, 2007, Fair sent a letter to Powers and Therrien proposing to
12 formalize the ownership agreement. Fair's proposal reduced the ownership of the
13 entity chosen by Les Powers from the 50% confirmed by Fair's email of February 23,
14 2005 (Plaintiff's Trial Ex. 39).

15 48. Powers and Therrien objected to this proposed agreement modification.

16 49. LKO subsequently filed this lawsuit to establish a 50% ownership interest
17 in TCG a matter of law.

18 INTEREST RATES

19 50. TCG was paying interest on a bank line of credit, which it was
20 subsequently able to arrange, at the prime rate of interest plus 3 percent.

21 51. Applying a prime rate plus 3 percent formula, through August 15, 2010,
22 interest in the sum of \$23,164.63 was calculated to be owed on LKO's \$52,000
23 investment.

24 52. The trial testimony on the issue of interest was not disputed or rebutted
25 by TCG.

26 FINDINGS OF FACT SUPPORT FINAL JUDGMENT

27 53. The court finds that a final judgment on the claims between LKO and
28 TCG should issue, because there is no further relationship between the claims
29 adjudicated by trial and those unadjudicated claims remaining to be tried between the
30 other parties to this consolidated proceeding. Also the issues, if any, an appeal would

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FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 7

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1 address are not to be determined as part of trying the unadjudicated claims remaining
2 between other lawsuit parties. Finally, it is unlikely that TCG's appeal rights will be
3 mooted by any future trial court developments.

4
5 CONCLUSIONS OF LAW

6 PREVIOUS RULINGS INCORPORATED HEREIN

7 A. Prior to trial, as set forth in its Memorandum Decision dated March 31,
8 2009, the court ruled as a matter of law that Brian Fair was a client of Les Powers.
9 The court also held as a matter of law that Powers also represented LKO, as counsel,
10 at the time of the proposed investment discussion. As a consequence of these legal
11 rulings, the court previously held, as a matter of law, that Les Powers violated RPC 1.7
12 by not obtaining the informed consent of LKO and Brian Fair to represent each of the
13 contracting parties with regard to the transaction.

14 B. The court ruled that rescission of the alleged contract was the
15 appropriate remedy, considering Powers' RPC violation.

16 C. Rescission was not based on the finding of fraud or misrepresentations
17 by either LKO or Powers.

18 CONCLUSIONS OF LAW FOLLOWING THE TRIAL

19 D. LKO is a Washington limited liability company. It exists and operates as
20 an independent legal entity.

21 E. LKO was not formed for the purpose of becoming involved with TCG's
22 debt collection business.

23 F. LKO is not the "alter ego" of Powers or Therrien, nor is there a basis to
24 pierce the corporate veil of LKO's independent existence.

25 G. Brian Fair was the authorized agent of The Collection Group due to his
26 capacity as Manager of that LLC.

27 H. Les Powers was both a principal in the law firm of Powers & Therrien,
28 P.S., and an officer of LKO's manager, PTE.

1 I. Prior to February 23, 2005, both Brian Fair and The Collection Group
2 were clients of Les Powers due to the fact that he had been performing legal services
3 for both prior to that date. (See Ex. 15).

4 J. The terms of the Proposal by Fair as agent for TCG were accepted by
5 Les Powers.

6 K. Ultimately, Les Powers, pursuant to his agreement with Brian Fair, as
7 agent for TCG, chose to enter into the Investment Agreement with TCG.

8 L. Les Powers made sure at all times that performance of the terms of the
9 Proposal, including investing \$52,000 from LKO to TCG, and Powers & Therrien, P.S.
10 providing legal services to TCG was accomplished. The court makes no ruling
11 regarding whether LKO was involved in the unauthorized practice of law.

12 M. Les Powers accepted the business offer by having LKO provide the sum
13 of \$17,000 to TCG, which occurred beginning February 21, 2005, (See Findings of
14 Fact Nos. 21 and 22 and Ex. 1 and 2), and by having Powers & Therrien, P.S. provide
15 the legal services to TCG ~~on behalf of LKO~~ as requested in Fair's October 27, 2004
16 email. *Les Powers did NOT do any legal work between the parties*

17 N. The fax sent by Brian Fair on February 23, 2005 (Ex. 28) was an offer to
18 Les Powers and Keith Therrien to contribute \$17,000 of capital to TCG for half
19 ownership in that company. The Court finds that the statement on the bottom of this
20 fax "Les, this gives you guys 1/2 ownership in the company. You can formalize
21 however you wish. . . ." provided Les Powers and Keith Therrien the option to name
22 the investor of their choosing. Subsequent to that fax, Powers made sure that TCG
23 received the \$17,000. It is clear that \$52,000 in funds came from LKO, and therefore
24 TCG must return \$52,000 to LKO.

25 O. When a two or more member LLC tax return is filed, K-1 notices are
26 required to be delivered to each of the tax partners. However, Fair, as TCG tax return
27 preparer did not issue a K-1 to LKO (or any other party he may have believed made
28 the investment). Instead, Fair prepared and filed TCG tax returns which inaccurately
29 represented that he and his wife Shirley were the only member/investors in TCG and
30 that all TCG's capital had been contributed solely by him and his wife. Any

31
FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 9

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1 uncertainty over the identity of the contracting party was not resolved by Fair in order to
2 prepare accurate tax returns for TCG.

3 P. In April 2007, Fair proposed to modify the initially agreed to 50/50%
4 equity structure of TCG. Powers and Therrien rejected the modification, and LKO filed
5 this suit.

6 Q. Having granted rescission, LKO is entitled to a return of its \$52,000
7 investment, with interest.

8 R. The appropriate rate of prejudgment interest is prime rate plus 3 percent.

9 S. Applying the prime rate plus 3 percent formula to LKO's investments the
10 interest accrued through August 15, 2010 is \$23,164.63. Interest continues to accrue
11 daily at the rate of 11.25 percent until entry of judgment.

12 T. Post-judgment interest will accrue at the legal rate of 12 percent.

13 U. Because all claims between LKO and TCG have been adjudicated by the
14 trial, the court will enter a final and appealable judgment for the money judgment which
15 the court has ruled should now issue in LKO's favor against TCG.

16

17 Consistent with these findings of fact and conclusions of law, a final form of
18 judgment shall be entered by the court setting forth the accurate principal and interest
19 judgment amounts through the date the judgment is entered.

20

21 DATED this 31 day of January, 2011.

22

23

24

cb Ted Small
TED W. SMALL, Judge

25

26 Presented by:

27

28 LARSON BERG & PERKINS PLLC
Attorneys for LK Operating, LLC

29

30

By: [Signature]
James A. Perkins, WSBA #13330

31

FINDINGS OF FACT AND
CONCLUSIONS OF LAW - 10

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Superior Court of the State of Washington
For Chelan County

Lesley A. Allan, Judge
Department 1
T.W. Small, Judge
Department 2



John E. Bridges, Judge
Department 3
Bart Vandegriff
Court Commissioner

401 Washington Street
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March 31, 2009

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*Re: LK Operating, LLC v. The Collection Group, LLC
Chelan County Superior Court Cause No. 07-2-00652-9*

Court's Memorandum Decision

Dear Counsel:

This matter came before the court on August 25, 2008, October 31, 2008 and December 11, 2008, for hearing defendants' Motions for Partial Summary Judgment, plaintiff's Cross-Motion for Summary Judgment and related motions to strike, for in camera review, to seal and for a protective order. The court previously ruled orally to strike the Declaration of John A. Strait filed as Exhibit D to the Declaration of Brian Fair. The court took the remaining issues under advisement on January 12, 2009.

The court has now had the opportunity to review the following documents:

1. Defendants' Motion for Partial Summary Judgment
2. Defendants' Memorandum in Support of Motion for Partial Summary Judgment
3. Declaration of Brian Fair In Support of Motion for Partial Summary Judgment
4. Declaration of Brian Fair

March 31, 2009

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5. Declaration of Kenneth S. Kagan
6. Defendants' Response to Powers and Therrien's Motion for Partial Summary Judgment
7. Declaration of Brian Fair in Support of Defendants' Response to Powers and Therrien's Motion for Partial Summary Judgment
8. Defendants' Fairs' Motion to Strike Plaintiff's Cross-Motion for Summary Judgment and Strike LK Operating, Powers' and Therrien's Materials served July 15, 2008
9. Declaration of Stewart R. Smith in Support of Motion to Strike Cross Motion and Materials of July 15, 2008
10. Defendant The Collection Group, LLC's Motion for Partial Summary Judgment
11. Memorandum in Support of The Collection Group, LLC's Motion for Partial Summary Judgment
12. (Second) Declaration of Kenneth S. Kagan
13. Declaration of Brian Fair in Support of The Collection Group LLC's Motion for Partial Summary Judgment
14. The Collection Group, LLC's Memorandum in Opposition to LK Operating LLC's Motion for Partial Summary Judgment
15. Cross Motion for Partial Summary Judgment
16. Memorandum by Powers and Therrien: (1) In Opposition to Fair's Motion for Partial Summary Judgment; and (2) In Support of Cross Motion
17. Declaration of Brian C. Huber in Support of Cross Motion for Partial Summary Judgment
18. Declaration of Leslie A. Powers (1) In Opposition to Fair's Motion for Partial Summary Judgment and (2) In Support of Cross Motion for Partial Summary Judgment
19. Declaration of Thomas M. Fitzpatrick
20. Supplemental Memorandum in Opposition to Motions by Brian and Shirley Fair and The Collection Group, LLC
21. Declaration of Leslie A. Powers
22. Declaration of Keith Therrien
23. Declaration of Craig Homchick
24. Powers' and Therriens' Motion to Strike Affidavit of John Strait
25. Supplemental Declaration of Kenneth S. Kagan
26. Reply of The Collection Group, LLC to P&T's Supplemental Memorandum in Opposition to Motions by Brian and Shirley Fair and The Collection Group, LLC
27. Defendants' Fairs' Reply Memorandum in Support of Fairs' Motion for Partial Summary Judgment
28. Second Declaration of Brian C. Huber in Support of Cross Motion for Partial Summary Judgment
29. Declaration of Brian Fair in Support of Reply Memorandum
30. Powers' and Therriens' Memorandum in Opposition to Fair's Motion to Strike
31. Powers and Therrien's Reply Memorandum in Support of Motion for Partial Summary Judgment
32. Defendants' Fairs' Joinder in The Collection Group, L.L.C.'s, Memorandum in Opposition to Powers' and Therrien's Motion to Strike Affidavit of John Strait
33. The Collection Group LLC's Memorandum in Opposition to Powers' and Therriens' Motion to Strike Affidavit of John Strait
34. Declaration of Ronald J. Trompeter in Opposition to Motion to Strike
35. Motion for In-Camera Review, or Alternatively, to Seal Records and for Protective Order
36. Defendants' Fairs' Objection to Motion for In Camera Review
37. Declaration of Ronald J. Trompeter in Support of The Collection Group LLC's Opposition to Motion for In-Camera Review, or Alternately, to Seal Records and for Protective Order
38. Opposition of The Collection Group LLC to Motion for In-Camera Review, or Alternately, to Seal

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• Page 3

- Records, and for Protective Order
39. Declaration of Danae C. Klitski Powers
 40. Declaration of Aron L. Powers-McAllister
 41. Declaration of Nina F. Powers
 42. Declaration of Sarah B. Therrien
 43. Declaration of Seth R. Therrien
 44. Trustees' Reply Supporting Motion for In-Camera Review or Alternately to Seal Records and for Protective Order
 45. Declaration of Ken Meissner
 46. LK Operating, LLC's Joinder Memorandum Re: Motion by Trusts
 47. Stipulation and Order Re Protective Order\
 48. Declaration of Ronald J. Trompeter
 49. Declaration of David B. Petrich
 50. Memorandum of The Collection Group, LLC Regarding Trust Agreements and Pending Motion for Summary Judgment
 51. Defendants' Fairs' Memorandum Re Effect of Trust Documents/Meissner Declaration
 52. Powers and Therrien's (1) Motion to Strike, and (2) Memorandum Re Trusts
 53. Beneficiaries' Reply Memorandum
 54. The Collection Group, LLC Response to Plaintiff's Motion to Strike
 55. Reply Memorandum Re Motion to Strike or for Additional Time to Respond
 56. Joinder Memorandum
 57. Third Declaration of Brian C. Huber in Support of Cross Motion for Partial Summary Judgment
 58. Declaration of Leslie A. Powers
 59. Declaration of Seth R. Therrien
 60. Declaration of Thomas M. Fitzpatrick Regarding Confidentiality Issues
 61. Supplemental Memorandum in Support of Cross Motion for Summary Judgment
 62. Declaration of Brian Fair in Support of TCG Reply to LKO Supplemental Memo Dated December 29, 2008
 63. The Collection Group Response to Supplemental Memo Re Cross Motion for Partial Summary Judgment Dated December 29, 2008
 64. Redacted Copy Declaration of Brian Fair
 65. Stipulation and Order Re Redaction
 66. Declaration of Diane Sires
 67. Aron L. Powers Intervivos Trust
 68. Danae C. Klitski Powers Intervivos Trust
 69. Nina F. Powers Intervivos Trust
 70. Sarah B. Therrien Intervivos Trust
 71. Seth R. Therrien Intervivos Trust
 72. Valley/50th Avenue, LLC v. Stewart, 159 Wn.2d 736 (2007)
 73. In re Corporate Dissolution of Ocean Shores Park, Inc., v. Jordan, 132 Wn.App. 903 (2006)
 74. Danzig v. Danzig, 79 Wn.App. 612 (1995)

Contentions of the Parties

This case is a dispute about who owns The Collection Group, LLC (hereinafter referred to as TCG). Plaintiff, LK Operating, LLC (hereinafter referred to as LKO), claims that it owns at least a 50% interest in TCG.

Defendants deny plaintiff has any ownership interest in TCG. Defendants claim that if anyone associated with LKO owns part of TCG, it is Leslie Powers and Keith Therrien individually.

Because Defendant Brian Fair alleges he was a client of Powers and Therrien when he formed TCG and had discussions with Powers and Therrien regarding them owning a portion of TCG, Defendants argue Powers and Therrien failed to follow the Rules of Professional Conduct when going into business with their client, Brian Fair.

Consequently, Defendants allege any agreement between LKO and TCG is void because it violates public policy.

Plaintiff alleges that LKO is the entity that owns 50% of TCG, not attorneys Powers and Therrien. Plaintiff further alleges LKO is an entity owned by various trusts set up for the benefit of the adult children of Powers and Therrien.

Consequently, the agreement between LKO and Brian Fair regarding the ownership of TCG does not violate the Rules of Professional Conduct, is not a violation of public policy and is not void.

Issues

May the court rule as a matter of law that Brian Fair was a current client of Powers & Therrien, P.S. between October, 2004 and February 21, 2005?

If so, may the court rule as a matter of law that any agreement between Brian Fair and Les Powers and Keith Therrien or Brian Fair and LKO is void as against public policy?

Facts

Undisputed Facts

The Collection Group

TCG is a corporate entity formed and originally owned by Brian (a CPA) and Shirley Fair. TCG purchases outstanding consumer debt portfolios from various companies and collects on those debts. TCG was incorporated on May 10, 2004 by Brian Fair as a limited liability company. He created this company without the assistance of any legal counsel. He is the manager of TCG.

LK Operating

The purpose of LKO was to involve the adult children of Les Powers and Keith Therrien in the management of the families' business affairs and to provide a basis for the children to share in them. LKO has no employees and the source of its income is unknown.

There are five trusts for each of the adult children of Les Powers and Keith Therrien. These trusts owned LK Partners, a partnership, at the time they were created on December 23, 2003. The Grantors of the trusts are the wives of Les Powers and Keith Therrien: Patricia Powers and Marsha Therrien. The wives also signed the SS-4's in 2004. None of the trusts have employees. The beneficiaries and trustees of each trust are the adult children of Les Powers and Keith Therrien.

The trusts are shareholders of related corporations. For example, the Seth Therrien trust is the sole shareholder of SRT Enterprises, Inc. Marsha Therrien and Michelle Briggs are the only authorized signers on the accounts of SRT Enterprises, Inc. and SBT Enterprises, Inc.. Marsha Therrien is the president of SRT Enterprises, Inc. and SBT Enterprises, Inc.. Patricia Powers and Michelle Briggs are the only authorized signers on the accounts of NFP Enterprises, Inc., DCP Enterprises, Inc. and ALP Enterprises, Inc.. Patricia Powers is the president of NFP Enterprises, Inc., DCP Enterprises, Inc. and ALP Enterprises, Inc.. Each of the adult children of Powers and Therrien are the vice-presidents of the related corporations.

LKO is composed of five member corporations: NFP Enterprises, Inc., DCP Enterprises, Inc., ALP Enterprises, Inc., SRT Enterprises, Inc., and SBT Enterprises, Inc.. LKO was formed by Les Powers and Keith Therrien. LKO is managed by Powers & Therrien Enterprises, Inc. which is owned by Les Powers and Keith Therrien. Les Powers is the president of Powers & Therrien Enterprises, Inc. and Keith Therrien is the vice-president of Powers & Therrien Enterprises, Inc. LKO is represented by the law firm of Powers & Therrien, P.S. and Les Powers is LKO's registered agent.

Operative Facts

Shortly before Brian Fair formed TCG, he hired the law firm of Powers & Therrien, P.S. to form, renew and ultimately close a Nevada corporation known as BF Trading. Powers & Therrien, P.S. drafted BF Trading's articles of incorporation on January 8, 2004. Powers & Therrien, P.S. billed Brian Fair for this legal work on April 6, 2004. Thereafter, the firm continued to provide services to Brian Fair by maintaining the existence of his wholly-owned corporation, BF Trading, until it was dissolved in 2006. The business contemplated to be done by BF Trading was unrelated to the business of TCG. The last time Powers & Therrien, P.S. billed Brian Fair for services rendered to his company, BF Trading, was March 15, 2006.

On October 27, 2004, Brian Fair sent an e-mail to Powers & Therrien "[r]egarding an agreement between myself and you two." The e-mail indicated Brian Fair wanted Powers & Therrien to split the cost of purchasing debt portfolios and contribute legal services to TCG. The e-mail included an attachment which was a copy of the standard Unifund agreement. On December 6, 2004, Les Powers sent an e-mail with an attached mark-up of the Unifund agreement. Powers & Therrien, P.S. never billed Brian Fair or TCG for this legal service. LKO is not a law firm, and is not in the business of providing legal services.

No e-mail or any other written communication was sent to Brian Fair from Powers & Therrien advising him that they would not enter into such an agreement. Eventually, a counter check dated February 21, 2005 written on the account of LKO payable to TCG was sent to Brian Fair in the amount of exactly one-half of the first debt portfolio already purchased by TCG by Brian Fair. This check came after a fax from Brian Fair was sent on February 8, 2005, to Diane at Powers & Therrien, P.S. Diane Sires is a legal assistant at Powers & Therrien, P.S.

Ms. Sires states in her declaration that: "Mr. Fair at all times knew that LK Operating, LLC was the investor in The Collection Group, LLC and that LK Operating, LLC was owned by Mr. Powers' and Mr. Therrien's adult children and not Mr. Powers, Mr. Therrien, or Powers & Therrien, P.S. I spoke with Mr. Fair on a regular basis concerning The Collection Group, LLC's collection activities. He repeatedly confirmed to me and made jokes about the fact that LK Operating, LLC was Les' and Keith's children's company."

All checks sent to TCG were LKO checks. No checks were sent on the account of Powers & Therrien, P.S. or on the personal accounts of Les Powers or Keith Therrien. The first reference to TCG in LKO's records was on February 7, 2007.

At all times relevant herein Powers & Therrien, P.S. represented LKO. Les Powers, Keith Therrien and Michelle Briggs, an employee of Powers & Therrien, P.S., were the only authorized signers on LKO checks. LKO did not have any employees.

Powers & Therrien, P.S. provided legal services to TCG after Brian Fair received the first check written on the LKO account dated February 21, 2005.

On April 21, 2007 a letter from TCG signed by Brian Fair was sent to Les Powers and Keith Therrien indicating he wanted to formalize their ownership in TCG. The letter suggested a stock ownership split between Brian and Shirley Fair (55%), Les Powers and Keith Therrien (38%), and Dorothy Fair (7%). Thereafter, LKO filed this lawsuit.

Neither Les Powers nor Keith Therrien ever advised Brian Fair in writing of the desirability of seeking the advice of independent legal counsel regarding Brian Fair's proposal to them. Neither Les Powers nor Keith Therrien ever obtained written consent from Brian Fair to represent LKO in any purchase of an ownership interest in TCG from Brian Fair.

Les Powers, Keith Therrien and employees of Powers & Therrien, P.S. were the only individuals Brian Fair communicated with when he attempted to sell an interest in TCG. He never spoke with Marsha Therrien, Patricia Powers or any of the adult children of Les Powers and Keith Therrien when negotiating the sale of an interest in TCG.

Brian Fair and TCG never entered into a written agreement with anyone acknowledging a third party's ownership interest in TCG.

Disputed Facts

Primary

Did Brian Fair enter into an agreement to sell an ownership interest in TCG with Powers and Therrien or LKO?

What are the terms of LKO's limited liability company agreement regarding the management powers of Powers & Therrien Enterprises, Inc.?

The extent of ownership in TCG by those persons/entities other than Brian and Shirley Fair is disputed.

Secondary

Whether Les Powers and/or Keith Therrien ever told Brian Fair that they, personally, and Powers & Therrien, P.S., their law business, declined to invest in TCG is disputed.

Why Les Powers and Keith Therrien never advised Brian Fair in writing of the desirability of seeking the advice of independent legal counsel regarding his proposal to them is disputed. Why they never obtained Brian Fair's consent in writing to represent LKO is disputed.

Whether Les Powers and/or Keith Therrien told Brian Fair that the children of Powers and Therrien had a company with funds to invest is disputed. Whether they told Brian Fair between February 1 and February 8, 2005 that LKO wanted to invest in TCG is disputed.

Why Mr. Powers red-lined a contract Mr. Fair was negotiating with Unifund on behalf of TCG after Mr. Fair first offered to sell Mr. Powers an interest in TCG is disputed.

Principles of Law

Summary Judgment

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits show no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one upon which the outcome of the litigation depends, in whole or in part. Vacova v. Farrel, 62 Wash.App. 386, 395 (1991).

Once a moving party establishes no genuine issue of material fact exists, the burden shifts to the non-moving party to show "specific facts showing that there is a genuine issue for trial." CR 56(e). "Unsupported conclusory allegations are not sufficient to defeat summary judgment." Vacova, 62 Wash.App. at 395, citing Stringfellow v. Stringfellow, 53 Wash.2d 639, 641 (1959). "Unsupported argumentative assertions are not sufficient to defeat summary judgment." Vacova at 395, citing Blakely v. Housing Auth. Of King Cy., 8 Wash. App. 204 210 review denied, 82 Wash.2d 1003 (1973). An affidavit does not raise a genuine issue for trial unless it sets forth facts evidentiary in nature, i.e.,

information as to 'what took place, an act, an incident, a reality as distinguished from supposition or opinion.'" *Id.* At 395, citing Grimwood v. University of Puget Sound, Inc., 110 Wn.2d 355, 359 (1988).

Rules of Professional Conduct

Rule 1.8 of the Rules of Professional Conduct states, in pertinent part, as follows:

(a) *A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:*

(1) *the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;*

(2) *the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of the independent legal counsel on the transaction; and*

(3) *the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.*

The comments to RPC 1.8 clarify the rule and emphasize the duty imposed on lawyers. In particular, the comments state, as follows:

A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business...or financial transaction with a client...*RPC 1.8, comment 1*

The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation...*RPC 1.8, comment 1.*

The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyers' representation of the client will be materially limited by the lawyer's financial interest in the transaction. *RPC 1.8, comment 2*

Under these circumstances, the lawyer must also comply with RPC 1.7, which requires the lawyer to disclose the risks associated with the dual role as both legal advisor and participate in the transaction, "such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client." *RPC 1.8, comment 2.*

The lawyer must obtain the client's informed consent. *RPC 1.8, comment 2.*

The prohibition on conduct by an individual lawyer under (a) also applies to all lawyers associated in a firm with the personally prohibited lawyer. *RPC 1.8, comment 20.*

The rule that a lawyer must not use information relating to representation of a client to the disadvantage of the client applies when the information is used to benefit either the lawyer or a third

person, such as another client or business associate of the lawyer. *RPC 1.8, comment 5.* (Emphasis added.)

Washington cases further elaborate on the rule. “The burden of proving compliance with RPC 1.8 rests with the lawyer; ‘an attorney-client transaction is prima facie fraudulent.’” Valley/50th Avenue, LLC v. Stewart, 159 Wn.2d 736, 745 (2007), citing In re Disciplinary Proceeding Against Johnson, 118 Wn.2d 693, 704 (1992). “A lawyer must prove strict compliance with the safeguards of RPC 1.8(a); full disclosure, opportunity to consult outside counsel, and consent must be proved by the communications between the attorney and the client. *Id.* In Corporate Dissolution of Ocean Shores Park, Inc., v. Jordan, 132 Wn.App. 903, (2006), review denied Corporate Dissolution of Ocean Shores v. Rawson-Sweet, 154 P. 3d 918 (2007), the court explained,

[t]o justify a transaction between an attorney and client, the attorney has the burden to prove: (1) there was no undue influence, (2) he 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 dealt with a stranger...To meet this burden of proof, the attorney is responsible for documenting the transaction and preserving this documentation to protect himself in the future.

132 Wn.App. at 911-12.

A client’s sophistication does not relax the requirements of RPC 1.8. *Id.* In addition, corporate entities are legal persons as much as an actual person. Valley, supra; RCW § 1.16.080(1).

Rule 1.8(b) of the Rules of Professional Conduct states, in pertinent part, as follows:

A lawyer who is representing a client in a matter shall not use information relating to representation of a client to the disadvantage of the client unless the client consents in writing after consultation.

Rule 1.7 of the Rules of Professional Conduct states, in pertinent part, as follows:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

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

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to

provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

Statute

RCW 25.15.150(2) provides in pertinent part:

If the certificate of formation vests management of the limited liability company in one or more managers, then such persons shall have such power to manage the business or affairs of the limited liability company as is provided in the limited liability company agreement.

Analysis

Brian Fair Was a Current Client of Powers & Therrien

Powers and Therrien argue that the attorney-client relationship between Powers & Therrien, P.S. and Brian Fair ended when BF Trading was formed. See Declaration of Thomas M. Fitzpatrick.

With all due respect to Mr. Fitzpatrick, the court respectfully disagrees with his analysis. Once an attorney-client relationship is established, it continues until it is either terminated by some action of the parties or abandoned, In Re McGlothlen, 99 Wn. 2d 515 (1983).

In this case, Brian Fair hired Powers & Therrien, P.S. to form a corporation for him: BF Trading. After his lawyers created this corporation, wholly owned by Brian Fair, the law firm continued to make sure Mr. Fair's corporation continued to exist by paying the appropriate fees. The law firm regularly billed Mr. Fair for these services and eventually assisted Mr. Fair in dissolving BF Trading. However, long before BF Trading was dissolved, Mr. Fair offered Mr. Powers and Mr. Therrien the opportunity to purchase an interest in Mr. Fair's other corporation, TCG. They acknowledge that event occurred by their own declarations that say they emphatically rejected his offer.

At that time, Powers & Therrien, P.S. continued to represent Mr. Fair regarding BF Trading, and continued to bill him for those services. They did not expressly terminate the attorney-client relationship with Mr. Fair in 2004 or 2005.

Indeed, Mr. Powers even red-lined a contract Mr. Fair was negotiating with Unifund on behalf of TCG after Mr. Fair first offered to sell Mr. Powers an interest in TCG. While Mr. Powers never billed TCG or Mr. Fair for this advice, an attorney-client relationship does not require the payment of a fee or formal retainer, Ibid, at 522.

Where a relation of confidence is established, either some positive act or some complete case of abandonment must be shown in order to end it, Conner v. Hodgson, 120 Wash. 426, 431-432 (1922). No such positive act occurred between Mr. Fair and Powers & Therrien, P.S. and it certainly was not abandoned since the law firm continued to provide him legal advice and continued to maintain his corporation.

More importantly, when our Supreme Court was faced with the issue of whether to limit the application of the rules of professional conduct to clearly defined attorney-client relationships or whether to include less well defined relationships, Supreme Court Justice Utter answered the question as follows: "To more effectively protect the public, we choose to paint with the broader brush.", McGlothlen at 517.

The fact that Mr. Powers now states he was only reviewing the Unifund contract to determine if TCG would be a good investment for his children is immaterial for purposes of determining whether the attorney-client relationship existed. The existence of the relationship is based upon the client's subjective belief, provided that it is reasonably formed based upon the attending circumstances, Bohn v. Cody, 119 Wn.2d 357, 363 (1992).

Even assuming Mr. Powers and Mr. Therrien, individually and on behalf of Powers and Therrien, P.S., rejected Mr. Fair's offer to sell an ownership interest in TCG, there is no evidence of a positive act that terminated the ongoing attorney-client relationship Powers & Therrien, P.S. had with Brian Fair.

Therefore, this court concludes as a matter of law that Brian Fair was a client of Powers & Therrien, P.S. at all times material hereto.

There Is a Dispute of Fact Regarding Whether Brian Fair Knew or Should Have Known He Was Dealing with a Representative of LKO, Powers & Therrien, P.S. or Powers and Therrien, Individually

Diane Sires declaration does not create an issue of fact about who Brian Fair was negotiating with regarding the sale of a portion of his interest in TCG. The first sentence of paragraph 9 of her declaration is not admissible evidence. She may not testify about what Brian Fair knew. She may testify about what she told him and what he told her, but not what he knew.

The last sentence of paragraph 9 of her declaration is immaterial to the issues in this case. The reasonable inference is Brian Fair knew the children of Powers and Therrien had an ownership interest in LKO. So what?

The fact that LKO was the source of the funds used by Les Powers and Keith Therrien to purchase an interest in TCG does not create a reasonable inference that LKO entered into any agreement with Brian Fair. His only communications were between Les Powers, Keith Therrien, Powers & Therrien, P.S. and Diane Sires, a legal assistant for Powers & Therrien, P.S. He requested funds from Les Powers and Keith Therrien, not LKO. Powers and Therrien provided TCG the money. Whether they got the money from their own account, a loan from Bank of America, or LKO is immaterial to the issue of who Brian Fair entered into an agreement with regarding the ownership of TCG. No legal

authority is cited by counsel to the contrary. Nor does receiving an LKO check from them legally impose a duty to inquire about the source of the funds. All Brian Fair would reasonably care about would be whether the check would clear, not whose account it was drawn on. In short, there is no documentary evidence that Brian Fair knew or should have known LKO was the entity investing in TCG.

However, Leslie Powers declaration states that he and Keith Therrien "rejected the September proposal outright. . . . We declined to invest either personally or through our professional services corporation. We did, however, mention that our children had a company that had funds it was looking to invest." Mr. Powers declaration further states: ". . . I spoke with Brian Fair by telephone and informed him that LK Operating, LLC did wish to make the proposed investment."

In addition, Keith Therrien's declaration stated: "In late 2004 Brian Fair was advised that neither Powers & Therrien, P.S., the law firm in which I am a principal, nor myself or Leslie A. Powers would be investors in The Collection Group, LLC, and that the investor would be a company owned by our children."

Mr. Powers' declaration does *not* state that he told Brian Fair that Powers, Therrien and their professional services corporation declined to invest. Mr. Therrien's declaration states that Brian Fair was advised of this fact, but does *not* state it was Mr. Therrien who told Brian Fair. If both declarants are relying on Ms. Sires statements to Brian Fair to establish his knowledge, then as discussed above, her declaration does not create such knowledge in Mr. Fair.

However, viewing these attorneys' declarations in a light most favorable to plaintiff, for purposes of defendants' motion for partial summary judgment, they do create a reasonable inference that Brian Fair knew or should have known he was dealing with a representative of LKO. Consequently, there is a question of fact about this issue at this time.

Les Powers, Keith Therrien, and Powers & Therrien, P.S. May Not Own an Interest in TCG

The court has ruled as a matter of law that Brian Fair was a client of Powers & Therrien, P.S. at all times material hereto.

The court has also found as an undisputed fact that neither Les Powers nor Keith Therrien ever advised Brian Fair in writing of the desirability of seeking the advice of independent legal counsel regarding Brian Fair's proposal to them.

Consequently, any agreement by Brian Fair to sell an interest in TCG to Les Powers, Keith Therrien and/or Powers and Therrien, P.S. would be a violation of RPC 1.8.

Therefore, any agreement to purchase an interest in TCG by Les Powers, Keith Therrien and Powers & Therrien, P.S. would be against public policy and void, Valley/50th Avenue, LLC, supra.

LKO May or May Not Own an Interest in TCG

There is a question of fact about who Brian Fair entered into an agreement with: Powers and Therrien or LKO. The court has ruled if Brian Fair entered into an agreement with Powers and Therrien, then it is against public policy and void.

The next question is whether any agreement between Brian Fair and LKO is also void against public policy.

Les Powers and Keith Therrien Violated RPC 1.7

While Brian Fair was a client of Powers & Therrien, P.S., he approached his attorneys about whether they wanted to invest in another one of his companies. Brian Fair was a seller of an ownership interest in TCG.

Powers & Therrien, P.S. represented LKO at this time. LKO was a potential buyer of an ownership interest in TCG.

Consequently, the representation of Brian Fair, seller, is directly adverse to representation of LKO, purchaser. Furthermore, Les Powers and Keith Therrien had a personal interest in the success of their children's trusts which created a significant risk that their continued representation of Brian Fair would be materially limited.

Notwithstanding these conflicts, RPC 1.7(b) allows Powers & Therrien, P.S. a method of allowing Powers & Therrien, P.S. to represent both the buyer and seller in this transaction. However, there is no evidence Powers & Therrien, P.S. ever obtained informed consent from LKO or Brian Fair in writing pursuant to RPC 1.7(b)(4).

Consequently, Les Powers and Keith Therrien violated RPC 1.7.

They had the opportunity to either terminate their attorney-client relationship with Brian Fair before proceeding further or follow the provisions of RPC 1.7 and/or 1.8. As officers of the court, it was their responsibility to make certain the rules of professional conduct were complied with, not the duty of Brian Fair, regardless of his degree of sophistication.

A fee agreement between a lawyer and a client may be void or voidable unless the attorney shows that the contract was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts, *Ibid.* citing Kennedy v. Clausing, 74 Wn.2d 483 (1968). It has also been noted that agreements violating the RPC are contrary to public policy, Ocean Shores Park v. Gloria Rawson-Sweet, *supra*, citing Danzig v. Danzig, 79 Wn.App. 612 (1995).

These cases generally involve agreements between attorneys and their clients and the application of RPC 1.8. This court is unaware of any case that holds a contract entered into by a buyer and seller, who are both represented by the same lawyers who violated RPC 1.7, is voidable. However, assuming LKO was the party that entered into an agreement with Mr. Fair, because LKO is managed by Powers & Therrien Enterprises, P.S. which is owned by Powers and Therrien, and LKO was formed for the

purpose of benefiting Powers and Therrien's adult children, then there may be an argument that whatever agreement entered into between LKO and Mr. Fair is voidable.

Because the parties have not briefed the consequence of a violation of RPC 1.7, the court will defer ruling on this issue at this time.

LKO Is Not Owned by Les Powers and Keith Therrien

Because LKO is owned by corporations that are owned by trusts set up for the benefit of the children of Les Powers and Keith Therrien, LKO is not owned by attorneys Powers and Therrien. Thus, it appears that RPC 1.8 would not apply to void any agreement between LKO and Brian Fair.

Is LKO Controlled by Les Powers and Keith Therrien such that RPC 1.8 Should Apply?

Powers & Therrien, P.S. represented LKO at all times material hereto. LKO was established to benefit Mr. Powers' and Mr. Therrien's children. Powers & Therrien Enterprises, Inc. managed LKO at all times material hereto and Les Powers and Keith Therrien own Powers & Therrien Enterprises, Inc..

Because LKO is managed by Powers & Therrien Enterprises, Inc., (a corporation owned by attorneys, Powers and Therrien), LKO has vested its management powers in Powers & Therrien Enterprises, Inc. pursuant to RCW 25.15.150. The exact extent of its control, however, is unknown because the court does not believe LKO's limited liability company agreement has been made part of the record.

Because that information is not available at this time, the court must defer ruling on the issue of whether RPC 1.8 should be applied to void any transaction between LKO and Brian Fair, based on the extent of control attorneys, Powers and Therrien, had over LKO through their corporation Powers & Therrien Enterprises, Inc.

RPC Was Violated

RPC 1.7 has been violated. RPC 1.8 may also have been violated. Consequently, LKO's cross motion for partial summary judgment based upon the allegation there were no ethical violations must be denied.

Summary

Brian Fair was a client of Powers & Therrien, P.S. at all times material hereto. Les Powers and Keith Therrien violated RPC 1.7. Any agreement between Powers and Therrien and Brian Fair is against public policy and void.

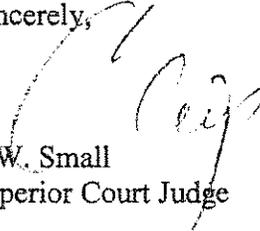
Any agreement between LKO and Brian Fair may be against public policy and void due to the violation of RPC 1.7 and/or RPC 1.8 depending upon the briefing by counsel and the provisions of the limited liability company agreement between LKO and Powers & Therrien Enterprises, Inc. respectively.

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Therefore, the plaintiff's motion for partial summary judgment is denied, and the defendants' motion for partial summary judgment is granted in part and denied in part without prejudice. Counsel for defendants should prepare and present the appropriate order in conformance with this court's decision herein.

Sincerely,



T.W. Small
Superior Court Judge

cc: Superior Court file

Superior Court of the State of Washington
For Chelan County

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Department 1
T.W. Small, Judge
Department 2



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September 25, 2009

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Re: *LK Operating, LLC v. The Collection Group, LLC*
Chelan County Superior Court Cause No. 07-2-00652-9
Court's Memorandum Decision

Dear Counsel:

This matter came before the court on August 25, 2008, October 31, 2008 and December 11, 2008, for hearing, among other things, defendants' Motions for Partial Summary Judgment and plaintiff's Cross-Motion for Summary Judgment. After additional briefing the court took the matter under advisement on January 12, 2009 and issued a memorandum decision on March 31, 2009.

The court ruled Brian Fair was a client of Powers & Therrien, P.S. at all times material hereto. Les Powers and Keith Therrien violated RPC 1.7. Any agreement between Powers and Therrien and Brian Fair is void as against public policy.

The court also ruled that any agreement between LK Operating, LLC and Brian Fair may also be void due to the violation of RPC 1.7 and/or RPC 1.8, depending upon

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additional briefing by counsel and the terms of the limited liability company agreement between LKO and Powers & Therrien Enterprises, Inc.

Before considering these remaining issues, the court ruled on a Motion for Reconsideration brought by Powers and Therrien. The court denied the motion except to the extent that there was a question of fact regarding whether Mr. Therrien violated RPC 1.7, because RPC 1.10 requires *actual* knowledge of his firm's representation of Brian Fair. The extent of Mr. Therrien's knowledge is a disputed fact, so the court vacated its ruling that Mr. Therrien violated RPC 1.7 as a matter of law.

Thereafter, at a hearing on July 9, 2009 the parties stipulated that the transaction at issue in this case was between The Collection Group, LLC and the purchaser (either LK Operating, LLC or Powers and Therrien). They further stipulated that the transaction was not a sale of Mr. Fair's interest in The Collection Group, LLC, but rather Mr. Fair was an agent of The Collection Group, LLC trying to obtain new members.

Finally, this matter came before the court on July 20, 2009, for a continuation of the summary judgment motions after additional briefing and additional evidence, specifically the Membership Agreement of LK Operating, LLC and the declarations listed below.

Documents Reviewed

1. Defendants' Joint Memorandum Re: Leslie Powers' and Keith Therrien's Control of LK Operating, LLC
2. Declaration of Brian Fair Re: Control of LK Operating, LLC, by Leslie Powers and Keith Therrien
3. Defendants' Joint Memorandum Re Rescission for Attorneys' Violation of RPC 1.7
4. Declaration of Leslie A. Powers filed June 1, 2009
5. Declaration of Keith Therrien filed June 1, 2009
6. Declaration of Diane Sires filed June 1, 2009
7. Supplemental Memorandum of Powers and Therrien Re Pending Motions
8. LKO's Memorandum Supporting Reconsideration of Court's June 11, 2009 Order
9. LK Operating, LLC's Memorandum Re: RPC 1.8 and 1.7 Partial Summary Judgment Issues
10. Defendants' Joint Memorandum in Response to LKO Memorandum Re RPC 1.8 and 1.7 Partial Summary Judgment Issues
11. Powers's (sic) and Therrien's Supplemental Memorandum Re: Summary Judgment Motions
12. LK Operating, LLC's Reply Brief
13. Declaration of Brian Fair Regarding LK Operating LLC's Memorandum Re: RPC 1.8 and 1.7 Partial Summary Judgment Issues
14. Defendants Fair's Final Response to Pleadings by LKO and Powers, Therrien on Summary Judgment

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15. The Collection Group's Reply to LK Operating, LLC's "Reply" Brief and to Powers and Therrien's Supplemental Memorandum Re: Summary Judgment Issues

Contentions of the Parties

Plaintiff alleges that neither RPC 1.7 nor RPC 1.8 was violated.

Defendants argue RPC 1.7 was violated as a matter of law regardless of who the alleged purchaser(s) was(were) (LK Operating, LLC or Les Powers and Keith Therrien). Defendants claim LK Operating, LLC was so completely controlled by Les Powers and Keith Therrien and was formed as a part of their estate plan and to benefit their children, that the court must void the transaction due to a violation of RPC 1.7. They maintain this claimed violation of RPC 1.7 occurred as a matter of law even if the transaction was between The Collection Group, LLC and LK Operating, LLC.

Defendants also argue that any contract between the The Collection Group, LLC and LK Operating, LLC should be voided due to the extent of control Powers and Therrien had over LK Operating, LLC and the application of RPC 1.8.

Original Issues

Does the violation of RPC 1.7 by Les Powers void any agreement between LK Operating, LLC and Brian Fair?

Was RPC 1.8 violated due to the extent of control of LK Operating, LLC by Les Powers and Keith Therrien such that any agreement between LK Operating, LLC and Brian Fair is void?

Undisputed Facts

The undisputed facts were previously set forth in this court's Memorandum Decision dated March 31, 2009. The extent of Mr. Therrien's actual knowledge of his firm representing Brian Fair is now disputed, however.

Additional Undisputed Facts

The terms of the Membership Agreement of LK Operating, LLC are undisputed.

The terms of the stipulation entered into by the parties at the hearing on July 9, 2009 as stated above are undisputed.

No later than September 27, 2004, Brian Fair advised Les Powers that he, Brian Fair, was looking for a 50/50 partner in his new debt collection business.

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On February 9, 2005, Powers & Therrien, P.S. drafted legal pleadings for The Collection Group, LLC.

Disputed Fact

How soon before February 21, 2005 Powers & Therrien, P.S. represented The Collection Group, LLC is disputed.

Principles of Law

RPC 1.7 provides:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

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

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

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Analysis

Violation of RPC 1.7 As A Matter of Law

It is undisputed that Powers & Therrien, P.S. represented LK Operating, LLC at all times material hereto.

This court further concluded Powers & Therrien, P.S. represented Brian Fair at all times material hereto. The additional declaration of Ms. Sires does not change that conclusion. Indeed, it confirms Les Powers' actual knowledge of Powers & Therrien, P.S. representing Brian Fair to assist him in forming and maintaining his Nevada corporation, BF Trading. The Rules of Professional Conduct apply to Mr. Powers regardless of the alleged fact that the paralegal who reported to him actually provided the legal services.

Consequently, this court previously concluded Les Powers violated RPC 1.7 by representing both sides of the alleged transaction between arguably LK Operating, LLC and Brian Fair.

The remaining issue to be resolved regarding RPC 1.7 was whether that violation would allow Brian Fair to rescind the alleged transaction between LK Operating, LLC and Brian Fair. So the court requested briefing on this issue.

Now, based upon the parties' stipulation, the issue has become whether the violation of RPC 1.7 by Les Powers voids any agreement between LK Operating, LLC and The Collection Group, LLC?

Mr. Powers and Mr. Therrien controlled the operation of LK Operating, LLC, through their ownership of Powers & Therrien Enterprises, Inc., the manager of LK Operating, LLC. As an owner of Powers & Therrien Enterprises, Inc., Mr. Powers had a fiduciary duty to LK Operating, LLC at all time material hereto.

The creation of LK Operating, LLC by Les Powers and Keith Therrien assisted their estate plans. The success of LK Operating, LLC benefitted their children. Les Powers and Keith Therrien had a personal interest in the success of LK Operating, LLC.

There is clearly a question of fact as to when Powers & Therrien, P.S. began to represent The Collection Group, LLC. However, at the time their client, the owner of a new collection business, first approached them about joining him as partners in this business, they had a duty *inter alia* to disclose their personal interest (as parents), legal duties (as manager) and professional duties (as attorneys) that they had to LK Operating, LLC pursuant to RPC 1.7.

They also owed professional duties to Brian Fair, their existing client, the individual who represented to them that he was the sole owner of the collection business.

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They owed these professional duties to Brian Fair regardless of the fact that he approached them as an agent of The Collection Group, LLC because he was still their client and he owned The Collection Group, LLC. His ownership interest in The Collection Group, LLC would be affected by the addition of any investors. Consequently, any representation of LK Operating, LLC by Mr. Powers would be adverse to the interests of Brian Fair, even if the transaction was going to be between LK Operating, LLC and The Collection Group, LLC, Mr. Fair's company.

It is not necessary to determine when Mr. Powers began representing The Collection Group, LLC in order to conclude RPC 1.7 was violated by Mr. Powers as a matter of law. He represented LK Operating, LLC. He had a significant personal and financial interest in LK Operating, LLC as a parent, as an owner of its manager, Powers & Therrien Enterprises, Inc. and as the attorney for LK Operating, LLC. He represented Brian Fair, who had significant personal interest in any transaction between LK Operating, LLC and The Collection Group, LLC.

As a result, Mr. Powers had a concurrent conflict of interest as a matter of law. Because he failed to disclose his relationships to LK Operating, LLC to Brian Fair and he failed to obtain written informed consent from Brian Fair and LK Operating, LLC, he violated RPC 1.7 as a matter of law.

Voidable Transaction

The court acknowledges that there is no controlling authority on the issue of whether Brian Fair and/or The Collection Group may void this transaction over the objection of LK Operating, LLC.

The closest case is C.B. & T. Company v. Hefner, 98 N.M. 594, 651 P.2d 1029 (1982). An attorney represented both parties in a real estate transaction, only one of which had knowledge that the property included a valuable interest in a natural gas well. After the sale, the party without such knowledge moved to rescind the transaction on the grounds the attorney had breached his fiduciary duty to disclose the existence of the well.

The court affirmed the judgment voiding the sale:

"[T]he attorney for both parties had an absolute duty to make a full disclosure . . . of the existence of this well. . . the failure of the attorney to inform [the personal representative] of all pertinent facts surrounding the sale and purchase of the [real] property was a violation of the attorney's fiduciary duty . . .

The facts in this case are more egregious than the facts in C.B. & T. Company because neither client in C.B. & T. Company, had any relationship with the attorney. In this case, one of the clients was formed and controlled by the lawyers involved. Mr. Powers, at a minimum, was obligated to provide full disclosure to Brian Fair and to obtain his written informed consent. He failed at the expense of his client, Brian Fair, who was ultimately sued by Mr. Powers client, LK Operating, LLC.

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The remedy of rescission is appropriate and shall be granted. It should be noted that rescission is granted on the basis that the attorney breached his fiduciary duty, not on the basis of fraud or misrepresentation.

Any Violation of RPC 1.8 As A Matter of Law Is Moot

Similarly, due to the extensive control of LK Operating, LLC by Mr. Powers and Mr. Therrien, an extension of the holding in In re Corporate Dissolution of Ocean Shores Park, Inc. v. Rawson-Sweet, 132 Wn.App. 903 (2006) to a transaction between LK Operating, LLC and The Collection Group, LLC is appealing.

However, the court having granted defendants' motion for partial summary judgment and rescission, it is unnecessary to decide whether RPC 1.8 was also violated as a matter of law

Summary

Brian Fair was a client of Powers & Therrien, P.S. at all times material hereto. Any agreement between Powers & Therrien, P.S. violates RPC 1.8 and is void. Any agreement between Powers & Therrien, P.S. and The Collection Group also violates RPC 1.8 and is void.

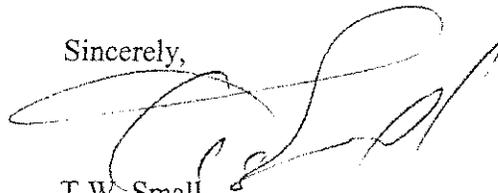
Brian Fair, the owner of The Collection Group, LLC, was a client of Powers & Therrien, P.S. LK Operating, LLC was a client of Powers & Therrien, P.S.. RPC 1.7 was violated as a matter of law. Any agreement between LK Operating, LLC and The Collection Group, LLC is void.

It is no longer necessary to rule on whether RPC 1.8 was violated in regard to a transaction between LK Operating, LLC and The Collection Group, LLC.

Conclusion

The remainder of defendants' motion for partial summary judgment is granted. Counsel for defendants should prepare the appropriate order for presentment.

Sincerely,



T.W. Small
Superior Court Judge

pc: Superior Court file