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Brian Waid

Ethics: Establishing and Maintaining the Attorney-Client Relationship

by Brian J. Waid

Practice Pointer > Choose Your Clients Well

Perhaps the most critical decision you make is deciding which clients to accept. When you accept representation, you undertake the duties of a fiduciary to the client, bound to act with utmost fairness and good faith toward the client in all matters. *E.g., Perez v. Pappas*, 98 Wn.2d 895, 840-41, 659 P.2d 475 (1983) (attorney owes highest duty to the client); *VersusLaw v. Stoel Rives, LLP,* 127 Wn. App. 309, 333, 111 P.3d 866 (2005)("highest duty"); *In re Beakley*, 6 Wn.2d 410, 423, 107 P.2d 1097 (1940) ("one of the strongest fiduciary relationships known to the law"); *Bovy v. Graham, Cohen & Wampold*, 17 Wn. App. 567, 570, 564 P.2d 1175 (1977) ("'the punctilio of an honor the most sensitive'"); and *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 798 n. 2, 16 P.3d 574 (2001) (Talmadge, J., concurring)("the law creates a special status for fiduciaries, imposing duties of loyalty, care, and full disclosure upon them").

This fiduciary relationship between attorney and client is neither new, nor unique to Washington. Sir Francis Bacon thus wrote:

> '[t]he greatest Trust, between Man and Man, is the Trust of Giving Counsell. For in other Confidences, Men commit the parts of life; their Lands, their Goods, their Children, their Credit, some particular Affaire; But to such, as they make their Counsellors, they commit the whole: By how much the more, they are obligated to all Faith integrity.'"[1]

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[1] *Ween v. Dow,* 35 A.D.3d 58, 822 N.Y.S.2d 257, 261 (2006), *quoting,* The Essays or Counsels, Civill and Morall 63 (Kierman ed. Oxford Univ. Press 1985), *quoted in,* Anenson, *Creating Conflicts of Interest: Litigation as Interference with the Attorney-Client Relationship,* 43 Am. Bus. L.J. 173, 244 (2006).

The attorney's duty to act in utmost fairness and good faith toward clients provides the foundation for most modern rules of ethics governing the attorney-client relationship, including obligations of diligence (RPC 1.3), communication (RPC 1.4), confidentiality (RPC 1.6), conflicts of interest (RPC 1.7, 1.8), fee arrangements (RPC 1.5), fee splitting (RPC 5.4), and truthfulness in dealings with the client (RPC 8.4).

Furthermore, you will *not* owe any lesser duty to a client even if you later find out you do not like that client, or that the client is "difficult" or "demanding, or "sophisticated." See, *Valley/50th Ave., LLC v. Stewart,* 159 Wn.2d 736, 745, 153P.3d 186 (2007), *citing, In re: Miller,* 149 Wn.2d 262, 279-80, 66 P.3d 1069 (2003) ("[a] client's sophistication does not relax the requirements of RPC 1.8" governing the attorney's fiduciary duty toward the client).

Once you accept representation, you become that client's fiduciary—warts and all. So the wise attorney takes great care when deciding which clients to accept because, once established, the attorney-client relationship has significant ramifications.

Practice Pointer > Avoid the "Inadvertent Client" Trap

Privity of contract (written or oral) does *not* define the scope of those to whom you owe a duty. *Bohn v. Cody,* 119 Wn.2d 357, 365, 832 P.2d 71 (1992). In other words, you *may* owe a duty of care, or a fiduciary duty, to a person even if you do not have a formal attorney-client agreement with that party. This is because the existence of an attorney-client relationship "'turns largely on the client's subjective belief that it exists'...[and] may be implied from the parties' conduct; it need not be memorialized. *In re: Eggers,* 152 Wn.2d 393, 410, 98 P.3d 477 (2004), *quoting, Bohn, supra,* 119 Wn.2d at 363. The "essence of the attorney/client relationship is whether the attorney's advice or assistance is sought and received on legal matters." *Id.* Moreover, you may have a duty of care even

if you have told the potential client "no." *Bohn, supra,* 119 Wn.2d at 359, 363, 365-67 (adopting a "multi-factor balancing test" to determine whether an attorney owes a duty to a "party the attorney never represented").

You must, therefore, be alert to the "inadvertent client," *i.e.,* a person to whom you owe a duty of care even though you do not have a formal attorney-client relationship. The problem can arise in a wide variety of situations. Compare, *Guardianship of Karan,* 110 Wn. App. 76, 84-87, 38 P.3d 396 (2002)(Attorney who established guardianship at mother's request owed a duty of care to the minor child) and *Estate of Treadwell v. Wright,* 115 Wn. App. 238, 243-49, 61 P.3d 1214 (2003)("RCW 11.88.100 and .105 impose duties on the attorney for the guardian that are owed to the incompetent ward"), with *Trask v. Butler,* 123 Wn.2d 835, 840, 872 P.2d 1080 (1994)(attorney of personal representative generally does not have a duty to estate beneficiaries).[2] In *Eggers,* the attorney suffered discipline for an RPC 1.7 conflict of interest because the financial transaction the attorney handled for one client actually benefited another client on the law firm's active client roster, without a formal written conflict of interest waiver. *In re: Discipline of Holcomb,* 162 Wn.2d 563, 173 P.3d 898 (2007) imposed discipline because the attorney obtained loans from a trust controlled by, and for the benefit of, the client.

Of course, the classic example of an inadvertent client is the person who approaches you with a legal question at a party. RPC 1.18 helps to slightly clarify your responsibilities in such a situation, by establishing that a person who

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[2] Some may argue that the 2006 amendments to RPC 1.6(b)(3) and (b)(7) may have changed the scope of the estate attorney's duty to beneficiaries).

discusses possible formation a client-lawyer relationship becomes "a prospective client." Even if this contact does not ripen into an attorney-client relationship, you nevertheless undertake a duty of confidentiality under RPC 1.9 and you *may* be precluded from employment by an adverse client. RPC 1.18 (b) and (c). This same rule, RPC 1.18, has application to the common practice of allowing potential clients to contact you through your law firm website. For a more detailed analysis of best practices relative to potential client inquiries over the internet, I have included District of Columbia Bar Association Op. 302 in the materials. Attachment 6.

In short, be alert to potential "inadvertent clients" to whom you may owe a duty of care and/or a fiduciary duty, even though you have never agreed to represent them.

Practice Pointer > Establish a Clear Fee Agreement

It is your duty, not your client's, to establish a clear and unambiguous fee agreement. RPC 1.5. See, *Simburg, Ketter Sheppard & Purdy v. Olshan,* 109 Wn. App. 436, 445, 33 P.3d 742 (1999). By far, the safest way to do this is through a written fee agreement or letter of engagement. Conversely, a sure way for you to generate legal malpractice and fee litigation, as well as disciplinary complaints, by your clients, is for you to use ambiguous or oral fee agreements, or over-reach relative to fees or "expenses."

Once established, attorneys rightly encounter significant impediments to changing the fee agreement in a way favorable to the attorney, because Washington requires *lawyers* to "prove strict compliance" with the "stringent

requirements" of RPC 1.8 in *all* transactions with the client. *Valley/50th Ave., supra,* 159 Wn.2d at 745. Thus, when an attorney modifies a fee agreement during the course of representation, the attorney must prove that the contract was fair and reasonable, free from undue influence, and made after a fair and full disclosure of the facts on which it is predicated." *Id.* at 745-46. Absent strict compliance with these stringent requirements, the client may void the fee transaction. *In re: Corporate Dissolution of Ocean Shores Park*, 132 Wn. App. 903, 912-13, 134 P.3d 1188 (2006); *Valley/50th Ave., supra,* 159 Wn.2d at 743; *Cotton v. Kronenberg,* 111 Wn. App. 258, 44 P.3d 878 (2002); *Ward v. Richards & Rossano, Inc.*, 51 Wn. App. 423, 428-29, 754 P.2d 120 (1988); and *Ween v. Dow, supra,* 822 N.Y.S.2d at 261; 2 Mallen & Smith, *Legal Malpractice,* §15.4, pp. 754-57 (2007 ed.)("The presumption of invalidity applies even if the transaction appears fair on its face, is fair, or would be binding and irrevocable if the defendant was not an attorney"). In essence, if you try to modify your fee agreement in your favor, you risk the potential of working for free, exposure to a Consumer Protection Act cause of action, or even a disciplinary complaint.

RPC 1.5 also prohibits you from charging an unreasonable fee, regardless of whether your fee agreement is written or oral. In this context, fees "outside the terms of the fee agreement" will constitute a *knowingly* unreasonable fee. *In re: Boelter,* 139 Wn.2d 81, 95-97, 985 P.2d 328 (1999); *In re: Cohen,* 149 Wn.2d 323, 327, 67 P.3d 1086 (2003); and *In re: Vanderbeek,* 153 Wn.2d 64, 72-3, 84, 101 P.3d 88 (2004). See further, *Marshall,* 160 Wn.2d 317, 335 ¶¶30-31, 345 ¶53, 157 P.3d 859 (2007) (attorney suspended from practice for mistakenly

withholding $41,000 in cost overcharges "when a lawyer knows or should know that he is dealing improperly with client property and **he causes injury or potential injury** to the client"). RPC 1.5(c), of course, requires a written fee agreement as a condition for charging a contingent fee agreement. Once the contingency is established, these same principles prevent charging the client a higher fee without meeting these same fiduciary standards. *E.g., Ward, supra.*

Poorly drafted fee agreements can create other problems for the unwitting attorney. For example, a fee agreement may not unreasonably restrict the client's control over settlement. In *Compton v. Kittleson,* 171 P.3d 172 (Alaska 2007), for example, the Court held that the attorney committed legal malpractice because he used of a "hybrid" fee agreement that converted a contingency fee into an hourly fee if the client settled the case for an amount that would yield the attorney a contingent fee of less than $175/hour. See, WSBA Formal Ethics Op. no. 191 (Attorney may *not* include a clause in contingent fee contract that converts fee to a contingency based upon the "larger of the recovery obtained at trial/arbitration or the amount offered in settlement" if the client rejects a settlement offer the attorney recommends). [Attachment 1].

You should also consider "ancillary" issues related to client fee agreements. For example, if you jointly represent multiple clients, how will you allocate fees and expenses among them? That formula should be clearly established in the fee agreement itself. Should you include a special provision relative to ownership of the client file? See, WSBA Formal Ethics Opinion no. 181 [Attachment 2]. In that context, WSBA Disciplinary Counsel receive *many*

disciplinary complaints arising out of disputes over control of the client file. May you, and if so, should you include a contractual attorney fee clause, as authorized by RCW 4.84.330? Should you include a special provision relative to charging the client interest? See, WSBA Formal Ethics Opinion no. 158 [Attachment 3]. May you include a binding arbitration clause in your fee agreement? See, WSBA Informal Ethics Op. no. 1670 (permitting an arbitration clause if "consistent with the lawyer's fiduciary obligations and statutory law, and "only with full disclosure to the client"). [Attachment 4]. Division I may speak to some of these issues in the near future.

Practice Pointer > Recognize Potential Conflicts of Interest

Rule 1.7 of the Rules of Professional Conduct provides that an attorney "shall not" represent a client if the attorney has a conflict of interest, except that in some situations an attorney *may* represent a client if "**each client consents in writing** after full disclosure of the material facts." RPC 1.7(a)(2). See, *e.g., Valley/50th Ave., LLC v. Stewart,* 159 Wn.2d 736, 747, 153 P.3d 186 (2007)(law firm owed independent duties to both LLC and its managing member).

The attorney's fiduciary duty specifically applies in the context of the attorney's conflicts of interest under RPC 1.7. 2 Mallen & Smith, *Legal Malpractice,* §14.2, p. 588 (2007 ed.), thus explains:

> A breach of the duty of "undivided loyalty" has been found in two basic situations. The first is when an attorney obtains a personal advantage, whether consisting of an acquisition from the client, a joint venture with the client, or usurpation of an interest in, or opportunity concerning, the subject matter of the retention. Second, the duty of undivided loyalty is imperiled when there are circumstances that create adversity to the client's interest. These circumstances may consist of an

> existing, personal adverse interest of the attorney, an interest of a prior or subsequent client, or conflicting interests of present or multiple clients.

Accord, *Eriks v. Denver,* 118 Wn.2d 451, 458-61, 824 P.2d 1207 (1992).

Thus, when an attorney considers whether to jointly represent more than one client, the *attorney* (not the clients, as the lower court reasoned) undertakes a fiduciary responsibility under RPC 1.7(a) and (b) to determine whether potential conflicts of interest exist and, if so, whether those conflicts are waivable. RPC 1.7(a). If the conflicts are not waivable, then the attorney has no choice but to refuse employment. However, even for waivable conflicts of interest, the attorney must provide the client with "full disclosure of the material facts" and obtain *each* client's "consent **in writing** after consultation." RPC 1.7(a) and (b)(emphasis added). *Gustafson, supra,* 87 Wn. App. at 303, explains the purpose of these requirements:

> If a lawyer accepts dual representation and the clients' interests thereafter come into actual conflict, the lawyer must withdraw. **To protect clients from the hardship and expense of obtaining new counsel in this situation,** "[a]n attorney must discuss all potential conflicts of interest of which he or she is aware **prior to** undertaking the multiple representation." The attorney should resolve all doubts against undertaking a dual representation. [Emphasis added; *quoting, Eriks, supra,* 118 Wn.2d at 459-60].

If you run afoul of RPC 1.7, you risk working for free. This is because an attorney "who fails in his ethical and professional duties may not reap any benefits from his clients' ignorance." *In re: Corporate Dissolution of Ocean Shores Park,* 132 Wn. App. 903, 913, 134 P.3d 1188 (2006). Accord, *Gustafson v. City of Seattle,* 87 Wn. App. 298, 304, 941 P.2d 701 (1997); and *Eriks v. Denver,* 118 Wn.2d 451, 462-63, 924 P.2d 1207 (1992) (affirming disgorgement

of *all* fees due to attorney's conflict of interest). Accordingly, an attorney who represents multiple clients despite a non-waivable conflict of interest, or without obtaining the informed consent of *all* of the jointly represented clients (even if the conflicts might otherwise be waivable), should not profit from his/her ethical violation. *Eriks, supra,* 118 Wn.2d at 462-63; and *Gustafson, supra,* 87 Wn. App. at 304. Any result other than requiring strict compliance with the explicit requirements of RPC 1.7 creates a strong incentive for attorneys to ignore these protective rules because no meaningful remedy would otherwise exist for their disobedience.

Beyond potentially working for free, the attorney who ignores conflicts of interest also risks potentially serious disciplinary exposure. *E.g., In re: Discipline of Holcomb,* 162 Wn.2d 563, 173 P.3d 898 (2007)(suspension); and *In re: Discipline of Egger,* 152 Wn.2d 393, 409-13, 98 P.3d 477 (2004)(suspension).

In this context, may you keep client confidences of one jointly represented client from another of your jointly-represented clients? Despite RPC 1.6, your fiduciary duty requires you to disclose all material information to each client. See discussion, *infra.* Furthermore, what happens if one client wants to settle and the other does not? You can potentially solve, or at least minimize, such problems from the outset. See, Attachment 5. In any event, however, you cannot take sides in favor of one client against the other.

Practice Pointer > Communicate with Your Client

Your fiduciary obligation includes the duty to *promptly* communicate all material information to the client. RPC 1.4. With the advent of scanners and

email, this does not represent a burden for you. Our office, for example, provides the clients with virtually *all* incoming and outgoing pleadings and correspondence, usually by email. Mallen & Smith, in the seminal treatise, *Legal Malpractice,* explain the attorney's duty of "undivided loyalty" as follows (§15.22, pp. 783-84):

> A corollary of the fiduciary obligations of undivided loyalty and confidentiality is *the attorney's responsibility to promptly advise the client of any important information that may impinge on those obligations.* This means that *there must be complete disclosure of all information that may bear on the quality of the attorney's representation.* The disclosure must include not only all material facts but also should include an explanation of their legal significance.
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> The duty of disclosure does not exist in the abstract but relates to the particular circumstances. There are two basic requirements. First, the attorney must disclose any fact that may limit his or her ability to comply with the fiduciary obligations. Therefore, there must be disclosure of any personal interest of the attorney, any adverse interest of a prior client, or a conflicting interest of another present client. Second, the client must be informed of any acts or events, concerning the subject matter of the retention for which the client has a right to exercise discretion or control. [Emphasis added; footnotes omitted].

As a result, you may *not* remain silent when you become aware of a material fact that affects the fiduciary relations; instead you have an *affirmative duty* to make prompt and full disclosure to the beneficiary because "'[t]he concealment of a fact which one is bound to disclose is an indirect representation that such fact does not exist, and *constitutes fraud.*'" *Oates v. Taylor,* 31 Wn.2d 898, 903, 199 P.2d 924 (1948) (emphasis added), *quoting,* 37 C.J.S. 244, *Fraud* §16a. Accord, *Burien Motors v. Balch,* 9 Wn. App. 573, 577-8, 513 P.2d 582 (1973)[equating attorney's duty with fiduciary's duty under *Restatement (Second) of Trusts* §170(2)]. This duty of prompt disclosure is therefore consistent with the

duty of fiduciaries, generally, "to **inform the beneficiaries fully of all facts which would aid them in protecting their interests."** *Esmieu v. Schrag, supra,* 88 Wn.2d 490 (emphasis added), *quoted with approval, Van Noy, supra,* 142 Wn.2d at 792. A Washington attorney thus breaches the attorney's fiduciary duty if the attorney misrepresents matters to a client, *including by failing to disclose material information to the client.* See, RPC 8.4(d). An attorney also breaches his/her fiduciary duties to keep the client informed, as required by RPC 1.4(b), if the attorney delays giving material information to the client. *In re: Discipline of Cohen,* 149 Wn.2d 323, 336-7, 67 P.3d 1086 (2003)(attorney subject to discipline for *two month* delay in notification of dismissal).

Your fiduciary duty to promptly disclose extends to facts "which are, or *may be,* material...and which *might* affect the principal's rights and interests or influence his actions." *Mersky v. Multiple Listing Bureau,* 73 Wn.2d 225, 229, 437 P.2d 897 (1968) (emphasis added)(real estate broker/fiduciary must "timely reveal" close ties to subagent). A "'material fact' is a fact 'to which a reasonable [person] would attach importance in determining his [or her] choice of action in the transaction in question.'" *Guarino v. Interactive Objects, Inc.,* 122 Wn. App. 95, 115, 86 P.3d 1175 (2004), *quoting, Aspelund v. Olerich,* 56 Wn. App. 477, 481-2, 784 P.2d 179 (1990) ("material fact" under Securities Act of Washington, RCW 21.20.010(2)); and *Morris v. Int'l Yogurt Co.,* 107 Wn.2d 314, 322-3, 729 P.2d 33 (1986) ("material fact" under FIPA, RCW 19.100.170(2)).

As a result, if you discover that the client has a potential legal malpractice claim against either you *or your co-counsel,* you must immediately notify the

client of the mistake, and advise the client to consult with independent counsel concerning that potential malpractice claim. *In re SRC Holding,* 364 B.R. 1, 38-40, 43-46 (D Minn. 2007). Accord, RPC 1.7 cmte. 10 (2006)("[I]f the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice"); 1 *Restatement (Third) of the Law Governing Lawyers,* §20, cmt. c, p. 171 (ALI 2000); *In re: Talon,* 86 App. Div.2d 897, 447 N.Y.S.2d 50, 51 (1982)("An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him."); and Wisc. Ethics Op. E-82-12; N.Y. State Bar Ass'n, Ethics Op. 734 (11/1/00). Absent such disclosure and informed consent by the client, you may *not* continue to represent the client. RPC 1.7.

The attorney who ignores these warnings risks working for free, because the courts will usually refuse to allow an attorney to profit from his/her disregard of the RPC's and the attorney's fiduciary duties, particularly those involving a conflict of interest. *In re: Corporate Dissolution of Ocean Shores Park,* 132 Wn. App. 903, 913, 134 P.3d 1188 (2006)(An attorney "who fails in his ethical and professional duties may not reap any benefits from his clients' ignorance."). Accord, *Yount v. Zarbell,* 17 Wn.2d 278, 135 P.2d 309 (1943)(denying *any* fee recovery to husband (non-attorney) and wife (attorney) arising out of husband's unauthorized practice of law with wife); *Gustafson v. City of Seattle,* 87 Wn. App. 298, 304, 941 P.2d 701 (1997); and *Eriks v. Denver,* 118 Wn.2d 451, 462-63, 924

P.2d 1207 (1992)(affirming disgorgement of *all* fees due to attorney's conflict of interest).

Let me be very specific relative to co-counsel situations, whether characterized as considering local counsel, referral counsel, or some other joint representation arrangement. *Mazon v. Krafchick,* 158 Wn.2d 440, 448-50, 144 P.3d 1168 (2006) arose when one of two co-counsel (Steve Krafchick) missed the statute of limitations, resulting in the loss of the client's case. The not-at-fault co-counsel (Mazon) contributed to settle the malpractice claim, but then sued Krafchick to recover Mazon's settlement payment and damages (including Mazon's lost contingent fee). The Washington Supreme Court rejected Mazon's claim for his share of the contingent fee lost by Krafchick's malpractice, explaining (158 Wn.2d at 450):

> [W]e believe that allowing cocounsel to recover prospective fees would create the opposite incentives to overemphasize the informal divisions of responsibilities between cocounsel, overlook any failings of cocounsel, and later claim that cocounsel's failures were not their responsibility. Prohibiting cocounsel from suing each other for prospective fees arising from an attorney's malpractice in representing their mutual client provides a clear message to attorneys: **each cocounsel is *entirely responsible* for diligently representing the client.**
>
> The Court of Appeals correctly recognized that this approach encourages cocounsel to back each other up and ensure that there are fewer mistakes in pursuing the best outcome for the client. Cocounsel are in the best position to ensure that they are not injured by each other's mistakes. **This approach is consistent with the attorneys' duty to maintain undivided loyalty to the client.** [Emphasis added].

In short, you are indeed your "brother's keeper" or, perhaps more aptly, your "co-counsel's keeper" in this situation. If you engage in a co-counsel, referral counsel, or local counsel role, the wise course of action is to carefully

define each attorney's responsibilities, in writing, *and submit that allocation of responsibility to the client to sign off on as well.* That may not completely insulate you from joint liability for your co-counsel's errors, but clearly delineating each counsel's roles helps to avoid miscommunication that an informal division of labors can engender. *Mazon, supra,* 158 Wn.2d at 444.

Practice Pointer > Fix Your Bills *Before* You Send Them

RPC 1.5 requires that you "shall not make an agreement for, **charge, or collect** an unreasonable fee." (Emphasis added). Your duties as the client's fiduciary thus dictate that you charge only for those hours which are reasonably necessary. *E.g., Estate of Larson,* 103 Wn.2d 517, 531, 694 P.2d 1051 (1985). You would therefore breach your fiduciary duty and violate RPC 1.5(a) if you charge the client time and expenses incurred to rectify your own error [See, *e.g., In re: Cohen,* 149 Wn.2d 323, 327, 67 P.3d 1086 (2003)], bill improper fees, including fees "outside the terms of the fee agreement" [*In re: Boelter,* 139 Wn.2d 81, 95-97, 985 P.2d 328 (1999); and *In re: Vanderbeek, supra,* 153 Wn.2d at 72-3, 84 ("charging for overhead and secretarial work" and "mere requests for contact and/or payment of fees" violated RPC 1.5(a)], or fees for time incurred in preparing untimely or improper pleadings. *Cohen, supra,* 149 Wn.2d at 334. Moreover, charging hourly rates for clerical services, more properly included in overhead, "is not within the realm of 'reasonable attorney fees.'" *North Coast Electric Co. v. Selig,* 136 Wn. App. 636, 643-45, 151 P.3d 211, 215-6 (2007). Furthermore, you may no more bill paralegal fees for unnecessary or duplicative paralegal work than you could bill for your own time for such work; nor can you

bill paralegal rates for performance of clerical work by the paralegal. *Id.* Accord, *Absher Constr. Co. v. Kent Sch. Dist.*, 79 Wn. App. 841, 845, 905 P.2d 1229 (1995). Other common billing problems include duplicative expense entries, double billing (including for intra-firm conferences), unspecified telephone or internet expenses, and unnecessary expenses.

Clients do not like it when you over-charge them, or subject them to "nickel and dime" billing. Beyond risking the goodwill of your client, careless billing practices expose you to potential disciplinary action and liability under the Washington Consumer Protection Act, RCW 19.86. See, *Short & Cressman v. Demopolis,* 103 Wn.2d 52, 691 P.2d 163 (1984). You want to avoid those risks.

The wise attorney, therefore, carefully checks and corrects his/her billings *before* sending them to the client.

Practice Pointer > Recognize the Danger of Going to War Against Your (Former) Client

Joseph W.E. Schmitt of Travelers Insurance Companies, speaking at the February, 2008 Legal Malpractice & Risk Management Conference in Chicago, "estimated that 15 to 20 percent of the malpractice claims he sees 'started out as counterclaims in a simple collection action.'" 24 *Lawyers Manual on Professional Conduct,* No. 5, p. 125 (ABA/BNA 3/5/08). War with your client creates a high probability of a lose-lose situation for you. If you win the fee case, you will almost certainly have spent substantial amounts of uncompensated time in depositions, discovery, and potential trial, and will have incurred the substantial costs of litigation, including (most probably) substantial attorney fees. If you lose, your professional reputation may be tarnished *forever*, particularly if there is

a decision on appeal. WestLaw is forever. Moreover, if you resort to collection actions too often, you can fully expect that word-of-mouth will circulate among your colleagues and potential clients. This creates the opposite of goodwill. Indeed, in the course of evaluating potential legal malpractice claims, we invariably investigate *all* litigation in which the defendant attorney has engaged, including the attorney's collection actions, because fee collection cases can provide substantial amounts of information for use in later legal malpractice cases.

For these reasons, when the attorney client relationship sours, regardless of the reason, blaming the client may do you more harm than good. You did, after all, accept them as clients "warts and all." But you did not volunteer to be your client's banker. See, RPC 1.8(e). Accordingly, if the client falls behind on his/her/its financial obligations to your law firm, then you *must* make a fundamental choice, *i.e.,* you must: either cut the chord with the client and withdraw from representation, or; you must resign yourself to the simple fact that you may have to write off your fees and expenses as uncollectible.

Delaying this inevitable decision disserves not only the client, but yourself and your other clients as well. See, *Rockefeller v. Landau,* 2007 WL 572357 (Div. I, 2/26/07)(unpublished)($1.3M in uncollectible legal fees, alleged to have harmed the attorney's compensation and reputation within the law firm). For example, RPC 1.16 and CR 71 usually make termination of the attorney-client relationship more complicated than it was to establish the relationship in the first place. Depending on the circumstances, your ethical obligations may even

prevent you from withdrawing even if the client cannot pay you for your continuing representation. See, *e.g., In re: Discipline of Cohen,* 150 Wn.2d 744, 82 P.3d 224 (2004); *In re: Discipline of Miller,* 99 Wn.2d 695, 663 P.2d 1324 (1983). Moreover, even if you can withdraw, you must still take reasonable steps to protect the client from any prejudice. RPC 1.16(d). This could include, for example, filing the client's complaint prior to expiration of the statute of limitations and providing the client and new counsel notice of the need to effectuate timely service of process. *Lockhart v. Greive,* 66 Wn. App. 735, 740-41, 834 P.2d 64 (1992).

Which brings us full circle: choose your clients well. Your practice of law, and life in general, will be sweeter, safer, less stressful, and more productive if you do.

ATTACHMENTS

TABLE OF CONTENTS