CHAPTER FIVE

AVOIDING FEE PROBLEMS WITH CLIENTS AND LAWYERS PROACTIVE TACTICS

December 2006

Michael R. Caryl

Michael R. Caryl, P.S.
18 W. Mercer St.
Suite 400
Seattle, WA 98119
(206) 378-4125
michaelc@michaelcaryl.com

MICHAEL CARYL graduated from St. Lawrence University *cum laude* (1969) and received his J.D. from Georgetown University in 1972. He has an LL.M. from George Washington University with Highest Honors (1977). Mr. Caryl served 4 years active duty as an Army J.A.G.C., including a stint in the Airborne at Fort Bragg, where he tried several hundred courts-martial, and later handled several hundred appeals before the Army appellate Court and the Court of Military Appeals in Washington, D.C.

Mr. Caryl specializes in fee dispute cases involving lawyers and clients. This practice developed out of his successful representation of Seattle attorney Fred Zeder and the Peterson Young Putra law firm. Zeder prevailed after a successful 5-day trial, an appeal to Division I and a petition to the Supreme Court. *Taylor v. Shigaki*, 84 Wn. App. 723 (1997), pet. den. 132 Wn.2d 1009 (1997) holds that a client cannot defeat a contingency fee agreement by terminating the lawyer who has substantially performed the contract.

In *Barrett v. Freise*, 119 Wn. App. 823, 82 P.3d 1179 (2003), Mr. Caryl prevailed in another contingency fee dispute under RCW 4.24.005 where the client fired the lawyer after obtaining settlement commitments of over $600,000, obtaining the lawyer his contingency fee despite claims of malpractice and that the contingency fee was unreasonable.

Services to lawyer clients include:

- Evaluation of fee issues in partnership split-ups; negotiation and representation
- Counseling terminated or successor lawyers in disputes over contingency fees
- Foreclosure of attorney's liens and collection of fees in hourly cases

- Defense of client lawsuits seeking disgorgement of attorney's fees based on claims of breach of fiduciary duty and challenges to the reasonableness of the fee under R.C.W. 4.24.005

- Expert testimony in fee disputes and in establishing the "reasonable attorney's fees" to be awarded on a "lodestar" basis in cases involving the Consumer Protection Act, employment discrimination and wage and hour statutes, and bad faith claims under *Olympic Steamship v. Centennial Ins*

- Representation in bar discipline matters involving fee issues

Services to non-lawyer clients include:

- Representation of clients concerned about excessive or unreasonable attorney's fees or improper billing practices

- Representation in contingency fee cases where the client has terminated the lawyer before substantial performance has taken place

- Defense of fee collection actions and foreclosure of attorney's liens

- Expert testimony on behalf of clients in fee disputes, reasonableness determinations, issues involving breach of fiduciary duty in the fee or other contexts

Mr. Caryl also serves as a paid mediator or arbitrator in fee dispute cases. He is a frequent lecturer at WSTLA, WSBA and private CLEs on tort, trial practice, ethics and fee dispute issues. This is his fourth presentation in the Annual WSBA Law of Lawyering Seminar.

Mr. Caryl practices in lower Queen Anne in Seattle. His website dedicated to attorney's fees and ethics issues is ***www.michaelcaryl.com*** ***and he can be reached at michaelc@michaelcaryl.com.***

TABLE OF CONTENTS

CHAPTER FIVE

AVOIDING FEE PROBLEMS WITH CLIENTS AND LAWYERS: PROACTIVE TACTICS IN CLIENT/CASE SELECTION AND CLIENT MANAGEMENT

I. INTRODUCTION

It has been almost 12 years since I first waded into the arcana of attorney's fees and ethics in the attorney-client relationship. As a complete neophyte in the field, I came to realize that there were many things involving attorney's fees and ethics that we experienced practitioners knew nothing about and rarely even thought about. Both well-meaning lawyers, merely ignorant of the rules, as well as careless lawyers, who see ethics as something to maneuver around, get into trouble with clients, the courts and the Bar. Success in my very first fee dispute case brought with it the opportunity to make CLE presentations like this one, as well as other fee dispute cases. This presentation marks

about the 15th one I have given on these subjects over the years. Many of my presentations have dealt with the subject of getting your contingent fee, or successfully suing a client for fees, and often had catchy titles like "Fear of Feeing" and "Getting Paid without Getting Sued." Obviously, starting out, I knew only enough to be dangerous, so in both the preparation of my CLE materials and in my growing fee practice, I was forced to become a serious student of this material. In seminars and in litigation, I rubbed elbows with expert witness / academics like my friend Prof. John Strait of Seattle U. Law School and other practitioners who really know a lot about this area. Over time, I too became knowledgeable in the area, as my fee practice grew.

What has struck me the most is that many of the problems lawyers get into in the attorney's fee arena are preventable with prior planning, forethought and the exercise of simple judgment. In recent years, I have dedicated some of my presentations to proactive tactics when problems with clients arise. Last year, I discussed "fostering good client relations," "dealing with red flags" and "when to get out." I tried a two-plus week trial in Superior Court earlier this year where I sued my lawyer-client's ex-client for fees. The ex-client countersued for legal malpractice, breach of fiduciary and all of the typical client defenses to fees, as well as a few new ones. The case was long, nasty, expensive, and to a large extent successful; it is now up on appeal.

While I was on Federal jury duty late last summer, I had some time to think about what I would address this year, and it occurred to me that most important lessons from this recent trial and many others over the last 10 years came down to poor client selection, poor fee arrangement discussions, written agreements or no agreement, and poor case selection. Both good and bad lawyers get into fee disputes with clients. Most of my lawyer-clients in fee disputes are very good lawyers. What is worse than working for an ungrateful client and not getting paid? The simple answer is getting embroiled in nasty expensive and uncertain fee litigation with that client and have that become yet another albatross tied around your neck while you are trying to make a living practicing law. Newer lawyers lack experience in these important subjects and in large part, this presentation is for them. Nonetheless, most of the fee disputes I get involved in, as counsel, involve experienced lawyers, not rookies. This may be because newer lawyers are often handling smaller dollar cases, although I am presently representing a young lawyer in a case over 7 figures in fees at stake. I hope that some of the common sense suggestions contained in this paper will be of value to the Bar at large.

II. SMART CLIENT SELECTION: SPOTTING THE PROBLEM CLIENT AND ACTING ON IT

A. Who Needs Problem Clients?

Search your memory and call up your worst nightmare client. If you are too inexperienced to have had such a client, read the case of *Taylor v. Shigaki,* 84 Wn App 723, to see what poor Fred Zeder put up with before he was fired. Then, imagine a client who won't pay your fees, is nasty and critical, harasses you on a weekly, if not daily basis, and causes no end of trouble with your staff. Finally, imagine spending 24 months

litigating over your unpaid fees and every one of that client's gripes. Undoubtedly, this scenario has the makings of a Steven King movie for lawyers.

B. Earmarks of the Problem Client.

1. Client Personality

These client personality traits tend to be associated with problem-clients:

- Victim mentality
- Zealot personality
- Absolute certainty of his/her version – client's truth is the only truth
- Very excitable and demonstrative at initial intake interview
- Tends to demonize the opponent. (You might become the next demon)
- The issue, as claimed by the client, is the principle of the thing, not the money.

2. Fee Arrangements

These situations often characterize problem-clients:

- Clients who aggressively seek to renegotiate fee arrangements
- Clients who really don't want to sign written fee agreements (their mantra is "Can't we trust each other?")
- Clients who want their fees covered by another person or the opponent, or one who has a pre-paid legal insurance program covering limited fees.
- Clients who challenge the manner in which you will charge them, e.g. hourly, monthly billings, interest on unpaid balances, etc.
- Clients who insist on re-writing your standard fee agreement or engagement letter.

3. Red Flag Types of Cases

The following types of cases are heavily associated with client dissatisfaction with their lawyers and, ultimately, fee disputes:

- Boundary litigation
- Harassment/nuisance
- Slander/defamation
- Cases involving severe personality clashes between the putative parties to litigation (e.g. neighbors in boundary litigation, or harassment by a co-worker.
- Collection actions involving complicated facts
- Any case where the case rides largely or totally on the credibility of the client.

4. Damages and Collectibility

Clients often come to us and ask us to take a case where there is no front-end ability to assess damages. If all else with the case seems okay, taking the case on an hourly basis to explore the issue of damages can be fine. But when the client insists on contingency fee arrangements, where there is no way to predict an award of damages, taking that case on a contingency fee basis risks a rather serious self-inflicted wound. The client's vociferous assurances that her damages are huge and provable are just another red flag of a case to avoid. The client has already told you that she believes her case is worth big bucks. Even if you handle it, hourly, when you get to a trial or mediation result where the end result is not much more than your fees, then you will learn about problem-clients, big time! If you take the case on a contingency fee basis and the ultimate damages or settlement is small, then you are working for a fraction of your overhead. It is best not to learn from hindsight that the case was a loser on fees. If the predictable end result is modest, then the client needs to learn this, at the outset of the attorney-client relationship, and this must be discussed in terms of the estimated fees to get that result.

Collectibility is another issue. Bringing a claim that is fully insured is one thing. If the defendant is Paul Allen, personally, there's no problem. But in most cases, Paul Allen or George Soros are not the defendants. Taking a case like that should be premised on a pre-filing asset check and even if there are a lot of assets pre-filing, what assurances do you have that they will be there as you close in on a judgment?

5. Your Gut Feelings

All of us, 50-year practitioners and newbies, who just passed the bar, have gut feelings about clients because we are all people. As I get older, I go with my gut more and more. Your intuition, vibes and feelings about a client are critically important in the determination of whether to take him or her on as your client. The lawyer-client in my trial, earlier this year, has said, repeatedly, that he had bad vibes about these clients from the start, but that he ignored those feelings. And he is a fine and experienced lawyer.

Learn to recognize and honor these gut feelings or vibes. If you have an uncertain, but bad feeling about a particular potential client, just let him or her go – let him or her become someone else's problem-client.

6. Never Take a Paying Client out of Altruism

We all want to help – particularly lawyers. That is our job, to help people with legal problems. If you want to help someone *pro bono*, even if the odds are long, go for it! But never take a client whom you expect to be a paying client simply because you want to help him or her, despite all of the other problems. Never! This is the very worst reason to take a client's case where some of the warning signs discussed above exist. Angry, vindictive, victim-mentality type clients are undoubtedly beyond your help.

People with unrealistic expectations cannot be helped because the strong probability is that their expectations will never be met. You cannot help them because they won't help themselves. Taking on their impossible tasks will only make you one of the demons in the end.

C. What if You Take this Client Anyway?

Let's say you ignore many of the warning signs above and take one of these clients anyway. What can you expect?

- The client who tells you what to do and when to do it.
- The client who harasses your staff.
- The client who calls you at the office all the time, who calls you on your cell phone and who drops in routinely and unannounced.
- The client who sends frequent emotional emails.
- The client who acts out emotionally when he/she does not get their way.
- The client who delays payments, challenges hours, seeks discounts on bills, objects to interest charges after not paying your bills, and criticizes your work product, often as a ruse to induce fee reductions.
- The client whose personality and tactics interfere with your overall practice, your peace of mind and intrudes on your personal life.

This client, in all likelihood, will bring you to a point where you have no choice but to choose between firing the client and maybe not getting paid, or staying in for continued suffering, only to be chiseled on fees in the end, threatened with bar complaints and malpractice. If you do stay in, like my recent lawyer-client who went to trial, be prepared to sue for unpaid fees, defend malpractice allegations and accusations of fiduciary duty breaches. When it comes down to this, that's when the real nightmares begin.

Not all clients who demonstrate some of the warning signs above are narcistic psychos, but many are angry, vindictive, irrational, unreasonable and wholly incapable of objectivity. They seek to hire you as their gladiator to abuse, punish and crush their antagonist – and you can stay in the good graces of such a client only as long as you fulfill that person's needs.

D. Just Say No!

To take a phrase from the Nancy Reagan playbook, "Just Say No." It might not work with peer-induced drug use and teen sex, but it can work in this area. In less than an hour, you can usually identify the problem-client if you are really motivated. Then in ten minutes or less, you can politely move that client down the road. Just do it! If you don't, you will wish you did when the client is not paying your bills, chiseling on your hours, telling you how to handle her case, while at the same time making your life miserable.

E. Client Screening is Essential to a Healthy Practice and Peace of Mind

Every lawyer should prepare his or her own checklist of red flags for clients and their potential cases, beginning with my list, which is certainly not all-inclusive. Score your potential client against the checklist. If the score seems too high in red flags, politely decline the case. Even if you are unsure, go with your gut. If your practice is busy, it's a no-brainer. If you are building your practice, try to weigh the cost of fighting with this client to get paid as you go along, and the ultimate cost of later litigating with the client in dollars and in suffering. If you look at it this way, the choice is simple.

Attached as an Appendix is a sample Client Screening and Intake Checklist that might be of use to you in making the hard decision to take or reject cases and clients.

III. SMART FEE ARRANGEMENT PRACTICES

These materials offer common sense advice on how to get paid using a positive, cooperative attitude toward your client, based on some 29 years of experience managing to get paid in cases with client problems or vice-versa. Included are suggestions on how to put your best foot forward in court or arbitration with a client. In this client-friendly environment, a positive strategy can help you retain your fee.

A. Discuss Fees and Billing Practices Up Front

Every client matter, other than a simple one-time consultation, should begin with a written fee agreement or engagement letter. It is too late in the day for lawyers to shrug off this responsibility because it is too burdensome. Clients can take advantage of a lawyer just as lawyers can take advantage of a client. At the outset, the lawyer should discuss precisely how he or she will bill the client, providing details, and, if necessary, giving the client a hand-out that discusses billing practices. The lawyer should never let any client put him or her in the position, months later, of disputing what the billing arrangements are. The only time the lawyer and the client have a close to arms-length relationship is at the time of the initial intake meeting. Once the matter is undertaken, fiduciary duties arise and the client's best interests come first. Lawyers will often be found to have breached fiduciary duties when they try to negotiate fee disputes and misunderstandings with the client late in the engagement.

B. Fee Arrangements – Always in Writing, and Contemporaneously!

There are two rules of fee agreements that in my view are absolute. First, the fee arrangement must be in writing; second, the fee agreement must be more or less contemporaneous with the beginning of the engagement and must track the oral discussion. Remember, the client who does not want a written agreement is a client to avoid. He/she has an agenda, down the road, that you want no part of. One of my old law partners had a rule that goes like this: "My feet don't come off the desk until the fee agreement is signed." One of my recent fee dispute clients, with well over 40 years in practice, prided himself on never having had a written fee agreement. One of the issues

litigated in his fee dispute case was whether he agreed to take the case *pro bono*. Enough said!

Rule II above has its basis in the law of the lawyer's fiduciary duty. At the intake interview, the lawyer-client relationship is as close as it ever will be to arms-length. Once the relationship arises and the lawyer agrees to take the case, the lawyer's fiduciary duties to the client, under the Rules of Professional Conduct, also arise. One of those duties is the duty of highest loyalty and fidelity. This has been interpreted to mean that the lawyer must put the client's financial interest ahead of the lawyer's. This duty extends to the matter of renegotiating fee arrangements with the client. In *Ward v. Richards and Rossano*, 51 Wn. App. 423, 754 P.2d 120 (1988), the lawyers did not get away with the modification of a fee agreement after the case was settled. Plaintiff Ward retained counsel on a 40% contingency fee basis in a medical malpractice case where she had suffered a stroke, allegedly induced by oral contraceptives prescribed by her doctor. An outside attorney was associated and there was evidence, denied by the plaintiff, that the contingency fee was increased to 50% when the outside attorney joined in the case. The lawyers obviously did a good job, obtaining a $1.1 million jury verdict in 1979. Defendants appealed. The lawyers questioned whether the contingency fee covered an appeal. Before the notice of appeal was filed, the client agreed, reluctantly, to 40% fee if there was no appeal and 50% if there was an appeal. Of course, the case was appealed and ultimately the verdict was upheld. Client Ward sued the lawyers for a refund of the 10% additional fee, which amounted to about $124,000. As to the fee modification, the Court concluded that the new fee agreement was improper, but ultimately ruled that the settlement agreement was an accord and satisfaction.

I think that the lawyers in *Ward* were lucky to get off as they did. Today, given the judicial climate favoring clients and the worsening place of lawyers in the public estimation, a competent attorney, representing the client, could make a credible argument for partial forfeiture of the fee for breaching fiduciary duties. In my opinion, *Ward* would be decided differently today and in my further humble opinion, seeking to modify a fee agreement with a client after the original agreement has been executed is risky business indeed.

A few years later, in *Perez. v. Pappas*, 98 Wn.2d 835, 659 P.2d 475 (1983), the issue of modification of fee arrangements, after the inception of the attorney-client relationship, again came up. After obtaining a structured settlement, the lawyer renegotiated his fee arrangement to obtain a $350,000 cash fee, instead of a fraction of the stream of payments. The Supreme Court held that the renegotiation of the fee, without full disclosure to the clients and without providing a proper accounting, constituted a breach of fiduciary duty. In yet a more recent case, *Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3rd 878 (2002), Division I held that a criminal lawyer changing from an hourly fee to a flat fee, after the fiduciary obligation arose, was a breach and forfeited all of the lawyer's fees. The lawyer was ultimately disbarred for his conduct.

In the fee dispute case I tried to judgment last summer, my lawyer-client presented his client with a written fee agreement many months after the intake interview

took place and fees were orally agreed to. The first trial judge determined that the later written fee agreement violated fiduciary duties and she dismissed our claim based on the written fee agreement. At trial to a second judge, the Court determined that the substantive terms of the oral agreement were identical to those of the written agreement, but refused to reinstate the written agreement. Despite largely prevailing in the fee dispute, my lawyer-client lost his attorney's fees for this fee dispute (per the prevailing party attorney's fee clause contained in the written agreement) and the matter is now on appeal. There is no legitimate reason not to get a written fee agreement signed at or shortly after the intake interview.

C. Fee Arrangements – All Terms Must be Contained in the Writing

Every term you want to enforce with the client must be in the written fee agreement. Duh! Interest on unpaid balances? If you want it, include it; don't rely on RCW 19.52.010. I have a fee dispute going now where an enormous amount of the end result consists of interest. We have successfully litigated the hourly rate, the entitlement to interest and the fees previously awarded to the original client, on a lodestar basis, are now binding on this client. The former client is now challenging how payments are to be applied for purposes of interest, and whether they are applied to accrued interest or to the oldest billings of principal, which will make a real dollar difference. If you want it in the agreement, spell it out. This means who owns the file, whether there is an entitlement to prevailing party attorney's fees in any fee dispute, and any anything else that is important to you.

IV. SMART, PROACTIVE CLIENT PRACTICES DURING THE RELATIONSHIP

A. Be Proactive with Your Clients – Communicate, Communicate, Communicate.

Many attorney-client disputes and disciplinary actions arise not over performance or non-performance but rather over lack of communication. Clients usually get angry, not because that deposition or motion didn't go well, but usually because you did not meet an expectation borne of your failure to communicate or to do so effectively.. All too common lawyer-communication errors include:

- You didn't promptly return calls
- The client assumed certain things that a simple call would have set straight
- You made a decision, but did not advise the client
- You got the client into an event, but didn't adequately prepare the client; *e.g.* depositions, defense medical exams, or even mediation
- The client is getting summary billings, but has no idea what is going on in the case
- You get into a tiff because you had expectations that the client would perform

some homework without adequately making that clear to the client
- You fail to meet a time commitment

Clients have expectations about the legal process, whether you discuss those processes with them or not. For example, if you didn't clearly explain how the client is responsible for costs and you did not bill the client for costs as you went along, when you finally get around to billing him for substantial costs, that surprise can turn into resentment.

Bring every client up to date, periodically on his or her case, whether hourly or contingency; do some basic handholding. Make your client happy that he or she hired you. Build the human bridge between the two of you. Make a practice of connecting with every client, periodically, if not monthly.

B. Beware of the Red Flags; Deal with Client Unhappiness Professionally and with Understanding

Not all problem-clients terminate their lawyers, or sue for disgorgement of fees, but the client who does is likely to send early signals of unhappiness. What are some common examples of these red flags?

- Complaints in emails or voicemails
- Unhappy comments when bills are paid are a red flag, along with excuses when bills are not paid
- Nickel-diming over small amounts in billings
- When the client raises questions about your choices or judgments, it is a clear sign of a greater dissatisfaction; telling you that he has heard that "other lawyers do it differently" is another indication.
- Non-payment of hourly billings, or promises to pay later
- Making unreasonable demands in terms of time or demonstrating unreasonable expectations in terms of results

Don't fail to respond to client's complaints. In a recent case of mine, my lawyer-client's client made frequent complaints about timeliness and my client did not respond as quickly as his client wanted and did not document his responses well. The client used those written complaints as evidence of poor lawyering in the fee dispute. In another case, my lawyer-clients responded to each and every such complaint, as they came in; and as a result, the complaints did not become critical evidence later in the case against the lawyer.

These red flags frequently predate a termination or fee dispute. Acknowledging the grievances expressed by a problem-client with professional concern can civilize the ordeal and even preempt a termination or dispute. Specifically addressing the client's legitimate concerns and making clear when there is no real concern at all, from your standpoint, in other than an "I told you so" manner may defuse some client unhappiness and keep a client on an even keel.

C. Appropriate Communications Only

As lawyers, we engage in wishful thinking if we maintain that fee disputes only happen to other lawyers, not to us. The fee dispute will find virtually every one of us who works for fees. I have a fee dispute client now who just received from the Bar his 50-year service honor. He maintains that he never had a fee dispute before. He has a donnybrook of one, complete with nasty accusations and costly legal skirmishing. Before this happens, you have the opportunity to create documents that reflect well on your character and the value of your services to every client. Your client's first expression of doubt about your tactics or judgment is a red flag that calls for a clear, polite, communication expressing your position. I urge the use of written communications that delineate advice in a polite and professional tone to foreclose suggestions of inappropriate behavior in a later dispute. You have a vested interest in exhibiting your professionalism if the client's questioning continues.

I am amazed at how freely lawyers send "nastigrams" and stern or threatening letters to clients upon receipt of client accusations or criticisms. A nasty email or letter responding to verbal accusations will reflect poorly on you a year later when stripped of its context and the strong feelings that may have engendered it. A series of the same "nastigrams" will paint you in a negative light such that the decision-maker might automatically prejudge the case against you. The wise lawyer drafts every communication with the assumption that it will be an exhibit in a later fee dispute. Your client's next lawyer may use any phone call, letter, memo or meeting as an exhibit or subject of testimony for challenging your entitlement to a fee. I was recently an expert witness in a case where the new lawyer took a strongly worded letter by the former lawyer insisting that the client pay a costs retainer as trial approaches as a form of blackmail to compel the client to settle.

Deprive your disgruntled client of the centerpiece of his case against you; set aside the client's angry missive for a few days. Think about the content of your email before you hit the "send" key and think about the defensive letter from the stand point of the judge hearing your fee dispute case.

D. Just Getting Out

When I get a new fee dispute client, whether lay client or lawyer, I tell them I am expensive and that this will likely be an unpleasant and pricey exercise. Hourly litigation over fees you have not even been paid, or worse, over fees that have been paid, but are potentially subject to disgorgement, should be every lawyer's worst nightmare.

Many lawyers are loath to drop a client, even if the client's conduct or attitude spells trouble. Contingency fee lawyers will forfeit their time if they fire the client. Hourly lawyers are reluctant to turn away a paying client, especially when trying to build a client base. Some feel that firing clients may hurt their reputation or reduce their chances for

future referrals.

To me, a bad attorney-client relationship, like a bad marriage, is something to bring to an end. Taking control and terminating a client relationship that has gone awry will save you unpleasantness, regret, and real money in the end. Withdrawal is cheaper and easier than dealing with bar complaints, fee disputes and malpractice allegations of a problem-client gone worse. A toxic client can assault your dignity, distract you from your other clients, and deplete your work of pride and pleasure. Exorcising these clients can be worth losing a fee. Terminating your client will not always be such a great sacrifice. Less is lost when you pull out early while your investment is still minimal. Learning to read the telltale signs of a problem-client will also help you trust your instincts to walk away early. Often the only sensible thing is to just get out. Period.

V. SENSIBLE TACTICS WHEN YOU ARE FIRED

A. Generally.

I covered the situation when you are fired in a contingency fee case in this program two years ago and in other programs. See Caryl, WSBA Law of Lawyering, 2004, "Protecting and Defending Your Fees: Strategies for Preventing Premature Termination and Getting Paid when Termination is Unavoidable," pp. 2 – 8 through 2 – 11; Caryl, WSTLA Annual Ethics in Trial Practice, December 1998, Zen and the Art of Getting Fired, While Getting Paid. When you are terminated on any other fee basis, there are some sensible steps to take to avoid worsening a potentially, bad situation.

The situation of termination is rife for serious complications, including fee disputes, bar complaints, and potential malpractice claims. At best, you are faced with dealing with unfounded accusations against your reputation and integrity. How you react to the prospect of termination will have a large impact on how well you come out of this. The client is *always* right in firing you. The client can fire her lawyer at any time, for any reason, even a bad reason. A client has an unmitigated right to fire his attorney at any time "either for good or fancied cause, . . . or wantonly and without cause whatever." *Kimball v. P.U.D.*, 64 Wn.2d 252, 257, 391 P.2d 205 (1964). "It is well-established in the case of a client that he may at any time for any reason which seems satisfactory to him, however arbitrary, discharge his attorney." *Wright v. Johanson*, 135 Wash. 696, 236 Pac. 807 (1925). This is not the time to counterattack the client.

B. Cooperation and Polite Communication

If the client has fired you, be as cooperative as possible. To the extent that you have not been fully paid, make a decision as to whether to file an attorney's lien. If you do decide to lien the client's potential recovery, inform the client of your right to file an attorney's lien and tell the client that you will be doing so. Do this in a non-threatening manner and inform the client that you will cooperate with him or her in every possible manner, cooperate with his new attorney, and do nothing to jeopardize the further pursuit of his claim.

C. The Client's Demand for the File

Read WSBA Formal Opinion #181 and learn about the client's rights with respect to the file. You do have a possessory lien over the file but Opinion #181 has largely emasculated that right because you cannot exercise the possessory lien in a manner that would harm the client. If your fee agreement does not accord you ownership of the file, you can only make a copy of the file at your own expense. Withholding a file that you do not have a right to withhold will be Count One in the client's claim for breach of fiduciary duty or bar complaint. Impress your client's new lawyer with your cooperativeness and you may elicit her support when the client wants to attack you later.

D. Try to Resolve Fee Issues Informally, and Right Away

I suggest a face-to-face meeting with your client as soon as he raises any questions about your fees. Listening to your client and expressing concern for his views might mollify any hostility. Plain talk can often iron out misunderstandings. An early meeting can also set the stage for an amicable compromise, where you reduce your fee in exchange for prompt and certain payment. An attorney's lien will secure nothing if the successor does not deliver a decent settlement or judgment while an amicable settlement may be optimal. The good will you have with your client can be preserved while locking out additional costs or risks. The high price of litigation doesn't just buy you a chance to recover some of your fees; it often results in a client with hard feelings who might file a bar complaint against you or bad-mouth you to other clients and business referral sources.

E. Engage and Cultivate the New Lawyer

The sensible lawyer, upon being fired, builds a bridge with the new lawyer, if possible, and irons out an acceptable settlement on fees before anything else is done. It might involve a steep discount for cash; or even involve an agreement to accept so many dollars in fees when recovery occurs, secured either by a lien or a partial assignment of proceeds. It might even mean sharing a contingency fee on a percentage basis (e.g. one-third of the fee to the original lawyer). Certainty beats litigating almost every time.

F. Remembering Our Fiduciary Obligations

Because of the fiduciary aspects of the attorney-client relationship, collecting attorneys' fees from a client is unlike any other collection activity. The fiduciary duty is, by and large, a one-way street. The attorney must respect and observe all aspects of his fiduciary relationship while the client seeks to eliminate any fee entitlement. The lawyer's single greatest temptation is to engage in the same tactics as the soon-to-be-ex-client, and in so doing, risks breaching that fiduciary duty.

Interfering with the client's ability to obtain a new lawyer gives rise to a fiduciary breach claim. Charging unreasonable fees or using unfair means to get paid, gives rise to a fiduciary breach claim. A lawyer's breach of a fiduciary duty to a client may result in

partial or total denial of his fees, if the lawyer has already been paid, or disgorgement of attorneys' fees. *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992). And in *Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002), Division One upheld the entire forfeiture of an attorney's fees because the terms of his fee agreement and his conduct relating to fees breached fiduciary duties to the client.

No matter which path you choose, you are more likely to receive your fees in a fee dispute with an attitude of reasonable generosity rather than adverse litigiousness. Wearing the white hat may allow you to avoid the kind of "compromises" in a fee dispute resolution that all attorneys dread. Professionalism rises above the level of a petty or vindictive client and puts you in a position to argue a record that supports a favorable fee result.

VI. WHAT TO DO IF THE CLIENT REFUSES TO NEGOTIATE

Your fee agreement will, to a great extent, govern your litigation options to collect. If your agreement provides for arbitration, the client will most likely be stuck arbitrating your fee with you. If so, make sure of the details of the arbitration, including the selection of the arbitrator(s), their number, who pays, limits on discovery, etc. are clearly stated in your fee agreement. Be sure to make it clear whether prevailing party attorney fees are the rule rather than the exception.

You can even provide for a court foreclosure of your attorney lien based on the arbitrator's award. But, you must clearly state these provisions in the fee agreement. They cannot be added later by an amendment, in the absence of independent counsel for the client. Without these options, you may be limited to an attorney's lien or a suit on the contract.

In my CLE materials in this Law of Lawyering seminar last year, I covered the various options in terms of collecting attorney's fees, including a suit on the contract, foreclosure of the attorney's lien and an RCW 4.24.005 proceeding. Considerations for these options are discussed therein and in Caryl, WSTLA Annual Ethics in Trial Practice, December 1998, Zen and the Art of Getting Fired, While Getting Paid.

VII. CONCLUSIONS

In each of these presentations that I give relating to fee disputes, I point out the obvious – the climate in which lawyers are judged by the public has worsened while at the same time, client sophistication and litigiousness have substantially increased. Couple this with the growing "me society" of popular culture where individual rights (or the mis-perception of the same) are celebrated while personal responsibility takes a back seat, the cost and consequences of a substantial fee dispute with an angry, victim-mentality client cannot be overestimated. In last year's conclusion, I said:

> If lawyers are to be successful and to avoid the cost and misery of fighting with clients over fees, attorney business practices must change.

> Communication must improve. Lawyers must develop a much more sophisticated awareness of the new legal ground rules included in the RPCs and the emerging case law of fiduciary duties and reasonableness of fees. Lawyers must become more selective in the taking of cases and in which cases they keep, in order to avoid serious problems later. Finally, when a fee dispute arises, the lawyer should approach it with a different mindset, and seek resolution in a generous manner. Getting professional advice early when a potential problem client begins making waves is advisable.

It goes without saying that there can be no fee dispute with a client you declined to take. Screening of clients and cases is essential to avoid the cost, negative energy and emotional drain that a nightmare fee dispute client can have on your practice and your life. Avoiding toxic clients is a must. Declining cases where there is not much of a case or where the value of the case is not worth the lawyer's fees and costs is wise. Following your gut and acting on your intuition as to the chemistry between you and the potential client will pay large dividends. Using common sense office practices in discussing and documenting fee arrangements, at the outset, can avoid all manner of later client mischief. Treating clients with respect, dignity and showing that you care by being responsive and taking them seriously can avoid hurt feelings, misunderstandings and other germs that grow into angry confrontations that will eventually involve fee issues. Finally, bowing out gracefully when the relationship is going badly is critical.

NEW CLIENT INTAKE CHECKLIST

A. Client's End Results Sought and Means

– here identify what the client's end results and/or goals are what the means to be used are. For instance, does the client want to recover money, the return of property, a determination of rights under a contract, a deal to be negotiated, etc?

As for the means, does the client expect you to litigate or does he insist that all results be obtained through negotiation only?

Does the client have limited resources with which to pursue the end goals? If so, what are the limits?

B. Size Up the Client and the Case for Red Flags and Potential Problems

1. Negative client personality attributes –

   a. Is client angry, zealot-type or victim-mentality?

   b. Is client irrational, excitable, overbearing or does the client demonize the opposing party?

   c. Is the client pushy, inflexible and domineering? Or is the client passive and do you expect difficulty making necessary decisions? How can you imagine the relationship going?

2. Are client expectations realistic in relationship to facts and resources available?

3. Is the case a red-flag type of case, involving defamation, boundary dispute, harassment or a neighborhood war?

4. Is the client resistant on fee arrangements or do you anticipate problems in getting paid.

5. Make the weighing decision now – do you really want this client and case? If not, no need to discuss any further; start the process of moving the client on to someone else.

C. Fee Arrangements and Fee Agreements

1. Does the client have a preference in fee arrangements, e.g. contingent fee, flat fee, hourly, some kind of blended arrangement?

2. Given the client's desired end result, what is your preference in terms of fee arrangements? Hourly, c/f or what?

3. Discuss the general manner in which you would take the case:

a. Hourly at specific enumerated hourly rates;

b. Frequency of billing – monthly, quarterly, etc.;

c. When bills are due and payable; if, when and how interest will be imposed and calculated;

d. What costs or expenses are to be charged and payable by the client;

e. Who owns the case file – see WSBA Formal Opinion #181;

f. Is there a prevailing party attorney's fee provision in the agreement – fee shifting, loser pays;

g. Retainer – how much is it to be and when it is due; how is the retainer to be used (e.g. applied to initial billings, or held to cover the last billing)

h. Make clear – that continuing legal services are directly dependent on current payment of fees; if the client falls behind, he/she will be given one chance to get caught up. If the client cannot or will not do so, be prepared to get out of the case before you are too far behind.

4. Discuss entering into a consistent written fee agreement, and a time frame. E.g., you will get the written fee agreement or engagement letter to the client within a specific number of days – preferably 3 or fewer and never mote than a week. Make clear to client what you will and will not do before the fee agreement comes back signed. Try to avoid entering any notice of appearance until the written fee agreement is signed.

D. Discuss with the Client a Short Term Game Plan

1. Make clear to the client what you will or won't do until the client returns the signed agreement and retainer.

2. Once the retainer and signed fee agreement are returned, outline the short term game plan.

E. Fee Estimates

1. Don't make them unless you expect to have them taken seriously later. Remember that an estimate 2 years later when you are well beyond your estimate in dollars will be seen by the client as a much firmer number.

2. If you do give fee estimates, use a large range.

3. Make specific disclaimer (to be echoed in the written fee agreement if you give an oral estimate) that the estimate is nothing but an early estimate before really learning about the case; that you cannot be responsible for the cost of actions taken to counter the other side's tactics.

F. Answer all Remaining Questions

Ask client if he/she has further questions – then answer them.