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NOV 09 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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

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LK OPERATING, LLC, a Washington limited liability company,

Appellant,

vs.

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

Respondents.

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PETITION FOR REVIEW OF APPELLANT LK OPERATING LLC

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

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## **I. IDENTITY OF PETITIONER**

Petitioner is LK Operating, LLC, a Washington limited liability company (LKO).

## **II. COURT OF APPEALS DECISION**

Review is sought of the decision filed June 19, 2012, by Division III of the Court of Appeals in Cause No. 28726-2-III. LKO filed for decision reconsideration on July 9, 2012. The Court of Appeals' reconsideration decision issued October 11, 2012. (Appendix 2). The decision is published and attached as Appendix 1.

## **III. ISSUES PRESENTED FOR REVIEW**

1. Did the Court of Appeals violate "due process" by itself deciding a Rule of Professional Conduct (RPC) 1.8 violation claim not tried below, in the absence of "necessary" parties?

2. Does the Court of Appeals decision conflict the Supreme Court decision of *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992) and Court of Appeals decision of *Harrington v. Pailthorp*, 67 Wn. App. 901, 841 P.2d 1258 (1992), holding RPC violations do not give rise to private civil remedies?

3. Does the Court of Appeals decision render RPC 1.8 unconstitutionally vague by improperly expanding the term "business

transaction” in RPC 1.8 to cover transactions between non-lawyer parties, in which a lawyer acted representationally?

#### **IV. STATEMENT OF THE CASE**

##### **1. LKO.**

In 2003 irrevocable trusts were created for attorney Keith Therrien’s (Therrien) two adult children and attorney Leslie Powers’ (Powers) three adult children. Each child was the trustee of his or her trust. Each trust owned a separately created Washington corporation. The five corporations combined, jointly owned LKO. Powers and Therrien have never had any legal or equitable ownership in 1) any child’s trust, 2) any trust owned corporation, or 3) LKO.

Prior to the instant lawsuit, LKO was managed by a separate Washington corporation, Powers & Therrien Enterprises, Inc. (PTE). PTE was formed in 1979. PTE provides management services for many companies besides LKO. Powers and Therrien are PTE officers. At times, Powers and Therrien also acted as lawyers for LKO. Based thereon, the trial court confirmed:

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

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

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.

**2. TCG.**

TCG is a manager managed limited liability company formed by Fair without Powers’ knowledge or representation on May 10, 2004, and initially owned by Brian Fair (Fair), a CPA, and his wife, Shirley Fair.<sup>1</sup> Fair is TCG’s manager. Fair formed TCG to purchase and liquidate discounted debt. In September 2004, Fair spoke to Powers and/or Therrien, inviting their possible participation in this new business venture. Powers and Therrien rejected Fair’s proposal, choosing not to become involved. In October 2004, Fair again asked Powers and Therrien to consider becoming involved in the new business venture. Fair proposed an equal investment of funds, Fair’s contribution of administrative and management services, and Powers and Therrien’s contribution of legal services, as needed to liquidate any purchased debt. By an October telephone call, Powers and Therrien again declined to participate personally, but said a company owned by their adult children might be interested. Eventually, between February 1, 2005 and February 8, 2005, Powers and Fair again spoke by telephone, and Fair was told LKO had

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<sup>1</sup> Fair only disclosed TCG as the investee on February 8, 2005 to Powers.

decided to accept the investment proposal. The persons who made the decision to invest were Powers and Therrien's adult children.

**3. The contract.**

After being told LKO had accepted Fair's proposal made on TCG's behalf, LKO sent several investment checks to TCG. Fair admitted knowing the checks were issued by LKO. Diane Sires (Sires), Powers legal assistant, testified that Fair knew LKO was the investor and at times joked with her about it. Although Fair disputed Sires' testimony, the trial court believed Sires and disbelieved Fair.

By April 2007, TCG had become successful to the point where Fair valued TCG's worth at approximately \$1.5 million. Dissatisfied with the parties' ownership agreements however, in April 2007, Fair proposed that the 50/50 ownership of TCG be modified so as to make Brian and Shirley Fair the majority owners, and to provide Fair's mother with an ownership interest, all at LKO's expense. LKO objected to this proposed change. Fair then, for the first time, denied LKO was a TCG owner and instead, alleged TCG had contracted with Powers and/or Powers and Therrien, and asserted RPC 1.8 as a defense. Absent resolution, on July 10, 2007, LKO filed suit to have its interest in TCG declared and to assert TCG's breach of contract, among other claims.

**4. Post-lawsuit proceedings.**

On October 22, 2007, Fair in part, responded to LKO's complaint by filing a separate action against Powers and Therrien for legal malpractice based on RPC 1.8, among other claims. LKO's and Fair's two separate lawsuits were later consolidated, following which cross-motions for summary judgment were filed. Two trial court memorandum decisions subsequently issued, addressing the parties' motion claims. In its second memorandum decision, the trial court ruled there were material fact disputes about 1) whether TCG was a law firm client at the time the contested contract was formed; and 2) who the contracting parties actually were. It therefore declined to rule that RPC 1.8 had been violated or that TCG had contracted with Powers. The trial court did rule that Powers had violated RPC 1.7, and based thereon ordered rescission.

The court eventually bifurcated the two lawsuits for trial and tried the LKO rescission action first.

**5. Superior Court/Appellate Court decisions.**

Pre-trial, Fair stipulated that when making the contract offer, he was acting as the managing agent for TCG and not personally. Therefore, one contracting party was admittedly TCG.

Eventually, to recover those funds paid to TCG, LKO argued that it need only prove the money invested belonged to LKO and that proving

who the other contracting party had been, was unnecessary. TCG disagreed. TCG insisted the trial court had to decide who the other contracting party was, arguing that if Powers was the contracting party, then LKO would not be “a real party in interest” in whose favor a judgment could be entered. TCG, as one affirmative defense, had asserted this claim.

The trial court said if LKO did not prove it was the contracting party, then LKO would not get a judgment.

And, I'm looking at the Answer and Affirmative Defenses of The Collection Group, that, as an affirmative defense, No. 9, LK Operating, the plaintiff in this matter, is not a real party in interest, under CR 17. So, that's a defense. So, if they succeed in that defense, all it means is LKO doesn't get a judgment.  
[Emphasis added.]

The lower court ultimately resolved the issue in LKO's favor, issuing a judgment stating:

And the court, obviously, has concluded that LKO did meet its burden of proof to show it was the contracting party, as well as the investor, as an alternative basis for the court's decision to provide it its money.  
[Emphasis added.]<sup>2</sup>

Neither Powers nor Therrien appeared or participated as parties or witnesses in the LKO trial. Because the trial court did not find an RPC 1.8

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<sup>2</sup> Similarly, the written judgment states in part “... and the court having ruled that TCG is liable to plaintiff as a result of the court previously having found that any business transaction between LKO and TCG is subject to rescission...IT IS FURTHER ORDERED that this judgment shall be considered a final judgment as to those lawsuit claims between LKO and TCG...” [Emphasis added.]

violation at summary judgment, when the matter was to be tried in the Fair Lawsuit, Powers and Therrien retained the right to respond and to present evidence to defeat that claim, in that different proceeding.

Post-trial, LKO presented Findings of Fact and Conclusions of Law (FFCL) which, consistent with the trial court's decision, stated that Powers acting for LKO, had accepted TCG's contract proposal. Because Powers had not testified at trial about who he spoke for however, the trial court adopted the neutral course of stating only that contract acceptance was communicated by Powers to TCG. The trial court did not rule, and the FFCL do not say, that Powers spoke for himself as a contracting party, rather than LKO.<sup>3</sup>

After judgment, LKO appealed and TCG and Fair cross-appealed on March 9, 2011. In June 2011, the separate bifurcated case filed by Fair against Powers and Therrien was resolved by a summary judgment order in Powers and Therrien's favor. Fair and TCG appealed that dismissal order on August 5, 2011. That separate appeal has not been decided by Division III.

Although the claim of an RPC 1.8 violation was not decided by summary judgment, was not tried as part of the LKO trial, and was not

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<sup>3</sup> Logically, Powers necessarily had to have spoken as LKO's agent however, as a company can act only through its agents. RPC 1.13, Comment 1. No other LKO agent ever communicated LKO's contract acceptance to TCG, thereby making it a contract party, as the court found.

tried as part of the later bifurcated Fair lawsuit (because the trial court issued summary judgment on other grounds) as part of TCG and Fair's cross-appeal in this proceeding, it was claimed the lower court's rescission order could nevertheless be upheld upon the basis that an RPC 1.8 violation had occurred.

Addressing this cross-appeal issue, ignoring the lower court's "real party in interest" conclusion, and its express bench finding that LKO (not Powers) had contracted with TCG, the court of appeals recently ruled:

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.

[Emphasis added.]

Also ignoring the lower court's refusal to resolve at summary judgment or trial, the disputed issue of when TCG first became a law firm client, the appellate court also *sua sponte* held:

We are led to conclude that Mr. Powers entered into a business transaction with a client (TCG) in violation of RPC 1.8.

[Emphasis added.]<sup>4</sup>

After this decision issued, on July 9, 2012, LKO moved for reconsideration. On October 11, 2012, the appellate court in part granted

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<sup>4</sup> The legal work done by Powers for TCG which the appellate court says made TCG a client, was all done after LKO/TCG contract formation. The decision does not identify the date TCG first became a Powers' client, because that issue was never resolved by trial.

reconsideration, amending its decision to infer that the lower court had purportedly found Powers to have factually violated RPC 1.8.

Because that simply did not happen, LKO now asks this court to accept review of the appellate court's decision for the following RAP 13.4(b) reasons.

#### **V. ARGUMENT SUMMARY**

By adversely deciding an RPC 1.8 violation claim in a case in which Powers and Therrien were not parties or witnesses, the appeals court violated Powers' due process rights. The court also violated LKO's due process rights in that absent all "necessary" parties, LKO could not present all relevant evidence which might defeat that claim, had it been tried. By expanding the meaning of the RPC 1.8 term "business transaction" beyond a contract entered into by a lawyer with a client, and by not otherwise defining the term's altered scope, RPC 1.8 has now been made unconstitutionally vague. These actions do not solely damage innocent party LKO. Rather, these actions broadly impact all persons who have a relationship with lawyers, enter contracts with their assistance, and who otherwise have constitutionally protected contract rights. (*See, e.g.* Washington Constitution Article I, § 23).

## VI. ARGUMENT

1. **In the LKO lawsuit, “due process” precluded the adjudication of a Powers’ RPC 1.8 violation claim, by either the trial court or appeals court.**

This court has confirmed due process protections are implicated where the individual interest asserted is encompassed within the protection of a party’s life, liberty, or property. *Washington Fed’n of State Employees v. State*, 127 Wn.2d 544, 558, 901 P.2d 1028 (1995). Washington courts have also long held that for due process reasons, a “necessary and indispensable party” must be given an opportunity to be heard before being deprived of a valuable property right. (*Veradale Valley Citizens’ Planning Committee v. Bd. of County Comm’rs of Spokane County*, 22 Wn. App. 229, 232, 588 P.2d 750 (1978)).

Due process protections specifically apply when it is claimed an attorney has violated an RPC. (*In Re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 340, 157 P.3d 859 (2007); ENFORCEMENT OF LAWYER CONDUCT (ELC) 10.3(a)(3); *In Re Disciplinary Proceeding Against Romero*, 152 Wn.2d 124, 137, 94 P.3d 939 (2004); *In Re Disciplinary Proceeding Against Blanchard*, 158 Wn.2d 317, 331, 144 P.3d 286 (2006)).

In Washington, a party’s due process rights are in part, governed by the provisions of CR 19, which addresses the issue of “indispensable”

parties. Confirming the connection between the rule and due process protections, in the case *Lakemoor Community Club, Inc. v. Swanson*, 24 Wn. App. 10, 600 P.2d 1022 (1979), the court stated:

The failure to serve indispensable parties to a lawsuit, although not jurisdictional, results in the inability of the trial court to render a judgment that affords all interested persons their rights to due process of law.  
*Lakemoor*, at 17. [Emphasis added.]

Under CR 19(a) and Washington common law, the following tests apply to determine if a party is “necessary.”

A party is necessary if “a complete determination of a controversy cannot be had” without its presence. *Town of Ruston v. City of Tacoma*, 90 Wn. App. 75, 82, 951 P.2d 805 (1998) (citation omitted). Stated another way, a necessary party is “one whose ability to protect its interest in the subject matter of the litigation would be impeded by a judgment.” *Primark, Inc. v. Burien Gardens Assocs.*, 63 Wn. App. 900, 907, 823 P.2d 1116 (1992). The party must have a sufficient interest “such that [a] judgment cannot be determined without affecting that interest.” *Primark*, 63 Wn. App. at 907.

*Treyz v. Pierce County*, 118 Wn. App. 458, 462-63, 76 P.3d 292 (2003), *rev. denied*, 151 Wn.2d 1022, 91 P.3d 94 (2004). [Emphasis added.]

(*See also, Town of Ruston v. City of Tacoma*, 90 Wn. App. 75, 82, 951 P.2d 805, *rev. denied*, 136 Wn.2d 1003, 966 P.2d 902 (1998)).

The issue of whether an omitted party is a necessary “due process” party, can be raised for the first time on appeal, since any court lacks jurisdiction to decide an issue, if all parties whose rights may be affected are not before the court. *Treyz, supra*, at 462.

Generally, under CR 19, where a necessary party was not joined in an action, the proceedings are subject to challenge and a decision will be overturned where the judgment was not in favor of the absent party or where another party is prejudiced by the absence.

*Burt v. Washington State Dept. of Corrections*, 168 Wn.2d 828, 834, 231 P.3d 191 (2010); *Est. of Bunch v. McGraw Residential Center*, 174 Wn.2d 425, 436, 275 P.3d 1119 (2012). [Emphasis added.]

To lawfully decide the RPC 1.8 claim as part of the LKO Lawsuit, the trial court could have required Powers and Therrien's joinder as parties, on its own motion. *Toulouse v. New York Life Ins. Co.*, 40 Wn.2d 538, 245 P.2d 205 (1952). It did not do so, even though before the LKO trial commenced, LKO brought the due process issue and the requirements of CR 19 to the trial court's attention and reminded the court that Powers and Therrien were not named parties and would not be trial witnesses.

The trial court responded, observing the lawyers would not be necessary parties and no claims involving them would be at issue, if it turned out as LKO maintained, that the contract was always between LKO and TCG.

A trial court's decision about whether a party is "necessary" in order to decide those specific lawsuit claims to be tried, is reviewed on appeal for an abuse of discretion. (*Freestone Capital Partners, L.P. v. MKA Real Estate Opportunity Fund I, LLC*, 155 Wn. App. 643, 669, 230

P.3d 625 (2010); *see also*, *Gildon v. Simon Prop. Grp., Inc.*, 158 Wn.2d 483, 493, 145 P.3d 1196 (2006)).

Ultimately, as noted, the trial court found LKO had sustained its burden of proof to show it, not Powers, was the contracting party.

After determining that LKO was the contracting party, the trial court concurrently concluded LKO was the “real party in interest,” and so denied TCG’s affirmative defense, and issued a judgment in LKO’s favor.

The trial court neither adjudicated the RPC 1.8 violation claim, nor decided when TCG first became a Powers & Therrien, P.S. client. Without also deciding that predicate fact, no RPC 1.8 violation claim could be accurately adjudicated by either the trial court or appellate court.

Never addressing these due process issues or the predicate acts needed to support an RPC 1.8 claim, the Court of Appeals, following record review, *sua sponte* ruled that an RPC 1.8 breach by Powers occurred. For the reasons stated, that ruling conflicts with the due process rights guaranteed by both the United States and Washington State Constitutions.<sup>5</sup> Because this is the only basis on which the trial court’s judgment was affirmed, it is essential this Court now review whether the appellate court’s *sua sponte* action did or did not violate both state and federal law.

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<sup>5</sup> U.S. Constitution, Amendment XIV and Washington Constitution, Article I, § 3.

2. **The Court of Appeals decision conflicts with prior court decisions and also violates LKO's due process rights.**

In the case *Hizey v. Carpenter, supra*, this court held that while the RPCs might give rise to a disciplinary remedy, they do not give rise to a private civil remedy.

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

Inconsistently, the appeals court first applied the *Hizey* case, holding to affirm that an RPC 1.7 violation would not support the remedy of rescission,<sup>6</sup> then ignored its correct reasoning to differently rule that an RPC 1.8 violation was different and could otherwise support the civil remedy of rescission as between two non-lawyer contracting parties.

To support its inconsistent ruling, the appellate court cites to three decisions. The cases are *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); and *Marshall v. Higginson*, 62 Wn. App. 212, 217-18, 813 P.2d 1275 (1991).

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<sup>6</sup> "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." *LK Operating* at 456.

Each case is factually and legally distinguishable. In all three cases, the business transaction at issue was between an attorney and the client. Here, the contract at issue was between non-lawyers LKO and TCG. In all three cases, the court also ruled agreements between a lawyer and client which violate an RPC, may be voidable on public policy grounds. Here, LKO is not a lawyer. It is not subject to the RPCs. TCG is not LKO's client, and no other public policy grounds for rescinding the LKO/TCG contract exist.<sup>7</sup>

As a consequence of its conflicting rulings, the court has in substance, held a "business transaction" between non-lawyers LKO and TCG is substantively subject to the RPCs, even though LKO did nothing wrong, is not a lawyer, and is not directly subject to the RPCs.

Compounding the error, the appeals court also violated LKO's due process rights by voiding its contract with TCG based upon an RPC 1.8 violation claim, which 1) the trial court did not decide, and 2) LKO could not fully defend against, in Powers and Therrien's absence.

In Washington, it is the Supreme Court who has "exclusive responsibility" in matters of attorney standards of professional conduct.

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<sup>7</sup> In Conclusion of Law C, the trial court expressly said: "Rescission was not based on the finding of fraud or misrepresentations by either LKO or Powers." These findings were never challenged by TCG or Fair on appeal. Accordingly, impairing LKO's contract rights also violated the protection afforded by Washington Constitution, Article I § 23. (See also, *Ketcham v. King County Medical Service Corp.*, 81 Wn.2d 565, 570, 502 P.2d 1197 (1973)).

(ELC 2.1; *In Re Disciplinary Proceeding Against Carmick*, 146 Wn.2d 582, 593, 48 P.3d 311, 317 (2002)). It is equally the Supreme Court which interprets and enforces disciplinary rules. (*In Re Disciplinary Proceeding Against Hicks*, 166 Wn.2d 774, 781, 214 P.3d 897, 900 (2009)). This court has previously applied RPC 1.8 only to contracts entered into by an attorney. RPC 1.8 has never previously been found to support a civil claim as between two non-lawyer contracting parties. By issuing a decision which conflicts with prior case law and by expanding RPC 1.8 to now encompass undefined acts beyond direct lawyer contracting, the appellate court has made it impossible to know what activities or actions are actually permitted or prohibited by RPC 1.8. Therefore, Supreme Court review is appropriate.

3. **The Court of Appeals decision broadens the scope of RPC 1.8, thereby presenting an issue of “substantial public interest,” requiring review.**

As written, RPC 1.8(a) is clear in requiring that a lawyer be a party to a “business transaction” with a client.

In the RPC 1.8 violation decisions relied upon by the appellate court, a lawyer was always a contracting party. The current decision now abandons this bright line test, leaving uncertain how the terms of RPC 1.8 are to be applied.

Whether particular conduct violates an RPC rule has been held to present an issue of “substantial public interest.” (*In Re Disciplinary Proceeding Against Bonet*, 144 Wn.2d 502, 29 P.3d 1242 (2001)).

In this case, the lower court specifically found LKO, not Powers, contracted with TCG. Ignoring this finding, the appellate court observed that LKO and its constituent owners were the relatives of Powers and Therrien, that Powers was an owner/officer of LKO’s manager, and was at times, also LKO’s attorney. Based on these attenuated relationships, the appellate court then concluded Powers had an interest in the success of LKO.

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.

Therefore, based upon Powers’ “relationships” with only some of the parties owning LKO, the appellate court ruled Powers had violated RPC 1.8.

This decision by the appellate court has broad implications. Exactly what type of “business transaction” is actually required for RPC 1.8 to apply?

In the case *In re Disciplinary Proceeding Against Hailey*, 156 Wn.2d 324, 126 P.3d 1262 (2006) this court was previously asked to decide what RPC 4.2 (a) meant by the phrase “representing a client.” At

issue was whether this language included a self-represented lawyer. The lawyer argued this rule language was “unconstitutionally vague,” violating his constitutional due process rights. This court confirmed that a statute, rule or regulation is fatally vague “when it exposes a potential actor to some risk or detriment without giving fair warning of the nature of the prescribed conduct.” *Hailey* at 336.<sup>8</sup>

Here, the trial court found Powers did not contract with TCG, LKO did. Although not a contracting party, the Court of Appeals has now ruled that because Powers had some connections to LKO, he therefore “entered into a business transaction with a client (TCG) in violation of RPC 1.8.” Because the scope of what now constitutes a “business transaction” under RPC 1.8 has thereby been made ambiguous by this decision (since what this term involves is “susceptible to more than one reasonable meaning”) as well is “vague,” (because the precise conduct now encompassed by the phrase as interpreted by the appeals court is not defined) both constitutional and due process questions are raised by the decision, making Supreme Court review appropriate.

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<sup>8</sup> In concurring comments, Justice Madsen also stated: “A [rule] is *ambiguous* if it ‘refers to *P*, *P* can alternatively encompass either *a* or *b*, and it is beyond dispute that the defendant did *a*’ and *vague* if it ‘refers to *X*, but we cannot tell whether the disputed event is an *X*.’” ... “The only question is whether the term ‘representing a client’ encompasses self-represented lawyers, as well as lawyers representing third parties. And if the term ‘representing a client’ is ‘susceptible to more than one reasonable meaning,’ it is ambiguous.” *City of Seattle v. Guay*, 150 Wn.2d 288, 300, 76 P.3d 231 (2003). *Hailey* at 349. [Emphasis added.]

## VI. CONCLUSION

Without addressing Powers' due process right to be made a party to any proceeding in which an RPC 1.8 violation claim against him is adjudicated, and without addressing that in Powers' absence, LKO as well could not present all evidence which might defeat that claim, violating its due process rights, the Court of Appeals *sua sponte* adjudicated this issue to the prejudice of both LKO and Powers. Not only does this action violate due process law, it violates the longstanding appellate rule that appellate courts do not "hear or weigh evidence, find facts, or substitute their opinions for the trier-of-fact." (*Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 225 P.3d 260 (2009); *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 572, 575, 343 P.2d 183 (1959)).

The appellate court has also now made a contract between non-lawyers substantively subject to RPC 1.8 provisions, while leaving unclear, what exact activities and actions are prohibited or permitted under its new interpretation of RPC 1.8. This mishandling of important due process and RPC issues well warrants review acceptance.

Actually, the rule previously enunciated by this court in *Hizey*, *supra*, is correct. An RPC violation should not support the issuance of a civil remedy as between two non-lawyers. The appellate court was also correct in first stating that even if an RPC 1.7 violation exists: "It is the

lawyer who should suffer the consequences, not the client. It is not the client(s) who did anything wrong...” Properly applying Washington law, the LKO/TCG contract should be enforced. If TCG suffers any damage from its enforcement, then, as part of the Fair Lawsuit, it has the due process right to prosecute a damages claim against Powers, and Powers, in turn, has the due process right as a party to the Fair Lawsuit, to oppose that claim, consistent with both state and federal law.

There is however, no legal justification for making non-lawyers LKO and its contract substantively subject to RPC 1.8 provisions, particularly when doing so requires interpreting RPC 1.8 language to encompass undefined actions and activities, thereby making the rule unconstitutionally “vague.”

These are not legal issues important solely to LKO, Powers or to TCG. Review should therefore be accepted and these important “public interest issues” resolved.

RESPECTFULLY SUBMITTED this 8 day of November, 2012.

LARSON BERG & PERKINS PLLC

  
James A. Perkins, WSBA #13330  
Attorney for Petitioners LK Operating, LLC

# APPENDIX 1

**FILED**  
**JUNE 19, 2012**  
In the Office of the Clerk of Court  
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,

No. 29741-1-III

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,

PUBLISHED OPINION

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

Intervenors.

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

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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

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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

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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*<sup>1</sup> 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

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<sup>1</sup> 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

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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

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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

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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

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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

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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

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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

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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

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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

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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.

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Sweeney, J.

WE CONCUR:

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Kulik, J.

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Siddoway, A.C.J.

## APPENDIX 2

**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)).

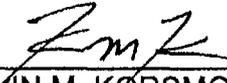
No. 29741-1-III

*LK.Operating v. Collection Group*

DATED: October 11, 2012

PANEL: Judges Sweeney, Kulik, and Siddoway

FOR THE COURT:

  
\_\_\_\_\_  
KEVIN M. KORSMO  
CHIEF JUDGE

CJ

## APPENDIX 3



United States Code Annotated Currentness

Constitution of the United States

▣ Annotated

▣ Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement (Refs & Annos)

→ → **AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT**

**Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Section 2.** Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

**Section 3.** No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

**Section 4.** The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

breath alcohol concentration might have been at the time of driving. *State v. Crediford*, 130 Wn.2d 747, 927 P.2d 1129 (1996).

Because it is beyond debate that the legislature may legitimately adopt statutes that penalize drivers for using the public's highways and roads when they are impaired by the consumption of alcohol, the supreme court was satisfied that it did not exceed its authority under the police power of the state in making it an offense for a driver to have an amount of alcohol in his or her system while driving that registers 0.10 percent of breath or blood within two hours after driving. *State v. Crediford*, 130 Wn.2d 747, 927 P.2d 1129 (1996).

#### Protection of health and welfare.

City's four-foot rule regarding the distance between nude dancers and patrons is within the constitutional power delegated by the state to the city to protect the health and welfare of its citizens. *Ino Ino, Inc. v. City*

of Bellevue, 132 Wn.2d 103, 937 P.2d 154, modified, 133 Wn.2d 229, 943 P.2d 1358, cert. denied, 522 U.S. 1077, 139 L. Ed. 2d 755, 118 S. Ct. 856 (1998).

City acted within its constitutional power to protect the health and welfare of its citizens by requiring adult cabarets to close from 2 a.m. to 10 a.m. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 937 P.2d 154, modified, 133 Wn.2d 229, 943 P.2d 1358, cert. denied, 522 U.S. 1077, 139 L. Ed. 2d 755, 118 S. Ct. 856 (1998).

Seattle ordinance prohibiting the sitting or lying on city sidewalks during certain hours was enacted in response to a legitimate legislative health and safety concern. Wa. Const., Art. XI, § 11 permits a municipality to enact such an ordinance, and defendants failed to show that the limits the ordinance imposed were unreasonable under this section. *City of Seattle v. McConahy*, 86 Wn. App. 557, 937 P.2d 1133, review denied, 133 Wn.2d 1018, 948 P.2d 388 (1997).

### RESEARCH REFERENCES

#### Univ. of Puget Sound Law Review.

Freedom and diversity in a federal system: perspectives on state constitutions and the Washington declaration of rights. 7 U. Puget Sound L. Rev. 491.

#### Seattle Univ. Law Review.

The plain feel doctrine in Washington: an opportunity to provide greater protections of privacy to citizens of this state. 19 Seattle U. L. Rev. 131.

#### Washington Law Review.

Police power, gifts, and the Washington Constitu-

tion: A framework for determining the validity of property rights legislation. 71 Wash. L. Rev. 461 (1996).

Rethinking civil liberties under the Washington State Constitution. 66 Wash. L. Rev. 1099.

The role of the bill of rights in a modern state constitution. 45 Wash. L. Rev. 463.

Interpretation of similar federal constitutional provisions. 23 Wash. L. Rev. 143.

Significance of bill of rights. 18 Wash. L. Rev. 90.

## § 2 Supreme law of the land.

The Constitution of the United States is the supreme law of the land.

### JUDICIAL DECISIONS

#### ANALYSIS

Applicability  
Contract for personal services

#### Applicability.

Section applies only to matters wherein general government assumes to control individual states. In re Rafferty, 1 Wash. 382, 25 P. 465 (1890).

#### Contract for personal services.

The broad recognition of rights contained in RCW 49.60.030(1) includes the right of an independent contractor to be free of discrimination based on sex, race, national origin, religion, or disability in the making or performing of a contract for personal services. *Marquis v. City of Spokane*, 130 Wn.2d 97, 922 P.2d 43 (1996).

### OPINIONS OF THE ATTORNEY GENERAL

#### Veteran's rights.

Veteran's rights under federal and state law. AGO

1953-55 No. 365; 1953-1955 Op. Atty Gen. Wash. No. 365 (1954).

## § 3 Personal rights.

No person shall be deprived of life, liberty, or property, without due process of law.

### JUDICIAL DECISIONS

#### ANALYSIS

In general  
Abolition of actions  
Administrative proceedings  
Applicability

Attorney discipline proceedings  
Attorney's fees  
Civil cases  
—In general  
—Child care  
—Child custody

DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and sent via Federal Express for service, a true and correct copy of LK Operating, LLC's Petition for Review to:

Ronald J. Trompeter Hackett Beecher & Hart 1601 Fifth Avenue, Suite 2200 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Express mail
Steve Lacy Lacy Kane, P.S 455 6 <sup>th</sup> Street NE East Wenatchee, WA 98802	<input type="checkbox"/> Facsimile <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Express mail
Catherine Wright Smith Smith Goodfriend PS 1109 1 <sup>st</sup> Avenue, Ste. 500 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Express mail
Philip A. Talmadge Sidney C. Tribe Talmadge/Fitzpatrick 18010 Southcenter Parkway Tukwila, WA 98188	<input type="checkbox"/> Facsimile <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Express mail

Original plus one copy was sent by Federal Express for file to:  
Patricia Crandall, Clerk/Staff Attorney  
Court of Appeals Division III  
North 500 Cedar  
Spokane, WA 99201

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

SIGNED this 8<sup>th</sup> day of November, 2012, at Yakima, WA.

  
Sonia R. Noe