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NOV 09 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 297411-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LK OPERATING, LLC, a Washington limited liability company,

Appellant,

vs.

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

Respondents.

PETITION FOR REVIEW OF INTERVENORS
LES POWERS AND KEITH THERRIEN

FILED
NOV 29 2012
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	ii - iii
A. IDENTITY OF PETITIONER.....	1
B. COURT OF APPEALS DECISION.....	1
C. ISSUES PRESENTED FOR REVIEW	1
D. STATEMENT OF THE CASE.....	2
E. ARGUMENT WHY REVIEW SHOULD BE GRANTED	5
(1) <u>The Court of Appeals’ Ruling Conflicts With this Court’s Authority Regarding Interpretation of the RPCs and Demonstrates that this Court’s Guidance Will Benefit the Broader Public; Review Is Warranted Under RAP 13.4(b)(1) and (4)</u>	5
(2) <u>The Court of Appeals’ Finding of an RPC 1.8 Violation for the First Time on Appeal, After a Trial from Which the Attorney Was Excluded, and Based Upon New Facts Found By the Court of Appeals, Violates Due Process and Review Is Merited Under RAP 13.4(b)(3)</u>	14
F. CONCLUSION.....	18
Appendix	

TABLE OF AUTHORITIES

Page

Table of Cases

Washington Cases

Berger Engineering Co. v. Hopkins, 54 Wn.2d 300,
340 P.2d 777 (1959).....15

Bohn v. Cody, 119 Wn.2d 357, 832 P.2d 71 (1992)
holding modified by Trask v. Butler, 123 Wn.2d 835,
872 P.2d 1080 (1994).....8

Dodd v. Bannister, 86 Wn.2d 176, 543 P.2d 237 (1975).....7

Grader v. City of Lynnwood, 45 Wn. App. 876, 728 P.2d 1057 (1986)....16

Hahn v. Boeing Co., 95 Wn.2d 28, 621 P.2d 1263 (1980)7, 13

In re Disciplinary Proceeding Against Carmick, 146 Wn.2d 582,
48 P.3d 311 (2002).....6

In re Disciplinary Proceeding Against Hicks, 166 Wn.2d 774,
214 P.3d 897 (2009).....7, 13

In re Disciplinary Proceeding Against Holcomb, 162 Wn.2d 563,
173 P.3d 898 (2007).....11

In re Disciplinary Proceeding Against Miller, 149 Wn.2d 262,
66 P.3d 1069 (2003).....10, 11

Maranatha Mining, Inc. v. Pierce Cy., 59 Wn. App. 795,
801 P.2d 985 (1990).....16

Matter of Stroh, 97 Wn.2d 289, 644 P.2d 1161 (1982),
cert. denied, 459 U.S. 1202 (1983).....7

Olympic Forest Products, Inc. v. Chaussee Corp., 82 Wn.2d 418,
511 P.2d 1002 (1973).....14

Petstel, Inc. v. County of King, 77 Wn.2d 144, 459 P.2d 937 (1969).....14

Valley/50th Ave., L.L.C. v. Stewart, 159 Wn.2d 736,
153 P.3d 186 (2007), *review denied*,
172 Wn.2d 1020 (2011).....9, 10

Federal Cases

Armstrong v. Manzo, 380 U.S. 545, 85 S. Ct. 1187,
14 L.Ed.2d 62 (1965).....15

<i>Grannis v. Ordean</i> , 234 U.S. 385, 34 S. Ct. 779, 58 L.Ed. 1363 (1914).....	14
<i>Mullane v. Central Hanover Bank & Trust Co.</i> , 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950).....	15

Rules and Regulations

ELC 2.1	6
ELC 2.13(a).....	15
ELC 10.11	15
ELC 10.13	15
ELC 10.14(b)	15
RAP 13.4(b)(1)	1, 6, 14
RAP 13.4(b)(3)	14, 18
RAP 13.4(b)(4)	1, 6, 14
RPC 1.7	1, 3, 4, 6
RPC 1.8.....	<i>passim</i>
RPC 1.8(a).....	4, 9, 10, 11

A. IDENTITY OF PETITIONER

Les Powers and Keith Therrien,¹ who were permitted to intervene in this matter by the Court of Appeals, ask this Court to accept review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

Powers seeks review of the Court of Appeals decision filed on June 19, 2012 that affirmed the judgment in this case on different grounds than those stated by the trial court. The Court issued an order denying reconsideration of that decision in an order dated October 11, 2012. A copy of the opinion is at Appendix A, and a copy of the order denying reconsideration is at Appendix B.

C. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals' ruling that a contract can simultaneously be between two clients of the same attorney *and* between the attorney and one client contradict this Court's prior authority regarding RPC 1.7 and 1.8, and create confusion among the public such that review is warranted under RAP 13.4(b)(1) and (4)?

2. Does the Court of Appeals' finding of an RPC 1.8 violation for the first time on appeal, when the trial below excluded the attorney in

¹ Appendix C. Although law partners Powers and Therrien both have a substantial interest in this matter, only Powers has been implicated in the alleged RPC violations at issue.

question as a party, violate due process, particularly when the new finding on appeal is based on a new factual finding made by the Court of Appeals?

D. STATEMENT OF THE CASE

Intervenors and petitioners Powers and Keith Therrien (collectively, “Powers”)² are shareholders in the law firm of Powers & Therrien, P.S. In May 2004, a client for whom Powers had incorporated a past business, Brian Fair, established a new corporation, The Collection Group LLC, (hereinafter “TCG”) to operate a debt collection business. Fair was the sole manager of TCG. Fair did *not* ask Powers to incorporate TCG. In October 2004, Fair, as agent for TCG, asked Powers to purchase a TCG debt portfolio. Powers declined to invest in TCG, but passed along the business opportunity to a company owned by his adult children, LKO. Powers was a corporate officer of the business manager for LKO, but also represented LKO with respect to some legal matters.

LKO contributed \$52,000 to TCG in exchange for 50% of the debt collection business. The investment grew to be worth millions. Then, TCG’s manager, Brian Fair, suggested altering its contract, in which LKO and TCG were 50/50 members, to increase the share owned by Fair and

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.

his family. LKO filed suit against TCG and Fair to protect its rights under the agreement with TCG.

TCG and Fair answered and cross-claimed against Powers and his law partner, Keith Therrien, and their marital communities. TCG accused Powers himself, rather than LKO, of being the actual contracting party, thereby violating RPC 1.8 with respect to the contract in question. TCG asked for rescission of the contract, so that it would own 100% of the now valuable business owned by TCG.³ TCG and Fair also cross-claimed against Powers for malpractice.

During complex pre-trial proceedings, the trial court concluded on summary judgment that if the contract were between LKO and TCG, it would violate RPC 1.7, which prohibits lawyers from representing two clients in the same matter. Although TCG and Fair strenuously argued the matter, the trial court declined to rule on an alleged violation of RPC 1.8, 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

³ 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, later vacated that ruling as to Keith Therrien. The opinion confirms that the RPC 1.7 finding applied to Les Powers only, and the Court of Appeals confined its new finding of an RPC 1.8 violation to Powers as well. Appendix A at 15, 25.

Therrien, and 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. Nonetheless, the trial court rescinded the LKO and TCG contract based on its conclusion that Powers violated RPC 1.7 by “representing” both LKO and Fair in the transaction.⁴ The trial court made no finding regarding RPC 1.8.⁵

An appeal by LKO followed. As respondents, Fair and TCG asked the Court of Appeals to find for the first time that Powers also violated RPC 1.8(a). Because such a ruling, like the RPC 1.7 ruling, potentially would have serious personal consequences for Powers, and because they had not been allowed a trial on the RPC 1.8 issues, they asked to intervene in the LKO appeal. The Court of Appeals permitted Powers to file an intervenor’s brief.

⁴ 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.

⁵ Powers and Therrien prevailed in the malpractice action. 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 of that appeal to Division III

The Court of Appeals issued its opinion granted TCG rescission of the contract, but not on the same grounds as the trial court. Appendix A at 25. It concluded that Powers had violated RPC 1.7, because he had represented both LKO and TCG in their agreement to invest in the debt portfolio. But it concluded that RPC 1.7 could not be grounds for rescission, because such a remedy should not be imposed upon an “innocent client.” *Id.* at 19.

However, the Court of Appeals concluded that rescission *could* be granted on grounds that Powers had also violated RPC 1.8, prohibiting lawyers from engaging in business transactions with clients. *Id.* at 25. Thus, the Court of Appeals found the contract at issue to be both between two clients of the same lawyer, *and* between a lawyer and a client.

Both Powers and LKO moved for reconsideration. Appendix B at 1. The court granted reconsideration on the limited grounds that it had misstated the trial court’s disposition of the RPC 1.8 issue. *Id.* at 2. Otherwise, the opinion was affirmed.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

- (1) The Court of Appeals’ Ruling Conflicts With this Court’s Authority Regarding Interpretation of the RPCs and Demonstrates that this Court’s Guidance Will Benefit the Broader Public; Review Is Warranted Under RAP 13.4(b)(1) and (4)

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.

This Court exercises plenary authority and “exclusive responsibility” in matters of attorney standards of professional conduct. ELC 2.1; *In re Disciplinary Proceeding Against Carmick*, 146 Wn.2d 582, 593, 48 P.3d 311, 317 (2002). Although the dispute between LKO and TCG is not a formal disciplinary matter, the Court of Appeals’ ruling has disciplinary implications for Powers, insofar as he has been found by a court to have violated two RPCs.⁶ Exercise of this Court’s plenary authority is particularly crucial where the findings are confusing and appear to be in direct conflict with each other.

The Court of Appeals here ruled that the contract between LKO and TCG was *both* a contract between a lawyer and a client (RPC 1.8) *and* a contract between two clients of the same lawyer (RPC 1.7). Appendix A at 19, 25. In other words, the Court of Appeals concluded that LKO was a client of Powers *and* LKO was Powers himself.⁷ The Court of Appeals concluded that it could not apply the remedy of rescission on LKO under

⁶ It is unclear whether, in a disciplinary hearing, the WSBA would consider the Court of Appeals’ interpretation and conclusions binding, especially given the differing burdens of proof between a civil action and a disciplinary action.

⁷ The trial court concluded, in a finding unchallenged by TCG on appeal, that LKO was not an “alter ego” of Powers. However, the Court of Appeals concluded that LKO was “sufficiently aligned” with Powers as to justify concluding that Powers was the contracting party. Appendix A at 2.

RPC 1.7, because it is inappropriate to impose such a remedy on an “innocent client.” Appendix A at 19. However, it then concluded that rescission *was* an appropriate remedy under RPC 1.8, finding that Powers was actually the “contracting party.” *Id.* at 25.

These seemingly contradictory rulings stem from the Court of Appeals’ misinterpretation of the RPCs. First, the Court of Appeals misinterpreted what constitutes “representation” by an attorney in a matter under RPC 1.7. Second, the Court of Appeals misinterpreted what constitutes a “business transaction” with a client under RPC 1.8.

This Court has the inherent power to promulgate rules of discipline, to interpret them, and to enforce them. *In re Disciplinary Proceeding Against Hicks*, 166 Wn.2d 774, 781, 214 P.3d 897, 900 (2009); *Matter of Stroh*, 97 Wn.2d 289, 294, 644 P.2d 1161, 1164 (1982); *Dodd v. Bannister*, 86 Wn.2d 176, 187, 543 P.2d 237 (1975). Neither the superior courts nor the Court of Appeals has authority to impose attorney discipline. *Hahn v. Boeing Co.*, 95 Wn.2d 28, 34, 621 P.2d 1263, 1267 (1980).

With respect to RPC 1.7, the Court of Appeals misapplied the rule by concluding that conveying a business offer from one client to another constitutes “representation” under the meaning of the rule. Lawyers’ professional duties are to advise clients on their legal rights, options, and

responsibilities. “The essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters.” *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71, 75 (1992) *holding modified by Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994).

There is not a shred of evidence in this record that either LKO or TCG sought or received any legal advice or assistance from Powers with respect to the matter at issue: LKO and TCG’s decision to go into business together. The record shows that Powers passed along a business opportunity between two clients, and offered no legal advice or services with respect to either client’s decision to do business, or the terms of the contract. In fact, Fair stated that he did not care who the investor was, let alone offer any testimony as to Powers’ role. The notion that relaying a business opportunity between two parties without offering any advice, let alone legal advice, constitutes “representation” is unsupported by RPC 1.7.

With respect to RPC 1.8, the Court of Appeals misunderstood the meaning of the phrase “business transaction.” After ruling that LKO was engaged in business with TCG for the purposes of finding an RPC 1.7 violation, the Court of Appeals concluded that under RPC 1.8 *Powers*, not LKO, went into business with TCG. Appendix A at 24. The Court

accepted the trial court's findings that LKO is an independent corporate entity and that there is no basis to pierce LKO's corporate veil, *id.* at 21, but nevertheless concluded that Powers was the actual contracting party. *Id.* at 24.

Although many cases discuss whether a lawyer engaging in a business transaction took the proper steps to comply with RPC 1.8(a), few interpret what the phrase "business transaction" actually means under this RPC. It is axiomatic that if the attorney did not engage in a business transaction with the client, there can be no RPC 1.8 violation.

One case that does discuss what constitutes a "business transaction" is *Valley/50th Ave., L.L.C. v. Stewart*, 159 Wn.2d 736, 153 P.3d 186, 188 (2007), *review denied*, 172 Wn.2d 1020 (2011). 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. This 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 on a 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.*

This 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, this 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 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.*

What this Court's analysis in these cases reveals is that a "business transaction," between a lawyer and client must confer some benefit or potential 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.

However, the Court of Appeals has concluded that even if the lawyer receives no benefit or potential benefit from a transaction, he or she is still doing business with a client if persons *connected* to the lawyer stand to benefit. Appendix A at 24. This broad reading contradicts the plain language of RPC 1.8.

The Court of Appeals' opinion here leaves the interpretation of "business transaction" under RPC 1.8 and "representation" under RPC 1.7 muddled, and raises the possibility for confusion and error in future court proceedings. How can a contract simultaneously be between two clients of the same lawyer *and* between the client and the lawyer directly? Also, the Court of Appeals concluded that if an LLC owned by a lawyer's adult children enters into a contract with that lawyer's client, then the lawyer has engaged in "business transaction" with that client, because the lawyer's adult children have engaged in the transaction. Appendix A at 25. How far does this interpretation extend? What if it is the lawyer's cousin or nephew? Also, what should a client expect when a lawyer performs both legal and business functions for that client? If a person who happens to be a lawyer does a business deal in his or her capacity as a

manager, does the lawyer automatically become the real party in interest, rather than the contracting party who actually paid the money and did the business? The Court of Appeals' conflicted opinion creates a morass that only this Court can remedy.

The Court of Appeals decision impacts not only Powers and LKO, whose contract with TCG was rescinded resulting in a massive windfall to TCG, but it also impacts the broader public by creating confusion. Specifically, the Court of Appeals' decision has the capacity to create uncertainty for individuals and businesses who use attorneys for both legal and business advice and management. The RPCs may become a trap for innocent, unwary clients who think they are being represented by a general manager or chief operating officer, but who will – as happened here – be accused by other parties of having wielded an attorney inappropriately.

Certainly, review of this case has an impact within the legal profession, which looks to this Court as the final authority on interpretation of the RPCs. *Hicks*, 166 Wn.2d at 781; *Hahn*, 95 Wn.2d at 34. Attorneys must rely on the RPCs to guide appropriate behavior, and also to resolve difficult questions that arise. RPC Preamble, Washington Revision 9.

Both lawyers and clients have a right to reasonable certainty regarding what activities and actions are permitted and prohibited by the

RPCs. While these rules certainly should be a shield from lawyer malfeasance, they should not, through incorrect interpretation, be used as a sword by one client against another to unjustly enrich one party.

The Court of Appeals here interpreted the RPCs in a manner that contradicts this Court's prior interpretation of RPCs 1.7 and 1.8. It will cause confusion for lawyers and clients alike. Particularly given this Court's role as the interpreter of the RPCs, it should accept review to clarify these matters under RAP 13.4(b)(1) and (4).

- (2) The Court of Appeals' Finding of an RPC 1.8 Violation for the First Time on Appeal, After a Trial from Which the Attorney Was Excluded, and Based Upon New Facts Found By the Court of Appeals, Violates Due Process and Review Is Merited Under RAP 13.4(b)(3)

Violation of the right to notice and opportunity to be heard is a violation of due process under the Washington and U.S. Constitutions. *Olympic Forest Products, Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 421-22, 511 P.2d 1002, 1005 (1973). The language of the two due process clauses is nearly identical, and federal authority on questions of due process should be given "great weight" in construing Washington's provision. *Petstel, Inc. v. County of King*, 77 Wn.2d 144, 153, 459 P.2d 937, 942 (1969).

The fundamental requisites of due process are the opportunity to be heard, *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 58 L.Ed. 1363

(1914), and “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L.Ed. 865 (1950). The opportunity “must be granted at a meaningful time and in a meaningful manner.” *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 1191, 14 L.Ed.2d 62 (1965).

Finding a violation of an RPC is a serious matter, usually entered only after a full evidentiary hearing where the accused party has notice and opportunity to be heard, and the right to be represented by counsel. ELC 2.13(a), 10.11, 10.13. The attorney has the right to reasonable discovery, and the accuser must prove the charge by a clear preponderance of evidence. ELC 10.11, 10.14(b).⁸

Only a tribunal with original jurisdiction has the authority to make findings of fact, *see Berger Engineering Co. v. Hopkins*, 54 Wn.2d 300, 308, 340 P.2d 777 (1959) (an appellate court “is not a fact-finding branch of the judicial system of this state”). A tribunal with only appellate jurisdiction is not permitted or required to make its own findings, *Berger*

⁸ Again, the differing burden of proof between the civil and disciplinary contexts increases the need for review by this Court. An attorney might be exonerated in a disciplinary proceeding but convicted under the lower civil standard. This increases the risk of an erroneous finding, and increases the need for proper interpretation and application of the RPCs to the facts presented.

Engineering Co. v. Hopkins, 54 Wn.2d at 308, *Maranatha Mining, Inc. v. Pierce Cy.*, 59 Wn. App. 795, 802, 801 P.2d 985 (1990), and such findings, if entered, are surplusage. *Grader v. City of Lynnwood*, 45 Wn. App. 876, 879, 728 P.2d 1057 (1986).

Here, two significant errors deprived Powers of due process. First, the RPC 1.8 ruling was made for the first time on appeal based upon findings of fact after a trial *in which Powers was not a party*. Appendix A at 25. Powers was not permitted *any* notice or opportunity to be heard, let alone the protections afforded at a disciplinary hearing.

The second error was entry of a *new finding of fact* by the Court of Appeals, the finding that Powers acted “in his capacity as an attorney” for LKO in accepting TCG’s offer, rather than in his capacity as an officer of the business manager for LKO. Appendix A at 24. It is undisputed that Powers performed both functions for LKO. Appendix A at 22. The Court of Appeals did not rely on a finding of the trial court to draw this conclusion, rather, the Court relied on a *lack* of any such finding: “There is no finding that Mr. Powers acted in any other capacity than a lawyer when he accepted the deal and forwarded the funds.” Appendix A at 23. In other words, because the trial court made no finding on this question of fact, the Court of Appeals inferred it.

The Court of Appeals admitted there was no finding that Powers was acting as an attorney for LKO when he passed along a business opportunity to it. Even if there had been such a finding, it would violate due process because Powers was never given notice and opportunity to rebut that finding.

Another due process problem presented by the RPC 1.8 finding is evident from the Court of Appeals' opinion: even if a client demonstrates that he engaged in a business transaction with a lawyer, the lawyer must have notice and opportunity to demonstrate that the transaction was arm's length and did not unduly benefit the lawyer. Appendix A at 21. As the Court of Appeals correctly states:

The burden is on the lawyer who has entered into a business transaction with a client or acquires an interest adverse to a client to show that there was no undue influence. The lawyer must show that he or she gave the client the same information or advice as a disinterested lawyer would have given. And the lawyer must show that client would have received no greater benefit had he or she dealt with a stranger. *In re Disciplinary Proceeding Against Haley*, 157 Wn.2d 398, 406, 138 P.3d 1044 (2006) (quoting *In re Disciplinary Proceeding Against McMullen*, 127 Wn.2d 150,164, 896 P.2d 1281 (1995)).

Id. Again, Powers was not a party to the LKO-TCG contract action, and had no opportunity to present this defense.

Unless TCG presents clear and convincing evidence – which Powers must have the opportunity to rebut – that Powers acted as an

attorney with respect to the LKO-TCG transaction, and that TCG somehow was negatively impacted by the business arrangement with LKO, the Court of Appeals has deprived Powers of due process regarding the RPC 1.8 finding.

Whether the Court of Appeals may make a new factual finding on appeal that affects a party who was not a participant at the trial in question is a significant question of law arising under the Washington and U.S. Constitutions, and this Court should accept review under RAP 13.4(b)(3).

F. CONCLUSION

This Court should exercise its plenary authority over the interpretation of the RPCs to review the strange and contrary interpretations enunciated by the Court of Appeals. The ruling not only has the capacity to confuse attorneys and their clients, it also violated the most fundamental principles of due process and appellate restraint that govern our legal system.

DATED this th 8 day of November, 2012.

Respectfully submitted,



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APPENDIX

APPENDIX A

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WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

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 and)
 Cross-Appellants,)
)
LESLIE ALAN POWERS and PATRICIA)
POWERS, husband and wife, and KEITH)
TERRIEN and MARSHA TERRIEN,)
husband and wife,)
)
 Intervenors.)
)

No. 29741-1-III

PUBLISHED OPINION

Sweeney, J. — Rules of professional conduct have been used to prohibit lawyers from enforcing agreements with clients that lawyers were a party to. But those same

rules have not been applied to support actions for legal malpractice or for equitable relief or damages based on a lawyer's ethical lapses. Here, the court refused to enforce a business agreement between two limited liability companies (LLCs) after concluding that the lawyer representing the parties represented both sides at the same time and therefore violated Rule of Professional Conduct (RPC) 1.7 (prohibiting lawyers from representing clients if there is a conflict of interest). We conclude that the remedy of rescission cannot be based on a violation of RPC 1.7. We, however, also conclude based on the court's findings that the interests of the lawyer and one of the LLCs were sufficiently aligned to warrant rescission of the agreement based on a violation of RPC 1.8 (prohibiting lawyers from entering into business agreements with their clients). We therefore affirm the superior court's judgment ordering rescission.

FACTS

Background

Leslie Powers and Keith Therrien practiced law as Powers & Therrien, P.S. in Yakima, Washington. Together they formed LK Operating, LLC (LKO) in December 2003. LKO managed irrevocable trusts for the benefit of Mr. Powers' and Mr. Therrien's adult children. Each of the five adult children of Mr. Powers and Mr. Therrien is the sole trustee and the beneficiary of a separate trust. Each trust is the sole shareholder of a

corporation and the five corporations are the sole members of LKO. Powers & Therrien Enterprises Inc. manages LKO. Mr. Powers and Mr. Therrien are the officers of that management corporation.

Brian Fair was a client of Powers & Therrien, P.S. in 2004. That same year, Mr. Fair and his wife formed The Collection Group LLC (TCG) to engage in the business of debt collection. Powers & Therrien, P.S. had no role in the formation of TCG. TCG is managed by Mr. Fair. Mr. Fair asked Mr. Powers whether he or Mr. Therrien would be interested in his new business venture. Mr. Fair proposed an equal investment of funds and ownership. Mr. Fair proposed that he would contribute administrative and management services and that Mr. Powers and Mr. Therrien would contribute legal services. Mr. Fair outlined his joint venture proposal in an October 2004 e-mail regarding the purchase of debt from Unifund, a debt vendor:

Les, Keith,

....

Attached is a sample purchase agreement from Unifund, the company selling the debt, and the attachment for when they sell FUSA debt (aka First USA). I have not had a chance to review it, but I will do so tonight.

Regarding an agreement between myself and you two, this is how I would like to see it:

- A. We will split the purchase price and other out of pocket costs, including legal services that your firm cannot provide.
- B. You will contribute legal services you can provide (review the purchase agreement contract, legal doc for this JV [joint

- venture] (if needed), demand letter, ask smart questions, kick the tires, etc.)
- C. My contribution will include no charge for finding this debt, negotiations with debtor and debt seller (unless you prefer to do this), and keeping you informed.

Clerk's Papers (CP) at 216.

Mr. Powers later reviewed the attached Unifund purchase agreement and returned it to Mr. Fair marked up with extensive suggested changes. Mr. Powers did not respond to Mr. Fair's inquiry about an agreement. Mr. Fair continued to negotiate with Unifund; TCG was eventually named as the prospective purchaser of the debt. Mr. Fair sent an e-mail to Mr. Powers in January 2005 asking whether he was still interested in the deal with Unifund. Mr. Powers did not respond. Mr. Fair then caused TCG to invest in the Unifund debt portfolio with \$7,969.23 of its own money. Mr. Fair began work to collect the debt that TCG had purchased.

Mr. Fair exchanged e-mails with Powers & Therrien, P.S. that discussed the legal services required to collect the debt. The law firm drafted legal documents for TCG and TCG made progress collecting the accounts in the Unifund portfolio. In early February 2005, Mr. Powers apparently indicated in a telephone conversation with Mr. Fair that LKO, the company owned by the adult children, was interested in making the proposed investment. Mr. Fair sent a fax to Mr. Powers' legal assistant asking her to arrange for a

No. 29741-1-III
LK Operating v. Collection Group

check for \$3,984.61 (one-half the cost of the Unifund portfolio) made out to “The Collection Group, LLC.” CP at 1153. Mr. Fair again sent the fax to the firm’s bookkeeper several days later after he did not receive the funds.

TCG received a check in the amount requested on February 21, 2005. The check was signed by Michelle Briggs, whom Mr. Fair knew to be an employee of Powers & Therrien, P.S. The check was a “counter check” with the name “LK Operating LLC” handwritten in the upper left-hand corner. CP at 197, 441. Mr. Fair did not know the identity of LKO but assumed it was an account owned by Les and Keith (LK) of Powers & Therrien, P.S. Mr. Fair faxed an accounting to Powers & Therrien, P.S. that stated: “Les, this gives you guys 1/2 ownership in the company. You can formalize however you wish.” CP at 311. Neither Mr. Powers nor Mr. Therrien formalized any agreement.

Mr. Fair continued to expand the business and when an opportunity to purchase additional debt portfolios arose, he contacted Powers and Therrien, P.S. for additional funds. They responded and sent three additional checks: one on March 3, 2005, for \$13,015.39; one on December 23, 2005, for \$10,000; and one on September 11, 2006, for \$25,000. Each check was a “LK Operating LLC” counter check. Mr. Powers and Mr. Therrien still had not proposed any formal agreement to spell out the relationship among the parties.

Mr. Fair asked Mr. Powers to draft an operating agreement for a new entity, OPM I, LLC (OPM), in early 2007. OPM was a limited liability company formed by TCG and Mr. Fair to collect delinquent debt in states other than Washington. TCG was a member of OPM, and TCG and Mr. Fair were its managers. The OPM operating agreement drafted by Mr. Powers included a waiver of “legal conflict”: “Members of Counsel’s family have an interest in the Manager and through it the Company [OPM].” CP at 1478-79. Mr. Fair signed the OPM operating agreement personally and as TCG’s manager.

Mr. Fair again requested that Mr. Powers and Mr. Therrien formalize their ownership interest in TCG in April 2007. This time Mr. Fair proposed that Mr. Powers and Mr. Therrien would own a 38 percent interest, that Mr. Fair’s mother would own a 7 percent interest, and that he and his wife would own a 55 percent interest. The percentages were based on both the financial and service related contributions of the parties. Mr. Fair estimated that the value of TCG had grown to approximately \$1.5 million. Mr. Powers and Mr. Therrien rejected the proposal and insisted that they were entitled to a 50 percent ownership interest in TCG.

Procedural History

Mr. Powers and Mr. Therrien caused LKO to sue TCG and Mr. Fair for a judicial declaration of the ownership rights of the parties, for breach of fiduciary duty, and for

breach of contract. The Fairs responded by suing Mr. Powers and Mr. Therrien personally for legal malpractice and breach of the Consumer Protection Act, chapter 19.86 RCW. Both matters were consolidated. TCG and the Fairs moved for partial summary judgment against LKO on the ground that RPC 1.8 prohibits business dealings between an attorney and his client unless the client gives informed consent. LKO also moved for summary judgment against the Fairs on the ground that Mr. Fair was not a client of Powers & Therrien, P.S. at the time of the disputed transaction, and neither Mr. Powers, Mr. Therrien, nor Powers & Therrien, P.S. had any ownership or financial interest in LKO.

The court ruled in a memorandum decision that Mr. Fair personally was at all times a client of Powers & Therrien, P.S. The court ruled that any attempted purchase of an interest in TCG by Mr. Powers and Mr. Therrien personally or through Powers & Therrien, P.S. would be against public policy and void because it violated RPC 1.8. The court, however, also concluded that a question of fact remained about whom Mr. Fair actually entered into the agreement with, Powers & Therrien, P.S. or LKO.

The court went on to conclude, *sua sponte*, that Mr. Powers and Mr. Therrien had a conflict of interest under RPC 1.7 (concurrent conflict of interest). This was because Powers & Therrien, P.S. represented LKO, and LKO was a potential purchaser of an

ownership interest in TCG, and neither entity consented to the representation. The court denied LKO's motion for summary judgment, partially granted TCG's motion for summary judgment, and requested additional briefing on whether rescission was an appropriate remedy for a violation of RPC 1.7.

LKO and Mr. Powers and Mr. Therrien each moved to reconsider. The court granted LKO's motion in part by ruling that a question of fact remained as to whether Mr. Therrien had violated RPC 1.7, but denied the balance of the motions. Mr. Fair later stipulated at a discovery hearing that the contract at issue was not a sale of personal equity, but was a direct transaction with TCG. He stipulated that he acted as an agent for TCG, and not personally. LKO then again requested that the court reverse the previous ruling on the ground that the stipulations effectively meant the contract at issue was solely between LKO and TCG, not with Mr. Fair personally, and therefore there could not be the basis for a RPC 1.8 violation by Powers & Therrien, P.S. LKO also again argued that a question of fact remained as to whether there was an attorney-client relationship between TCG and Powers & Therrien, P.S. at the time they contracted with LKO. The court rejected those arguments in a second memorandum decision:

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 times 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. 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.

CP at 2371-72. The court acknowledged the absence of controlling authority in Washington on whether a violation of RPC 1.7 made the transaction voidable but cited the New Mexico case of *C.B.&T. Co. v. Hefner*¹ in support of its ultimate conclusion that it did. The court also dismissed the question of whether Mr. Powers violated RPC 1.8 as moot.

The court bifurcated the malpractice action from the contract action in preparation for trial limited to the appropriate amount of damages that should follow from the rescission. Following trial, the court entered judgment in favor of LKO for the principal amount of all sums which LKO invested with TCG plus interest, \$78,431.61. The court entered findings of fact and conclusions of law. LKO appeals and TCG and Mr. Fair cross-appeal. In June 2011, the court summarily dismissed Mr. Fair's malpractice action on the basis that there were no cognizable damages from Mr. Powers' violation of RPC 1.7.

DISCUSSION

Violation of RPC 1.7 and Remedy of Rescission

¹ 98 N.M. 594, 651 P.2d 1029 (1982).

LKO contends that the court's conclusion that Mr. Powers represented either LKO or Mr. Fair in this investment agreement is wrong. LKO admits that Mr. Fair personally was a client of Powers & Therrien, P.S., but contends that when Mr. Fair presented the investment proposal to Mr. Powers he was acting as the managing agent for TCG. LKO contends that Mr. Fair never acted in his personal capacity. LKO argues that it, not Mr. Powers, invested in TCG. LKO argues that is precisely why the trial court could not, and did not, rule that Mr. Powers violated any RPC 1.7 obligation owed to TCG, only to Mr. Fair. But, again, LKO contends that because Mr. Fair was not personally a party to the investment agreement and also did not ask for personal representation, there can be no finding that Mr. Powers violated any RPC 1.7 obligation owed to Mr. Fair.

LKO contends that the court's use of RPC 1.7 to impose civil legal obligations was wrong because the RPCs are ethical rules, not intended to be used to impose civil liability. LKO argues that RPC 1.7 was the only basis for approving rescission here since the court refused to find fraud or misrepresentation, breach of fiduciary duties, or breach of contract. LKO contends it is a nonlawyer and therefore owed no ethical duties and should not have been subject to this civil sanction based on violation of a RPC.

TCG responds that Powers & Therrien, P.S. represented LKO at the time of the investment proposal and worked on LKO's behalf to make it a member of TCG. TCG

contends that Powers & Therrien, P.S. also represented Mr. Fair. TCG argues that it is irrelevant whether a lawyer's two clients are both involved in the same transaction for purposes of a RPC 1.7 violation. RPC 1.7 bars a lawyer from representing a client in a negotiation with someone who is a client of the lawyer in an unrelated matter. TCG argues that the investment opportunity was offered directly to Mr. Powers and Mr. Therrien, and that Mr. Fair did not even know who LKO was. Indeed, Mr. Fair assumed that because the initials were "LK," it was Les's and Keith's company. So, TCG urges that the court was correct in holding that Powers & Therrien, P.S. simply could not ethically represent LKO in a negotiation when Mr. Fair was still a client. And TCG says that the court's remedy, rescission, is proper. *See C.B.&T. Co. v. Hefner*, 98 N.M. 594, 651 P.2d 1029 (1982).

We review a trial court's order granting summary judgment de novo and engage in the same inquiry as the trial court. *Hubbard v. Spokane County*, 146 Wn.2d 699, 706-07, 50 P.3d 602 (2002) (quoting *Ellis v. City of Seattle*, 142 Wn.2d 450, 458, 13 P.3d 1065 (2000)). Summary judgment is appropriate when the pleadings and affidavits show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We consider facts and reasonable inferences in the light most favorable to the nonmoving party. *Hubbard*, 146 Wn.2d at 707. And we review de novo

No. 29741-1-III
LK Operating v. Collection Group

whether an attorney's conduct violates the Washington Rules of Professional Conduct.
See Gustafson v. City of Seattle, 87 Wn. App. 298, 302, 941 P.2d 701 (1997).

Conflict of Interest (RPC 1.7)

A lawyer shall not represent a client if the representation of that client may be directly adverse to another client or materially limited by the lawyer's responsibilities to another client, third person, or by the lawyer's own interests unless the lawyer reasonably believes that the representation will not be adversely affected, and the client consents in writing after consultation and a full disclosure of material facts. RPC 1.7(a), (b). Direct conflicts can even arise in transactional matters involving the representation of multiple clients in unrelated matters. RPC 1.7 cmt. 7 ("For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.").

LKO does not dispute that Mr. Powers represented Mr. Fair prior to the formation of TCG in an unrelated matter. And this record supports that this attorney-client relationship had not ended at the time of the agreement that is the center of the dispute. LKO also does not dispute that Mr. Powers represented LKO, his children's company. Mr. Powers managed LKO through a separate corporation. Mr. Fair solicited investments

from Mr. Powers and Mr. Therrien, not LKO. The initial proposal is set out in an e-mail with an attached sample purchase agreement from a debt vendor. Mr. Powers marked up that sample agreement with suggestions and returned it to Mr. Fair. Mr. Powers performed those legal services for Mr. Fair, not LKO. Mr. Powers later created legal documents for Mr. Fair and his new company, TCG. We are led then to conclude, as the trial judge did, that Mr. Powers simultaneously represented both Mr. Fair and LKO.

LKO contends, nonetheless, that such simultaneous representation still does not give rise to a RPC 1.7 violation because the representations occurred in unrelated matters and not the transaction at issue. We disagree. There is a conflict of interest even when a lawyer represents a client in another unrelated matter and then represents a second client in a business transaction with the current client. RPC 1.7 cmt. 7. And that is what we have here.

Mr. Powers represented both Mr. Fair and LKO in separate unrelated matters and then represented LKO in the business transaction with Mr. Fair by relaying the investment proposal and forwarding the funds. Mr. Powers had a duty to disclose his personal interest in LKO, his legal duties as manager of LKO, and his professional duties as an attorney for LKO. The representation of Mr. Fair was directly adverse to the representation of LKO in the transaction and there is no evidence that either client gave

No. 29741-1-III
LK Operating v. Collection Group

informed consent in writing. Mr. Powers violated RPC 1.7.

RPC as Basis for Rescission

LKO next contends that, even if Mr. Powers violated RPC 1.7, LKO's agreement with TCG should not be subject to rescission.

The Supreme Court adopted the RPCs pursuant to its power to regulate the practice of law in Washington. *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992). The RPCs are not intended to serve as a basis for civil liability, nor do they establish the appropriate standard of care in a civil action. *Id.* at 259-61. The RPCs simply establish the “‘minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.’” *Id.* at 261 (quoting former RPC Preliminary Statement (1985)). But agreements that violate RPCs or, at least, RPC 1.8, have been held to be contrary to public policy and the courts of this state have refused to enforce agreements based on a violation of RPC 1.8. *In re Corp. Dissolution of Ocean Shores Park, Inc.*, 132 Wn. App. 903, 910, 134 P.3d 1188 (2006); *Danzig v. Danzig*, 79 Wn. App. 612, 616-17, 904 P.2d 312 (1995); *Marshall v. Higginson*, 62 Wn. App. 212, 217-18, 813 P.2d 1275 (1991). Here LKO sued for a judicial declaration of its understanding of the agreement with Mr. Fair and TCG.

In *Hizey*, clients sued their attorney and alleged legal malpractice based on the

lawyer's conflict of interest. *Hizey*, 119 Wn.2d at 256-57. The trial judge refused to let an expert testify on rules of professional conduct and refused to instruct the jury on those rules. *Id.* at 257-58. The Supreme Court affirmed. The court held that a violation of ethics rules must be pursued through a disciplinary proceeding. *Id.* at 259. And the court held that such violations may not serve as the basis for a private cause of action. *Id.* at 259, 261. The court reasoned that a claim for legal malpractice focuses on the duty of care owed to the client, which is established by the relationship and not by the RPCs. *Id.* at 260-62.

The *Hizey* decision, however, addressed application of the RPCs only in the legal malpractice setting. The court did not answer whether the court would also separate the ethics and potential civil liability in other suits, such as fee disgorgement, breach of contract, or disqualification motions. Indeed, the court noted that other courts had "relied on the CPR [Code of Professional Responsibility] and RPC for reasons other than to find malpractice liability and our holding today does not alter or affect such use." *Hizey*, 119 Wn.2d at 264 (citing *Singleton v. Frost*, 108 Wn.2d 723, 742 P.2d 1224 (1987) (relying on disciplinary rule to determine reasonableness of attorney fees); *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992) (holding violation of CPR is a question of law, not fact); *Walsh v. Brousseau*, 62 Wn. App. 739, 815 P.2d 828 (1991) (holding contract for

No. 29741-1-III
LK Operating v. Collection Group

sale of law practice, which included duty on part of selling attorney to refer clients as consideration for the sale, violated RPC)). At least one legal scholar has suggested that the court did not need to be so cautious, as many of the other cases are distinguishable. Stephen E. Kalish, *How to Encourage Lawyers To Be Ethical: Do Not Use the Ethics Codes as a Basis for Regular Law Decisions*, 13 Geo. J. Legal Ethics 649, 672 (2000) (“None of the cases that [the court] cites suggests that a judge in his instructions or an expert in his opinion may explicitly refer to ethics law.”).

The courts of this state have applied RPC 1.8 (restricting business transactions with a client) to refuse to enforce fee agreements with attorneys as being against public policy. See *Valley/50th Ave., LLC v. Stewart*, 159 Wn.2d 736, 743, 153 P.3d 186 (2007); *Ocean Shores Park*, 132 Wn. App. 903; *Holmes v. Loveless*, 122 Wn. App. 470, 475, 94 P.3d 338 (2004); *Cotton v. Kronenberg*, 111 Wn. App. 258, 270-71, 44 P.3d 878 (2002). The application of the RPC and result in these cases was not however categorical. The lawyer could show that the contract was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts before the court would hold any agreement void or voidable. *Valley/50th Ave.*, 159 Wn.2d at 743-44.

The issue in *Valley/50th Avenue* was the enforceability of a promissory note and fee agreement a client executed in favor of a law firm to secure a fee and cost bill owed

by another client. 159 Wn.2d at 740-41. The court concluded that “the note and deed of trust was more like a business transaction than a fee agreement, [so] the issue then is whether [the law firm] satisfied the minimum notice, disclosure, and reasonable opportunity to seek the advice of independent counsel.” *Id.* at 745. The court ultimately concluded that there were material issues of fact as to whether the law firm discharged its duty under RPC 1.8 and remanded for further proceedings. *Valley/50th Ave.*, 159 Wn.2d at 747.

Here, the court concluded that Mr. Powers had violated RPC 1.7 and based on the New Mexico case, *C.B.&T. Co.*, it held that the agreement between LKO and TCG was voidable.

We conclude, however, that RPC 1.7 cannot provide the basis for rescission. RPC 1.8, which has provided the legal basis for rescission, is different in its wording and its effect from RPC 1.7. A lawyer violates RPC 1.8 when the lawyer enters into a business transaction with his or her client without the minimum notice, disclosure, and without giving the client the opportunity to seek the advice of independent counsel. We will then generally refuse efforts by the lawyer to enforce those agreements. *Valley/50th Ave.*, 159 Wn.2d at 743; *Ocean Shores Park*, 132 Wn. App. at 912-13.

What we have with RPC 1.7 is a rule to regulate the attorney-client relationship

and ensure that an attorney's representation is not materially limited by conflicting interests. *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 336, 157 P.3d 859 (2007) ("The rule assumes that multiple representation will necessarily require consultation and consent in writing, reasonably so since the rule imposes these requirements anytime there is a *potential* conflict."). The differences are important.

The problem with applying RPC 1.7 here is that the remedy, rescission, could easily fall on an innocent client. And it is not the client who should pay for the sins of its lawyer. Even if the lawyer breached his or her fiduciary duties, it is the lawyer who should suffer the consequences not the client. It is not the client(s) who did anything wrong; it is the lawyer by representing clients on both sides. The appropriate remedy is to file a disciplinary action with the Washington State Bar Association.

In sum, we agree Mr. Powers violated RPC 1.7. But that violation cannot be grounds to rescind any investment agreement between LKO and TCG.

CROSS-APPEAL

TCG cross-appeals and urges that we affirm the court's decision to rescind the contract based on a violation of RPC 1.8 since we may affirm on any ground argued at the trial court. TCG argues essentially that there was sufficient evidence of a *de facto* contract between Mr. Powers and TCG and Mr. Fair, a contract sufficient to invoke the

strictures of RPC 1.8. Mr. Powers again responds that the agreement was between LKO and TCG, not LKO and Mr. Powers and so he did not enter into this business relationship with a client. LKO responds that it accepted the investment offer and it provided the investment funds. Mr. Powers also urges that the court's conclusions show that there was not the commonality of interest between Powers & Therrien, P.S. and LKO that TCG and Mr. Fair suggest. CP at 2307 (Conclusion of Law F) ("LKO is not the 'alter ego' of Powers or Therrien, nor is there a basis to pierce the corporate veil of LKO's independent existence.").

Business Transaction with Client (RPC 1.8)

TCG became a client of Powers & Therrien, P.S. in February 2005, when the firm drafted legal pleadings for TCG to use to collect debt. Accordingly, TCG argues that the resulting agreement between Mr. Powers and TCG is voidable as a violation of public policy pursuant to RPC 1.8.

RPC 1.8 sets out rigorous requirements a lawyer must meet before he enters into a business transaction with a current client or knowingly acquires an ownership, or possessory, security, or other pecuniary interest adverse to a client. RPC 1.8. "[A]n attorney-client transaction is prima facie fraudulent." *Valley/50th Ave.*, 159 Wn.2d at 745 (quoting *In re Disciplinary Proceeding Against Johnson*, 118 Wn.2d 693, 704, 826

P.2d 186 (1992)). The burden is on the lawyer who has entered into a business transaction with a client or acquires an interest adverse to a client to show that there was no undue influence. The lawyer must show that he or she gave the client the same information or advice as a disinterested lawyer would have given. And the lawyer must show that client would have received no greater benefit had he or she dealt with a stranger. *In re Disciplinary Proceeding Against Haley*, 157 Wn.2d 398, 406, 138 P.3d 1044 (2006) (quoting *In re Disciplinary Proceeding Against McMullen*, 127 Wn.2d 150, 164, 896 P.2d 1281 (1995)).

It is undisputed that Powers & Therrien, P.S. represented Mr. Fair, the manager of TCG, in 2004 on a separate matter. After Mr. Fair formed TCG in 2004, Powers & Therrien, P.S. drafted legal documents for TCG to facilitate collecting the debt TCG had purchased. The documents included promissory notes, mutual releases, and a summons and complaint. Powers & Therrien, P.S. then represented TCG and performed legal services on TCG's behalf.

The matter proceeded to a bench trial after the court ordered rescission of the contract and the court entered findings and conclusions following that bench trial that are helpful here.

FINDINGS OF FACT

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

....

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

....

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

....

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

CONCLUSIONS OF LAW

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

....

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

....

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

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

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

M. Les Powers accepted the business offer by having LKO provide the sum of \$17,000 to TCG, which occurred beginning February 21, 2005.

Mr. Fair and TCG were clients of Powers & Therrien, P.S.; the attorneys provided legal services for them. And, the October 2004 e-mail from Mr. Fair was an offer to Mr. Powers and Mr. Therrien to invest in TCG and provide legal services as part of the deal. Mr. Powers and Mr. Therrien were the only persons who could accept the specific investment offer from Mr. Fair because the offer was a bilateral offer to them. *Dorsey v. Strand*, 21 Wn.2d 217, 224, 150 P.2d 702 (1944) (“[W]hen an offer is made, it can be accepted only by the offeree.”). The trial court concluded that LKO is not the “alter ego” of Mr. Powers or Mr. Therrien. But Mr. Powers is both a principal in the law firm of Powers & Therrien, P.S., and a controlling officer of LKO’s manager, Powers & Therrien Enterprises, Inc. There is no finding that Mr. Powers acted in any other capacity than a lawyer when he accepted the deal and forwarded the funds. In fact, TCG contends that the court specifically struck such agency language from the findings because it was unsupported. Br. of Resp’ts to Br. of Intervenors at 8-9.

Mr. Powers and Mr. Therrien organized LKO as part of their estate planning for their adult children. It is controlled by five corporate members headed by the spouses of Mr. Powers and Mr. Therrien and the shareholders of those corporate members are trusts for their children. Mr. Powers then had a significant personal and financial interest in LKO as a parent, as an owner/officer of its manager, and as its attorney. The court

concluded that he alone chose to enter into the business deal with Mr. Fair. CP at 2308 (Conclusions of Law J, K, L) Those conclusions are supported by the fact that Mr. Powers personally received the offer and he forwarded the funds from his law office. Mr. Powers may not have been the “alter ego” of LKO but that is not dispositive. He accepted the offer to invest in TCG in his capacity as an attorney and then caused LKO to contribute the funds. He had a substantial interest in the success of LKO—it was his family.

Mr. Powers and Mr. Therrien contend that a business transaction between a lawyer and a client must confer some benefit to the attorney or client. *See Valley/50th Ave.*, 159 Wn.2d at 747; *In re Disciplinary Proceeding Against Miller*, 149 Wn.2d 262, 66 P.3d 1069 (2003); *In re Disciplinary Proceeding Against Holcomb*, 162 Wn.2d 563, 173 P.3d 898 (2007); *Holmes*, 122 Wn. App. at 475. Neither the cases cited nor RPC 1.8 seems to require that an actual benefit be conferred. In *Holmes*, an attorney’s ownership stake in a client’s joint venture actually declined and the court still found that the accompanying fee agreement fell within the scope of the business transaction rule. 122 Wn. App. at 475. Regardless, there is evidence in this record that Mr. Powers stood to benefit from LKO’s success in many ways. Again, it was his family.

We are led to conclude that Mr. Powers entered into a business transaction with a

No. 29741-1-III
LK Operating v. Collection Group

client (TCG) in violation of RPC 1.8. *See Valley/50th Ave.*, 159 Wn.2d at 745 (quoting *Johnson*, 118 Wn.2d at 704) (“[A]n attorney-client transaction is prima facie fraudulent.”). The fact that the trial court ruled LKO was entitled to the return of the \$52,000 investment does not necessarily mean it was the contracting party. Mr. Powers entered into the transaction and then used funds from his children’s company, a company he also controlled. We then conclude that RPC 1.8 provides an alternative basis to rescind the agreement because it was against public policy. *Ocean Shores Park*, 132 Wn. App. at 912-13 (business deal between attorney and client void as against public policy).

We affirm the superior court’s judgment ordering recession.

Sweeney, J.

WE CONCUR:

Kulik, J.

Siddoway, A.C.J.

APPENDIX B

Renee S. Townsley
Clerk/Administrator
(509) 456-3082
TDD #1-800-833-6388

*The Court of Appeals
of the
State of Washington
Division III*

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October 11, 2012

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Tukwila, WA 98188-4630

CASE # 297411
LK Operating v. The Collection Group, LLC, et al
CHELAN COUNTY SUPERIOR COURT No. 072006529

Counsel:

Enclosed is a copy of the Order Granting Motion for Reconsideration and Amending Opinion.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy of the Petition for Review in this Court within 30 days after the Order Granting Motion for Reconsideration and Amending Opinion is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S. Townsley
Clerk/Administrator

RST:jcs
Enclosure

FILED

OCT 11 2012

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION III, 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 and
Cross-Appellants,

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

Intervenors.

No. 29741-1-III

ORDER GRANTING
LK OPERATING'S MOTION
FOR RECONSIDERATION
AND AMENDING OPINION

The court has considered LK Operating's motion for reconsideration, Powers' and Therrien's motion for reconsideration, and the answer filed by the Collection Group. The court is of the opinion that LK Operating's motion should be granted and the opinion should be amended. Therefore

IT IS ORDERED that LK Operating's motion for reconsideration is granted and the opinion shall be amended as follows:

The first full sentence at the top of page 10 that begins, "The court also dismissed" shall be deleted and the following shall be substituted in its place:

The trial court's decision on the motion for reconsideration stated that it was "no longer necessary to rule on whether RPC 1.8 was violated." CP at 2373.

The following footnote shall be added at the end of the first full paragraph on page 21 that ends "are helpful here":

In motions for reconsideration, LK Operating and Powers and Therrien argue that in the evaluation of RPC 1.8 as a basis for decision, we should not review these findings and conclusions but should limit ourselves to the summary judgment record, viewed in the light most favorable to them. While TCG always relied on the trial court's findings following trial as the basis for its cross appeal, the appellant and intervenors raise this objection for the first time in their motions for reconsideration.

The trial court was not required to reach the RPC 1.8 issue in ruling on summary judgment but it did not dismiss TCG's and Mr. Fair's claim based on that ethical rule. (The statement to the contrary in our original opinion was mistaken.) And while the trial focused on LK Operating's right to recover rescissory damages, TCG persisted in contending that both ethical rules had been violated, *see, e.g.*, CP at 2121, just as LK Operating continued to contend that TCG had not established an ethical breach by the lawyers. *See, e.g.*, RP at 384 ("[T]hey're trying to, from the other side, turn an innocent party's investment into, You don't get any money back, because we think . . . some other third party . . . did something wrong."). In any event, a judge may reverse or modify a summary judgment ruling at any time prior to the entry of final judgment. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 37, 864 P.2d 921 (1993). The court's findings following trial are the appropriate focus of our review. *See Johnson v. Rothstein*, 52 Wn. App. 303, 306, 759 P.2d 471 (1988) (rulings made at the time summary judgment was denied affecting the final judgment "'can be reviewed at that time in light of the full record'") (quoting *Evans v. Jensen*, 103 Idaho 937, 942, 655 P.2d 454 (1982)).

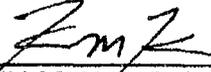
No. 29741-1-III

LK.Operating v. Collection Group

DATED: October 11, 2012

PANEL: Judges Sweeney, Kulik, and Siddoway

FOR THE COURT:

 CJ

KEVIN M. KORSMO
CHIEF JUDGE

APPENDIX C

Renee S. Townsley
Clerk/Administrator

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APR 13 2012

April 11, 2012

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CASE # 297411
LK Operating v. The Collection Group, LLC, et al
CHELAN COUNTY SUPERIOR COURT No. 072006529

Counsel:

Pursuant to the Motion of Les and Patricia Powers and Keith and Marsha Therrien to Intervene or Submit Amicus Brief, the following notation ruling was entered:

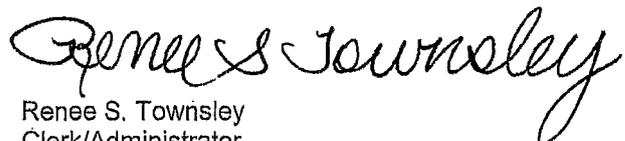
April 9, 2012

The Motion of Les and Patricia Powers and Keith and Marsha Therrien to Intervene is granted and Powers and Therrien are allowed to file a brief.

**Renee S. Townsley
Clerk**

Response briefs, if any, are due within 7 days from the date of this letter, by April 18, 2012.

Sincerely,



Renee S. Townsley
Clerk/Administrator

RST:jr

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited with the U.S. Postal Service for service a true and accurate copy of the following document: Petition for Review of Intervenor Les Powers and Keith Therrien in Court of Appeals Cause No. 29741-1-III to the following:

Catherine Wright Smith Smith Goodfriend PS 1109 1 st Avenue Suite 500 Seattle, WA 98101-2988	James Perkins Larson Berg & Perkins PO Box 550 Yakima, WA 98907-0550
Steven L. Lacy Lacy Kane, P.S. PO Box 7132 East Wenatchee, WA 98802-0132	Ronald J. Trompeter Law Offices of Hackett, Beecher & Hart 1601 5 th Avenue, Suite 2200 Seattle, WA 98101-1651

Originals sent by Fed Ex for filing with:

Court of Appeals, Division III
Clerk's Office
500 N. Cedar Street
Spokane, WA 99201

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

Dated November 8, 2012 at Tukwila, Washington.



Paula Chapler
Talmadge/Fitzpatrick