USING SMART CLIENT RELATIONS AND BILLING PRACTICES TO GET YOUR FEES PAID

I. INTRODUCTION

I have been asked numerous times to give a presentation like this on how to get lawyers' fees paid, and indeed, I have given at least a half-dozen of these types of presentations. The original proposed title to this presentation was something like, "How to Get Paid without Getting Sued." In fact, I gave a presentation on this subject back in December 2005 where the main title was "Getting Paid without Getting Sued." Lawyers frequently approach me to collect a large, often six-figure unpaid balance once the case is over. Oftentimes however, by then it is too late to collect all of the fees that are reasonable and should be paid. To make this clear, let me demonstrate with a story.

A Lawyer comes to me and presents the following:

- Lawyer's client has a piece of commercial litigation that was hotly contested. Client agreed to pay lawyer hourly. The client despised the other party and the opposing counsel was very aggressive. A great deal of discovery was done, numerous motions were brought and the case actually went to trial for over a week. The end result was a compromise where client won some but not all. The client got a net judgment of $50,000. There is no basis for an award of attorney's fees against the opposing party.
- Client got behind early on in paying lawyer's invoices, and the unpaid balance grew with each invoice.
- Lawyer billed sporadically, not monthly. The time entries in his invoices are not a model of clarity or completeness, and are in blocked (non-apportioned) format.
- Client paid sporadically, not monthly.
- Lawyer either has no written agreement or a barebones agreement which was never discussed with client at intake.
- Three months before trial, the unpaid balance was $70,000. Lawyer asked client for security like a deed of trust. Client refused.
- Lawyer prepared the case for trial in a workmanlike fashion, prepared and paid two expert witnesses, and performed a workmanlike job in the trial. The outcome was at the low end of the predictable range of possibility.
- After the trial, the unpaid fees balance is $125,000.
- Lawyer did not seriously discuss settlement and potential risks at trial with the client.
- Client is livid with the result. The client presents the lawyer with a written manifesto of all of the lawyer's failings, potential malpractice, claims of excessive fees. Client refuses to pay the balance or any part of it.

My potential client asks me to collect his or her fee in full (or almost in full), without suing the client, and without incurring substantial fees of my own. The problem is, my lawyer-client-to-be does not need a lawyer with sophistication in attorney's fee litigation. He/she needs

a miracle worker. This is like the person who refuses all immunizations throughout his life, and then wants a full cure for a terminal illness that could have been prevented merely by inoculation.

Once a lawyer reaches a situation similar to the story above, there is no sure and inexpensive way to get the lawyer paid, with or without litigation. The lawyer in the story has an attorney's lien remedy that might get him paid $50,000, but otherwise he is looking at a nasty and potentially expensive lawsuit with no assurance of full payment, irrespective of the cost. This is not what the lawyer wants to hear.

But there is another manner in which the problem of getting paid can and should be addressed, not after the problem raises its ugly head but long before the lawyer even takes that client. That involves the lawyer engaging in serious selectivity in taking clients in the first place, and for those clients who are taken in, establishing and maintaining high quality client relations and good billing practices. In effect, this is merely a form of early inoculation against the kind of situation described above. What can any lawyer do to avoid the situation where there is an enormous unpaid balance in the first place, putting the lawyer in the best possible position to collect he unpaid balance? That is the real subject of this CLE presentation.

Well-meaning lawyers, merely ignorant of the ethics rules, as well as careless lawyers who see ethics as something to maneuver around, both get into trouble with clients, the courts and the Bar. For instance, I tried a two-plus week fee dispute trial in Superior Court a few years ago where I sued my lawyer-client's ex-client for unpaid fees. In fact, his client had paid virtually nothing but the earlier advances. My lawyer-client was a very good lawyer and had tried hundreds of cases. His ex-client countersued him for legal malpractice, breach of fiduciary duty and all of the current typical client defenses to fees, as well as a few new ones. The case was long, nasty, and expensive, went through two years of appeal, and cost a small fortune. To a large extent, my lawyer client was the prevailing party, but for the enormous cost.

Over the years, I have taken time to ruminate on issues surrounding disputed lawyer's fees. What strikes me the most is that many of the problems we lawyers get into in the attorneys' fee arena are preventable with prior planning, forethought and the exercise of simple good judgment. In recent years, I have dedicated some of my presentations to proactive tactics when problems with clients arise. It occurs to me that the most important lessons from my trial I just described above and many others over the last 17 years derive from poor client and case selection, poor fee arrangement discussions, poorly drafted written agreements or no agreement at all.

Both good and bad lawyers get into fee disputes with clients. *Most* of my lawyer-clients in fee disputes are very good lawyers. What is worse than working for an ungrateful client and not getting paid? The simple answer is getting embroiled in nasty, expensive, and uncertain fee litigation with that very ungrateful and now angry client becomes yet another albatross around your neck while you are trying to make a living practicing law. Newer lawyers lack experience in these important subjects and this presentation will hopefully give them some important tools. Nonetheless, most of the fee disputes I get involved in as counsel involve experienced lawyers, not rookies. This may be because newer lawyers are often handling smaller dollar cases, although I have had several cases where my less experienced lawyer-clients were involved in

cases where enormous fees were at stake. Hopefully, preventive medicine will finally start to take hold in our collective consciousness. Good health and diet habits early on can prevent quadruple bypass surgeries later. Similarly, good practices at the intake interview and common sense screening of cases and clients can avoid later fee issues with clients.

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

A. Who Needs Problem Clients?

Search your memory and call up your worst nightmare client. If you are too inexperienced to have had such a client, read the case of *Taylor v. Shigaki*, 84 Wn App 723 (1997), to see what my very first lawyer-client-in-a-fee dispute put up with before he was fired. Then, imagine a client who won't pay your fees, is nasty and critical, harasses you on a weekly, if not daily basis, and causes no end of trouble with your staff. Finally, imagine spending 24 months litigating over your unpaid fees and every one of that client's gripes. Undoubtedly, this scenario has the makings of a Stephen King movie for lawyers.

B. Earmarks of the Problem Client.

It is critical first to commit to identify and avoid problem clients, and then to actually avoid them. First however, you need to learn to identify the clients and cases you want to send on down the road to other lawyers. The following are some of my thoughts on how to identify these problem clients.

1. Client Personality

I have probably represented over 1,000 clients. I have had my share of problem clients and I have represented many lawyers with problem clients. I have found that the following client personality traits tend to be associated with problem-clients:

- Victim mentality
- Zealot personality
- Absolute certainty of his/her version of the facts - client's truth is the only truth
- Very excitable and demonstrative at initial intake interview
- Tendency to demonize the opponent. (You might become the next demon)
- The issue, as claimed by the client, is the principle of the thing, not the money.
- Clients who have strong opinions on how the litigation or other legal task should be conducted or approached from the beginning.
- The client who is absolutely certain that he or she is "right."

You undoubtedly have had your own experiences with trouble clients and could add to this list.

2. The Client's Approach to Fee Arrangements

I find that these situations often characterize problem-clients:

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

Again, you will have your own experiences. Make your own list.

3. Red Flag Types of Cases

In my experiences I find that the following types of cases are heavily associated with client dissatisfaction with their lawyers and, ultimately, fee disputes:

- Divorce/family law
- Boundary litigation
- Harassment/nuisance
- Slander/defamation
- Cases involving severe personality clashes between the putative parties to litigation ~ neighbors in boundary litigation, or harassment by a co-worker.
- Collection actions involving complicated facts
- Any case where the case rides largely or totally on the credibility of the client.
- Cases that rely on collecting your client's own legal fees from the other side
- Disputes over lawyer's fees

4. Damages and Collectability

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

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

5. Your Gut Feelings

All of us, 50-year practitioners and newbies who just passed the bar, have gut feelings about clients because we are all people. It's called intuition, and even men possess it, although we often ignore its merits. As I get older, I go with my gut more and more. Your intuition, vibes and feelings about a potential client are critically important in the determination of whether to take him or her on as your client. My lawyer-client in the story above has said repeatedly that he had bad vibes about these clients from the start, but that he ignored those feelings. Learn to recognize and honor your gut feelings or vibes. If you have an uncertain or bad feeling about a particular potential client, just let that potential client become someone else's problem-client.

6. Never Take a Paying Client out of Altruism

We all want to help - particularly trial lawyers. That is our job, to help people with legal problems. If you want to help someone *pro bono,* even if the odds are long, go for it! But never take a client whom you expect to be a paying client simply because you want to help him or her, despite all of the other problems. Never! This is the very worst reason to take a client's case where some of the warning signs discussed above exist. Angry, vindictive, victim-mentality type clients are undoubtedly beyond your help. People with unrealistic expectations cannot be helped because the strong probability is that their expectations will never be met. You cannot help them because they won't help themselves. Taking on their impossible tasks will only make you one of the demons in the end.

C. What if You Take this Client Anyway?

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

- The client who tells you what to do and when to do it.
- The client who harasses your staff.
- The client who calls you at the office all the time, who calls you on your cell phone (if you give that out to clients) and who drops in routinely and unannounced.
- The client who sends frequent emotional emails.
- The client who acts out emotionally when he/she does not get their way.
- The client who delays payments, challenges hours, seeks discounts on bills, objects to interest charges after not paying your bills, and criticizes your work product, often as a ruse to induce fee reductions.

- The client whose personality and tactics interfere with your overall practice, your peace of mind and intrudes on your personal life.

This client, in all likelihood, will bring you to a point where your only options are to choose between firing the client and maybe not getting paid, or staying in for continued suffering, only to be chiseled on fees in the end, threatened with bar complaints and malpractice. *See Taylor v. Shigaki*, 84 Wn. App. 723 (1997), and *Barrett v. Freise*, 119 Wn. App. 823 (2003) for two clear examples of client abuse of lawyers. If you do stay in, like my lawyer-client in the story above, be prepared to sue for unpaid fees, defend malpractice allegations and accusations of fiduciary duty breaches. When it comes down to this, that's when the real nightmares begin.

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

D. Just Say No!

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

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

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

III. SMART FEE ARRANGEMENT PRACTICES

These materials offer common sense advice on how to enter into a positive, cooperative relationship with your new client, and to avoid misunderstandings and potential conflict through good intake practices.

A. Discuss Fees and Billing Practices Up Front

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

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

There are two rules for fee agreements that in my view are absolute. First, the fee arrangement must be in writing; second, the fee agreement must be more or less contemporaneous with the beginning of the engagement and must track the oral discussion. Remember, the client who does not want a written agreement is a client to avoid. That client has an agenda, down the road, that you want no part of. An oral fee agreement is not worth the paper it is not written on! One of my old law partners had a rule that goes like this: "My feet don't come off the desk until the fee agreement is signed."

One of my recent fee dispute clients, a prominent big-firm lawyer with well over 40 years in practice, prided himself on never having had a written fee agreement with a client. One of the issues litigated in his fee dispute case was whether he agreed to take the case *pro bono*. Enough said!

My Rule #2 above has its basis in the law of the lawyer's fiduciary duties. At the intake interview, the lawyer does not yet owe fiduciary duties to the prospective client. Once the relationship arises and the lawyer agrees to take the case, then lawyer's fiduciary duties to the client, under the Rules of Professional Conduct, arise. One of those duties is the duty of highest loyalty and fidelity. This has been interpreted to mean that the lawyer must put the client's financial interest ahead of the lawyer's.

This duty extends to the matter of renegotiating fee arrangements with the client. In *Ward v. Richards and Rossano*, 51 Wn. App. 423, 754 P.2d 120 (1988), the lawyers did not get away with the modification of a fee agreement after the case was settled. Plaintiff Ward retained counsel on a 40% contingency fee basis in a medical malpractice case where she had suffered a stroke, allegedly induced by oral contraceptives prescribed by her doctor. An outside attorney was associated to assist with Ward's original counsel and there was evidence, denied by plaintiff Ward, that the contingency fee had been increased to 50% when the outside attorney joined in the case. The lawyers obviously did a good job, obtaining a $1.1 million jury verdict in 1979. Defendants appealed.

The lawyers questioned whether the contingency fee covered an appeal. Before the notice of appeal was filed, the client agreed, reluctantly, to a 40% fee if there was no appeal and 50% if there was an appeal. Of course, the case was appealed and ultimately the verdict was upheld. Client Ward sued the lawyers for a refund of the 10% additional fee, which amounted to about $124,000. As to the fee modification, the Court concluded that the new fee agreement was improper, but ultimately ruled that the settlement agreement was an accord and satisfaction.

I think that the lawyers in *Ward* were lucky to get off as they did. Today, given the judicial climate favoring clients and the worsening place of lawyers in the public's estimation, a competent attorney representing such a 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. Seeking to modify a fee agreement with a client after the original agreement has been executed is risky business indeed. [1]

In the fee dispute case I tried to judgment that is described above on page 2, 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 on summary judgment 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 even so, she refused to reinstate the written fee 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). The trial court's decision not to reinstate the written fee agreement was affirmed on appeal. There is no legitimate reason not to get a written fee agreement signed at or shortly after the intake interview.

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

Every term you want to be able to enforce with the client must be in the written fee agreement. This includes subjects like interest on unpaid balances, arbitration of disputes over the representation, fee shifting fees owing to the prevailing party in the event of such disputes, and who owns the case file, to name a few. If you want it in the agreement, spell it out. This includes whether there is an entitlement to prevailing party attorneys' fees in any fee dispute, and anything else that is important to you.

IV. SMART, PROACTIVE INTAKE INTERVIEW PRACTICES

A. The Law of Attorney-Client Fee Agreements.

Fee agreements between lawyers and clients are like no other contract. Attorney's fees are regulated by the Rules of Professional Conduct, RPC 1.5, and the relationship of lawyers and clients is regulated by the other RPCs. The attorney-client fee agreement is touched by the ethical duties of the lawyer to the client and our state's jurisprudence that bends over backwards

[1] A few years earlier, 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 of fiduciary duty and forfeited all of the lawyer's fees. The lawyer was ultimately disbarred for his conduct.

to protect clients in fee dealings with lawyers. In *Holmes v. Loveless*, 122 Wn. App. 470, 478, 94 P.3d 338 (2004), quoting from an Arizona case, the court stated:

> [A] fee agreement between lawyer and client is not an ordinary business contract. The profession has both an obligation of public service and duties to clients which transcend ordinary business relationship and prohibit the lawyer from taking advantage of the client. Thus, in fixing and collecting fees the profession must remember that it is "a branch of the administration of justice and not a mere money getting trade." ABA Canons of Professional Ethics, Canon 12.

The law places clear limitations on the right of a lawyer to contract with a client. Lawyer-client agreements are not arms-length or "caveat emptor" type contracts. Some examples of limitations on lawyers' ability to contract with a client include Rule 1.4 (duty to explain to clients the risks and benefits of alternative courses of action); Rule 1.8(a) (guidelines governing business transactions with clients); Rule 1.8(h) (requirement of independent representation when prospectively limiting liability to clients); Rule 1.8(d) (prohibition against entering into agreements for literary/media rights); 1.5 (requirements governing fee agreements with clients); and Rules 1.7, 1.8, 1.9 (conflicts between lawyer and client that require disclosure and informed consent).

The original RPC 1.5(a)(8), recites one of the factors that went to the reasonableness of a fee arrangement, "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." The current RPC 1.5(a)(9) is virtually identical to the predecessor RPC 1.5(a)(8). The obvious basis for this rule is to enable the client to have a clear understanding from the outset how she is being charged for the attorney's services.

B. The Fee Arrangement Discussion.

Poll any dozen lawyers about how they handle fee arrangements in their intake interview with new clients and the differences would overpower the similarities. Perhaps three lawyers would admit they hate doing it and that they get it over as quickly as possible. This means presenting the fee agreement to the client, wrangling out a signature while discouraging questions and being done with it. One or two lawyers will acknowledge taking pride in going over the fee agreement paragraph by paragraph, explaining and anticipating questions and discussing relevant billing practices. One or two will hand the client a fee agreement at the end of the interview, ask the client to read it and return the signed copy to their legal assistant once signed. The rest will do something else in between. Some lawyers leave their clients with a hand-out on billing practices, while the concept of billing may never be discussed at all by others.

How we address fees with potential clients is largely a function of our personalities and our comfort level in discussing potential off-putting subjects 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 later and this 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 in 1978 and recalling how awkward it was to discuss hourly fees, retainers and payments, I can

empathize with those lawyers who find it difficult. However, with practice and the passage of time, it has gotten easier and now I do not give it a second thought.

As soon as you decide to take the case and it appears the client will hire you, you must turn the conversation squarely 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.

I. What Must be Discussed.

The following is a non-exclusive list of what should be orally discussed in any intake interview:

1. The Specific Fee Arrangements:

a. Contingency fee cases – the precise percentages and when and to what each percentage attaches to.

b. Flat fee - what is the fee to be and precisely what must be done for it to be earned. [2]

c. Hourly fees - each rate to be charged for each potential timekeeper, and a provision for notice when hourly rates are to be raised.

d. If staff persons other than lawyers are to be billed hourly, what services are billed and what are the rates. Remember, pure clerical work should not be billed if you are charging a competitive hourly rate.

e. In a contingency fee case, if there is any potential entitlement to court awarded fees, how are these to be dealt with. *E.g.* lawyer gets his contingency fraction on gross recovery including court awarded fees, or lawyer gets the court awarded fees that are awarded, or lawyer gets to choose. *See* case of *Luna v. Gillingham*, 57 Wn. App. 574 (1990) where the lawyer lost his fee dispute with client over how court awarded fees were to be handled, because the agreement was silent.

f. What costs are chargeable and reimbursable?

2. What costs are chargeable and reimbursable? It is a very good idea to identify costs with illustrated examples. The list should be specific but make clear to indicate that the list is not exclusive.

[2] All lawyers should be fully aware of the requirements of RPC 1.5(f) adopted by the Supreme Court in November, 2008, relating to flat fees. Note that there is no such thing anymore as an absolutely non-refundable flat fee. The new rule distinguishes between true "retainers" which merely secure the availability of counsel for which no services are required, "advances" to cover fees earned in the future, and flat fees paid at the outset of the representation.

3. Handling of Interest. This has become a hot subject of late. It seems clear that a lawyer can only charge a client simple interest. So testified a law professor in a trial of mine many years ago. Whether interest is to be charged, how it is computed, grace periods and the like should be discussed orally. I settled a fee dispute about 5 years ago where an enormous amount of the end result consisted of interest on unpaid attorney's fees. We successfully litigated the hourly rate, the entitlement to interest and judicial estoppel covering the court-awarded attorney's fees previously awarded to the client on a lodestar basis. But in the fee dispute litigation, the former client challenged how payments were to be applied for purposes of interest, *i.e.* whether they were to be applied first to accrued interest or to the oldest billings of principal. The U.S. Rule that applies nearly everywhere, including Washington, is that interest should always be applied first to accrued but unpaid interest. However, where original oral discussion and the written fee agreement did not specify how interest was to be applied, the trial court ruled in favor of the client and this ultimately cost my lawyer-client about $40,000. How the payments are applied can have a significant impact in the bottom line that is owed. Make it clear both orally and in the written agreement.

4. Who is responsible for the payment of expert witness and other professional fees? This was the subject of yet another fee dispute I litigated several years ago. The client later claimed that he was not responsible for payment of expert witness fees or the fees of nurse consultants or life care planners. This should be spelled out both orally and in the written agreement.

5. Liability for Fees upon termination in a contingency fee case. We all know (or certainly should know) the rule of *Barr v. Day* and *Taylor v. Shigaki.* The lawyer is not entitled to the contingency fee unless he/she has substantially or fully performed. Full performance means you settled the case with the other side with your client's consent and the only thing remaining is to get paid and divide the recovery. What constitutes substantial performance is the subject of numerous prior CLE presentations of mine. *See e.g.* Caryl, "Fear of Feeing" 2003 WSBA Law of Lawyering Seminar, Chapter 8; Caryl, 1999 WSTLA Ethics Issues in Plaintiffs' Personal Injury Practice, "When you're out before you're done," at p. 73.

If you have not substantially performed, you are entitled to *quantum meruit*, by the common law of Washington. The lawyer can certainly put in a paragraph that says the lawyer is entitled to be paid hourly at a given rate if the client terminates you. When I was doing contingent fee work, I had such a clause in my contingency fee agreement. Is it enforceable? There is no clear legal answer. If the hourly rate is unreasonable given your experience and expertise, then probably not. *See* RPC 1.5(a). Nonetheless, most judges use the lodestar method in determining reasonable attorney's fees under *quantum meruit*. The judge would determine if the hourly rate is reasonable given the lawyer's knowledge, skill and experience, and would determine if all of the time spent was reasonable, necessary and appropriate. In a recent summary judgment motion I had, a very highly regarded King County judge ruled that *quantum meruit* should be determined on a lodestar basis, while taking into account the nine enumerated factors of RPC 1.5(a).

6. Can the lawyer compel arbitration of disputes with the client? I was questioned at a CLE I gave several years ago whether arbitration clauses in fee agreements were enforceable. I answered yes, if the client has given informed consent and the clause is

reasonable. Another CLE panelist disagreed with me and insisted that the client had to obtain independent counsel for that to be enforceable. I have researched that and learned that under the Bar opinions, arbitration must be fully discussed with the client and the client's informed consent must be obtained. Those lawyers who want to compel arbitration of fee disputes with clients are advised to have a hand-out that discusses this with a client acknowledgment on the hand-out of having it explained.

The obligation of a lawyer to fully disclose regarding arbitration of disputes is the subject of a brief Informal WSBA Bar Opinion, Informal Opinion #1670. In that opinion, the Bar states: The Committee was of the opinion that there is no per se prohibition in the Rules of Professional Conduct against including an arbitration provision in a fee agreement with a client but that it (1) must be consistent with a lawyer's fiduciary obligations and statutory law such as RCW Ch. 4.24; and (2) it properly must be done only with full disclosure to the client. (Emphasis added) Copy of WSBA Informal Opinion #1670 is attached hereto at **Appendix A**. As it happens, the American Bar Association has a recent formal opinion which addresses this precise situation, the arbitration clause in the fee agreement, directly. *See* Formal Opinion #02-425, attached hereto at **Appendix B.** The capsule abstract of the Opinion reads as follows:

> It is permissible under the Model Rules to include in a retainer agreement with a client a provision that requires the binding arbitration of disputes concerning fees and malpractice claims, provided that the client has been fully apprised of the advantages and disadvantages of arbitration and has given her informed consent to the inclusion of the arbitration provision in the retainer agreement.

The ABA considered this issue in great detail and the entire formal opinion is required reading for anyone seeking to assert such a compulsory arbitration clause in an attorney's fee agreement in this State. The opinion addresses the requirement of full disclosure as follows:

> The lawyer's duty to explain matters to a client expressed in Rule lA(b) derives in large measure from the lawyer's fiduciary duty to clients and includes the duty to advise clients of the possible adverse consequences as well as the benefits that may arise from the execution of an agreement. The Committee is of the opinion that Rule lA(b) applies when lawyers ask prospective clients to execute retainer agreements that include provisions mandating the use of arbitration to resolve fee disputes and malpractice claims.
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> Rule 1.4(b) requires the lawyer to "explain" the implications of the proposed binding arbitration provision "to the extent reasonably necessary to permit the client to make (an) informed decision" about whether to agree to the inclusion of the binding arbitration provision in the agreement. Depending on the sophistication of the client and to the extent necessary to enable the client to make an "informed decision," the lawyer should explain the possible adverse consequences as well as the benefits arising from execution of the agreement. For example, the lawyer should make clear that arbitration typically results in the client's waiver of significant rights, such as the waiver of the right to a jury trial, the possible waiver of broad discovery, and the loss of the right to appeal. The lawyer also might explain that the case will be decided by an individual arbitrator

or panel of arbitrators and inform the client of any obligation that the lawyer or client may have to pay the fees and costs of arbitration.

In several cases in the last 6 years, I successfully used these bar opinions on behalf of a lay client as the principal basis for avoiding an arbitration clause in an attorney's fee agreement. If your client can truthfully prove that you never even mentioned, let alone discussed arbitration in the intake interview, you may well lose the right to arbitrate. However, in representing a lay client about a year ago, I moved a King County trial judge to strike the arbitration clause in a contingency fee agreement. The lawyers moved to compel arbitration. That judge ordered arbitration even where it was never even mentioned by the lawyers in the RPC 1.5(b) fees discussion.

7. Fee Disputes - prevailing party attorneys' fees. Any contract including lawyer – client fee agreements may contain a fee shifting provision that the prevailing party in any litigation over the quality or cost of the services is entitled to an award of reasonable attorney's fees against the loser. In my view, whether the prevailing party in an attorney's fee dispute is entitled to an award of reasonable attorney's fees is no less important than the arbitration clause. This must be fully explained to the client in the intake interview. I litigated the enforceability of an attorney's fee clause in a trial in 2006 and I can assure you that the Courts will give those clauses close scrutiny. If you litigate a fee dispute with a client, you want to have your fees paid. That is a given.

8. What is the specific scope of engagement? Specify what is and what is not included in your engagement? Don't let an unsophisticated client expand it on you by oral recollection years later. For instance, you might want to make clear in a personal injury case that the only engagement is to resolve claims for injuries and that defending fee lawsuits by unpaid medical providers is not covered. If you are going to assist the client in reducing claims of subrogation, specify the limits of your obligation, and make clear if you are claiming a contingency fee entitlement to be paid on those reductions.

9. Retainers versus Deposits. With the adoption of RPC 1.5(f) in November 2008, the nomenclature of client payments to the lawyer at the outset of the representation has been changed. *See* footnote 2 above. The term "retainer" is now defined as a fee to compensate the "retained" lawyer for committing to be available. Where the lawyer requires that the client place funds in a trust account to be worked against on an hourly basis, and/or to secure reimbursement of costs, those funds are now called an advance in RPC 1.5(f). The purpose of the advance should be discussed in the fees and billing practices discussion and specifically provided for in the written fee agreement. How is the advance to be used by the lawyer? Is it to be applied to initial and subsequent bills, or to be held for use in covering the final billing? Is it simply to cover costs in a contingency fee case? If the fee is intended to be an RPC 1.5(f)(2) "flat fee," the lawyer should discuss what must be done to earn the fee and what happens relating to a partial refund if the work is not completed. The written agreement must contain language that is specifically required in that rule. No lawyer should get involved with flat fees without thoroughly studying the obligations placed by the new rule on the use of such fees.

10. Who owns the case file? *See* WSBA Formal Opinion # 181, attached at **Appendix C.** If you want to retain possession of the case file if you are fired, or at the end of the

engagement, you should discuss this in the intake interview with your client and specify this in the written fee agreement. If you own the file per your fee agreement, you can lawfully charge the client for a copy when asked. If you don't, the original file belongs to the client on demand.

V. ALTERNATIVES FOR COLLECTION OF UNPAID LAWYERS' FEES

A. Starting Out on the Right Foot – Work out a Compromise.

Consider this hypothetical situation. You litigated your client's case. A decision was rendered and the judgment has become final. The case is now over. The end result is not equal to the client's goals. The client has gotten way behind in paying you. The unpaid balance is large – mid to high 5 figures – or worse. The client now owes you money and may be resentful about the mediocre result that falls far short of his expectations. The client may now be looking for someone to blame. You are a convenient target. At the least, the client has issues with payment in full and in one lump sum, and may be looking for a discount or some period of time to pay in installments. You need to get paid a substantial amount, even if less than the full amount.

Now is the time to try to heal any issues in the relationship, if possible, and to put forward your understanding and empathetic mien. Offer to meet with the client and discuss the client's gripes or concerns – be a good listener. See what the client's goals are, and see if you could live with those goals. Getting paid the majority of your unpaid balance and not getting sued (or having to sue the client yourself for fees) should be your first goal. Agreeing to a discount for prompt payment is one approach. Another is to seek a sizeable down payment and the rest to be paid over time. If the unpaid balance is $75,000, getting paid $50,000 or $55,000 and avoiding litigation beats litigation every time.

Keep in mind that if you ask the client to agree to sign a promissory note and/or give you security like a deed of trust or some UCC security interest, that would probably be viewed as a "business transaction with a client." Thus, you must comply with RPC 1.8(a), particularly making sure that 1) the terms and conditions of the note and deed of trust are fair and reasonable, and communicated in a writing that is readily understood by the client, 2) the client is advised of the importance of and afforded the opportunity to get independent counsel on the note and any security, and 3) the client gives informed consent to all essential terms of the security in writing and is advised of the lawyer's role in the security transaction.

B. No Nastigrams and Other Defensive Communications.

Every act, omission, and communication with or about the client will ultimately become part of the client's lore in any ensuing fee dispute, and possibly even part of the official record. You may well receive an angry telephone call, letter or email from this client. Set aside the client's angry missive or personal attack for a day or two. 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. Your client's next lawyer may use any phone call, letter, email, memo or meeting as an exhibit or subject of testimony for challenging your entitlement to a fee. 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(s) of his case against you.

You have the opportunity to actually 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 or the unpaid balance 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 negative reaction continues or worsens.

C. Informal Fee Resolution.

I suggest a face-to-face meeting with the client as soon as he or she raises any questions about your fees or performance. Listening to the client's side and expressing concern for the client's views may mollify an unhappy or even 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 is always the optimal solution. It preserves the good will you have with the client and locks out additional costs or risks. Litigating with a client over fees or the client's dissatisfaction doesn't just buy you a chance at recovering some of your fees; it may well result 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 this window to dialogue is open, do not dig in your heels. 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 a one-way street. The attorney must respect and observe all aspects of his or her fiduciary duty, while at the same time, the client may be seeking to eliminate any fee entitlement of yours altogether. 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. Unreasonable fees charged, or using unfair means to get paid, give rise to fiduciary breach claims. A lawyer's breach of a fiduciary duty to a client may result in partial or total denial of all unpaid fees, or if the lawyer has already been paid, disgorgement of attorneys' fees. *See Eriks* v. *Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992). In *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 the lawyer's fee agreement breached fiduciary duties to the client. No matter which forum is chosen for attempting to collect your fees, 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 petty or vindictive client and puts you in a position to point out the client's extremism. A record favorable to the lawyer presages a more

favorable fee result.

B. The Concept of Reasonableness of Fees.

RPC 1.5(a) requires the total charge to be reasonable. “”A lawyer shall not make an agreement for, charge or collect an unreasonable fee or unreasonable amount for expenses. RPC 1.5(a). A client can always challenge the reasonableness of attorney’s fees, even fees previously paid. 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) contains a list of nine considerations the Court must assess in determining reasonableness. 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. *See Barr* v. *Day, supra,* and *Ross* v. *Scannell*, 97 Wn.2d 598, 647 P.2d 1004 (1982). 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.*, 64 Wn.2d 252, 391 P.2d 205 (1964). 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 trial court will certainly give the client the benefit of the doubt in totaling hours where there are no time records. 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 wholly unreasonable. Judges tend to find a basis for compromise, even if the fee claimed was earned. A successful outcome is not easy to predict.

C. Civil Action on the Contract.

The lawyer may bring a civil action on the fee agreement in District or Superior Court. If the amount of the fees (and costs) sued on is not greater than $50,000, the lawyer may opt to move the case into the MAR program in Superior Court. MAR arbitrators in private practice often prove to be more favorable to a lawyer suing for fees than a jury or a judge who never practiced in private practice. If the client opts for a jury which is a constitutional right, the scales might tip more in favor of the client. Even so, a lawyer may successfully move for summary judgment on hourly or quantum meruit fees if the client is unable to raises genuine factual issues on reasonableness.

D. Foreclosure of Attorney's Lien.

If the attorney is entitled to an attorney's lien of right under RCW 60.40.010(1)(d), or has properly noticed his or her claim of attorney's lien, the proper forum is before the court where the lien has been asserted or exists of right. Under Washington lien law, the determination of reasonableness of fees secured by an attorney's lien must be made by the court. The client has no right to a jury trial. Under Washington law, the trial court may use a "summary procedure" for foreclosure of the lien, and the state of Washington lien law gives enormous discretion to the court in fashioning a remedy that meets the requirements of procedural due process. The best kind of judge for a lien foreclosure is one with substantial prior private practice before going on the bench.

E. Contract Arbitration

I addressed MAR arbitration above. This subsection addresses basic contract arbitration. With contract arbitration, in order to arbitrate, there must be an arbitration clause in an agreement with the client. If there is not, you may only arbitrate if your client agrees to do so by *submission to arbitration.* This is done with a written submission to arbitration agreement.

The pros and cons of arbitration generally in all areas of litigation generally apply equally well to fee disputes with clients. There is no clear right to appeal in arbitration, although I am familiar with cases where appeals were fully prosecuted from an order of the court confirming the award to judgment. The scope of court review of an arbitrator's decision is generally fairly narrow. Arbitration precludes a jury trial. Arbitrators are not generally required to give detailed factual determinations or clearly rule on legal arguments. We are all reminded that the word arbitration derives from the root "arbitrary." One prejudice about arbitration held by many lawyers is that it is often a loaf-splitting exercise, where neither side really prevails.

Generally but not always, arbitrations have less discovery than court trials. In some arbitrations, discovery is greatly limited, which can be a problem. Arbitration hearings can be set in a shorter time frame than trials in Superior Court. This can be an advantage to the lawyer seeking to get paid. Arbitrators in contract arbitration are routinely lawyers in private litigation practice, although a number of them may be former judges or court commissioners, with or without prior private practice. Lawyers who work for fees are more likely to be sensitive to the attorneys collecting from clients who do not pay the lawyer's fees, particularly where the client has an established a history of not paying lawyers.

Arbitration is often favorable to the lawyer rather than the client because arbitrators are lawyers, most of whom are in private practice and bill hourly. When I represent lawyers against clients, I like arbitration. There is an arbitration clause in my own fee agreement with clients, both lay and lawyers. Most of the time, the arbitrator(s) render the correct result. Clients may prefer arbitration because of the speed with which an arbitration hearing can be set up and completed, and the lesser costs of arbitration, at least theoretically.

VII. CONCLUSIONS

In each of these presentations that I have given relating to fee disputes, I point out the obvious - the current climate in which lawyers are judged by the public has worsened while at

the same time, client sophistication and litigiousness have substantially increased. Couple this with the growing "me society" of popular culture where individual rights (or the mis-perception of the same) are celebrated while personal responsibility takes a back seat, the cost and consequences of a substantial fee dispute with an angry, victim-mentality client cannot be overestimated.

It goes without saying that there can be no fee dispute with a client you declined to take. Screening of clients and cases is essential to avoid the cost, negative energy and emotional drain that a nightmare fee dispute-client can have on your practice and your life. Avoiding toxic clients is a must. Declining cases where there is not much of a case or where the value of the case is not worth the lawyer's fees and costs is a wise choice. Following your gut and acting on your intuition as to the chemistry between you and the potential client will pay large dividends in peace and quiet, not to mention financially. Not wasting time, energy and emotion in dealing with a difficult ingrate client who places a low value on your talents and services cannot be overstated.

Using common sense office practices in discussing and documenting fee arrangements at the outset can avoid all manner of later client mischief. Making a point of discussing all parts of your written fee agreement that you want to rely on later is essential. Covering orally literally everything that is to go into the written fee agreement is a must. If your written fee agreement is a form, going through the contract paragraph by paragraph is a very wise practice. Getting the client to acknowledge in writing that you covered the essentials in your oral explanation could be very wise with some clients later. Insuring that your fee agreement is returned signed, promptly, is essential to avoid a later *Ward/Perez* argument later.

In my opinion, based on nearly 20 years of litigating disputed attorney's fees for both lay clients and lawyers, many fee disputes with clients can be entirely avoided using the practices and approach set forth above. Even so, the average practitioner might see these precautions as unnecessary, burdensome, and perhaps even intimidating to potential new clients. Indeed, relatively few lawyers maintain such scrupulous client relations/billing practices. While the average practitioner undoubtedly will get away with sloppy practices in a majority of cases, these lawyers won't with all such clients. Should such lawyers elect to remain with the old, business-as-usual fee agreements and billing practices, a lawyer like me will be looking forward to their calls in the near future. Something to think about!

September, 2013

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