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CHAPTER TWO

PROTECTING AND DEFENDING YOUR FEES:

STRATEGIES FOR PREVENTING PERMATURE TERMIONATION AND GETTING PAID WHEN TERMINATIN IS UNAVOIDABLE

I. INTRODUCTION

In a contingency fee practice, if you are doing your job right, and if you hope to stay in business, you have to be in the game at the business end, when the contingency fee arrangement matures and you and your client get paid. For most of us, *most of the time*, this is the rule rather than the exception. However, there are those cases, and those clients, where your best efforts, good counsel and best intentions cannot prevent deterioration in the attorney-client relationship. You start wondering if you didn't make an enormous mistake in taking this case, or the client's sense of dissatisfaction becomes painfully clear in his communications, tone, or attitude.

You communicate with the client to see if the problem can be worked out. But communication fails. It may be that client just simply cannot accept your evaluation of his damages. He may not take well to your identification of the weaknesses in his case that are all-too-obvious to you. The client may question your loyalty, or commitment. Even worse, he or she may see you as too tied to the other side's arguments. There can be a myriad of reasons, none of which have anything to do with the quality of your work or your loyalty, but nonetheless, the relationship slides inexorably towards termination before completion.

This paper emphasizes getting paid in the contingency fee context but virtually all of the advice and caution applies to handling any case on an hourly or flat fee basis. The first portion of this paper will address ways to avoid getting fired. Some of this is so basic that I am almost embarrassed to even discuss it, but I see many bonehead acts and omissions by lawyers in my fee dispute cases that I am aware that it is not ingrained for some practitioners.

The second part of this paper deals with how you, as counsel, react when you receive the news that you are history. How you react now, and after you are terminated, may have far-reaching consequences in terms of your fee in the case, future referrals, and your reputation, not to mention your free time.

Third, this paper will address whether you can prevent your own termination, the client's rights to fire you, your fee possibilities when you are fired, and the factors that will affect your fee entitlement, if any, and reimbursement of your costs. Last, this paper will discuss the filing and foreclosure of attorney's liens, when to walk away entirely from a case and its fee. I will also address the various forums available to resolve fee disputes with former personal injury clients. What I hope to accomplish with this paper and presentation is to raise issues all lawyers should be thinking about, suggest how best to deal with the unfortunate event of termination, and help you to navigate this conundrum.

II. FOSTERING GOOD CLIENT RELATIONS

These materials offer common sense advice on how to get paid using a positive, cooperative attitude toward your client, based on 25 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. 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 usually 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 on your lack of communication. You didn't promptly return calls; they 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. 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 do raise the costs issue, 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.

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

Not all problem clients terminate their lawyers, but the client who terminates you is likely to send early signals of unhappiness. Complaints in emails or voicemails are a red flag. Unhappy comments when bills are paid are a red flag, along with excuses when bills are not paid. 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. These red flags frequently predate a fee dispute. Acknowledging the grievances expressed by a 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 any client's 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. 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.

I am amazed at how freely lawyers send "nastigrams" and letters to clients when they are criticized by them. A nasty email or letter responding to verbal accusations will reflect poorly on you 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 will 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.

Deprive your disgruntled client of the centerpiece of his case against you; set aside the client's angry missive. Think about 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.

You have the opportunity to create documents that 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 that calls for a clear, polite, communication expressing your position. I try to use letters that delineate my 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.

III. WHEN TO GET OUT

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 that same type of client go. Nonetheless, I still have hung on too long to a few clients when I should have known better.

Many lawyers are loathe 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. While 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.

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

of a problem client will also help you trust your instincts to walk away early. If you have a busy practice, politely withdrawing your representation can lighten your load. Withdrawing usually eliminates entitlement to a contingency fee, but you still may recover fees in *quantum meruit* under a theory of constructive termination if the client's conduct has made a productive attorney-client relationship impossible. Getting out early, when you realize you have a toxic client, is good business. This is equally true in hourly cases.

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

A. The Client's Rights and How to React

You are not going to get terminated very often if you are doing your client-relations job well. A good attitude and respectful behavior towards the client can reduce the opportunities for termination, but cannot prevent them. One of my cases involved a lawyer-client who was fired after a divorce lawyer criticized my client after obtaining all available liability and UIM insurance. The divorce lawyer took the case from my fired client and then sued him for malpractice. See *Barrett v. Freise*, 119 Wn. App. 823, 82 P.3d 1179 (2003). Even the best lawyers cannot prevent termination. 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 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). You, as counsel, can do absolutely nothing to prevent the termination, nor should you try. A client determined to fire you either knows that he can or easily learn that he can, merely by calling any other lawyer. In this arena, the law tilts in favor of the client.

As lawyers, we have no choice but to make a client-friendly legal environment. Poor bedside manner can provoke time-consuming fee disputes, nasty bar complaints, malpractice suits, and even besmirch your professional reputation. How you react to the prospect of termination may determine 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. Reassure the client that he has the unquestioned right to fire you. While you don't have to take abuse from your client, this is not the time to counterattack. Assure the client that you will fully cooperate in transitioning to his or her new lawyer. You may suggest that she ask the new lawyer to discuss with her a stipulation to the amount of your fee so you can avoid filing an attorney's lien. But if you must file an attorney's lien to protect your fee entitlement, let the client know beforehand so he does not feel ambushed.

When a client fires you, it 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. You will also learn how to take termination gracefully and improve your chances for a positive fee recovery.

B. Does Termination Defeat the Fee?

I am frequently asked about whether a contingency fee is lost upon termination. 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. Johanson, 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. Johanson, 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. *Hamlin v. Case & Case*, 188 Wash. 150, 161 P.2d 1287 (1936); *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 the client's termination of the attorney 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, supra*, 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, 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*, at 153.

There is a narrow exception to the general rule when a lawyer has substantially performed. The Supreme Court in *Barr v. Day*, 124 Wn.2d 318, 979 P.2d 912 (1994), reiterated 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*, at 38. I had the opportunity to test the *dicta* in *Barr* in *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* sought to prevent, *i.e.*, the client firing 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.

C. 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* determined it to be 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, the facts are sufficient to earn the attorney his contingency fee. A binding settlement agreement with the client's consent, even before disbursement, is also sufficient. In contrast, if 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 will probably not be sufficient to earn the attorney his contingency fee.

I represented another fine lawyer in *Barrett v. Freise*, discussed earlier. In *Barrett*, my client had represented the family of a brain-injured man, the victim of a drunk driver who had been over served in a tavern. My client received an offer of settlement for the liability limits of $500,000, plus all of the UIM insurance. He obtained waivers of the PIP sand health insurance subrogation worth about $170,000. My client declined to consummate the $500,000 liability limit settlement because he would not allow the loss of joint and several liability. But while he was pursuing the case against the tavern, another lawyer intervened with the family, and my client was terminated, with the assistance of the other lawyer, and then sued for malpractice, breach of fiduciary duty and conflicts of interest.

It took six years, a summary judgment, a five day trial and a Division I appeal before we ultimately prevailed. After upholding the trial court's dismissal of all of the claims of malpractice and self-dealing, the Court of Appeals held the contingency fee as reasonable. The court stated:

> The court also rejected John and Jeff's claim on summary judgment that Freise should recover no fee whatsoever for his services in obtaining the commitment from American States to pay its policy limits. As the trial court recognized, a client may not deprive a lawyer of his contingency fee by discharging him just short of completion of the contract, where the lawyer has substantially performed under the contract. *Taylor v. Shigaki*, 84 Wn. App. 723, 728-29, 930 P.2d 340 (1997). A discharged lawyer has substantially performed his or her duties when the attorney's efforts make a settlement "practically certain," even if the settlement is consummated after the client fires the attorney. *Id.* at 729. To permit a client to terminate a lawyer after substantial performance but before a settlement offer is accepted and money received would eviscerate the usefulness of contingency fee contracts. *Id.* at 729. The record unequivocally establishes that Freise had substantially performed under the agreement regarding the American States settlement, as of June 24, 1996.

Id. at 846. Read the opinion in *Barrett* for a horrendous story of what one lawyer can do to another.

D. So What is *Quantum Meruit*?

In the event that you do not qualify for substantial performance, then the only recovery the law accords is under the doctrine of *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.

The court looks specifically at the fee agreement to determine the scope of the work and whether the lawyer has substantially performed. In *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. In *Ross*, the court held that the lawyer's fee entitlement was not the contingency fee but one based upon *quantum meruit*.

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 *Kimball* had to scour his file materials to demonstrate what he had done, identify any settlement offers he had obtained to date, and identify the extent of his trial preparation. For example, as the terminated attorney, you can expect the court will give the client the benefit of doubt in determining lodestar hours where there are no time records. For attorneys who do not keep time records, you are assuming the risk of poor compensation in cases 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 initially is whether to pursue your fee at all. And the same considerations underlying "getting out first" also 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. You might file an attorney's lien and simply wait, if the case is already filed in court. But walking away from your fee is an option worth considering if you have an ornery client **and** you anticipate a contentious fee dispute.

First, consider how much is at stake. The size of the potential financial loss will depend on how far into the course of the representation the relationship ended. If you have wholly accomplished what you were hired to do, giving up your fee in its entirely does not make sense; and it may encourage future abuse by clients. If you are four months from trial and have 150 hours in the case, your investment may be too much. If you have merely begun negotiations, then you should consider your options.

You may want to walk from a substantial fee, though, if there is actual or apparent validity to the client's complaints. Reflect honestly on whether the relationship with your client has been good. 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 he did not appreciate may return to embarrass you, or worse, serve as the basis for a complaint. If there are problems that you would rather not confront, for example, you actually did make a mistake that has harmed your client, you should consider walking away from the fee.

B. If You Don't Walk Away – How To Enhance Your Chances of Getting Paid

The situation of termination is rife for serious complications, including fee disputes, bar complaints, 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 the time to counterattack the client.

If the client has fired you, or if you feel the absolute need to withdraw, 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, 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 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 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 may 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 results in a client with hard feelings who may file a bar complaint against you or bad-mouth you to other clients and business referral sources.

As long as the window to dialogue is open, do not dig in your heels. As an arbitrator, I have seen lawyers act like the stereotypical attorney. Stridency corners the client into a more hostile stance over the fees but courtesy, restraint, and a reasonable demeanor will go a long way to facilitate an amicable resolution.

An ethical and caring successor lawyer will want to make sure that his new client does not suffer financially from his or her taking over the case from the discharged lawyer. The same lawyer will not make the firing an excuse for punishing the client with his and the old lawyer's fees. Many ethical and caring successor lawyers will absorb a portion of the old lawyer's fees within their fee. Unfortunately, I have seen the new lawyer talk the client into terminating the old lawyer, usually on the basis of some failing

of tactic or preparation and then make the client sign a full contingency fee with him or her, leaving the client to deal with the old lawyer's *quantum meruit* rights.1

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

VI. WHAT TO DO IF THE CLIENT REFUSES TO NEGOTIATE

A. Securing and Collecting Options

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.

B. 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 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. Unreasonable fees charged, 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

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1 I represented a fired lawyer recently in a modest personal injury case. My take was that the client had some client relations issues with his lawyer, contacted another lawyer who criticized the first and suggested he could do better. The client then fired the first lawyer, signed a full contingency fee agreement with the second, and then was stuck tin dealing with the first lawyer's attorney's lien. I moved to foreclose the lien, the client had to hire another lawyer and after some litigating and a mediation, the client paid real money to my client, mediation fees and lawyer's fees. He may have ended up with more in his pocket if he had not fired the first lawyer at all.

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 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 allows 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 point out a record that supports a favorable fee result.

C. Sensible Use of the Attorney's Lien

1. To what does the lien attach?

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 Washington's territorial legislature of 1881. Now codified at RCW 60.40.010, et seq., the language does not provide a great deal of practical guidance. The statute was recently amended in 20042 and new subsection (1)(d) was added:

> Upon an action, including one pursued by arbitration or mediation, and its proceeds after the commencement thereof to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement;

The new law also renumbered the old subsection (4) to subsection (1)(e), and it now reads as follows:

> . . . upon a judgment to the extent of the value of any services performed by the attorney in the action, or if the services were rendered under a special agreement, for the sum due under such agreement, from the time of filing notice of such lien or claim with the clerk of the court in which such judgment is entered, which notice must be filed with the papers in the action in which such judgment was rendered, and an entry made in the execution docket, showing name of claimant, amount claimed and date of filing notice.

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2 In fact, the preamble to the new legislation states:

> The purpose of this act is to end double taxation of attorneys' fees obtained through judgments and settlements, whether paid by the client from the recovery or by the defendant pursuant to a statute or a contract. Through this legislation, Washington law clearly recognizes that attorneys have a property interest in their clients' cases so that the attorney's fee portion of an award or settlement may be taxed only once and against the attorney who actually receives the fee.

The new legislation added several other provisions:

- Giving the lawyers the same right to enforce their lien under new subsection (1)(d), "or over judgments" as the client would have "for the amounts due thereon to them." Subsection (2).

- The lien created by subsection (1)(d) on an action and proceeds under subsection (l)(d) and upon judgments under subsection (1)(e) on judgments "is superior to all other liens." Subsection (3).

- A settlement of the parties may not affect the right of the lawyer to his or her own lien "until the lien of the attorney based thereon is satisfied in full." Subsection (4). This means that the client may not settle on his or her own and leave the lawyer empty-handed.

- The statute defines "proceeds" as any monetary sum received in the action and grants to the attorney a security interest in any proceeds received by the client. Subsection (5).

The lien statute permits a lawyer to claim a lien against the file. However, I strongly urge against using the client's file as leverage to get paid. Formal Ethics Opinion No. 181 in Washington forbids an attorney to withhold file materials to the extent that it would "materially interfere with the client's subsequent legal representation." Read the full opinion on your own; there is a lot of popular wisdom about Formal Opinion 181 that the formal opinion does not really support.

In short, an attorney's lien attaches to a *res* that your services were intended to bring about "upon an action, including one pursued by arbitration or mediation, and its proceeds after the commencement thereof to the extent of the value of any services performed by the attorney in the action," and upon a judgment. If there is no *res* to which the fee can attach, there is no place for the lien. The requirement of a *res* generally limits the use of a lien to plaintiffs lawyers involved in litigation, it can never attach to real property. *Ross v. Scannell, supra.*

2. What should the lien claim notice contain?

What should be included in the lien claim notice? At a minimum it should contain the lawyer's name, the name and address of the client, a statement that the lawyer performed legal services for the client of the client, the basis for the fee (e.g. written fee agreement), the subject matter to be liened, the name and address of the stakeholder, the amount of the lien in dollar amount or descriptively (i.e., one-third of the last offer of settlement that the client has authorized the lawyer to accept, or *quantum meruit*, i.e. the reasonable value of the legal services), including costs advanced. The lawyer claiming the lien should have his or her signature on the claim of lien notarized.

The lien claim should be filed in the cause in which the legal services were performed. Many lawyers draft lien claims in the absence of any lawsuit, and serve copies on the opposing party or the stakeholder, such as an insurer. Such liens are of doubtful validity, because the statute requires that the lien notice be "filed with the papers in the action in which the judgment is entered." A copy of the lien should also be served on the person holding the *res* or subject to which it attaches, the stakeholder, and the client or former client. Proof of service is essential.

3. How to foreclose the lien?

The procedure for foreclosing the lien is contained in the few lines of RCW 60.40.030. The statute gives virtually no guidance as to how the lien is to be foreclosed. It simply states, ". . . the court or judge may . . . .2) summarily . . . inquire into the facts upon which the claim of the lien is founded, and determine the same, or 3) . . . to refer it, and upon the report, to determine the same." With archaic and unhelpful language, many practitioners procedurally "wing it."

In my experience, the court will do one of two things: 1) permit a summary procedure where there is a motion to foreclose, or determine the lien, accompanied by affidavits or declarations. A hearing where argument only is permitted would accompany this. If the issues are very complicated, the court may set it on the short trial calendar or even conduct a trial. If the court requires that the lawyer surrender the client's papers or money to the client, the court can impose an obligation of the client to provide security.

In *Krein v. Nordstrom*, 80 Wn.App. 306 (1995), the court affirmed the trial judge's decision to permit a half day trial on the short calendar where the court entertained affidavits and some live testimony. Expert testimony was permitted. The "summary process" was upheld as meeting the requirements of procedural due process and was affirmed.

I have filed a number of motions to foreclose attorney's liens and, in my experience, the prudent attorney will create the appearance of familiarity with the process and prepare the pleadings and proof as he or she would a summary judgment, and in appropriate cases, ask for the opportunity to put on live testimony. In all probability, the trial court will be upheld in whatever manner it allows the litigants to determine the validity of the lien, so long as each party has the opportunity to offer evidence and to be heard on the issue.

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, 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.

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 invoke concept of "equity."

D. Suit on the Contract

You can sue the client based on your fee agreement. If no lawsuit is filed, and if you don't have an arbitration clause, attorney's liens and arbitrations are unavailing. You may be limited to a lawsuit 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 comes across as dishonest or unreasonable. Judges tend to find a basis for compromise, even if the fee claimed was earned. The outcome is never easy to predict.

While an 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 of 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. These are largely worthless as guides, although most courts pay lip service to them.

For a contingency fee arrangement, a 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). And if you are fired short of substantial performance, there is no entitlement to the contingency fee.

The contingency fee attorney still has the equitable remedy in *quantum meruit* for the reasonable value of his or her 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 on the open market may not be determined to be the reasonable rate, although it may be used as evidence and the total number of hours expended will not 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 either. 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., supra. However, the court will certainly give the client the benefit of the doubt in totaling hours where there are no time records.

E. 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*, 34 Wn.2d 351, 208 P.2d 1207 (1949) 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.

If you are fired in litigation, you should ask the court for a summary determination on the issue of fees when 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.

F. Voluntary Bar Association Fee Arbitration

The Washington State Bar Association has a fee arbitration panel for the voluntary resolution of fee disputes, but it is not commonly used. I have not had experience with this procedure and none of my clients has ever requested fee arbitration. A proposed court rule circulated several years ago would have made this process mandatory. That proposed rule was dropped when faced with strong sentiment among the bar against it.

To my knowledge, voluntary arbitration has no procedural rules other than the right of either side to veto the procedure. But if you and the client do 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.

G. The Tort Reform Act's "Reasonableness of the Fee Determination."

The "reasonableness of the fee hearing," is part of the Tort Reform Act of 1986, where the legislature toyed with joint and several liability, caps on damages and other aspects of tort deform. Several parts of this legislation have been struck down by our Supreme Court, but the RCW 4.24.005 hearing is one part that still survives. This statute gives 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, the statute applies literally in any case, even where the lawyer has been terminated.

This proceeding is very rare. In fact, I am not aware of another 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 under RCW 4.24.005, 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 quality of the work that was done and the likely result, but for the termination. And in each of those cases, the trial court found, as a matter of fact, that my clients had substantially (or fully) performed his fee agreement at the time he was terminated.

Ultimately, the purpose of a RCW 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 sought 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 RCW 4.24.005 hearing is only available by petition of the client, if the petition is filed no 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. The statute gives no guidance to the court to determine a reasonable fee; meaning 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.

Last, if you have put an enormous amount of work into the case, but have not substantially performed, you can take the position that the only reasonable fee under the circumstances is a significant portion of the contingency fee. You 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 the case, I wouldn't expect that argument to go very far.

VI. CONCLUSIONS

Getting fired is no fun. Getting fired, then insulted, maligned and then not getting paid is a real bummer. But getting fired can sometimes be prevented. Avoiding this situation may involve changing the ways you practice and relate to your clients. If you have been fired many times, assume you are doing something wrong. If you have fee or other disputes or disagreements with clients regularly, look at how you are practicing. Clients have a different perspective than their lawyers. They tend to think, well, like clients. They aren't going to change. If we want to have better relationship with clients, we are going to have to be the ones to change.

Being right all the time does not get us to attorney-client nirvana either. Failing to disclose important aspects of the case as you go along is not a good idea. Clients, like the

rest of us, don't like surprises. "Sugar-coating" matters is a bad idea unless your track record is incredibly better than mine. I arbitrated a fee dispute case as arbitrator where a client fired the lawyer largely because he was not returning phone call. The client alleged that failure to return phone calls was a breach of fiduciary duty. It wasn't, but it made for expensive litigation for both parties. Applying the golden rule can prevent many client difficulties.

When you do get fired, handle it gracefully and negotiate. Avoid litigating with a client and be generous. Litigating with clients can be bad business and should be reserved for special cases. But when you have one of those special cases, file your attorney's lien, determine your direction and move quickly. A fee claim is like fresh fruit. It doesn't age well. The passage of time will only entrench your former client, make the process more unpleasant and may make you wonder why you didn't settle this earlier.