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September 22, 2011

Mr. Lewis M. Horowitz, Esq.
Mr. Michael D. Dwyer, Esq.
Lane Powell
1420 Fifth Avenue, Suite 4100
Seattle, WA 98101

Re: Carol and Mark DeCoursey

Dear Mssrs. Horowitz and Dwyer:

This firm has been retained by Carol and Mark DeCoursey in connection with Lane Powell's ("LP") handling of their Consumer Protection Act (CPA) case against Windermere Real Estate and a number of other entities. The purpose of this letter is to invite LP to address the issues with the goal of resolving them amicably.

We begin by inviting you to acknowledge this truism: It is difficult to be the servant of two masters. It is difficult to serve large institutional and development interests and at the same time serve homeowners who have brought a CPA case against some of those interests.

In brief, the DeCourseys contend that LP breached its fiduciary duty to them. It allowed positional conflicts of interest and self-interest to dictate its handling of their case. LP's illegal and unenforceable amended fee agreement is an example of LP's breach of fiduciary duty and its self-dealing approach.

I continue to investigate the matter; at this point, this letter should not be seen as an exhaustive list of issues to be addressed. Calculation of the damages to the DeCourseys are still being reviewed and may be updated.

The following issues illustrate LP's irregular and problematic handling of the DeCourseys' case:

1. **LP allowed positional conflicts of interest and its own self-interest to impede its representation of the DeCourseys.**

As an advocate, an attorney must "conscientiously and ardently assert the client's position under the rules of the adversary system." Preamble to Washington Rules of Professional Conduct (RPC), ¶2. Additionally, the RPCs mandate that LP should not have represented the DeCourseys if "there [was] a significant risk that the representation . . . will be materially

limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." RPC 1.7(a)(2). Moreover, even Lane Powell acknowledged some of its ethical responsibilities in its purported amended fee agreement dated December 30, 2008, when it expressly stated that it would represent the DeCourseys "as necessary to prevail in or retain the awards discussed." *Id.* Additionally, and in fact, LP's duty extended further, as it had a duty to preserve, expand and/or obtain additional' awards, if possible, by asserting good faith arguments based on the legislative intent and wording of the Consumer Protection Act.

Unbeknownst to DeCourseys when they engaged LP, the person who directed the Construction and Environmental Practice Group, in which their attorney worked, was Grant Degginger, then Mayor of Bellevue. As you may have learned from recent media coverage, Mr. Degginger, now Bellevue City Councilman, will not seek re-election following conflict of interest allegations against him.

In recent years, Bellevue has enjoyed an enormous construction boom. While serving as Bellevue Mayor/City Councilman, it would be fair to say that Mr. Degginger had cordial relationships with the development community.

After the DeCoursey victory at trial, Carol and Mark spoke with Mr. Degginger at the LP offices. The DeCourseys suggested that the win at trial would open up a whole new line of business for LP, and suggested Mr. Degginger must be delighted. Mr. Degginger looked sour and said words to this effect: "No, not really, it isn't good for Lane Powell."

In retrospect, it now seems odd that Mr. Degginger's practice group would take on the DeCourseys' Consumer Protection Act case against construction/real estate interests. Certainly, Mr. Degginger's lack of delight in the victory suggests that, as a representative of LP, LP and Mr. Degginger had conflicted motivation while pursuing the case.

Indeed, the DeCourseys showed LP that Windermere did not fear lawful regulatory censure, that it enjoyed favorable regard from the Department of Licensing and the Attorney General's office. The DeCourseys also showed LP that litigation attrition warfare was a pattern of behavior for Windermere. A politically ambitious lawyer working for a pro-business law firm may not feel comfortable aggressively prosecuting a case like the DeCourseys'.

Even though Mr. Degginger was billing the time to the DeCourseys' case, he did not sign any pleadings or publically appear on the case. Mr. Degginger apparently wanted to protect his pro-development/business image and support.

It appears that LP, a corporate defense firm, did not want to vigorously represent CPA plaintiffs for fear the case would create "bad law" for its present and future corporate clients, insurance companies and businesses such as Home Depot, Nike, Tesoro, Eli Lilly, Wells Fargo, and Nordstrom. Like Mr. Degginger, LP apparently wanted to protect its pro-business image.

Additionally, LP appeared to be motivated by its own self-interest. Before trial, LP strongly pressured the DeCourseys to settle, a settlement that would have left the DeCourseys penniless but would have paid the LP bill. When the DeCourseys refused to settle and then prevailed at trial, LP took on a fortress mentality on appeal. Instead of vigorously defending the DeCourseys' awards as specifically required by the Letter of Agreement of December 30, 2008 – a strategy that would have neutralized Windermere-style attacks on the CPA – LP balked. Mr. Degginger said LP did not want to risk opening up the case on appeal even though the DeCourseys, the clients, directed LP to do so. Mr. Degginger said LP did not want to "risk" the trial recovery. That recovery, while inadequate to compensate the DeCourseys for their damages, would adequately pay the LP bill.

However, events of February 28, 2011 show that a completely different dynamic was in play. LP (in the person of McBride) stated in phone conference that LP would withdraw from the case rather than represent DeCourseys on cross-appeal. This threat showed that LP was more willing to undertake the risk of losing the appeal with unknown (or even pro se) representation, rather than having LP's name on a successful pro-consumer precedent strengthening the CPA.

These facts strongly suggest that, had DeCourseys' case been argued successfully in the Supreme Court, the damage to LP's (other conflicting) interests would have been greater than the outstanding invoice for $370,000.

**A. LP refused to argue for a broader scope of attorneys' fees and costs under the Consumer Protection Act ("CPA").**

In attempting to recover their losses at the Court of Appeals, the DeCourseys requested that LP advance the argument to the Supreme Court that the CPA should provide an award of attorneys' fees and costs incurred in the suit, not just relating to the CPA claim, especially because the CPA claim was based largely on the same set of facts and related non-CPA theories. Indeed, the language of the *Letter of Agreement* of December 30, 2008, required LP to assist recovering the cost of the *suit*. LP refused, and failed, to assert this argument.

LP insisted the DeCourseys accept the cramped interpretation of RCW 19.86.080. Currently, as argued by LP, the Washington courts use a cramped interpretation of the words of RCW 19.86.080. The statute allows the plaintiff to recover "the costs of the *suit*, including reasonable attorney's fees." (Emphasis added). According to LP, the courts up until now have

taken this to mean to mean the plaintiff may be awarded only the attorney fees involved in proving the CPA violation and the related costs that fall within RCW 4.84.010. The courts, of course, have not been presented with a case like the DeCourseys -- where a large, moneyed corporation has attempted to vitiate the CPA by abusive litigation tactics. The courts have never ruled on such a case.

Accordingly, the Court of Appeals disallowed most of the "costs" awarded to the DeCourseys at the trial, dealing a loss of about $45,442. LP calculated that the DeCourseys' answer and oral argument to the Court of Appeals cost about $95,219, but the Court specified in its ruling that the award would cover only the attorney work directly concerned with the CPA. On court instructions, LP submitted a bill for $56,499.45 and the commissioner whittled it down to $47,601, another loss on the appeal of $47,618.

Protecting DeCourseys award on appeal was a specific point of the December 30, 2008 *Letter of Agreement*. Quoting that Agreement, "LANE POWELL PC agrees . . . and will assist you in your motion for attorneys fees and costs of the suit . . . LANE POWELL PC will also assist you regarding possible appeals with regard to the same as necessary to prevail in or retain the awards discussed." By refusing to appeal the COA decision to protect the awards, LP breached that agreement. LP can't both breach that Agreement and demand the DeCourseys be bound by it, especially in matters of interest, attorney fee rate, or, arguably, or being paid any further moneys at all.

Moreover, as will be further discussed, LP cannot expect to recover under that illegal and voidable amended fee agreement because LP coerced DeCourseys into signing it without advising them to obtain advice of counsel.

Let's look at this again from another viewpoint: In January 2011, Windermere submitted a petition for review to the Supreme Court. The DeCourseys instructed LP to cross-petition the $93,060 loss at the Court of Appeals and drafted some language and arguments to illustrate their intent. Email dated February 6, 2011. In summary, the DeCourseys argued that Windermere was deliberately gaming the system, forcing them to answer its diverse arguments on a broad range subjects on which it had little hope of prevailing, with the intent of vitiating the CPA award and consuming the damages award in legal fees and delaying the outcome. The DeCourseys argued it was an abuse of the courts and an assault on the CPA.[1]

[1] Windermere was aware of the DeCourseys' limited war-chest, revealed by Atty. McNeill when she told Nourse in 2008 that they should just settle because "everyone knows DeCourseys don't have the money to go to trial." Declaration of B. Nourse dated January 9, 2009 at p4, CP 1237. Windermere's application of this knowledge is revealed by the history of the case: The Superior Court docket contains almost 450 entries comprising Windermere's numerous summary judgment motions, motions for reconsideration

The CPA, RCW 19.86.090, provides an award for "costs of the suit, including reasonable attorney's fees," not just the fees associated with the segregated CPA arguments, and not just the severely abbreviated "costs" enumerated in RCW 4.84.010. According to *Sign-O-Lite Signs v. DeLaurenti Florists,* 64. Wash. App. 553, 825 P.2d 714 (1992), the CPA award of attorney fees is "aimed at helping the victim file the suit and ultimately serves to protect the public from further violations." Again, the DeCourseys wanted to argue that the cramped interpretation penalized them $47,618 in fees (at the Court of Appeals) and another $45,442 (at trial level), and is contrary to the legislative purpose of the CPA. Also, courts must apply the CPA as written, and the statute provides for the costs of the *suit*, including reasonable attorney's fees, not just the costs of the CPA claim including attorney fees applicable only to the CPA claim. *See, e.g., Edmonds v. John L. Scott Real Estate*, 87 Wash. App. 834, 850 (1997)(While the CPA is to be liberally construed, courts must apply the CPA as written and are limited to a single award of exemplary damages where multiple violations of the CPA result in but a single injury).

In the DeCourseys' case, a literal interpretation of the scope of the attorney's fee provision in the CPA is "the suit," not just the claim. Certainly, the non-CPA claims arose out of the same facts giving rise to the CPA claims, and six out of the seven issues on appeal cited by Windermere were integral to the CPA claim. The same Windermere conduct related to the CPA claim and the tort claims that were component to the CPA. In other issues, Windermere disputed the CPA award from various angles. Accordingly, the claims and claim facts were essentially non-segregable from the CPA, and therefore, the DeCourseys had an argument that the fee award should extend to the entire suit (as written in the statute). In the DeCourseys' case, most of the issues arose from the same set of facts related to the CPA claim.

The DeCourseys submit that their proposed argument was exactly on point. *Edmonds v. John L. Scott Real Estate, Inc.*, 87 Wn. App. 834, 850 (1997). Here was a large corporation gaming the system, using the segregation of attorney fees to consume the award, reversing the intention of the legislature. And the risk was by that time negligible – the trial and appeals court had already upheld the verdict *twice in each court* (trial, JNOV, appeal, reconsideration of decision).

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and modification of rulings, trial with no evidence or experts presented by Windermere, motion for JNOV, appeal to the Court of Appeals, motion for reconsideration to the CofA decision, dispute of the costs bill, petition to the Supreme Court, dispute of the costs bill, and motion for modification of the costs. In between, numerous refusals to cooperate in discovery, low-ball offers of settlement, and insincere mediation. The tale is told in the *Plaintiff's Motion in Support of an Award of Attorneys' Fees and Costs* dated January 9, 2009 and in the *Respondents' Response to Petitioner's Motion to Modify Clerk's Ruling re Attorney Fees* dated July 15, 2011. That this is Windermere's established strategy for dealing with injured customers is told in the *Brief of Amicus Curiae* dated March 31, 2011 and the published policy of Demco Law, Windermere's pocket law firm.

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LP refused to use the arguments (email dated 2/14/2011), arguing to the DeCourseys that "[o]nly the legislature" can change the law. That is, LP attempted to misinform the DeCourseys about the power of the courts to shape law through precedent. LP also alleged that a cross-petition would increase the chances that the Court would accept the review, and thereby increase the risk of reversal.

Despite the LP arguments, the DeCourseys insisted on the additional argument, saying that it was a good faith interpretation of existing law (harking to CR 11) and a long email controversy ensued for which LP charged the DeCourseys by the hour. During the exchange, LP treated the DeCourseys like Ma and Pa Kettle, telling them that the fee award was according to "the law" and they would have to go to the legislature to change "the law."[2]

On or about February 15 or 16, Grant Degginger, Ryan McBride, and Andrew Gable called the DeCourseys. The DeCourseys' write-up of that conversation can be found in their email dated February 17, 2011, 8:59 AM. LP responded about an hour and a half later, disputing their account and the DeCourseys responded.

As a compromise, the DeCourseys suggested making the cross-appeal contingent upon the Court accepting Windermere's petition. Email dated February 23, 2011 at 2:58 p.m. LP still refused, saying that their argument was not in keeping with current law. Email dated February 24, 2011 at 9:12 p.m.

The DeCourseys asked whether LP would withdraw if they insisted that the firm follow their directions, email dated February 23, 2011; on February 24, 2011 at 9:12 am, LP answered by email: "We do not wish to withdraw."

On February 25, the email exchange continued. And throughout this exchange, LP made no announcement that LP would withdraw if the DeCourseys did not follow their directions. Email dated February 25, 2011.

On the morning of the filing deadline (Feb. 28, 2011), the DeCourseys sent an email directing LP to comply with their request. Email dated February 28, 2011 at 7:08am. The parties spoke on the phone. The DeCourseys asked LP to request an extension from the court so that they could get a second legal opinion on their cross-petition. LP said no. LP said that if the DeCourseys did

[2] "The legislature allowed successful plaintiffs to recover fees for their CPA claims, but not other claims. The only way to change that is to change the law. Only the legislature can do that. For that reason, a declaration from me would be procedurally improper and it wouldn't make a difference anyway. I'd be happy to help you figure out who in the legislature could consider the issue." – Email dated February 14, 2011 at 1:04 PM.

not permit them to file the answer that day as it was written without the cross-appeal argument, LP would withdraw from the case.

The DeCourseys were left with no choice. Unwilling to risk finding competent representation for the Supreme Court appeal within the time available, the DeCourseys relented and permitted LP to file the answer to the petition as it was written.

On February 28, 2011 at 1:07 pm, the DeCourseys sent LP an email memorializing the phone conversation that morning. Emails dated February 28, 2011 and March 1, 2011.

When the DeCourseys received the next invoice, they found that LP had been billing for the time LP spent refusing to follow the DeCourseys' legitimate instructions and arguing with them about it. For example, not only did LP bill for the February 28 conference call, but also **billed for a non-existent conference call** on March 1. LP Invoice dated March 1, 2011.

The DeCourseys consider LP's refusal to follow their instructions a violation of the amended fee agreement, the *Letter of Agreement* of December 30, 2008 where LP promised to protect their award. It is also a violation of RPC 1.2, "A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to sections (c), (d), and (e), ..."

LP couched its refusal to follow the DeCourseys' direction in the language of clause RPC 1.2(e):

> The purpose of the [February 16] call was to discuss our concern with the additional three pages of arguments that you [Ms. DeCoursey] and/or Mark [Mr. DeCoursey] had written and which you wanted us to include in the brief in opposition to review that [LP] had prepared. At the beginning of the call, I explained that there were three reasons why we could not include them: First, we concluded that the arguments were not supported by the statutes and case law. Second, we do not believe that we could argue that they represented a reasonable extension of existing law. (Email dated February 17, 2011 at 10:49 a.m.)

However, more recent events run contrary to LP's position. The Supreme Court ordered Windermere to pay the DeCourseys' attorney fees for answering the petition without specifying that the CPA arguments must be segregated from the others. LP submitted a bill for $17,818.46 in unsegregated fees and Windermere objected. The Court commissioner awarded the unsegregated hours, but ruled that LP's rates were not "reasonable" and cut the award by a third to $11,979. Order entered May 25, 2011.

Then, Windermere asked the Court to modify the award. The Court set a hearing date of August 9th and invited the DeCourseys to respond. In the response, LP incorporated the bulk of the DeCourseys' arguments for unsegregated fees that the DeCourseys' had proposed for the cross-petition. *Respondents' Response to Petitioner's Motion to Modify Clerk's Ruling re Attorneys Fees* dated July 15, 2011. LP argued that Windermere was gaming the system, and therefore, the attorney fees expended on the CPA claim should not be segregated from the other issues.

Moreover, the Supreme Court denied Windermere's motion to segment the attorney fees for DeCourseys' work answering the petition.

If the DeCourseys' arguments about "costs of the suit" were inappropriate and not supported by law in one place, they could not be appropriate and lawful in the other. However, since the trial court and Court of Appeals did not award fees and costs for the "suit" as stated in the CPA statute, the argument should have been raised by LP earlier instead of waiting until after the cross-petition deadline.

Amount at issue: about $93,060.

**B. LP failed to object to Windermere's frivolous, scorched earth defense with CR 11 motions.**

*Plaintiff's Motion in Support of an Award of Attorneys' Fees and Costs*, dated January 9, 2009 to the trial court and *Respondents' Response to Petitioner's Motion to Modify Clerk's Ruling re Attorney's Fees* to the Supreme Court dated July 15, 2011 document Windermere's multiple abuses of the justice system, frivolous filings, bogus claims, and pointless arguments. These included arguments such as:

- Stickney is not an agent of Windermere;
- Windermere is not vicariously liable for Stickney's actions as a real estate agent;
- Stickney is a third party beneficiary of the purchase and sale agreement, exempting him from fiduciary duties; and
- DeCourseys' losses are covered by the Economic Loss Doctrine.

Windermere also attempted to conduct discovery into the DeCourseys' political and religious views and activities, as though they would lead to admissible evidence. Virtually every decision was the subject of a motion for reconsideration, a CR 56 action, a JNOV, or a motion to modify. Outrageously, despite transcripts, Windermere misrepresented witness statements to convince the Court of Appeals that some other testimony had occurred and misrepresented trial judge statements.

Though the legal fees soared through the trial and appeal, and though the DeCourseys pleaded with LP to complain, not once did LP move for CR 11 sanctions (or the RAP equivalent) to discourage Windermere's strategy. Instead, LP proceeded as if asserting frivolous arguments in a lawsuit was par for the course. It certainly enriched LP. The LP invoices total $702,931.46 before applying LP's $8,055 in discounts.

This approach is illustrated by a comment in 2008 by Dennis Strasser, corporate counsel for LP, when addressing the issue of Windermere's attorneys using this strategy: "They're just doing their job." LP even acknowledged Windermere's unanswered litigation tactics in the LP amended fee agreement. *Letter of Agreement* dated December 30, 2011 ("to ensure the administration of justice will not be impeded in the case by Windermere attempting to prevail by the muscle of the purse and to ensure 'equal justice under the law,' . . . .").

Amount at issue: to be calculated.

**C. LP failed to assert a claim for triple damages under the CPA.**

The CPA (RCW 19.86) provides for a triple damages award. At the time of trial in 2008, the cap on that award was $10,000. Though the DeCourseys were awarded $6,300 on the CPA cause of action, *see* Special Jury Verdict dated October 30, 2008, LP did not request triple damages on the award.

Amount at issue: $10,000.

**D. LP failed to advance the DeCourseys' CR 8(d) arguments at the summary judgment stage.**

In 2008 before trial, the case went through a spate of summary judgment hearings. At that time, Windermere's vest-pocket law firm, Demco Law, was arguing that Stickney was not an agent of Windermere and that Windermere had no liability. Demco was also arguing on behalf of Stickney that Stickney was not liable to the DeCourseys.

The DeCourseys filed cross-motions for summary judgment against Windermere and Stickney. During that part of the case, the DeCourseys had collated the various pleadings and answers, and discovered that Demco had failed to deny a number of their allegations in its pleadings. *See, e.g.* defendants' answer dated June 20, 2007 and email dated June 14, 2008. Civil Rule 8(d) states that any allegation not denied is admitted.

Demco Law failed to deny these allegations:

- that Stickney had an undisclosed conflict of interest;
- that Stickney breached the DeCourseys' fiduciary trust;
- that Stickney was liable for the damages suffered by DeCourseys;
- that Stickney's breaches had extended over multiple transactions and had public impact; and
- that Windermere was liable for Stickney's actions.

Months later, on October 30, 2008, the trial jury came to essentially the same verdict.

During the work on the MSJ, the DeCourseys listed these above points for LP, email dated June 14, 2008, and alerted them to the significance of CR 8(d). LP found a recent Washington precedent that enforced that rule on Summary Judgment:

> *Jansen v. Nu-West, Inc.*, 102 Wash.App. 432, 438, 6 P.3d 98 (2000) ("Failure to deny an averment in a counterclaim constitutes an admission. CR 8(d). ... [The] averment [contained in the counterclaim]...was therefore admitted at the time of the summary judgment. [The party opposing the application of CR 8(d)] offers no authority to support his contention that defenses to a counterclaim are preserved without filing a reply unless the court asks for one. And we can find none.").

Email dated June 14, 2008.

This issue was addressed with LP who agreed to include in the summary judgment pleadings, email dated June 14, 2008, but then left the argument out altogether. Even without the DeCourseys' prompting, LP should have asserted CR 8(d) admissions argument as a matter of basic summary judgment practice.

The cost of ignoring those arguments on summary judgment cannot be overstated. Given the text of CR 8(d) and the *Jansen* precedent, the DeCourseys' had excellent arguments to prevail on summary judgment in all the major elements of the eventual verdict without an expensive trial. The trial would have been avoided or narrowly tailored (e.g. amount of damages). In cases where the facts are established and only the damages are left at issue, the case usually terminates in a settlement. And any appeal would have been much abbreviated, given the precedent.

On August 3, 2011, LP filed a lien on DeCourseys' case for $384,881.66. The failure to assert the CR 8(d) arguments represent a preventable expense up to $350,905.66 in legal fees.[3]

**2. LP agreed to reduce the interest on the judgment from 12% to 3.49% without consulting the DeCourseys.**

LP downgraded the post-judgment interest rate from 12% to 3.49% without consulting the DeCourseys.

At the November 14, 2008 judgment hearing, Judge Fox stated that the post-judgment interest rate on the award would be 12% and it would start on that day. The clerk recorded the ruling and the on-line court records reflect that revised rate. The interest rate does not appear in the transcript of the hearing or the written judgment, or the amended judgment filed on December 29, 2008.

The hearing on the attorney fees and costs was held on February 6, 2009, and the final *Judgment* with damages, fees, costs, and interest was filed on February 27, 2009. In his declaration accompanying a later motion, Nourse tells of the original 12% rate, of sending an early draft of the *Judgment* to Demco, and of compromising the interest rate down to 3.49%. Nourse *Declaration* dated November 12,2009. The DeCourseys were not consulted on this change. But given the DeCourseys' agreement to pay LP 9% on unpaid fees and costs, they certainly should have been consulted.

Over the last three years since the verdict, the cost of the lowered interest rate (12% - 3.49% = 8.51%) is more than $232,717, considering only the awards that LP did not otherwise neglect or give away.

But the lower interest rate had even greater consequences than just the reduced award. With an interest penalty so close to zero, Windermere was encouraged to delay the case endlessly, as told in *Respondents' Response to Petitioner's Motion to Modify Clerk's Ruling re Attorney Fees* dated July 15, 2011 at 5-7. And with each action that Windermere was encouraged to undertake, the risk of reversal was increased.

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[3] In my recent phone call with Mr. Dwyer, he argued that the DeCourseys have no claim based on the fees and costs charged by LP because Windermere is paying. This argument is flawed. 1) Windermere is not paying all the fees and costs; 2) LP has charged the DeCourseys interest on the bloated fees and costs and therefore the DeCourseys have been damaged; 3) regardless of who is paying, LP placed a lien on the DeCoursey recovery and included all fees and costs invoiced -- the lien is a claim against the DeCourseys; 4) The DeCourseys have a bigger tax liability because the fee award is bigger.

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Subsequent to LP's unilateral agreement to lower the interest rate on the judgment from 12% to 3.49%, the DeCourseys discussed the interest rate issue with LP, and LP provided them with an appellate court precedent. But if LP knew about the precedent, LP should have told the DeCourseys before getting them to sign an agreement to pay LP 9% and not advising them about the discrepancy so they could plan to protect themselves by moving the Court to adjust the attorney fee award to cover LP's interest terms. Further, with respect to the LP amended fee service agreement (which will be discussed later in this letter), the DeCourseys should have been advised that LP carrying the amount purportedly owed was a losing proposition for the DeCourseys because the fees and costs owed would grow at a faster rate than any fee and cost award.

Moreover, not only did LP agree to a lower interest rate without consulting the DeCourseys, LP agreed to the *wrong* rate even if one follows *Woo*. Under *Woo* and following the interest rate statute as computed by the Washington State Treasurer,[4] the rate should have been 3.935% through to 6/10/10 and 5.25% after that date.[5] At the moment, the DeCourseys are incurring substantial legal fees attempting to correct LP's erroneous rate.

Amount at issue: if interest rate cannot be corrected and payout is Oct 31, 2011: at least $19,113.28 plus fees for Allied Law Group work, total not known at this time.

**3. LP provided wrong advice about the tax consequences involved.**

In 2008 before the trial, the DeCourseys asked Nourse about the tax consequences of winning the suit. Nourse told them that he did not think the award – and hence the attorney fees associated with the award – were taxable, but he would ask the "specialists" at LP. A few days later, he told the DeCourseys that neither the damages nor the fee award would be taxable because they were based in tort. A review of the LP bills indicate that no time was spent consulting with any tax experts. The advice turns out to be incorrect. According to the DeCourseys' accountant, the IRS will tax as much as $150,000 on a $500,000 fee award. Surely, even if the DeCourseys did not know to ask, LP should have advised the DeCourseys about the tax issues impacting such a large award.

If the DeCourseys had this information at the proper time, they would have sought for the fee award to be "grossed up," that is, for Windermere to pay both the award and the associated taxes so that the DeCourseys would not come up short on the damages.[6]

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[4] http://www.tre.wa.gov/resources/historicalJudgementRatesArchive.shtml

[5] RCW 4.56.111(2) computed by Washington State Treasurer
http://www.tre.wa.gov/resources/historicalJudgementRates.shtml

[6] Regarding the interest and tax issues, it is not just a question of a dollar out and a dollar in. It is a

Amount at issue: $150,000 to $200,000.

**4. LP failed to seek attorneys' fees and costs incurred.**

At each of the court levels -- Superior, Appeals, and Supreme, -- LP entered a costs bill. And each time, LP entered less than the actual amount, occasioning further losses to the DeCourseys.

**Superior Court:**

- In the declaration enumerating the costs and fees, Nourse *Declaration* dated January 9, 2009, LP failed to include the attorney fees incurred between November 11, 2008 and January 9, 2011, and LP failed to supplement relating to fees and costs after January 9, 2011 up to and including the hearing on February 6, 2009, totaling $21,062.50. Since the base amount of trial attorney fees[7] was increased "by a 30 percent multiplier" (Court of Appeals Opinion dated November 8, 2010 at 7), this loss through LP negligence is calculably $27,381.25.
- LP did not argue for any costs to Windermere in *Plaintiff's Motion in Support of an Award of Attorneys' Fees and Costs* dated January 9, 2009 or the Nourse *Declaration* dated January 9, 2009, and therefore, none of that $21,977.82 was recovered from Windermere.

**Court of Appeals:**

- **Collection costs:** In February and March 2009, prior to Windermere filing a supercedeas bond, LP expended $7,138 in February and $4,046 in March, totaling $11,184 in collection efforts against Stickney and Windermere. This cost should have been recoverable from Windermere by request to the Court of Appeals, but LP did not request it, neither in the responding brief dated October 9, 2009 nor in the Respondents' Application/Affidavit.
- **Appeal Briefs and arguments:** According to LP's invoices, the attorney fees and expenses for the appeal amounted to $97,187.50. However, LP calculated only from $95,219. Since the court awarded about 50% of this, the loss was about $1,000.

**Supreme Court:**

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question of a dollar out and the DeCourseys pay interest, and a dollar in and the DeCourseys pay taxes."

[7] The DeCourseys asked many times for the transcript of the February 6, 2009 costs and fees hearing, but LP has ignored their requests.

- By actual invoice (LP invoices dated 2/15/2011 and 3/15/2011), the DeCourseys incurred fees and costs of $28,195.25 answering Windermere's Petition, billing for costs, and answering Windermere's motion. LP decided not to claim for $5,555 and credited that amount back to DeCourseys and the court disallowed $2,645 in claims. Still, LP claimed only $17818.46 in Respondents' Affidavit of Fees and Expenses leaving a shortfall of about $2,176.79.
- **Supreme Court Motion to Modify**: LP billed the DeCourseys for $1,687.98 for this action (LP 7/15 Invoice), but asserted a claim for only $1,540.

Amount at issue: About $30,302.09.

**5. LP failed to collect Windermere's share of the mediation fee.**

Even in the little things, LP did not protect the DeCourseys' interests.

In June 2008, [redacted] and the DeCourseys agreed to mediate, but Windermere abstained. As expected, [redacted] and the DeCourseys split the $3,500 fee for a day of mediation.

On that day, Windermere arrived at the mediation office and participated (sort of), offering 1/20$^{th}$ of the DeCourseys' damages. Windermere escaped without paying a share of the fee.

A dozen times over the years, the DeCourseys have urged LP to raise the issue of Windermere's failure to pay $583.33, but LP never raised it and never demanded Windermere show good faith by paying its share of the mediation fees.

Amount at issue: $583.33.

**6. LP charged an unreasonable hourly billing rate.**

The Supreme Court ruled that Mr. McBride's hourly rate was not reasonable and reduced it by a third. *Clerk's Ruling Setting of Attorney Fees and Costs.* Also, Windermere objected to $17,818.46 in unsegregated fees. The Court commissioner awarded the unsegregated hours, but ruled that LP's rates were not "reasonable" and cut the award by almost a third to $11,979.

$440 per hour is almost double the rate to which the DeCourseys originally agreed when they signed on with LP in 2007. LP argued to the court (and to DeCourseys) that not only are they entitled to 9% interest on the unpaid balance, but also a 10-15% increase annually on the hourly rate of the attorneys.

Amount at issue: About $40,000.

**7. Grant Degginger billed time but did not add corresponding value.**

On October 20, the day before trial, Grant Degginger began billing to the DeCoursey case, though he added no visible value to the case (LP Invoice 12/5/2008, p5,6).

Nourse left the firm suddenly on November 19, 2009. He departed the firm without notice and without explanation to his clients, DeCourseys, strongly suggesting he was summarily fired without notice or forced into quitting. Nourse has told DeCourseys only that he has signed "a non-disparagement agreement."

Nourse's name continued on the invoices until February as the attorney of record, but because the case was in the hands of the appeals specialist (Ryan McBride), his absence had no effect on the case. Beginning in December 2009, Mr. Degginger accompanied each invoice with a line or two of a personally signed cover letter, as though he were now DeCourseys' attorney. Mr. Degginger's name has never appeared on the pleadings as an attorney of record, but he continued sending personal letters with the invoices – and billing to their account. Presumably, he did not bill for these letters – did he?

When it was in the Court of Appeals, the case was primarily handled by McBride, though he sent Mr. Degginger copies of all his email with the DeCourseys. McBride also requested that the DeCourseys send Mr. Degginger and Gabel CCs of all their emails too. Email dated June 16, 2011. The DeCourseys protested that Mr. Degginger's name never appeared on their pleadings, that he added no value to the case, and that the combined rates could not be justified (McBride at $440/hr., Degginger at $470/hr., and Gabel at $275/hr). McBride assured the DeCourseys that Mr. Degginger would stop billing to their case account. Email dated June 16, 2011. This poses a paradox: if Mr. Degginger's activities were billable, why would he stop billing for them? Or if Mr. Degginger's activities were not billable, why was he ever billing for them? What was Mr. Degginger's role in this case?

The invoices reveal that Mr. Degginger billed 8.3 hours to the case during the Court of Appeals phase, but the affidavit of fees and costs for the Court of Appeals states that only 5.4 hours were billed for Mr. Degginger. Why weren't all of Mr. Degginger's fees put before the court?

When LP submitted its costs bill to the Supreme Court, it emailed the DeCourseys that it could not bill Windermere for (primarily) Mr. Degginger's time and would recredit their account for $5,000. Email dated May 4, 2011. But the refund/credit did not appear on an invoice until August 17, 2011, when another attorney had been retained in place of Lane Powell.

Amount at issue: about $10,186.50.

**8. LP inefficiently handled the case.**

LP had a large amount of timekeepers working on the case given the relatively narrow substantive issues. As each new attorney started working on the case, they each incurred start-up time, repeated on the DeCourseys' bills, over and over. The LP fees and costs soared as it appears the timekeepers billed with a "heavy pencil." It is anticipated that LP will argue that to the extent that fees incurred were paid by Windermere, then the DeCourseys have not been damaged. This argument is flawed. First, Windermere was not charged with paying all of LP's bloated fees. Second, LP has charged, and continues to charge, interest on the entire inflated amount, and of course only a fraction of that interest is paid by Windermere.

The award from Windermere does not cover attorneys' fees and costs that LP failed to seek from Windermere. Though the Court of Appeals found McBride's $380 and $400/hr. rates reasonable, the Supreme Court did not find McBride's $440/hr. reasonable.

The court clerk wrote, "I find that the number of hours claimed for the various activities of Respondents' counsel to be slightly on the strong side as to some of the activities ... Also, given the given the nature of the litigation, the general quality of their pleadings, and the levels of professional experience of counsel, I have determined that the claimed hourly rate of $440 per hour to frankly be excessive." *Clerk's Ruling Setting of Attorney Fees and Expenses*, page 4.

From the clerk's ruling, it appears the clerk found that no more than $315/hr. was a reasonable rate for McBride. And Mr. Degginger's billings at $470/hr have never appeared on a fees and costs bill submitted to any court.

Mr. Degginger's name never appeared on the pleadings as an attorney of record, but Mr. Degginger did surface to sign the lien on the judgment when DeCourseys left the firm. This strongly suggests that Mr. Degginger was representing LP's interests in the case but charging his time to the DeCourseys.

Accordingly, the DeCourseys have definitely been damaged and have a solid basis for a CPA claim against LP.

Amount at issue: to be calculated.

**9. LP withheld information about an upcoming partial payout by Windermere.**

On Tuesday, August 2, 2011, the DeCourseys sent LP an email asking it not to begin work on the remand. Mr. McBride answered in a casual tone ("Also, Hickman called me Friday afternoon ...") that LP had been in telephone conversation(s) with Windermere's attorney Hickman on Friday (four days earlier) regarding a partial payout of the judgment.

When a lawsuit extends over five and a half years, the news that the losing opponents were negotiating to pay the judgment should be announced with fanfare and confetti – yet LP withheld the news for four calendar days and mentioned it only in passing in an email. In contrast, Brent Nourse once apologized for delaying news by a few hours within the same day.

This issue is yet another example of LP's self-dealing approach to this case. The DeCourseys' case was a milk-cow to LP, not a sacred trust in the palace of justice.

If LP had proceeded with this plan for leaving DeCourseys in the dark, it is likely its attorneys would have neglected to correct the interest rate, as discussed in §2, above. That issue was discovered only after DeCourseys engaged Allied Law. Had LP proceeded on the previously briefed 3.49%, DeCourseys' losses would have been sizeable.

Amount at issue: as much as $40,000.

**10. LP's amended fee agreement is illegal and exemplifies LP's self-interest dealings.**

In order for the DeCourseys to receive any payout from the initial settlement, LP required them to "agree" that "Lane Powell's fees were honestly derived, and were necessarily derived and were necessarily incurred in this litigation given our opponent's strategy." Now, how would they know that? They're not attorneys. They did not have the luxury of a forensic examination of the timekeeper computers or electronic versions of files to be able to match up the time working on documents with the billing entries, for example. They were not advised to obtain the opinion of an independent counsel. Arguably, all fees incurred under the amended fee agreement should be disgorged. This amended fee agreement is offensive and frankly, a violation of the RPCs. It is also a telling example of how LP looked out for itself over the needs of its client.

Amount at issue: all fees incurred since December 2008 (about $161,720).

**11. The DeCourseys request more information relating to the billed costs.**

The DeCourseys were charged for costs for computer research database time, reproductions, facsimile charges, and long distance telephone charges. Upon review of the LP invoices, it appears that some of these charges appear irregular. Please provide a copy of the invoices relating to these advances and if no invoices exist, the basis for the charges and how they were determined.

Also, it should be noted that LP's characterization/description of the costs on the invoices make it difficult for the DeCourseys to know whether the costs are or were (or should have been) recoverable costs from Windermere. Based on the lack of description of the costs, it appears that LP never intended to seek costs to the fullest extent allowed by law.

Amount at issue: $21,977.82.

**12. Lane Powell is holding the Windermere award hostage to its invoices.**

The DeCourseys are attempting to negotiate a payment of the final judgment with Windermere's underwriter, but Lane Powell is interposing stumbling blocks without reason. Mr. Degginger has informed Allied Law Group (the firm currently representing DeCourseys on the case), that he would not permit a payment of the judgment to go to Allied. LP's position is a clear violation of RPC 1.15A where, at the very least, the undisputed amount of the Windermere payment, the amount above LP's lien, should be released immediately. Each day that LP holds up the transfer, it is violating the RPCs. It suggests once again that LP's self-interest is swollen beyond acceptable size, exceeding the welfare of its clients.

**13. The DeCourseys request a copy of all documents from their file.**

So that the DeCourseys can be fully informed of the facts as they work with LP to resolve the parties' issues, the DeCourseys request a copy of all file documents which they have not previously received from LP. This request includes all internal and external LP communications (such as letters, emails, texts, instant messages) relating to the DeCourseys. *See also* Fee Agreement dated September 19, 2007 at 2 (Document retention: "a copy of your entire file").

Please instruct LP and the relevant timekeepers to preserve the following: 1) all computers and servers used in the handling of the DeCourseys' case; and 2) all documents (hard copy, electronic or otherwise) and other data, including drafts, metadata, emails, texts, instant messages and any other data of whatever nature and in whatever form relating to the DeCourseys.

The DeCourseys request the opportunity to discuss this matter with Brent Nourse, a former employee of LP. Mr. Nourse has said he cannot talk about the case because he signed a non-disparagement agreement with LP. While such a provision is probably unenforceable as to Mr. Nourse and the DeCourseys in this context, nevertheless, the DeCourseys request that LP release Mr. Nourse from any non-disparagement agreement to the extent that it enables Mr. Nourse to talk openly with the DeCourseys about this matter.

**14. This case was perhaps a win for LP – but not a win for the DeCourseys.**

LP will probably argue that it "won" the case -- as if that argument somehow justifies the conflicts of interest, billing irregularities, and bad advice. But Lane Powell is the only "winner" in this case. And that "win" means that DeCourseys will suffer a loss of hundreds of thousands of dollars.

**15. The DeCourseys have incurred fees and costs during this investigation.**

The DeCourseys also submit that part of their damages is the fees and costs they have had to incur, and will continue to incur, relating to the investigation of this matter, and the assertion of their claims. The DeCourseys expect LP to compensate them for these damages.

Finally, in the event that the foregoing issues cannot be resolved, the DeCourseys intend to file a lawsuit against LP alleging legal malpractice and CPA claims.[8] Additionally, in the event that LP's handling of the case and its charges (e.g. costs) are part of LP's procedure for all of its clients, I will recommend that the DeCourseys consider the pursuit of class action status as to some of their claims on behalf of some or all LP's former and present clients.

Sincerely,

Paul E. Fogarty

Cc: Stan Beck
Grant Degginger

[8] In the event an investigation or discovery confirms the DeCourseys' belief that personal liability is warranted, the DeCourseys will pursue those claims.