Supreme Court No. 1027613
Court of Appeals No. 84337-1-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondent.

v.

JAMES BANKS, an individual,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

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I. INTRODUCTION

Respondent Seattle Truck Law, PLLC ("STL" or "Respondent") respectfully requests the Court deny Petitioner James Banks's ("Banks" or "Petitioner") Petition for Review. Division I's opinion is well-reasoned. Its decision should remain undisturbed because Banks improperly seeks to use the Rules of Professional Conduct ("RPC") to avoid his contractual obligations. The Parties' Contract does not violate the RPCs and is enforceable under Washington law. This Court should not give Banks an opportunity to avoid his bargained for contractual obligations by attempting to hide behind a misreading of the RPCs after the fact, nor should it guide other Washington attorneys to shirk their contractual obligations under the guise of discovering ethics for personal profit.

Furthermore, the Petitioner failed to raise arguments at the trial court that he improperly raised at Division I and attempts to raise again in his Petition. Division I declined to consider

Banks's new arguments and so should this Court. These failures limit the scope of review making it a poor matter to set precedent.

II. STATEMENT OF THE CASE

A. Factual History

1. Seattle Truck Law and Banks Were Parties To A Valid Employment Agreement.

a. Both Parties Are Attorneys Licensed To Practice In Washington State.

Seattle Truck Law is a personal injury law firm located in Seattle, Washington. CP 151. The firm's primary area of practice is representing injured persons in cases that involve large truck and bus crashes. *Id*. STL was formed in 2016. *Id*. The principal owner of STL is Morgan Adams. *Id*. Mr. Adams is an attorney licensed to practice in Washington, among other states. *Id*.

James Banks worked as a lawyer at STL from January 1, 2018 to December 31, 2020. CP 159. He entered into an employment agreement with STL on November 29, 2017. CP 152.

b. The Agreement Governed The Division Of Fees On Cases Taken With Banks When His Employment With Seattle Truck Law Ended.

There is no dispute that Banks violated the plain terms of the Parties' Agreement. Banks attempts to avoid his legal responsibilities with a series of unsupported arguments that the Parties' Agreement is not enforceable. The pertinent section of the Parties' Agreement states as follows:

> On Contingency files opened at the office, that you take with you if you leave, you agree you will repay all costs and expenses owed to the firm within three (3) months of the date you leave. **You further agree to remit fifty percent (50%) of any attorney fees received on those files to the firm for the first year from the date you leave and forty percent (40%) the second year, and thereafter**.

CP 152 (emphasis added).

On January 1, 2020, the Parties executed an addendum to the Parties' Agreement (the "Addendum"). CP 156. Banks renegotiated certain aspects of the Parties' Agreement. The parties did not, however, alter the provisions in the Contract

regarding Banks's handling of files following his separation from STL. The Addendum states, in pertinent part:

> Other than income discussed below, the other aspects and terms of our November 29, 2017 agreement (bar dues, CLE, separation terms to include files you take with you, files you leave, etc…) will remain the same.

CP 156.

The Parties' Agreement and the Addendum are referred to collectively as the "Contract" or the "Parties' Agreement." The Addendum did not contain a zipper clause, or any other clause that would invalidate or limit the Contract.

2. <u>Banks Breached The Contract When He Took Cases Opened At Seattle Truck Law Upon His Resignation Then Refused To Pay The Required Split Of Fees.</u>

In January of 2021, Banks resigned from STL. CP 159. When he left, he took eight cases (the "Cases") that were opened at STL. Banks immediately settled the first case within six weeks of leaving STL. CP 177. The case settled for $350,000 and constitutes nearly a third of the fees disputed by the parties. *Id*.

Banks litigated the Cases following his departure to resolution. CP 175.

Prior to the trial court's order on summary judgment, Banks failed to remit any payment to STL for any attorney's fees realized from the Cases. CP 159, 175. He refused to remit payment for any of the attorney's fees that were owed to STL per the Parties' Agreement. *Id*.; CP 9.

B. The Trial Court Held the Parties' Agreement Does Not Violate RPC 5.6 and Division I Affirmed.

On June 17, 2022, the trial court granted summary judgment in favor of Seattle Truck Law on its claim for Breach of Contract and denied Banks's motion in its entirety. The court held the provision in the Parties' Agreement regarding the division of attorney's fees for the Cases Banks took with him from STL "does not violate RPC 5.6, [and] there's no other basis upon which I would find that provision unenforceable." Verbatim Report of Proceedings, 48-49:25-2 (June 17, 2022).

Division I affirmed, holding that the Parties' Agreement was neither a non-compete nor a *de facto* non-compete and did not violate RPC 5.6.

III. REVIEW SHOULD BE DECLINED

A. <u>This Matter Does Not Warrant The Court's Review.</u>

Division I issued a well-reasoned, thoughtful decision and its conclusion is unassailable. Further, the record in this matter is not ideal for developing ethical jurisprudence. Division I did not consider Petitioner's arguments involving numerous RPCs in this matter because the issue was not properly raised at the trial court. Undeterred, Banks now seeks to make these arguments and a wholly new argument related to retirement benefits to this Court. These new arguments are proscribed by RAP 2.5(a).

Another reason this Court should decline to hear this matter is that Division I reached the correct conclusion. The Petitioner's arguments have not evolved or improved since the trial court, he continues to misapprehend key holdings in persuasive cases as well as how the majority of jurisdictions have

interpreted RPC 5.6, and he fails to distinguish hourly from contingency cases. Banks's arguments simply are not supported by the authority he points to.

B. Banks Is Precluded From Raising New Arguments.

Banks failed to properly develop the record at the trial court and RAP 2.5(a) prohibits him from raising new arguments on appeal. He did not raise any argument regarding any RPC other than 5.6 at the trial court that would allow him to raise the myriad new issues he attempted to raise before Division I and now puts before this Court. He also did not raise argument regarding RPC 5.6's exception to restrictions on a lawyer's right to practice involving retirement benefits.

1. Banks Is Precluded From Arguing This Court Must Consider All The RPCs.

At the trial court, Banks's only reference to any RPC other than 5.6 is in a bullet point summary of *Cincinnati Bar Ass'n v. Hackett*[1] stating "Lawyer violated RPC 1.5 and 5.6 for

[1] 950 N.E.2d 969 (Ohio 2011).

attempting to require departing associates to pay 95% fees (sic) generated in the clients' cases to respondent regardless of the proportion of the work that each attorney performed." CP 54. At the trial court, Banks did not argue that numerous RPCs should be read together to gain insight into the meaning of RPC 5.6 as he does now. Pet. Rev. at 15-17.

Banks is not simply citing new authorities in his Petition for Review. He is attempting to shoehorn entirely new theories and arguments into the Petition. RPC 1.5 was mentioned in passing at the trial court. Banks cites a total of sixteen RPCs or their subsections in his Petition. Fourteen more than were raised before the trial court.

2. Banks Is Precluded From Raising His New Retirement Benefits Argument.

Banks raises an *expressio unius est exclusio alterius* argument regarding the retirement benefits exception in RPC 5.6 in his Petition for the first time. This argument was not raised at the trial court or even attempted to be raised at Division I. Banks is precluded by RAP 2.5(a) from making this new argument now.

Even if Banks were not proscribed from making this argument, it would not change the result of Division I's opinion. It makes no difference if the retirement benefits exception excludes any other exception to restricting the right of a lawyer to practice because the Parties' Agreement did not restrict Banks's right to practice. The Parties' Agreement is not a non-compete, a financial disincentive, or a restriction on his right to practice. Slip Op. at 9, 12-13.

Banks argues at least three theories that were not raised at the trial court: (1) that RPC 1.5[2] is part of a larger harmony of all the RPCs and their purposes; (2) that the requirements related to the totality of how fees are governed in Washington under RPC 1.5(a)-(c) was somehow violated by the Parties' Agreement; and (3) the implications of the retirement exception in RPC 5.6. This Court should refrain from addressing these arguments at this late hour.

[2] RPC 1.5 (Cmt 8) limits the scope of this RPC and states, "Paragraph (e) does not prohibit or regulate division of fees to be received in the future for work done when lawyers were previously associated in a law firm."

C. The Parties' Agreement Is Not A Non-Compete.

The majority view[3] of RPC 5.6 prohibits outright noncompete agreements as part of a lawyer's employment agreement. It allows fee-allocation agreements exactly like the one in this case.

"Rule 5.6(a) does not…preclude enforcement of fee-allocation agreements logically related to the anticipated financial impact of the lawyer's departure." Annotated Model Rules of Prof'l Conduct R. 5.6 (2023). Division I's opinion puts Washington in line with the majority view according to the American Bar Association. The ABA's analysis of the majority position bases its reasoning on several cases that Division I relied on in its Opinion. See *Groen, Laveson, Goldberg & Rubenstone v. Kancher*, 827 A.2d 1163 (N.J. Super. Ct. App. Div. 2003); *Barna, Guzy & Steffen, Ltd. v. Beens*, 541 N.W.2d 354 (Minn.

[3] At every opportunity, Banks has incorrectly argued what constitutes the majority and minority positions on RPC 5.6. He hopes that if he keeps saying something, that will make it true. But his argument is wrong before this Court just as it was before the trial court and Division I.

Ct. App. 1995); *Warner v. Carimi Law Firm*, 725 So. 2d 561 (La. App. 1998).

"A minority of jurisdictions have upheld reasonable financial disincentives notwithstanding their potential anticompetitive effect." [Annotated Model Rules of Prof'l Conduct R. 5.6.] These jurisdictions analyze the "reasonableness" of law firm noncompete provisions the same way "reasonableness" is measured for noncompete agreements outside the legal profession. See *Id.* (citing *Haight, Brown & Bonesteel v. Superior Court*, 285 Cal. Rptr. 845 (Ct. App. 1991) ("Recognizing the sweeping changes in the practice of law, we can see no legal justification for treating partners in law firms differently [regarding noncompetition agreements] from partners in other businesses and professions."); *Fearnow v. Ridenour, Swenson, Cleere & Evans*, 138 P. 3d 723 (Ariz. 2006) (shareholder agreement requiring departing lawyer to relinquish his stock to professional corporation if he competes with it must be examined for reasonableness just like any other professional's

employment agreement); *Capozzi v. Latsha & Capossi, P.C.*, 797 A.2d 314 (Pa. Super. Ct. 2002) ("We agree with the California Supreme Court and, further, adopt its reasoning and rationale [in *Howard v. Babcock*, 863 P.2d 150 (Cal. 1993).]").

The Petitioner repeatedly attempts to tie Division I's opinion to *Howard v. Babcock* in support of his incorrect assertion that Division I adopted the minority view. Nowhere in its opinion did Division I rely on *Howard v. Babcock*. The case is not cited once.

To cite *Babcock*, as Banks does, for the proposition that, "Division I marched in lockstep with the minority view's desire to protect 'the legitimate business interest of law firms[]'"[4] is a gross misrepresentation of Division I's opinion. Not only does Division I not base its analysis on a desire to protect business interest, the phrase "business interest" does not even appear in the opinion. Division I did not ask whether the Parties'

[4] Pet. Rev. at 22.

Agreement contained a "restriction [that] can be justified,"[5] the court simply determined there was no restriction and no financial disincentive. Slip Op. at 13. "And as was the case in *Barna*[6] the fee-splitting provision entitled Banks to a higher percentage of the contingent fees than he was entitled to as an employee of STL. Thus, the agreement could not serve as a financial disincentive." *Id*.

It is also a gross misrepresentation to say Division I rejected *Arena v. Schulman, LeRoy & Bennett*, 233 S.W.3d 809 (Tenn. Ct. App. 2006). Division I thoroughly analyzed *Arena* and outright rejected Banks's misinterpretation of its reasoning and holding. *Arena* involved a "shareholder agreement that required a departing shareholder to pay the firm 50 percent of fees received from contingent fee cases if the shareholder continued practicing **within the same and surrounding counties**." Slip Op. at 10 (citing *Arena*, 233 S.W.3d at 810) (emphasis added).

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[5] Pet. Rev. at 22.
[6] *Barna, Guzy & Steffen, Ltd. v. Beens*, 541 N.W.2d 354 (Minn. Ct. App. 1995)

Such an "economic disincentive constituted an impermissible restraint on the practice of law." Slip Op. at 10 (citing *Arena*, 233 S.W.3d at 812). "But the court explained, '[i]t is not impermissible for a law firm to make an economic claim to a client's file that originated while the withdrawing attorney was with the firm." Slip Op. at 10 (citing *Arena*, 233 S.W.3d at 814). The fact that economic significance was placed on cases only if the *Arena* lawyer practiced in the same or adjoining counties as his previous firm, demonstrated that the agreement's purpose was not to protect the firm's investment in the cases but to disincentivize the departing lawyer from practicing nearby. Slip Op. at 10. "Thus, the agreement was a direct restrictive covenant on the right to practice." *Id*.

The salient distinction between the unenforceable agreement in *Arena* and the Parties' Agreement is that STL was not concerned with where Banks practiced, rather, the Parties' Agreement "protected the firm's rights in case the parties terminated their relationship after cases were initiated at the

firm." Slip Op. at 13. Banks does not address any of Division I's reasoning based on *Arena* in his Petition for Review. He simply reiterates the same specious argument he made to Division I.

The Parties' Agreement is not a non-compete. Banks's ability to practice law or take clients was not restricted in any way. The clients' choice of representation was not restricted in any way. There is nothing in the record that suggests the clients were even aware that Banks owed STL a portion of the recovery, even though Banks had a duty to so inform them.[7] The Contract contains an enforceable fee split contemplated for a lawyer who departs a firm.

D. Banks's Reliance On Ethics Opinions From Foreign Jurisdictions Is Misguided.

Banks cites several ethics opinions from different jurisdictions in support of his arguments. Each of these authorities, however, are readily distinguishable from this matter

[7] Banks's failure to abide by RPC 1.5 and his inappropriate accusation that, in fact, it is Seattle Truck Law who violated RPC 1.5, are discussed in detail *infra* § E.

or simply do not stand for the proposition cited for by the Petitioner. *See* Michigan Bar Ethics Op. RI-245 (1995); Ohio Advisory Ethics Op. 2021-7; D.C. Ethics Op. 65 (1979); Fla. Ethics Op. 93-4 (1995) ("we do not suggest that every termination compensation clause in an employment agreement violates Rule 4-5.6(a). In fact, when appropriately drawn, such clauses 'offer an orderly and practical transition for the dissolution of law practices.'" (citing *Cohen v. Graham*, 722 P.2d 1388 (Wn. Ct. App. 1986)).

The Michigan and Ohio opinions deal with agreements apportioning hourly fees after the attorney has left the employer, which implicates RPC 1.5(a) governing fee splits between lawyers in different firms and has no application here. The D.C. opinion allows splits of contingency fees when a lawyer departs a firm. The cited ethics opinions do not support the Petitioner's position.

Reliance on the Michigan and Florida bar opinions is particularly spurious because both jurisdictions do not prohibit

fee split provisions like the one in the Parties' Agreement. See *McCroskey, Feldman, Cochrane & Brock PC v. Waters*, 494 N.W.2d 826, 828 (Mich. Ct. App. 1992) (contract requiring departing attorney to pay 75% of fees from former firm's client "not so overreaching that they amount to an actual restriction on defendant's right to practice law."); *Miller v. Jacobs & Goodman*, 699 So. 2d 729 (Fl. App. 1997) ("Florida courts' (sic) are uniform in enforcing such fee splitting arrangements between lawyers and law firms.").

Banks also relies on N.C. Ethics Op. 2008-8 for the vague assertion that "[a] financial disincentive may be enough[]" to violate RPC 5.6. However, the language of the bar opinion undermines Banks's argument and supports the enforcement of the Parties' Agreement:

> "[A]n agreement on the division of fees after a lawyer's departure from a firm may not be a prohibited restrictive covenant if the agreement seeks merely to compensate the firm for the loss of firm resources invested in the representation of a client who leaves

> the firm prior to the realization of the fee. As favorably noted in Ethics Decision 2000-6, agreements that resolve the division of contingent fees received after a lawyer leaves a law firm 'prevent client from being put in the middle of a dispute between lawyers.' For this reason, lawyers are encouraged to enter into agreements that will resolve such potential disputes fairly and without rancor. Nevertheless, such agreements may not be so financially onerous or punitive as to deter a withdrawing lawyer from continuing to represent a client if the client chooses to be represented by the lawyer after the lawyer's departure from the firm. Any financial disincentive in an employment agreement that deters a lawyer from continuing to represent a client restricts the lawyer's right to practice in violation of rule 5.6(a)[.]

N.C. Ethics Op. 2008-8 at 50-8.

E. Banks's "Secret Agreement" Argument Displays His Own Failure To Abide By The Rules Of Professional Conduct.

In his effort to find any violation of the RPCs, Banks levels an absurd accusation against STL: that the Parties' Agreement contained a "secret" or "secretive" fee splitting clause. This was

an employment agreement. There is nothing secretive or duplicitous about the Parties' Agreement. In making this accusation, Banks attempts to distract from his failure to provide written notice to clients of the fee-split provision in violation of Rule 1.5; which was **his** duty, not STL's.

Banks has grossly misinterpreted the obligations under RPC 1.5. Contrary to Banks's assertion, RPC 1.5 has not been violated by STL. Banks argues that RPC 1.5(a)-(c)[8] is violated "by STL claiming a fee split without prior disclosure to the client." Pet. Rev. at 29. However, any requirement of notice was the responsibility of Banks, not STL.

"This opinion addresses the **successor counsel's obligations** under the Model Rules of Professional Conduct after taking over the case when there is a monetary recovery." ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 487 at 1 (emphasis added); *see also* 1 Geoffrey C. Hazard, Jr., W.

[8] As set forth *supra* § B, Banks is precluded from arguing STL violated RPC 1.5(a)-(c).

William Hodes, & Peter R. Jarvis, *The Law of Lawyering*, at 9-102 (4th ed. 2014) ("the onus must be on successor counsel to take account of, *and explain to the client*, predecessor counsel's likely claim to a fee.") (emphasis in original). The ABA Opinion goes on to say, "[w]here a client hires successor counsel to handle an existing contingency fee matter, it does not pose an unreasonable burden on the successor counsel to advise the client that the predecessor counsel may have a claim to a portion of the legal fee if there is a recovery." ABA Formal Op. 487 at 3.

The ABA Opinion does not preclude fee splitting agreements like the Parties' Agreement. In fact, it tacitly acknowledges their existence and necessity: "neither the predecessor nor the successor counsel ordinarily would be entitled to a full contingent fee." *Id*.

STL had no duty to alert clients to the terms of the Parties' Agreement when they signed up with STL. The fee-splitting provision would only become operative if Banks both left STL and engaged former clients of STL. The provision was

contingent on Banks's actions. *See Baron v. Mullinax, Wells, Mauzy & Baab, Inc.*, 623 S.W.2d 457, 461-62 (Tex. App.—Texarkana 1981) ("At the outset the fee would be a division between a firm and its associate, and later would ripen into a payment to a former associate pursuant to the agreement[.]").

Both contingent events, the leaving of STL and the engagement of STL's former clients, occurred solely because Banks made them happen. It was Banks's duty to disclose the fee split to his clients. There is no evidence in the record that he did so.

F. *The Law of Lawyering* Does Not Promote Invalidating Agreements Based On Theoretical Impact.

Banks continues to incorrectly state that if a provision could theoretically inhibit client choice, then it violates RPC 5.6. In so doing, Banks asks the Court to ignore reality and the actual impacts of the Parties' Agreement. Despite Banks's argument otherwise, Division I's decision is in line with *The Law of Lawyering*.

The quote that Banks relies on for his "theoretical impact" premise is taken out of context in a manner that fundamentally changes its meaning. Pet. Rev. at 27. The quote that Banks references is set forth with the omitted portions in **BOLD**:

> **The role played by client choice and lawyer mobility concerns in *Cohen* and similar cases is different from the role played by competition in the typical antitrust case.** Under Rule 5.6(a), no actual anticompetitive effect on any marketplace for legal services need be shown.

1 Geoffrey C. Hazard, Jr., W. William Hodes, & Peter R. Jarvis, *The Law of Lawyering*, at 50-08 (4th ed. 2014).

Banks's reliance on this quote is misleading because it does not stand for the proposition that any theoretical inhibition to the lawyer-client relationship violates RPC 5.6. Rather, the quote differentiates an RPC 5.6 case from the burden of proof in an antitrust case which, under the rule of reason, requires proof of actual injury to competition. See *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012).

"[T]he factual support needed to show injury to competition must include proof of the relevant geographic and product markets and demonstrations of the restraint's anticompetitive effects within those markets." *Les Shockley Racing, Inc. v. National Hot Rod Asso.*, 884 F.2d 504, 508 (9th Cir. 1989) (citation omitted). Just because *The Law of Lawyering* states that Banks does not need to prove anticompetitive effects under the rule of reason standard in an antitrust case does not mean that he may simply allege that the Parties' Agreement "may," "could," or "theoretically" impacts competition.

This is particularly true when the undisputed facts demonstrate the opposite. Banks's departure entitled him to a higher fee percentage of the eight contingent fee cases he took with him when he departed than if he had stayed at STL.

Furthermore, the Parties' Agreement resulted in a clean division of fees that did not drag clients, or courts, into messy quantum meruit fights. Avoiding such squabbles over fees serves public policy and is a benefit to clients. See *Walker v. Gribble*,

689 N.W.2d 104, 109 (Iowa 2004) (citing *McCroskey*, 494 N.W.2d 826).

G. Banks's Continued False Representations To The Courts Regarding Work Performed By Seattle Truck Law.

Banks's continued representations to the courts that STL performed "little, if any work, on most of the"[9] Cases lacks candor. Division I was not taken in by this misrepresentation: "[it is] incorrect that 'little to no work had been done on [these] matters' before Banks's resignation from STL. Indeed, the first case settled within the first six weeks of Banks's departure from STL, five of the cases settled in 2021, while the remaining three settled in 2022." Slip Op. at 13.

By Banks's own admission, two of these cases settled almost immediately after his departure and for substantial sums. CP 177. On February 14, 2021, just six-weeks after Banks left STL, one of the cases settled for $350,000. Banks had this offer in hand when he left STL, the vast majority of the work occurred

[9] Pet. Rev. at 25.

prior to his departure. CP 251. Then on May 26, 2021, another case settled for $300,000 in "[m]ediation, less than 30 days before trial." *Id*. The recovery from these two matters constitutes more than half of the disputed sums.

IV. CONCLUSION

Banks has failed to cite or rely on any case or advisory opinion that is analogous to his Contract with STL. RPC 5.6 does not restrict the Parties' Agreement in Washington, nor is such an agreement violative of RPC 5.6 in other jurisdictions. Rather, such an agreement has been specifically upheld in multiple states as furthering public policy. *See La Mantia v. Durst*, 561 A.2d 275, 279 (N.J. Super. 1989); *Norton Frickey, P.C. v. James B. Turner, P.C.*, 94 P.3d 1266, 1269 (Colo. App. 2004); *Warner*, 725 So. 2d at 595; *McCroskey*, 494 N.W.2d at 826.

For the foregoing reasons, STL respectfully requests this Court deny the Petition for Review.

This document contains 4,203 words, excluding the parts of the document exempted from the word count by RAP 18.17(b).

DATED this 28th day of February, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 2024, I caused to be served the foregoing **RESPONSE TO PETITION FOR REVIEW** upon the following individual(s) in the manner indicated below:

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