IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,383

MARY BARNER, as guardian and natural parent of JOSEPH BURKES, a minor, and MARY BARNER, individually,

Petitioner,

vs.

SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A.,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

SEARCY, DENNEY, SCAROLA, BARNHART & SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Fla. 33409
-and-
PODHURST, ORSECK, JOSEFSBERG, EATON, MEADOW, OLIN & PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800

By: JOEL D. EATON
Fla. Bar No. 203513

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25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

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(305) 358-2800

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(305) 358-2800

I.
STATEMENT OF THE CASE AND FACTS

We are unable to accept Ms. Barner's statement of the case and facts, because it is neither fair, nor accurate, nor complete. In fact, because it is little more than a diatribe against the Searcy firm -- constructed from facts which were in dispute below and not resolved, and which have no relevance whatsoever to the legal issue presented here -- it is no statement of the case at all. We must therefore restate the case and facts. We will restate the case first, and respond to Ms. Barner's irrelevant diatribe at the end.

A. Restatement of the case and facts.

The issue in this appeal is how the reasonable value of a law firm's services is to be measured under the doctrine of quantum meruit, where the firm has been discharged without cause after substantially performing, but before fully completing, its contingent fee contract. The relevant facts are straightforward and largely undisputed. They also demonstrate rather compellingly what the trial court itself acknowledged below -- that the measurement apparently required by at least one of the existing district court decisions on the subject is neither logical nor fair (R. 386, 399-400). In the argument which follows, we will ask the Court to follow its own decision in *Rosenberg v. Levin*, 409 So.2d 1016 (Fla. 1982), and to adopt a measure of recovery consistent with the doctrine of quantum meruit, as that doctrine has historically been applied, and as the district court did in the decision under review. Hopefully, the facts themselves will plainly demonstrate the need for that fairer rule of law which we seek from this Court.

In October, 1989, Mary Barner hired the firm of Searcy, Denney, Scarola, Barnhart & Shipley, P.A. to bring a medical malpractice action against several health care providers on behalf of her brain-damaged baby, Joseph Burkes; she executed a court-approved contingent fee contract in which she agreed to pay the Searcy firm 40% of the recovery if

suit were filed (R. 284; Searcy Ex. 1). Day-to-day responsibility for the case was assigned to an associate in the firm, Phillip Taylor (R. 284, 287). After extensive investigation and preparation, suit was filed against Indian River Memorial Hospital and its emergency room physicians (R. 284-92). In October, 1991, during mediation, the hospital offered $1,750,000.00 to settle the case (R. 294-95). At that point, however, Ms. Barner was only willing to settle the case for the $1,000,000.00 in insurance coverage available to the emergency room physicians and $3,750,000.00 from the hospital, so a settlement was not effected (R. 294-95). A few days prior to a scheduled meeting with the attorneys for the emergency room physicians, at which the physicians' policy limits would probably have been tendered, Mr. Taylor resigned from the firm, effective November 21, 1991 (R. 296).

Mr. Taylor thereafter joined the newly-titled firm of Gary, Williams, Parenti & Taylor, P.A. and solicited Ms. Barner to discharge the Searcy firm and hire his new firm as her attorney (R. 296-301, 359). Shortly thereafter, Mr. Taylor's conduct was adjudicated to be improper, and he was enjoined from communicating with any of the Searcy firm's clients, including Ms. Barner, in an order which was ultimately affirmed by the District Court of Appeal, Fourth District. *See Taylor v. Searcy, Denney, Scarola, Barnhart & Shipley, P.A.*, 596 So. 2d 1287 (Fla. 4th DCA 1992). Following several procedural developments not pertinent here, Mr. Gary determined that Mr. Taylor had improperly solicited Ms. Barner's case and recommended to her that she rehire the Searcy firm; Ms. Barner followed the recommendation (R. 304-06, 361-62). Mr. Taylor thereafter persuaded Ms. Barner to have no further contact with the Searcy firm (R. 307-08). Because this conduct violated the injunction which had been entered against him, the Searcy firm moved to hold Mr. Taylor in contempt of court (R. 308). Three days later, Mr. Gary fired Mr. Taylor (R. 308).

Shortly thereafter, Mr. Taylor went to Ms. Barner's home, picked her up, and drove

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

her down to the law offices of Montgomery & Larmoyeux, where she hired Mr. Montgomery to represent her under a standard "40/30/20" contingency fee contract (R. 308, 414, 464). Ms. Barner then discharged the Searcy firm once again (R. 308). It was stipulated on the record below that this discharge was "without cause" (R. 360). Prior to its discharge, the Searcy firm had expended (according to a conservative reconstruction) 316.6 hours in preparing the case (R. 167, 313). Shortly after the Searcy firm was discharged, Mr. Montgomery hired Mr. Taylor as an associate (R. 418, 435, 475). The two of them then settled Ms. Barner's case for $4,237,500.00 -- by writing a one-page letter demanding the $1,000,000.00 in insurance coverage available to the emergency room physicians, which was immediately tendered, and by holding one meeting with counsel for the hospital at which the hospital offered $3,237,500.00 (R. 427-29, 436-37, 446, 469-71, 478-82). According to Mr. Montgomery, *all* of the information necessary to obtain settlement of the case had previously been provided to defense counsel by the Searcy firm, and he spent no more than 40 hours working on Ms. Barner's case (R. 471-72, 486-88, 494-99, 503-05). If time alone were the determinative factor, the Searcy firm therefore did 91% of the work resulting in the settlement.

To protect its entitlement to fees, the Searcy firm filed a charging lien on the settlement proceeds (R. 590, 797, 1180). In its second amended lien, it asserted that it had substantially completed all of the work necessary to effect settlement of Ms. Barner's case at the time of its discharge, and it claimed entitlement to a fee of up to 40% of the recovery which was ultimately obtained as a result of its substantial efforts (R. 1180). In the memorandum of law which it filed in support of its lien, the Searcy firm asserted two alternative positions (R. 1249). First, it argued that, because it had done substantially all of the work necessary to effect the settlement, its fee should be measured under the doctrine of quantum meruit as a substantial portion of the 40% contingent fee to which it would have

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
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been entitled had it not been discharged without cause. Second, it argued that, if this measure of recovery were to be rejected, it was entitled at minimum to a fee measured by the factors set forth in *Florida Patient's Compensation Fund v. Rowe,* 472 So.2d 1145 (Fla. 1985), including a "contingency risk multiplier."

At the hearing held to determine the amount of attorney's fees to be awarded to both the Searcy firm and the Montgomery firm (at which the facts stated above were adduced), the Searcy firm asserted in opening statement that the determination of its fees was to be measured by the doctrine of quantum meruit, as *Rosenberg v. Levin,* 409 So. 2d 1016 (Fla. 1982), required -- and it reiterated its alternative positions as to how the fees were to be computed under that doctrine (R. 112-24). First, it claimed entitlement to a substantial portion of the total fees which were to be awarded: ". . . it would appear that the equitable solution would be, in fact, to allow our firm[,] whatever percentage of fees were going to be allowed, to allow our firm 99 percent or 95 percent of those fees" (R. 116-17). Counsel acknowledged, however, that "it would take a strained interpretation of the case law for the court to do that" -- since, although the Fourth District had not ruled on the subject, the Second District had held that a discharged attorney's fee was to be computed by applying the *Rowe* factors (including a "contingency risk multiplier"), and the court was probably bound to follow that decision (R. 117-21).

This concession of the existing state of the law was not a waiver of the first alternative position asserted by the firm, of course; it was required by the settled rule that trial courts are bound by the decisions of district courts other than their own, when their own district court has yet to speak on the question. *See Pardo v. State,* 596 So. 2d 665 (Fla. 1992); *Stanfill v. State,* 384 So. 2d 141 (Fla. 1980); *Durham v. Palm Court, Inc.,* 558 So. 2d 59 (Fla. 4th DCA), *review dismissed,* 566 So. 2d 256 (Fla. 1990); *State v. Hayes,* 333 So. 2d 51 (Fla. 4th DCA 1976). The logical corollary of this rule is that a litigant can urge

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

a different rule in the trial court, notwithstanding that the law in other districts is presently against it, in order to lay the predicate for a challenge to the rule in its own district court. *See Durham v. Palm Court, Inc., supra* at 60. And that, of course, is precisely what the Searcy firm did, so its first alternative position was fully preserved for appellate review.

In the opening statements which followed, Mr. Montgomery took the position that he was entitled to his full "40\30\20" contingent fee, and that the Searcy firm was limited by a decision of the First District to a fee computed under *Rowe*, *without* a "contingency risk multiplier" (R. 126-27, 133). The guardian for Ms. Barner's minor child agreed with this position, but pointed out that, because a minor child was involved, the court had discretion to lower Mr. Montgomery's fee (R. 134-35). During presentation of the evidence which followed, the Searcy firm proved up its expenditure of 316.6 hours, as well as the reasonable hourly rates for the various attorneys involved (to which Mr. Montgomery stipulated), resulting in a minimum fee at straight hourly rates of $100,945.00 (R. 157-67, 251, 313). Mr. Montgomery then reduced his demand for fees from $1,147,500.00 to 20% of the gross recovery, or a fee of $800,000.00 (R. 405, 435, 452-54). (Although the professed reason for this reduction was generosity, we think it should be obvious that the real reason for the concession was recognition of the absurdity of recovering in excess of $1,000,000.00 for doing less than 10% of the work, when the Searcy firm would recover less than 10% of that amount for doing over 90% of the work.) Both Ms. Barner and the court-appointed guardian for her minor child expressed their agreement with Mr. Montgomery's claim to $800,000.00 in fees (R. 507-08, 517).

In closing argument, the Searcy firm once again asked the trial court to determine the total amount of fees which Ms. Barner should pay, and divide those fees between the two firms on a pro rata basis (R. 385). It acknowledged once again, however, that the court would have to strain the existing case law to do that, and asked that, if the *Rowe* factors

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

were to be utilized, the $100,945.00 in hourly fees proven by the evidence at least should be increased by a "contingency risk multiplier" (R. 385-96). Although the trial court was generally in agreement with the Searcy firm's position, it felt bound by *Boyette v. Martha White Foods, Inc.*, 528 So.2d 539 (Fla. 1st DCA), *review denied*, 538 So.2d 1255 (Fla. 1988), to apply the *Rowe* factors, *without* a "contingency risk multiplier" -- and it therefore awarded the Searcy firm a straight hourly fee of $100,945.00 (R. 399-400):

> . . . There's no dispute that the discharge was without cause by Ms. Barner. And the question is whether the multiplier should be applied.
>
> Now, Boyette versus Martha White Foods cited at 525 So.2d 540 First District says clearly that the application of the Lode Star Formula's contingency multiplier was improper in that particular case. Although I believe that that results in an unfair result in this case. It appears to me that there's no law that is -- that all the law is in conformance with Boyette and, therefore, I'll set in the fees at $100,945.00.
>
> I do that with the feeling that it should be more, that there should be a risk multiplier applied, but it seems to me that I'm constrained by Boyette to not allow it. And I think the risk multiplier should be applied because in this case substantially all the work was done by the Searcy firm, and that's why it should be applied. But as I said, I feel like I'm bound by Boyette and so I'll set the fee at $100,945.00.

With respect to Mr. Montgomery's fee, the trial court "split the baby," as it were; it determined that Mr. Montgomery was entitled to no contingent fee on the first $1,750,-000.00 recovered, because that amount had been offered on the Searcy firm's watch, and that he would therefore be awarded 20% of the balance of $2,487,500.00, or $497,500.00 (R. 538-41).[1/] The several rulings were then reduced to a written Order and Final Judgment

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[1/] Of course, the logic of this ruling required that the Searcy firm at least recover 40% of the first $1,750,000.00 -- but because of *Boyette*, the trial court was required to cast logic aside and award a straight hourly fee.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

(R. 1271). Given Mr. Montgomery's concession that he worked no more than 40 hours on the case, his award (even though reduced from his claim) represents an hourly fee of nearly $12,500.00 per hour. In contrast, the Searcy firm's attorneys were compensated at rates of $250.00 to $500.00 per hour (R. 398). The Searcy firm also received only 17% of the total fees awarded, notwithstanding that it had done 91% of the work, and Mr. Montgomery received 83% of the total fees awarded, notwithstanding that he had done only 9% of the work. And, of course, by the simple expedient of following Mr. Taylor's thoroughly unethical importuning and discharging the Searcy firm without cause to follow Mr. Taylor elsewhere, Ms. Barner ended up paying the two firms a contingent fee of only 14% of the recovery -- and pocketed an extra $1,096,555.00 which would have gone to the Searcy firm had Mr. Taylor been loyal to his employer rather than to himself.

For reasons which should be painfully obvious at this point, the Searcy firm appealed to the District Court of Appeal, Fourth District (R. 1286). The district court reversed. In a unanimous opinion, it disagreed with *Boyette*; held that *Rosenberg* rather than *Rowe* applied to the determination of a discharged attorney's quantum meruit recovery; and remanded the case to the trial court for a redetermination of the fees owing to the two law firms who handled Ms. Barner's case.[2/] *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Barner*, 632 So.2d 1071 (Fla. 4th DCA 1994). Because of the patent conflict with *Boyette*

[2/] We note parenthetically that this relief will require a recomputation of the fees owing to *both* law firms, so a substantial portion of any additional fee to be awarded to the Searcy firm on remand will come out of the clearly exorbitant fee initially awarded to the Montgomery firm, rather than out of the fund which Ms. Barner presently holds for the benefit of her child. It was for this reason, of course, that we served copies of our initial brief in the district court on both the Montgomery firm and Ms. Barner. However, the Montgomery firm filed neither an answer brief nor a joinder in Ms. Barner's brief, and it did not appear at oral argument in the district court, so it was apparently willing to abide the result in the appeal without participating in it. Similarly, the Montgomery firm did not invoke this Court's jurisdiction to review the district court's decision, so it would appear that it is also willing to abide the result in this proceeding without participating in it.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

(and other decisions), this Court accepted jurisdiction.

The identical question is pending here in another case arising out of Mr. Taylor's unethical but successful solicitations of several of the Searcy firm's clients, in which the Second District reached a decision in conflict with the Fourth District's decision in this case: *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz*; case no. 83,375. In the instant case, the Searcy firm asks that the Fourth District's decision be approved, and it has asked in the *Poletz* case that the Second District's conflicting decision be quashed.

B. A response to Ms. Barner's irrelevant diatribe.

It should be apparent at this point that the bulk of Ms. Barner's statement of the case and facts is simply an effort to "poison the well" with facts which have no relevance whatsoever to the legal question presented here. First, Ms. Barner details the history of her child's medical problems. Most respectfully, those facts clearly have no relevance to the issue of whether the appropriate legal principles were followed in determining the amount of the Searcy firm's fee under the doctrine of quantum meruit, and that point should be obvious.

Second, Ms. Barner borrows several comments which Mr. Montgomery made which were critical of the Searcy firm, and pools them together in an effort to denigrate the Searcy firm's handling of the case before its discharge.[3/] There is considerable irony in these aspersions, of course, since Mr. Taylor was in charge of the file during the period of which

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[3/] Some of the statements are demonstrably untrue. For example, Ms. Barner states that the Searcy firm allowed the statute of limitations to run on her child's claim. Although Mr. Montgomery did make a statement on direct examination which arguably suggested such a thing (R. 449), he conceded the obvious on cross-examination -- that the case he ultimately settled for over $4,000,000.00 had been timely filed before expiration of the statute of limitations (R. 489-90). There are other statements like this in Ms. Barner's supplemental facts, but because they are irrelevant to the legal question presented here, we will not trouble the Court with a detailed refutation of each of them.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

Ms. Barner now complains, yet she followed him elsewhere when he left the Searcy firm. Her counsel's trashing of the Searcy firm during this period of time is therefore a trashing of *Mr. Taylor*, which is patently inconsistent with Ms. Barner's own ultimate feelings in the matter. In effect, in his effort to "poison the well" here, Ms. Barner's counsel has trashed his own client's position -- and counsel's diatribe therefore so obviously amounts to mere lawyering here that it ought to be disregarded for that reason alone.

There is a more important point which needs to be made about counsel's aspersions, however, and that is this: there is *conflicting* testimony on each of Mr. Montgomery's criticisms in the record, but the trial court was not called upon to resolve any of the conflicts because it was *stipulated* on the record that the Searcy firm had been discharged "without cause" (R. 360). Most respectfully, if there had been an issue below as to whether the Searcy firm had been discharged "for cause," then counsel's aspersions might have had some relevance to the legal question presented here (although the trial court might have resolved the conflicts in the Searcy firm's favor, of course, rendering counsel's reliance upon them here inappropriate for that additional reason). But once Ms. Barner stipulated that she discharged the Searcy firm "without cause," and thereby made it unnecessary for the trial court to resolve the conflicts in the evidence concerning the Searcy firm's handling of the case, Mr. Montgomery's aspersions became totally irrelevant to the determination of the amount of attorneys' fees to which the Searcy firm was entitled under the doctrine of quantum meruit. And because those aspersions were irrelevant to any issue decided below, they are equally irrelevant to the legal question presented here.

Third, Ms. Barner attempts to minimize the Searcy firm's contribution (and maximize Mr. Montgomery's contribution) to the ultimate settlement of the case by selecting bits and pieces of the conflicting evidence on the point (which, once again, because of the manner in which it felt bound to determine the Searcy firm's fee, the trial court was never called

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

upon to resolve). She even goes so far as to state that Mr. Montgomery received no benefit from the Searcy firm's past involvement in the case. Most respectfully, this assertion is false as a matter of simple common sense, especially since the Searcy firm expended 91% of the total hours expended on the case, and Mr. Montgomery's fee claim was reduced by the trial court because of the substantial settlement offer pending at the time of the Searcy firm's discharge.

In addition, the statement is contrary to Mr. Montgomery's own admissions at trial that *all* of the information necessary to obtain settlement of Ms. Barner's case had previously been provided to defense counsel by the Searcy firm, and that he spent no more than 40 hours working on the case (R. 471-72, 486-88, 494-99). More importantly, while the supplemental bits and pieces of conflicting evidence may become relevant to the determination of the amount of the Searcy firm's fee on remand (if we are successful in convincing the Court of the correctness of our principal legal position here), they are clearly irrelevant to the issue presently before the Court -- whether the appropriate legal principles were followed in determining the amount of the Searcy firm's fee under the doctrine of quantum meruit. Most respectfully, *all* of the facts collected in Ms. Barner's statement of the case and facts are irrelevant to the legal question presented here -- and we stand by the accuracy, fairness, and completeness of our restatement of the case and facts.

II.
ISSUE ON APPEAL

WHETHER THE TRIAL COURT ERRED IN COMPUTING THE SEARCY FIRM'S QUANTUM MERUIT RECOVERY AS A STRAIGHT HOURLY FEE, RATHER THAN (1) AWARDING IT AN EQUITABLE PRO RATA SHARE OF THE TOTAL FEES WHICH MS. BARNER WOULD HAVE OWED UNDER THE "MARKET PRICE" OF A CONTINGENT FEE CONTRACT, OR ALTERNATIVELY, (2) AN HOURLY FEE ENHANCED BY A "CONTINGENCY RISK MULTIPLIER."

III.
SUMMARY OF THE ARGUMENT

Because of the numerous conflicting decisions on the point in issue here, our argument will be sufficiently complex that it cannot readily be summarized in a page or two. Suffice it to say simply that we intend to argue both of the alternative positions which the Searcy firm advanced in the trial court. First, we will demonstrate that, under the quasi-contractual remedy of quantum meruit required by *Rosenberg v. Levin*, 409 So.2d 1016 (Fla. 1982), as that doctrine is ordinarily applied, the trial court should have (1) determined the "market price" of a contingent fee contract for cases like Ms. Barner's; (2) divided the fee owing under such a contract between the two firms which prosecuted her case to a successful conclusion in equitable pro rata shares based upon their respective contributions to that result; and (3) awarded the Searcy firm the recovery to which it would have been entitled under such a computation. We will also demonstrate that that is the *only* disposition of the problem presented here which has any foundation in simple logic or fundamental fairness.

We will argue alternatively that, if this measure of recovery is to be rejected in favor of a wooden application of *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985), the trial court should at least have enhanced the Searcy firm's clearly inadequate compensation and reduced Ms. Barner's unjustified windfall by applying a "contingency risk multiplier" to the straight hourly fee which it awarded, as *Rowe* plainly requires. We apologize in advance for the apparent complexity of what follows, but the fault lies in the numerous inconsistencies in the decisional law which has developed on the subject.

IV.
ARGUMENT

THE TRIAL COURT ERRED IN COMPUTING THE SEARCY FIRM'S QUANTUM MERUIT RECOVERY AS A STRAIGHT HOURLY FEE, RATHER THAN (1) AWARDING IT AN EQUITABLE PRO RATA SHARE OF

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

THE TOTAL FEES WHICH MS. BARNER WOULD HAVE OWED UNDER THE "MARKET PRICE" OF A CONTINGENT FEE CONTRACT, OR ALTERNATIVELY, (2) AN HOURLY FEE ENHANCED BY A "CONTINGENCY RISK MULTIPLIER."

In our judgment, Ms. Barner's argument is not responsive to the issue decided by the district court, or to the legal question presented here. She simply assumes at the outset what the district court rejected below -- that the determination of the Searcy firm's fee is governed by the "lodestar" method of *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985) -- and then argues at length that no "contingency risk multiplier" is appropriate in that calculation. Because our principal contention is that the determination of the Searcy firm's fee is governed by *Rosenberg v. Levin*, 409 So.2d 1016 (Fla. 1982), rather than *Rowe* -- as the district court squarely held -- we obviously cannot respond to Ms. Barner's argument on its own terms. We therefore intend to defend the district court's decision on our own terms -- and we will respond to Ms. Barner's unresponsive argument at the end of that defense.

A. The trial court should have awarded the Searcy firm an equitable pro rata share of the total fees which Ms. Barner would have owed under the "market price" of a contingent fee contract.

The appropriate starting point for this controversy is, of course, *Rosenberg v. Levin, supra*. In that case, this Court followed the decisions of the California courts and held that a law firm employed under a contingent fee contract which is discharged without cause before the contingency occurs may not recover the full contract price in a breach of contract action; instead, its fees for the services rendered prior to its discharge must be determined under the traditional quasi-contractual remedy of quantum meruit, limited by the maximum contract price, and only after the contingency occurs. It is therefore simply undeniable here that the Searcy firm's recovery must be governed by traditional principles of the quasi-

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

contractual remedy of quantum meruit.[4/]

Unfortunately, *Rosenberg* is far from specific on how the fees of a discharged attorney are to be measured under that doctrine. The most that the decision offers on the point is a vague set of generalities:

> In computing the reasonable value of the discharged attorney's services, the trial court can consider the totality of the circumstances surrounding the professional relationship between the attorney and client. Factors such as time, the recovery sought, the skill demanded, the results obtained, and the attorney-client contract itself will necessarily be relevant considerations.

409 So.2d at 1022. Because of the lack of concrete, fact-specific guidance in this catalogue, the district court decisions interpreting this language are in total disarray. We will reserve discussion of them for the moment, however, in order to explore the doctrine of quantum meruit itself, as it has historically been applied by the courts of this nation.

The basic principle of the measurement of a recovery under the doctrine is expressed in §371, *Restatement (Second) of Contracts*, as follows:

> If a sum of money is awarded to protect a party's restitution interest, it may as justice requires be measured by either
>
> (a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or
>
> (b) the extent to which the other party's property has been increased in value or his other interests advanced.

Only subsection (a) of this provision is applicable here.

The thrust of this provision is that a recovery under the doctrine of quantum meruit should be measured, not by some artificial valuation of what the plaintiff might have charged

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[4/] The Latin phrase "quantum meruit" means simply "as much as he deserves." *Black's Law Dictionary*, p. 1119 (5th Ed. 1979).

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

for individual increments of the part performance under a hypothetical contract which did not exist between the parties, but by the "market price" of what it would have cost the defendant to have obtained services similar to those rendered by the plaintiff, so that the defendant is not unjustly enriched by discharging the plaintiff at the plaintiff's expense. *See* Comment a to §371. As a general rule, the contract itself is deemed the best evidence of that "market price," and a pro rata recovery of the contract price for the part performance rendered is therefore the ordinary measure of recovery under the doctrine of quantum meruit. *See* 12 *Williston on Contracts*, §§1483, 1485 (1970 Ed.). *See also* Comment b to §377, *Restatement (Second) of Contracts* (requiring pro rata recovery of contract price where quantum meruit becomes appropriate remedy because contract performance has been frustrated or rendered impracticable).

In most commercial contexts, the computation is relatively simple. If a painter is discharged without cause after painting 90% of a house, for example, the successor painter will normally charge only for painting the remaining 10% of the house, and the "market price" of the total undertaking is easily prorated 90% to the first painter without the need to resolve a conflicting claim by the second painter. The circumstances presented by the type of fee dispute in issue here are unusual, because a successor attorney employed under a contingent fee contract normally contracts for the whole (rather than for the uncompleted portion of the litigation), since it is usually impossible to know at the outset of the relationship how much time and effort will be involved to complete the contract. As a result, when the contingency ultimately occurs, there are normally two conflicting claims to the whole to be resolved. As we will demonstrate, however, these conflicting claims can fairly be resolved by the same type of pro rata apportionment available in the more ordinary case of our hypothetical painters, so the circumstances presented by the facts in this case are simply a complication; they are not an obstacle to fair compensation for both sets of

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

attorneys.

Applying this basic principle of the *Restatement* to the instant case produces a perfectly logical and eminently fair result. Because the "market price" for engaging an attorney to prosecute a medical malpractice case is (as everyone conceded below) a contingent fee of up to 40%, Ms. Barner could expect to pay an attorney that amount for the successful prosecution of her case. The fact that she chose to hire two successive sets of attorneys to prosecute her case to conclusion should not change that fact. She should still expect to pay a contingent fee of up to 40% for the successful prosecution of her case, because that is the "market price" of the total package of services which she would receive.[5/] And when one of the firms does 91% of the work, and the other firm does 9% of the work, it is both logical and fair that this "market price" of the total package of services be divided on a pro rata basis between the two firms, according to their respective contributions to the final result -- 91% to one, and 9% to the other.[6/]

[5/] A complicating wrinkle exists in the instant case, since Ms. Barner initially agreed to pay the Searcy firm a non-standard, court-approved 40% contingency fee, and later agreed to pay Mr. Montgomery a standard "40/30/20" contingent fee. The relevant "market price" is therefore not plainly established on the record. Because the second contract was negotiated when very little work remained to be done, a decent argument can be made that it does not represent the "market price." A decent argument can also be made that, because Ms. Barner agreed to a 40% contract when initially testing the market for counsel to handle her complicated medical malpractice case, a contingent fee of 40% is the relevant "market price." Nevertheless, a factual question plainly remains as to the relevant "market price" for the total package of services obtained by Ms. Barner. The Court need not decide that question of fact, of course. The actual "market price" can be determined on remand if we are successful in upholding the district court's decision here.

[6/] We use these particular numbers solely for the sake of discussion and simply because they are conveniently suggested by the facts proved below. We do not mean to suggest that a pro rata distribution of the total fees awarded necessarily has to be bottomed upon hours expended alone. Certainly some discretion would exist to adjust these numbers for things like quality of performance, unnecessarily expended time, and the like. All of these things remain for determination on remand.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

This, incidentally, is precisely the way in which the American Law Institute recommends that the problem be handled in the more specific *Restatement* which it is presently considering on the subject. On the measurement of quantum meruit recoveries by discharged attorneys, §52 of the *Restatement of the Law Governing Lawyers* (Tentative Draft No. 4, April 10, 1991), provides in pertinent part as follows:

> When the client-lawyer relationship ends before the lawyer has completed the services due for a matter:
>
> (1) a lawyer who has been discharged without forfeiting the lawyer's fee under §49 [such as "without cause"] and after substantially performing the services due, or any severable part of them, may recover the compensation provided by any otherwise enforceable agreement, less the value of the services covered by that contractual compensation that the lawyer did not provide because of the discharge; . . .

This provision is explained in Comment b to §52 as follows:

> *b. Recovery of contractual fee when client discharges lawyer after services (or a severable part of them) were substantially complete.* A lawyer is entitled to the contractual fee (less the value of any services the lawyer did not provide that are covered by that fee) when the lawyer has substantially earned the contractual fee at the time of termination, except when forfeiture is warranted. The typical case occurs when a client discharges a contingent-fee lawyer without cause just before the contingency occurs and then argues that the lawyer should receive only the fair value of the lawyer's services, not the contractual percentage fee. There is no need to protect the client's right to change lawyers during the case, because the case is in substance finished and a new lawyer is either unnecessary or could be hired for a small fee. Allowing a client to avoid paying the agreed fee by discharging the lawyer at the last minute would be unfair.
>
> For similar reasons, a client who discharges a lawyer is liable on the basis of the fee contract with the lawyer who has substantially completed a severable part of the services contracted for, without any conduct by the lawyer that would warrant forfeiture. . . . Services are severable when a new lawyer would not

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

> reasonably have to repeat what has already been done in order to complete the representation and when (for example, because the parties had agreed to an hourly fee) it is possible with reasonable accuracy to determine the portion of the contractual fee allocable to the services already performed. If those conditions are met, recovery of the contractual fee will not inappropriately deter clients who wish to change lawyers, and denying such a recovery would make it possible for clients to obtain useful services at less than the agreed fee.
>
> . . . .
>
> Allowing the lawyer to recover under the contract when discharged at a point when the lawyer's services (or a severable part of them) are substantially complete does not wholly prevent abuse by the client, who could discharge the lawyer just before substantial completion and thereby deprive the lawyer of the benefit of the contract fee. The client runs some risk by doing so, however, because the client normally must pay another lawyer to complete the services and because the client may have mistakenly concluded that the services were not substantially complete.
>
> Services should be found to be substantially completed when the client had no significant reason for discharging the lawyer other [t]han avoiding the contractual fee. . . . When the services were substantially complete but the lawyer, because of discharge, did not perform some services otherwise due, the value of those services, valued at the contractual rate, should be deducted from the lawyer's contractual recovery.

In the instant case, because Mr. Montgomery did not have to duplicate any of the work previously performed by the Searcy firm, the Searcy firm clearly completed a "severable part" of its contract. And if the quantum meruit recovery represented by §52 of the *Restatement* is what this Court meant in *Rosenberg* when it adopted quantum meruit as the measure of a discharged attorney's fee in Florida, then the trial court should have determined the "market price" of the total package of legal services rendered to Ms. Barner by the two law firms which represented her, and divided that fee 91% to the Searcy firm and 9% to Mr. Montgomery (or in some other equitable shares) -- just as the Searcy firm urged

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

in its first alternative position below.

In our judgment, there are two good reasons to believe that this is exactly what the Court intended in *Rosenberg*. First, in its general catalogue of factors to be considered when computing a reasonable fee under the doctrine of quantum meruit, the Court expressly required consideration of "the *totality of the circumstances* surrounding the professional relationship," including "*time*," "the *results obtained*, and *the attorney-client contract itself*." 409 So.2d at 1022 (emphasis supplied). Surely, consideration of all three of these factors (plus the other factors in the catalogue) points to something entirely different than the straight hourly fee which the trial court awarded the Searcy firm below. At the very least, there is certainly no indication in this catalogue that a client who hires two successive law firms to prosecute a medical malpractice case, and who recovers in excess of $4,000,000.00 as a result, can fairly pay only 14% of the total recovery to the two firms, when the "market price" for such services is *considerably* higher. Neither is there any indication in this catalogue that the firm which did more than 90% of the work resulting in the $4,000,-000.00+ recovery could fairly be compensated by receiving a mere fraction of the "market price" for such services as its fee.

The second good reason to believe that, in *Rosenberg*, the Court intended application of the doctrine of quantum meruit as that doctrine is ordinarily applied can be found in the fact that it followed the California decisions on the question. In California, the measure of a discharged attorney's quantum meruit recovery is exactly the measure spelled out in §52 of the *Restatement of the Law Governing Lawyers* (Tentative Draft No. 4, April 10, 1991):[7/]

Our decision requires that we remand the case to the trial court

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[7/] Ordinarily, we would not provide the Court with such a lengthy quotation. Because the quotation makes our point as well as we could ever hope to make it in the same space (and with far more authority, of course), we believe the lengthy quotation is an appropriate substitute for our own argument on the point.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

for a determination of the reasonable value of the services rendered by Cazares & Tosdal on the Gutierrez case. . . . Because the hourly fee is the prevailing price structure in the legal profession, it is sometimes assumed that the quantum meruit standard applied to legal services includes nothing more than a reasonable hourly rate multiplied by the amount of time spent on the case. . . . As even Saenz's counsel candidly recognizes, however, this is an overly narrow view of the quantum meruit standard applied in the context of a contingent fee agreement which, through no fault of either party, could not be performed.

A.

As a matter of professional responsibility, California lawyers are entitled to charge clients no more than a reasonable fee for legal services. . . . What is reasonable in a given case depends on a host of circumstances. . . . Moreover, there may be a significant difference between what is reasonable in the context of a negotiated fee and the otherwise calculated reasonable value of legal services rendered. . . . A party to a contract may agree to pay a higher-than-market price for services, but where the bargaining process is a fair one, courts traditionally defer to the parties' agreement as the best measure of the value of the contract performance. . . .

The hourly fee is the standard price structure in the legal profession. . . . Where a lawyer normally charges for work on the basis of an hourly fee, it is a fairly simple matter to calculate the reasonable value of services rendered even in the absence of a negotiated fee. The lawyer's customary hourly rate can be evaluated by comparison to the rate charged by others in the legal community with similar experience. The number of hours expended by the lawyer can also be evaluated in light of how long it would have taken other attorneys to perform the same tasks. Properly evaluated and adjusted, the product of the hourly rate and the number of hours expended should yield the reasonable value of the work completed.

Where a lawyer has contracted to provide services in exchange for a contingent percentage fee, calculation of the reasonable value of services rendered in partial performance of the contract becomes a more complicated task. It has been repeatedly recognized that a contingent fee "'may properly provide for a

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

larger compensation than would otherwise be reasonable.'" . . . This is because a contingent fee involves economic considerations separate and apart from the attorney's work on the case.

In addition to compensation for the legal services rendered, there is the raison d'etre for the contingent fee: the contingency. The lawyer on a contingent fee contract receives nothing unless the plaintiff obtains a recovery. Thus, in theory, a contingent fee in a case with a 50 percent chance of success should be twice the amount of a non-contingent fee for the same case. Usually, the fee is contingent not only on the ultimate success of the case but also on the amount recovered; that is, the fee is measured as a percentage of the total recovery. Thus, the lawyer runs the risk that even if successful, the amount recovered will yield a percentage fee which does not provide adequate compensation. . . .

Finally, even putting aside the contingent nature of the fee, the lawyer under such an arrangement agrees to delay receiving his fee until the conclusion of the case, which is often years in the future. The lawyer in effect finances the case for the client during the pendency of the lawsuit. . . . If a lawyer was forced to borrow against the legal services already performed on a case which took five years to complete, the cost of such a financing arrangement could be significant.

Where the calculation of an attorney's reasonable fee requires evidence and analysis of all these factors, it can be a formidable undertaking. . . . Fortunately, when an attorney partially performs on a contingency fee contract, we already have the parties' agreement as to what was a reasonable fee for the entire case. If the trial court can determine what portion of the contract was performed, calculating the reasonable value of that partial performance becomes a relatively simple procedure.

To determine the extent of partial performance, the trial judge must calculate a fraction where the numerator is the value of the legal services rendered by the particular attorney or firm at issue and the denominator is the aggregate value of all the legal services rendered by any attorney in the case. This may be as simple as adding up the total number of hours spent by all attorneys on the matter, but it is by no means limited to "straight time." The trial court may adjust the fraction upward or downward to account for difficulty of the work or other

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

relevant factors.

> The fraction thus calculated represents the attorney's or firm's proportionate work on the case and, if multiplied by the total fee due under the contract, should yield a reasonable approximation of the proportional fee due the attorney or firm. In effect, then, the reasonable value of the services rendered is measured by the attorney's or firm's pro rata share of the contract price.

Cazares v. Saenz, 208 Cal. App.3d 279, 256 Cal. Rptr. 209, 213-15 (1989) (footnotes omitted). *Accord Spires v. American Bus Lines*, 158 Cal. App.3d 211, 204 Cal. Rptr. 531 (1984). *See Joseph E. Di Loreto, Inc. v. O'Neill*, 1 Cal. App.4th 149, 1 Cal. Rptr.2d 636 (1991); *Schneider v. Kaiser Foundation Hospitals*, 215 Cal. App.3d 1311, 264 Cal. Rptr. 227 (1989), *review denied*. The law in New York is essentially the same. *See Cheng v. Modansky Leasing Co., Inc.*, 73 N.Y.2d 454, 539 N.E.2d 570, 541 N.Y.S.2d 742 (1989). In addition, *see Saucier v. Hayes Dairy Products, Inc.*, 373 So.2d 102 (La. 1979), which we will discuss in detail at pages 30-31, *infra*.[8/] Clearly, if this is what the Court meant in *Rosenberg* when it adopted California law on the subject in issue here, then the trial court should have determined the "market price" of the total package of legal services rendered to Ms. Barner by the two law firms which represented her, and divided that fee 91% to the Searcy firm and 9% to Mr. Montgomery (or in some other equitable shares) -- just as the Searcy firm urged in its first alternative position below.

Although the trial court announced that it would have preferred a much more equitable solution like this one, it felt bound by at least one existing district court decision to reach the upside-down result ultimately reflected in its final order. Most respectfully, the several district court decisions which have been rendered on the subject are in total disarray

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[8/] Nine additional decisions supporting Comment b of §52 of the *Restatement of the Law Governing Lawyers* (Tentative Draft No. 4, April 10, 1991), are cited in the "Reporter's Note" to §52. For additional decisions supporting our position here, *see* Annotation, *Quantum Meruit Recovery of Attorney*, 92 A.L.R.3d 690 (1979) (and supplement thereto).

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

-- and, in our judgment, some of them are bottomed upon a total misunderstanding of the doctrine of quantum meruit. To begin with, most of the discharged attorneys who have had to argue the problem presented here in the various appellate courts have confused the recovery of fees under the doctrine of quantum meruit with the recovery of fees under a statutory authorization, and have assumed that *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145 (Fla. 1985), which governs the computation of fees under a statutory authorization, also governs the computation of fees under the doctrine of quantum meruit. The confusion is understandable, given this Court's use of the single phrase "reasonable value of services" to describe the measure of both recoveries. The two concepts are entirely different, however -- and, in our judgment at least, the formula set forth in *Rowe* is an inappropriate measure of recovery under the doctrine of quantum meruit (which, according to *Rosenberg*, is the appropriate doctrine governing recovery in cases like this one).

We are reinforced in that conclusion by the American Law Institute's position on the point:

> The "fair value" fee recoverable under this Section is not measured by the standards applied when a party recovers a reasonable attorney's fee from an opposing party under a fee-award statute or doctrine. The latter kind of fee often implicates factors -- such as a legislative intent to encourage such suits or to limit fee awards to less than full compensation (for example, when the main purpose of the fee award is to deter misconduct by the fee-paying party) -- not present in quantum meruit recovery under this Section.

Comment a to §51, *Restatement of the Law Governing Lawyers* (Tentative Draft No. 4, April 10, 1991) (discussing quantum meruit recoveries from clients for services rendered without a fee contract).

Our position is also supported by several decisions of the Third and Fourth Districts. The issue first arose in *Stabinski, Funt & de Oliveira, P.A. v. Law Offices of Frank H.*

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

Alvarez, 490 So.2d 159 (Fla. 3d DCA), *review denied*, 500 So.2d 545 (Fla. 1986). In that case, a discharged attorney who was unhappy with the size of his quantum meruit recovery argued a single issue on appeal -- that the trial court's final order was deficient for failing to set forth specific findings to support the fee award, as *Rowe* required. The district court rejected this contention, holding that *Rowe* was entirely inapplicable to the recovery of fees under the doctrine of quantum meruit adopted as the measure of recovery in *Rosenberg*:

> We reject this contention upon the holding that *Rowe* and the federal lodestar method it adopts applies only to fees imposed ancillary to the primary action against a non-client either under common law principles, . . . or, as in *Rowe* itself . . . , pursuant to statutory authorization; they do not affect the assessment of attorney's fees which are due, as here, as damages for breach of an agreement for the payment of such fees by the client or other contracting party. This conclusion is in accordance with both the entire thrust of the *Rowe* decision -- which seeks to protect third parties from excessive awards over which they have no contractual or adversarial control -- as well as with much of its specific language. . . .

490 So.2d at 160.

This holding was followed in two subsequent decisions. In *Trend Coin Co. v. Fuller, Feingold & Mallah, P.A.*, 538 So.2d 919 (Fla. 3d DCA 1989), the district court held that a discharged attorney's quantum meruit recovery is governed by the catalogue of factors in *Rosenberg*, rather than the factors set forth in *Rowe*. And in *David B. Mishael, P.A. v. Ferrell, Cardenas, Fertel, Rodriguez & Mishael, P.A.*, 606 So.2d 651 (Fla. 3d DCA 1992), *review denied*, 618 So.2d 209 (Fla. 1993), the district court rejected a discharged attorney's claim of entitlement to a "contingency risk multiplier" in computing fees under the doctrine of quantum meruit, because the *Rowe* factors are inapplicable in such a computation.

More recently, in *Faro v. Romani*, 629 So.2d 872 (Fla. 4th DCA 1993), *quashed on other grounds*, 19 Fla. L. Weekly S358 (Fla. Jul. 7, 1994), the Fourth District squarely

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

agreed with the Third District, and certified the conflict which exists with the decisions which we will discuss in a moment. More recently still, the Fourth District followed *Faro* in the instant case. *See also Schwartz, Gold & Cohen, P.A. v. Streicher,* 549 So.2d 1044 (Fla. 4th DCA 1989). *Faro* was recently decided by this Court, but the issue presented here was left open for consideration in the instant case (or in *Searcy v. Poletz*, or both).

For purposes of our first alternative position, we believe these decisions are correct in rejecting application of *Rowe* to the type of fee dispute in issue here. When computing a discharged attorney's quantum meruit recovery, the catalogue of factors set forth in *Rosenberg* governs -- not the factors set forth in *Rowe*. And because that general catalogue of factors is sufficiently broad to accommodate the type of pro rata recovery which we seek here, which is the type of recovery ordinarily available under the quasi-contractual remedy of quantum meruit, we believe that these Third and Fourth District decisions (which contain no language preventing such an analysis of *Rosenberg*) fully support our principal position here.

The waters become considerably muddied as we look to the north. The Second District has reached a conclusion contrary to that reached by the Third and Fourth Districts. In *Riesgo v. Weinstein*, 523 So.2d 752 (Fla. 2d DCA 1988), it explicitly announced its disagreement with *Stabinski*, and it held that the determination of a discharged attorney's fee under the doctrine of quantum meruit is to be made by applying the several factors in *Rowe* (presumably including its "contingency risk multiplier"). A similar conclusion in a related context was announced in *Rood v. McMakin*, 538 So.2d 125 (Fla. 2d DCA 1989). And, of course, the Second District adhered to both of these decisions in another case in which Mr. Taylor stole some medical malpractice clients from the Searcy firm and delivered them to Mr. Montgomery: *Searcy, Denney, Scarola, Barnhart & Shipley, P.A. v. Poletz*, 19 Fla. L. Weekly D503 (Fla. 2d DCA Mar. 4, 1994), *review granted*. Since we have already

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

announced our agreement with the Third and Fourth Districts, our disagreement with these cases necessarily follows.

Our disagreement with these cases follows for another reason. In *Riesgo*, the Second District bottomed its disagreement with *Stabinski* upon its earlier holding in *Freedom Savings & Loan Ass'n v. Biltmore Construction Co.*, 510 So.2d 1141 (Fla. 2d DCA 1987), that *Rowe* applies whether the entitlement to attorneys' fees arises from a statute or from a provision in a contract between the plaintiff and defendant which is the subject of the litigation. It is here, we believe, that the Second District confused two quite different concepts, and therefore reached the wrong conclusion. *Rowe* may very well apply when determining the amount of an attorneys' fee to be awarded to a "prevailing party" in a contract dispute, where the contract provides for such an award. The district courts are split on this question. In the Third District, *Rowe* applies *only* to fees authorized by statute, and not to fees authorized by a prevailing-party contractual provision. *See Financial Services, Inc. v. Sheehan*, 537 So.2d 1111 (Fla. 3d DCA 1989). In the First and Fourth Districts, *Rowe* applies to "prevailing party" attorneys' fees authorized by both statute and contract. *See Giltex Corp. v. Diehl*, 583 So.2d 734 (Fla. 1st DCA 1991); *Alston v. Sundeck Products, Inc.*, 498 So.2d 493 (Fla. 4th DCA 1986).

These cases are inapposite to the type of problem presented in *Riesgo*, however, because the issue presented there was how a discharged attorney with no contract was to be compensated under the doctrine of quantum meruit, not the amount of fees to be assessed as additional damages against a losing litigant in a contract dispute, where the contract authorized an award of fees to the "prevailing party." In our judgment, "prevailing party" attorneys' fees arising under a contractual authorization can be appropriately analogized to "prevailing party" attorneys' fees arising under a statutory authorization, but neither can appropriately be analogized to a discharged attorney's recovery of fees for services rendered

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

to a former client under the quasi-contractual remedy of quantum meruit. In cases like *Riesgo* and the instant case, *Rosenberg* should apply -- not *Rowe*. (That, incidentally, is all that the Court needs to say in this case; it need not reach the additional conflict represented by the cases cited in the preceding paragraph, because the Searcy firm's entitlement to attorneys' fees does not arise under a contractual authorization for "prevailing party" attorneys' fees.)

Further to the north, in the decision relied upon by Ms. Barner and by which the trial court felt it was bound, the First District has announced what we consider to be an even more anomalous and logically insupportable rule. In *Boyette v. Martha White Foods, Inc.*, 528 So.2d 539 (Fla. 1st DCA), *review denied*, 538 So.2d 1255 (Fla. 1988), it disagreed with *Stabinski*, agreed with *Riesgo*, and held that the *Rowe* factors govern determination of a discharged attorney's quantum meruit recovery under *Rosenberg*.[9/] It then disagreed with *Riesgo*, however, and held that the quantum meruit recovery contemplated by *Rosenberg* did not include the "contingency risk multiplier" authorized by *Rowe*.[10/] Most respectfully, this is a hybrid which is bound to be infertile, and the rule announced in *Boyette* simply makes no sense. Either *Rosenberg's* catalogue of factors (which allows consideration of "the attorney-client contract itself") applies, or *Rowe's* catalogue of factors (which includes a "contingency risk multiplier") applies. And if *Rowe* applies, as *Boyette* holds, it is simply

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[9/] This conclusion was bottomed upon the same confusion between quantum meruit and contractual "prevailing party" attorneys' fees discussed in the preceding paragraphs.

[10/] Actually, the *Boyette* Court purported to "distinguish" *Riesgo* on this point, stating that "[t]he issue in *Riesgo* dealt with factors affecting the amount of the attorney's fee other than the contingency risk multiplier." 528 So.2d at 541. In our judgment, this is an inaccurate reading of *Riesgo*. Although the specific factor of a "contingency risk multiplier" was not discussed in *Riesgo*, that factor was clearly subsumed in the *Riesgo* Court's all-embracing holding that, "[i]n determining the reasonable value of the attorney's services, the trial court must utilize the criteria set forth in *Rowe* . . . ." 523 So.2d at 754.

impossible that only some of the factors contained in *Rowe* can apply.[11/] We therefore announce our disagreement with *Boyette* as well.

We should also point out that *Boyette* appears to be in conflict with an earlier First District decision on the point -- *Sohn v. Brockington*, 371 So.2d 1089 (Fla. 1st DCA 1979), *cert. denied*, 383 So.2d 1202 (Fla. 1980) -- a decision which was rendered prior to this Court's decision in *Rosenberg*, and which this Court purported to follow in *Rosenberg* in several respects.[12/] In *Sohn*, which involved a dispute between a discharged attorney and a successor attorney over how the first attorney was to be compensated out of the proceeds of a settlement obtained by the successor attorney, the district court held that the second attorney's contingent fee of $30,000.00 was to be "apportioned . . . between the attorneys" based upon the respective contributions of the two attorneys to the ultimate settlement. 371 So.2d at 1095. That, of course, is almost exactly what we have urged here as the fairest and most logical disposition of these types of controversies -- and we therefore urge the Court to follow *Sohn*, as it did in *Rosenberg*.

Sohn brings us back to where we began. Most respectfully, *Rowe* simply does not apply to the determination of a discharged attorney's fee under the quasi-contractual remedy of quantum meruit. No decision of this Court says so, and all of the cases in which this Court has applied *Rowe* involve statutorily-authorized attorneys' fees. Instead, *Rosenberg* clearly applies -- and there is nothing in *Rosenberg's* general catalogue of factors which even

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[11/] More recently, in a case involving assessment of statutorily-authorized attorneys' fees, the First District held that consideration of a "contingency risk multiplier" is *mandatory* under *Rowe*. *Loper v. Allstate Insurance Co.*, 616 So.2d 1055 (Fla. 1st DCA 1993).

[12/] The only aspect of *Sohn* which this Court did not follow in *Rosenberg* was its conclusion that the cause of action for a quantum meruit recovery accrued immediately upon discharge of the attorney. This Court held in *Rosenberg* that the cause of action did not accrue until the contingency occurred. All other aspects of *Sohn* appear to have been endorsed by the *Rosenberg* decision.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

arguably suggests that the determination of a discharged attorney's fee under the doctrine of quantum meruit should be limited to the type of straight hourly fee which the Searcy firm received below, notwithstanding that it had been hired under a 40% contingent fee contract, for doing 91% of the work required to obtain a $4,000,000.00+ settlement of Ms. Barner's claim. Indeed, *Rosenberg's* implicit approval of *Sohn*, as well as its express approval of California's solution to the problem, strongly suggests that the type of pro rata apportionment which we seek here is the proper way to resolve this type of controversy.

Moreover, the type of pro rata apportionment which we seek here is the *only* solution to this type of controversy which has a foundation in simple logic and fundamental fairness. Neither will the solution we have proposed here place any restraint whatsoever upon a client's right to discharge an attorney for any reason or no reason at all, because the client will still pay no more than the "market price" fee for the total package of legal services received, and the predecessor and successor attorneys will simply divide that fee between themselves in realistic and equitable shares. In contrast, the solution imposed upon the problem by the trial court below has nothing in logic or fairness to commend it, and it provides a strong economic incentive for contingent-fee clients with substantial cases to discharge their initial attorneys after most of the work has been done. Indeed, it provides a strong economic incentive for associate attorneys to prepare such cases to the point where they are ready to be settled, and then steal them, take them for themselves, and pocket the substantial fees earned on their former employers' time -- as Mr. Taylor did in the instant case.

The facts in this case, we respectfully submit, should make those things perfectly clear. Although the "market price" for the legal services she received was a contingent fee of up to 40%, Ms. Barner ended up paying only 14% of her $4,000,000.00+ recovery to the two sets of attorneys she hired, and thereby obtained an enormous windfall which she

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

would never have received if she had not followed Mr. Taylor's unethical importuning and allowed him to steal her case from the Searcy firm after it had been substantially prepared. The Montgomery firm, which now employs Mr. Taylor, also received an enormous windfall as a result of Mr. Taylor's unethical conduct, based on only 40 hours of work, after the Searcy firm had done 91% of the work. And the Searcy firm, which did nearly all of the work contributing to this windfall, received a mere fraction of the amount which Ms. Barner initially agreed to pay them for their services.

While the inequity of that result is plain enough, we should also note that the inequity produced by utilization of *Rowe* to compute a quantum meruit fee can also be redirected, and fall squarely on the client in cases capable of producing only modest recoveries. Assume, for example, that Ms. Barner's case had been worth only $100,000.00, rather than millions, and that she had contemplated discharging the Searcy firm after it had devoted 316.6 hours to its preparation. If *Rowe* were to govern the Searcy firm's fees after its contemplated discharge, the "lodestar" computed under *Rowe* would greatly exceed the 40% which Ms. Barner had contracted to pay, so the Searcy firm's quantum meruit fees would be capped at the contract price by *Rosenberg*, and would therefore be $40,000.00. In order to hire another attorney, Ms. Barner would have to agree to pay an *additional* 40% of her recovery to the second attorney, which would leave her only 20% of her recovery in the end.

Were Ms. Barner to adopt that course, she would end up paying 80% of her recovery to her two sets of attorneys -- which is obviously an inequitable result. More likely, of course, the prospect of having to pay out 80% of her recovery to hire two sets of attorneys would effectively deter her from changing attorneys at all -- which is precisely what this Court set out to *prevent* in *Rosenberg*. Most respectfully, the only equitable solution to *this* type of problem -- the type of problem presented by cases with modest value, which is simply the reverse of the problem presented in the instant case -- is an equitable pro rata

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

apportionment of the "market price" of a single contingent fee contract between the predecessor and successor attorneys. And because that is also the only equitable solution to the flip side of the problem presented by the facts in the instant case, where the value of the case is substantial, it should be readily apparent that *Rowe* should not be utilized to measure a discharged attorney's quantum meruit fee in *any* circumstance -- and that the solution to the problem we have proposed here is the only fair solution in *all* circumstances in which a discharged attorney's fee is to be computed under the doctrine of quantum meruit.

This, incidentally, was the conclusion reached by the Louisiana Supreme Court in *Saucier v. Hayes Dairy Products, Inc.*, 373 So.2d 102 (La. 1979) (on rehearing) -- in which it rejected the "contract rule," just as this Court did in *Rosenberg*, and adopted the fairer, more flexible measure of recovery we have proposed here for the reasons we have offered here, explaining as follows:

> . . . Considering the peculiar nature of the contingency fee contract, its social importance, and its potential for abuse as well, in light of our duty to enforce the Disciplinary Rules, we conclude that only one contingency fee should be paid by the client, the amount of the fee to be determined according to the highest ethical contingency percentage to which the client contractually agreed in any of the contingency fee contracts which he executed. Further, that fee should in turn be allocated between or among the various attorneys involved in handling the claim in question, such fee apportionment to be on the basis of factors which are set forth in the Code of Professional Responsibility.
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> . . . In this way, the client is prevented from reaping any possible unfair advantage resulting from the discharge of his attorney. [FN 8] Similarly by this resolution the client is not exposed to the risk of being penalized by being required to pay excessive and duplicitous legal fees for having chosen to exercise his right to discharge one attorney and retain the services of another. In the future, both client and attorney involved in a contingency fee contract will realize that only one maximum contingency fee to which the client agrees will be paid.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

> This solution envisions apportionment of only the highest agreed upon contingent fee in accordance with factors set forth in the Code of Professional Responsibility. Thus the fee is to be apportioned according to the respective services and contributions of the attorneys for work performed and other relevant factors. Resort to the Code of Professional Responsibility also will have in the future a salutary effect of assuring that unethical conduct, such as solicitation on the part of one attorney of another's client, will not be countenanced or rewarded. Knowing that a contingent fee may have to be shared provides an incentive for successor attorneys to encourage a client who has no just cause for complaint to maintain relations with his first attorney. And it encourages the lawyer first retained to seek resolution of the client's misgivings, thereby avoiding needless controversy and engendering public respect. We believe that this resolution will discourage professional disputes and encourage out-of-court settlements since each attorney will be encouraged to emphasize the positive contribution he made to the end result and subsequent counsel will be less inclined to contend that there was cause to discharge all previous counsel. Perhaps more significant even than the foregoing reasons, which relate to governance of attorneys and the practice of law, is the fact that this solution should assure fair treatment of the client who will never be compelled to pay more than one reasonable contingency fee in an amount he has agreed to pay. And it permits the client to change attorneys without acting to his financial peril, whether or not he has "cause" to make the change in attorneys.
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> FN8. The rationale of this holding would likewise thwart the client's last minute attempt to supplant his original attorney with another or to proceed in proper person so as to obviate responsibility for payment of a contingent fee after substantially all of the legal services contemplated by the contract have been performed and settlement or judgment has been obtained or is imminent.

373 So.2d at 118-19. We commend this perfectly sensible decision to the Court as the proper disposition of the instant case.

We also challenge Ms. Barner to convince this Court that there is some basis, any basis at all, in logic or fairness or sound public policy to justify the type of upside-down

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

results which will inevitably be produced by measuring a discharged attorney's quantum meruit recovery with the "lodestar" method adopted in *Rowe* for statutory "prevailing party" attorneys' fees -- and if she does so, we will acquiesce in the Court's rejection of our first alternative position here. We respectfully submit, however, that just as no such basis was advanced in Ms. Barner's initial brief, no such basis will be forthcoming in reply. The *only* disposition of this controversy which makes any sense at all is the pro rata apportionment required by the doctrine of quantum meruit -- as that doctrine is ordinarily applied, as it was applied in *Sohn*, as it is presently applied by the California decisions upon which this Court relied in *Rosenberg*, and as it is presently applied in Louisiana (and other jurisdictions).

Most respectfully, the district court's decision should be approved, and the case should be remanded to the trial court with instructions to (1) determine the "market price" of a contingent fee contract for cases like Ms. Barner's; (2) divide the fee owing under such a contract between the two firms which prosecuted her case to a successful conclusion, in equitable pro rata shares based upon their respective contributions to that result; and (3) award the Searcy firm the recovery to which it will be entitled after that computation is made.

B. Alternatively, if *Rowe* governs determination of the amount of the Searcy firm's quantum meruit recovery under *Rosenberg*, a "contingency risk multiplier" should have been applied.

Alternatively, if the Court should conclude (contrary to the Third and Fourth Districts, but consistent with the First and Second Districts) that *Rowe* governs determination of the amount of the Searcy firm's quantum meruit recovery under *Rosenberg*, notwithstanding the inequity of such a result, the trial court should at least have enhanced the Searcy firm's clearly inadequate "hourly" compensation and reduced Ms. Barner's unjustified windfall by a "contingency risk multiplier," as *Rowe* plainly requires. Although we have disagreed with the Second District's conclusion in *Riesgo* that *Rowe* applies in the context

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

presented here, *Riesgo* at least supports the proposition that, if *Rowe* applies, all of *Rowe's* factors apply (and if it does not, it must be disapproved at least in part, given the decisions of this Court which we will quote in a moment.)

The *only* decision to the contrary is the First District's decision in *Boyette*, in which that court reached the anomalous and logically insupportable conclusion that *Rowe* governed the determination of a discharged attorney's quantum meruit recovery, but that *Rowe's* allowance of a "contingency risk multiplier" was inappropriate in that context because *Rosenberg* says nothing about such an enhancement. (*Rosenberg* does allow consideration of "the attorney-client contract itself," however, which would appear to allow the type of enhancement represented by *Rowe's* "contingency risk multiplier"; at the very least, there is nothing in *Rosenberg* to suggest that a straight hourly fee without any enhancement for the risk of a contingent fee contract is an appropriate measure of a discharged attorney's fee under the doctrine of quantum meruit.)[13/]

Most respectfully, the anomalous conclusion reached in *Boyette* makes no sense. Either *Rosenberg* applies, or *Rowe* applies. And if *Rowe* applies, then *Rosenberg* does not. And if *Rowe* applies, then *all* of its factors must be applied: "We emphasize again that '*all* the factors contained in *Rowe* apply whenever the lodestar approach applies.'" *Perez-Borroto v. Brea*, 544 So.2d 1022, 1023 (Fla. 1989), *quoting Miami Children's Hospital v. Tamayo*, 529 So.2d 667, 668 (Fla. 1988). *See Standard Guaranty Insurance Co. v. Quanstrom*, 555 So.2d 828 (Fla. 1990) (although use of a "contingency risk multiplier" is not mandatory in

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[13/] Ms. Barner may argue that the Third and Fourth Districts' decisions also disallow use of a "contingency risk multiplier" in computing a discharged attorney's fee. The Third and Fourth Districts certainly do disallow the use of such a multiplier, but that is because they disallow application of *Rowe* altogether in the computation of a discharged attorney's fee under the doctrine of quantum meruit. No decision of the Third or Fourth District is even remotely consistent with *Boyette*, which requires application of some of *Rowe's* factors, and disallows use of one of them.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

every case in which plaintiff's counsel has a contingent fee contract, it is mandatory that the trial court at least consider whether or not a "contingency risk multiplier" would be appropriate under the facts); *Lane v. Head*, 566 So.2d 508 (Fla. 1990) (similar).

The reason why such a multiplier should be applied in appropriate cases is, we respectfully submit, perfectly obvious. As *Rowe* itself explains, "[b]ecause the attorney working under the contingent fee contract receives no compensation when his client does not prevail, he must charge a client more than the attorney who is guaranteed remuneration for his services." 472 So.2d at 1151. In measuring the "reasonable value of services" rendered by an attorney employed under a contingent fee contract, it is therefore wholly inappropriate to measure it solely by the hourly fee which the attorney would have charged if his remuneration had been guaranteed -- as the trial court did in the instant case. The point is also nicely explained in the lengthy quotation from *Cazares v. Saenz*, 208 Cal. App.3d 279, 256 Cal. Rptr. 209 (1989), set out at pages 18-21, *supra*.

The point should be obvious enough that we need not belabor it. We simply reiterate that *Boyette* is an infertile hybrid which makes no sense -- and that, if *Rowe* applies in the context presented here at all, *all* of its factors must apply. And if the Court rejects our first alternative position here in favor of the upside-down result which will be produced by adopting *Rowe* as the measure of recovery in the entirely different context presented by a recovery under the quasi-contractual remedy of quantum meruit, the very least that it should do is direct that the case be remanded to the trial court with instructions to enhance the straight hourly fee which it awarded to the Searcy firm by an appropriate "contingency risk multiplier." We rest our case. We invite Ms. Barner to justify the upside-down result reached in the trial court below on any ground -- in logic, in fairness, or in sound public policy -- if she can. We respectfully submit that, just as this challenge went wholly unanswered both below and in Ms. Barner's initial brief here, no such justification will be

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

forthcoming.

C. A brief response to Ms. Barner's arguments.

It remains for us to respond briefly to Ms. Barner's arguments. There are two. First, Ms. Barner manages to ignore our first alternative position altogether by simply positing that the "lodestar" methodology of *Rowe* governs determination of the Searcy firm's fee -- because, according to her counsel, "Rowe's Loadstar [sic] approach was later declared to be the essential point of beginning in all attorney's fee cases, [in] Standard Guaranty Ins. Co. v. Quanstrom, 555 So.2d 828, 833 (Fla. 1990)" (petitioner's brief, p. 8). Most respectfully, there is no support whatsoever in the *Quanstrom* decision for such an assertion. *Quanstrom* dealt with a prevailing-party attorneys' fee award authorized by *statute* (§627.428); its entire discussion is limited to statutorily-authorized prevailing-party attorneys' fees; and it nowhere even arguably suggests that the "lodestar" method adopted in *Rowe* for determining statutorily-authorized prevailing-party attorneys' fees is to be used to determine the measure of a discharged attorney's fee under the restitutionary, quasi-contractual doctrine of quantum meruit. *Rosenberg* clearly continues to govern that entirely different problem -- and we therefore stand by our initial argument on this point.

Ms. Barner's second argument proceeds from the first. Given that *Rowe* governs, she contends, the Court should overrule its own conclusion in *Quanstrom* that a "contingency risk multiplier" *is* appropriate where statutorily-authorized, prevailing-party attorneys' fee awards are recoverable in tort and contract cases. It should overrule this conclusion, she asserts, because (1) "it is unnecessary to impose a contingency multiplier to assure that [a discharged attorney] is fairly paid," and (2) use of a multiplier undermines "the client's confidence in the integrity and ability of counsel" by imposing an economic penalty upon the decision to discharge an attorney without cause (petitioners' brief, pp. 9, 12). We have already addressed the first assertion at length, so we need not reargue our principal position

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

-- that some solution *other* than a straight hourly fee is definitely needed to ensure that an attorney discharged without cause after substantially completing the contract is fairly paid, and that the successor attorney is not unfairly overpaid. We will address the second assertion in a moment. For the moment, we must respectfully submit that the Court has already addressed and previously rejected these arguments in *Quanstrom*, so there should be no need to revisit the arguments here.

Ms. Barner's entire argument is based upon the United State Supreme Court's recent decision in *Burlington v. Dague*, _____ U.S. _____, 112 S. Ct. 2638, 120 L. Ed.2d 449 (1992). She argues, in effect, that *Burlington* should cause this Court to reassess the conclusions it announced in *Quanstrom*. We disagree. The only significance of *Burlington* is that a majority of the Court finally announced what only a plurality had previously announced in *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 107 S. Ct. 3078, 97 L. Ed.2d 585 (1987) -- that "contingency risk multipliers" are generally inappropriate in determining a reasonable attorneys' fee under a "fee-shifting statute" in "public policy enforcement cases." In *Quanstrom*, however, this Court *accepted* the plurality position in *Delaware Valley*, and modified *Rowe* accordingly to eliminate the use of a "contingency risk multiplier" in "public policy enforcement cases," so *Burlington* adds nothing new to the problem previously evaluated and resolved in *Quanstrom*.

And in *Quanstrom*, notwithstanding its acceptance of the plurality position in *Delaware Valley*, the Court "reaffirm[ed] the principles set forth in *Rowe*" in "tort and contract cases"; stated that the "multiplier is still a useful tool . . . in this category of cases"; and modified *Rowe* "to allow a multiplier from 1 to 2.5." *Quanstrom, supra*, 555 So.2d at 834. Since *Burlington* does no more than elevate the plurality position of *Delaware Valley* to a majority position, we fail to see why *Burlington* provides any reason whatsoever for this Court to reassess the conclusions it reached in *Quanstrom*. And if the Court meant what it

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

said in *Quanstrom*, then a "contingency risk multiplier" is clearly appropriate in the instant case if the Searcy firm's quantum meruit recovery must be determined by utilizing the principles of *Rowe*.

In any event, Ms. Barner's second contention -- that use of a "contingency risk multiplier" may result in a client having to pay two sets of lawyers more than 40% of a recovery, indeed up to 80% of a recovery -- is not a particularly good argument against the use of a "contingency risk multiplier" in a *Rowe* determination. However, it is an *exceptionally* good argument against use of *Rowe* itself in cases like this one -- since, as we have already demonstrated, a straight hourly fee (even without a "contingency risk multiplier") in a case with only a modest recovery may well have this penalizing effect when two sets of attorneys must be compensated by a client.

It is for that reason, of course, that we have argued so strenuously *against* the use of *Rowe* at all in cases like this one, and in favor of an equitable pro rata apportionment of the "market price" of a single contingent fee contract between predecessor and successor attorneys -- an apportionment which ensures that both sets of attorneys are fairly compensated and that the client is not penalized at all. And because that perfectly sensible proposal squarely answers *all* of the concerns which Ms. Barner has directed to use of a "contingency risk multiplier" under *Rowe*, we respectfully submit that it would make far more sense for this Court simply to declare *Rowe* inapplicable altogether to the determination of a discharged attorney's quantum meruit recovery, as the district court did, and be done with the problem once and for all.

Most respectfully, for the very reasons articulated by Ms. Barner in her misdirected opposition to "contingency risk multipliers," we continue to believe that our first alternative position is the only fair solution to the recurring problem presented here, for lawyers and clients alike. That solution would ensure that all lawyers are fairly compensated for their

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

efforts and that no client is penalized for discharging an attorney -- and it would eliminate the strong incentives which exist, if *Rowe* applies, for clients to discharge their attorneys on the eve of settlement, and for associate attorneys and successor attorneys to steal cases from other attorneys after most of the work has been done, in the pursuit of a windfall fee for very little additional work. If we are wrong about that, however -- and if a wooden application of *Rowe* is to be required in cases like this one, notwithstanding the inequitable results that it produces and the anti-social incentives which it provides -- at the very least the trial court should have enhanced the straight hourly fee awarded to the Searcy firm by an appropriate "contingency risk multiplier," as *Rowe* and *Quanstrom* plainly require.

V.
CONCLUSION

It is respectfully submitted that the district court's decision should be approved. The district court should be directed to remand the case to the trial court with instructions to (1) determine the "market price" of a contingent fee contract for cases like Ms. Barner's; (2) divide the fee owing under such a contract among the two firms which prosecuted her case to a successful conclusion, in equitable pro rata shares based upon their respective contributions to that result; and (3) award the Searcy firm the recovery to which it will be entitled after that computation is made. Alternatively, if *Rowe* rather than *Rosenberg* is to govern the issue presented here, the district court should be directed to reverse the judgment and remand the case with instructions to enhance the straight hourly fee awarded to the Searcy firm by an appropriate "contingency risk multiplier."

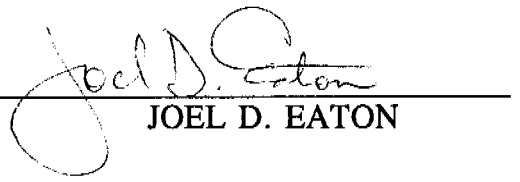
VI.
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 21st day of July, 1994, to: James T. Walker, Esq., Post Office Box 3779, Ft. Pierce, Fla. 34948-3779.

LAW OFFICES, PODHURST ORSECK JOSEFSBERG EATON MEADOW OLIN & PERWIN, P.A. - OF COUNSEL, WALTER H. BECKHAM, JR.
25 WEST FLAGLER STREET - SUITE 800, MIAMI, FLORIDA 33130-1780
(305) 358-2800

Respectfully submitted,

SEARCY, DENNEY, SCAROLA, BARNHART
& SHIPLEY, P.A.
2139 Palm Beach Lakes Blvd.
West Palm Beach, Fla. 33409
-and-
PODHURST, ORSECK, JOSEFSBERG,
EATON, MEADOW, OLIN & PERWIN, P.A.
25 West Flagler Street, Suite 800
Miami, Florida 33130
(305) 358-2800

By: 
JOEL D. EATON