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SUPREME COURT
OF THE STATE OF WASHINGTON
NO. 88132-4

C/A NO. 29741-1-III

LK OPERATING, LLC, a Washington limited liability company,

Petitioner,

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.

SUPPLEMENTAL BRIEF OF PETITIONER LK OPERATING LLC

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

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I. IDENTITY OF PARTIES

Petitioner is LK Operating, LLC, a Washington limited liability company (LKO). Respondents are The Collection Group, LLC, a Washington limited liability company (TCG), and Brian and Shirley Fair, husband and wife (Fair).

II. INTRODUCTION

On appeal from a summary judgment order, the court must accept as true, all facts most favorable to the non-moving party (*Trans Alta Centralia Generation, LLC v. Sicklesteel Cranes, Inc.*, 134 Wn. App. 819, 825, 142 P.3d 209 (2006)). On appeal from a trial court decision, the court must accept as true, all record evidence and fact inferences most favorable to the successful party. (*Arthurs v. National Postal Transport Ass'n*, 49 Wn.2d 570, 304 P.2d 685 (1956)). Accordingly, the record must be construed and record disputes resolved in LKO's favor.

III. SUPPLEMENTAL STATEMENT OF THE CASE

On October 27, 2004, Fair made a business proposal (the Proposal) to Leslie Powers (Powers) and Keith Therrien (Therrien). Conditioned upon acceptance, he proposed the parties would equally contribute funds to develop a consumer debt collection business, Powers and Therrien would provide legal collection services, and Fair administrative services,

each gratis. TCG's name, existence, and Fair's agency relationship were not disclosed. (CP 125-126, 1113; RP 28).

Powers and Therrien expressly declined to invest. They informed Fair, a licensed CPA, their adult children had a company (LKO) with available funds, that might be willing to invest. (CP 125-126, 1113). Before the LKO/TCG Contract was formed (the LKO/TCG Contract), TCG was not a Powers or Therrien client.

Fair did not claim the "Unifund" agreement, which the appellate court mentions, was reviewed for him or at his request. (CP 849, 954-955, 1114, 1411). Accordingly, as a matter of law, Powers was not acting as attorney for TCG or LKO prior to the February LKO/TCG Contract. *See, Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992).

Between February 1, 2005 and February 8, 2005, Powers told Fair LKO had accepted Fair's Proposal. (CP 1114). When Fair asked for funds on February 8, 2005, he knew the contracting party was LKO, not Powers or Therrien.¹ (CP 197, RP 417-418, 422; CP 498, 499, 2304).

Before February 8, 2005, neither LKO, Fair, nor TCG asked Powers or Therrien to provide legal services relating to the investment or its documentation. There were never any contract "negotiations". Fair made the Proposal for TCG upon terms he considered reasonable (CP 196,

¹ The court specifically found Fair knew LKO was the investor. (RP 417-418, 422).

1113; RP 284). Told of the terms, LKO's owners decided to invest (CP 501, 522, 543-547, 565). The trial court found Fair did not care who contracted with TCG, so long as TCG received the cash and free legal services it requested. (CP 2303; RP 417-418). At trial conclusion, the court said LKO had proven LKO, not Powers, was the contracting party.

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.

RP 424, ln. 6-9; *see also*, CP 2306, 2302). [Emphasis added.]

Inexplicably, the appellate court disregarded these "favorable" facts. Decision Paragraph 5 erroneously concludes legal work was performed for TCG by Powers & Therrien before the LKO/TCG Contract was formed in February, 2005. However, no such work was done by Powers for TCG until after the LKO/TCG Contract was formed.

Disregarding these proven facts, the appellate court stated:

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

. . . .

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.

Decision p. 4 ¶42. [Emphasis added.]

To reach its conclusion, the appellate court disregarded what the trial court found LKO had proven, *i.e.* that LKO, had contracted with TCG (RP 424), and that LKO was not Powers' "alter ego." (CP 2307).

Contrary to *Trans Alta, supra*, the Court of Appeals disregarded the trial court's rejection of defendant's Affirmative Defense No. 9, which claimed Powers was the "real party in interest" (RP 15-16). Before trial, the court said if Powers was the real party in interest, LKO would not get a judgment. (RP 15). A judgment later issued in LKO's favor.

Based upon the record facts, the appellate court's erroneous conclusion that Powers and not LKO contracted with TCG, must be reversed.

IV. SUPPLEMENTAL ARGUMENT SUMMARY

Under Washington law, only in exceptional circumstances should a private contract be found unenforceable.

While questioning the wisdom of certain exclusion clauses, we have been hesitant to invoke public policy to limit or avoid express contract terms absent legislative action. [Citation.] In general, a contract which is not prohibited by statute, condemned by judicial decision, or contrary to the public morals contravenes no principle of public policy. 17 C.J.S. Contracts § 211, at 1024 (1963).

State Farm General Ins. Co. v. Emerson, 102 Wn.2d 477, 687 P.2d 1139 (1984). [Emphasis added.]

Here, the LKO/TCG Contract was mutually beneficial. LKO accepted, without negotiations, the contract terms which Fair for TCG

offered, provided all investment funds, and arranged for those free legal services requested. (CP 2303; RP 417-418). In partial consequence, TCG's value increased from the original cash investment to approximately \$1.5 million. (CP 276, 1026; Decision ¶ 9).

To avoid sharing the results of the investment in TCG, Fair sought to modify the parties' financial arrangements by reducing LKO's interest, and by concurrently increasing Fair's interest. (CP 238; Decision ¶ 9). When LKO objected, Fair sought to avoid LKO's rights by claiming Powers and/or Therrien were the contracting parties, so the contract was voidable per the RPCs.²

Ignoring Fair's misconduct and without explanation, TCG and Fair then repeatedly and falsely asserted that TCG was "taken advantage of" by Powers. The record supports no such claim.³ LKO accepted the terms Fair proposed for TCG and fulfilled its obligations, contributing to TCG's financial success. (RP 417-418, 422). The trial court identified no unfair act ever taken by LKO (or by Powers), and there is no act which, as a matter of public policy, warrants contract rescission.

² Beyond seeking contract nullification, Fair also terminated TCG's active business, transferring its assets to other companies owned exclusively by him, which caused LKO to sue Fair for breach of fiduciary duties. Fair then had TCG hire the same law firm who orchestrated the transfer of its assets, to seek to void LKO's contract rights.

³ The Court's application of the ABC rule at summary judgment later to dismiss Fair's claims against Powers and Therrien, well evidences that Fair/TCG were never taken advantage of by the lawyers.

After falsely alleging Powers was the real party in interest, TCG sought a summary judgment that Powers and/or Therrien had violated RPC 1.8. (CP 683-698). The court declined to rule on Fair's RPC 1.8 claim, finding instead that an RPC 1.7 violation had occurred, which it deemed alone sufficient to justify contract rescission. (*See, e.g.* CP 1979-1982). As a result thereof and of trial bifurcation, the issue of a RPC 1.8 violation was not adjudicated in the LKO trial.⁴ The RPC 1.8 claim then became moot when the court said LKO proved the contract was between LKO and TCG, i.e. it involved neither Fair nor Powers.⁵ (RP 424).

Ignoring 1) the RPC 1.8 claim was not adjudicated; 2) under RAP 2.5 the appellate court does not normally consider new claims on appeal; and 3) that appellate courts will not review a newly raised issue, absent its adjudication below (*State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)), the appellate court, *sua sponte*, decided the still disputed and unadjudicated RPC 1.8 violation claim.

The appellate court's ruling on RPC 1.8, issued without LKO having been given the opportunity to defend against this claim and violated its due process rights. The appellate court ruled that the

⁴ There was no need to do so. The court had already ruled RPC 1.7 justified rescission, so proving another basis for rescission was unnecessary. Thus, neither party's trial brief discusses RPC 1.8 at all. (CP 2100-2111; 2112-2122).

⁵ That fact alone now requires a reversal of the appellate court's contradictory ruling that Powers was purportedly the contracting party and therefore RPC 1.8 was violated.

LKO/TCG Contract should be rescinded as void in violation of public policy on the basis of its improper *sua sponte* finding of an RPC 1.8 violation, in conflict with the record, absence of adjudication, and over the objection of LKO.⁶

V. ARGUMENT

1. No RPC 1.8 Violation Occurred.

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)). By ignoring the lower court’s conclusion that LKO contracted with TCG, the appellate court erred by ruling Powers had contracted with TCG and therefore violated RPC 1.8. (Decision ¶ 11). A reversal of this erroneous ruling removes the legal and factual bases for rescinding the LKO/TCG Contract. On remand the trial court must then adjudicate LKO’s claims for declaratory relief, contract breach and breach of fiduciary duty against TCG and Fair.

2. There Was No RPC 1.8 “Business Transaction” Between a Lawyer and a “Client.”

For a business transaction to violate RPC 1.8, there must be an attorney-client relationship between the investor attorney and the investee

⁶ The appellate court correctly ruled that a violation of RPC 1.7 does not provide a basis to rescind a contract.

client. For such a relationship to exist, Fair subjectively had to believe that Powers was performing legal services for TCG (*Bohn, supra*, at 363; *In re the Matter of McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983)). Fair for TCG had no such belief before February 8, 2005. (CP 954-955). To find breach of fiduciary duty, an attorney/client relationship must exist at the time of the alleged transaction or wrong. 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice*, § 14.2, at 232 (4th ed. 1996). Here, until the February 8, 2005, email acceptance of LKO's subscription and the initial identification of the investee, TCG was not a client. Prior thereto, Powers had no knowledge TCG even existed.

For an attorney/client relationship to be formed, an attorney's advice or assistance must be sought and received on legal matters. *Bohn, supra*, at 75. Here, consistent with the Proposal, TCG did not ask Powers to do legal work until after LKO and TCG contracted. Thus, regardless of any relationship between Powers and LKO, RPC 1.8 could not apply. There was no TCG "client". There was no legal work done.

There was finally no business transaction involving Powers and TCG. Powers never acquired any interest in LKO or TCG. The only investment was LKO's investment in TCG. Fair and Powers were not parties. RPC 1.8(a) on its face does not apply.

3. Wrongful Forfeiture of LKO's Property Interests.

The appellate court erroneously conflated LKO and Powers and on that basis equitably forfeited LKO's property interests. (*See*, LKO's initial Appeal Brief, pp. 20-26; Reply Brief, pp. 20-22; Decision ¶ 42)). In direct conflict therewith, this Court has ruled that the separate personhood of legal entities is to be respected in cases involving the RPCs.

The courts below mistakenly treated Rose and Valley as one. Washington law defines legal person to include limited liability companies. RCW 1.16.080 (1). A limited liability company like Valley is "an artificial entity or person created under Chapter 25.15 RCW." [Citation] 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.

Valley/50th Ave. L.L.C. v. Stewart, 159 Wn.2d 736, 747, 153 P.3d 186 (2007). [Emphasis added.]

In *Valley, supra*, a father "Rose" owned two percent (2%) of an LLC and was its manager. His sons owned the other ninety-eight percent (98%). Notwithstanding the father's economic ties, investment in Valley, and management role, this court held "Rose and Valley are not one in the same." (*Valley, supra*, at 747). RPC 1.13 and Comment 34 to RPC 1.7 confirm this holding.⁷

⁷ Recognizing separate corporate existence is also constitutionally required as well. *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 361, 365, 130 S.Ct. 876, 175-L.Ed.2d 753 (2010).

In conflict with settled law requiring legal entities to be treated as separate persons under the RPCs, as a basis for forfeiting LKO's contract rights, the appellate court said:

Mr. Powers and Mr. Therrien organized LKO as part of their estate planning for their adult children. It is controlled by five (5) 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.

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.

Decision ¶ 40.

The appellate court then voided the LKO/TCG Contract by finding that Powers (not LKO) “entered into a business transaction with a client (TCG) in violation of RPC 1.8.” (Decision ¶ 42).

This fundamental error in conflating different parties must be reversed. Powers entered no business transaction with and had no interest, ownership, security, or pecuniary in LKO or TCG. (CP 498, 501, 845, 965; RP 100-101). As Conclusions of Law D and F, the trial court found LKO was an independent legal entity and that LKO was not the “alter ego” of Powers or Therrien. (CP 2307). Based thereon, the trial court

correctly held LKO had contracted with TCG. These findings are controlling; they cannot be ignored.

Citing *Dorsey v. Strand*, 21 Wn.2d 217, 150 P.2d 702 (1944), the appellate court also observed an offer can normally be accepted only by the identified offeree. Fair was told however, LKO would be the contract party (CP 1114). Fair then accepted LKO as the contract party when he accepted LKO's funds. (CP 2303, RP 412, 418, 422). Therefore, *Dorsey, supra*, is factually inapplicable.

4. **The Appellate Court's Interpretation of "Business Transaction" Renders the Phrase Unconstitutionally Vague.**

The RPCs are quasi-criminal in nature; Clarity of rule meaning and scope is vital. (*See, e.g., In re Disciplinary Proceeding against Haley*, 156 Wn.2d 324, 335, 126 P.3d 1262 (2006)). The appellate court now extends the term "business transaction" as used in RPC 1.8 from transactions between a lawyer and his or her client to transactions and from investments between a lawyer and his or her client involving direct pecuniary benefit, to business transactions to which the lawyer is not a party and to investments which do not financially benefit the lawyer or the lawyer's counterparty."⁸ The scope of the parties and the nature of the

⁸ RPC 1.8(a) says that to be a prohibited "business transaction," a lawyer must be acquiring "an ownership, possessory, security or other pecuniary interest adverse to the client." However, as applied by the appellate court, relationships not between an

benefit are unspecified. Apparently they are to be developed by the courts, ad hoc.

The RPCs are considered penal. *Haley, supra*, at 335-336; *In re Disciplinary Proceeding Against McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983). Viewed through the prism of the constitutional requirement that a penal rule must define the proscribed act with clarity, the appellate court's application of RPC 1.8 to case facts raises the question whether the court's reading and application render RPC 1.8 "void for vagueness."

The void for vagueness test is a settled one.

Under the due process clause, a penal or quasi penal rule is unconstitutional when it forbids conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application.

City of Spokane v. Douglass, 115 Wn.2d 171, 179, 795 P.2d 693 (1990); *See also, Burien Bark Supply v. King Cy.*, 106 Wn.2d 868, 871, 725 P.2d 994 (1986).

If "business transaction" encompasses only those situations in which a lawyer is one party to a transaction and from which a "pecuniary benefit" for the lawyer is expected, then the term is constitutional;

attorney and client are now swept under the rule. Further, those relationships need not involve any pecuniary benefit to the attorney or involve the attorney as a party. What other relationships are then sufficient? The anecdotal statements of the appellate court's decision do not give guidance. Were the rule limited to relationships financially beneficial between an existing client and that client's attorney, the rule would be clear. The appellate court has instead now rendered the rule unclear and potentially void by applying it to attenuated relationships. It also improperly expands rule coverage to contracting parties who are not subject to the RPCs.

ordinary people can understand what conduct is potentially prohibited. It should be so construed.

Here, neither Powers nor Therrien were contract parties. Neither enjoyed any “pecuniary benefit”. Neither had an ownership interest in LKO or was the source of the funds invested by LKO. Neither had a financial interest in the results of the investment. Rather, these financial attributes belonged exclusively to their children.

Absent a showing in the record that Powers benefitted financially from the TCG/LKO Contract, what was the proscribed “business transaction?” If the TCG/LKO Contract is the “business transaction,” what contract participants are pulled within its ambit under the “lawyer” provision in the rule? For example, if a lawyer represents a relative’s company and that company contracts with another lawyer’s client, is that contract potentially voidable as against public policy? If the lawyer is on the board and a relation’s company contracts with the lawyer’s client, is that contract voidable as against public policy? How can the lawyer as board member or even as lawyer, assure the company that there is not a voidability issue? To prevent the issue, does a lawyer have to tell a relative’s company who all the lawyer’s clients are? If so, how often must the list be kept current? Does this violate the rights of the lawyer’s other clients? RPC 1.8 allows a client to waive the rule if the transaction is fair.

Who now must waive rule application? Does the need to waive extend to third parties such as LKO?

If the lawyer is held to have a “pecuniary interest” in a business transaction, because a relative’s business may financially benefit, what degree of relationship is encompassed by the rule? Do in-law-owned businesses count, or is it just direct family? What about friends? The appellate court has imprudently expanded the meaning of “business transaction,” as used in RPC 1.8, well beyond its ordinary meaning. It has left the term to ad hoc definition by the Courts. This cannot meet the constitutional test of clarity. It has expanded the notion of “lawyer” beyond its ordinary meaning, to now include persons who may only have some undefined relationship with a lawyer. By doing so, it has made the rule so vague, it is not possible to know what its intended limits are or what types of conduct are prohibited.

Vagueness is usually avoided by construing language in penal rules narrowly. Here, the appellate court erred by failing to adopt that rule of construction.

Where the constitutional requirement of definiteness is at stake, we have the further obligation to construe the statute, if that can be done consistent with the legislature’s purpose, to avoid the shoals of vagueness. *United States v. Harriss*, *supra*, 347 U.S., at 618, 74 S.Ct. at 812; *United States v. Rumely*, 345 U.S., at 45, 73 S.Ct. at 545. *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612 (1976). [Emphasis added].

Powers was not using LKO personally, but indirectly, to conduct business with a client.⁹ There is accordingly no public policy reason to broadly expand the scope of RPC 1.8 to rescind LKO's contract, and there are sound public policy and constitutional reasons for not doing so.

5. RPC 1.8 Should Not Be Used to Rescind a Contract Between Non-Lawyers.

The appellate court correctly confirmed the RPCs are not intended to serve as a basis for civil liability, in a civil action (Decision ¶ 5; *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992)). A limited exception to this general legal rule exists where the facts establish that an attorney and client were involved in a prohibited RPC 1.8 "business transaction." *Valley* at 473. Here however, the appellate court erroneously extended RPC 1.8 to a contract in which no party was a lawyer to invalidate an otherwise legal contract.

Using an RPC rule to nullify non-lawyer contracts directly conflicts with this Court's decisions in *Hizey, supra*, and *Harrington v. Pailthorp*, 67 Wn. App. 901, 841 P.2d 1259 (1992). It also conflicts with RPC preamble paragraph 20 which states:¹⁰

The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through

⁹ This is why LKO, not Powers, obtained the judgment below.

¹⁰ Further, the RPCs do not apply to conduct that does not involve lawyers. See e.g., *State v. Hunter*, 100 Wn. App. 198, 997 P.2d 393 (2000).

disciplinary agencies. They are not designed to be a basis for civil liability...

Neither the appellate court nor the lower court should have invalidated the otherwise lawful LKO/TCG Contract; it should have been enforced. If, as a consequence, TCG suffered damages (because Powers or Therrien had allegedly breached a legal duty) then by way of their malpractice lawsuit, TCG and/or Fair could seek a damages recovery from them. This different analytical approach is consistent with the public policy reasons given by the appellate court to explain why RPC 1.7 cannot be used to justify the contract rescission.¹¹

This same public policy analysis applies equally to preclude the expanded use of RPC 1.8 as a basis for contract rescission.¹² In fact, the cases principally cited by the appellate court as purportedly supporting its use of RPC 1.8 to void the LKO contract are not supportive. First, as a necessary predicate to applying RPC 1.8, factually one contract party in each case was a lawyer. Those are not the facts here. In *Danzig v. Danzig*, 79 Wn. App. 612, 904 P.2d 312 (1995), a client referral arrangement between a lawyer and non-lawyer violating then RPC 7.2(c)

¹¹ “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.” (Decision ¶ 32.)

¹² Indeed, LKO is confident the appellate court would have so held, had they not mistakenly concluded that a lawyer (Powers) was a contract party.

was held not void as against public policy because 1) the RPCs do not apply to non-lawyers; 2) the prescribed conduct had already occurred so voiding the contract would not protect the public; and 3) because the non-lawyer may not have known the conduct violated an RPC, so the Restatement (2nd) of Contracts § 180 (1979) would still allow for contract enforcement. Since LKO's contract facts meet all three tests, *Danzig*, upon which *In re Corp. Dissolution of Ocean Shores Park, Inc.*, 132 Wn. App. 903, 134 P.3d 1188 (2006) relied, does not support voiding LKO's contract on "public policy" grounds.

The *Ocean Shores* case involved a lawyer and his wife who arranged to become 50 percent owners of a client's property. Because a lawyer was a transaction party, the court held RPC 1.8 might void the deal, but then held if adequate consideration for the transaction could be proven, "public policy" would again not void the contract. Because LKO has never been given the due process opportunity to show the contract consideration it paid was fair, and since LKO is not a lawyer, there is again no "public policy" basis for voiding its contract.

6. The Appellate Court's RPC 1.8 Ruling Violates Due Process.

In part as a result of trial bifurcation, the unresolved RPC 1.8 claim was not adjudicated as part of the LKO/TCG trial. Before trial, the court

addressed the due process concerns raised by LKO with respect to RPC 1.8. (RP 4-8). The trial court confirmed it was not deciding the RPC 1.8 claim. It said if TCG succeeded in proving that LKO was “not a real party in interest,” then LKO would simply not get a judgment. (RP 15).

Because the trial court intentionally declined to decide the claim, LKO did not and could not introduce evidence to defend against the claim. Had RPC 1.8 been at issue, to disprove a violation, the following defense is allowed:

The lawyer must show that (1) there was no undue influence; (2) he or she gave the client exactly the same information or advice as would have been given by a disinterested attorney; and (3) the client would have received no greater benefit had he or she dealt with a stranger.

In re Disciplinary Proceeding Against Holcomb, 162 Wn.2d 563, 580, 173 P.3d 898 (2007); *see also*, *In re Disciplinary Proceeding Against McGlothlen*, *supra*.

Absent claim adjudication by the trial court, there is no constitutionally sufficient trial record on which the appellate court’s decision based on a RPC 1.8 violation can now stand.¹³ (*Wingert v. Yellow Freight Systems, Inc.*, 146 Wn.2d 841, 853, 50 P.3d 256 (2002); *State v. Riley*, 121 Wn.2d 31, 846 P.2d 1365 (1993); *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

¹³ The appellate court could have asked that added RPC 1.8 defense evidence be put on record (*See, e.g.*, RAP 9.11), it did not.

Washington law has long upheld that when a court disregards a party's due process rights, the resulting judgment is void. (*Tatham v. Rogers*, 170 Wn. App. 76, 100, 283 P.3d 583 (2012); *In re Marriage of Ebbighausen*, 42 Wn. App. 99, 708 P.2d 1220 (1985)).

Where a party is not told until after a hearing that a particular claim is going to be adjudicated, the United States Supreme Court has also held that a party's due process rights are violated. (*In re Ruffalo*, 390 U.S. 544 [551-52], 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968)).

It follows that the appellate court's *sua sponte* adjudication of the RPC 1.8 violation claim without an adequate trial record, violated LKO's constitutional due process rights, its ruling is therefore void and it must be reversed.

VI. CONCLUSION

The appellate court erred by refusing to recognize LKO's separate existence. Because Powers was not a party to the LKO/TCG Contract, there is no RPC 1.8 violation. Similarly, because TCG was not a law firm client at the time the LKO/TCG Contract was formed, there was no business transaction with a "client".

Because the subject contract was between LKO and TCG (neither of which are lawyers) it was legally incorrect for the appellate court to

apply RPC 1.8 as a basis for sustaining a civil rescission remedy. *Hizey, supra; Harrington, supra.*

By holding that a lawyer is purportedly involved in a “business transaction” with a client, in situations where only a lawyer’s relatives and/or their separate company contracted, the appellate court has made the scope of the rule term “business transaction” so broad, that the rule is now unconstitutionally vague about what conduct is proscribed and what rule limits are.

Finally, LKO’s due process rights were dispositively violated when the appellate court decided a disputed RPC 1.8 claim, which LKO was never given the opportunity to litigate or defend against.

For each of these reasons, the appellate court’s RPC 1.8 violation ruling and the lower court’s rescission remedy ruling must be reversed and the case remanded, so that LKO may proceed with its contract enforcement claims as against TCG and Fair.

RESPECTFULLY SUBMITTED this 30 day of July, 2013.

LARSON BERG & PERKINS PLLC



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

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 the Supplemental Brief of Petitioner LK Operating, LLC 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 type="checkbox"/> Express mail <input checked="" type="checkbox"/> FedEx
Steve Lacy Lacy Kane, P.S 455 6 th Street NE East Wenatchee, WA 98802	<input type="checkbox"/> Facsimile <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Express mail <input checked="" type="checkbox"/> FedEx
Catherine Wright Smith Smith Goodfriend PS 1109 1 st Avenue, Ste. 500 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> U.S. Mail <input type="checkbox"/> Express mail <input checked="" type="checkbox"/> FedEx
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 type="checkbox"/> Express mail <input checked="" type="checkbox"/> FedEx

Original plus one copy was sent by Federal Express for file to:

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415 12th Ave. SW.
Olympia, WA 98501-2314

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

SIGNED this 30th day of July, 2013, at Yakima, WA.


Sonia R. Noe