IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

Valley/50th Avenue LLC, Appellant, v. Morse and Bratt, a professional service corporation, Respondent, and RANDALL STEWART, Trustee, Defendant.	No. 39939-3-II UNPUBLISHED OPINION

Hunt, J. — Valley/50th Avenue LLC (Valley) appeals the trial court's declaratory judgment ruling that the law firm of Morse and Bratt (Firm) can enforce a Deed of Trust against Valley's only asset: a piece of real property. Valley argues that the trial court erred in limiting Valley's expert witness's testimony, and in concluding that (1) a meeting occurred at which the Firm's former president allegedly complied with the former Rules of Professional Conduct (RPC) when he told Neil Rose, the founder and a manger of Valley, to consult independent counsel regarding a Deed of Trust and other documents; (2) there was no attorney-client relationship between Valley and the Firm for purposes of negotiating and executing the Deed of Trust and

these other documents; (3) the Firm did not violate former RPC 1.7(b) (1995) or former RPC 1.8(a) (1993); (4) Rose had authority to bind Valley; (5) Valley consented to be bound by the Deed of Trust and the other documents; (7) the record does not show that the Firm provided a completed estate plan to Rose; and (8) the Firm had no reason to ask about whether Rose had transferred most of his economic interest in Valley to two of his sons. We affirm.

FACTS

I. Relationships Among Rose, Valley, and the Firm

Neil Rose, who executed the Certificate of Formation on behalf of Valley, became a client of the Firm in 1995 and sought counsel for estate planning and "business needs." Clerk's Papers (CP) at 13. At that time, Rose was romantically involved with a member of the Firm, Diane Woolard.[1] The Firm facilitated the creation of a Personal Residence Trust for Rose, which trust conveyed Rose's residence to his son, Alexander.[2] Rose also had an interest in and was an officer of Impact Alloys Foundry, Inc. and Impact Alloys Corporation. Rose's son Brett was also an officer of both companies.

A. Formation of Valley; Clyde Corporation Lawsuit

In response to a memorandum from November 13, 1995 that John E. Morse[3] wrote to Woolard regarding Rose's estate planning, Rose asked the Firm to facilitate the organization of Valley. Rose intended to transfer ownership of real property located at 10517 NE 50th Avenue,

[1] Woolard left the Firm sometime in 2000.

[2] For clarity, we will refer to Rose's sons by their first names; we intend no disrespect.

[3] Morse is a senior partner at the Firm.

Vancouver, Washington (Property) to Valley and then to transfer his ownership interests in Valley to two of his sons, Brett and James.

On October 22, 1997, Clyde Corporation filed a lawsuit, concerning a business transaction unrelated to this appeal, against Rose, Brett, and Impact Alloys Foundry, Inc. and Impact Alloys Corporation. On November 20, Woolard, the Firm's "lead attorney," entered an appearance on Rose's behalf in this Clyde Corporation litigation. 1 Verbatim Report of Proceedings (VRP) at 34.

On February 2, 1998, Rose executed a Certification of Formation for Valley. Woolard consented to serve as the Registered Agent for Valley, using the Firm's address as Valley's registered address.[4] Using a Warranty Deed dated February 19, 1998, Rose conveyed the Property to Valley. The Clark County Auditor recorded the deed on May 18. On March 19, Rose transferred 49 percent of his "Economic Interest"[5] to Scott and 49 percent to Brett. Ex. 10.

B. Conflict of Interest

In early 1998, shortly after the Clyde Corporation litigation commenced, the Firm advised

[4] As of at least February 10, 2001, a "Limited Liability Company License Renewal & Annual Report" listed Woolard as Valley's designated agent and gave the Firm's address. CP at 114. Brett, however, testified at trial in 2009 that the Firm no longer maintains Valley's records. The Secretary of State's Corporations Division currently lists Brett Rose as Valley's registered agent.

[5] Valley's Operating Agreement defines "Economic Interest" as

> a Unit Holder's share of net Profits, net Losses, and other tax items of [Valley] and distributions of [Valley's] assets pursuant to this Agreement and the Act, but shall not include any right to participate in the management or affairs of [Valley], including the right to vote on, consent to or otherwise participate in any decision of the Members.

Ex. 4 at 3. Valley's Operating Agreement also defines "Unit Holder" as "a Person who is a Member or who holds an Economic Interest but is not a Member." Ex. 4 at 3.

Brett that he needed to obtain independent counsel because of a conflict of interest.[6] On January 14, 1998, Brett obtained independent counsel, Stephen Garrett Leatham. About one year and eight months later, on September 28, 1999, Woolard withdrew the Firm's representation of Impact Alloys Foundry, Inc. in the Clyde Corporation litigation.[7] Steven M. Claussen, an attorney with a different law firm, substituted as counsel for Impact Alloy Foundry, Inc. with Brad Littlefield, an Oregon attorney, appearing pro hac vice. Littlefield had previously performed legal services for Rose; Littlefield continued to represent Impact Alloys Foundry, Inc. in the matter until at least February 3, 2000.

In spring 1999, Rose and Impact Alloys Corporation owed the Firm over $100,000 in fees for the Clyde Corporation litigation. John Nellor, the Firm's president until July 2005, recalled Firm conversations "about how Mr. Rose was going to pay . . . whether or not the collateral would be sufficient, what the value of the collateral was, and whether or not this was sufficient to allow us to proceed." 1 VRP at 34. The Firm delegated to Don Thacker, the Firm's treasurer, the tasks of "negotiat[ing] and complet[ing] the arrangements regarding the fees." 1 VRP at 33.

Thacker and Morse met with Rose to discuss his growing account receivable, explained that the Clyde Corporation litigation was expensive, and told him that the Firm required collateral in order to proceed. Rose later told Nellor he "intended to use [the Property] as collateral to help pay for the obligations that he had with the [F]irm and that he was going to incur with the [F]irm

[6] The record does not explain the nature of this conflict.
[7] According to John Nellor, the Firm's former president, Impact Alloys Foundry, Inc. came to be represented by independent counsel because "there was some potential adverse interest [between] [Impact Alloys Foundry, Inc. and Impact Alloys Corporation] and there was a need for them to be represented independently." 1 VRP at 167.

in the Clyde litigation." 1 VRP at 31. On April 5, 1999, Thacker sent Nellor a title report and a memo stating, "Here is the title report that we got on Neil Rose's property that is going to secure our fees." Ex. 12.

C. Representation Agreement, Deed of Trust, Promissory Note

On September 20, a Firm attorney drafted an "Agreement Regarding Representation" (Representation Agreement) that listed the parties as the Firm, Rose, Valley, Impact Alloys Corporation, Impact Alloys Foundry, Inc., and other entities. This first version of the Representation Agreement provided that Rose would (1) deposit a $300,000 retainer with the Firm secured by a "promissory note, payable on demand," Ex. 15 at 3; and (2)

> execute and deliver . . . a Deed [of] Trust . . . to a parcel of real property commonly known as 10517 N.E. 50th Avenue in Vancouver, Clark County, Washington . . . as security for the performance of this Agreement, for payment and performance of any promissory note executed and delivered by [Rose] or [the parties listed in the first version of the Representation Agreement], and the payment of any obligation now owed or hereafter incurred by [the parties listed in the first version of the Representation Agreement].

Ex. 15 at 3. On September 22, Nellor delivered to Rose this first version of the Representation Agreement, which the parties did not sign.

Also on September 22, a Firm attorney drafted the Promissory Note discussed in this first version of the Representation Agreement. The Promissory Note stated: (1) "Neil M. Rose and Valley/50th Avenue, LLC, and each of them, promise to pay [the Firm] . . . the principal sum of [$300,000] on demand"; and (2) "[t]his note is secured by a [Deed of Trust] on real property, and other security as set forth in an Agreement . . . dated September 1, 1999." Ex. 16. The Promissory Note's effective date was September 1, 1999; there is no date of signature.

On November 15, Nellor created the Deed of Trust referenced in the first version of the Representation Agreement. This Deed of Trust (1) lists Valley as the grantor and the Firm as the beneficiary;[8] and (2) states that its purpose is to secure "the payment of [$300,000], together with interest, in accordance with the terms of a promissory note dated September 1, 1999, payable from the Grantor to the Beneficiary."[9] Ex. 19 at 1.

A week later, on November 22, Rose came to Nellor with a marked-up copy of the first version of the Representation Agreement, which Nellor then revised on his computer in Rose's presence;[10] this revision resulted in a second version of the Representation Agreement. This second version listed only the Firm, Rose, and Impact Alloys Corporation as parties; its references to the Promissory Note and the Deed of Trust remained substantially the same as in the first version. Nellor printed this second version of the Representation Agreement and gave it to Rose.

At this November 22 meeting, Nellor also handed Rose the Promissory Note. Rose asked Nellor whether he (Rose) should sign the Representation Agreement (second version). According to Nellor, the following conversation took place:

> [Nellor]: I specifically told Mr. Rose that I could not advise him whether or not he should execute the [Promissory Note] and [the Deed] or whether the [Promissory Note] and [the Deed] and [the Representation Agreement] met his understanding or his intent, that he had to seek independent counsel, if he wished

[8] The Deed of Trust also lists Chicago Title Insurance Company as the trustee.

[9] It is not clear from the record when the Firm delivered the Promissory Note to Rose.

[10] Woolard, Nellor, and Thacker all claimed that they did not advise Rose on the negotiation of the terms of the Deed, the Promissory Note, and the second version of the Representation Agreement (collectively, the "Documents"). Nellor, however, testified that Thacker did, in fact, negotiate the Documents with Rose. It is also undisputed that, during the November 22 meeting, Rose and Nellor discussed "the scope of the obligations that the Deed of Trust would secure." CP at 155.

to have an opinion of that.

[Valley's counsel]: Yes. You told that to Mr. Rose?

[Nellor]: Correct.

[Valley's counsel]: The question, though, is directed to within the context of that conversation, did you also advise him that Valley needed to have independent representation?

[Nellor]: I did not.

[Valley's counsel]: You did not. And you did not advise him that he should have independent representation regarding [the Representation Agreement] either?

[Nellor]: Well, I did. I mean, I told him that if he wanted somebody to interpret that for him, he needed to have somebody look at it.

[Valley's counsel]: Yes. You told that to Mr. Rose. But we're just reiterating. The prior question was regarding [the Promissory Note] and [the Deed], and this question is related to [the Representation Agreement]. And, Mr. Nellor, you did . . . not tell Mr. Rose to have Valley obtain independent legal counsel, did you?

[Nellor]: Well, I think we're splitting hairs here. Mr. Rose sat—when Mr. Rose was in my office from time to time, because I represented him on numerous matters, Mr. Rose was the owner of several entities. I don't believe we were representing [Valley] on anything at that point in time. I don't believe there was any ongoing work for [Valley] at that point in time, so there was really no reason for me to discuss anything about [Valley] with him.

My discussions with him were in the context of, if he wanted somebody to interpret this and whether it was a good or bad deal, he needed somebody else to look at it than me. I can't give him advice on something that essentially we're a party to.

[Valley's counsel]: I know these words are hard to spit out, but what you're saying is, no, I did not tell Mr. Rose—

[Nellor]: If—

> [Valley's counsel]: —to have Valley have independent counsel review the [Representation Agreement]?
>
> [Nellor]: If you're specifically asking me did I say, you must have [Valley] get independent counsel, I did not use those words.
>
> [Valley's counsel]: Or should—
>
> [Nellor]: Pardon?
>
> [Valley's counsel]: —as opposed to must.
>
> [Nellor]: Should is fine, too.

1 VRP at 35-37. Nellor later testified:

> [Nellor]: I told him that I couldn't answer the question [of whether he should sign the Representation Agreement], that he needed to get independent counsel on—if he needed advice on whether it met his needs or whether it met his intent, whether the [Representation Agreement] reflected his intent. He needed to seek independent counsel if he wanted an opinion on that.
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> [Valley's counsel]: And when he asked that question, you don't know whether he was asking for himself or whether he was asking for Valley or even thought about the distinction; right?
>
> [Nellor]: Well, I don't. I know—I mean, our meetings were all in the context of what—you know, the Clyde litigation and those things that were going on at the time.

1 VRP at 65-66.[11]

[11] In a 2003 declaration, Rose stated:

> I was not told to get another lawyer to review the [D]ocuments at any time. No one in the [F]irm ever gave me any legal advice as a client regarding these [D]ocuments. No one in the [F]irm ever gave or offered to give the LLC any legal advice regarding the [D]ocuments. I did not have any lawyer look over the [D]ocuments for me.

CP at 14. To Nellor's knowledge, Valley did not hire independent counsel to review the Documents. Nellor never received any communications about the Documents from independent counsel for Valley.

Thacker and Nellor signed the second version of the Representation Agreement on behalf of the Firm. Rose signed it twice: once as "Neil M. Rose" and once as "Impact Alloys Corporation, Neil M. Rose, Authorized Agent." Ex. 20 at 5. The second version of the Representation Agreement does not bear any signature date, but Rose apparently signed it sometime between December 22, 1999, and February 3, 2000.[12]

At some point Woolard brought the Promissory Note and Deed of Trust to Rose's residence, where he signed, but did not date, both documents.[13] Rose signed the Promissory Note under the heading "Valley/50th Avenue, LLC" twice: once as "Neil M. Rose, Member," and once as "Neil M. Rose, Promissor." Ex. 16. Rose similarly signed the Deed of Trust under the heading "Valley/50th Avenue, LLC" twice: once as "Neil M. Rose, Member, and once simply as "Neil M. Rose." Ex. 19 at 5. The Clark County auditor recorded the Deed of Trust on February 8, 2000.

On April 18, 2001, the trial court in the Clyde Corporation litigation entered judgment for over $1,000,000.00 in favor of Clyde Corporation. Around this time, Nellor first learned that

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[12] In his 2003 declaration, Rose also asserted:

> The Representation Agreement was given to me for signing when we had a meeting with [the trial court judge in the Clyde Corporation litigation] about a trial date [sometime] in late 1999, and I was taken into a conference room in the [courthouse], and the Agreement was given to me to sign.

CP at 14.

[13] The trial court found, and Rose does not dispute, that Rose signed the Promissory Note and the Deed on February 3, 2000. The Deed of Trust also bears the same date of Rose's signature, February 3, 2000. Woolard notarized the Promissory Note on February 3, 2000.

Randall Stewart is the successor trustee to Chicago Title Insurance Company on the Deed dated February 3, 2000. Stewart eventually initiated sale proceedings under the Deed of Trust and made a demand on Valley for payment of sums owing to the Firm. Valley named Stewart as a defendant in the action underlying this case, but Stewart was not present during the trial below.

Rose had transferred a majority of his economic interest in Valley to his sons.[14]

D. Default

In April 2002, the Firm issued Valley a notice of default on its Promissory Note. As of April 15, the principal balance the Deed of Trust secured was $207,256.98, with interest accruing at 9 percent annually from April 15, 2002, onward. On May 31, Randall Stewart, a successor Valley trustee to the Deed of Trust, made a demand on Valley for payment of sums owing to the Firm and commenced proceedings to sell the Property under the Deed of Trust.

II. Procedure

A. *Valley* I[15]

On August 26, 2002, Valley sued Stewart and the Firm, claiming that the Deed of Trust "does not competently convey any interest to [Stewart and the Firm] that subjects the interest of [Valley] in [the Property] to sale or a security interest of [the Firm]." CP at 4. Valley requested: (1) declaratory relief stating that the claim of Stewart and the Firm in the Property was "null and void"; (2) injunctive relief preventing Stewart and the Firm "from asserting any interest in the subject property on the basis of the Deed of Trust"; and (3) attorney fees and costs. CP at 4.

Stewart counterclaimed, seeking a declaratory judgment

that the [Deed of Trust] constitutes a valid lien pursuant to provisions of [chapter]

[14] The Firm did not become aware of Rose's 1998 Property transfer to Valley and his 1998 transfer of Valley to Brett and Scott until fall 2001. According to Brett, the Firm did not keep Valley's "minute[s]." 1 VRP at 93. According to Woolard, however, if "[the Firm] [was] the agent [of Rose's business entities] and [the entities] came to [the Firm's] office, [the Firm] took care of what needed to be done." 1 VRP at 16. But, as of May 7, 2001, the Firm had incurred only $923.83 in charges for representing Valley, mostly for performing its role as Valley's registered agent. *See* Ex. 34; 1 VRP at 45-46.

[15] *Valley/50th Ave., LLC v. Stewart*, noted at 128 Wn. App. 1014, 2005 WL 1502021.

> 61.24 [RCW] upon [the Property] described in the Complaint, and that the procedures employed by [Stewart] with respect to foreclosure and sale of [the Property] are authorized and competently executed under the requirements of such statute.

CP at 6. Stewart requested attorney fees and costs.

The Firm also counterclaimed, asserting that "[the Firm] is entitled to a Declaratory Judgment adjudging the Deed of Trust to be valid and enforceable against the property identified in the Deed of Trust and permitting [the Firm] to complete the foreclosure of the Deed of Trust." CP at 10. And the Firm requested attorney costs and fees. The trial court ruled that Stewart and the Firm could enforce the Representation Agreement, the Promissory Note, and the Deed of Trust.[16]

The Firm and Valley both appealed.[17] The only argument from the earlier appeal that is relevant here is Valley's contention that the Firm cannot enforce the Deed of Trust because the Firm violated former RPC 1.7(b) (1995) and former RPC 1.8(a) (1993). On June 21 2005, we filed an unpublished opinion, holding that (1) there was no genuine issue of material fact as to whether the Firm violated former RPC 1.7(b) because Valley failed to show that the Firm's security interest in the Property "materially limited [the Firm's] ability to represent Valley"; and (2) for a variety of reasons, there was no genuine issue of material fact as to whether the Firm violated former RPC 1.8(a).[18] *Valley/50th Ave., LLC v. Stewart*, noted at 128 Wn. App. 1014,

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[16] The record before us does not contain any transcripts or documents from the *Valley* I trial.

[17] *Valley/50th Ave., LLC v. Stewart*, noted at 128 Wn. App. 1014, 2005 WL 1502021, at *2. The panel members were JJ. Armstrong, Hunt, and Van Deren.

[18] We also decided other issues that are not germane to the instant appeal.

2005 WL 1502021, at *3-5. Ultimately, we substantially agreed with the trial court, except that we remanded to the trial court for a determination of the exact fees that Rose and the Firm intended the Representation Agreement to cover. *Valley*, 2005 WL 1502021, at *8.

Valley appealed to our Supreme Court, which, about two years later, reversed in part and affirmed in part. *Valley/50th Ave., LLC v. Stewart*, 159 Wn.2d 736, 153 P.3d 186 (2007). The Supreme Court held that: (1) the Promissory Note and the Deed of Trust "w[ere] more like a business transaction than a fee agreement" and, therefore, former RPC 1.8(a) applied to the drafting and execution of the Documents; and (2) "the Firm's duties under former RPC 1.8 were owed independently to Valley as well" as to Rose. *Valley/50th Ave.*, 159 Wn.2d at 745, 747.

Applying former RPC 1.8, our Supreme Court reversed, in part, because "[t]he exact circumstances, disclosure, and reasonable opportunity of Rose and Valley to seek independent counsel are in dispute" and, therefore, "there are material issues of fact as to whether the Firm discharged its duty under former RPC 1.8." *Valley/50th Ave.*, 159 Wn.2d at 747. But the Supreme Court affirmed our holdings that were "not inconsistent with [the] opinion." *Valley/50th Ave.*, 159 Wn.2d at 747. Noting that we had not applied former RPC 1.7(b) to "whether the Firm's *interest in obtaining* the security interest," as opposed to simply possessing the security interest, negatively affected its ability to represent Valley, the Supreme Court explained:

> [The interest in obtaining the security interest] is distinct from any conflicts that may have resulted *after* the firm obtained its security interest. Though we endorse the holdings of the Court of Appeals not inconsistent with our opinion, only those conflicts that have been examined under [former] RPC 1.7 are affirmed. The Court of Appeals' generic statement that Valley did not prove a violation of [former] RPC 1.7 does not apply to conflicts the court did not examine.

Valley/50th Ave., 159 Wn.2d at 748 n.7. The Supreme Court remanded the case to the trial court.

B. *Valley* II

On remand, the trial court determined that (1) the Firm had not violated former RPC 1.7(b) because "[t]here was no attorney-client relationship between [Valley] and [the Firm] for the purpose of negotiat[ing] and/or executing [the Documents]," CP at 157; (2) even if there had been such a relationship, the Firm did not violate former RPC 1.7(b); and (3) "[the Firm] has proven that it met the requirements of former RPC 1.8(a) by clear, cogent, and convincing evidence" and "[t]he actions of [the Firm] did not violate the requirements of former RPC 1.8." CP at 158. More specifically, the trial court ruled that "[Valley] had been given a reasonable opportunity to seek independent legal advice and had been advised to seek counsel independent of [the Firm] at the time [Rose] signed [the Promissory Note] and [the Deed] on behalf of [Valley]." CP at 157. On September 27, 2009, the trial court dismissed Valley's complaint with prejudice, upheld the Deed of Trust, and awarded the Firm attorney fees and costs.

Valley appeals.

ANALYSIS

I. The November 22, 1999 Meeting

Valley makes a threshold factual argument that we must address first: That "the quantum of evidence is such that [Valley] proved affirmatively that the [November 22, 1999] meeting [between Rose and Nellor] did not occur[.]" Br. of Appellant at 28. This argument fails.

We review questions of fact for substantial evidence. *Ridgeview Prop. v. Starbuck*, 96

Wn.2d 716, 719, 638 P.3d 1231 (1982). "Substantial evidence" is "evidence 'sufficient . . . to persuade a fair-minded, rational person of the truth of the declared premise.'"[19] *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 531, 70 P.3d 126 (2003) (quoting *Helman v. Sacred Heart Hosp.*, 62 Wn.2d 136, 147, 381 P.2d 605 (1963)).

Valley did not attempt to argue at trial that the November 22 meeting did not occur. Because Valley failed to preserve this issue for appellate review, we could decline to address it for the first time on appeal. RAP 2.5(a). Nevertheless, we note that substantial evidence supports the trial court's finding that the November 22 meeting occurred.[20] Accordingly, we affirm the trial court's finding.

II. Attorney-Client Relationship

Valley next argues that the trial court erred by ruling that "[t]here was no attorney-client relationship between [Valley] and [the Firm] for the purpose of negotiating and/or executing the

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[19] Valley suggests that we apply the "'clear, cogent[,] and convincing' standard of persuasion" because this case "involves an issue of presumptive fraud and claims of ethical transgression." Reply Br. of Appellant at 13 (quoting *Proctor v. Huntington*, 146 Wn. App. 836, 846, 192 P.3d 958 (2008), *aff'd*, 169 Wn.2d 491 (2010), *cert. denied*, 131 S. Ct. 1700 (2011)). We do not find this argument persuasive. Moreover, *Proctor*, the case that Valley cites, holds, "The trial court, *not a reviewing court*, determines whether evidence meets the clear, cogent and convincing standard of persuasion." *Proctor*, 146 Wn. App. at 846 (emphasis added) (internal quotation marks omitted). Thus, *Proctor* is consistent with the substantial evidence standard of review that we apply here.

[20] The trial court found that this meeting did in fact occur, based largely on Nellor's extensive testimony about the meeting. *See*, *e.g.*, 1 VRP 64-66, 72-73; CP at 155 ("During the course of the . . . November, 22 1999 office conference, Neil Rose and John D. Nellor discussed . . . ."). Moreover, even if Valley is correct that the Firm kept no record and Nellor took no notes during the meeting, Valley failed to present any evidence "affirmatively" proving that the November 22 meeting did not occur. Br. of Appellant at 28. Rose's 2003 declaration does not suggest that the November 22 meeting never happened; instead, it states only that no one told him to seek independent counsel and that the Firm did not advise him or Valley with regard to the Documents.

[Agreement Regarding Representation, Promissory Note, and Deed of Trust]" because Valley was a client of the Firm "at all material times." Br. of Appellant at 10, n.7 (quoting CP at 167). Valley asserts that both the "rule of the case" and the "facts of the case" support this argument. Br. of Appellant at 10. The Firm responds that, although it was engaged in limited representation of Valley, the Firm did not represent Valley for purposes of "the negotiation and execution of the Promissory Note and Deed of Trust" at issue in this appeal. Br. of Resp't at 11. We need not resolve this issue because, even if the Firm did represent Valley with regard to the negotiation and execution of the Documents, the Firm did not violate former RPC 1.7(b) and former RPC 1.8(a).

III. Former RPC 1.7(b)[21]

Valley argues that the Firm violated former RPC 1.7(b) because the Firm's interest in obtaining the Property as collateral, for money Rose owed the Firm, materially limited the Firm's representation of Valley, and the Firm failed to obtain informed written consent from Valley. The Firm counters that, because it advised Valley that it would not represent Valley in negotiating and executing the Documents: (1) the Firm did not "represent" Valley in any manner that could "materially limit" the Firm's interest in obtaining the Property as collateral; and (2) therefore, former RPC 1.7(b) does not apply. *See* Br. of Resp't at 14, 18. Valley's argument fails.

[21] We engage in preliminary analysis of the alleged former RPC violations solely for the purpose of determining whether the Deed of Trust is enforceable. The enforceability of the Deed of Trust hinges exclusively on whether the Firm violated the former RPCs because "[a]ttorney fee agreements that violate the RPCs are against public policy and unenforceable." *Valley/50th Avenue*, 159 Wn.2d at 743-44. In addressing the former RPCs for purposes of this appeal, we do not purport to address the propriety of potential disciplinary action against the Firm, for which we lack authority.

A. Standard of Review

"[W]hether an attorney's conduct violates the relevant rules of professional conduct is a question of law." *Eriks v. Denver*, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992) (footnote omitted). We review questions of law de novo. *Rainier View Court Homeowners Ass'n Inc. v. Zenker*, 157 Wn. App. 710, 719, 238 P.3d 1217 (2010) (citing *Veach v. Culp*, 92 Wn.2d 570, 573, 599 P.2d 526 (1979)).

B. Firm's Interest in Obtaining the Property as Collateral

Former RPC 1.7(b) (1995) provided:

> A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
>
> > (1) The lawyer reasonably believes the representation will not be adversely affected; and
> >
> > (2) The client consents in writing after consultation and a full disclosure of the material facts (following authorization from the other client to make such a disclosure). When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Valley contends that actual conflicts arose when Rose began to have conversations with the Firm about his intention to offer Valley's only asset, the Property, as collateral for the fees he owed the Firm.

Before turning to the specific conflict alleged in this appeal, we note that in *Valley* I, our Supreme Court affirmed our previous RPC 1.7(b) analysis in the context of a slightly different issue. *Valley/50th Ave.*, 159 Wn.2d at 748 n.7 (citing *Valley/50th Ave.*, 2001 WL 1502021, at

*8) ("[T]hose conflicts that have been examined [by Division Two in *Valley* I] under [former] RPC 1.7 are affirmed."). Our Supreme Court noted that we analyzed only whether the Firm had violated RPC 1.7(b) in the context of its *holding* a security interest in the Property and that we did not analyze whether the Firm's "*interest in obtaining* the security interest in [the Property] materially limited its ability to represent Valley." *Valley/50th Ave.*, 159 Wn.2d at 748 n.7. In our view, this distinction does not bear materially on the issue before us now because Valley has not shown that the Firm's interest in obtaining, as compared to possessing, the collateral negatively affected the Firm's representation of Valley. As we noted in *Valley* I, the Firm's representation of Valley had a "limited scope" and entailed performing very few services for Valley.[22] *Valley/50th Ave.*, 2001 WL 1502021, at *3.

In addition, we disagree with Valley's contention that "[t]he circumstances in the instant case are indistinguishable from those" in *In re Disciplinary Proceeding Against Holcomb*, 162 Wn.2d 563, 173 P.3d 898 (2007). Br. of Appellant at 17. Holcomb obtained 24 individual loans from his client, totaling $52,300.00, for personal purposes, while continuing to represent his client in a frivolous equal employment opportunity action. *Holcomb*, 162 Wn.2d at 570 n.1, 581-82. Our Supreme Court held that Holcomb's obtaining loans from his client materially limited his representation because it caused him to pursue the lawsuit even though his client "had no case."

[22] These limited services included reviewing and revising Valley's LLC agreement, assisting in the transfer of the Property from Rose to the Valley, renewing Valley's license with the Department of Licensing, and serving as its registered agent. *See* Ex. 34. Valley does not explain, for example, how the Firm's interest in obtaining the collateral would have caused the Firm to fail to renew Valley's license with the Department of Licensing. If anything, the Firm's interest in collateralizing the Property would have motivated the Firm to represent Valley to avoid encumbering the Firm's collateral.

Holcomb, 162 Wn.2d at 581.

Valley has not demonstrated how the Firm's interest in obtaining the Property as collateral materially limited the Firm's representation of Valley in any manner similar to the way in which Holcomb's borrowing money from his client materially limited representation of his client. Unlike Holcomb, the Firm was not representing Valley in a pending legal action. On the contrary, as of 2001, the Firm's representation of Valley involved mostly filing and recording services, the cost of which amounted to less than $1,000. Additionally, according to Nellor, as of the November 22 meeting, "[T]here was [no] ongoing work for [Valley] at that point in time." 1 VRP at 36.

Again, the Firm's representation of Valley was narrow in scope, and Valley has failed to present any plausible reason how or why the Firm's interest in obtaining the collateral negatively affected that representation. Accordingly, we affirm the trial court's conclusion that the Firm did not violate former RPC 1.7(b).

IV. Former RPC 1.8(a)

In *Valley* I, our Supreme Court remanded to the trial court because "there [we]re material issues of fact as to whether the Firm discharged its duty under former RPC 1.8." *Valley/50th Ave.*, 159 Wn.2d at 747. After a bench trial on remand, Valley now argues that the Firm violated former RPC 1.8(a) because: (1) the Firm did not satisfy its duty to disclose; (2) "Nellor did not warn Rose that Valley needed independent advice," Br. of Appellant at 22; (3) the Firm did not give Valley the same advice that a disinterested attorney would have provided; (4) the terms and conditions of the collateralization of the Property were not fair or reasonable; and (5) the Firm failed to document its compliance with former RPC 1.8(a).[23] Valley's arguments fail.

A. Standard of Review

"[W]hether an attorney's conduct violates the relevant rules of professional conduct is a question of law." *Eriks*, 118 Wn.2d at 457-58. We review questions of law de novo. *Rainier View Court*, 157 Wn. App. at 719.

B. Requirements of Former RPC 1.8(a)

Former RPC 1.8(a) (1993) provided:

A lawyer who is representing a client in a matter:

> (a) Shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
>
> > (1) The transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
> > (2) The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
> > (3) The client consents thereto.

In *Valley* I, our Supreme Court elaborated on these requirements:

> Under [former RPC 1.8(a)], the lawyer must establish, "'(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.'" The disclosure [that] accompanies an attorney-client transaction must be complete. . . .
>
> The burden of proving compliance with [former] RPC 1.8 rests with the lawyer; "an attorney-client transaction is prima facie fraudulent." A lawyer must prove strict compliance with the safeguards of [former] RPC 1.8(a); full

[23] In addition, Valley cites several cases relating to former RPC 1.8(a) without providing any analysis of how these cases apply to the facts here. "Passing treatment of an issue or lack of reasoned argument is insufficient to allow for our meaningful review." *State v. Stubbs*, 144 Wn. App. 644, 652, 184 P.3d 660 (2008) *rev'd on other grounds*, 170 Wn.2d 1035 (2010); RAP 10.3(6). Accordingly, we do not further consider these cases.

> disclosure, opportunity to consult outside counsel, and consent must be proved by the communications between the attorney and the client.
>
> A client's sophistication does not relax the requirements of [former] RPC 1.8, though it may be relevant to its satisfaction.

Valley/50th Ave., 159 Wn.2d at 745 (internal citations and quotation marks omitted).

C. Disclosure

Valley argues that the trial court erred in finding, "The terms of the Agreement Regarding Representation, the Promissory Note, and the [D]eed of Trust were fully disclosed to [Valley] and were transmitted to [Valley] in writing in a manner that could be clearly understood by [Valley]." Br. of Appellant at 22, n.16 (quoting CP at 156 (FF 33)). We disagree.

In *Holcomb*, our Supreme Court held that the "terms [of the 24 individual loans totaling $52,300 that the attorney obtained from his client] were not fully disclosed and transmitted in writing to [the client]" because: (1) "[the attorney] failed to prepare written promissory notes for any of the loans setting out their terms and providing for interest, fees, and penalties"; (2) "[the attorney] did not discuss payment of interest, fees, or penalties with [the client]"; and (3) "[the attorney] did not advise [the client] that his interests might conflict with [the client's interests]." *Holcomb*, 162 Wn.2d at 580-81. Unlike in *Holcomb*, here, the Firm provided Valley with two written versions of the Representation Agreement, the Promissory Note, and the Deed of Trust. Furthermore, Valley had over two months to review the first version of the Representation Agreement before Rose brought his hand-edited first version back to the Firm for revision. Nellor implemented those revisions on his computer with Rose in his presence. From the time that Nellor and Rose revised the Representation Agreement, one to two-and-a-half months passed

before Rose signed the second version of the Representation Agreement, the Promissory Note, and the Deed of Trust. Unlike *Holcomb*, Valley had ample information about the transaction and time to review that information.

The record shows that Nellor explained to Valley (acting through Rose as Valley's manager) that the Firm could not advise Valley on a matter to which "essentially [the Firm was] a party." 1 VRP at 36. In *In re Disciplinary Proceeding Against McKean*, 148 Wn.2d 849, 870-71, 64 P.3d 1226 (2003), the attorney violated former RPC 1.8(a) because he failed to advise his clients about the "risks inherent in having their attorney as a business associate." Here, in contrast, Nellor pointed out the specific conflict at issue: The Firm was a party to the Representation Agreement, Promissory Note, and the Deed of Trust and, therefore, had an interest in those documents; this interest ethically precluded the Firm from advising Valley about whether the Documents were in Valley's best interests.

Moreover, "[a] client's sophistication . . . may be relevant to . . . [the] satisfaction" of former RPC 1.8(a). *Valley*, 159 Wn.2d at 745. Rose was a business owner with experience dealing with attorneys and litigation; and, before the November 22 meeting, Impact Alloys Foundry, Inc. had obtained independent counsel. Thus, Valley was aware of the difference between Rose's obtaining independent counsel for himself personally and Rose's obtaining independent counsel for one of Rose's legal entities such as Valley, as well as the underlying conflicts that create the need for obtaining independent counsel.

D. Reasonable Opportunity To Obtain Independent Counsel

Valley next argues that (1) "as an independent entity," it "was never told that it . . . needed to consult independent counsel," Br. of Appellant at 21; and (2) substantial evidence does not support the trial court's third conclusion of law, which is actually a finding of fact, that "'[Valley] . . . had been advised to seek counsel independent of [the Firm] at the time [Rose] signed the Promissory Note and Deed of Trust on behalf of [Valley].'" Br. of Appellant at 33 (quoting CP at 157 (CL 3)). These assertions are incorrect.

First, the trial court expressly found, "[B]ecause [the Firm] was a party to the [D]ocuments, [Nellor] could not give [Rose] advice and that [Rose] would have to consult independent counsel for advice regarding the [Documents]." CP at 155 (FF 25). Valley does not challenge this finding, which, therefore, is a verity on appeal. *Manke Lumber Co., Inc. v. Cent. Puget Sound Mgmt.*, 113 Wn. App. 615, 628, 53 P.3d 1011 (2002). Second, even without considering Finding of Fact 25 to be a verity on appeal, standing alone, Nellor's testimony is sufficient to persuade a fair-minded, rational fact-finder that the Firm advised Valley to seek independent counsel.[24]

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[24] Although, in response to Valley's question, Nellor said, "[D]id I say, you must have [Valley] get independent counsel[?] I did not use those words," 1 VRP at 37, he further testified:

> [Nellor]: I told him that I couldn't answer the question [of whether he should sign the Representation Agreement], that he needed to get independent counsel on—if he needed advice on whether it met his needs or whether it met his intent, whether the [Representation Agreement] reflected his intent. He needed to seek independent counsel if he wanted an opinion on that.
>
> [Valley's counsel]: And when he asked that question, you don't know whether he was asking for himself or whether he was asking for Valley or even thought about the distinction; right?
>
> [Nellor]: Well, I don't. I know—I mean, our meetings were all in the context of what—you know, the Clyde litigation and those things that were going

Furthermore, as we previously ruled in *Valley* I, former RPC 1.8(a) required only a "'*reasonable opportunity*' to consult with a conflict-free attorney." *Valley/50th Ave.*, 2005 WL 1502021, at *5 (quoting former RPC 1.8(a)(2) (1993)) (emphasis added). Case law does not provide a specific definition of a "reasonable opportunity"; but our Supreme Court has explained that it "must be real and meaningful" and that "[i]t is not enough that at some moment in time an opportunity existed no matter how brief or fleeting that opportunity might have been." *Valley/50th Ave.*, 159 Wn.2d at 746 (citing *In Re Disciplinary Proceeding Against Haley*, 157 Wn.2d 398, 408, 138 P.3d 1044 (2006)).

Here, the Firm gave Rose the first version of the Representation Agreement and the Promissory Note on September 22, 1999. About two months later, Rose returned to the Firm on November 22 with penciled-in changes to the Representation Agreement. Rose did not sign this second version of the Representation Agreement until one to two-and-a-half months later. Thus, Rose had three to five months to consult independent counsel between the time the Firm gave him the first version of the Representation Agreement and the time he signed the second version. It further appears from the record that Rose had about three months between the delivery of and his signing the Deed of Trust and the Promissory Note. Based on these lengthy time periods, Rose's familiarity with attorneys, and Rose's involvement with Impact Alloys Foundry, Inc., (which did retain independent counsel), we hold that the record supports the trial court's finding that the Firm provided Valley with a reasonable opportunity to consult independent counsel.[25]

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on at the time. 1 VRP at 65-66.

[25] The record supports the trial court's finding that the Firm told Valley to consult independent counsel. Furthermore, to the extent that Valley is arguing that failure to advise it to consult independent counsel was an RPC violation, this argument also fails because former RPC 1.8(a)

E. Fairness and Reasonableness of the Terms

Valley also argues that the "the terms [of the second version of the Representation Agreement, the Deed of Trust, and the Promissory Note] and transaction [involving the Firm]" were not "fair and reasonable." Br. of Appellant at 24. Because Valley raises this argument for the first time on appeal and provides no supporting legal authority,[26] we do not address it. RAP 2.5(a), 10.3(6).

F. Documentation

Finally, Valley argues that the Firm violated former RPC 1.8(a) because the Firm made "no documentation of [the Firm's] attempts to comply with [former] RPC 1.8." Br. of Appellant at 25. In support of this argument, Valley cites *In re Corp. Dissolution of Ocean Shores Park v. Rawson-Sweet*, 132 Wn. App. 903, 134 P.3d 1188 (2006), *review denied*, 159 Wn.2d 1009 (2007), a case in which we held that a business deal between an attorney and client was void as against public policy. *Ocean Shores Park*, 132 Wn. App. at 912-13. The attorney in that case failed to document that the client obtained a one-half interest in real property in exchange for corporate shares. *Ocean Shores Park*, 132 Wn. App. at 912. We voided the business dealing as

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required only a "reasonable *opportunity* to [consult] independent counsel," not express advice to consult independent counsel. Former RPC 1.8(a)(2) (1993) (emphasis added).

[26] *See* Br. of Appellant at 23-25. Valley refers to approximately nine pages of expert witness testimony (from a partner at Perkins Coie LLP with experience in deeds and promissory notes, which, it baldly concludes, "establishes that the terms were neither fair nor reasonable to Valley's interests.") Br. of Appellant at 24. To the extent that Valley is actually arguing for the first time on appeal that the "the terms and transaction" were not "fair and reasonable" because the Firm allegedly violated former RPC 1.7(b) and 1.8(a), Br. of Appellant at 24, we do not address this argument because Valley failed to raise it below. RAP 2.5(a) ("The appellate court may refuse to review any claim of error which was not raised in the trial court"). Moreover, Valley provides no legal authority to support this argument, in violation of RAP 10.3(6). *See* Br. of Appellant at 23-25.

against public policy because "[w]here the attorney fail[s] to document that the client received any consideration, we will presume that inadequate consideration was given." *Ocean Shores Park*, 132 Wn. App. at 912-13 (footnote omitted).

This case is distinguishable from *Ocean Shores Park* because the record contains documentation establishing that the Firm obtained an interest in Valley's real property to secure attorney fees that Rose owed the Firm for services the Firm had provided on his behalf. As we explained in *Ocean Shores Park*, "the attorney is responsible for documenting the transaction [between an attorney and client] and preserving this documentation to protect *himself* [the attorney] in the future." *Ocean Shores Park*, 132 Wn. App. at 912 (emphasis added). Here, the Firm satisfied this burden with the Promissory Note, the Deed of Trust, and two Representation Agreements. Accordingly, Valley's argument fails.

V. Other Alleged Errors of Law

Valley next argues that other finding of facts, namely Findings of Fact 28 and 34, contain several conclusions of law that are erroneous. Regardless of whether these are findings of fact or conclusions of law, we already addressed these issues in *Valley* I and Valley failed to appeal them to our Supreme Court. Thus, we do not address them again here.

A. Rose's Authority to Bind Valley, Finding of Fact 28

Valley argues for the first time on appeal that (1) Rose lacked authority to execute the Documents and to bind Valley because the Firm knew that the "General Manager Duties" section of Valley's Operating Agreement prohibited Rose's using Valley's assets for his personal debts, Ex. 4; and (2), therefore, the trial court erred in concluding that "[Rose] 'possessed the authority

to execute [the Documents] and bind [Valley].'" Br. of Appellant at 33 (quoting CP at 156 (FF 28)). This "finding" is actually a legal conclusion because it is a "determination . . . made by a process of legal reasoning from the facts," rather than "an assertion that evidence shows something occurred or exists, independent of an assertion of its legal effect." *Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 417-18, 225 P.3d 448 (citing *State v. Niedergang*, 43 Wn. App. 656, 658-59, 719 P.2d 576 (1986); *State v. Williams*, 96 Wn.2d 215, 221, 634 P.2d 868 (1981)), *review denied*, 169 Wn.2d 1014 (2010).

As the Firm correctly points out, we previously ruled in *Valley* I that Rose had authority to bind Valley, 2001 WL 1502021, at *6-7, which holding Valley did not appeal to our Supreme Court. Therefore, res judicata prevents our reconsidering this argument. *See In re Estate of Black*, 153 Wn.2d 152, 170, 102 P.3d 796 (2004).

B. Valley's Consent to the Promissory Note and the Deed of Trust (Finding of Fact 34)

Valley next contends that (1) it did not give "informed" consent when Rose, acting as manager, signed the Promissory Note and the Deed of Trust; and (2) therefore, in Finding of Fact 34, the trial court erroneously concluded, "'By the signature of its manager, and with full knowledge of the terms of the [Representation Agreement], [Valley] consented to the terms of the Promissory Note, and Deed of Trust.'" Br. of Appellant at 33 (quoting CP at 156 (FF 34)). Again, this "finding of fact" is a conclusion of law, which we review de novo. *Douglass*, 154 Wn. App. at 417-18.

Again, we previously addressed and decided this issue in *Valley*, 2001 WL 1502021, at *5-7, in favor of the Firm, which decision Valley did not include in its appeal to our Supreme Court

in *Valley* I. Because our previous holding on this issue was, therefore, final and operated as res judicata, we do not further address this argument. *See Black*, 153 Wn.2d at 170.

VI. Other Alleged Errors of Fact

Valley makes two additional arguments related to alleged factual errors. Valley first argues that the trial court erred by finding that "[o]utside of [the John E. Morse Memorandum] Exhibit 1 . . . and the Rose Personal Residence Trust [Exhibit 2], no actual completed estate plan by [the Firm] was shown." Br. of Appellant at 30 (quoting CP at 152 (FF 4)). Because the record does not contain a completed estate plan that the Firm prepared for Rose, the evidence supports the trial court's finding and Valley's first argument fails.

Valley's second argument is that the trial court erred by finding that "'[the Firm] had no reason to make [such] inquiry [into the fact that, on March 19, 1998, Rose transferred 98 percent of his 'Economic Units' to his sons].'" Br. of Appellant at 31 (quoting CP at 153 (FF 16)). Valley contends that the Firm owed Valley a "duty" and a "standard of care" that required the Firm to make such an inquiry. Br. of Appellant at 31. Again, Valley makes this argument for the first time on appeal in violation of RAP 2.5(a); moreover, Valley fails to provide legal authority to support this contention.[27] RAP 10.3(6). Therefore, we do not further address this argument.

VII. Limitation on Witness Testimony

Lastly, Valley argues that the trial court erred by limiting the testimony of Valley's expert witness. Valley admits that the trial court's "treatment" of Valley's expert witness testimony is "unclear." Br. of Appellant at 29. Nevertheless, Valley claims, "[T]o the extent that the Court

[27] Valley lists other reasons why the Firm should have inquired into Rose's transfer of economic units to his sons, but these reasons stem from Valley's claim that the Firm violated a duty or standard of care by failing to make an inquiry. As we note above, Valley's failure to comply with the applicable RAPs precludes our addressing these arguments.

may have limited the application of [the expert witness's testimony], exception is taken." Br. of Appellant at 29. This argument also fails.

A. Standard of Review

We review a trial court's evidentiary rulings for abuse of discretion. *Jaeger v. Cleaver Constr., Inc.*, 148 Wn. App. 698, 719, 201 P.3d 1028 (2009). "A trial court abuses its discretion when its decision is manifestly unreasonable, is exercised for untenable reasons, or is based on untenable grounds." *Edwards v. Le Duc*, 157 Wn. App. 455, 459, 238 P.3d 1187 (2010) (citing *Lian v. Stalick*, 106 Wn. App. 811, 824, 25 P.3d 467 (2001)), *review denied*, 170 Wn.2d 1024 (2011). A trial court does not abuse its discretion unless no reasonable person would take the position the trial court adopted. *Stevens v. Gordon*, 118 Wn. App. 43, 51, 74 P.3d 653 (2003) (citing *Mayer v. City of Seattle*, 102 Wn. App. 66, 79, 10 P.3d 408 (2000)). Such is not the case here.

B. The Expert Witness's Testimony

During direct examination, Valley showed its expert witness copies of the Documents and Valley's Operating Agreement. Valley then stated, "I'm going to ask you . . . that further you have been asked to give advice or provide information regarding these documents before they were signed." 1 VRP at 116. After a colloquy, the trial court stated:

> [Trial court]: Okay. I'm going to allow the testimony, I think, at least as to one area regarding the knowledge or lack of knowledge or should have had knowledge, I guess, of the transfer [of 98 percent of Rose's Economic Units to two of his sons]. I think this is where it's going. I'll allow questions in that regard at this point.

1 VRP at 120.

Then Valley asked the witness:

> [Valley's counsel]: And perhaps to make this easier, I will say if Valley came to you with [the Documents and the Operating Agreement] before signing them and asked you for information and advice concerning those documents, what would you do?

1 VRP at 121-22. The Firm objected again. After another colloquy, the trial court ruled:

> [Trial court]: All right. And I'm going to sustain the objection to that question because it assumes facts that are directly contrary to the evidence that we have. It assumes that [Valley] went and talked to somebody [about the negotiation and execution of the Documents]. We know that didn't happen. So I don't see the relevance of it.

1 VRP at 124.

When Valley attempted to rephrase the question,[28] the Firm again objected. This time, the trial court ruled: "All right. For the record I think this is basically the same question. I'm going to allow it just for [c]ounsel to establish his record. So you can go ahead and answer the question," 1 VRP at 125; the offer of proof and colloquy continued:

> [The Firm's counsel]: Your Honor, I would like Your Honor to consider my objection continuing as to the line of questioning so that I don't have to continue to—
>
> [Trial court]: Yes, sir.
>
> [The Firm's counsel]: —to interrupt and object.

1 VRP at 126.

As it began cross examination, the Firm's counsel stated:

> [The Firm's counsel]: Your Honor, I want to make sure by cross-examining I don't sacrifice my objection to the line of questioning.

[28] Valley asked, "What would, in your opinion, a disinterested attorney provide by way of information and advice to Valley concerning these documents?" 1 VRP at 124-25.

> [Trial court]: As I indicated, I sustained the objection to give [Valley's counsel] the opportunity to make his record. So if you have any questions, go ahead.

1 VRP at 134-35. Valley's counsel responded:

> [Valley's counsel]: Your Honor, I have to admit I did not understand that I was proceeding solely on an offer of proof basis.

1 VRP at 135.

Concerned that the proferred testimony "assumes facts that are directly contrary to the evidence" presented in the case and irrelevant,[29] the trial court limited Valley's expert witness testimony to an offer of proof to make a record for appeal. Valley asked its expert witness to opine about what she would have told Valley if Valley had approached her for independent legal advice regarding the Documents; but Valley never sought such advice. *See* 2 VRP at 201-02. Holding that the trial court's decision to limit the expert witness testimony is not a decision that "no reasonable person would take," *Stevens*, 118 Wn. App. at 51, we find no abuse of discretion in its evidentiary ruling limiting Valley's expert witness's testimony to an offer of proof and in refusing to consider it as relevant substantive evidence below.

VIII. Attorney Fees

We affirm the trial court's award of attorney fees and costs to the Firm below based on the attorney fee provision of the Deed of Trust. Both parties request attorney fees and costs on appeal under RAP 18.1 and the same attorney fee provision of the Deed of Trust. Because Valley has not prevailed on appeal, we deny Valley's request. Because the Firm has prevailed,

[29] *See* ER 402 ("Evidence which is not relevant is not admissible.").

we grant the Firm's request for attorney fees and costs on appeal in an amount that our court commissioner will determine, upon compliance with RAP 18.1.

We affirm the trial court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Worswick, A.C.J.

Van Deren, J.