68329-2 68329-2

No. 68329-2

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

THE FERGUSON FIRM, PLLC,
Appellant,

v.

TELLER & ASSOCIATES, PLLC,
Respondent.

Reply Brief of Respondent/Cross-Appellant

Kelby D. Fletcher (WSBA #5623)
STOKES LAWRENCE, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, Washington 98101-2393
(206) 626-6000

Attorneys for Respondent and Cross-Appellant

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I. INTRODUCTION

The trial court ruled in favor of Respondent Teller & Associates on various dispositive motions and affirmatively determined that Teller and Sandra Ferguson[1] formed a fee division contract for representation of clients in a discrimination case. Ferguson's e-mails and conduct conclusively demonstrated her knowledge that she formed a contract.

Based on the reasonable belief that Ferguson fabricated facts, Teller sought sanctions under CR 11 and RCW 4.84.185. The trial court denied this relief. CP 448-450. Teller appealed from that decision. CP 1180-1186.[2]

Ferguson's lawyer, Brian J. Waid, withdrew from representation after summary judgment was granted to Teller. Ferguson disputed his lien for fees. That dispute is linked with this appeal. After appeals were taken in this case, Waid filed a declaration with the trial court refuting allegations of misconduct by Ferguson and asserting that Ferguson "misled this [the trial court] and other Courts" and "previously lied to this [the trial court]." CP 860. His declaration provided objectively verifiable

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[1] As in Teller's Response Brief, this brief will refer to the parties by their personal last names and personal pronouns.

[2] Teller's appeal of the order denying sanctions followed by more than two months the trial court's summary judgment to Teller and Ferguson's appeal. Teller's appeal was pursuant to RAP 2.2(a)(13) - an order affecting a substantial right after judgment.

evidence of these assertions[3]. Attached to his declaration were e-mails from and to Ferguson which further substantiate that Ferguson's position in this litigation was baseless. The trial court did not have the benefit of those admissions when it denied Teller's motion for sanctions.

Ferguson's admissions to Teller and later to her lawyer demonstrate that this litigation is factually and legally baseless. The admissions by Ferguson to her lawyer also demonstrate that the litigation was taken for improper purposes - to cause Teller to incur legal fees and costs in the trial court and in this Court.

II. ARGUMENT.

It is clear that "the sanctions rules are not 'fee shifting' rules. Furthermore, requests for sanctions should not turn into satellite litigation or become a 'cottage industry' for lawyers." ***Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.***, 122 Wn.2d 299, 356, 858 P.2d 1054 (1993) However, "[s]tarting a lawsuit is no trifling thing. By the simple act of signing a pleading, an attorney sets in motion a chain of events that surely will hurt someone." ***Cascade Brigade v. Econ. Dev. Bd. for Tacoma-Pierce County***, 61 Wn. App. 615, 617, 811 P.2d 697 (1991).

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[3] The documentation provided by Mr. Waid reciting his experience with Ferguson is similar to what happened with Teller and in her bar discipline case, ***In re Ferguson***, 170 Wn.2d 916, 246 P.3d 1236 (2011): Misrepresentation to a judge; denial of wrongdoing and justification on untenable grounds.

Ferguson used this litigation to assert legally and factually baseless claims, to delay and to increase expense to Teller. For all these reasons, this Court should determine that CR 11 and RCW 4.84.185 were violated. Teller should be awarded his fees and costs by this Court. Alternatively, this matter should be remanded to the trial court with instructions for that same determination.[4]

Ordinarily, review of a denial of sanctions under the rule and the statute is for abuse of discretion. ***Housing Auth. of City of Everett v. Kirby,*** 154 Wn. App. 842, 849-50, 226 P.3d 222, *rvw. denied*, 169 Wn.2d 1022 (2010). However here, the trial court did not have the benefit of Ferguson's admissions to her lawyer on the eve of, and after litigation started. CR 59(a)(4) requires this new evidence to be considered in this Court, RAP 12.2, or in a remand. This new evidence clearly establishes that this case was factually and legally baseless.

A. Ferguson's Reply Does Not Comport With The Rules.

It is difficult to determine which part of Ferguson's Reply Brief responds to Teller's cross-appeal.

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[4] Teller sought sanctions under RAP 18.7 and 18.9 for conduct of the appeal and for a frivolous appeal in this Court. Those were raised in in the Response and are separate from Teller's cross-appeal.

There are citations in Ferguson's Reply Brief to her Declaration in Opposition to Sanctions found at CP 365-410. But no portion of the brief is dedicated to the cross appeal.[5]

Ferguson continues to assert matters which were not raised in the trial court. She argues, for example, that an earlier fee agreement Ferguson had with her clients somehow governs this dispute. Reply at 17-18.[6] To the extent any of these arguments have a bearing on Teller's cross-appeal they must be stricken. See, RAP 2.5(a), ***Doe v. Puget Sound Blood Ctr.***, 117 Wn.2d 772, 780, 819 P.2d 370 (1991) (appellate courts will not consider a theory as a ground for reversal unless presented to the trial court); ***Brundridge v. Fluor Fed. Servs., Inc.***, 164 Wn.2d 432, 441,

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[5] Ferguson continues to refer to portions of the record which were not before the trial court in either of the dispositive motions made by Teller. *See, e.g.*, pp. 14-25 of the Reply (extensive citations to Ferguson's Declaration in Support of Reconsideration of the trial court's summary judgment in favor of Teller, CP 309-364). For this reason, the portions of the brief which do not conform to RAP 9.12 must be stricken. Ferguson filed five iterations of an opening brief in this Court. The first one largely omitted citations to the record. Teller moved to strike in a motion on February 28, 2013. Ultimately, further motions were made by Teller because of the multitude of opening briefs. The Commissioner and the Chief Judge, in rulings on March 14, 2013, deferred to the panel on the merits disposition of these motions.

[6] Ferguson did not designate in Clerk's Papers either her Response to Teller's Motion for Summary Judgment or her Motion for Reconsideration of the summary judgment. Teller's Response Brief at p. 18.

191 P.3d 879 (2008) (absent a change in the law, failure to raise an issue at trial waives the right to raise the issue on appeal).

B. Both CR 11 and RCW 4.84.185 Are Meant To Deter Baseless Litigation.

The functional difference between the rule and the statute is that the latter applies if the entire action is baseless while the rule may apply to discrete claims and counterclaims. ***North Coast Elec. Co. v. Selig,*** 136 Wn. App. 636, 650, 151 P.3d 211 (2007). The rule allows for sanctions against either an attorney or a party while the statute mentions only the "nonprevailing party." ***Stiles v. Kearney***, 168 Wn. App. 250, 260, 277 P.3d 9, *rvw. denied*, 175 Wn.2d 1016 (2012). The rule deals with baseless filings and those made for improper purposes. *Id.* at 261. A baseless filing is one which is not well grounded in fact or law. *Id.*

C. Ferguson's Claims Were Factually Baseless.

Teller's Response referred to facts before the trial court in his successful motion for summary judgment. RAP 9.12. They reveal:

- Ferguson solicited Teller in September, 2010 to appear in the Underlying Matter.
- Other lawyers were also considered by Ferguson.

- By October, 2010 there were multiple orders from the trial court in the Underlying Matter compelling discovery and awarding sanctions against Ferguson.
- Ferguson and Teller negotiated and agreed to a joint representation agreement. This was presented by Ferguson to the clients in the Underlying Matter. CP 1120. The contingent fee agreement with the clients set out a 50/50 division of any potential contingent fee. She wrote to her clients, "[a]t this point, Steve has agreed to take joint responsibility for your case. His firm and mine will represent you going forward." CP 1120. Teller confirmed with Ferguson "that I will carry the bulk of the costs advanced during the litigation." CP 1110.
- Ferguson was "all for settling this case, early, if that is possible." CP 1073, 1146.
- Ferguson did not make any objection to the fee agreement with Teller and the clients or Teller's agreement with her to advance costs.

- Teller performed. He engaged in discovery, advanced costs, obtained and reviewed 60,000 pages of discovery from the Underlying Defendant. CP 1072.
- In the meantime, Ferguson was suspended from practice and withdrew.
- Teller litigated and obtained a continuance of the trial date. This would have allowed Ferguson to re-enter the case following her 90 day suspension if the case had not settled.
- The clients chose to settle. The settlement agreement required confidentiality regarding the settlement. They were not to disclose the settlement to Ferguson unless she re-appeared in the case. CP 122, 358. Ferguson did not attempt to re-enter the case.
- Before settlement, Ferguson wrote she was "confused whether the **contract between us** governs the fees . . . ." In the same message, she referred to "the **agreement between you and I** . . . ." CP 1137 (Emphases added).

- While settlement was pending, she wrote, "I am not sure I need to repudiate **the 50/50 joint representation agreement** . . .."
- On April 25, 2012, Ferguson wrote Teller "I agreed that you would receive 50% of the fees BECAUSE you agreed to take the case forward with me and to advance costs. **That was the reason for our contract.**" CP 1142. (Emphasis supplied, capitalization in original text).
- Ferguson admitted to her lawyer before filing suit that she had an agreement with Teller to divide fees evenly. CP 950.

What Ferguson wrote her lawyer about her relationship with Teller conclusively established that she knew had a contract with Teller. In an email to her lawyer on May 2, 2011 - 25 days before the Complaint was filed, CP 80 - Ferguson wrote to Brian Waid:

> By the time of the second mediation [in the Underlying Matter], of February 2nd, both Teller and I are representing clients under new fee agreement with Teller and I jointly responsible for representation. He and I also have a 50/50 agreement between ourselves regarding the 40% attorney fees contingency share under the contract with the clients.
>
> * * *

> Thus, there are two alternatives: 1) After Teller and I enter into the 50/50 contract he improves the offer by [redaction]. If we split that 50/50, Teller gets the total of [redaction] . . . .
>
> Alternatively, I take a harder line and argue that Teller does not even get 50% of the [redaction] . . . .Essentially, I assert that I am entitled to a portion of the [redaction] based on quantum meruit basis, which entitles me to far more than 1/2."
>
> A copy of that email is found at Appendix 'A'.[7]

Ferguson knew she had contracts with Teller and with Teller and her clients. She inappropriately believed she had the option of choosing to be paid under the terms of these contracts or through *quantum meruit*. See *infra* at p.14. As a lawyer, Ferguson should know better. Further, her action was not taken in a good faith effort to extend existing law.

1. The Waid Declaration Is Properly Before This Court.

Ferguson contends that her e-mails with Mr. Waid are privileged. Reply at 13. Without citation to authority, she claims that the exception found at RPC 1.6(b)(5) to a lawyer's duty to maintain confidentiality of

[7] The redactions and other markings which appear on the hard copy of the email are found in the copy provided by Mr. Waid in his Declaration of July 23, 2012, CP 950.

client information does not apply.[8] This exception allows a lawyer to reveal client information "to respond to allegations in any proceeding concerning the lawyer's representation of the client."

a. The Waid Declaration Was Filed in July, 2012.

Ferguson did not object to the Waid Declaration or any attachment to it after filing in the trial court on July 23, 2012. Teller designated the declaration and attachments as Clerk's Papers on August 7, 2012. Ferguson did not object to any portion of the declaration or its attachments until her Reply filed on June 3, 2013.

Ferguson waived any objection. For example, ER 502 deals with waiver of the attorney-client privilege and work product. If the disclosure of such information is inadvertent, waiver occurs if the holder failed promptly to take reasonable steps to rectify the error. Rectification includes following the commands of CR 26(b)(6) with regard to information produced in discovery - timely notice of the claim of privilege. *And, see*, ***Sitterson v. Evergreen School Dist. No. 114***, 147 Wn. App. 576, 583-89, 196 P.3d 735 (2008) (pre-ER 502) (time to remedy the

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[8] "Contentions unsupported by argument or citation of authority will not be considered on appeal." ***Camer v. Seattle Post-Intelligencer***, 45 Wn. App. 29, 36, 723 P.2d 1195 (1986), *cert. denied*, 482 U.S. 916 (1987).

error taken into consideration, citing to federal decisions where one year delay, as here, constituted waiver).

b. Ferguson's Claims Against Waid Allow Waiver.

Without dealing with the issues in the linked appeal regarding Ferguson's disputes with Waid, it is evident even from her Reply that RPC 1.6(b)(5) applies.

- Ms. Ferguson claims that Mr. Waid had an "undisclosed conflict of interest" arising days after this lawsuit was filed. Reply at 4.

- Together with another attorney, Robert Gould, Mr. Waid, Mr. Teller and yet another attorney, Reba Weiss, schemed to "intentionally interfere[] with Ferguson's attorney-client relationship." *Id.* at 4.

- Waid made an "erroneous concession under CR 2A." *Id.* at 11.

- Waid "abandoned his client." *Id.* at 12.

- Waid retaliated against his client. *Id.* at 12.

Mr. Waid was responding in his Declaration to these and other allegations in the trial court concerning his representation.

D. Ferguson Denies in This Litigation The Contracts She Earlier Admitted Were Formed.

In the trial court and in this Court Ferguson ignores her admissions of the formation of her contract with Teller and with Teller and her clients.

Instead, her declaration in opposition to the summary judgment motion[9] claims that her e-mail references to "contract" or "agreement" were an agreement to "negotiate and finalize a written co-counsel agreement in the future . . . ." CP 161, ¶ 64. This is an astounding assertion. The texts of Ferguson's admissions make that assertion implausible if not mendacious. That Ferguson intended to and did form contracts with Teller is reinforced by her admissions to Mr. Waid. One can't quite understand how Ferguson, a lawyer, can deny the formation and enforceability of these contracts given the requirements of RPC 3.3 and 8.4(c)-(d). Any lawyer taking up her cause is faced with the same problem.[10] A party cannot create an issue of fact by denying what it

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[9] Ferguson chose to omit from Clerk's Papers her Response to Teller's Motion For Summary Judgment, CP 1024-1047.

[10] RPC 3.3(a) states that a lawyer "shall not knowingly (1) make a false statement of fact . . . to a tribunal . . . .(4) offer evidence that the lawyer knows to be false." RPC 8.4 provides that it is unprofessional conduct for a lawyer to "(c) engage in conduct involving dishonesty . . . .or misrepresentation; (d) engage in conduct that is prejudicial to the administration of justice."

earlier admitted. *See, generally,* ***In Re Kelly & Moesslang***, 170 Wn. App. 722, 737-38, 287 P.3d 12 (2012).

In addition to her admissions, there is the conduct of the parties which support the fact of the contracts: Ferguson sent her clients a contingent fee contract which stated that the two law firms "agreed to a 50/50 split of fees . . . ." CP 1111-1112; Teller then appeared in the Underlying Matter "as co-counsel on behalf of the Plaintiffs, CP 1072, 1130; Teller paid costs, CP 1072.

E. Ferguson's Lawsuit Is Based On The Contract With Teller And Their Clients.

Paragraph 3.24 of Ferguson's Complaint alleged that Ferguson served her attorneys' fee lien on Teller on April 27, 2011. CP 87; CP 1062 (lien). The lien claims "90% of the 40% contingent attorneys' fees . . . ." and that the clients "retained the Ferguson Firm, PLLC and your firm, the law firm of Teller & Associates, PLLC, on a contingent fee basis, providing for a 40% contingent fee out of any recovery to the plaintiffs . . . ." This is a further admission by Ferguson that she formed a contract with Teller and her clients.

Ferguson plainly relied upon the existence of the contingent fee agreement between her firm, Teller and their clients. It provided for an

even division of fees and that each firm assumed joint responsibility for the case. CP 1111. This lawsuit is therefore premised upon the existence of a contract Ferguson attempts to disown.

All through this litigation Ferguson relied on the contract with Teller and her clients when it suited her and denied its existence when it did not suit her. While Ferguson has claimed in her briefing in this court that her earlier, non-litigation fee agreement with her former clients governed her fee, that theory was never presented to the trial court. It is therefore not before this court. RAP 2.5, ***State v. Scott***, 110 Wn.2d 682, 685, 757 P.2d 492 (1988).

F. Ferguson's Complaint Was Legally Baseless.

Ferguson does not contend that her position is a good faith attempt to change the law. Her legal position is wholly at odds with Washington law.

1. *Quantum meruit* was never an available option.

Ferguson's e-mails, *supra*, suggest she (and only she) could elect between either *quantum meruit* and the express contract for determination of her fee. She can't do that. *Quantum meruit* is available only to recover the value of services under an implied-in-fact contract. ***Young v. Young,*** 164 Wn.2d 477, 485, 191 P.3d 1258 (2008). Ferguson continues to claim

that the "legal validity of [her] claims depends on the remedy she seeks or does not seek." Reply at 6, n.14.

Only if the express contract did not exist would a claim for a *quantum meruit* division of fees be appropriate.[11]

2. RPC 1.5(e) Requires That Clients Consent To A Division Of Fees.

RPC 1.5(e)(1)(ii) requires client consent to "the share [of fees] each lawyer will receive . . . ." Without their consent, the division of fees proposed by Ferguson in her lien and in this litigation would be impermissible.[12] From the outset, then, Ferguson has been doing an end-run not only from her own admissions but from her professional obligations to, and her contract with, her former clients.

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[11] In Ferguson's view of the world, *quantum meruit* would allow her to obtain far more than half of the fee obtained in the underlying matter. However, that could result in far less than half. Multiple discovery orders were entered against her without opposition. She conducted little discovery. Other counsel had to be recruited in order to advance costs because she would not do so and because she was facing suspension.

[12] Ferguson was re-admitted to practice law by the time the fee was ultimately paid into the court registry. CP 1023. There is no evidence she sought to become involved in the Underlying Matter following her suspension nor is there any evidence that either Teller or her former clients would oppose her association. Ferguson opposed distribution to Teller of his half of the fee in this and the trial court.

This requirement for client consent to a division of fees is a client right. The clients in the Underlying Matter did not give up that right. There is no evidence they would agree to any division of the fee other than what is found in the 50/50 agreement their lawyers tendered to them.

G. Ferguson's Litigation Strategy Is Delay And Expense To Teller.

CR 11 prohibits litigation for "an improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, ..."

In Ferguson's e-mails with her former lawyer she revealed her intentions about this litigation.

On July 14, 2011, she wrote, "I'll take my chances at summary judgment and pay you my money instead of Teller. Either way, I lose. But I would rather pay you than Teller." CP 1009. She continued. "All money I pay to Teller is available for my legal fees, as far as I am concerned. But I would rather pay you than Teller." *Id.*

On August 9, 2011 Ferguson explains to her lawyer that if Teller prevails and obtains the contractual half of the fee, he will spend $100,000 in fees.

H. The Waid Declaration Was Not Before The Trial Court When Teller Sought Sanctions.

Judge Spearman did not have the benefit of Ferguson's admissions to her lawyer when she ruled against Teller on his motion for sanctions under CR 11 and RCW 4.84.185. These admissions constitute newly discovered evidence allowing the court to reconsider its earlier ruling. CR 59(a)(4).

By the time summary judgment was granted, reconsideration was denied, and some supersedeas issues were fought, Teller incurred $80,947.41 in fees and costs. CP 1167. This was within $2,600 of the fees incurred by Ferguson.[13] Teller, of course, made two dispositive motions.

Alternatively, this Court should determine that sanctions are appropriately awarded to Teller based on the record created in the trial court and as a matter of law. RAP 12.2. This will avoid "a useless act or a waste of judicial resources." ***In re Dependency of A.S.***, 101 Wn. App. 60, 72, 6 P.3d 11, *rvw. denied*, 141 Wn.2d 1030 (2000).

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[13] This was through February 9, 2012. Fees and costs incurred by Ferguson through summary judgment and to February 14, 2012 were $78,350.85. Waid Declaration at ¶¶ 21-23, CP 868-869; CP 946 (itemized statement).

III. CONCLUSION

What prompted this long and expensive litigation was the decision by Ferguson's former clients to settle their lawsuit. Footnote 14 of her Reply laments that Washington jurisprudence "bar[s] Ferguson from holding Teller liable for the loss of fees she would have received, ..." if the clients had gone forward. (Emphasis supplied.) This assumes, of course, that the clients would have done better by going forward or that they should not have settled. The decision to settle belonged to the clients. It was their decision, not Teller's and not Ferguson's. This is not actionable.

Ferguson and the clients in the Underlying Matter made a contract with Teller. The contract must be enforced. Ferguson cannot un-do what she, Teller and their clients agreed to do.

The funds on deposit in the King County Superior Court registry should be disbursed to Teller, with interest. Teller must be awarded his reasonable fees and costs incurred in the trial court and in this Court.[14]

STOKES LAWRENCE, PS

By: _____

Kelby D. Fletcher (WSBA #5623)
STOKES LAWRENCE, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101
(206) 626-6000

Attorneys for Respondent and Cross-Appellant

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[14] Teller made a number of motions in this Court dealing with Ferguson's failure timely to perfect the appeal, the burden she placed on Teller in filing five versions of an opening brief and her failure to produce a brief which comports with the Rules of Appellate Procedure. Many of those motions were referred by the Commissioner and the Chief Judge to the three judge panel.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 24th day of June, 2013, I caused a true and correct copy of the foregoing document, "Reply Brief of Respondent/Cross-Appellant" to be delivered by e-mail to the following counsel of record:

Counsel for Sandra Ferguson:

John Muenster
Muenster & Koenig
14940 Sunrise Drive N.E.
Bainbridge Island, WA 98110

Dated this 24th day of June, 2013, at Seattle, Washington.

Kelby D. Fletcher (WSBA #5623)
Stokes Lawrence, P.S.
1420 Fifth Avenue, Suite 3000
Seattle, WA 98101
(206) 626-6000
Fax: (206) 464-1496
kdf@stokeslaw.com

Appendix A

Brian J. Waid

From: "Sandra Ferguson" <Sandra@slfergusonlaw.com>
To: <bjwaid@waidlawoffice.com>
Cc: "Jessica Creager" <jcreager@waidlawoffice.com>
Sent: Monday, May 02, 2011 11:33 PM
Subject: Two Theories of Fee Recovery!!

I would like to share with you a theory on which to base my share of the fees:

CONTINGENCY FEE ENTITLEMENT TO AMOUNT OFFERED AT FIRST MEDIATION: At the first mediation on October 28th, I was the only attorney representing the four plaintiffs. I had a contingency fee agreement with them. The scope of the agreement was that I would attempt to negotiate a settlement for them. If I succeeded, they would be required to pay me a contingency fee of 1/3. At the first mediation on October 28th, [redacted] offered $[redacted] This means I am entitled to contingency fee of 1/3 on the $[redacted] and Teller is not entitled to any portion of the amount of the final settlement up to $[redacted]. I get [redacted] which I do not have to share at all with Teller.

QUANTUM MERUIT BASIS FOR MY SHARE OF ADDITIONAL AMOUNT OBTAINED FOR CLIENTS WHILE STEVE IS ON BOARD AND AFER MY SUSPENSION. By the time of the second mediation, on February 2nd, both Teller and I are representing clients under new fee agreement with Teller and I jointly responsible for representation. He and I also have a 50/50 agreement between ourselves regarding the 40% attorney fees contingency share under the contract with the clients. By the end of the day on February 2nd, the second mediation had also failed to resolve the case. [redacted] offers Lucy [redacted] continued employment and $[redacted]. I cannot recall what offer was made to the other two clients (the fourth one has, by now, dropped out of the case). In any case, the litigation did not settle at the conclusion of the February 2nd mediation. (Stew Cogan's' notes would reflect what offer was on the table at the end of the day for each of the three clients who remained.)

After my suspension, however, continued negotiations with Teller at the helm and me absent, apparently brought about total offer of $[redacted]. If [redacted] already offered in first mediation is subtracted and I am paid 1/3, then what remains is $[redacted]. This amount of $[redacted] is the only amount at issue with regard to the fee division. Thus, there are two alternatives: (1) After Teller and I enter into the 50/50 contract, he improves the offer by [redacted]. If we split that 50/50, Teller gets total of [redacted]. I also get [redacted] AND I get the $[redacted]. This gives me entitlement to a grand total of [redacted].

Alternatively, I take a harder line and argue that Teller does not even get 50% of the [redacted] because he did not fulfill either obligation under the 50/50 contract, i.e., he did not share the work load with me and he did not advance costs, other than a few bucks to have the clients go see an economist. Now that I think about it, I am pretty sure he did this so that he could say he "advanced costs". Otherwise, it did not make a whole lot of sense to me. Essentially, I assert that I am entitled to a portion of the $[redacted] based on quantum meruit basis, which entitles me to far more than ½. But the offer made at the first mediation, I am entitled to 1/3 based on Contingency Fee Agreement.

Your thoughts?

slf