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ELLIOTT GREENLEAF, P.C.,	:	COURT OF COMMON PLEAS
	:	MONTGOMERY COUNTY,
Plaintiff,	:	PENNSYLVANIA
	:	
v.	:	
	:	NO. 2018-08557
RICHARD C. DEMARCO,	:	
	:	
Defendant.	:	
	:	

DEFENDANT AND COUNTERCLAIM PLAINTIFF,
RICHARD DEMARCO'S POST-TRIAL MOTION PURSUANT TO PA. R.C.P. 227.1

Richard C. DeMarco ("DeMarco"), Defendant and Counterclaim Plaintiff, by and through his undersigned counsel, files this Post-Trial Motion regarding the Findings of Fact, Conclusions of Law, and Decision of September 2, 2022 (the "Decision"), as follows:

INTRODUCTION

This Court has, in its Decision, profoundly eliminated the ability of a client to object to a referral fee. The text of Rule 1.5(e) promises clients they will have the opportunity to know who will share in a legal fee in their personal injury case so that they may object if they so choose. The Decision, however, holds that a minor client hospitalized with catastrophic burn injuries at the time of the referral, not signed as a client nor spoken to, and ***never*** provided with any information about the identity of which lawyers will share in a referral fee, cannot upon

reaching the age of majority and before any contingency legal fees were earned object to a referral agreement made in the past.

In this matter, the client was horribly burned in a propane tank explosion on July 1, 2014, when she was 17. The client was not discharged from the hospital until late October 2014, and spent some of the intervening time in a medically-induced coma; yet this Court found that a referral email, dated August 6, 2014, was enforceable and complete as a contract. This Court so found even though no attorney spoke to the client until November 2014, and the client was never informed of the identity of which "lawyer" or "law firm" would share in the fee until late 2016. When the client was informed, she plainly and in writing objected to Elliott Greenleaf, P.C. ("EG") receiving the shared fee.

In the end, this Court's Decision denied the client her right to object to the referral arrangement reached without her knowledge and without full and fair disclosure of the material facts. The Court's Decision also prevents a client from objecting to the fee sharing arrangement well before the contingency fee and referral fee were even earned, which did not occur until the case settled in 2018. As the ability of the client to object is at the core of Rule 1.5(e), the Decision is plainly in error and cannot stand.

Additionally, this matter involved several disputed issues of material fact, in an action about money similar to a contract case. In such circumstances, the plain language of the Pennsylvania Constitution reads that the right to a jury trial "shall remain inviolate." Pa. Const. Art. I, § 6. This Court, however, ruled that no right to a jury trial existed, and erred by conducting a "bench" trial without a jury.

For these and other reasons set forth herein, DeMarco respectfully requests a new trial, judgment in his favor, or a modification of the decision, as more fully described below.

A. The Decision Errs in Failing to Properly Apply Pa. R.P.C. 1.5 to the Facts of this Case

1. The Decision errs by failing to apply Pennsylvania Rule of Professional Conduct 1.5 to the facts of the case at trial.

2. In paragraphs 10 through 14 of this Court's Legal Conclusions,[1] this Court deviated from the plain language of Rule 1.5 and the comment to that rule, in interpreting it and applying it to the facts of this case.

3. Furthermore, this Court ignored the testimony in this matter most relevant to the objection that Z.G. raised pursuant to Rule 1.5 to payment of a referral fee to EG..

4. Rule 1.5(e) of the Pennsylvania Rules of Professional Conduct provides, in relevant part, that:

> A lawyer **shall not** divide a fee for legal services with another lawyer who is not in the same firm **unless**:
>
> (1) the client is **advised of** and **does not object to** the **participation of all the lawyers involved**; and
>
> (2) the total fee of the lawyers is not illegal or clearly excessive for all legal services they rendered the client.

See Pa. R.P.C. 1.5(e) (emphasis added); *see also Oberneder v. Link Computer Corp.*, 696 A.2d 148, 151 (Pa. 1997) ("By definition, 'shall' is mandatory.") (quoting *Coretsky v. Bd. of Commissioners*, 555 A.2d 72, 74 (Pa. 1989)).

5. The comment to Rule 1.5(e) states, "Paragraph (e) permits the lawyers to divide a fee if the total fee is not illegal or excessive and the client is advised and does not object." *Id.* at cmt.

6. The Decision relies on part of an ethics opinion, from 1997, and uses that language to water down the express language of Rule 1.5(e) in a manner both contrary to the ethics opinion and the Rule.

[1] Decision at 25-26.

7. In paragraphs 10 through 12 of its Legal Conclusions,[2] the Decision relies upon Pa. Bar Ass'n Formal Ethics Opinion 96-176, and quotes from it for the propositions that:

a. "Unlike many other Rules, which require a client's express consent after full disclosure of a particular aspect of representation, this Rule only requires that, after being apprised that more than one lawyer will participate in the fee, the client 'does not object.'" Pa. Bar Ass'n Formal Ethics Op. 96-176, 1997 WL 189081, at *2.

b. "Because there is no requirement that the client be told anything more than the fact that a fee will be split, the Committee concludes that Rule 1.5(e)(1) does not convey to the client the authority to manipulate or veto the specific terms of the referral or split fee relationship." *Id.* at *3.

c. "[T]he lawyer is not required under Rule 1.5 to secure an additional consent to the payment of the referral fee upon the conclusion of the matter and distribution of the proceeds, assuming the referral fee is entirely drawn from the previously agreed upon contingent fee." *Id.* at *4.

8. Unfortunately, the Decision uses these quotes to selectively erode both the Rules of Professional Conduct and the ethics opinion it quotes from.

9. Ethics Opinion 96-176, in portions not quoted by the Decision, explicitly reinforces the language of Rule 1.5(e) as to what must be communicated to the client: "Rule 1.5(e)(1) only permits such split fees if 'the client is advised of and does not object to the participation' of ***all such lawyers*** in the fee." *Id.* at *2 (emphasis added).

10. Ethics Opinion 96-176 also emphasizes the timing of the communications owed to a

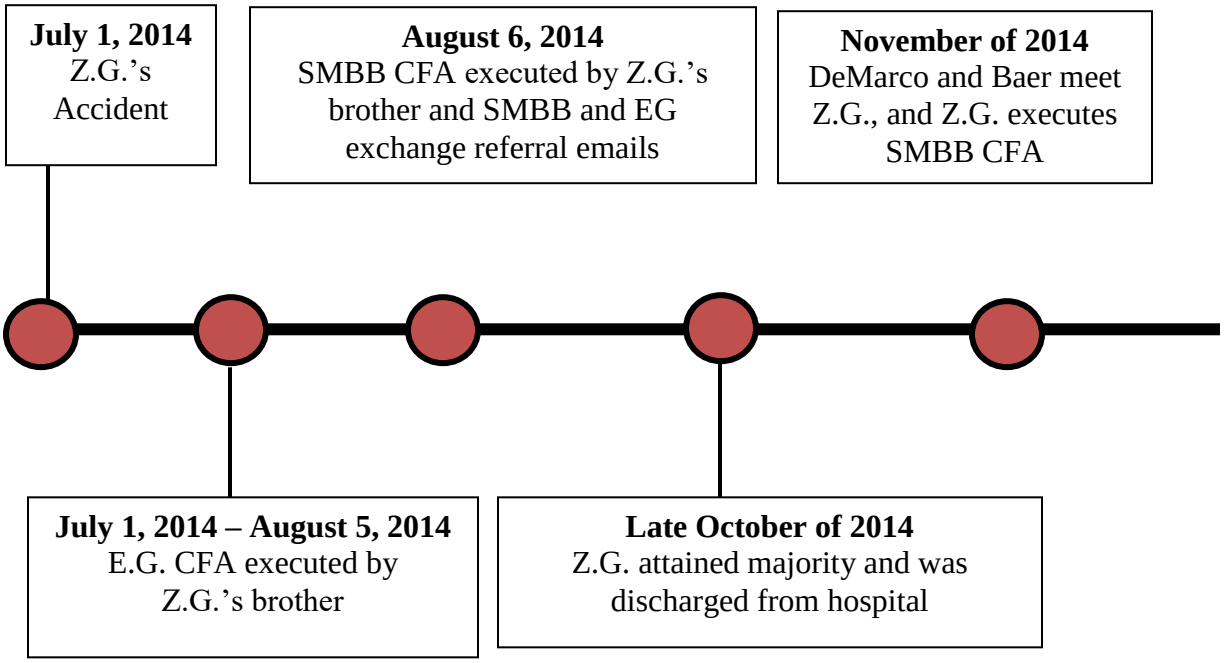
[2] Decision at 26.

client, contrary to the portions used in the Decision: "[t]he lawyer's general obligations to communicate with the client ***require adequate disclosure at the outset*** of the existence of the referral fee arrangement." *Id.* at *4 (emphasis added).

11. Additionally, the full sentence from page 4 of the Ethics Opinion quoted by the Decision reads, "While ***client consent (or lack of objection) to the referral arrangement should be secured when the referral fee agreement is made***, the lawyer is not required under Rule 1.5 to secure an additional consent to the payment of the referral fee upon the conclusion of the matter and distribution of the proceeds, assuming the referral fee is entirely drawn from the previously agreed upon contingent fee." *Id.* at *2 (emphasis added).

12. The foregoing provision from the Ethics Opinion makes clear that where, as here, the referral fee was not entirely drawn from the previously agreed upon contingent fee, which the referral fee purportedly attached to, SMBB needed to secure additional consent from Z.G. to divide a fee with EG.

13. At the time of the email exchange between SMBB and EG dated August 6, 2014, the only contingency fee agreements that existed were those between EG and Z.G.'s brother and SMBB and Z.G.'s brother; as depicted below:



14. As such, the referral arrangement between EG and SMBB anticipated that the referral fee would, if at all, be entirely drawn from the contingency fee agreement between SMBB and Z.G.'s brother.

15. When Z.G. executed a contingency fee agreement with SMBB in November of 2014 after attaining majority, however, Z.G. disaffirmed all prior contingency fee agreements. *Haines v. Fitzgerald*, 165 A. 52, 55 (Pa. Super 1933) (explaining that a minor, though "affirming" contract during minority, may disaffirm it after coming of age").

16. Since the prior contingency fee agreements were disaffirmed, the Ethics Opinion instructs that SMBB must have subsequently obtained Z.G.'s consent to distribute the referral fee that it purportedly promised to EG.

17. Yet, Z.G. was never consulted concerning the referral email or arrangement; it was made after her "guardian-in-fact" brother executed fee agreements with EG and SMBB, while she was still a minor and hospitalized with catastrophic burn injuries.

18. Z.G. was never provided with a copy of the August 6, 2014, referral email, and when she did sign an SMBB fee agreement, it was ***never*** explained to her who the referring attorney was or who would actually participate in the shared fee.

19. The Decision characterizes Ben Baer, Esq.'s testimony as follows: "Baer explained that the referring attorney or firm would receive a referral fee."[3]

20. In fact, in the portions of the transcript cited in the Decision, Baer only testified that the form of the agreement would be used if the referral came from an attorney or from a law firm (Tr. Vol. 1 at 104:3-6), and that he explained SMBB "can share attorney fees with referral sources" (Tr. Vol. 1 at 101:5-6) as well as that "there's not more money that's going to be taken away from the clients" (Tr. Vol. 1 at 101:17-18).

21. The record is bare of any explanation by Ben Baer to Z.G. as to the identity of what attorney or attorneys would share in the referral fee; Baer never explained to Z.G. or to Eddie Santos that the word "attorney" in the SMB fee agreement meant anything other than a singular attorney.[4]

22. The SMBB fee agreement makes no reference to Elliott Greenleaf.[5]

23. Baer testified that a law firm is distinct and different from an "attorney."[6]

24. Baer testified that his explanation of the referral language in the SMB fee agreement was as follows:

> So I explained and what would have been explained both to Eddie and to Z.G. is what is contained in the contingency fee agreement, and specifically that if the -- in this case, if there is a referral, a portion of the attorney fee would be paid as a referral fee. I do not

[3] Decision at 6, ¶ 30.
[4] Tr. Vol. 1 at 112:6-11.
[5] *Id.* at 111:20-22.
[6] *Id.* at 112:12-14.

> have any recollection of explaining that there is a difference between a law firm having a referral fee or an attorney having a referral fee.[7]

25. DeMarco's presence at the signing of the SMBB fee agreement implied that he was the "referring attorney" in the SMBB fee agreement, and EG was not disclosed as sharing in the referral fee at the time.

26. The Decision's interpretation of Pa. R.P.C. 1.5(e) erases what is due to the client; the client is at the very least required to be informed of what attorneys will participate in the shared fee, and the client's right to object to a shared fee can only come into being when the client is so informed.

27. Authority interpreting Rule 1.5(e) supports this position.

28. A later ethics opinion by the Philadelphia Bar Association emphasizes the timing of the communication regarding what lawyers will share a fee, which should occur before the shared fee arrangement is made: "First, the client must be advised of the **proposed** division of fee and not object to it (Rule 1.5(e)(1)), and the total fee of the lawyers [must not be] illegal or clearly excessive for the legal services rendered to the client (Rule 1.5 (e)(2))." Phila. Bar. Ass'n, Ethics Op. 99-2 (1999) (emphasis added).

29. Z.G. objected through her Dec. 1, 2016 letter, which was received by SMB prior to settlement of the case.[8]

30. Similarly, because the record does not reflect an explanation to the client—Z.G.—by Baer of what counsel were involved in the fee sharing agreement, insufficient evidence supports the Decision on the issue of compliance with Rule 1.5(e).

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[7] *Id.* at 113:23-114:6.
[8] P-4; Tr. of July 11, 2022, at 118:10-16.

31. Furthermore, contrary to the Decision in para. 15 of the Legal Conclusions, only DeMarco satisfies the requirements of Rule 1.5(e) and can receive the referral fee: (a) the client, Z.G., approves of his receipt of the fee divided with SMBB; (b) SMB recognizes DeMarco as a potential recipient of the fee, which SMBB is not claiming for itself; and (c) the client, Z.G., objects to any other attorney sharing in the fee.

32. In addition, only DeMarco satisfies the requirements of the SMBB agreement with Z.G. regarding sharing the contingency fee.

33. The SMBB fee agreement with Z.G. states, "If you have been referred to our firm by another ***attorney***, our Firm may divide our fee for legal services with the ***referring attorney***. You, as the client, are only responsible to pay one fee to both our Firm and the attorney who referred you to our Firm." (P-3 (emphasis added).)

34. The agreement is specific; it calls for a referral fee paid to an attorney, not a law firm.

35. The distinction between law firms and lawyers in this instance is significant, as the Pennsylvania Rules of Professional Conduct themselves articulate that clients are represented by lawyers: "A lawyer, as a member of the legal profession, is a representative of clients[.]" Pa. R.P.C Preamble [1].

36. A "law firm" on the other hand, is merely a "lawyer or lawyers in a law partnership," not an entity that can represent clients on its own. Pa. R.P.C. 1.0(c).

37. EG is, by definition, not itself an attorney.

38. Finally, and equally as important, DeMarco is the only party in this matter who possesses an enforceable agreement with Z.G. regarding sharing the contingency fee with SMBB.

39. Z.G. executed the December 1, 2016 letter in favor of DeMarco, designating him as her counsel and directing that he – as her lawyer – receive compensation, which she understood to be the referral fee. (D-22; P-4.)

40. The Decision, in awarding the shared fee from Z.G.'s personal injury case to EG, does so in violation of Pa. R.P.C. 1.5(e), and therefore the Decision cannot stand. *Wishnefsky v. Riley and Fanelli, P.C.*, 799 A.2d 827, 829-30 (Pa. Super. 2002), *app. denied*, 813 A.2d 844 (Pa. 2002) (holding that unethical fee sharing agreements are violative of public policy, and thus, unenforceable); *Flowers v. Shein & Brookman, P.A.*, 9 Phila. Cty. Rptr. 145, 152 (Pa. Com. Pl. 1983); *see also American Dredging Co. v. City of Philadelphia*, 389 A.2d 568, 571 (Pa. 1978) ("In Pennsylvania, the Canons of the Code of Professional Responsibility have the force of statutory rules of conduct for attorneys.") (citations omitted); *Seiko v. Home Insurance Company*, No. 95-7653, 1996 WL 397483, at *4 n.5 (E.D. Pa. 1996), *aff'd* 139 F.3d 146 (3d Cir. 1998) ("[D]espite the wording in the Scope section of the Rules of Professional Conduct, Pennsylvania courts do recognize that the Rules of Professional Conduct impose duties on lawyers practicing within this state."); *See SCF Consulting, LLC v. Barrack, Rodos & Bacine,* 175 A.3d 273, 279-80 (Pa. 2017) (Baer, J., concurring and dissenting) ("[H]olding that, as a matter of public policy, a lawyer may not be rewarded for violating a rule of conduct … because, to hold otherwise, would encourage non-compliance with the rule and would create incentives for malfeasance.").

B. The Court Erred in Refusing to Permit a Trial by Jury

41. This Court erred in limiting this matter to a non-jury trial in Montgomery County.

42. "Trial by jury shall be as heretofore, and the right thereof shall remain inviolate." Pa. Const. Art. I, § 6.

43. The relevant statute, rule, and caselaw are consistent on the existence of a right to a jury trial in this matter.

44. The Declaratory Judgment Act ("DJA") plainly sets forth the right to a jury trial in claims filed pursuant to it: "When a proceeding under this subchapter involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending." 42 Pa. Stat. and Cons. Stat. Ann. § 7539.

45. Rule 1601(b) of the Pennsylvania Rules of Civil Procedure provides for the right to a jury where declaratory judgments involve "disputed issues of fact."

46. The Note to Rule 1601 explains that where a declaratory judgment action would otherwise be an action in assumpsit for money damages, a right to a jury trial exists where there are disputed issues of fact.

47. In this case, the parties tried declaratory judgment claims regarding the impairment or enforcement of contractual rights. The Pennsylvania Constitution itself safeguards the right to a trial by jury in these circumstances: "Trial by jury shall be as heretofore, and the right thereof remain inviolate." Pa. Const. art. I, § 6. *See also Petrecca v. Allstate Ins. Co.*, 797 A.2d 322, 325 (Pa. Super. Ct. 2002) ("Article I, Section Six of the Pennsylvania Constitution guarantees the right to a jury trial in all matters in which a right to a jury trial was recognized at the time the Constitution was written or later granted by statute."); *see also Bruckshaw*, 58 A.3d at 109 ("[T]he constitutional right to a jury trial, as set forth in Pa. Const. Art. 1, § 6, does not differentiate between civil cases and criminal cases.").

48. Any action for money in assumpsit, i.e., a claim under a contract, allows a right to a jury. *Petrecca*, 797 A.2d at 325.

49. It is indisputable that in this case, the parties dispute the right to the shared fee in the underlying personal injury case: that it was an action for money.

50. This case involved disputed issues of material fact as to whether Elliott Greenleaf had an enforceable contractual right to a referral fee, specifically:

a. Whether Z.G. consented to and was properly advised of the proposed division of SMBB's legal fee with Elliott Greenleaf in light of her letter of December 1, 2016, and her affidavit;

b. Whether Z.G. objected to Elliott Greenleaf receiving any part of the fee from her personal injury case;

c. Whether Z.G. terminated Elliott Greenleaf;

d. Whether Z.G. consented to and was properly advised of the proposed division of SMBB's legal fee with DeMarco; and

e. Whether DeMarco disclosed to Elliott Greenleaf and Fred Santarelli that the Z.G. case would go with him after he left Elliott Greenleaf.

51. Jury trials have been granted under the statute and rule in declaratory judgment actions where disputed issues of material fact exist. *See Khodara Env't II v. Chest Twp.*, No. 3:2002-96, 2007 WL 4375929, at *20 (W.D. Pa. Nov. 30, 2007) (proceeding to jury trial under Pa. statute where fact issue existed as to condition of road at relevant time); *Eichelberger v. Azemar*, 2017 WL 4162346, at *5-7 (Pa. Super. Sept. 20, 2017) (finding right to jury trial where remedy at law could have been pled); *Wheeling-Pittsburgh Steel Corp. v. Alexander & Alexander, Inc.*, 36 Pa. D. & C.3d 605, 605–06 (Pa. Com. Pl. 1984), *aff'd sub nom. Z. v. Z.*, 496 A.2d 861 (Pa. Super. Ct. 1985) (resolving factual issue in insurance defense dispute using jury in declaratory judgment case).

52. In *Eichelberger v. Azemar*, one party argued that the predominant nature of the case was equitable due to its being couched in declaratory judgment claims, and no right to a jury trial existed (despite the separate existence of claims at law). 2017 WL 4162346 at *3-5.

53. The Superior Court adopted the reasoning of the trial court, which examined in detail the DJA and Pa. R.C.P. 1601 and found that because the appellant could have elected to file for damages, and disputed issues of fact existed, a right to a jury existed. *Id.* at *5-7.

54. This matter is no different, as it involved disputed issues of material fact concerning declaratory judgment actions that at their core involved claims to money.

55. Denying a jury trial in this matter abrogates the rights of DeMarco under Article I, Section 6 of the Pennsylvania Constitution, as well as the Declaratory Judgment Act and Rule 1601.

C. The Decision Erred in Permitting DeMarco's Pleadings of Legal Theories to Conclusively Determine Facts

56. In Footnote 13 of the Decision,[9] this Court found that statements by DeMarco in his Answer and Counterclaim to EG's Second Amended Complaint admit certain facts as judicial admissions.

57. The alleged judicial admissions are set forth in paragraphs 156-159 of the Decision:

a. "On August 6, 2014, Dean Phillips of Elliott Greenleaf confirmed the referral of Z.G.'s case to [SMBB] through an email." DeMarco Answer ¶ 26.

b. "Admitted that Elliott Greenleaf, in exchange for a referral fee, assumed obligations with respect to client contact and support that it did not perform." DeMarco Answer ¶ 23.

[9] Decision at 21.

c. "DeMarco negotiated the referral and explained it to the client." DeMarco Answer ¶ 24.

d. "The legal effect of Z.G.'s letter was to withdraw her approval of a payment to Elliott Greenleaf of the referral fee on her matter, directing that it go to DeMarco." DeMarco Counterclaim ¶ 42.

58. "For an averment to qualify as a judicial admission**,** it must be a clear and unequivocal admission of fact. Judicial admissions are limited in scope to factual matters otherwise requiring evidentiary proof, and are exclusive of legal theories and conclusions of law." *See e.g.*, *John B. Conomos, Inc. v. Sun Co., Inc. (R & M)*, 831 A.2d 696, 713 (Pa. Super. 2003) (citation omitted), *app.* denied, 577 Pa. 697 (2004) (explaining that "admissions to be binding must be unequivocal, ... and anyway they may be disregarded in the interests of justice") (quoting *The Doyle*, 105 F.2d 113, 117 (3d Cir.1939)); *Cogley v. Duncan*, 32 A.3d 1288, 1292 (Pa. Super. 2011) (citing *John B. Conomos, Inc.*, 831 A.2d at 713); *DeArmitt v. New York Life Ins. Co.*, 73 A.3d 578, 590-91 (Pa. Super. 2013) (citing *John B. Conomos, Inc.*, 831 A.2d at 713).

59. To rise to the level of a judicial admission, the fact must "have been unequivocally admitted and not be merely one interpretation of the statement that is purported to be a judicial admission." *See e.g.*, *John B. Conomos, Inc.*, 831 A.2d at 713 (citation omitted) (emphasis added); *Cogley*, 32 A.3d at 1292 (citing *John B. Conomos, Inc.*, 831 A.2d at 713); *DeArmitt*, 73 A.3d at 590-91 (citing *John B. Conomos, Inc.*, 831 A.2d at 713); *see also Jones v. Constantino*, 631 A.2d 1289, 1293–94 (Pa. Super. 1993) (explaining that the subject statements were ambiguous and insufficient to constitute judicial admissions because "the evidence could be reasonably construed to admit of more than one meaning").

60. Where a statement is indeterminate, inconsistent, or ambiguous, an admission is not conclusively binding. *See e.g., John B. Conomos, Inc.*, 831 A.2d at 713 (citation omitted) (emphasis added); *Cogley*, 32 A.3d at 1292 (citing *John B. Conomos, Inc.*, 831 A.2d at 713); *DeArmitt*, 73 A.3d at 590-91 (citing *John B. Conomos, Inc.*, 831 A.2d at 713).

61. As an initial matter, with respect to the referral email, the Decision finds that the August 6, 2014 "email exchange…confirms the existence of a valid and enforceable fee contract between EG and SMBB." (Decision at 24, Legal Conclusions ¶ 5).

62. In support of this conclusion, the Court relied on DeMarco's supposed admission in Paragraph 23 of DeMarco's Answer, contending that "DeMarco factually admitted that EG was a party to the referral fee agreement." *Id.* at 21, n.13; *see e.g., Consolidated Rail Corp. v. Delaware River Port Authority*, 880 A.2d 628, 631-32 (Pa. Super. 2005) (explaining that "[c]ontract interpretation is a question of law").

63. In doing so, this Court erred because judicial admissions are "limited in scope to factual matters otherwise requiring evidentiary proof, and are exclusive of legal theories and conclusions of law." *See e.g., John B. Conomos, Inc.*, 831 A.2d at 713 (citation omitted).

64. Read in proper context, Paragraph 23 of DeMarco's Answer addresses legal conclusions not factual matters and therefore cannot be properly characterized as a judicial admission.

65. The supposed judicial admissions in DeMarco's Answer are all rendered ambiguous by the facts as found at trial.

66. The supposed admissions are also open to multiple interpretations because the facts adduced at trial make it apparent that at the time of the August 6, 2014 email exchange, the client—Z.G.—was not even engaging with any attorneys.

67. Paragraphs 23, 24, and 26 of DeMarco's answer are susceptible to multiple interpretations and are unclear. *See Jones*, 631 A.2d at 1293–94 (explaining that the subject statements were ambiguous and insufficient to constitute judicial admissions because "the evidence could be reasonably construed to admit of more than one meaning").

68. In asking this Court to find that DeMarco judicially admitted that he explained the referral fee agreement, including the participants dividing the referral fee, EG has requested this court to make an impermissible inference that goes far beyond the language it relies on. *See Coleman v. Wyeth Pharma., Inc.*, 6 A.3d 502, 524 (Pa. Super. 2010) (finding that the trial court erred where it drew impermissible inferences to treat responses as judicial admissions).[10]

69. Notwithstanding the fact that Paragraph No. Twenty-Four (24) only states that DeMarco explained the "referral" (not the referral fee agreement), to the extent that DeMarco explained the referral fee agreement to anyone – Demarco did so between August 1, 2014 and August 6, 2014.[11] *See John B. Conomos, Inc.*, 831 A.2d at 713 ("When there is uncertainty surrounding a conceded fact, it is the role of the judge or jury as fact finder to determine which facts have been adequately proved and which must be rejected.") (citations omitted).

70. Indeed, the uncontroverted evidence adduced through trial established that at that time, Z.G. remained hospitalized in a medically induced coma, and thus, DeMarco could not have possibly explained the referral fee agreement to Z.G.

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[10] In doing so, EG also asked this Court to find, as a matter of law, that EG complied with Rule 1.5(e) as a result of DeMarco's supposed admission in Paragraph 24 of DeMarco's Answer. Judicial admissions, however, are "limited in scope to factual matters otherwise requiring evidentiary proof, and are exclusive of legal theories and conclusions of law." *See e.g., John B. Conomos, Inc.*, 831 A.2d at 713 (citation omitted). Like Paragraph 23, Paragraph 24 of DeMarco's Answer addresses legal conclusions that cannot be the basis of a judicial admission.

[11] D-6 at EG 311 (time entry of meeting with referral counsel, SMB).

71. Further, the record also reflects that Eddie Santos, not Z.G., executed the fee agreement with EG in July of 2014, and neither DeMarco, EG, nor SMB met with Z.G. until sometime in November of 2014.

72. As such, in referring to the "client" in Paragraph Nos. Twenty-Three (23) and Twenty-Four (24), it is not clear whether DeMarco was identifying Z.G.'s brother, Eddie, or Z.G. *But cf.* Pa. R.P.C. 1.14(a) (explaining that "[w]hen a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority … the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.").

73. Similarly, the referral addressed in Paragraph 26 of DeMarco's Answer is ambiguous because although it refers to "Z.G.'s case," Z.G. was unavailable consent, or to retain SMBB, and the referral is open to being only that of Eddie Santos, who signed an EG fee agreement as "guardian-in-fact."

74. Without any evidence to show that Z.G. consented to or otherwise approved of the referral, Paragraph 26 can be interpreted to mean that EG either referred Eddie Santos or Z.G. to SMBB.

75. The supposed admission in paragraph 42 of DeMarco's counterclaim is a conclusion of law not subject to use as an admission of fact.

76. Paragraph No. Forty-Two (42) of DeMarco's Counterclaim provides that: "[t]he **legal effect** of Z.G.'s letter was to withdraw her approval of a payment to Elliot Greenleaf of the referral fee on her matter, directing that it go to DeMarco." *Compare* DeMarco Counterclaim ¶ 42 (emphasis added) *with Seven Springs Farm, Inc. v. Croker*, 801 A.2d 1212, 1215 n. 1 (Pa. 2002) ("The

meaning of an unambiguous written instrument presents a question of law for resolution by the court.") (citations omitted).

77. In comparing Rule 1.5(e)(1) to Paragraph No. Forty-Two (42), it is clear that DeMarco asserted a conclusion of law because Rule 1.5(e)(1) prohibits fee splitting among lawyers from different firms where the client objects. Pa. R.P.C. 1.5(e)(1). In doing so, DeMarco laid the foundation for his legal theory that EG could not enforce the referral fee agreement because enforcement would result in a violation of the rules of professional conduct, rendering the agreement unenforceable as contrary to public policy. *See* DeMarco New Matter at ¶ 99.

78. Any doubts as to the factual nature of DeMarco's statements in Paragraph No. Forty-Two (42) are quickly resolved through an examination of EG's response thereto, which provides, in relevant part, that "[t]he averments of this paragraph are further denied as conclusions of law as to which no response is required." *See* Pl.'s Answer to Def.'s Counterclaim at ¶ 42.

79. As the above four paragraphs from DeMarco's pleadings are not judicial admissions, the Decision errs in relying on them as such.

D. The Decision Erred in Permitting DeMarco's Requests for Admissions to Conclusively Determine Facts

80. The alleged admissions derived from the Requests for Admissions (the "Requests") that EG propounded upon DeMarco are set forth in Paragraph 160 of the Decision.

81. In finding that DeMarco admitted that he never entered into a referral fee agreement with SMBB in connection with the Z.G. personal injury matter, the Court impermissibly accepted a conclusion of law as fact. *See* Decision at 22 (citing DeMarco Request for Admission ¶ 11).

82. Requests for admissions must relate to factual matters since conclusions of law are outside the permissible scope of requests under Rule 4014. Pa. R. Civ. P. 4014(a); *See Dwight v. Girard Med. Ctr.*, 623 A.2d 913, 916 (Pa. Commw. 1993).

83. As the Commonwealth Court has explained:

> [I]f the subject matter of the admissions is broad and far-reaching, a court should permit withdrawal [of the admissions] in the absence of bad faith or substantial prejudice. Moreover, requests for admissions must call for matters of fact rather than legal opinions and conclusions. Since conclusions of law are not within the permissible scope of requests for admissions under Rule 4014, those statements in the requests for admissions which constitute conclusions of law are not properly before the court.

Id.; *see also Brindley v. Woodland Village Restaurant, Inc*., 652 A.2d 865, 871 (Pa. Super. 1995) (quoting and reaffirming *Dwight v. Girard Med. Ctr.*).

84. Whether an implied contract exists is a question of law. *See e.g., Konyk v. Pennsylvania State Police*, 183 A.3d 981, 987 n.6 (Pa. 2018) ("[W]hether an implied contract can be derived from a set of underlying facts represents a question of law.") (citing *Reitmyer v. Coxe Bros. & Co., Inc.*, 107 A. 739, 741 (Pa. 1919)).

85. Accordingly, in failing to disregard the conclusion of law sought in Request for Admission No. 11, this Court committed a reversible error.

86. The interest of justice also require this Court to disregard Request for Admission No. 7. *See John B. Conomos, Inc*., 831 A.2d at 713 (explaining that "admissions to be binding must be unequivocal, ... and anyway they may be disregarded in the interests of justice") (quoting *The Doyle*, 105 F.2d 113, 117 (3d Cir.1939)).

87. The uncontroverted evidence at trial demonstrates that DeMarco told Santarelli that Z.G. wanted DeMarco to continue to represent her when he left EG. *See* Tr. of July 12, 2022, at 66:25-67:4; *see also* P-25.

88. Accordingly, the interest of justice favor disregarding DeMarco's inadvertent admission that he did not tell anyone at EG that Z.G. wished to discharge EG.

E. The Decision Erred in Finding that the Termination of EG by Z.G. Had No Effect

89. The Decision erred in its treatment of Z.G.'s letter, which explained the intent of Z.G., as the client in the personal injury case, after receiving sufficient information to object to the referral fee under Rule 1.5(e).

90. This Decision failed to take into account the effect of the December 1, 2016 letter of Z.G. on EG's rights and SMB's duties under the Rules of Professional Conduct.

91. Paragraphs 18 through 23 of the Decision's Legal Conclusions[12] do not reject that the December 1, 2016 letter of Z.G. terminated EG, but fail to take into account the consequence of that termination under Pennsylvania law.

92. First, Z.G. had the right to object to the referral arrangement when informed of all the attorneys who would participate. Pa. R.P.C. 1.5(e); Pa. Bar Ass'n Formal Ethics Op. 96-176, 1997 WL 189081, at *2.

93. The Decision thus errs in paragraph 22 of the Legal Conclusions when it finds, contrary to the settled public policy of the Commonwealth of Pennsylvania set forth by the Supreme Court thereof, that Z.G. "has no legally cognizable interest in this dispute," as she possessed the right to object after learning what was entitled to her under the Rule.

94. Second, the Decision fails to properly consider Pennsylvania law on the issues of discharged counsel and when a contingent fee is earned.

95. An attorney has no property rights to the cause of action or contractual right to an unrealized contingent fee or to continued representation of a client by virtue of a fee agreement.

[12] Decision at 27-28.

Mager v. Bultena, 797 A.2d 948, 958 (Pa. Super. 2002), *app. denied*, 814 A.2d 678 (Pa. 2002) ("No Pennsylvania appellate court has ever awarded a proportionate share of a contingency fee to a firm discharged by the client well prior to the occurrence of the contingency, for the simple reason that a client may discharge an attorney at any time, for any reason. Once the contractual relationship has been severed, any recovery must necessarily be based on the work performed pursuant to the contract up to that point. Where the contingency has not occurred, the fee has not been earned.") (citations omitted).

96. Indeed, "[a]n attorney ... does not acquire a vested interest in a client's action. To rule otherwise would make fiction of the oft-repeated rule that a client always has a right to discharge his attorney, for any reason or for no reason." *Id.* (citations omitted).

97. Here, the Decision enforces a referral arrangement made prior to the point at which Z.G. had achieved her age of majority or was even out of the hospital after her catastrophic burns, long before she had any opportunity to object. (Decision ¶ 20.)

98. Pursuant to *Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman, P.C.* (hereinafter "*Meyer Darragh I*"), in the absence of an agreement to the contrary, discharged counsel's rights are limited to quantum meruit. 137 A.3d 1247, 1249 (Pa. 2016).

99. Importantly, the Supreme Court of Pennsylvania recognized that the discharged firm had no right to any fee prior to the settlement of the underlying contingent fee case: "Aside from failing to cite any governing authority applying such law to attorney fee disputes, Meyer Darragh fails to acknowledge that ***it held no possessory right to contingent fees*** relating to the Eazor estate litigation ***at the time the clients discharged the firm from the case, as no settlement had yet been realized***." *Id.* (emphasis added).

100. The Decision, by ruling that EG acquired a possessory, legal interest in a referral fee prior to the fee being earned, contravenes both *Mager* and *Meyer, Darragh* in allowing discharged counsel to receive a fee after their participation in fee sharing has been objected to by the client.[13]

101. SMBB had possession of the December 1, 2016 letter well before settlement. (P-4; Tr. of July 11, 2022, at 118:10-16.)

102. Because SMBB had possession of the December 1, 2016 letter well in advance of the settlement of Z.G.'s case, EG was limited to quantum meruit recovery after being discharged on the unearned fee.

F. EG's Unfulfilled Obligation in the August 6, 2014, Email Was Material

103. The Decision erred in paragraph 25 of the Legal Conclusions[14] finding that the reciprocal obligation of EG to continue to interact with the Z.G. and her family was not a material term of the referral arrangement.

104. The August 6, 2014 Phillips and Bear emails require EG to "continue to interact with the Gabriel family."[15]

105. EG never interacted with Z.G., Eddie Santos, or their family at any point after December 2016; prior to DeMarco leaving EG, he was the sole person at EG who interacted with Z.G., Eddie Santos, or their family.[16]

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[13] The Decision's citations to out-of-Pennsylvania cases do not shed light on the specific facts of this case. In *Sirote & Permutt, P.C. v. Caldwell*, No. 1200092, 2021 WL 4344363, at *7 (Ala. Sept. 24, 2021), the referring attorney is identified on the initial representation letter and none of the facts about the referral are similar to the facts here. In *Burrell v. Sperry Rand Corp.*, 534 F. Supp. 680, 681 (D. Mass. 1982), there was no issue over whether the client knew who would share the fee prior to the objection to the referral or the discharge of the attorney. *Idalski v. Crouse Cartage Co.*, 229 F. Supp. 2d 730, 740 (E.D. Mich. 2002), involved a referral arrangement found voidable because it was procured via fraudulent inducement.

[14] Decision at 28.

[15] *Id.*

106. EG obligated itself to perform under the Aug. 6, 2014 email by promising to continue to interact with Z.G.'s family; by failing to do so after December 2016, it breached the referral agreement at a point in time before any fee had been earned. *Oak Ridge Const. Co. v. Tolley*, 504 A.2d 1343, 1348 (Pa. Super. 1985) ("When performance of a duty under a contract was due, any nonperformance is a breach.").

107. Pennsylvania determines whether a breach is material by evaluating many factors: the extent to which the injured party will be deprived of a benefit expected; extent to which the injured party can be adequately compensated for the lost benefit; extent of forfeiture of the non-breaching party; the likelihood of the party failing to perform curing the failure; the extent to which the party failing to perform comports with good faith and fair dealing. *Widmer Eng'g, Inc. v. Dufalla*, 837 A.2d 459, 468 (Pa. Super. Ct. 2003).

108. Here, several factors weigh in favor of the obligation in the August 6, 2014, to continue to work with the Gabriel family being material.

109. First and foremost, the Gabriel family—certainly Eddie Santos—was a client of EG, to whom a duty and obligation of communication is owed under the Rules of Professional Conduct. Pa. R.P.C. 1.4.

110. Additionally, when made, the only relationship with the Gabriel family was through DeMarco; the loss of the relationship with the Gabriel family would have been devastating to SMBB's case.

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[16] Elliott Dep. Tr. of Dec. 4, 2019 (Def. Ex. 16B) at 43:11-44:1, 48:9-22; Tr. of July 11, 2022, at 118:17-22, 126:6-10.

111. Furthermore, EG was unlikely to cure the breach, because EG's chairman didn't even know about the obligation. Elliott Dep. Tr. of Dec. 4, 2019 (Def. Ex. 16B) at 13:2-6, 43:11-44:1.

WHEREFORE, Defendant and Counter-Claimant Richard DeMarco requests relief in the form of a new trial, judgment in his favor, or an alteration of the Decision.

Respectfully Submitted,

BOCHETTO & LENTZ, P.C.

Date: 9/9/22

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	:	
v.	:	
	:	NO. 2018-08557
RICHARD C. DEMARCO,	:	
	:	
Defendant.	:	
	:	

CERTIFICATE OF SERVICE

I, George Bochetto, Esquire hereby certify that a true and correct copy of *Defendant and Counterclaim Plaintiff Richard DeMarco's Post-Trial Motion* on this 9th day of September, 2022 to all counsel via ECF notification as well as first-class mail at the following addresses:

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