CHAPTER EIGHT/B

FEAR OF FEEING

OR

GETTING PAID WHEN THE CHIPS ARE DOWN

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I. INTRODUCTION

A. NIGHTMARE SCENARIO

Your client is angry, upset, disappointed, unreasonable, confused, and he has just hung up on you. You are left with his words buzzing in your ear: he is not going to pay your last bill; or thinks your fee is too high, based on his subjective judgment; or he heard another lawyer challenge your advice or judgment; or he thinks that you have stopped representing his best interest. He has decided to replace you with another lawyer. What once seemed like a good relationship and fee prospect is suddenly in jeopardy. What has gone wrong so badly and completely? He raved – you responded honestly and soothingly – all to no avail. This rational person that you got on so well with earlier has just said those things none of us ever want to hear. The relationship is broken, wholly and irretrievably. You are powerless to prevent your client from becoming your adversary.

B. What Do You Do?

This unfortunate circumstance will come our way probably several times in our career and depending on how we relate to clients, maybe more. In some instances, we may have been able to prevent it; in other cases, it is bound to happen, given the particular client. Before you take action, you need to know what the client's rights are *vis-à-vis* your rights. What you do may, out of anger or overreaction, affect your fee entitlement and may well determine whether you later face bar complaints, malpractice claims or a tarnished reputation.

C. HISTORY OF THIS PRESENTATION

This talk and these materials are the current iteration of a work in process of some six years. I have spoken on similar and related subjects at least 5 times previously, and the suggestions contained herein are the result of making my own mistakes the first 20 years,

counseling lawyers and clients in similar situations, litigating these disputes on behalf of both lawyers and clients, serving as arbitrator in fee disputes and in preparing and offering expert testimony in such disputes. It is the result of collaboration with other professional colleagues in this field, like Prof. John Strait and lawyer Dick Kilpatrick. I cannot remember any more where the various lessons came from, except that I have absorbed them form many sources. To all who have obviously or subtly contributed to this development, I tip my hat.

II. OVERALL APPROACH - BEFORE THE DISPUTE ARISES

These materials offer some common sense advice on how to get paid using a positive, cooperative attitude toward your client, based on 25 years of experience extracting fees from more than a few disgruntled and recalcitrant clients. Included are some suggestions on how to put your best foot forward in court or arbitration. In this client-friendly environment, a positive strategy can help you recover a fee you can live with.

A. Be Proactive with Your Clients

Most attorney-client disputes arise not over performance or non-performance but over non-communication. Clients get angry, not because you are late in accomplishing the work, or because that deposition or motion didn't go well, but usually because you did not meet an expectation borne of lack of communication. You didn't promptly return calls and they assumed certain things that a simple call would have set straight. You made a decision but did not brief the client in advance. You got the client into an event and didn't adequately prepare the client, like preparing him or her to testify at deposition, or explain how the mediation was going to work. Clients always have expectations about the process, whether you discuss them with the client or not. Maybe 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 he is genuinely surprised at the amount

of costs as you approach settlement, 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 that client happy that he or she hired you. Build the human bridge between the two of you.

B. Beware of the Warning Signs; Deal with Unhappiness Professional and with Understanding

Not all problem clients terminate their lawyers, but the client who fires you is likely to send early signals of disgruntlement. Whining on emails or voicemails is a red flag. Unhappy comments when bills are paid should warn you. Excuses when bills are not paid is another example. Raising questions about choices or judgments is a clear sign. Mention that the client has heard that other lawyers do it differently is another. These are all red flags. These warning signs frequently predate a fee dispute. Engaging the grievances expressed by the problem client with professional concern can civilize the ordeal and even preempt a termination or dispute.

C. Nastigrams and Other Defensive Responses

Every act, omission, and communication with or about the client will ultimately become part of the client's lore of the ensuing fee dispute, and possibly even part of the official record. 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. A nasty letter responding to verbal accusations will reflect poorly on you a year later in court or arbitration, when stripped of its context and the strong feelings that may have engendered it. The wise lawyer drafts every communication with the assumption that it will be an exhibit in a later fee dispute forum. Deprive your disgruntled client of the centerpiece of his case against you. Set aside the client's angry missive or personal attack for a day or two.

You have the opportunity to create documents that will reflect well on your character and the value of your services to the client. Your client's first expression of doubt about your tactics or judgment is a red flag calling for a clear, polite communication expressing your position. I usually use letters that delineate my advice in a polite and professional tone to foreclose suggestions of inappropriate behavior in a later dispute. Your vested interest in exhibiting your professionalism only escalates if the client's questioning continues.

III. WHEN TO GET OUT FIRST

The new lawyer spends years developing his clientele. When getting clients is such a big exercise, it is hard to fire a problem client. During the earlier years of my practice, I almost never fired a client. I fought to keep unfriendly and unworkable relationships in order to preserve my entitlement to the fee. In recent years, I have been more willing to let the troublesome clients go. Nonetheless, I have hung on too long to a few clients where I should have known better.

Many lawyers are loath to drop a case, even if the client's conduct or attitude spells trouble. Contingency fee lawyers will forfeit their time if the client is fired. Hourly lawyers are often 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 chances for referrals.

My view is that a bad attorney-client relationship, like a bad marriage, is something to bring to an end. Taking control and terminating such a bad relationship that has gone awry will save you unpleasantness and regret in the end. Withdrawal is cheaper and easier than dealing with the bar complaints, fee disputes and the malpractice allegations of a problem client gone

bad. A toxic client relationship can assault your dignity, distract you from your other clients, and deplete your work of pride and pleasure. Exorcising these specters can be worth losing a fee.

Withdrawing from a case will not always be such a great sacrifice. Less is lost when you pull out early, when your investment is still minimal. Learning to read the telltale signs of a problem client will help you trust your instincts to walk away early. If you have a busy practice, politely withdrawing your representation can lighten your load. Although withdrawing usually eliminates entitlement to a contingency fee, you still may recover in *quantum meruit* under a theory of constructive termination if the client's conduct has made a productive attorney-client relationship possible.

IV. SO YOU'RE GOING TO BE FIRED – DO I LOSE MY FEE?

A. The Client's Rights – How to React

Termination is likely to occur infrequently. While our attitude and behavior can influence how often it occurs, but even the best lawyers cannot prevent it completely. It has happened to me a half-dozen times. The law does not discourage the client from firing you.

A client has an unmitigated right to fire the 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). Even a contingency fee arrangement does not stand in the way of an untimely discharge by the client. Counsel can do absolutely nothing to prevent the termination, nor should he try. A client determined to fire you either knows he can or can easily learn that he can, merely by calling any other lawyer. The law tilts in favor of the client in this arena.

As lawyers, we have no choice but to make the best of a client-friendly legal environment. Poor bedside manners can provoke a time-consuming fee dispute, nasty bar

complaints, a malpractice suit, and besmirch your professional reputation. How you react to the prospect of termination may determine just how unpleasant and costly the consequences will be.

Treat the client who fires you with the same courtesy and cooperation you would show if it were you who was firing the client. Assume that the client is right in firing you. While you don't have to take abuse, this is not the time to counterattack. Assure the client that you will fully cooperate in transitioning to her new lawyer. You may suggest that she ask the new lawyer to counsel her about a stipulation to the amount of your fee, so that you can avoid filing an attorney's lien. If you must file an attorney's lien to protect your fee entitlement, let her know beforehand so she does not end up feeling ambushed.

The occasional client who fires you is not the end of the world. In fact, being fired by a client gets easier with experience. Getting fired will teach you how to preempt a future untimely termination and when to get out first. And you will learn how to take termination gracefully and improve your chances at a positive fee recovery.

B. Does Termination Defeat the Fee?

What if I am representing the client on a contingency fee basis? Does the client's absolute right to terminate me defeat my entitlement to a contingency fee? The answer is, by and large, yes. The Supreme Court stated in *Wright v. Johanssen, supra*:

> If the client has the right to terminate the relationship of attorney and client at any time without cause, it follows as a corollary that the client cannot be compelled to pay damages for exercising a right which is an implied condition of the contract .... In such a case, the attorney may recover the reasonable value of the services which he has rendered but he cannot recover damages for breach of contract.

Wright v. Johanssen, supra, at 692. In the case of *Ramey v. Graves*, 112 Wash. 88, 91, 191 Pac. 801 (1920), the court was even more specific:

> The rule is that where the compensation of an attorney is to be paid to him contingent on the successful prosecution of a suit and he is discharged or prevented from performing the service, the measure of damages is not the contingent fee agreed upon, but the reasonable compensation for the services actually rendered.

While these are old cases, these rules have not changed. *See Barr v. Day*, 124 Wn.2d 318, 979 P.2d 912 (1994); *Ross v. Scannell*, 97 Wn.2d 598, 647 P.2d 1004 (1982). In *Ross*, the attorney's performance of the contingency was cut short by termination by the client, after a dispute over fees. The court held that the lawyer's only recovery would be in *quantum meruit*. An attorney may not attempt to change the result of these cases by contracting around them. In *Hamlin v. Case & Case*, 188 Wash. 150, 161 P.2d 1287 (1936), the lawyer drafted a fee agreement that called for a payment of the contingent fee on any ultimate recovery, even in the event of discharge. The court simply said no to the lawyer, stating, "The fallacy in [Hamlin's] position is that his contract is for a contingent fee. He must first succeed in creating the fund of his client upon which the assignment will operate until satisfied." *Hamlin, supra*, at 153.

There is a narrow exception to the general rule when a lawyer has substantially performed. The Supreme Court in *Barr v. Day*, in *dicta*, held that a client could not deprive the lawyer of his contingent fee by discharging him just short of fruition in order to defeat the contingency fee. The court specifically stated that, "The purpose of the substantial performance exception is to prevent clients from firing their attorneys immediately prior to the occurrence of the contingency in order to avoid the contingency fee." *Barr, supra*, at 38. I had the opportunity to test out the *dicta* in *Barr* in the case of *Taylor v. Shagaki*, 84 Wn. App. 723, 930 P.2d 340 (1997), where I represented a lawyer terminated when settlement had nearly occurred. In the *Taylor* case, my client's client did exactly what *Barr* seeks to prevent, *i.e.*, he fired the attorney at the last minute, when the contingency was about to occur, in order to defeat the contingency

fee. In that case, the difference between hourly fees and the contingency fee would have been about 350%. The Court of Appeals in *Taylor* did not countenance the client's efforts to defeat the contingency fee, and held:

> Full performance, however, is not required in all contingency fee cases. Washington courts have recognized an exception where an attorney is discharged after "substantially" performing the duties owed to a client. (Citations omitted.) This exception prevents clients from firing their attorneys immediately before the contingency occurs to avoid paying a contingency fee. *Barr*, 124 Wn.2d at 329.
>
> ... Taylor urges this court to construe the substantial performance doctrine narrowly such that an attorney's fright to a contingency fee vests only when an offer is accepted or a specific fund is created. In these circumstances, the only remaining task would be to sign the papers. We reject this rule as too narrow because the decision to accept or reject settlement offers belongs to the client, Taylor's interpretation of substantial performance would eviscerate the usefulness of contingency fee contracts.
>
> Taylor argues that because he has the right to discharge his attorney at any time, he has "an absolute right to remove himself from the contract and its obligations at any time." We agree that Taylor had the right to discharge his attorney at any time, with or without cause. (Citations omitted.) But although a client may fire his attorney at any time, the client has no right to pay less than the attorney has earned. Taylor argues that by forcing him to pay the contingency fee, the court is punishing him for firing his attorney. However, holding clients to the obligations they have undertaken is not a punishment. We affirm the trial court's conclusion that Zeder earned the $75,000 contingency fee.

What exactly does substantial performance mean, and what does an attorney have to do in order to qualify for the substantial performance exception? The Court of Appeals in *Taylor* denominated this issue as a purely factual issue. Each case will be decided on its own facts. *Taylor* suggests that where the lawyer has obtained a firm substantial offer of settlement coupled with a client whose motive is to deprive the lawyer of his contingency fee, this should be sufficient to earn the attorney the contingency fee. A binding settlement agreement with the client's consent, even before disbursement, is sufficient. Where the attorney has negotiated a

substantial offer of settlement, but such offer is outside the client's authority granted to the lawyer to settle, this probably is not sufficient.

In the event that the attorney does not qualify for substantial performance, then the only recovery the law accords the attorney is under the doctrine of *quantum meruit*. The court looks specifically at the fee agreement to determine the scope of the work, and to determine whether the lawyer has substantially performed. In the case of *Ross v. Scannell, supra*, the attorney had actually obtained the judgment that his fee agreement called for but had not completed all of the other ancillary services called for in the contingent fee agreement. A fee dispute arose, and then the client fired the lawyer. Under those facts, the Supreme Court held that the lawyer's fee entitlement was not the contingency fee but one based upon *quantum meruit*.

Quantum meruit means simply the reasonable value of the services performed. Naturally, the burden of proof is upon the lawyer to show what he did. Few contingent fee lawyers keep accurate time records or even any time records. The absence of contemporaneous hourly time records is probably not fatal to a *quantum meruit* recovery. In *Kimball v. P.U.D., supra*, the court determined that the absence of time records did not prevent a *quantum meruit* determination. The lawyer in that situation would have to scour his file materials to demonstrate what he had done, identify any settlement offers he had obtained to date and the extent of his trial preparation. However, as the terminated attorney, you can expect that the court will give the client the benefit of every doubt in determining lodestar hours where there are no time records. For those attorneys who keep no time records whatsoever, you are assuming the risk of poor compensation in the case where you are terminated before substantial performance.

V. WHAT TO DO WHEN THE CLIENT CALLS IT QUITS

A. Walking Away From Your Fee

The paramount question is whether to pursue your fee at all. The same considerations underlying "getting out first" apply here. Your Errors and Omissions insurer has probably warned you that suing your client for a fee may well result in a counterclaim for malpractice. Walking away from your fee is an option worth considering anytime you have an ornery client **and** you anticipated a contentious fee dispute.

First, you should consider how much is at stake. The size of the potential financial loss will depend on when into the course of the representation the relationship ended. If you have wholly accomplished what you were hired to do, then giving up your fee entirely makes no sense and only encourages future abuse by clients.

You may want to walk from even a substantial fee, though, if there was actual or apparent validity to the client's complaints. Reflect honestly on whether the relationship with this client had been good until recently. Was there any disagreement with your client that opposing counsel could portray as a rift. Any cross words with the client or legal advice that she did not appreciate may return to embarrass you, or worse, serve as the basis for a complaint. If there are any problems that you would rather not confront – for example, you actually did make a mistake that has harmed the client – you should consider walking away from the fee.

B. If You Don't Walk – Enhancing Your Chances Of Getting Paid

The situation of termination of one rife for serious complications, including fee disputes, fending off bar complaints or potential malpractice claims, or merely 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. This is not, then, the time to counterattack the client. If the client has fired you, or if you feel the absolute need to withdraw, you should be as cooperative as possible. To the extent that you are entitled to a fee based upon the client's refusal to cooperate (in the case where you terminate the client), you need to inform the client of your right to file an attorney's lien and, in fact, you should tell the client that you will be doing so. This should be done in a non-threatening manner. You must inform the client that you will cooperate with him in every possible manner, cooperate with his new attorney, and do nothing to jeopardize the further pursuit of his claim..

C. Informal Fee Resolution

I urge a face-to-face meeting with the client as soon as he or she raises any questions about your fee or performance. Listening to the client's side, and expressing concern for the client's views may mollify a hostile client. Plain talk can iron out misunderstandings.

An early meeting may set the stage for an amicable compromise in which you reduce your fee in exchange for prompt and certain payment. An amicable settlement may be the optimal solution. It preserves the good will you have with the client and locks out additional costs or risks. The high price of litigation doesn't just buy you a change at recovering some of your fees; it also results in a client with hard feelings who may file a bar complaint against you or bad-mouth your to other clients and business referral sources.

As long as this window to dialogue is open, do not dig in your heels. As an arbitrator, I have seen lawyers act like stereotypically greedy attorneys. Stridency corners the client into a

more hostile stance over the fees. Courtesy, restraint, and a reasonable demeanor will go a long way to facilitate an amicable resolution.

VI. WHEN ALL ELSE FAILS – FEE DETERMINATION FORUMS

A. 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 duty, while at the same time, the client is seeking 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, risking the breach of that fiduciary duty. Interfering with the client's ability to obtain a new lawyer gives rise to a fiduciary breach claim.[1] Unreasonable fees charged, or using unfair means to get paid, gives rise to fiduciary breach claims. A lawyer's breach of a fiduciary duty to a client may result in partial or total denial, if the lawyer has already been paid, or disgorgement of attorneys' fees. *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992). In a recent case, *Cotton v. Kronenberg*, 111 Wn. App. 258, 44 P.3d 878 (2002), Division One upheld the entire forfeiture of an attorney's fee where the terms of his fee agreement breached fiduciary duties to the client. This is discussed in much greater detail later.

No matter which forum is chosen, you are much more likely to receive the fee that you have earned in a fee dispute through an attitude of reasonable generosity than adversary litigiousness. Wearing the white hat puts you in the position to avoid the kind of "compromises" in a fee dispute resolution that we all dread. Reasoned professionalism rises above the level of a

[1] I discuss an instance in my materials on breach of fiduciary duty when a trial judge forfeited a lawyer's entire fee for allegedly doing just that.

petty or vindictive client and puts you in a position to point out the client's extremism. A record favorable to the lawyer leverages a favorable fee result.

B. Civil Action on the Contract

The fiduciary duties of the attorney-client relationship alter the lawyer's common law rights in the underlying contract. Most courts will give the client the benefit of the doubt unless he or she comes across as dishonest or unreasonable. Judges tend to find a basis for compromise, even if the fee claimed was earned. The outcome is not easy to predict.

While the hourly rate constitutes an enforceable basis for collection in an hourly fee agreement, the fiduciary nature of the attorney-client relationship and RPC 1.5 require the total charge to be reasonable. The reasonableness of the total charge depends on the hourly rate and the number of hours, given the undertaking – if in fact those hours were incurred at all. RPC 1.5(a) and (b). RPC 1.5 contains a list of eight considerations the Court must assess.

As for a contingency fee arrangement, the client who terminates an agreement before the attorney renders substantial performance is not technically in breach of contract and cannot be compelled to pay damages. *Barr v. Day*, and *Ross v. Scannell*, *supra*. The attorney and client cannot contract around this rule. *Hamlin v. Case and Case*, 188 Wn. 150, 161 P.2d 1287 (1936). If you are fired short of substantial performance, there is no entitlement to the contingency fee.

The contingency fee attorney still has an equitable remedy in *quantum meruit* for the reasonable value of the services. *Ramey v. Graves*, 112 Wn. 88, 91, 191 Pac. 801 (1920). The attorney seeking fees has the burden of proving what is reasonable compensation, based on equitable considerations such as the amount of the client's recovery, the number of hours spent, and the risks involved. The lawyer's normal hourly rate that he gets on the open market may not

be determined to be the reasonable rate, although it is certainly evidence. Nor will the total number of hours expended be binding as far as this determination. The services must be shown to be appropriate and reasonable in extent.

The absence of time records is not fatal to a *quantum meruit* recovery. *Kimball v. P.U.D., supra.* The attorney may rely on circumstantial evidence tending to show time and effort expended, including the state of the file, settlement offers made, and the extent of trial preparation. *Kimball v. P.U.D.*, 64 Wn.2d 252, 391 P.2d 205 (1964). However, the trial court will certainly give the client the benefit of the doubt in totaling hours where there are no time records.

Your rights to your contingency fee under a written contract change dramatically upon the rendering of substantial performance. Substantial performance ripens the client's duty to pay the agreed contingency; non-payment gives rise to damages measured by the contingency agreement. *Taylor v. Shigaki, supra.* Substantial performance usually means obtaining a settlement offer which is within the client's stated goals, or obtaining a policy limits offer. *Taylor* also demonstrates that obtaining a very substantial offer of settlement may constitute substantial performance, such that the contingent fee is determined to have been earned. Prevailing under the substantial performance exception appears to require that the attorney obtain a firm settlement offer **and** that the client had a bad faith motive in discharging his attorney to cheat him of his contingency fee. *Taylor*, 84 Wn. App. at 730-1. The purpose of awarding the expectation interest to an attorney discharged after substantial performance "is to prevent clients from firing their attorneys immediately prior to the occurrence of the contingency in order to avoid the contingency fee." *Barr*, 128 Wn.2d at 328.

C. Statutory Resolution Under RCW 2.44.040

A little-known statute, RCW 2.44.040, provides another remedy. Upon motion by a terminated attorney, the trial court shall compel the party to pay the attorney before allowing that party to substitute counsel. RCW 2.44.042(2). In *State v. Moore*, the court held that where the client seeks to remove an attorney and substitute another under this statute, the court may determine the appropriate fee for the withdrawing attorney. 34 Wn.2d 351, 208 P.2d 1207 (1949). If you are fired in litigation, you should ask the court for a summary determination on the issue of fees whenever the client terminates you or forces you to withdraw before entry of judgment. *Moore* indicates that the court can even enter judgment in favor of the lawyer against the client for the fees determined.

D. Voluntary Bar Association Fee Arbitration

The Washington State Bar Association (WSBA) has a fee arbitration panel for the voluntary resolution of fee disputes, but it is not commonly used. I have had no experience with this procedure and no client of mine has ever requested fee arbitration. A proposed court rule circulated several years ago would have made this process mandatory. That proposed court rule was dropped when faced with strong sentiment among the bar against it.

Voluntary arbitration has no procedural rules to my knowledge other than the right of either side to veto the procedure. But if the client does agree to this form of arbitration, under RCW 7.04, the award is binding, except in cases of fraud, statutorily-recognized bias, or other very limited grounds. Compromise is the likely resolution. For smaller fee disputes, it may well be the forum of choice for the lawyer.

E. RCW 4.24.005 Hearing

This statute is part of the so-called Tort Reform Act of 1986, where the legislature toyed with joint and several liability, caps on damages and other aspects of tort reform. While several parts of this legislation have been struck down by our Supreme Court, the RCW 4.24.005 hearing is one part that still survives. This statute provides the client, not the lawyer, an opportunity to have a court determine, after the fact, what the reasonable fee should be for the lawyer. While this is at its most insidious when a lawyer has actually substantially or fully performed, this statute applies literally in any case, even where the lawyer has been terminated.

This proceeding is a very rare one. In fact, I am aware of no other lawyer in this state who has ever tried one, although I have heard rumors to the effect that RCW 4.24.005 petitions have been filed in cases that later settled. In both of the cases that I have tried, the trial judges treated the hearing as a full-scale trial, each lasting five to six days. We offered evidence in the form of file materials prepared by my client, the testimony of my client, and the testimony of several expert witnesses, one which addressed the qualify of the work that was done and the likely result, but for the termination. In both cases, the trial court found as a matter of fact that my clients had substantially (or fully) performed their fee agreements at the time they were terminated.

Ultimately, the gist of this 4.24.005 proceeding from the lawyer's standpoint is to demonstrate that the lawyer has contributed substantial value to the case and that the fee sough by the attorney is appropriate. In a case where the lawyer has not substantially or fully performed, this means establishing a substantial value, even in the face of poor or no time records. This can be a daunting task for an attorney seeking to obtain fair compensation. The 4.24.005 hearing is only available by petition of the client, if the petition is filed not later than 45

days after a final billing or accounting. The court is directed to consider ten factors set forth in the statute, the first seven of which are from the laundry list of fee considerations in RPC 1.5. This statute gives absolutely no guidance to the court as to how to determine a reasonable fee, which generally means that the court has enormous latitude in determining what is fair and reasonable. One of the factors that the court is directed to consider in such a proceeding is whether the client was aware in the first place of his right to this proceeding. For that reason alone, there is mention of this statute in my fee agreement.

Lastly, if you have put an enormous amount of work into the case, but yet have not substantially performed, you certainly can take the position that the only reasonable fee under the circumstances is a significant portion of the contingency fee. You certainly have not ***earned it*** if there is no substantial performance, but where you may have several hundred hours in the case, an enormous offer of settlement from the other side and no just reason for your termination, a court might go along with this type of an argument. If you don't have a whole lot of time in a case, I wouldn't expert that argument to go very far.

F. Filing and Foreclosing an Attorney's Lien

The attorney's lien is a much-misunderstood statutory device to protect a lawyer's entitlement to a fee. The statutory attorney's lien dates back to the territorial legislature of 1881. Now codified at RCW 60.40.010, *et seq.*, the language does not provide us with a great deal of practical guidance. For purposes of a plaintiff's personal injury counsel, the lien attaches:

> (3) upon money in the hands of an adverse party in an action, in an action or proceeding, in which the attorney was employed, from the time of giving notice to that party;
>
> (4) upon a judgment to the extent of any services performed by him in the action, or if the services were rendered by him under a special agreement, for the sum

due under such agreement, from time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered in . . . .

The lien statute permits a lawyer to claim a lien against the file. However, I strongly urge against using the file as leverage to get paid. There is a formal ethics opinion in Washington that forbids an attorney to withhold file materials to the extent that it would "materially interfere with the client's subsequent legal representation." (WSBA Formal Opinion #181.)

The attorney's lien attaches to a *res* that your services were intended to bring about – money in the hands of the adverse party to the suit, money in your hands belonging to the client, or a portion of the judgment. If there is no *res* to which the fee can attach, there is really no place for the lien. The requirement of a *res* generally limits the use of a lien to plaintiff's lawyers involved in litigation. An attorney's lien never attaches to real property. *Ross v. Scannell, supra.*

Though there are no legal formalities to an attorney's lien, in your lien you should identify: yourself as counsel, the client, the agreement under which your client accrued the fee obligation, the *res* or fund to which the lien attaches and in whose hands the fund resides, and the amount claimed. Prepare the lien in the pleadings format for the court that has jurisdiction over the *res*. A copy should be served not only on the client but on the owners or holder of the ultimate obligation or indebtedness to the client. If an insurer is involved, the insurer should be given notice. Proof of service is essential.

Even if you filed your lien with the court, you still may prefer to instigate a lawsuit on the contract instead of foreclosing the lien. A common law contract action will allow you to submit testimony on the quality of the services performed, or present an expert on legal ethics and fee agreements. Discovery is available. Another alternative to foreclosure is to send the client a

final bill or accounting, which triggers the client's rights to an RCW 4.24.005 hearing, if the matter is a tort action.

Foreclosure of your lien is the better route of choice if your goal is to obtain a quick and summary determination, or if you have accomplished what you were hired to do and the client is simply trying to defeat part or all of your fee. Moving to foreclose your lien creates no new cause of action, and there are no filing and service fees or specific discovery rights. Nonetheless, the Court may grant some discovery.

To foreclose the lien, prepare a short motion, an argument of the law, and an affidavit summarizing all the pertinent facts, including your fee agreement, any estimates or other fee-related correspondence with the client, an itemized summary of your services and results, and the client's explanation for refusing to pay or demanding a fee reduction. If the client challenges your hourly or contingency fee rate or the number of hours, you should consider obtaining an affidavit from an expert to establish that your fee is reasonable and appropriate. The final fee award will probably derive from conflicting affidavits rather than a full adversarial trial. I have just filed my most recent lien foreclosure motion on the day I completed the first edits to these materials.

Upon motion of either party, the court may either 1) summarily determine the facts on which the claim of lien is founded upon affidavits and briefing alone; or 2) refer the case out for a factual determination. RCW 60.40.030. If your local rules permit, you would probably prefer the court to resolve the fee dispute on the affidavits alone. Oral argument gives the client an opportunity to criticize you in open court, and to invoke concepts of "equity."

G. Choosing a Forum

A prompt hearing almost always benefits the lawyer. Whenever possible, the lawyer should push for quick remedies rather than the unlimited discovery and slow resolution of a common law contract suit. If the case is not over and the client has new counsel, then the quickest and simplest route to the fee may be an RCW 2.44.040 motion. If there is a *res* such as insurance coverage or a bond, attaching and foreclosing a lien will enable a prompt hearing and a quick determination. You may also benefit if your client pursues an RCW 4.24.005 hearing with its summary procedures. However, if you are defense counsel or are not involved in litigation for the client at all, you are probably relegated to an action on the contract.

Seeking the client's agreement to a voluntary WSBA-sponsored arbitration may be wise if the amount in controversy is very small, or if a fee determination is simple, or if you want to handle the matter pro se.

VII. CONCLUSIONS

Termination of the relationship and/or fee disputes can be avoided by better client relations, fuller communication and the obvious – treating the client with dignity and fairness – even when his or her own conduct might not otherwise warrant it. Answer all questions, even the accusatory or sarcastic ones. Treat each communication as if it will be evidence later. If the relationship has badly deteriorated, consider withdrawing first. If the client beats you to the punch, deal with termination gracefully. Cooperate with the client and new counsel. Determine how best to protect your fee, if possible, then seek an amicable compromise, and file your lien only if nothing amicably can be amicably arranged. Choose the forum that is best suited to your immediate needs; then move ahead promptly towards a resolution. At all times, be courteous and cooperative, while giving your former client the smallest possible target. At all times, wear

the white hat. In so doing, you will position yourself for the best possible outcome in this client-friendly environment.