68329-2

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NO. 68329-2-I

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

THE FERGUSON FIRM, PLLC,

Plaintiff-Appellant,

v.

TELLER & ASSOCIATES, PLLC,

Defendant-Respondent.

ON APPEAL FROM THE KING COUNTY SUPERIOR COURT

The Honorable Mariane Spearman, Judge

PLAINTIFF-APPELLANT'S RELY BRIEF

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I. *Introduction.*

Teller's opposition brief begins with the following fatally flawed premise from which all of his other arguments flow: Teller and Ferguson formed an "express contract" (i.e., the unsigned "Contingency Fee Representation Agreement" he drafted)1; therefore, (a) a "*quantum meruit* claim is not available to [Ferguson]"; (b) she is precluded from asserting that she "substantially performed" under her August 2009 Flat Fee/Contingency Fee Agreements with her clients; and (c) she cannot claim that "Teller is unjustly enriched" under the alleged 50-50 agreement.2

First, Teller's premise of an "express contract" is conclusory and circular. It *assumes* the ultimate question which the Court is called upon to review—i.e., the existence and/or terms of a co-counsel contract; Secondly, Teller's arguments are so devoid of merit that he attempts—as he did throughout the trial court proceedings—to inject unfair bias against Ferguson into the

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1 Resp.'s Br., p. 28 (Subpart C) See also, p. 4, Restatement of Issue 4: "With an express contract, can Ferguson claim quantum meruit or that Teller was unjustly enriched?" Teller's restatement of the issue begs the question: Is there an enforceable ("express") contract which requires—or permits—a non-proportional fee division between the two law firms?

2 Respondent's Br., pp. 24-27.

appeal process, rather than have the Court decide the issues on the merits;3 Third, Teller posits that the Court must ignore evidence that *was* called to the attention of the trial court below, while at the same time, urging the Court to consider evidence he admits was *not* before the trial court.4 Fourth, Teller asks for sanctions5, and wants the Court to consider as "new evidence" Ferguson's privileged communications with her former attorney, Brian Waid—disclosed by Waid in violation of RPC 1.6.6.

II. *Rebuttal of Teller's Non-Substantive Arguments.*

For the reasons discussed below, Teller's non-

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3 Respondent's Brief, at p.5. The facts which relate to Ferguson's disciplinary matter took place 8 years ago (in April 2005) and are not related to the Underlying Matter. Ferguson observed a 90-day suspension after the Supreme Court decided to uphold the discipline imposed. Ferguson is entitled to have this fee-dispute decided on the merits. Furthermore, since Teller has opened the door: the Court should note that the Office of Disciplinary Counsel initiated disciplinary proceedings against Teller. Teller admitted engaging in misconduct and his attorney persuaded the ODC to suspend the proceedings and place him in a diversion program. Teller's disciplinary matter—unlike Ferguson's—may still be pending. CP 375-80.

4 See Resp's Br., at pp. 20-22 and pp. 24-26.

5 This is at least Teller's fourth request for sanctions against Ferguson during this fee-dispute litigation. CP 487-494.

6 Waid has filed an appeal of the trial court's order setting aside his lien for attorneys' fees and disbursing Ferguson's funds from the Court Registry. Waid's appeal has been "linked", but not consolidated with this appeal. In retaliation against his former client for opposing his invalid lien, Waid disclosed a large volume of confidential and privileged communications. Ferguson did not waive the attorney-client privilege, either expressly or impliedly, by opposing Waid's lien as invalid under RCW 60.40. The privileged communications Waid disclosed were not permitted by RPC 1.6(b)(5).

substantive arguments must fail.

A. *The A pplicable Standard of Review is De Novo.*

Teller claims that the Court may not consider all of the record below on a *de novo* standard.7 Contrary to Teller's assertion, the legal standard of review of a summary judgment dismissal is *de novo*. CR 56(c). See *Wilson v. Tony Maroni's*, 134 Wash.2d 692, 952 P.2d 590, 594 (1998).

Teller's reliance on *Wilcox v. Lexington Eye Institute* is misplaced.8 The issue in *Wilcox* was whether the appellant's *new legal theories*—argued for the first time on a motion for reconsideration—had to be reviewed under the abuse of discretion standard. In contrast, Teller seeks to have portions of the *factual record* either excluded from consideration on appeal, or subject to an abuse of discretion standard.9 In any event, the *Wilcox* Court seems to have applied *both* standards of review; thus, the *de novo* standard of review *was* applied in *Wilcox*.10 Furthermore, the *Wilcox* Court notes that the appellant offered no

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7 Resp.'s Br., at 21.
8 130 Wn. App. 234, 122 P.3d 729 (2005).
9 Resp.'s Br., at 21.

10 See *Wilcox*, at 731. ("The question is whether Wilcox met her burden of proving that the forum selection clause should not be enforced. We conclude Wilcox failed to meet her burden under either a de novo or an abuse of discretion standard.")

explanation for the failure to present all of its legal arguments at summary judgment. Ferguson, however, offers the following explanation for providing the trial court with additional evidence after summary judgment: Brian Waid, Ferguson's attorney at the time of summary judgment, had an undisclosed conflict of interest involving his former client, Reba Weiss. CP 394-410. It also appears that *Teller* enlisted Reba Weiss's assistance and together, they intentionally interfered with Ferguson's attorney-client relationship. Id. Together, they even enlisted the assistance of Waid's former employer and Weiss' (then-current) attorney—Bob Gould—in order to carry out their scheme. CP 399.

Waid's potential conflict of interest arose just one or two days after Ferguson's lawsuit was filed. CP 396-97. Thus, Waid's conflict existed when he conceded and dismissed his clients' "breach of contract" claim on October 28, 2011; it existed when he deposed Weiss and she testified falsely and adversely to Ferguson; and it existed when Waid abandoned Ferguson while Teller's motion for sanctions was pending against her (seeking $120,000.00).11 CP 394-410. Waid never disclosed his conflict

11 The grounds for Teller's sanctions motion was Waid's dismissal of Ferguson's claims on October 28, 2011. Yet, Teller's motion for sanctions explicitly did not ask for

to Ferguson; nor did he disclose it to the trial court when he sought to withdraw. CP 394-410. Waid abandoned Ferguson just two days *after* the announcement was made that Weiss had joined Teller's law firm. CP 409-410.

Suffice it to say, Teller had a hand in the highly unusual events and the improper conduct that went on during the trial court proceedings. For the foregoing reasons, the Court should consider, under a *de novo* standard of review, all of the evidence supplied to the trial court below.

B. *Abuse of Discretion Standard Requires Reversal.*

Even under an abuse of discretion standard, the dismissal of Ferguson's claims must be reversed. '"A court necessarily abuses its discretion when basing its decision on an erroneous view of the law or applying an incorrect legal analysis."' *Dana v. Piper* ____ Wn.App. ____, 42290-5-II (February 20, 2013) (quoting *Dix v. ICT Group, Inc.,* 160 Wn.2d 826, 833, 161 P.3d 1016 (2007)).

On Teller's CR 12(c) motion, Waid dismissed his own client's claim of "breach of contract" based on a legal analysis that

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sanctions against Waid; just Ferguson.

was incorrect.12 In truth, *Mazon v. Krafchick13* does not bar Ferguson's "breach of contract" claim; nor does it bar her "negligent misrepresentation" claim—also dismissed by the trial court based on Waid's legal error.

In *Mazon*, the plaintiff was an attorney who sued his co-counsel for *prospective* (speculative) fees which were *never earned* due to the undisputed negligence of his co-counsel. Krafchick's negligence caused the loss of their client's case because he allowed the statute of limitations to expire, the client sued both law firms and recovered damages, and *neither* attorney received the fees expected from the co-counsel contract. In contrast, Ferguson does not seek to recover *prospective* fees which she alleges resulted from Teller's mishandling of the underlying matter. *Mazon* teaches that only Teller's clients—not his co-counsel—may assert a claim for the economic losses which resulted from his breach of the standard of care.14

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12 App.'s Br., pp. 25-27.

13 158 Wash.2d 440, 144 P.3d 1168 (2006).

14 Teller implies this case is analogous to *Mazon* because (in Teller's words) the clients' "decision to settle seems most troublesome to Ferguson". (Resp.'s Br.,at 29). This is nonsense. The legal validity of Ferguson's claims depends on the remedy she seeks or does not seek. It does not hinge on Ferguson's personal views about what may or may not have caused her former clients to settle, contrary to their plans, just 4 days prior to her

In contrast to *Mazon*, Ferguson's lawsuit against Teller seeks the equitable division of the *earned* fees which are sitting in the court registry.15 Although the trial court's error in dismissing claims on the pleadings was due to Ferguson's own attorney, Brian Waid, this does not alter the fact that the order was based on legal error and therefore, must be reversed—even under an abuse of discretion standard.

On Teller's summary judgment motion, the Court also abused its discretion when it resolved a number of material disputes of fact in Teller's favor. Ferguson—as the non-moving party—presented a different version of these material facts than Teller, and her version had substantial support in the record.16

The trial court made credibility determinations in Teller's favor as to the following facts alleged by Ferguson: (1) on November 10, 2010, she expressly rejected Teller's draft retainer agreement; Teller agreed to revise the agreement to include

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expected return to the case. Indeed, Ferguson does find the *circumstances* surrounding her former clients' decision to settle very troubling, including the confidentiality provision in the settlement agreement which appears to serve Teller's self-interest at the expense of his clients. Alas, *Mazon* does bar Ferguson from holding Teller liable for the loss of fees she would have received, but for his negligence and self-dealing. CP 337.

15 App.'s Br., pp. 25-27.

16 App.'s Br., pp. 28-41.

details about his obligation to advance 100% of the costs, but he never did so; (2) Teller's *only* consideration for the 50-50 fee-arrangement was to finance the case, including the costs of at least three specific experts; (3) she did not hire Teller in order to handle the case if she got suspended, but had arranged for another attorney to do that and Teller knew it; (4) the two attorneys always intended to negotiate a separate co-counsel agreement but never completed that process before Ferguson's suspension; (5) even after three of Ferguson's clients signed Teller's draft retainer agreement, the two attorneys did not believe there was an enforceable *co-counsel* contract, as evidenced by Teller's repeated threats to withdraw whenever Ferguson asked him to do any substantive work.17

For all of the foregoing reasons, the court abused its discretion when it dismissed Ferguson's case on summary judgment.

C. *RAP 9.12 Does Not Support Teller's Arguments.*

Teller asserts that the Court may not consider evidence, on review, that was not before the trial court at summary judgment.

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17 App. Br., pp. 34-41.

The rules of appellate procedure do not support Teller's view. On the contrary, the rules "will be liberally interpreted to promote justice and facilitate the decision of cases on the merits." RAP 1.2(a). Furthermore, "the appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice..." 18 RAP 1.2(c).

RAP 9.12 provide as follows:

"[T]he appellate court will consider only evidence and issues *called to the attention of the trial court*....Documents or ...evidence called to the attention of the trial court but not designated in the [summary judgment] order *shall* be made a part of the record by supplemental order of the trial court or by stipulation of counsel." [Emphasis added]

RAP 9.11 provides:

"[T]he appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if [*inter alia*]...the additional evidence would probably change the decision being reviewed [or if] it is equitable to excuse a party's failure to present the evidence to the trial court [or if] it would be inequitable to decide the case solely on the evidence already taken in the trial court."

The courts are to interpret the rules in a manner which allows appeals to be decided on the merits. Teller's technical arguments to the contrary must fail. Thus, the Court should

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18 This rule is subject only "to the restrictions in rule 18.8(b) and (c)."

consider all of the evidence that was "called to the attention of the trial court" below, regardless of the timing.

D. *Ferguson Is Not Bound by Waid's Concession.*

On October 28, 2011, Brian Waid "conceded" that his client's "breach of contract" claim was barred by *Mazon v. Krafchick*. The trial court applied Waid's logic to Ferguson's "negligent misrepresentation" claim and dismissed both causes of action on the pleadings.19 (RP 10/28/2011). This was legal error.20

Teller's opening brief on his CR 12 motion did not even raise the *Mazon* case as an argument for dismissal. CP 498. Ferguson never consented to Waid's concession.21 And Waid had an undisclosed conflict of interest at the time he acted against his client's interests and without her consent.22 CP 394-409. Nevertheless, Teller asserts that Ferguson should be bound by her former attorney's actions.23

It is noteworthy that Teller does not dispute that *Mazon* only bars claims against co-counsel for *prospective* fees, and

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19 App. Br. pp. 25-27.
20 Id.
21 App. Br., p. 26.
22 App.'s Br., pp. 25-27.
23 Resp.'s Br., pp. 22-24.

does not bar a lawsuit to recover *earned* fees. Thus, Teller does not dispute Ferguson's claims were dismissed based on legal error.

Teller further claims that Ferguson is bound by Waid's erroneous concession under CR 2A. He cites *Cook v. Vennigerholz 24* in support of this argument.25 *Cook* is inapposite. *Cook* was a land dispute case. The adverse parties stipulated, in open court, to the sale of the disputed land. The stipulation was presented with a statement of facts attached thereto, certifying that both parties concurred. It was entered into the record. A question presented on appeal was whether the trial court erred in ordering the sale of the land. Respondent argued that the land was properly sold. Appellant's counsel denied that the stipulation had been made below. The Court of Appeals concluded that "[t]he stipulation as there reported was arrived at and recorded in a manner which is binding upon the parties and the court."26

Teller's analogy to a CR 2A agreement is creative but it fails the common-sense test. There was no CR 2A agreement

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24 44 Wn.2d 612, 269 P.2d 824 (1954).
25 Resp.'s Br., at 23.
26 *Cook*, at 615.

entered below. Waid conceded his client's breach of contract claim without conferring with his client and without obtaining her informed consent.

Based on the foregoing, the trial court's dismissal of Ferguson's claims on Teller's CR 12 motion should be reversed.

E. *Ferguso n's Privileged Communications with Waid Are Not Admissible and Must be Stricken.*

One day after he abandoned his client—February 14, 2012—Waid filed a Notice of Lien for Attorneys' Fees which attached over $78,000.00 of Ferguson's funds then being unlawfully held in the Court Registry.27 The trial court set aside Waid's lien as invalid under RCW 60.40. Waid appealed and now seeks to insert himself as a party in Ferguson's appeal.28

In a brazen act of retaliation against his former client for successfully opposing his lien, Waid disclosed a large number of confidential and privileged communications in violation of RPC 1.6. Teller now seeks to use Waid's ethical misconduct to his

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27 The lien was filed one day after he abandoned Ferguson. But for more than one year, Waid failed to move for disbursement of Ferguson's funds. CP 394-409.

28 App.'s Br., pp. 23-24 (Waid's linked appeal is No. 69220-8-I.)

advantage, despite the fact that this "new evidence" was never before the trial court below.29

As discussed above, Ferguson's confidential and privileged communications with Waid were not before the trial court below. Waid did not disclose them until he filed his appeal. Waid's disclosures clearly violate RPC 1.6. Ferguson did not—expressly or impliedly—waive the privilege by opposing Waid's lien as invalid under RCW 60.40. Thus, Waid's disclosures are not justified by RPC 1.6(b)(5). It ineluctably follows that Teller cannot make wholesale use of Ferguson's attorney-client privileged communications that should not have been disclosed.

Ferguson's confidential and privileged communications with her former attorney, Brian Waid, should be stricken from the record. They are not properly considered by this Court as "evidence"; much less, a basis for imposing sanctions against *Ferguson*.30 Teller's argument that the Court should invade "the sanctity of the attorney-client privilege" 31 must be taken for what

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29 Resp.'s Br., at 35-38.

30 The communications Teller cites in his brief do not support his position, as he claims, and are taken out of context.

31 Resp.'s Br., p. 25.

it is—an act of desperation to avoid a just result in this fee-dispute.

III. *Rebuttal to Teller's "Statement of the Case."*

The following rebuttal addresses Teller's statements of facts. Some of the facts Teller recites in his opposition brief are indisputably false and not contested below; others are material facts disputed on the record below.

A. *False Statements of Fact.*

1) Teller states: **"Ferguson *unsuccessfully* tried to settle without Teller in mediation in late October 2010."** [Emphasis added.]32

This statement is false. The October mediation was a success. Ferguson procured a 6-figure settlement offer that her clients rejected. CP 157, CP 326. This fact is not disputed on the record below. Furthermore, the mediator informed Ferguson that the defendants were prepared to pay substantially more in order to settle the case immediately. CP 326-27. Ferguson's clients had this information and nevertheless, chose to end settlement discussions and proceed with litigation. Therefore, Ferguson resumed her pre-mediation discussions with Teller *and three*

32 Resp.'s Br., at 8.

other law firms to obtain the financing for the required experts. CP 327. Right after the mediation—but *before* Teller committed to advance 100% of the litigation costs—he contacted the mediator without Ferguson's (or her clients') knowledge or consent. Teller falsely represented to the mediator that he was the attorney of record, causing the mediator to breach confidentiality. CP 245-46, CP 326-27. As a result, Teller learned what transpired during the October 28, 2010 mediation, the parties' relative positions, and the mediator's impressions of what it might take to settle the case immediately. CP 245-56, CP 328-29. Only after obtaining this confidential information under false pretenses did Teller agree to finance 100% of the litigation costs so that he would be allowed to appear in the case. CP 244-45, CP 329-30.

After three of Ferguson's clients signed Teller's draft "Contingency Representation Agreement" Teller appeared but refused to work, and repeatedly told Ferguson that he might withdraw because he was "too busy".33 Meanwhile, he surreptitiously worked to bring about a second mediation. In

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33 App. Br., at 41.

order to achieve this goal, Teller communicated an unauthorized settlement proposal to defendants and deceived his own clients and co-counsel.34 CP 332-35. The second mediation was Teller's goal; not that of the clients.

On February 2, 2011, the second mediation took place. He had not performed any substantive work on the case. Id. No new mediation materials were submitted by either party. No new developments had occurred in the litigation since the prior mediation on October 28, 2010.35 CP 332-35.

At the February 2, 2011 mediation, Ferguson's work-product procured a 7-figure settlement offer for her clients.36 The clients rejected the offer and decided (for the second time) to proceed with litigation, which they now expected Teller to finance. CP 160, CP 333-35. The next day—February 3, 2011—Ferguson received notice of her suspension and promptly withdrew, as planned. CP 163, CP 335. The attorneys and clients always intended that Ferguson would return to the case at the conclusion of her suspension and Teller would begin to incur substantial costs to continue the litigation and achieve their financial goals.

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34 App.'s Br. at 18-19.
35 App.'s Br., at 20.
36 Id.

CP 129-172. CP 309-40.

Contrary to Teller's statement of fact, *two* mediations (not one) took place before Ferguson withdrew, and both mediations were *successful*. Thus, Ferguson "substantially" performed under her original flat fee/contingency-fee agreements with her clients. Ferguson is entitled to have the Court enforce those fee agreements.37

2) Teller states: **"Ferguson began representing four clients in the Underlying Matter on August 24, 2009, by way of fee agreements which expressly excluded litigation."38**

Teller's statement is false. Ferguson's "Flat Fee/Contingency Fee Agreement[s]" with her clients expressly *contemplate* the need for future litigation. As Teller admits, the original fee agreements explicitly provided that *"Ferguson [was] committed only to negotiate satisfactory settlements"*; thus, Ferguson was not obligated to represent her clients in litigation if settlement efforts were unsuccessful.39 But Ferguson and her clients later modified the original agreements to include litigation. The modification was supported by additional

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37 *See* App. Br., pp. 32, 43, 44. This is the law established by *Taylor v. Shigaki*, 84 Wash. App. 723, 930 P.2d 340 (1997).
38 Resp.'s Br., at 5.
39 Teller Br., at 5., See also, CP 108-114 (App. C to App's Br.)

consideration on both sides: Ferguson promised to file the lawsuit to preserve her clients' claims and to prosecute their case while continuing to present the case to prospective co-counsel willing to finance it. CP 154-55, CP 316-19. In return, the clients agreed to cooperate with Ferguson's efforts and to eventually retain co-counsel, on Ferguson's recommendation.40 CP 83, CP 154, CP 316-322. The modified retainer agreements remained in effect until Ferguson withdrew.41 Both Ferguson and her clients substantially performed.

3) Teller states: **"There is no admissible evidence that [Ferguson filed the lawsuit] with the advance consent of her clients."42**

The subsequent conduct of Ferguson's clients—part of the record below—is admissible evidence that Ferguson's clients consented to the filing of the lawsuit. They accepted the benefits of Ferguson's performance when the lawsuit was filed to preserve their claims. Thereafter, Ferguson actively litigated

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40 See App.'s Br., at 12.

41 If Teller's draft fee agreement is not enforceable, it does not supersede Ferguson's original contingency-fee agreements with her clients, entered in August 2009. Teller was allowed to associate on the case before the two attorneys had fully negotiated a co-counsel contract. As the record below establishes, this was consistent with the prior course of dealings between Ferguson and Teller in past associations, and this was also Ferguson's custom and habit in her past associations with other employment attorneys.

42 Resp.'s Br., at 5.

the case for one year, prepared mediation materials and represented the clients at two mediations, presented their case to prospective co-counsel to obtain financing (and the clients met with these attorneys), and procured substantial settlement offers which the clients rejected. Ferguson ultimately secured a financing commitment (i.e., Teller's). CP 154-171, CP 309-340. By continuing to accept the benefits of Ferguson's performance for over a year, Ferguson's clients impliedly consented to the filing of the lawsuit. Teller's assertion that none of this evidence is admissible is simply wrong.43

4) Teller states: **"Until settlement of the Underlying Matter, Ferguson never wrote or said that she believed it was necessary to have a separate express contract between the lawyers in addition to the fee division agreement between the lawyers and their clients."44**

This statement is flatly contradicted by the record. For example, on September 10, 2010, Ferguson writes in an e-mail to Teller:

"Currently, I have a fee agreement with each client that I will

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43 After Ferguson withdrew to observe her suspension, Teller forced his own clients to sign a written settlement agreement which prohibited any of them from *ever* discussing the settlement with their former attorney, "Sandra L. Ferguson". As a result, Ferguson and her attorney were unable to speak to the clients during the trial court proceedings. Teller and his attorney claimed Teller could advise the clients about their obligations under the settlement agreement if Waid deposed them. Waid never filed a motion to have the trial court resolve the issue and he never noted depositions of Ferguson's former clients.

44 Respondent's Br., p.12.

attempt to resolve or settle their claims against [the ABC Corp.] on a contingency-fee basis. If the mediation does not result in settlement, assuming you are still willing to proceed with me, we would enter into a new fee agreement ***with [the clients] and with each other***." CP 201 (See also, Appendix. B-4, B1, B2, H) [Emphasis Added]

A separate co-counsel agreement was executed in their past associations and was consistent with Ferguson's standard procedure with other employment lawyers. CP 220-31.

B. *Disputed Facts.*

1) Teller states: **"Other than Teller, none of the firms were willing to associate."**

This is a disputed material fact. The record below supports Ferguson's assertion that after the first mediation, Ferguson resumed discussions with Teller and *other* prospective co-counsel—who were in various stages of performing due diligence—when Teller stated his intention to finance the case. Ferguson forewent these other opportunities in reliance on Teller's statement of intent. CP 327.

2) **Teller states that Ferguson permitted him to associate "to save herself and her clients" because of Ferguson's potential suspension.45**

The record shows otherwise. It shows that Ferguson informed Teller that she had arranged for another attorney—

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45 Resp.'s Br., pp. 27, 34.

Shawn Newman—to take over for her if she were suspended.46 The possible suspension was not any part of the consideration by Teller for 50% of the fee.47

3) **Teller states that Ferguson approved the "Contingency Fee Representation Agreement" which her clients signed.48**

This is a disputed material fact. Ferguson claims that on November 10, 2010, she expressly *rejected* Teller's draft agreement and Teller agreed to revise it to contain more details about his obligation to advance 100% of the litigation costs.49 Thus, Ferguson disputes that she ever approved the 50-50 retainer agreement. There is substantial evidence in the record that supports Ferguson's claim.50

4) Teller states: **Ferguson is attempting to "profit from her professional misconduct" by asserting that Teller's 50-50 agreement entitles her to elect a *quantum meruit* fee**.51

This argument is the opposite of the true situation. It is just one more attempt, on Teller's part, to inject unfair bias into these proceedings. Ferguson is not alleged to have engaged in professional misconduct in the *underlying matter*. Thus, contrary

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46 App.'s Br., at 37.
47 App.'s Br., at 34-37.
48 Resp.'s Br., pp. 8-9.
49 App.'s Br., at 36.
50 App.'s Br., at 36.
51 Resp.'s Br., at 34.

to Teller's assertion, Ferguson will not "profit from her professional misconduct" if she is paid fairly for her work on the *underlying matter*. The fact of suspension from practice, arising out of an *unrelated* matter in 2005, should not and does not carry with it an additional punishment in the form of denying Ferguson compensation for services validly rendered prior to the suspension. The suspended lawyer is still entitled to whatever fees are provided for pursuant to the contract.52

As the record reveals, it is Teller who appears to have plotted, planned and schemed—all along— to take advantage of Ferguson's *unrelated* disciplinary matter (and suspension) with the expectation of receiving an unreasonable fee in violation of RPC 1.5(e). Teller laments "the work he put into the case" and the "risks he assumed."53 This is nonsense. Every attorney who takes contingency-fee cases assumes a risk. In this case, however, Teller assumed very minimal risk. Ferguson had already worked on the case for 4 years and procured two substantial settlement offers for her clients, and the case did not

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52 WSBA Advisory Opinion 1172 (1988) re: RPCs 1.5 and 5.4(a) (Subject: Division of fees with lawyer to be suspended).
53 Resp.'s Br., at 28.

proceed as contemplated, but settled shortly after Teller assumed a role as co-counsel. Ferguson is not arguing that Teller should be denied a reasonable fee for his work. She asserts, however, that his fee should be in proportion to the value of his contribution to the results achieved for the clients.54

Sound public policy—promoted by RPC 1.5(e)(2)—prohibits the non-proportional division of fees between attorneys from different firms, *except* where there (1) full disclosure to the clients in a written agreement; and (2) the assumption of "joint responsibility" by the attorneys. Teller's draft retainer agreement does not hold Teller to any of his promises to the clients because Teller *omitted* those verbal promises from the agreement he drafted.

5) **"Joint Responsibility" is more than legal liability.**

Teller argues that "joint responsibility" means legal liability; nothing more.55 Teller's proposition makes no sense when one considers the history and purpose of the rule. Prior to 1985, attorneys from different law firms were not permitted to

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54 The clients accepted a settlement offer which was $250,000.00 more than the offer they rejected on February 2, 2011. One-third of that amount equals $75,000.00. Teller is entitled to a quantum meruit share of the fee that resulted after Ferguson withdrew. This is fair payment for his time and effort administering the final settlement.
55 Resp.'s Br., p. 30.

share fees *except* in proportion to the work each attorney performed. RPC 1.5(e)(2) is slightly more permissive. Attorneys from different firms may share fees non-proportionally, but only if (*inter alia*) they assume "joint responsibility". In order to *effectively* protect the public, this requirement must be interpreted to mean *actual* responsibility *for the manner in which the clients' case is conducted*; not just legal liability after harm results to the client.

Relatively speaking, Teller had almost no investment in the case at the time of settlement. CP 309-40. Furthermore, if the litigation had continued—rather than settling—Teller *knew* he would have to incur substantial costs before he would receive a 50% fee. Teller now claims he is entitled to the same 50% fee even though he never assumed the contemplated financial risk and spent almost no time on the case, other than to negotiate a settlement which Ferguson's clients could have had without him.56 Finally, the settlement agreement prohibits his clients

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56 See Resp.'s Br., p. 28 (fte 21) (Teller implies the "risk" he assumed justifies his unreasonable fee. The risk he took was minimal considering that Ferguson had already extensively litigated the clients' claims and procured substantial settlement offers. Furthermore, Teller would not be denied a reasonable fee for his risk or his work, based on quantum meruit.

from *ever* discussing their decision to settle with their former attorney, "Sandra L. Ferguson"—without exposing themselves to financial liability. CP 358, (App. E).57 This fact utterly defeats Teller's argument that the "joint responsibility" requirement was satisfied. If the strict requirements of RPC 1.5 are consistently enforced, it serves to protect future clients from self-dealing conduct, and upholds the integrity of the entire legal profession.

IV. *Conclusion*

Ferguson substantially performed under the August 2009 contingency-fee agreements. Therefore, the Court should order disbursement of $215,000.00 to Ferguson (1/3 of the settlement offer procured for her clients on February 2, 2012) and remand to the trial court to adjudicate the *quantum meruit* apportionment of the $82,500.00 fee which resulted *after* Ferguson withdrew.

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57 See Resp.'s Br., at 32. Without any hint of irony, Teller notes that the clients "have not disputed the settlement or the fees" and that they "exercised their right to control the litigation and to settle". The record shows, however, that Teller wrested control of the litigation before he was even retained and before Ferguson withdrew. He did this by deceit. First, he caused the mediator to breach confidentiality by falsely presenting himself as their attorney. After he actually was retained, he surreptitiously communicated a settlement proposal to the defendants without the clients' or his co-counsel's authority. These unauthorized actions by Teller resulted in a second mediation. Teller took these actions knowing that the only reason the clients had retained him in the first place, was to continue with their litigation.

Dated this 3rd day of June, 2013

Respectfully submitted
MUENSTER AND KOENIG

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For The Ferguson Firm, PLLC

CERTIFICATE OF SERVICE

I certify that on the 3rd day of June, 2013, I caused a true and correct copy of this document to be served on counsel of record via email.

Dated this the 3rd day of June, 2013.

S/ John R. Muenster
Attorney at Law