FEE ARRANGEMENTS AND FEE SHARING THINKING OUTSIDE THE BOX

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I. INTRODUCTION

As attorneys, each of us has a "comfort" box in which we keep our ideas –honed and practiced – about how we approach our profession, our legal *modus operandi*. Nowhere is this more true than in our law practices and, in particular, the mechanical things that we do routinely - from how we start and conduct a deposition, to how we address a trial judge in open court, to how we deal with an obnoxious opponent; we go to our "comfort" box from which we extract preconditioned answers to questions and issues which give us pause. There is a disconcertingly *"automatic pilot"* aspect to this where we more or less unthinkingly repeat our common ways of performing tasks time and again. Thinking within the box is easier – more comfortable.

And nowhere is this staying with this "comfort level" more true as it is when we create fee arrangements with clients and other lawyers. We have our stock "form" fee agreements that we were provided as young associates in the first firms where we practiced, borrowed from a friend at about our level of experience, or which we picked up at a seminar like this. I wonder if my first contingent fee agreement came from Paul Luvera's initial loose-leaf manual for handling personal injury cases?

How do we discuss fee arrangements with a new client - if we even do at all? . Some of us do it as we learned when we were someone else's

associate many years ago. Some of us read a book or article. Some of us just started doing it - or not doing it. I gave a presentation last year to the WSTLA *"Fee Disputes"* seminar. Part of that seminar involved *"Solid Office Practices for Fee Arrangements Beginning with the Intake Interview."* I took an informal survey and about half of the lawyers did not verbally discuss fee arrangements with clients at all. Many lawyers simply handed the fee agreement to the client and told her to read it in the reception room or take it home and sign it. Lawyers have a discomfort level about discussing fee arrangements with clients that is similar to discussing sex with our adolescent children.. As parents, do you hand your kids a book about sex and tell them to read it and ask any questions they might have later?

Lastly, when you associate with another lawyer not in your firm to work a case together and plan to share fees, again, isn't there a "comfort" box solution from which the thought comes to address fee sharing? Is your box's solution that we are friends/colleagues/acquaintances or merely fellow lawyers and we can do the "fair and honorable thing" when the time comes? Or do you recognize the need for a written agreement but copy one you got from another lawyer without really thinking it through? When was the last time you did any research just to see if there were any rules, ethics opinions or case law that addresses this situation?

Fee disputes between lawyers and clients are becoming more and more common. And fee disputes between lawyers and lawyers fighting over the division of fees in a contingency fee case are not only fairly common - they can be uncommonly rancorous. I firmly believe that fee disputes can usually either be avoided altogether or won in litigation with clients or other lawyers if, at the beginning of the legal representation relationship, a solid, well-thought-out fee/fee sharing agreement is used and if the proper intake procedures are followed. None of us can really litigate cost-effectively with a client or another lawyer over a smaller amount of unpaid lawyer's fees. Getting it right from the outset can avoid the costs of litigating fee disputes and the emotions and nastiness of such litigation, or if litigation is unavoidable, to greatly increase the odds of your winning.

II. FEE AGREEMENTS – CONTENTS – HOW MUCH IS ENOUGH?

A. What is your General Approach?

There are two general approaches to written fee agreements – 1) everything including the kitchen sink; and 2) minimalist – the bare minimum. Where do you fit along that continuum? WSTLA's Lori Haskell addressed this general subject many years ago in a WSTLA seminar, and she discussed leaving the fee agreement general, open to interpretation, versus making it as specific as possible. Some lawyers hate to discuss fee arrangements with clients, and in fact, as a rule don't! Those kinds of lawyers often prefer short simple form agreements because the client is less likely to ask questions. In my view, favoring a short agreement with a client in order to avoid answering questions is a rather backward way of approaching client service and seems tailor-made to invite disputes later on. I tend to go towards the specific end. Fee agreements drafted by lawyers will always be construed against the lawyer, not only because of the old contract rule of construction, but by virtue of the lawyer's specific duties under RPC 1.5(b) to fully disclose the contents of the fee arrangement and billing practices. No one way is correct – just make a choice and go with it.

B. What do you want to accomplish?

First, determine what you want to accomplish with the fee agreement. If it is merely to cover the major points of the fee arrangement and billing practices, a simple one to two page contract will do. If you want to protect yourself from your own client down the road and clearly spell out remedies, then a comprehensive fee agreement is appropriate. Again, being in the business of fee dispute litigation, I tend to be very complete, cover what happens in certain circumstances, and make clear what the remedies are. I had occasion to review the Seattle Law Firm Nelson-Langer's contingency fee agreement a few years ago. It was a masterpiece of completeness, and covered many contingencies that I had never considered. I doubt Mike Nelson's firm has had many fee dispute problems with its clients, using a form agreement like that.

C. Written fee agreements – Always!

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. See RPC 1.5 (b). 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 always 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.

All contingency fee agreements must be in writing, as required by RPC 1.5(c), and RPC 1.5(c)(2) provides what must absolutely be in it. An oral contingency fee agreement is simply not enforceable. I recently ran across a case where lawyers were charging hourly but contingent on a sufficient recovery. Had we gone to the mat on that, I believe that their claimed fee arrangement would have been unenforceable.

What happens when there is a court award of attorney's fees, such as in CPA, employment or with other fee-shifting statutes, or if your client has an attorney's fees clause in the contract you are litigating for him or her. Your fee agreement must spell out what happens to the award of attorney's fees as far as your fee is concerned. Do you take the fee award instead of the contingency fee; do you provide yourself the option to take one or the other; or is the fee award added to the principal recovery and you take your contingency per centage on the gross recovery. Ambiguity in the agreement or total failure to address how fee awards fit into lawyer compensation will be resolved in favor of the client. *Luna v. Gillingham*, 57 Wn. App. 574, 789 P.2d 801 (1990).

My own personal rule is that <u>every</u> fee agreement must be in writing, contingency or otherwise. Why would anyone take on a major hourly case on a handshake with a client in this day and age? I litigated an oral hourly agreement dispute through trial against a determined opponent two years ago in a two-week trial. We won, for the most part, but it was quite a battle. And clients who are determined not to pay their lawyer will remember the oral terms consistent with their own self interest. If you want to arbitrate any later dispute with your client, the arbitration clause must be in the fee agreement and fully disclosed. If you want the client to pay 12% simple interest on unpaid balances, this should be in writing. A year ago in another

case, I litigated on behalf of my lawyer-client against his former client the issue of how client payments would be allocated between principal and interest, which actually made a substantial difference in accrued interest. A good lawyer on the other side convinced the trial judge in that to partly , disregard a 200-year year-old rule of accounting, which made a difference of about $40,000. Had my client thought of that detail in the fee agreement, that argument would not have been available later. A fee agreement cannot cover every imaginable possibility. However, If you want a specific result to occur in the event of a dispute, you must spell it out.

D. What must be in the Written agreement?

The following **must** be in the agreement:

- The nature of the engagement.
- How the fee is calculated. Contingency, hourly, flat.
- Charges for non-lawyers spelled out clearly.
- If hourly, may the hourly rate be increased and, if so, on how much notice?
- Note that contingency fee arrangements may not be increased once the fiduciary relationship attaches unless the client is afforded independent counsel.
- Retainers – under the very new RPC 1.5(f)(1) – a retainer only buys availability – is not a fee for services.
- Advances – to work against in hourly cases. How the advance is to be handled?
- What are reimbursable costs?
- Billing practices – when do you bill, what do billings consist of, when payment is due, grace periods, etc?

E. What may be put in the fee agreement?

- Scope of engagement – limiting what you are hired to do.
- The right to associate others – and how they will be charged.
- How interest is charged, if at all.
- The right to withdraw for non-payment, but only in compliance with RPC 1.16(b).
- Who owns the file at the end of the engagement or if terminated, in compliance with Formal Opinion #181?

- Arbitration of fee disputes.
- Attorney's fees to prevailing party in case of fee dispute.
- In a contingency fee – substantial performance.
- In a contingency fee case, what happens for your compensation if the client terminates the relationship?
- In a contingency fee case, how settlement funds are cleared through trust and how a disbursement accounting will be used in compliance with RPC 1.5(c)(3).

F. If you want to enforce it later – get it in now.

If there is a particular provision you want to enforce against the client in case you both get sideways later, get it into the fee agreement and fully discuss it and disclose it now. The agreement will be construed against you in the event of a dispute, and arguing later that the wished-for term is reasonably implied will likely fall on deaf ears.

G. Smart mechanics.

This subject falls more properly into the area of the intake interview disclosures, but I like to see fee agreements with good mechanics. I now have the client initial every page. That takes away the argument the client did not really read or look at that page. I also like a series of admissions that ties the client to the specific terms in the agreement. Here is what I use in my hourly engagement letters:

AGREEMENT TO TERMS OF ENGAGEMENT

Date: _____

1. I agree to the terms and conditions of this engagement as set forth above.
2. I acknowledge that I have received full disclosure of all material terms and conditions as set forth above.
3. I acknowledge that attorney has fully answered any question that I raised before signing and that he has made a reasonable effort to explain to me all of the terms and conditions set forth above.
4. Attorney has advised me of my right to consult independent counsel, at my own expense, before entering into the agreement.

5. Attorney has given me no oral estimates of the probable cost of this engagement in terms of attorney's fees and expenses incurred.
6. Attorney has not made any prediction as to the probable result of the litigation of this dispute.
7. I acknowledge that I am obligated by this agreement to pay all reasonable attorney's fees charged hereunder and to reimburse attorney for all costs expended in representing me, as described above.
8. I acknowledge that attorney has advised me of the pros and cons of arbitration of any dispute that might arise from this agreement or the work performed pursuant to this agreement, and how the process of arbitration works. I acknowledge receipt of a copy of ABA Formal Opinion # 02-425. I acknowledge that attorney has advised me of the pros and cons of agreeing to the prevailing party attorney's fees clause contained in the "Non-payment of Fees" paragraph above, and how that clause would impact my rights and obligations in later dispute that might arise from this agreement or the work performed pursuant to this agreement.

_____

Frank J. Smith, Client

III. THE INTAKE INTERVIEW AND THE FEE DISCLOSURES

A. The Law of Attorney-Client Fee Agreements.

1. General Rules.

The attorney owes a client the *"highest"* duty of fidelity, good faith and undivided loyalty, and the relationship is one of special trust and confidence. *In the Matter of the Estate of Larson*, 103 Wn.2d 517, 520, 694 P.2d 1051 (1985); *Perez v. Pappas*, 98 Wn.2d 835, 839-840, 659 P.2d 475 (1983). *"The standards of the legal profession require the lawyer's undeviating fidelity to the client. No exceptions can be tolerated." Van Dyke v. White*, 55 Wn.2d 601, 612-613, 349 P.2d 430 (1960).

The fee agreement between lawyer and client is not an ordinary business contract, because the legal profession *"has both an obligation of*

public service and duties to clients which transcend ordinary business relationships and prohibit the lawyer from taking advantage of the client." Holmes v. Loveless, 122 Wn. App. 470, 478, 94 P.3d 338 (2004), *quoting*, *In re Swartz*, 141 Ariz. 266, 273, 686 P.2d 1236, 1243 (1984). Lawyers have a duty to always act for the client's best interests and to honor the client's trust and confidence by always acting in complete honesty and good faith. These duties require full communication and candor. *Kelley v. Foster*, 62 Wn. App. 150, 154-55, 813 P.2d 598, *review denied*, 118 Wn.2d 1001 (1991). *Cf. Gustafson v. City of Seattle*, 87 Wn. App. 298, 303, 941 P.2d 701 (1997) [lawyer must discuss all potential conflicts of interest prior to undertaking multiple representation and when an actual conflict of interest arises the lawyer must withdraw], *quoting*, *Eriks v. Denver*, 118 Wn.2d 451, 460, 924 P.2d 1207 (1992).

2. At the Point of Intake.

At the intake interview, the lawyer does not yet have a fiduciary duty to the prospective client because the fiduciary relationship attaches once the lawyer-client relationship comes into being. The lawyer's obligation during the intake is to answer the prospective client's questions honestly and not to mislead - by commission or omission.

B. Fee Disclosures and RPC 1.5(b).

Most lawyers I survey have never read RPC 1.5(b) and are unaware of RPC 1.5(a)(9) which addresses required fee disclosures to the client at the intake stage. RPC 1.5(b) states:

> The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. Upon the request of the client in any matter, the lawyer shall communicate to the client in writing the basis or rate of the fee.

RPC 1.5(a)(9) provides:

> The factors to be considered in determining the reasonableness of a fee include the following:
>
> . . .
>
> (9) the terms of the fee agreement between the lawyer and the client, including whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and of the lawyer's billing practices.

This subsection, formerly RPC 1.5(a)(8), is discussed in *In re Disciplinary Proceedings Against Boelter*, 139 Wn.2d 81, 985 P.2d 328 (1999), where the court seems to place great emphasis on this factor. *Boelter* clearly stands for the proposition that a lawyer cannot charge a fee that is contrary to the written fee agreement's terms. The Supreme Court in *In re Disciplinary Proceeding Against Vanderbeek,* 153 Wn.2d 64, 101 P.3d 88 (2004), clarified that the statement in *Boelter* focusing on former RPC 1.5(a)(8) (now RPC 1.5(a)(9)) as *"the relevant factor in the determination of reasonableness"* applies *"in instances where an attorney has charged clients' fees that were alleged to be outside of those agreed upon by the parties in their fee agreement."* *Vanderbeek,* 153 Wn.2d at 85 n.18.

When read together, these two parts of RPC 1.5 seem to require that the lawyer orally discuss and fully disclose all that is in the fee agreement. The word *"shall"* in RPC 1.5(b) is obviously mandatory. RPC 1.5(a)(9) makes clear that if the full nature and extent of the fee arrangements and billing practices are not discussed and fully disclosed, the fee charged is susceptible to being determined unreasonable. Lawyers must have written fee agreements that are clear and unambiguous. Closer scrutiny by courts and more client-oriented end results may be expected in the future unless lawyers' documentation of billing practices and arrangements improves greatly. See RPC 1.5 cmt. [2] *("it is desirable to furnish the client with at least a simple memorandum"*; *"[a] written statement concerning the terms of the engagement reduces the possibility of misunderstanding"*); RPC 1.5 Wash. cmt. [11] *("Lawyers are encouraged to use written fee agreements that fully and fairly disclose all material terms in a manner easily understood by the client."*).

There is some disagreement among commentators about the extent to which a lawyer may charge clients for overhead items if fully disclosed in

the fee agreement. Nonetheless, all fees charged must be reasonable, and charges not fully disclosed to the client will not likely be determined to be reasonable.

C. Conducting the Fee Discussion at Intake.

How we address fees is largely a function of our personalities and our comfort level in discussing fees with brand new clients. If we are introverted or find money issues with clients hard to discuss openly, we put ourselves at a distinct disadvantage and will undoubtedly engender more than our fair share of problem clients and fee disputes. Having taken in my first private pay client of my own over 30 years ago and recalling how awkward it was to discuss hourly fees, retainers and payments, I can empathize with fellow lawyers who find it difficult. However, with practice and the knowledge that my fees and costs are reasonably determined, , it has gotten easier, and now I do not give it a second thought.

As soon as you decide to take a case, and it appears the client will hire you, you must turn the conversation solely to fees and fee arrangements. Once you shake hands with that client and agree to take the case, even before any signed fee agreement is ever signed, you have undertaken the full panoply of fiduciary duties to that client. Anything you fail to discuss may come back and bite you later on.

As to what should be discussed and fully disclosed, literally anything in the fee agreement to which you intend to hold the client should be discussed. The subjects listed in Section II above, if contained in your fee agreement, must be discussed. For a more detailed discussion of certain fee agreement topics and how to address them, see Caryl, *"Avoiding Fee Disputes Entirely; Adopting Solid Office Practices for Fee Arrangements beginning with the Intake Interview"* WSTLA Fee Disputes Seminar, March 28, 2007.

IV. THE FIDUCIARY RELATIONSHIP AND HOW IT IMPACTS LATER DEALINGS WITH THE CLIENT

Under the Rules of Professional Conduct, once the lawyer agrees to take the case, the attorney-client relationship arises and the lawyer's fiduciary duties to the client commence. 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 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 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's 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 in the summer of 2006, 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 attorneys' fee clause contained in the written agreement). Both sides appealed and we won a part of our appeal but the denial of attorney's fees to my client was sustained on appeal. There is no legitimate reason not to get a written fee agreement signed at or shortly after the intake interview.

V. FEE SHARING – WHAT IS PERMISSIBLE?

A. With the Client.

Can you share fees with your own client? How could that be? Well, it is done by discounting the fee. This can be done in a contingency or hourly context. Keep in mind that *"A lawyer cannot charge or collect an unreasonable fee."* In tort cases under RCW 4.24.005 and in any other case under RPC 1.5(a), a client can challenge the reasonableness of the fee. When I was doing mostly personal injury work, I occasionally reduced my fee if I thought the client was ending up with too little. This does not mean that the agreed upon fee is necessarily unreasonable. Now in my almost totally hourly practice, I reduce hourly billings routinely if I think that the charge is more than I feel comfortable accepting. I have yet to have a client challenge a fee reduction.

B. With a Non-Lawyer.

This is one issue that could not be clearer. A lawyer may not share fees with a non-lawyer. RPC 5.4 addresses fee sharing with non-lawyers and partnerships with non-lawyers. With very narrow exceptions dealing with the estates of deceased, and *"disappeared"* lawyers, and a law firm

profit-sharing program, *"A lawyer or law firm shall not share legal fees with a non-lawyer."* RPC 5.4(a). This would presumably cover compensating a paralegal or other staff person with a percentage of contingency fees. Don't go there!

RPC 5.4(d) generally forbids a lawyer from entering into a partnership with a non-lawyer where *"any of the activities of partnership consist of the practice of law."* The whole point of the rule is to protect the lawyer's professional independence of judgment. See comment to RPC 5.4.

C. With other lawyers not in the same firm – working together.

1. The Rule Itself.

The governing rule here is RPC 1.5(e). This rule governs situations where:

2. Lawyer #1 refers a case to lawyer #2 and largely or completely drops out.
3. Lawyer #1 associates lawyer #2 and one is the lead and performs the greater share of the work.
4. Lawyer #1 brings in lawyer #2 and plays a very passive role thereafter.
5. Client fires lawyer #1 and lawyers #1 and #2 reach a fee sharing agreement.

The original Code of Professional Responsibility rule that was succeeded by the Rules of Professional Conduct in 1985 did not allow disproportionate fee sharing, or referral fees. RPC 1.5(e) changed that in 1985, and permitted fee-sharing agreements. The Supreme Court adopted slight modifications to RPC 1.5(e) in the Amendments that took effect on September 1, 2006. It is that rule we address today. For pre-9/1/2006 fee sharing cases, I am happy to consult.

The current RPC 1.5(e) provides:

(e) A division of a fee between lawyers who are not in the same firm may be made only if:

(1) (i) the division is in proportion to the services provided by each lawyer or each lawyer assumes joint responsibility for the representation;

(ii) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and

(iii) the total fee is reasonable; or

(2) the division is between the lawyer and a duly authorized lawyer referral service of either the Washington State Bar Association or of one of the county bar associations of this state.

The 2006 rule essentially provides that such a division is permitted if (1) either fees are divided *"in proportion to the services provided by each lawyer," or "each lawyer assumes joint responsibility for the representation"* (largely for purposes of malpractice responsibility); (2) the total fee is reasonable; and (3) the client agrees in writing to the arrangement, *"including the share each lawyer will receive." See* RPC 1.5 cmts. [7], [8].

The prior rule was, by and large, the same with the exception that the written agreement with the client providing for fee sharing by the lawyers was not expressly required to contain the specification of *"the share each lawyer will receive,"* although this requirement was likely implicit in the old rule as well. Prof. John Strait of Seattle University Law School recently testified in a case of mine last year that the pre-2006 rule required the client be informed of the agreed split, although the rule did not expressly so state.

Two cases in which the effect of this rule was litigated are *Hoglund v. Meeks,* 139 Wn. App. 854, 170 P.3d 37 (2007), and *Mazon v. Krafchick,* 158 Wn.2d 440, 144 P.3d 1168 (2006). *See also* Wash. Rules of Prof'l Conduct Comm., Informal Op. 2127 (2006), and Wash. Rules of Prof'l Conduct Comm., Informal Op. 2159 (2007), which address the rule in the contract lawyer context.

2. Disproportionate Fee-Sharing by Agreement.

Lawyers not in the same firm can share fees disproportionally if the rule is followed. The client must agree both to the concept of a disproportionate division of the fees, the inter-lawyer agreement must be confirmed in writing, and the client must agree to *"the share each lawyer will receive."* The drafting of these ethics rules is always a political process and ultimate language adopted is always a compromise derived from differing interests of the Bar's membership. This RPC 1.5(e) language is

ambiguous in several regards. The agreement must be *"confirmed in writing."* By whom, and how? Does the client need only receive the confirmation or does the client have to be a party to the writing and sign off on it? Does the written confirmation have to include the *"share that each lawyer will receive,"* or need only reference that the client has been informed and agrees? My recommendation for such fee sharing is as follows:

- The client should be a party to the fee-sharing agreement and signs off on the agreement, approving the same.
- The specific share for each lawyer is always set forth expressly. The client acknowledges in writing that he/she is in agreement to the proposed fee-sharing.
- Both lawyers sign as well and bind themselves. (Fee disputes often do arise in these disproportionate fee-sharing arrangements.)
- The fee-sharing agreement should provide that the client acknowledges receipt of a copy of RPC 1.5(e), that it has been explained to the client and that he or she has had all questions answered by the lawyers.
- The original fee agreement with the client, if both lawyers are parties, may set forth the disproportionate fee division at the outset and with the client's signature, the fee agreement itself meets the requirements of RPC 1.5(e)

3. Sharing by Proportionality.

The rule clearly provides that fee divisions between lawyers, not in the same firm, may be proportional to the *"services provided by each lawyer."* The rule does not require mathematical certainty, but rather rough proportionality. Lawyers are not required to keep time records in contingent fee cases. *Kimball v. P.U.D.*, 65 Wn.2d 252, 391 P.2d 205 (1964). No case interpreting the requirement of proportionality under the 1985 or 2006 versions of RPC 1.5(e) has been found. However, this issue came up many years ago, under the old Code of Professional Responsibility and the Disciplinary Rules, in *McNeary v. American Cyanamid*, 105 Wn.2d 136, 712 P.2d 845 (1986). The injured plaintiff in that case associated two law firms, one from Minneapolis and one from Seattle, for the litigation. The lawyers entered into an agreement to share the contingent fee *equally* and to do the work *equally*. There was a falling out between the lawyers, and a dispute arose between the two firms over dividing the fee. The decision came to the

Supreme Court. DR 2-107 then provided that lawyers could divide contingent fees *"only (1) with the client's consent after full disclosure, (2) if the division is proportionate to the services performed and responsibility assumed by each, and (3) the total fee does not clearly exceed reasonable compensation."* This was the immediate predecessor to RPC 1.5(e)(2), which allows disproportionate fee sharing if the client agrees in writing. The newly-adopted 2006 Amendments to the Rules of Professional Conduct for Washington have left the prior RPC 1.5(e) largely intact. In *McNeary*, the trial court awarded 40% to the Minneapolis firm and the Seattle firm challenged this division. Neither firm kept hourly time records. The Supreme Court reversed the trial court's decision and returned it for additional testimony and findings, holding that the 40% fee to the Minneapolis firm was not supported by competent evidence. In so doing, the Court stated:

> On the other hand, CPR DR 2-107 should not mean that attorneys must "correlate each minute spent on a case to each penny earned therefrom in order to achieve proportionality between 'the responsibility assumed and services performed' on the one hand and each attorney's share of the fee on the other." Fitzgibbon v. Carey, 70 Or.App. 127, 137, 688 P.2d 1367 (1984), *rev. denied*, 298 Or. 553, 695 P.2d 49 (1985). This case aptly demonstrates that as a practical matter, it is extremely difficult for a trial court to independently assess the proportions of work performed and responsibility assumed, after the fact, in cases involving a joint representation agreement.

McNeary, supra, 105 Wn, 2d at 142. The Court concluded, however, that the fee-splitting agreement was not unlawful:

> This agreement does not necessarily violate CPR DR 2-107. We agree with the Oregon Court of Appeals that "***when there is a 'true division of services and responsibility,' a specific agreement to divide a contingency fee between associating attorneys may be enforced, even though it is claimed that the division is not directly proportional to the work performed by each***." Fitzgibbon v. Carey, *supra*, 70 Or.App. at 136, 688 P.2d 1367. ***Therefore, where the trial court finds a substantial division of services or responsibility, the agreed division***

should control. *See* Breckler v. Thaler, 87 Cal.App. 3d 189, 151 Cal.Rptr. 50, 55 (1978). (Emphasis added).

McNeary, supra at 142-43. When it comes to what is proportional, the *McNeary* case is still good law and *". . . where the trial court finds a substantial division of services or responsibility, the agreed division should control." Id.*

This subject is discussed in outdated fashion in the WSBA Ethics Deskbook at p. 3.0. In the 2008 Supplement to the Ethics Deskbook which is about to be published, I have updated the Attorney's Fee chapter, including the section on fee sharing. Stay tuned!

D. With other Lawyers not in the same Firm – Successor/Predecessor.

This is the situation where the client elects to terminate the first lawyer and hire another. This is an area in the attorney's fee arena where the law is absolutely well-settled. Clients can fire their lawyer for any reason, no reason or even an improper reason. The lawyer has no recourse.

1. Where there is no Fee Sharing Agreement.

In lawyer termination cases such as *Wright v. Johansson,* 132 Wash. 682, 692, 233 Pac. 16 (1925), *Kimball v. P.U.D.*., 64 Wn.2d 252, 257,391 P.2d 205 (1964), and *Ramey v. Graves*, 112 Wash. 88, 91, 191 Pac. 801 (1920), the terminated lawyer's only recourse is the reasonable *quantum meruit* value of the services. The Court in *Ramey* stated:

> 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.

Id at 91. *Quantum meruit* literally translates to *"as much as he deserved." Losli v. Foster*, 37 Wn.2d 220, 233, 222 P.2d 824 (1950)," *Dailey v. Testone*, 72 Wn. 2d 662, 664 (1967).

In *Barr v. Day*, 124 Wn.2d 318, 879 P.2d 912 (1994), the Court identified an exception to *quantum meruit* only where the lawyer had *"substantially performed"* the contingency. See *Taylor v. Shigaki*, 84 Wn. App. 723, 930 P.2d 340 (1997) and *Barrett v. Freise*, 119 Wn. App. 823, 82 P.3d 1179 (2003) where the Courts made clear what substantial performance actually entails. As the Court in *Taylor v. Shigaki* makes clear,

> The doctrine of substantial performance is applied in rare instances where only "minor and relatively unimportant deviations" remain to accomplish full contractual performance. 17A Am.Jur.2d *Contracts*, § 634 (1991).

Taylor supra, 84 Wn. App. at 729. Washington precedent defines the earned contingency as recovery that is *"practically certain,"* which would include any complete prosecution of appeal. See, *Taylor v. Shigaki*, 84 Wn. App. 723, 930 P.2d 340 (1997), where substantial performance is defined as follows:

> A discharged attorney has substantially performed his or her duties when the attorney's efforts make a settlement "practically certain," even if the settlement occurs after the client fires the attorney. *Clifford v. Wilcox*, 175 Wash. 513, 27 P.2d 722 (1933) (interpreting North Dakota law)

See, *Ross v. Scanell*, 97 Wn. 2d 598, 647 P.2d 1004 (1982), where despite the fact that the lawyer had actually obtained the recovery and there was merely some paperwork to complete the job remaining when he was fired, yet the Court held that he had not substantially performed. See, *Cavers v. Old National Bank*, 166 Wash. 449, 7 P.2d 23 (1932) where the Court ruled that the terminated lawyer had not substantially performed when he obtained a two thousand dollar offer of settlement although the client settled the same claim for the very same $2,000 a couple of weeks after firing his lawyer.

2. Fee Sharing is Permissible Here.

When the client fires the first lawyer, often there is antagonism between the old lawyer and the client, and sometimes this extends to controversy between the old lawyer and the new lawyer. In contingency fee cases, if the client fires lawyer #1 who has not fully or substantially performed, the price of that right is that the client owes lawyer #1 the reasonable value of the services performed before termination. New lawyer

#1 may sign a standard contingency fee agreement with the client and the client would owe lawyer #1 the full contingency plus the *quantum meruit* fees owed to previous lawyer #1, so long as the contingency fee owed to that lawyer is reasonable. See RPC 1.5(a) and RCW 4.24.005. In fact, I litigated such a situation several years ago for the terminated lawyer (lawyer #1) and achieved the recovery of *quantum meruit* fees, while lawyer #2 collected his full contingency fee and then abandoned the client, who had to pay lawyer #3 to defend the *quantum meruit* claims. This turned into a financial disaster for the unsuspecting client, who ended up paying three lawyers for one recovery.

The stand-up manner of addressing this situation and one that is typically used is an agreement between lawyers #1 and #2 to divide the contingency fee. Neither lawyer is required to do so by any case law or court rule. Nonetheless, it would seem intuitive that a client should ordinarily be required to pay one fee. The best result is one where the lawyers agree on the division of the contingency fee, the client only pays one fee and there is no cost of litigation. In such a case, the division of the fees is governed by RPC 1.5(e), and as long as the requirements of the rule are met, the agreement is enforceable. The same rules apply as in Section IV.C.2 above. Ordinarily, the client will not object to a fee sharing arrangement because he or she only has to pay one fee. If the fee division is not proportional to the services performed, the client's informed consent in writing is required.

QUERY: WHAT HAPPENS WHEN THE LAWYERS REACH AN AGREEMENT TO DIVIDE THE FEES, THE CLIENT'S WRITTEN CONSENT IS NOT OBTAINED, AND THEIR FEE-SHARING IS NOT PROPORTIONAL TO THE SERVICES PERFORMED?

Can the client object? Presumably so, but to what end? I litigated this issue several years ago where a client long after disbursement questioned the amount of fees charged and sought disgorgement of my lawyer #1's share of the fees. Lawyers #1 and #2 had agreed to divide the contingency fee one third to lawyer#1 and two-thirds to lawyer #2, but not in writing. I successfully argued that the client had no standing to object because he paid the contingency fee that he agreed to pay, nothing more, and lawyer #2 was not objecting to the handshake agreement. There is no clear answer in this

situation. Hence, the lesson here is to obtain from the client written informed consent.

VI. CONCLUSIONS

Avoiding later complaints and/or fee disputes with clients can be avoided, or if litigated anyway, won, by doing the stand-up thing by the client right from the beginning, including 1) working with a clear and unambiguous written fee agreement that covers all the bases desirable to the lawyer; 2) conducting a complete fee disclosure in the intake interview where everything in the fee agreement and the lawyer's billing practices are fully explained and the client's questions answered; and 3) obtaining for your file written acknowledgements from the client. Every fee agreement should be in writing - literally every one. All terms you want to enforce against the client must be in writing and discussed. Tie the client to the terms in your written agreements with proper mechanics – get the client to acknowledge in writing that he or she has been fully advised and all questions answered.

Fee sharing disproportionate to the value of the services performed can be accomplished with other lawyers not in your firm by full compliance with RPC 1.5(e). Fee sharing proportionate to the value of the services performed can be done without a written instrument, but that practice carries with it some inherent risks. Fee sharing with a non-lawyer is strictly verboten!

Avoiding fee disputes with either clients or other lawyers is very possible with advance preparation of the agreement and a truly complete discussion and disclosure of all fee arrangements and billing practices in the intake interview. As you grow more comfortable discussing your fee and cost schedule with your clients and clients-to-be, you are well on your way to a more expanded "comfort" zone with regard to a very important component of your law practice – thinking outside the traditional box.