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Supreme Court No. 102761-3
Court of Appeals No. 84337-1-I

SUPREME COURT
OF THE STATE OF WASHINGTON

SEATTLE TRUCK LAW, PLLC, a Washington
Professional Liability Company,

Respondent.,

v.

JAMES BANKS, an individual,

Petitioner,

MEMORANDUM OF *AMICUS CURIAE* MARK J. KING, IV, PRO SE, IN SUPPORT OF PETITION FOR REVIEW

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Pro Se Attorney for Amicus Curiae

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I. IDENTITY AND INTEREST OF APPLICANT STATEMENT OF RELIEF REQUESTED

Amicus applicant respectfully submits this Memorandum of Amicus Curiae. As more fully explained in the concurrently filed Motion for Leave to File Memorandum of Amicus Curiae, Amicus is similarly situated as Petitioner with similar ethical and factual issues and requests the court accept review and provide ethical guidance for himself and other members of the Washington State bar.

Amicus applicant submits that under the circumstances of this case, it appears violative of the Washington State Rules of Professional Conduct ("RPC") for a previously terminated law firm to enforce a restrictive covenant against a departed former lawyer, requiring payment of a substantial percentage of the legal fees, not earned, and not agreed to in writing by the client, to the prior law firm.

More specifically, predecessor law firms attempt to create a loophole in drafting clauses subverting RPC 5.6 and 1.5, resulting in a restriction/limitation on the departing lawyers right

to practice, restriction on the freedom of clients to counsel of choice, and in the predecessor law firm collecting an unreasonable legal fee through a hidden from the client fee-sharing agreement.

II. INTRODUCTION

RPC 5.6(a) makes an employment agreement restricting the rights of a lawyer to practice law after the relationship terminates unethical. It is also unethical for a Washington licensed lawyer to make or charge an unreasonable legal fee and make a division of fees of fees unless it is in proportion to the services provided and agreed to by the client (confirmed in writing). RPC 1.5.

Contingency fees are commonly used by attorneys for tort/personal injury related claims, and like any other lawyer fees, must always be reasonable. RPC 1.5 cmt. 3. If a client terminates an attorney-client relationship under a contingency fee agreement, the attorney may be entitled to the full contingency fee if they fully or substantially perform (i.e. obtain

settlement), but otherwise they are usually entitled to reasonable fees for services rendered in quantum meruit. *Taylor v. Shigaki*, 84 Wn. App. 723, 728, 930 P.2d 340, 344 (1997).

An attorney working for a client on a contingency fee agreement may also bring in another attorney or firm as co-counsel and enter into a fee-sharing agreement together, as long as: the division is in proportion to the services each provides; the client agrees to the fee division, confirmed in writing; and the fee is reasonable. RPC 1.5(e). However, again, if the attorneys' representation is terminated by the client, unless there was full or substantial performance, they can recover their reasonable fees for service rendered in quantum meruit. *Id. Taylor*.

Many law firms now attempt a back-door method to draft their way around these ethical requirements. This involves an employment agreement related restrictive covenant, a post-termination fee-sharing agreement, between the law firm and their associate attorney that allows them to collect more than the

reasonable fee than they have earned and/or would normally receive under quantum meruit, after their representation is terminated by the client.

As demonstrated in the current case at bar, if an associate attorney leaves a firm and the client decides they would prefer to hire the departing associate attorney, rather than staying with the predecessor law firm, such a restrictive covenant allows the prior terminated law firm to attempt to swoop in after being terminated, not having to do the work or take any further risk/responsibility, and then take a large arbitrary percentage of the legal fee for which they otherwise would not be entitled to. They attempt to get more than the reasonable fees for services rendered under quantum meruit they would normally be entitled to by drafting a fee-sharing agreement with their current (and potential future) associate attorney.

This attempt to create a loophole of the Rules of Professional Conduct results in limitations of the former

lawyer's ability to practice law, lack of client attorney choices, and a windfall of legal fees for services not performed by the terminated former law firm.

III. LEGAL ANALYSIS/ARGUMENT

A. Employment Agreements with Restrictive Covenants Restrict a Lawyer's Right Practice and Client Choice as to Counsel of Its Choosing

RPC 5.6(a) notes in pertinent part that a "lawyer shall not participate in offering or making an "employment, or other similar type of agreement that restricts the rights of a lawyer . . . to practice after termination of the relationship". RPC 5.6(a) is to be read in the context of the RPCs as a whole. *LK Operating, LLC v. Collection Grp. LLC*, 181 Wn.2d 48, 76 n.13, 331 P.3d 1147 (2014).

The issues in this case are not new ethical issue within the legal field. Back in 1999, the Virginia Legal Ethics Committee was asked for guidance when presented with a very similar hypothetical situation as the case at bar. *See* Appendix, LE Op. 1732 (June 29, 1999).

While only persuasive authority, the Virginia Ethics Committee was asked to provide an ethical analysis of the ethical implications for a former attorney who was required (while an employee) to enter into a fee-splitting employment agreement with a former law firm, requiring him to pay diminishing percentages of whatever contingent fee was earned on clients who went with him (i.e. 80% of the fee within 6 mos., 65% 7-12 mos, and 50% more than 12 mos after departure). *Id.* Also, the agreement made no provision for client consent to the fee-splitting agreement and the prior firm was demanding payment on settled contingency fee cases. *Id.*

The Virginia Ethics Committee advised that it believed the fee-sharing agreement violated their equivalent to our RPC 1.5(e) and 5.6(a) due to the lack of client disclosure/consent, case joint responsibility, and creation of an improper financial disincentive that penalizes the departing attorney for leaving and competing (and impairing a client's choice of counsel), respectively. *Id.*

As it pertains to their equivalent of our RPC 5.6(a), it noted this would create restrictions for the attorneys on both sides of the equation. *Id.* Some of the restrictions it notes include attorneys unwilling to work at substantially reduced rates; pressure against accepting former clients in favor of full value paying clients. *Id.* The Virginia Ethics Committee points out the obvious, that attorneys might have to decline the employment and deprive clients of counsel of their choice. *Id.*

The court in *Johnson Family L., P.C. v. Bursek*, 2024 CO 1, ¶ 11, 541 P.3d 605, 609, points out that the majority of courts to date in this regard see such restrictions and any financial burdens on the departing lawyers as violative of Washington's equivalent of RPC 5.6(a) having harmful effects on clients, including limiting a client's freedom to choose a lawyer. While the Washington State Bar ethics committee has not opined on this ethical dilemma yet, the Ohio Board of Professional Conduct recently provided guidance on August 4, 2023.

In Ohio Board of Professional Conduct Opinion 2023-08,

the Board analyzed where a law firm that advertises heavily sought to add a post-termination clause to is employment contract with associate attorneys who leave and take cases with them. The new clause would require the departed attorney to pay not just the quantum meruit value of work done from later settlements, but an additional 25% of the overall recovery to reimburse the firm for its advertising costs. *Id*.

The Board noted that such restrictive covenants can limit a lawyer's professional autonomy and client's choice of a lawyer, which are strong public policy interests. *Id*. It noted that minority jurisdictions permit such post-termination fee-sharing restrictive covenants, as long as they are only a reasonable financial penalty, but the higher the percentage of the fee going to the former firm, the more likely the rule (5.6(a)) will be violated. *Id.*

The Banks post-termination restrictive covenant/clause would likely violate both the majority and minority jurisdiction

equivalent to RPC 5.6(a).

Evaluation of RPC 1.5 further confirms this as RPC 5.6(a) should be read in the context of the RPCs as a whole, including RPC 1.5.

B. All Attorney Fees Agreements and Charges Must Be Reasonable – RPC 1.5

Attorney fee agreements that violate the Washington State Rules of Professional Conduct, specifically RPC 1.5, are against public policy and are therefore, unenforceable." *Kayshel v. Chae, Inc.*, 17 Wn. App. 2d 563, 572, 486 P.3d 936, 941 (2021) citing *Rafel Law Grp. PLLC v. Defoor*, 176 Wn. App. 210, 219, 308 P.3d 767 (2013).

It is clearly unethical under the Washington Rules of Professional Conduct for an attorney to ever take an unreasonable fee. RPC 1.5(a) makes it clear that an attorney "shall not make an agreement for, charge, or collect an unreasonable fee." RPC 1.5(a) articulates and then lays out the factors for determining an ethical, reasonable fee:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
(3) The fee customarily charged in the locality for similar legal services;
(4) The amount involved and the results obtained;
(5) The time limitations imposed by the client or by the circumstances;
(6) The nature and length of the professional relationship with the client;
(7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
(8) Whether the fee is fixed or contingent; and
(9) The terms of the fee agreement between the lawyer and the client, including whether the fee agreement or confirming writing demonstrates that the client had received a reasonable and fair disclosure of material elements of the fee agreement and or the lawyer's billing practices;

RPC 1.5(e) further supports the requirement of a legal fee always having to be reasonable. It provides, in pertinent part, that fee divisions between attorneys not in the same firm require further client disclosure and agreement firm, and is permitted only if:

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

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

(iii) the total fee is reasonable;

RPC 1.5(e)(1).

In *Kayshel v. Chae, Inc.*, 17 Wn. App. 2d 563, 574-575, 486 P.3d 936, 942 (2021), the Court held that a contingency fee agreement wherein current counsel and prior withdrawn counsel split attorney fees without client approval in writing was ineffective and unenforceable as a matter of law. The court notes that:

> "the preamble to the RPCs states, one of the purposes of the RPCs is to regulate attorney conduct in order to protect the public interest. And, the purpose of RPC 1.5(e)(1)(ii)'s requirement that the client confirm the agreement in writing is to ensure "the client received a reasonable and fair disclosure of material elements of the fee agreement."" *Id.*

Attempts to draft post-termination fee-sharing employment agreements, without client confirmation, subvert RPC 5.6 and 1.5, and clearly result in restrictions on a departing lawyer's ability to practice, client choice of

counsel, and results in the predecessor firm taking more of the fee than it earned.

Of course, "**a client has no right to pay less than the attorney has earned**." *Taylor v. Shigaki*, 84 Wn. App. 723, 730, 930 P.2d 340, 344 (1997) (Emphasis added).

Conversely, an attorney has no right to be paid more than the attorney has earned.

IV. CONCLUSION

For the foregoing reasons, requiring a former employee associate attorney to pay a portion of the attorney fee they recover back to the prior terminated predecessor law firm results in a sharing of the legal fees between them, no matter how dressed up, labelled or disguised. By allowing a fee-sharing or fee-splitting agreement with its former employee, without disclosure and written approval of the client, the former employer is able to subvert RPC 1.5 and 5.6 by taking an unreasonable (and unearned) fee and placing financial penalties and restrictions on the departing lawyer, and client choice of

counsel.

This document contains 2,014 words, excluding the parts of the document exempted from the word court by RAP 18.17

DATED this 29th day of March 2024.

By: __*/Mark J. King, IV /*______________

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LEGAL ETHICS OPINION 1732 CONTRACT BETWEEN LAW FIRM AND ATTORNEY/EMPLOYEE REQUIRING PAYMENT TO FIRM OF A PERCENTAGE FROM ANY CONTINGENCY FEE CASE ATTORNEY/EMPLOYEE TAKES WITH HIM IF HE LEAVES THE FIRM.

You have presented a hypothetical situation in which an attorney worked for a law firm in which the attorney was required to enter into a written employment agreement. The employment agreement included a fee-splitting arrangement in the event that the attorney left the firm and took clients with him which had retained the firm on a contingency fee basis. The agreement provided that if the attorney settled a client's contingency fee case within six months after leaving the firm, the attorney must share with the firm 80 percent of the fee collected. The attorney would owe the firm 65 percent of the total fees collected for any case settled within seven to twelve months after the attorney left the firm. For any case settled more than twelve months after the attorney left the firm, the attorney must share 50 percent of the total fees collected with the former firm.

This agreement made no provision for client consent to the fee splitting arrangement. In addition, the firm never disclosed the terms of the fee-splitting arrangement with any client. The attorney left the firm to join a new law firm and has settled some contingency fee cases which fall within the scope of the fee splitting agreement with the old firm. The old firm has demanded that the new firm honor the provisions of the fee-splitting agreement.

Under the facts you have presented, you have asked the committee to opine as to the propriety of the fee-splitting agreement and the new law firm's ethical obligations with respect to payment of the fees demanded by the old law firm.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:2-105(D) which sets out the requirements for fee-sharing between attorneys who are not members of the same law firm; and DR:2-106(A) which prohibits a lawyer from entering into an agreement that restricts the right of the lawyer to practice law.

The committee has previously opined that DR:2-105(D)'s provisions concerning fee-sharing permit the division of fees among lawyers not in the same firm only if all three requirements are met: (1) the client must consent to the employment of additional counsel; (2) both attorneys must assume responsibility to the client; and (3) the terms of the agreement must be disclosed to the client and the client must consent thereto. In the context of a fee-splitting agreement between a departing lawyer and his former law firm, the committee has previously expressed the view that such arrangements cannot meet the requirements under DR:2-105(D). There is no

expectation that the old law firm would assume responsibility to the client following the attorney's departure from the firm. Nor is it likely that the client would have agreed, when the client first engaged the old law firm, to the employment of additional counsel or to the division of fees. LE Op. 1232, LE Op. 1404 and LE Op. 1556. Even if such expectation were reasonable, there was no client consent obtained under the facts of your inquiry.

In LE Op. 1556 the Committee opined that it is improper to contractually obligate the departing attorney who takes clients of the firm with him to share his post-withdrawal fees collected for such clients with the old law firm. The committee also opined that such agreements improperly restrict the departing attorney's ability to practice law:

> [T]he interjection of a fee [to the firm from which the lawyer withdrew] obviously impairs the creation of a lawyer-client relationship between the departing lawyer and the client of his former firm. The impairment arises on both sides of the transaction. The attorney may be unwilling to work at substantially reduced rates for even his best clients, and pressure against acceptance in favor of clients paying full value to the firm would arise within the new [firm employing the departing lawyer]. The attorney would thus be compelled to decline employment and the client would be deprived of the attorney of his choice.

LE Op. 1556. Therefore, in addition to violating DR:2-105(D), the committee believes that the agreement in your hypothetical creates an improper financial disincentive which has the effect of penalizing the attorney for leaving and competing with the old law firm and impairs the client's right to select counsel of his choice, in violation of DR:2-106(A).

In the facts you present, the committee believes the fee-sharing agreement violates DR:2-105(D) and DR:2-106(A). The committee does not opine on whether the fee-sharing agreement is enforceable since this is a question of law beyond its purview.

Committee Opinion
June 29, 1999

Legal Ethics Committee Notes. – Rule 1.5(f) allows fee sharing between lawyers formerly associated in a law firm, with no requirement for client consent.
October 23, 2012

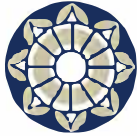
Ohio Board of Professional Conduct

OPINION 2023-08
Issued August 4, 2023

Departing Lawyer Reimbursing Firm for Advertising Costs

SYLLABUS: The Rules of Professional Conduct prohibit a law firm from adding a clause to its standard employment contract requiring a departing lawyer to pay the firm the quantum meruit value of work completed prior to the lawyer's departure, plus 25 percent of the overall recovery of attorney fees on any transferred cases to reimburse the firm for its advertising costs. The addition of 25 percent of the overall recovery of attorney fees is an impermissible restriction on the departing lawyer's right to practice after termination of the employment relationship. The additional fee is also an impermissible division of attorney fees by lawyers not in the same firm.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



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OPINION 2023-08
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APPLICABLE RULES: Prof.Cond.R. 1.5, 5.6

QUESTION PRESENTED:

> May a law firm add a clause to its standard employment contract requiring a departing lawyer to pay the firm the quantum meruit value of work completed prior to the lawyer's departure, plus 25 percent of the overall recovery of attorney fees on any transferred cases to reimburse the firm for its advertising costs?

OPINION:

A law firm concentrates its practice on plaintiff personal injury cases and spends a large amount of money each year on advertising to attract new clients. From time to time, lawyers leave the firm and take contingency fee cases of the firm with them ("Transferred Cases".) The Transferred Cases are subsequently settled or tried to verdict

by the departing lawyer. When a settlement or verdict is reached on a Transferred Case, the firm seeks a quantum meruit portion of the settlement or verdict.

The firm wants to add a clause to its standard employment contract that requires a departing lawyer to pay the firm 25 percent of any recovery of attorney fees on a Transferred Case to reimburse the firm for its advertising costs. This charge would be in addition to the firm's quantum meruit claim.

Restriction on right to practice

Prof.Cond.R. 5.6(a) prohibits a lawyer from offering or making an employment agreement that restricts the right of a lawyer to practice after termination of the relationship, except regarding benefits upon retirement or upon the sale of a law practice. Prof.Cond.R. 5.6(a), cmt. [1], [3]. The rationale behind the rule is that restrictive covenants can limit a lawyer's professional autonomy and a client's freedom to choose a lawyer. *Id.* at. cmt. [1] and Adv. Op. 2021-07. The Supreme Court has recognized that there is a strong public policy interest in permitting a party's continued representation by counsel of his or her choice. *Kala v. Aluminum Smelting & Refining Co.*, 81 Ohio St.3d 1, 1998-Ohio-439; Adv. Op. 2021-07. Beyond prohibiting restrictions related to competing within a specific geographic area, for a specified period of time, or in certain practice areas, the majority of jurisdictions prohibit agreements that serve as a financial deterrent to competition or as an economic penalty because it could lead to some lawyers declining to represent certain clients. ABA/BNA Lawyer's Manual on Professional Conduct, 51 Conflicts of Interest, 51:1201.40.10 Restrictions of Right to Practice (2022).

Only a few jurisdictions permit an employment agreement to impose a reasonable financial penalty for a departing lawyer to discourage competition. ABA/BNA Lawyer's Manual on Professional Conduct, 91 Types of Practice, Private Firm, 91:701.20.180.30 Withdrawal and Termination (2022). The higher the percentage to be paid to the former firm, the more likely the rule will be violated. *Id.* Courts have found employment agreements requiring a departing lawyer to pay 12.5 to 15 percent of fees received from former clients to the law firm unenforceable. *Id.* (*citing Denburg v. Parker Chapin Flattau & Klimpl*, 604 N.Y.S.2d 900 (N.Y. 1993) and *Eisenstein v. David G. Conlin PC*, 827 N.E.2d 686 (Mass. 2005)). Even in the limited jurisdictions that permit a departing lawyer to share fees from clients who leave with them, the amount "must be reasonable and reflect the actual financial loss or harm to the firm that can be expected from the lawyer's

departure." ABA/BNA Lawyer's Manual on Professional Conduct, 51 Conflicts of Interest, 51:1201.40.20 Restrictions of Right to Practice (2022).

In Adv. Op. 2019-04, the Board addressed Prof.Cond.R. 5.6 in the context of settlement provisions. The Board observed that even when a provision may not directly bar future representation by a lawyer, it may have the practical effect of limiting the lawyer's right to practice and thus violate the rule. *Id*. The Board further reasoned, "[a]n analysis of less obvious restrictions under Prof.Cond.R. 5.6 requires a determination of whether the lawyer is given significantly less discretion in pursuing future claims than a lawyer not subject to the agreement. In those instances, the provision constitutes an impermissible restriction on the practice of the lawyer." *Id*.

In *Cincinnati Bar Assn. v. Hackett*, 129 Ohio St.3d 186, 2011-Ohio-3096, the Supreme Court addressed an employment agreement wherein the departing associate was required to pay the firm 95 percent of the attorney fees generated on cases in which the clients followed the departing lawyer, regardless of the proportion of work each attorney performed. The Court observed that a client's absolute right to discharge a lawyer or law firm, at any time with or without cause, subject to compensation for services rendered, would be meaningless if the discharged attorney could prevent other attorneys from representing the client. *Id*. at ¶8. The Court concluded that if the employment agreement were enforced, it would create an "economic deterrent for the departing attorney that would adversely affect the clients' right to retain an attorney of their own choosing." *Id*. at ¶9.

In the Board's view, the proposed additional 25 percent of attorney fees recovered here is a financial disincentive disguised as the repayment of operating expenses of the law firm. First, this Board has already opined that a law firm cannot require a departing associate to pay the firm a percentage of fees generated from work occurring subsequent to departure. Adv. Op. 2021-7. By seeking 25 percent of the total attorney fees recovery on top of any quantum meruit claim, the law firm will receive a percentage of the legal fees earned for work completed after the lawyer departs the law firm.

Second, the percentage requested by the law firm to purportedly reimburse the firm for advertising costs appears to be arbitrary. While the law firm indicates that it spends a "large amount of money" each year on advertising, the firm makes no attempt

to demonstrate the reasonableness of the percentage or tie the amount to any actual financial loss to the firm. For example, there is no indication that the suggested percentage reflects a prorated amount of per client advertising costs. If one or two clients with the potential for a large recovery on a contingent fee case follow the departing lawyer, the law firm could receive a windfall that may surpass the law firm's actual annual expenditure for advertising.

The departing lawyer has significantly less discretion in agreeing to continue to represent the client than a lawyer not subject to the agreement. The percentage places a burden on the departing lawyer in a way that may impair the client's right to choose counsel if the departing lawyer is not willing to continue representing the client knowing his or her fee will be reduced by the 25 percent owed to the former firm. This is an impermissible restriction on the lawyer's right to practice after termination of the employment relationship.

Fee Splitting

The proposed employment agreement also implicates Prof.Cond.R. 1.5(e), which provides that lawyers not in the same firm may only divide fees if: 1) the fees are divided in proportion to the services performed or both lawyers agree to be jointly responsible for the representation; 2) the client gives written consent to the division of fees; 3) in the event the fee agreement is contingent, both lawyers and the client sign the closing statement; and 4) the total fees are reasonable. Comment [8] to the rule indicates that it does not prohibit or regulate the division of fees to be received in the future *for work done when lawyers were previously associated* in a law firm. The rule and comments are silent as to payment for work done after departure or of reimbursement for any additional or "costs" associated with a lawyer's employment and then departure from a firm. This additional proposed fee to reimburse the firm for advertising costs cannot be considered an attorney fee for "work done" when the lawyer was previously associated with the law firm given that the firm will receive a quantum meruit payment for that same work. If the employment agreement were enforced, it would operate to impose the division of attorney fees paid by the client without input from the client. The client would not be required to consent to the disposition of his or her fees and the law firm would have no requirement to maintain joint responsibility for a matter which was ongoing and from which the firm may ultimately benefit financially.

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of March, 2024, I electronically filed the foregoing with the Clerk of the Court using CM/ECF System, which will send notification of such filing to the following:

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GILBERT LAW FIRM

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