Although the "client" is the Estate of a person who was an adult, the sole beneficiaries of the Estate are minors. As such, there is an unsettled legal issue as to whether the 33 1/3% fee or the 25% fee for cases brought on behalf of minors would apply under *Rule* 1:21-7.

Under *Rule* 1:21-7 an attorney is ordinarily entitled to 33 1/3% of the first $500,000 recovered. This provision stipulates:

> *1:21-7. Contingent Fees*
>
> (c) In any matter where a client's claim for damages is based upon the alleged tortious conduct of another, including products liability claims and claims among family members that are subject to Part V of these Rules but excluding statutorily based discrimination and employment claims, and the client is not a subrogee, an attorney shall not contract for, charge, or collect a contingent fee in excess of the following limits:
>
> > (1) 33 1/3% on the first $500,000 recovered;
> > (2) 30% on the next $500,000 recovered;
> > (3) 25% on the next $500,000 recovered;
> > (4) 20% on the next $500,000 recovered; and
> > (5) on all amounts recovered in excess of the above by application for reasonable fee in accordance with the provisions of paragraph (f) hereof…
> > (g) where the amount recovered is for the benefit of a client who was a minor or mentally incapacitated when the contingent fee arrangement was made, the foregoing limits shall apply, except that the fee on any amount recovered by settlement without trial shall not exceed 25%.

In the case at hand, Counsel entered into a standard contingent fee retainer agreement with its client. The contingent fee portion of this agreement was in accordance with *Rule* 1:21-7 and provided for a 33 1/3% fee. Although in any case where the client is a minor, the Rule and retainer agreement provide that the fee shall be reduced to 25%[1]; in a wrongful death action, the client is the Estate of the adult decedent, <u>not</u> the class of beneficiaries who may ultimately take the proceeds. *McCullen v. Maryland Cas. Co.*, 127 N.J.Super. 231, 238 (App.Div. 1974). Since the client, the Estate, is not a minor, the 25% reduced fee should not apply. *Id; Rule* 1:21-7.

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[1]*Rule* 1:21-7 reads in pertinent part, "where the amount recovered is for the benefit *of a client* who was a minor...when the contingent fee arrangement was made, the foregoing limits shall apply, except that the fee on any amount recovered by settlement without trial shall not exceed 25%." (emphasis added)

This issue was addressed in *McCullen*, 127 N.J.Super. at 231. In *McMullen,* a father who was working as a mason was killed on a construction project. He left surviving a wife and minor children. When the case settled, the trial court decided to apply a 25% fee to the portion of the settlement proceeds allocated to the children, and the standard 33 1/3% fee for the portion allocated to the wife. The Appellate Court ruled this was incorrect:

> The settlement here was apportioned among plaintiff and her children pursuant to N.J.S.A. 2A:31-4. The argument is advanced that each distributive share represents a separate recovery and that the fee schedule should be applied to each fund after its division among the beneficiaries. We reject the contention. The rule assesses a sliding scale fee based on varying percentages of the amount 'recovered.' There were no separate recoveries for each beneficiary and cannot be. The beneficiaries have no right to sue individually to recover their respective losses. *All that our statute permits is a lump-sum recovery by one suing in a representative capacity*, the sum later to be divided equitably among those entitled to benefit from it. Since under our Death Act there can be only one 'recovery,' the fee schedule is to be applied to the total amount received, no matter how many beneficiaries are entitled to share in it, and not to the amounts of the various shares after distribution is determined.
>
> What we have said above applies with equal force to the thought that some portion of the settlement here is subject to R. 1:21-7(c)(6) which limits fees to not more than 25% on amounts recovered by way of settlement for the benefit of infants and incompetents. *We think the rule basically was aimed at those situations, all subject to judicial approval, where a specific settlement is obtained because of a tort committed against the person or property of an infant or incompetent and was not intended to apply to wrongful death recoveries* where the class of beneficiaries included one or more adults. It may be that the 25% Limitation is applicable to a wrongful death recovery where all the beneficiaries are infants or incompetents- *a point on which we do not rule*.

McCullen, 127 N.J.Super. at 239-240 (emphasis added). So here too, as this case was brought by the Estate, there can be only one recovery and the fee should not be reduced since the harm did not occur to a mentally incompetent adult or minor.

The Appellate Division reiterated this stance in *Gerszberg v. Jacuzzi Whirlpool Bath*, 286 N.J.Super. 197 (App.Div. 1995). Like in *McMullen*, the trial court in *Gerszberg* also mistakenly reduced the fee to 25% for wrongful death proceeds paid to minors. Again, the Court said this was incorrect and that the fee is correctly determined by focusing on the individual suing in the representative capacity:

> The settlement here was apportioned among plaintiff and her children pursuant to

> *N.J.S.A.* 2A:31-4. The argument is advanced that each distributive share represents a separate recovery and that the fee schedule should be applied to each fund after its division among the beneficiaries. We reject the contention. The rule assesses a sliding scale fee based on varying percentages of the amount "recovered." There were no separate recoveries for each beneficiary and cannot be. The beneficiaries have no right to sue individually to recover their respective losses. All that our statute permits is a lump-sum recovery by one suing in a representative capacity, the sum later to be divided equitably among those entitled to benefit from it. Since under our Death Act there can be only one "recovery," the fee schedule is to be applied to the total amount received, no matter how many beneficiaries are entitled to share in it, and not to the amounts of the various shares after distribution is determined.

Gerszberg, 286 N.J.Super. at 201. Here, there was only one recovery in the suit brought by the Estate of ______________________ who was an adult at the time of her death. The client in this matter is ultimately her Estate, not the minor beneficiaries. As the client is not a minor and as the fee should be determined irrespective of the class of those who ultimately took, the fee should not be reduced to 25%.

Regarding the *Gerszberg* case, the Court continued that, there are "no compelling equitable reasons why an attorney's fees should turn on such external factors [such as the status of the beneficiaries] unless all possible distributees were minors when the fee agreement was executed." *Id. at 204.* Similarly, the settlement of this case did not hinge on the fact that the proceeds would go to minors. It would be severely inequitable to reduce Counsel's fee exclusively, particularly under the facts of this case, because the settlement achieved for a deceased's Estate was to go to a minor.

It is the status of the plaintiff, not the beneficiaries, that determines the applicable or appropriate fee. *Gerszberg v. Jacuzzi Whirlpool Bath*, 286 N.J. Super. 197 (App. Div. 1995). The cases concerning contingent fee arrangements in a wrongful death matter stand for the proposition that the settlement is considered as a whole, and is not based on the distribution to the various beneficiaries. *Gerszberg*, *Id*. at 201 (there is only one wrongful death claim, and only one recovery for that claim on which to base a contingent fee, citing *Estate of Travarelli*, 283 N.J. Super. 431, 439-40 (App. Div. 1995); *McMullen v. Maryland Cas. Co.,* 127 N.J. Super. 231, 238 (1974) ("recovery is effectuated in one lump sum"). That is a different issue from allocation of the settlement proceeds after the deduction for fees, over which the court maintains discretion. *Id*., at 238-239. Fees are not to be based on the individual beneficiaries' shares or carved out from the shares; rather the fees are to be considered on the entire corpus. *Id*. at 239.

The Court can and should find the 33 1/3% floor applies.