THE RULES OF PROFESSIONAL CONDUCT

AND THE ROLE OF THE TRUST AND ESTATE ATTORNEY

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1. INTRODUCTION. The Rules of Professional Conduct (the "RPCs" or "Rules"), which have been adopted by Washington, can generally be applied fairly easily and at the commencement of representation in the context of litigation, for adversarial positions and resultant conflicts of interest are generally apparent. A business or estate planning engagement, however, is often non-adversarial, or adversarial only in part, or technically but seemingly not practically adversarial, as a consequence of which conflicts are often subtler and emerge later in the representation. Notwithstanding that difference, the RPCs apply in the context of those engagements as well. The purpose of this Outline is to explore the application of some of the ethical rules to issues confronting the business and estate planning lawyer.

2. CONSEQUENCES OF BREACH OF THE RULES OF PROFESSIONAL CONDUCT. As noted in section 3, below, the breach of an ethical rule is not malpractice *per se,* though it is a short journey from one to the other and they are often conflated. However, the breach of a Rule of Professional Conduct does expose a lawyer to a Bar Complaint and risk of discipline, the cost of which may be both broader in scope and costlier than a malpractice claim.

2.1. How Dangerous Is An Estate Planning/Probate and Trust Practice? In 2019, approximately 5.4% of all Washington disciplinary cases arose out of estate, probate and Wills practices. That was materially less than Criminal Law (29.9%), Family Law (20.1%), and Torts (11.3%), but higher than prior years.[1] Anecdotally, the author's sense is that disputes involving trusts and estates are increasing materially. As a consequence, the author anticipates that more and more trusts and estates lawyers will find themselves the target of inquiry, Bar complaints, or litigation.

2.1.1 In 2019, the most common grievance allegations against Washington laws related to unsatisfactory performance (40%), interference with the administration of justice (32%) and Violation of a Duty to Client (8%)/Trust Account Overdraft (8%).[2]

2.1.2 In 2019, there were 32,573 actively licensed lawyers and 1,681 grievance files opened. Of those, there were 56 disciplinary actions imposed. Notably, 2019 saw a diminishing number of grievances received as from prior years (down from 1,894 in 2017 and 1,965 in 2018).

2.2 Illustrative Cases.

2.2.1. Russell K. Jones. In 2014, Mr. Jones was disbarred by the Washington Supreme Court related to four counts of misconduct arising out of litigation involving his mother's estate. Mr. Jones, an attorney, was named as the PR of his mother's estate. Mr. Jones and his siblings were the only beneficiaries of the Estate. As a result of his actions during the

[1] WSBA Discipline System Annual Report (2019) www.wsba.org
[2] *Id.*

administration of his mother's Estate, the hearing officer determined that Mr. Jones knowingly made false responses to discovery requests and withheld documents to conceal his dishonest responses (RPC 3.4), and filed motions for relief, vacation or judgment, disqualification, and/or neutral judge that were frivolous (RPC 3.1 and/or RPC 8.4). The hearing officer found that Mr. Jones violated seven factors which aggravated the causes of action (1) dishonest or selfish motive, (2) a pattern of misconduct, (3) multiple offenses, (4) bad faith obstruction of the disciplinary proceedings by intentionally failing to comply with the rules or orders of the disciplinary agency, (5) refusal to acknowledge the wrongful nature of conduct, (5) refusal to acknowledge the wrongful nature of conduct, (6) substantial experience in the practice of law, and (4) indifference to making restitution.

2.2.2. Sally N. Rees. In 2015, Sally N. Rees resigned from the Washington State Bar in lieu of disbarment as a result of her conduct involving an elderly client. Ms. Rees represented an elderly client and communicated with the client and the client's daughter, Nancy. Ms. Rees obtained an extra credit card that belonged to the client and used the card to make unauthorized personal purchases. In at least one occasion, Ms. Rees forged Nancy's signature on the card to make personal expenditures for her.

2.2.3. David A. Frazier. In 2001, the Idaho Supreme Court suspended for one (1) year David A. Frazier, a 35 year Coeur d'Alene lawyer. Mr. Frazier was appointed Personal Representative of a long-time client's estate in 1991, but between 1991 and 1996 he (a) failed to provide any information to the beneficiaries and (b) paid himself approximately $104,000 in fees on a $500,000 estate. When the beneficiaries brought a Petition for his removal, the Court ordered an accounting, in which he fabricated his time and rate to justify the fees. In addition, he lost, or at least failed to safekeep, the decedent's allegedly valuable jewelry. He was found to have violated RPC 1.3 (duty of diligence), 1.15 (safekeeping property), 1.5 (fees shall be reasonable), and 3.3 (duty of candor).

2.2.4. In re Disciplinary Proceeding Against Richard Dale Shepard, 239 P.3d 1066 (Washington 2010). Mr. Shepard was found to have aligned himself with Steven Cuccia and Coranda Living Trust Services, which the Court characterized as "a living trust scam targeted at seniors." Mr. Cuccia would meet with seniors in their homes, and convince them of the need to purchase a living trust package from Coranda. The clients would then sign both an agreement with Coranda for the living trust package, and a fee agreement with Mr. Shepard by which, in exchange for $200, Mr. Shepard agreed to (among other things) provide "independent review of the client's estate planning needs to make

recommendations regarding appropriate planning tools and supporting documents." While Mr. Shepard did contact the clients by phone, notwithstanding the commitment to provide independent review, Mr. Shepard merely confirmed that the information that the Clients had provided to Mr. Cuccia, and which Mr. Cuccia, in turn, had provided to a document preparation service, was accurate. Mr. Shepard was found to have aided in the unauthorized practice of law, and was suspended for two (2) years.

In 2009, Washington adopted RCW 48.24.250, which grants to group life insurers the right, with the consent of the Washington State Insurance Commissioner, to offer will preparation services, financial and estate planning services, probate and estate settlement services, and such other services as the Commissioner may allow by rule. Query the result had the Cuccia/Coranda services been provided by a group life insurer who had been granted that consent.

2.2.5. David Hellenthal. In 2010, David Hellenthal was disbarred following his prior suspension from the practice of law. Mr. Hellenthal was originally suspended for 18 months for having drafted a trust intended to qualify, but which did not qualify, as a special needs trust, and for having named himself as the remainder beneficiary of that trust. More interestingly or subtly dangerous from an ethics standpoint, Mr. Hellenthal generally represented both spouses when one spouse was seeking to qualify for Medicaid eligibility, and generally recommended that the parties legally separate and that the spouse seeking to qualify for Medicaid transfer virtually all of his or her assets to the other spouse, without disclosing or addressing the conflicts of interest thus involved and without obtaining the waivers required by RPC 1.7. In 2010, Mr. Hellenthal was eventually disbarred for lack of diligence, failure to communicate, trust account irregularities, failure to protect clients' interests, commission of a criminal act, violation of a court order, and violations of duties imposed by or under the Rules for Enforcement of Lawyer Conduct. Mr. Hellenthal's conduct included practicing while on suspension, missing court hearings that resulted in defaults, and draining a trust over which he was a co-trustee for "trustee advancements".

2.2.6. Thomas W. Nawalany. At the request of a caregiver, Mr. Nawalany drafted a Will for a patient suffering from dementia which left all of the estate to the caregiver. He also caused the caregiver's 19-year-old son to be named as the attorney-in-fact for the patient/client. Mr. Nawalany had no prior relationship with the testatrix, and only met her at the time of execution of the documents. He did little or nothing to determine the testatrix's competency.

2.2.7. Carleton F. Knappe. In June, 2006, Carleton F. Knappe was admonished for having had direct contact with a personal representative, when he knew the personal representative to be represented by a lawyer, in violation of RPC 4.2.

2.2.8. J. Marvin Benson. Without any investigation into his client's continuing competency, Mr. Benson assisted a child of a client with dementia to obtain the client's power of attorney, which the child then used to steal funds from Mr. Benson's client. Mr. Benson was reprimanded, having been found to have violated his duty to his client with diminished capacity (RPC 1.14).

2.2.9. Vicki L. Walser. Ms. Walser affiliated herself with non-lawyers who marketed living trust packages. She delegated legal work to non-lawyers and assisted non-lawyers in the unauthorized practice of law, which were violations of RPC 5.4 (sharing fees with non-lawyers) and 5.5 (assisting in the unauthorized practice of law). In May, 2005, she was suspended for 2 years. Though a violation of the Rules of Professional Conduct and the law are different charges, query whether Ms. Walser's conduct would have been found to be a violation of the Rules of Professional Conduct had §§48.24.280 and 48.23.525 then been in effect, each of which permits life insurance companies to offer "non-insurance benefits" as policy benefits, including "will preparation services, estate planning services, and probate and estate settlement services."

2.2.10. Charles B. Allen. In February, 2004, Bellevue lawyer Charles B. Allen resigned in lieu of disbarment for having participated in an arrangement by which, for $75 per case, Mr. Allen reviewed living trust "applications" prepared by insurance agents selling living trust packages on behalf of Family First Estate Planning and Family First Insurance Services. At the time of his resignation, Mr. Allen was facing disciplinary charges of incompetence (RPC 1.1), participating in the unauthorized practice of law (RPC 5.5), sharing fees with non-lawyers (RPC 5.4), and conflict of interest (RPC 1.7). See section 2.2.7, above, re a possible change in the outcome of this charge given a change in Washington law.

2.2.11. Sandra L. Davis. In February, 2005, the Supreme Court suspended Ms. Davis for 18 months for having drafted a Will for the domestic partner of Ms. Davis' mother which left Ms. Davis' mother $10,000, which, at the time, was a violation of RPC 1.8(c). RPC 1.8(c) as adopted by both Washington and Idaho has broadened the definition of "related persons," which probably would have immunized this bequest. Ms. Davis was also found to have mischaracterized as estate assets funds in a joint account that, but for such mischaracterization, would have passed to one

of the domestic partner's children outside of probate, in order to fund the bequest to her Mother.

2.2.12. Steven C. Miller. In 2003, Cheney lawyer Steven C. Miller was disbarred for having written a Will (his defense was that his legal assistant had drafted the Will) naming himself as sole beneficiary of an aged client's estate. In addition, Mr. Miller borrowed substantial sums from the client, and, when challenged, urged that in doing so, he had complied with RPC 1.8. The Court held that Mr. Miller could prevail on his RPC 1.8 argument only if he could prove: "(a) there was no undue influence; (b) he gave the client exactly the same information or advice as would have been given by a disinterested attorney; and (c) the client would have received no greater benefit had she dealt with a stranger." The test suggests the risk attendant to entering into a business transaction with a client.

2.2.13. In re Stephen K. Eugster. See section 5.6.4, below.

2.2.14. In re Charna R. Johnson. Charna Johnson, a lawyer, took ballroom dancing classes from Chad Lakridis. Not long thereafter, Mr. Lakridis asked Ms. Johnson to represent him in his divorce from Jan Martin. The dissolution action ended when Ms. Martin died. Shortly following the funeral, Charna Johnson informed Mr. Lakridis that Jan Martin had "come" to her, and that Ms. Johnson was able to "channel" the deceased Jan Martin. That channeling included a series of e-mails and other communications in which Jan/Charna suggested sexual relations with Mr. Lakridis, which Charna, individually or possibly on behalf of the channeled-Jan, consummated. Following a skirmish over the late Ms. Martin's estate, with respect to which Ms. Johnson was co-counsel, Ms. Johnson's channeling claims and activities came before the Arizona State Bar. The State Bar recommended disbarment, in part because she lied about her channeling claims, but the Commission suspended her for one (1) year.

2.2.15. John A. Long. In 2015, Mr. Long was given Two Reprimands for his conduct. One of the Reprimands involved a business deal between Mr. Long and his client. client. Mr. Long and one of his clients, Ms. Cayward, an active member of several real estate investor associations, entered into an agreement whereby Ms. Cayward would refer potential clients seeking loan modifications to Mr. Long in exchange for $850 fee per client (as a credit against her legal fees). Mr. Long did not advise Ms. Cayward in writing of the desirability to obtain independent legal counsel or obtain Ms. Cayward's written consent to the terms of the arrangement.

2.2.16. James M. Healy, Jr.. In 2015, Mr. Healy stipulated to a six (6) month suspension for his failure to safe-guard his trust account and to review

his records. Mr. Healy had accepted approximately $130,000 into his trust account for two of his clients who managed a company that loaned money for construction projects. The cash had been provided by investors of his clients. In 2013, Mr. Healy learned that his adult grandson had stolen some of his trust account checks and that the grandson had negotiated a $100 check against the trust account. Mr. Healy confronted the grandchild who stated that he had destroyed the remaining checks. Mr. Healy then repaid the $100 into the trust account, but took no further action to safeguard his account. Over the next few months, Mr. Healy's unlawfully grandson negotiated checks in the amount of $81,915 from his trust account. Mr. Healy was unable to repay the funds to his clients.

2.3 Consumer Protection Act. In *Short v. Demopolis,* 103 Wn.2d 52 (1984), the Court held that the Consumer Protection Act applies to the "entrepreneurial aspects" of the practice of law, including "how the price of legal services is determined, billed, and collected and the way a law firm obtains, retains, and dismisses clients." In *Eriks*, *supra.*, the Supreme Court found that a lawyer's conflicts of interest might present a violation of the Consumer Protection Act if they occurred within the context of such "entrepreneurial aspects." See also *Cotton v. Kronenberg,* 111 Wn. App. 258 (2002). Accordingly, one who breaches an ethical rule, at least as it relates to such "entrepreneurial aspects," might be found to have violated the Consumer Protection Act and thus might become liable for or subject to not only discipline, but also, if sued, disgorgement of fees, damages, and attorney fees as well.

3. A LAWYER'S DUTY OF CARE. As a matter of law, a lawyer owes his or her client that degree of care, skill, diligence, loyalty, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law. *Cook, Flanagan & Berst v. Clausing,* 73 Wn.2d 73, 438 P. 2d 865 (1968). If a lawyer holds himself or herself out as an expert, the lawyer may be held to a standard of care and performance of those who hold themselves out as experts. *Walker v. Bangs,* 92 Wn.2d 854, 601 P. 2d 1279 (1979). The standard of care is a statewide standard; it is not a localized standard. *Cook, supra.*

A lawyer can be liable to his or her client(s), and as noted below, perhaps others as well, for a breach of the foregoing duty of care and loyalty. However, a breach of an ethical duty may be evidence of, but is not the same as, a breach of the duty of loyalty and care. *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P. 2d. 646 (1992); *Hetzel v. Parks*, 93 Wn. App. 929, 971 P.2d 115 (1999). *See also,* the Preamble to the Washington Rules at Section 20. A breach of an ethical duty, standing alone, is thus not prima facie actionable. However, in *Eriks v. Denver*, 118 Wn.2d 451 (1992), the Court held that an attorney with an un-waived multiple client conflict thereby violated his duty of loyalty as well, thus establishing a direct link between a violation of the Rules of Professional Conduct and malpractice. See also *Traub v. Washington,* 591 SE2nd 382 (2003), in which the Court established a direct link between the Rules of Professional Conduct

and the standard of care. Thus, business or estate planning lawyers probably ought not to draw too much comfort from the seeming teachings of *Hizey* and *Hetzel*, and should pay greater attention to *Eriks*. In fact, poor client selection, often coupled with allegedly confusing roles for the lawyer (such as an alleged conflict of interest), is a common fact pattern of the "big money" case against law firms.

3.1 Duty to Assure Timely Execution of Testamentary and Other Instruments. Does an attorney have a duty to assure timely execution of testamentary or other documents? What if, for example, a client requests fundamental changes to his or her estate plan, the attorney drafts documents reflecting those requested changes and sends them to the client for review, and after appreciable delay (during which the attorney fails to encourage the client to complete the process), the client dies prior to executing the new documents? Is the attorney liable to third parties who would have benefited by the testamentary documents as changed? *Parks v. Fink*, 173 Wn.App. 366, 293 P.3d 1275, *review denied*, 177 Wn.2d 1025, 309 P.3d 504 (2013); *Sisson v. Jankowski*, 809 A.2nd 1265 (New Hampshire 2002); *Radovich v. Locke-Paddon*, 35 CalApp 4th 946 (2002), and the cases cited therein, hold that an attorney has no duty to assure timely execution of the documents and to impose such a duty would compromise the duty of loyalty owed a client (by encouraging an attorney to encourage his or her client to execute documents quickly, perhaps without the opportunity for thoughtful reflection).

3.2 Duty to Assure that Client Implements "Best" Strategies. Does an attorney have a duty to assure that the client implements the estate planning strategies which the attorney believes to be in the client's best interests? For example, if the attorney believes strongly that the client needs a tax-sensitive Will or Trust, but the client insists upon a simple Will or Trust, does the duty of competence require that the attorney either convince the client of the need for and wisdom of a tax-sensitive document or withdraw? In a very different context, this was at issue in *In the Matter of the Janice Galloway Trust*, No. C5-04-200042 (Minnesota Dist. Ct., 2007), in which expert witnesses retained by Mrs. Galloway's children, as remainder beneficiaries of the Trust, urged that US Bank, as trustee, had a duty to place her Marital Deduction Trust estate in a family limited partnership, in order to depress the value of that Trust for estate tax purposes. The Court held that US Bank had no duty to engage in estate tax saving strategies, but a number of commentators predicted that the claim itself foretold claims against attorneys for their failure to cause their clients to implement strategies best meeting the needs of beneficiaries. Those claims have not arisen, and, as described in Section 8, below, under the law as it currently exists, subject to limited exceptions, it appears beneficiaries would lack standing to bring such a claim. Instead RPC 1.4(a)(1) and 1.4(b) suggest that so long as the client is adequately informed, the choice of options rests with the client. The attorney is thus permitted to implement the option chosen by the client, even though the attorney believes such option inferior to one or more other alternatives.

Note that the lack of a duty to assure that the client adopts the best strategy is

materially different from a lack of a duty to assure that the client is aware of the best strategy. Indeed, RPCs 1.1 (Competence), 1.3 (Diligence), 1.4(a)(1) and 1.4(b) each suggest that a lawyer has a duty to assure that the client is aware of all reasonably available alternative strategies by which to meet the client's goals. As noted above and for the reasons set forth at section 8, below, however, it is likely only the client could complain for the failure to meet such duty.

4. A LAWYER'S DUTY OF ZEAL. At common law, an attorney owed his or her client the unbridled duty of zeal, upon the premise that "an advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client." *Proceedings in the House of Lords, Trials of Queen Caroline 7 (*Duncan Stevenson & Co. ed. 1820) (quoting Lord Brougham). Does the same duty still exist, or have Rules 3.4 and 4.1 and case law changed the status and duties of lawyers by defining the lawyer as not only an advocate but also an officer of the Court? See, for example, *Washington State Physicians Exchange & Association v. Fisons Corp.,* 122 Wn.2d 299 (1993). For example, in negotiations with others, does an attorney have a duty to assure that the attorney's client is wholly truthful and transparent, and a duty to assure that the opposing party is not mislead?

4.1 Relevant Rules. RPC 4.1(b) requires an attorney to disclose material facts to a third person when disclosure "is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is *prohibited* by RPC 1.6." RPC 1.2(d) provides that "a lawyer shall not…assist a client in conduct the lawyer knows is…fraudulent." RPC 1.6, as adopted in both Washington and Idaho, generally prohibits disclosure, but permits (ie, does not *prohibit*) disclosure "to prevent the client from committing a crime,…" or "…to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result … from the client's commission of a crime in furtherance of which the client has used the lawyer's services." Thus despite the fact that RPC 1.6 generally appears to trump RPC 4.1(b), and is often cited as the cornerstone of the legal profession, numerous cases and recent legislative and regulatory trends in the wake of the Enron/WorldCom cases, which appear to signal a requirement of (or at least a greater opportunity for) greater disclosure and appear to suggest a diminished acceptance of the lawyer's role as a close-mouthed advocate for an errant client, lead one to the conclusion that a lawyer is at greater risk if the lawyer fails to disclose a fraud of a client than if he discloses it.

4.2 Analysis. The threshold issue is thus whether the client's conduct or proposed conduct constitutes a "crime" as contemplated by RPC 1.6(b)(1). The Rules are silent as to that which is deemed to be a "crime" for purposes of disclosure. Unless the attorney concluded that the failure to disclose would be a "crime," the attorney could not disclose the material fact under RPC 1.6(b)(1). Washington and Idaho differ in the formulation of RPC 1.6(b)(3) dealing with disclosure "to prevent, mitigate, or rectify substantial injury to the financial interests…of another." Washington frames its Rule in terms of "fraud," which

is defined in RPC 1.0(d) as "conduct that is fraudulent under the substantive or procedural law of the jurisdiction and has the purpose to deceive." Under Washington's formulation of the rule, disclosure may not be permissible, because the definition of "fraud" in the RPC's does not include "failure to apprise another of relevant facts". *See* Comment to Model Rule 4.1. However, *Obde v. Schlemeyer*, 56 Wn.2d 449, 353 P.2d 672 (1960) supports a contrary result in the context of the sale of an apartment house.

If the lawyer knows or concludes that the client is knowingly failing to disclose germane information and is uncertain whether the client's failure to disclose constitutes fraud, the lawyer must face the ethical dilemma raised by RPC 4.1(b), RPC 1.2(d) and RPC 1.6. In that situation, the Rules of Professional Conduct are clear as to the lawyer's first response. Under RPC 1.2(d), the lawyer should discuss the legal consequences of the client's course of conduct, analyze the proposed conduct under applicable law, and offer options to the client that arguably would not involve fraudulent conduct.

If the client refuses to make the disclosure or otherwise prevent or mitigate the possible fraud, though disclosure is only permissive under Rule 1.6, the seeming thrust and direction of the law would suggest either that the lawyer should withdraw from the representation or, instead, should make the disclosure pursuant to the possible authority granted the lawyer in Rule 1.6. The lawyer does so, however, at his peril, if, in hindsight, the disclosure is not permitted by RPC 1.6.

In any case, the matter should be brought to the attention of the client and the lawyer should advise the client of the risks inherent in the client's decision to withhold the information. G.C. Hazard and W.W. Hodes, 2 The Law of Lawyering § 4.1:201 (1993) at 717. In the author's judgment, this would be a good first step. If the client failed to disclose thereafter, however, it would not be a reasonable last step.

4.3 <u>Does a Lawyer's Duty of Zeal Extend to Dormant Representation?</u> RPC 1.4, as adopted in Washington, encourages extensive communication between an attorney and his or her client. Does that duty of zealous communication require an attorney to advise the client, following the "active phase" of representation, of changes in the law which might affect the client's estate planning or to bring to the attention of the client alternative estate planning strategies which might be of value to the client? Does an attorney have a duty to encourage the "dormant" client to commence the "active phase" of representation? The ACTEC Commentary on RPC 1.4, says that absent an agreement, while each of such communications might be a valuable client service, none is required by the Rules. The author has found no case which directly speaks to the issue, though *Stanglund v. Brock,* 109 Wn.2d 675 (1987), more fully described in section 10.2, infra, suggests no such duty.

5. <u>WHO IS THE CLIENT?</u> RPC 1.1 demands that "A lawyer shall provide competent representation to a client." That demands not only competent representation, which, pursuant to Rule 1.1, "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary to the representation," (see, for example, *Lewis v. State Bar of California,* 170 Cal Rptr 634 (1981), in which Attorney Lewis was disciplined for having undertaken a matter beyond his competence), but also identification of the "client." No duty is more fundamental, nor sometimes more complex, than identifying the client. The other Rules discussed in this Outline can be applied if, and only after, the attorney has identified and, in some instances confirmed, the identity of his or her "client."

5.1 <u>Intake and Conflict Checking Procedures</u>. If the identity of a potential "client" is clear, the first question with which the attorney must deal is whether representation of such client will conflict with the attorney's representation of an existing or former client. That demands that the attorney apply a conflict checking system, the complexity of which is probably proportional to the size of the attorney's firm. The conflict checking database should include all clients of the firm from the inception of the practice, because "once a client, always a client, unless such relationship is terminated." WSBA Informal Ethics Opinion 2097 (2005). That conflict check should occur before the attorney obtains any substantive information from the potential client, because if, after having obtained substantive information from the potential client, the attorney discovers a conflict, neither the attorney nor his or her firm (RPC 1.10) may be able to participate in the transaction/litigation about which they obtained information from the "potential client."

5.2 <u>Existence of Attorney-Client Relationship</u>. The existence of an attorney-client relationship "turns largely on the client's subjective belief that it exists," regardless of whether or not a fee is paid. The client's subjective belief is controlling only if it "is reasonably formed based on the attending circumstances, including the attorney's words or actions." See for example, *Bohn v. Cody*, 119 Wn.2d 357 (1992), citing *In Re McGlothlen*, 99 Wn.2d 515 (1983), within which Attorney Cody carefully explained to Mrs. Bohn that he would not represent her as he represented the borrower who was adverse to her in the transaction, but then proceeded to give Mrs. Bohn both legal and factual advice. While, because of the attorney's statements that he did not represent Mrs. Bohn, which Mrs. Bohn admitted, the attorney was held not to have an "attorney-client" relationship with Mrs. Bohn, he was found to have owed a duty to Mrs. Bohn which may have been breached. A summary judgment in favor of Attorney Cody was therefore reversed.

Jones v. Runft, Leroy, Coffin, & Matthews, Chtd., 125 Idaho 607, 873 P.2d 861 (1994) is a somewhat analogous case. The law firm represented the borrower in a secured loan transaction. The lender sent the law firm the loan proceeds, together with a letter saying "Your responsibility is to handle the transaction in the best interests of [the lender]." The law firm disbursed the loan proceeds

without having obtained and recorded one of the lender's security instruments, and the lender was injured. While, as in *Bohn,* the Court found that the lender was not a client of the law firm, the Court did find that by not having repudiated the direction in the letter and by accepting the loan proceeds for disbursement, a question of fact arose as to whether the law firm assumed a contractual or other duty to the lender. The law firm could have avoided this result by proceeding as directed by RPC 4.3 (dealing with an unrepresented party), by advising the lender that the law firm represented only the borrower, and had and would assume no duty to the lender.

Malpractice awards have been based upon a "relationship" formed, (1) by a lawyer's substantive response to a non-lawyer's question at a Seminar, (2) by a casual (albeit apparently substantive, at least in the eyes of the "client") response to a question while shopping at a grocery store, and (3) by other seemingly inconsequential comments or conversations. Be forewarned, therefore, that any substantive comment or conversation, whether or not billed for, may be sufficient to satisfy (or at least implicate, thereby placing you in the crosshairs of a claim) the "reasonable expectations" test of *Bohn*, thereby giving rise to a duties of care, loyalty, zeal, confidence, etc.

The existence of an attorney-client relationship also turns on the client's capacity to enter into such a relationship. Absent capacity, the nominal client would not owe the traditional "duties" of a client (candor, etc) to the attorney. Query, however, whether an attorney who undertook such representation could successfully urge that the attorney owed no duties to the nominal client as a consequence of the client's lack of capacity to form such relationship.

In *Rogers v. Household Life Insurance Company,* 150 Idaho 735, 250 P.3d 786 (Idaho 2011), the Idaho Supreme Court affirmed a District Court ruling that a life insurance policy on the life of Alan Rogers was *void,* not *voidable,* because Mr. Rogers had been determined to be incompetent in a guardianship action before he entered into the insurance contract. In broad language, the Supreme Court held that "the appointment of a guardian with full powers represents a finding that the ward lacks the capacity to contract as a matter of law." Regarding the issues raised by the *Rogers* decision, see Aldridge, Robert L, *Guardianship and Ethics After Rogers,* The Advocate (June-July, 2012) at page 48.

Not long after it issued the *Rogers* decision, the Idaho Supreme Court held in *In the Matter of the Estate of Kathleen Conway,* 277 P3d 380 (2012), that notwithstanding an existing limited guardianship, Kathleen Conway possessed sufficient capacity to execute a valid Will, The Court neither mentioned nor distinguished the *Rogers* decision.

5.3 <u>Can the Lawyer Represent Both Spouses</u>? Generally the estate planning or business lawyer can represent both spouses jointly, regardless of the existence of potential conflicts of interest, because such representation best conforms to

client expectations and best affords appropriate delivery of legal services without excessive cost or duplication of services. See, for example, *Ethics Opinion No. 960731*, issued by the State Bar of Montana in December, 1996. Note, however, that there is a price for that joint representation, namely that information shared by one spouse is not privileged information as to the other spouse and thus can (and perhaps should) be shared with the nondisclosing spouse. Either spouse can compel discovery of information provided to the lawyer by the other. As to third parties, both possess the privilege and either can prevent disclosure.

a. Separate Representation of Spouses. In 1993, the Real Property, Trust and Probate Section of the ABA, recommended that in the context of estate planning, each spouse should be treated as a separate client. The recommendation has been widely criticized and, to the author's understanding, seldom followed. See however, *Leff v. Fulbright & Jaworski, L.L.P.,* 78 AD3d 531, 911 N.Y.S.2d 320 (2010), in which the Court held that because Fulbright & Jaworski had represented Mr. and Mrs. Leff separately, rather than jointly, Fulbright & Jaworski owed Mrs. Leff no duty with respect to Mr. Leff's estate planning, and thus could not be liable for any claimed losses suffered by Mrs. Leff attendant to that planning.

b. RPC 1.7. RPC 1.7 demands that a lawyer not represent a client if the representation of that client will be directly adverse to the interests of another client or there is a significant risk that the representation will be materially limited by the lawyer's duties to or relationship with a current or former client or by the lawyer's own interests. The potential for competing economic interests or goals in a marital setting may, depending on the facts, but does not necessarily, by itself, give rise to a conflict within the contemplation of Rule 1.7. However, once a conflict of interest arises, the lawyer must either obtain written consent to the continuing representation, upon full disclosure, if the conflict can be waived, or must withdraw.

There are many points of disagreement between spouses that may not rise to the level of a conflict of interest for purposes of a Rule 1.7 conflict waiver. Spouses may differ in their estate planning objectives; for example, one spouse may want to benefit the couple's children sooner than does the other, or may want to allocate his or her assets in unequal shares to the children. In the context of a second marriage, in which each spouse has children from a prior marriage, it is likely that their plans and objectives will differ. Nonetheless, different choices made by each spouse with respect to his or her own assets typically do not rise to a material potential for conflict which would implicate Rule 1.7.

Query, however, whether the characterization of property as "yours, mine, and ours," as a predicate to planning, involves an inherent, and

irreconcilable, conflict of interest. A conflict occurs when spouses disagree on issues in which only one spouse can succeed, such as ownership rights or the characterization of property as separate or community or where the exercise or implementation of one spouse's plan will defeat or prejudice the other spouse's intended plan. Illustrative of such conflict, in *Sindell v. Gibson, Dunn & Crutcher*, 63 Cal. Rptr. 2d 594 (Ct. App 1997), the Court held that the defendant law firm committed actionable malpractice by not having a separately represented second spouse sign a separate property declaration with respect to her husband's separate property in the context of the husband's estate planning, thereby frustrating her husband's estate planning.

While joint representation of both spouses in estate planning is both accepted and generally acceptable, it is thus easy to envision situations in which it would not be appropriate. For example, as noted above, query whether an attorney should represent both spouses in a second or later marriage, particularly if issues of property characterization exist. Query if it would be prudent to do so even if the spouses agree on the characterization of property, insofar as the attack is likely to come from a beneficiary who claims to have been disadvantaged by such characterization. Query if the attorney should represent both spouses if the attorney has a long-standing relationship with one of the spouses. Query if the attorney should do so if the marriage is unstable (given today's divorce rates, can the attorney plan based on the assumption that the marriage is stable?). In short, joint representation of both spouses is accepted practice, but it is not a practice which can be blindly followed.

c. Assessing Confidences in the Joint Representation of Spouses. In a joint representation, if one spouse (the "confiding spouse") imparts a confidence to the lawyer which is not to be shared with the other spouse (note that if the attorney had advised the spouses, in an engagement letter or otherwise, that there would be no secrets between spouses, this situation would not arise), the lawyer must inquire into the nature of the confidence in order to determine whether the couple's difference that caused information to be secret constitutes either a material potential for conflict or true adversity. The ACTEC Commentaries describe three broad types of confidences that will cause a lawyer to conclude that differences between spouses constitute true adversity, and thus implicate Rule 1.7 and the need for knowing waivers of the conflict or withdrawal:

1. Action-Related Confidences. An action-related confidence is a communication that asks the lawyer to draft a document or give advice that, without the other spouse's knowledge, would reduce or defeat the other spouse's interest in the confiding spouse's property or pass the confiding spouse's property to another. For example, the request, in confidence, to draft a codicil giving significant

assets to the confiding spouse's mistress, to the detriment of the spouse, would be an "action-related confidence."

2. Prejudicial Confidence. A prejudicial confidence is a communication of intent that seeks no action by the lawyer, but nonetheless signals substantial potential of material harm to the interests of the other spouse. For example, if a lawyer was recommending the execution of a community property agreement which would have the effect of converting the nonconfiding spouse's separate property to community property, the disclosure by one spouse (without disclosure to the other) that divorce is imminent would be a prejudicial confidence.

3. Factual Confidence. A factual confidence is a communication by which the lawyer learns that the expectations of one spouse with respect to the plan, or the spouse's understanding of the facts on which the plan is based, are not true. The disclosure of an illegitimate child, not known to the other spouse, who would take a portion of an estate would be a "factual confidence."

4. Nonadverse Confidences. In his representation, the lawyer may obtain knowledge or confidences which arguably do not significantly affect the estate planning relationship. Such confidences range, for example, from the disclosure of a significant relationship outside the marriage by one spouse (ACTEC opines that such a disclosure would be a nonadverse confidence, but the author would suggest that it may fundamentally affect the estate planning process and may represent a "factual confidence") or the disclosure of significant hidden assets by one spouse to isolated confidences about the strength of the marriage or the other spouse's ability to handle money. According to the Special Study Committee (of the ABA) on Professional Responsibility, which has explored the rules in parallel with ACTEC, unless a "nonadverse confidence" is coupled with an "adverse confidence," the lawyer is free to assess each individual incidence of a nonadverse confidence and the duties required of him or her in the representation.

   The author is far less sanguine than are ACTEC or the Select Committee about the opportunity for or wisdom of continued representation given "material, nonadverse" confidences. The premise for joint representation of both spouses is that both will share openly with each other and counsel those factors which they believe germane to the representation and planning. If either is unwilling to do so, the lawyer better either withdraw or contact his or her carrier, because sooner or later, the representation, like the marriage, is likely to "blow up."

5. Consequences of an "Adverse" Confidence. According to the Select Committee, faced with an "adverse" confidence, in the absence of an Engagement Letter addressing such risk, the lawyer must act as a *fiduciary* between clients -- "how did I ever get in the middle of this. . ." -- and must balance the potential for material harm to the confiding spouse, and the possible breach of the duty of confidentiality under RPC 1.6, which would be caused by disclosure against the potential for material harm to the other spouse caused by a failure to disclose. The Special Study Committee on Professional Responsibility concluded that, having thus balanced the competing interests (at his or her peril), the lawyer has a range of options including disclosure, nondisclosure, consent to disclosure from the confiding spouse, or withdrawal. In the author's opinion, if one spouse discloses an "adverse" confidence to the lawyer, unless the confiding client consents to disclosure, the attorney practically must withdraw. The only question then becomes whether the withdrawal should be a "quiet" or "noisy" withdrawal, in which the lawyer discloses the basis for withdrawal ("I am withdrawing, because I have concluded that a potential conflict of interest exists between you based upon the following:. . ."). Note, however, that if the lawyer engages in a "noisy" withdrawal, and if the confidence of the confiding spouse is thereby disclosed to the nonconfiding spouse (note that the ability to assert the "attorney-client privilege" and the right to prevent disclosure of confidential information are two different things), in effecting the "noisy" withdrawal, the lawyer may have breached a duty of confidentiality owed the confiding spouse under RPC 1.6.

In 2006, ACTEC published a number of Engagement Letters which complement the ACTEC Commentaries, including several engagement letters addressed to joint representation of spouses. Those materials, including the Commentaries, can be found on the ACTEC Website (www.actec.org).

5.4 Are The Rules of Joint Representation Different For Domestic Partners or Unmarried Couples? The same foundation for joint representation—conformity to expectations, appropriate delivery of services without excessive or redundant costs, and often common agreement on the plan of disposition—would seem to argue for permissible joint representation in this setting as it does for the spousal setting. However, in this setting, there are more likely to be property characterization issues than in the spousal setting, which would be aggravated if the "committed intimate relationship" line of cases were to apply. The author would thus be hesitant to engage in joint representation of domestic partners or unmarried couples.

5.5. Family Representation. Can the business or estate planning lawyer, as part of the same engagement, represent multiple family members? For example, if a child makes an appointment for his or her parent, attends the conference with the lawyer, advises the lawyer about his or her parents' desire to "preserve assets for the children," and asks or encourages his or her parents to ask the lawyer to prepare a Will leaving the estate to the children "in equal shares," and to name such child as the personal representative and attorney-in-fact, does the attorney represent the parent, child, or both? Can a lawyer represent both parent and child or children in business succession planning? Can the lawyer represent both parents and children in the formation of a family limited liability company or limited partnership? What about representation of multiple members of a family in multiple matters, in some of which a number of family members participate, and others of which are unique to one family matter? In such setting, how should the attorney proceed?

Comment 28 to RPC 1.7, the ACTEC Commentaries on RPC 1.7 at page 91, ABA Formal Opinion 02-428, and a number of cases [see, for example, *Griva v. Davison,* 637 A.2d 830 (D.C. 1994)], and numerous articles [see, for example, Mary F. Radford, *Ethical Challenges in Representing Families in Family Limited Partnerships,* American College of Trust and Estate Counsel Journal, Vol. 35, p. 2 (2009)] make clear that such representation is permissible. They similarly make clear the dangers of such representation.

Subject to certain limited exceptions, RPC 1.6 demands that the lawyer preserve confidences or secrets, unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation. RPC 1.4, on the other hand, requires the lawyer to promptly advise the lawyer's "client" of all relevant communications. RPC 1.7, more fully described above, requires that a lawyer not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, subject to certain exceptions. RPC 1.8(f), which often is implicated when a child seeks estate planning services for such child's parent(s), prohibits a lawyer from accepting compensation from a non-client for services rendered to a client, unless the client consents after consultation, there is no interference with the lawyer's independent judgment, and confidences are protected.

Numerous articles encourage and invite such representation, and describe such representation as common in the family setting. [see, for example, Radford, above, and the articles cited therein; Ronald D. Aucutt, *Creed or Code: The Calling of the Counselor in Advising Families,* 36 American College of Trust and Estate Counsel Journal, No. 4, page 669 (2011)].

Notwithstanding that invitation, in the author's judgment, it is unlikely that the attorney could satisfy the foregoing rules, particularly those set forth in RPC 1.4,

1.6, and 1.7 (or at least be assured of satisfying such rules) in the family setting for the duration of the representation. Both the setting itself, together with the dual representation, probably discourage candor and zealous representation. Accordingly, in the author's opinion, the attorney should at the outset of the representation, make it clear that the attorney will represent only one of the parties (typically the parent for whom documents will be drawn or on whose behalf the lawyer will work with respect to succession planning). In addition, as a consequence of RPC 4.3, which demands that a lawyer interacting with an unrepresented person, who believes that such person may misunderstand the lawyer's role, take steps to prevent or correct such misunderstanding, the lawyer should send a letter to the child making certain that the child understands that the attorney will represent only the parent. Subsequent contacts should be consistent with that letter. For example, draft documents should be sent only to the client, unless the client otherwise consents, future meetings should be only with the client, and the lawyer, of course, should pursue only the best interests of the client.

5.6 Representing the Client With Diminished Capacity. RPC 1.14, entitled *Client With Diminished Capacity,* provides:

a. When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

b. When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

c. Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

5.6.1 Importance of Capacity. As noted in section 5.2, above, an attorney-client relationship cannot be formed if the client lacks the capacity to form such relationship. Further, a client's capacity is critical to assure that the attorney can meet the attorney's obligation to advise the client fully with respect to available alternatives, and assist the client in choosing the alternative which best satisfies the client's goals. Capacity is similarly critical to the validity and enforceability of the client's

documents themselves. It is thus fundamental that as a predicate to rendering services, the attorney reasonably satisfy himself or herself that the client possesses the requisite capacity.

5.6.2 Determination of Capacity. Because of the importance of testamentary freedom, cases such as *Moore v. Anderson Zeigler Disharoon Gallagher & Gray,* 109 CalApp 4th 1287 (2003), and the cases cited therein, the Restatement Third of the Law Governing Lawyers, §51, Comment (f), and the ACTEC Commentaries, state that a lawyer should proceed based upon the presumption that the client possesses the requisite capacity, and has no duty to third parties to confirm capacity. Indeed, insisting upon confirmation of capacity as a condition of drafting and participating in the execution of a Will or other dispositive instruments has been held to "turn the presumption of testamentary capacity on its head" and potentially breach the duty owed one's client (*Moore, supra*). Thus, say the cases, the attorney owes only the duty to reasonably, fairly, and objectively personally evaluate capacity and, if the attorney has concerns, make reasonable inquiries, but no duty to third parties to confirm capacity. The cases, therefore, call into question the practice of encouraging or causing a borderline estate planning client to obtain medical certification of capacity as a prelude to planning (though such certification may be useful to assure that the client's plan is likely to be sustained if challenged). Though not discussed in the cases, the cases make clear the importance of documenting and retaining in the attorney's file the basis upon which the attorney made the determination of competency.

5.6.3 Tools For Assessing Capacity. There are a number of assessment tools which may be used to assess capacity. The most-often cited is the Mini Mental Status Exam (MMSE), which is generally accepted as a reliable determinant of capacity. A far more entertaining assessment tool (if anything in this area can be entertaining), which has been demonstrated to correlate closely with the MMSE, is The Legal Capacity Questionnaire, developed and copyrighted by Baird B. Brown of Grand Junction, Colorado. In the author's experience, most attorneys do not consistently utilize formal assessment tools, though the failure to do so creates risk if the attorney should be called upon to defend his or her determination of capacity. At a minimum, however, the attorney should make and document sufficient inquiries of the client that, if challenged, the attorney can describe the sound basis upon which he or she made that determination.

5.6.4 Disclosures to Protect the Client Who Lacks Capacity. If, pursuant to RPC 1.14(b), a lawyer concludes that a client lacks the capacity to act in his or her own best interests, can the attorney disclose confidences if the attorney concludes that those disclosures are necessary to adequately protect the client? Though the authorities in other jurisdictions are split, both

Washington and Idaho, pursuant to RPC 1.14(b) and 1.14(c), permit such limited disclosure. But what degree of potential harm should trigger disclosure? Neither cases nor ethics opinions nor the Commentaries provide material guidance. Instead, the Commentaries merely state that the lawyer must consider the nature and extent of the risk and the possible substantiality of harm. But note the risk to the lawyer. Disclosures clearly offend RPC 1.6, the duty of confidentiality. Those disclosures are immunized if, but only if, the lawyer reasonably believed that such disclosures were necessary to protect the client. If the lawyer is wrong, or cannot defend the diligence with which the lawyer sought to determine whether the client was at risk, the lawyer risks disbarment. See, for example, *In the Matter of the Disciplinary Proceeding Against Stephen K. Eugster,* 166 Wn2d 293, 209 P.3d 435 (Wash. 2009). See also *Estate of Lint,* 135 Wn.2d, 957 P.2d 755 (1998), which Senior Disciplinary Bar Counsel for the Washington Bar Association has cited as providing valuable lessons with respect to how best to prudently proceed to seek a guardianship for one's client.

In the *Matter of Welfare of Cudmore v. Bolliger*, 195 Wn.App. 1002 (2016)(unpublished), the Court of Appeals upheld the trial court's decision that a Vulnerable Adult Protective Act (VAPA) Order should be entered against an attorney, John Bolliger. The Court determined that the VAPA was necessary to prevent the attorney from contacting his elderly client. Mr. Bolliger had created estate planning documents for his elderly client which named himself as attorney-in-fact for financial and medical matters and named himself as Personal Representative of the elderly client's estate. Interestingly, in *Bolliger*, the Court held that although inserting yourself into the client's documents as a fiduciary is not a violation of the RPCs, it is a practice that the Court disapproves, and which the Court believes no attorney should engage, and which should not occur in the future.

5.7 If the Lawyer Represents a Fiduciary of an Estate or Trust, Or a Guardian of a Ward, Who is the "Client?" Comment 40 to new Washington Rule 1.7 states "under Washington case law, in estate administration matters, the client is the personal representative of the estate." However, in the author's judgment, the authorities in the State of Washington, like those in other jurisdictions and those academicians who have advanced proposals, do not necessarily support that statement. *In re Estate of Larson*, 103 Wn.2d 517 (1985), the Court held that the fiduciary duty of the attorney ran not only to the personal representative but also to the heirs. However, in *Linth v. Gay*, 190 Wn.App. 331, 260 P.3d 844 (2105), the Court held that the attorney for the Personal Representative was not liable to the beneficiaries of the Estate. The beneficiaries, the Court noted, had other options to pursue, including a claim against he PR. Similarly, *In re Vetter*, 104 Wn.2d 779 (1985), the Court held that as attorney for the personal representative, Mr. Vetter represented not only the personal representative but also the estate. In *In Re*

Fraser, 83 Wn.2d 884 (1974), in the context of a disciplinary proceeding, the Court held that Mr. Fraser represented both the guardian and the ward. More recently, however, in *Trask v. Butler*, 123 Wn.2d 835 (1994), the Washington Court introduced a "modified multifactor balancing test," and held that under that test, the primary inquiry is the degree to which the representation was "intended to benefit the plaintiff." Based upon that test, the Court held that Mr. Butler, who represented the personal representative of an estate, owed no duty to the beneficiaries of that estate. In *Stanglund, infra*, on the other hand, the Court discovered the duty owed third parties who, absent the discovery of such duty, would have been without a remedy. Similarly, in *Janssen v. Topliff,* 110 WnApp. 76 (2002) and *Estate of Treadwell v. Wright,* 115 WnApp 238 (2003), applying the "multifactor balancing test," the Court held that the attorney for the guardian owed duties to the ward. The decisions, in large part, appear to be driven by the beneficiaries' or ward's ability (or lack thereof) to bring an action against the personal representative or guardian for a breach of fiduciary duties.

Idaho has drawn a clear distinction between representing the personal representative and representing the beneficiaries In *Allen v. Stoker,* 138 Idaho 265, 61 P3rd 622 (2002), the Court stated that personal representatives and beneficiaries are often adverse to one another, and thus to suggest that an attorney for the personal representative owed duties to the non-client beneficiaries would create a patent conflict of interest. In that case, Ms. Allen was a beneficiary of an estate who was injured by the defalcations of Mr. Stoker's client, the personal representative of the estate (who was later removed in favor of Ms. Allen). Holding that Ms. Allen's remedy was against the personal representative, and that Ms. Allen was not a third-party beneficiary of the attorney-client relationship between Attorney Stoker and his client, the Court dismissed Ms. Allen's claim.

In an interesting twist on the above question, in *Fitzgerald v. Linnus,* 765 A.2d 251 (N.J. Super. Ct. App. Div. 2001), the Court held that Mr. Linnus, an attorney who had made clear to Ms. Fitzgerald that he was representing her solely in her fiduciary capacity, did not owe her a duty in her individual capacity. Ms. Fitzgerald asserted that Mr. Linnus, who represented Ms. Fitzgerald as the personal representative of her husband's estate, should have advised her to disclaim assets in favor of her children, thereby taking advantage of her late husband's transfer tax exemption. The Court stated that such advice to her as an individual would have been outside the scope of Mr. Linnus' express and intended representation of her solely as a fiduciary, and thus that Mr. Linnus did not owe her a duty as an individual.

The ACTEC Commentaries do little to resolve the conflict or confusion. Instead, the ACTEC Commentaries state:

> The nature and extent of the lawyer's duties to the beneficiaries of the fiduciary estate may vary according to the circumstances, including the nature

> and extent of the representation and the terms of any understanding or agreement among the parties (the lawyer, the fiduciary, and the beneficiaries). The lawyer for the fiduciary owes some duties to the beneficiaries of the fiduciary estate, although he or she does not represent them.

Given the absence of clarity suggested by the ACTEC Commentaries, a lawyer would be well advised to identify in a letter to the fiduciary the scope of the lawyer's intended representation and to send copies of that letter to the beneficiaries advising them of any limitations upon the lawyer's representation. The ACTEC Commentaries continue:

> The lawyer for the fiduciary should inform the beneficiaries that the lawyer has been retained by the fiduciary regarding the fiduciary estate and that the fiduciary is the lawyer's client; that while a fiduciary and the lawyer will, from time to time, provide information to the beneficiaries regarding the fiduciary estate, the lawyer does not represent them; and that the beneficiaries may wish to retain independent counsel to represent their interests.

The ACTEC website contains a sample letter.

What should the lawyer do if, while representing the fiduciary, the lawyer becomes aware of any potential breaches of trust by the fiduciary? Clearly, the attorney should bring those breaches of trust to the fiduciary's attention and seek to cause the fiduciary to voluntarily remedy those breaches. But what should the lawyer do if the fiduciary is unwilling or unable to remedy the breach? If the lawyer truly represents only the fiduciary, RPC 1.6, which demands that the lawyer respect client confidences, would generally prevent the lawyer from disclosing the misconduct to the beneficiaries. Note, however, that Washington's formulation of RPC 1.6 provides at paragraph (e):

> [A lawyer] may reveal information relating to the representation of a client to inform *a tribunal* about any client's breach of fiduciary responsibility when a client is serving as a court-appointed fiduciary such as a guardian, personal representative or receiver. [emphasis added]

Idaho's Rules of Professional Conduct do not contain a similar provision, though, like Washington's, they would permit disclosure to prevent fraud or the commission of a crime.

Sadly, however, RPC 1.6(e) as adopted by Washington does not permit disclosure to beneficiaries, and a lawyer who fails to inform the beneficiaries of the fiduciary's misconduct may ultimately be liable for losses to the fiduciary estate if, notwithstanding cases like *Allen v. Stoker,* above, a Court, applying the modified multifactor balancing test, concludes that the lawyer owed a duty to the beneficiaries just as he or she owed a duty to the fiduciary. As a consequence, the ACTEC Commentaries conclude that the lawyer representing a "breaching, noncorrecting" fiduciary has right of disclosure to beneficiaries. A number of state ethical opinions, distinguished by ACTEC, and ABA Opinion 94-380, hold otherwise. In such event, if the fiduciary will not voluntarily disclose and/or correct his or her breaches of trust, the authors believe strongly that the lawyer should withdraw.

5.7.1 Clients Bearing Multiple Relationships To An Estate or Trust. Be extremely careful in the situation where a client might bear several relationships to an estate or trust. For example, the personal representative will often be a beneficiary of the estate, and a conflict may arise between his or her duties as personal representative and desires as a beneficiary (But see *Baker Manock & Jensen v. Superior Court (Salwasser)* , 175 Cal.App. 4th 1414 (2009) which held the representing the personal representative, as a fiduciary and beneficiary was not a conflict of interest). A personal representative may be a joint account holder with the decedent, and the question may arise as to whether the funds in that account are estate assets or instead passed to the personal representative/joint account holder upon death. A guardian may be asked to be the trustee of a special needs trust for the ward (see, for example, Washington Advisory Opinion 2107 (2006) holding that such appointment would create an actual or potential conflict of interest). The personal representative may have claims against either the estate or others interested in the estate. Often a surviving spouse will be both the trustee and beneficiary of one or more trusts established upon the death of the first spouse to die. See, if a slightly different fact pattern, for example, *Taylor v. Maile,* 142 Idaho 253 (2005), affirmed 2009-ID-0202.167 (2009), where the Court held that as a matter of law, a trustee and beneficiary have a conflict of interest. It is critical that the lawyer identify and make clear not only the identity of the client, but also the capacity in which the lawyer will represent that client, and, however hard, that the lawyer refer the client to other counsel for representation in capacities other than the identified capacity.

5.7.2 Representation of Co-Fiduciaries. On the assumption that co-fiduciaries will have a common purpose and intent, the author believes that a lawyer can represent co-fiduciaries, though such

representation should be the subject of an engagement letter dealing with confidences and other matters (much like the representation of husband and wife). However, conflicts can arise between co-fiduciaries just as readily as in any other joint representation. Upon such conflicts, the lawyer should, I believe, transition the representation to separate counsel for each fiduciary.

5.7.3 Representation of the Decedent and Personal Representative. Generally a lawyer can and does represent both the decedent and, following the decedent's death, personal representative. What if, however, the Will or other dispositive instrument is challenged, and the lawyer will be a witness? RPC 3.7 permits a lawyer to be a witness in a Will contest, if another lawyer, even if in the same firm, is acting as the advocate in the proceeding.

5.7.4 Dispute Resolution Agreements. The drafting and execution of Dispute Resolution Agreements involves persons having arguably competing interests agreeing on an outcome in the context of an estate or trust. Note however that a party to such an agreement who initially agrees may later have second thoughts, and may challenge the Agreement and those who participated in its development and adoption. Thus, in the context of Dispute Resolution Agreements, the lawyer should be particularly mindful of RPC 1.7 (conflicts of interest, both as to identity and capacity) and RPC 4.3 (dealing with unrepresented persons).

5.7.5 Lawyer As Both Personal Representative and Lawyer For the Personal Representative. Setting aside any question as to whether the lawyer's malpractice insurance will cover activities as personal representative, the lawyer for the personal representative owes a duty to the personal representative, as described above, and the personal representative owes a duty to the beneficiaries. Thus, serving in both capacities dramatically increases the number and complexity of the fiduciary obligations of the lawyer/personal representative. See also section 9.2, below.

5.8 The Entity as Client. Generally, representation of an entity will not be deemed to be representation of the officers, directors, and owners of the entity as well. As described in the Guidelines, Courts have found an exception when an entity is wholly owned by one individual (in which instance, Courts have sometimes found that the attorney represented not only the entity, but also its sole owner). But, generally, representation of the owners, officers, or directors of an entity must be founded upon an independent basis for concluding that an attorney-client relationship exists.

Effective September 1, 2006, Washington adopted RPC 1.13 (earlier adopted in Idaho), which adopts the "entity theory" in which the lawyer is deemed to represent only the entity. The "entity theory" is distinguished from the "group theory" in which the lawyer is deemed to represent each of the owners of the entity jointly. Rule 1.13 also confirms another somewhat obvious proposition in subsection (g) that "a lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7." Perhaps, more useful to the corporate practitioner is the reminder in subsection (g) that "if the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders."

Issues of "who is the client" often arise in the representation of entities. For example, if you represent the partnership or a limited liability company are you deemed to represent all of the partners or members? Is the answer different in the case of representation of a close corporation (are you deemed to represent each shareholder)? Does representation of a subsidiary mean you represent the parent or all affiliates? The case law is not consistent. However, the lesson for the lawyer is to be clear up front exactly who the lawyer is representing and not representing, to put it in writing (for example, in the engagement letter).

Equally important, because of the "reasonable expectation" test described in Section 4.2, above, and pursuant to RPC 4.3, the attorney should take special care with respect to the persons the lawyer is not representing. First, if there is or could be any basis upon which the person could have a reasonable belief that the lawyer is looking out for such person's interests, the lawyer should send the person a letter stating explicitly that the lawyer does not represent such person. Second, the lawyer must "walk the walk," by not providing any legal advice, no matter how casual or minor, to such person (other than that such person should obtain their own counsel).

5.9 Beauty Contests and Lawyer Shopping. If a potential client is lawyer-shopping, the substantive information discussed during the interview may be sufficient to create an attorney-client relationship, at least for purposes of preventing the lawyer from representing another client with respect to the same or a substantially related matter. Rules 1.7, 1.9, and 1.18. As a consequence, a

lawyer who is knowingly participating in a potential client's lawyer-shopping should, if the potential exists for other client representation in the transaction which is the basis for the shopping, (a) limit the disclosures of the shopper, so that the lawyer cannot be alleged to have received "information...which could be significantly harmful to the prospective client," (see RPC 1.18) and (b) have a written agreement with the "shopper," prior to disclosure, that information disclosed during the "shopping trip" is not subject to the attorney client privilege, will not create an attorney-client relationship, and will not be used to disqualify the lawyer who is not selected to represent the "shopper." See WSBA Informal Ethics Opinions 2025 (2003) and 2064 (2004) regarding the efficacy of advance waivers in several different contexts.

6. CONFLICTS OF INTEREST INVOLVING CURRENT CLIENTS. Conflicts of interest involving current clients implicate Rule 1.7 ("Conflict of Interest: General Rule"). Rule 1.7 generally prohibits representation of one client if representation of that client will be directly adverse to another client or if the attorney will not be able to represent such client zealously because of duties owed a current or former client, duties owed another person, or the lawyer's own interests.

6.1 What is Direct Adversity? Neither the Rules themselves, nor the Guidelines, nor any case has, to the author's knowledge, defined "direct adversity," though most cases have their origin in the context of litigation, in which an attorney represented a party in one action who was seeking relief against a client whom the attorney was representing in a separate unrelated matter (See, for example, *In re Hershberger,* 288 Or. 559, 606 P.2d 623 (1980)). Nonetheless, based upon the focus of the Rules, which appears to be the reasonable expectations of a client, and the fact that if the question is even asked following representation, the attorney is going to endure substantial pain and spend substantial sums, the attorney should define "direct adversity" broadly.

6.2 Can You Represent Competitors? Direct adversity or material limitations upon an attorney's duty of zeal do not arise simply from the representation of business competitors. It may or may not be good business, but the representation of business competitors does not, by itself, implicate Rule 1.7.

6.3 Can the Clients Waive the Conflict? Under RPC 1.7, clients may give informed consent to waive the conflict of interest (in writing), and permit the lawyer to represent the otherwise conflicted clients if:

6.3.1 Lawyer's Reasonable Belief. The lawyer first must be able to demonstrate that he or she had a reasonable subjective belief that the representation of one conflicted client would not adversely affect the representation of or relationship with the other conflicted client(s). In addition, the lawyer must also be able to demonstrate that such subjective belief was objectively reasonable. Note that the presence or absence of such reasonable belief (a) cannot be waived or supported by the conflicted clients, but instead focuses upon only the lawyer who has

decided to accept the representation, and (b) will practically be (though theoretically it should not be) tested with the clarity of hindsight (when something will have arisen which, in and of itself, is likely to prejudice the inquiry and outcome with respect to the lawyer's reasonable belief); and

6.3.2 Waiver. Each conflicted client must give "informed consent," in writing, to the representation after full disclosure to each conflicted client of all material facts bearing upon the representation (following authorization from each client to make such disclosure). Note, therefore, that a waiver involves two separate client contacts, in the first of which the lawyer must disclose sufficient information to permit the client to make an informed decision with respect to whether the client should and will permit the lawyer to make that further disclosure necessary to permit an informed waiver of the conflict) and a second (and written) contact in which the lawyer must make full disclosure of all relevant facts with respect to the waiver decision itself. The Guidelines provide a laundry list of that which should be included in a letter requesting a waiver of a conflict under Rule 1.7, and a sample letter as well.

6.3.2.1 Informed Consent. In 2006, the Washington Rules of Professional Conduct were revised to replace "consents after full disclosure of the material facts" with "informed consent." Idaho adopted that phrase when it adopted the Model Rules in 2004. As discussed by Christopher H. Howard and Colin Folawn in *Informed Consent For Lawyers: What is It, how to do it, and why It's important,* Washington State Bar News (September 2008), the phrase, which has long been a lightning rod for medical malpractice litigation, demands not only that the material facts be disclosed to the client, but that alternative courses of action be disclosed as well. While, pursuant to RPC 1.0(e), such disclosures can be oral, best practice demands that such disclosures either be set forth in writing, or, alternatively, that such oral disclosures be confirmed in a contemporaneous writing.

6.3.3 Are Any Conflicts Nonwaiveable? The Official Comments to the Rules state that conflicts cannot be waived if the positions of the clients are "fundamentally antagonistic." The Comments do not define "fundamental antagonism." The examples typically given are simultaneous representation of buyer and seller, or lender and borrower. No Washington or Idaho decisions or Opinions appear to have spoken to the issue.

Much of the analysis may turn on the sophistication of the clients involved and whether the consent they have given was fully understood and well informed.

6.3.4 Advance Consent. Consent needs to be in writing, which includes electronic mail, although under the definition of "written consent," it may include a writing from the lawyer confirming the oral consent of the client. *See* Preamble to RPC (Terminology). Consider seeking advance consent, whereby the client authorizes the lawyer to represent one client in any (or certain) future matters that might arise that are adverse to the other client. So long as the clients giving their advance consent are adequately informed (which will vary depending upon the facts and circumstances of each case), such advance consents are generally considered to be permissible under the Model Rules. *See* Formal Opinion 93-372, April 16, 1993 (Law. Man. Prof. Cond. 1001:173) and WSBA Informal Ethics Opinions 2025 and 2064, *supra*. The Formal Opinion suggests that a person giving advance consent will be adequately informed only when the type of matter covered by the advance waiver is identified in advance with some specificity. If one cannot get advance consent to the adverse representation, consider seeking advance consent to the ability to withdraw. Otherwise you may find yourself in a "hot potato" situation where you cannot withdraw in order to accept the other work.

7. INTERMEDIATION. Effective September 1, 2006, Washington deleted Rule 2.2, dealing with Intermediation, and stated that representation of multiple parties is instead governed by Rule 1.7. To date, Idaho has retained Rule 2.2, entitled *Lawyer Serving As Third-Party Neutral.* Idaho's Rule 2.2 permits the lawyer to serve as an intermediary if (a) the lawyer consults with each client regarding the advantages and disadvantages of common representation and each client consents to common representation, (b) the lawyer reasonably believes (subjectively and objectively) that, via intermediation, the matter can be resolved in a way which serves each client's best interests, and (c) the lawyer reasonably believes (subjectively and objectively) that his or her common representation will be impartial and will not prejudice responsibilities that the lawyer has to any of the clients. A typical situation involving intermediation would be the formation of an entity.

7.1 Is "Intermediary" Just a Fancy Title for a Scrivener? While an intermediary may be, in part, a scrivener, an intermediary, as contemplated by Rule 2.2, is far more than a scrivener. In the intermediary role, the lawyer is a counselor rather than an advocate. But, unlike a "mere scrivener," the lawyer as intermediary is charged with the responsibility of assuring that each client represented in the intermediation is aware of the decisions required of such client and the relevant considerations with respect to those decisions. Thus, the lawyer cannot, in such role, merely accept decisions brought to the lawyer by the parties; if the lawyer seeks to rely upon RPC 2.2, the lawyer must demonstrate that such decisions were knowing decisions based upon each client's awareness and consideration of all material relevant factors.

7.2 Are There Situations Where the Lawyer Ought Not Act as Intermediary? The Guidelines set forth a number of factors which should cause the lawyer to elect not to serve as intermediary, including transaction complexity, disparate bargaining power, disparate client sophistication, a preexisting relationship with one of the parties to the intermediation, and the severity of the consequences if the intermediation fails.

7.3 What is the Impact of Intermediation on the Attorney-Client Privilege? While RPC 1.6 demands that the attorney protect and preserve client confidences, and while RPC 1.6 has sometimes been held to trump all other Rules, the effect of intermediation is that as between the multiple clients, the attorney-client privilege is waived and all attorney-client communication is discoverable. In addition, the intermediary generally has a duty to share with all parties to the intermediation all material communication from each party to the intermediation. Intermediation would not be wise if, for example, one of the clients insisted that his communications concerning the subject matter of the representation not be shared with the other.

7.4 What Must the Attorney Do if the Intermediation Fails? If the intermediation fails, the attorney must withdraw and likely may not represent any of the parties to the intermediation with respect to the matter involved in the intermediation.

8. DOES THE LAWYER'S DUTY RUN TO PERSONS OTHER THAN THE "CLIENT(S)?" Traditionally, the lawyer's duty ran only to the client(s), as a consequence of which third parties injured by the lawyer's acts or omissions could not sue the lawyer for malpractice. However, at least in the context of estate planning, virtually all states which have considered the question have now relaxed that constraint. For example, in *Stanglund v. Brock*, 109 Wn.2d 675 (1987), the Washington Court held that "An attorney who undertakes to draft a Will owes a duty to the intended beneficiaries of that Will." Though the attorney was successful in that case, the Court held that beneficiaries injured by a draftsman's incompetence may sue the draftsman for legal malpractice. More recently, in *Trask v. Butler*, 123 Wn.2d 835 (1994), the Court introduced, and in *Janssen v. Topliff,* 110 Wn. App. 76 (2002), in *Estate of Treadwell,* 61 P3rd 1214 (Wash, Ct. App. 2003), in the context of a guardianship, and in *Campbell v. Johnson,* 2007 Wash.App LEXIS 2930, 2007 WL 3133883 (2007), the Court affirmed a "modified multifactor balancing test," borrowed from *Biakanja v. Irving,* 49 Cal 2d 647 (1958), as supplemented by *Lucas v. Hamm,* 56 Cal2d 583 (1961), and held that under that test, the primary inquiry is the degree to which the representation was clearly and unambiguously "intended to benefit the plaintiff." Based upon that test, the Court held that Mr. Butler, who represented the personal representative of an estate, owed no duty to the beneficiaries of that estate. The decision, in large part, was driven by the beneficiaries' ability to bring an action against the personal representative for a breach of fiduciary duties. In *Stanglund*, supra, on the other hand, the Court discovered the duty owed third parties who, absent the discovery of such duty, would have been without a remedy.

In *Linth v. Gay*, —P.3d—, 2015 WL 5567050 (Wash. App. 2015), the Court, relying on *Parks v. Fink*, 173 Wn.App. 366, 293 P.3d 1275 (2013), the court held that an estate planner does not owe a duty to an intended beneficiary to make sure a critical document was attached to a trust prepared for and executed by the decedent. Relying on *Trask v. Butler*, 123 Wn.2d 835, 872 P.2d 1080 (1994), the court also held that the same attorney, while serving as attorney for the personal representative after trustor's death, did not owe a duty to the same beneficiary.

The Idaho Supreme Court reached a similar conclusion in *Harrigfeld v. Hancock,* 140 Idaho 134, 90 P.3rd 884 (2004), in which the Court, seemingly somewhat reluctantly, held:

> "We hold that an attorney preparing testamentary instruments owes a duty to the beneficiaries named or identified therein to prepare such instruments, and if requested by the testator to have them properly executed, so as to effectuate the testator's intent as expressed in the testamentary instruments. If, as a proximate result of the attorney's negligence, the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized, the attorney would be liable to the beneficiary harmed."

If the planner's duty runs to persons in addition to the "client," what is the scope of that

duty? As noted in Section 5.6, above, it does not include the duty to confirm competence (*Moore*, *supra*), nor timely execution of documents as noted in Section 3.1, above (*Sisson*, *supra*). Instead the authorities appear to demand that the planner draft the client's documents non-negligently (so that the clear and unambiguous intent reflected in the four corners of the dispositive instruments is satisfied) and that the instruments are validly executed and thus can be administered. Stated differently, the authorities seem to demand that the instrument(s) clearly reflect and carry out the testator's intent, as reflected in the documents themselves, and not be infected with a legal defect that either prevents their administration or otherwise frustrates the testator's clear and unambiguous intent (*Moore*, *supra* and *Harrigfeld, supra;* see also *Soignier v. Fletcher,* 37123 (IDSCCI) Supreme Court of Idaho 2011 Opinion No. 69). Generalized to a business lawyer's practice, the same theme would appear to demand that documents express clearly the intended agreement of the parties, as reflected in the agreement itself, though in this context the "multi-factor balancing test" would seemingly identify a duty only to the contracting parties and not to family members or others collaterally injured by poor draftsmanship or advocacy.

However, the scope of that duty, as well, may be broadening. In *Sorkowitz, Trustee, et. Al. V. Lakritz, Wissbrun & Assoc., P.C.,* 683 NW2d 210, the Court held that the defendant law firm owed a duty to the beneficiaries not with respect to defects in the documentation itself or the manner of its execution, but instead in the firm's failure to include a "*Crummey* clause" and appropriate generation skipping provisions.

9. TRANSACTIONS WITH A CLIENT. A lawyer is generally viewed as having a fiduciary relationship with his or her clients. RPC 1.8 thus generally allows an attorney to enter into a business transaction with a client, subject to the constraints that one would reasonably expect in a transaction between a fiduciary and his or her beneficiary. Thus, the terms of the transaction must be objectively fair and reasonable to the client, and the client must be fully advised of, and must understand, his or her rights and obligations with respect to the transaction. The attorney should put the disclosures necessary to satisfaction of the Rule in writing (including a disclosure as to how the business relationship might color the lawyer's professional judgment and advice with respect to other representation of the client), and that writing should expressly encourage the client to engage independent counsel to review the transaction. Any such consent should be in writing. Notwithstanding the foregoing safeguards, WSBA Informal Ethics Opinion 2055 (2004) reveals a number of ethical risks attendant to the proposed business relationship.

9.1 Preparations of Wills and Trusts in which the Lawyer is a Beneficiary.

RPC 1.8(c) provides in part:

> A lawyer shall not prepare on behalf of a client an instrument giving the lawyer or a person with whom the lawyer has a familial, domestic, or close relationship any substantial gift unless the lawyer or

other recipient of the gift is related to the client.

The rule is absolute. For example, in *In Re Gillingham*, 126 Wn.2d 454 (1995), a lawyer was disciplined, in part, for drafting a Will naming the lawyer as beneficiary, even though the testator later changed her Will and eliminated the bequest. See also the Steven C. Miller Disciplinary Case at section 2.2.10, above. The Model Rules as adopted in Washington and Idaho have broadened the persons to whom a lawyer is deemed to be "related," in that they provide that a lawyer is "related" to persons with whom the lawyer shares a "close familial relationship." .

Notwithstanding the possible relaxation of the Rule, given the number of disciplinary cases, at least in Washington, in which a lawyer drafted himself or herself into the Will, a lawyer should be extremely reluctant to do so.

9.2 Preparation of Wills and Trusts that Name Drafting Lawyer as Fiduciary. Under RPC 1.8, entitled "Conflict of Interest: Current Clients; Specific Rules," a lawyer is prohibited from participating in certain "prohibited transactions," and discouraged from participating in transactions having an "appearance of impropriety." Under RPC 1.7, a lawyer should not undertake or continue representation where such representation may be materially limited by the lawyer's own interests.

Drafting oneself into a Will or trust as a personal representative or trustee, from which the attorney may enjoy substantial fees, gives rise to an appearance of impropriety. The relationship, were it to arise, also creates a potential for conflicts of interest with other clients of the lawyer and with beneficiaries of the estate or trust. Naming oneself as a fiduciary thus creates substantial ethical risks.

a. Is Independent Counsel Required. RPC 1.8 demands that the client receive independent counsel before engaging in any business or financial transactions potentially adverse to the client. The ACTEC Commentaries opine that Rule 1.8 is not implicated in a situation in which the attorney drafts an instrument in which he or she is named as a fiduciary. Nonetheless, a good practice would suggest or demand that, if the client insists upon naming the attorney as a fiduciary, the attorney, in writing, encourage the client to seek independent counsel and, if the client elects not to engage independent counsel, to obtain a written waiver from the client. Further, the document naming the attorney as fiduciary should recite that the attorney has discussed the issue with the client and has encouraged independent representation.

1. Washington Informal Opinion 86-1 held that:

> A lawyer may draft a document for an unrelated client that appoints the lawyer as a fiduciary if the client is fully informed regarding the alternatives and costs and is advised that he or she is free to consult independent counsel.

b. Potential Additional Problems. Naming the lawyer as fiduciary may give rise to some secondary problems as well. For example, naming the lawyer as fiduciary may cause beneficiaries to challenge the Will who, but for such designation, might not have challenged the Will, as it may suggest an absence of independence of the testator. Similarly, the evenhandedness required of the fiduciary may create a conflict between the lawyer's role as an advocate for the fiduciary and the fiduciary's duty of evenhandedness. That same duty of evenhandedness will extend the duties owed by the attorney from duties owed solely to the fiduciary to duties owed the beneficiaries themselves. See, for example, *In re Disciplinary Proceeding Against John L.McKean,* 148 Wn.2d 849, 64 P.3d 1226 (2003) and *In re Talbot,* 107 Wn.2d 335, 728 P3d 595 (1986), each of which held that an attorney acting as personal representative owes a fiduciary duty to each and all beneficiaries. The attorney ought not draft himself or herself into an instrument as a fiduciary unless he or she is willing to accept these broader risks. Finally, the lawyer's malpractice insurance might not provide coverage for claims incurred as a fiduciary, as opposed to those incurred as a lawyer.

9.3 Payments By Other Than the Client. RPC 1.8(f) provides that a lawyer may not accept compensation from other than the client unless: "(1) the client gives informed consent; (2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and (3) information relating to representation of a client is protected as required by Rule 1.6."

10. CONFLICTS INVOLVING FORMER CLIENTS. RPC 1.9 bars a lawyer from representing a current client in a matter which is materially adverse to a former client and which involves the same or a substantially related matter as was the subject of the former representation, unless the former client consents after consultation and full disclosure. In addition, whether or not the former client consents, the lawyer may not use confidences gained in the prior representation to the disadvantage of the former client, unless RPC 1.6 would allow such use. Finally, even if the former client consents, the new client probably must also consent under Rule 1.7.

10.1 What is a Former Client? The line between a terminated attorney client relationship, giving rise to "former client" status, and a "dormant albeit on-going" attorney-client relationship is unclear. Sometimes it is not easy to tell whether X is a current or former client. (For example, what if you have represented X off and on for a number of years, but do not have anything currently going on?). Note that the issue may be interpreted from the client's perspective, with doubt resolved against the lawyer. The comments to Model Rule 1.9 states:

> If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal.

> Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing... .

If there is a reasonable basis by which the client could argue that they felt they were still represented by the lawyer or the firm, the situation should be tested under RPC 1.7 rather than RPC 1.9. In order to avoid the question, and to blunt such dispute, the attorney should, where possible, send a "disengagement" letter upon termination of a matter.

10.2. How Long Does the Duty Owed One's Clients Persist? During the active phase of an estate planning representation, the lawyer owes a duty of competence to the client under Rule 1.1. But for how long does that duty persist?

In *Stanglund v. Brock*, 109 Wn.2d 675 (1987), the Court considered a situation in which attorney Brock drafted a Will devising all real property to one beneficiary and all remaining non-real property to another beneficiary. Subsequently, another attorney in the same firm, Carpenter, participated in a transaction by which testator Stanglund sold the real property on a real estate contract to an unrelated third party. The real property was thereby converted to personal property, leading to a dispute between two competing beneficiaries, one of whom had been devised the real property and the other of whom had been devised the balance of the testator's property. Plaintiff Stanglund, the real property beneficiary, ultimately compromised the dispute and received 60% of the contractual proceeds of sale. He tried to get the 40% out of the "hides" of Brock, Carpenter, and their firm.

Beneficiary Stanglund sued attorney Brock, urging that attorney Brock owed Stangland a duty as a third party beneficiary of the Will and further alleging that attorney Brock had a continuing duty to monitor the testator's estate to assure that the testator did nothing which would frustrate the testator's estate plan. Beneficiary Stangland further sued the other attorney in the firm, urging that the second attorney should have reviewed the testator's Will to assure that the contractual sale did not frustrate the testator's Will.

The Court held that while both attorneys owed duties to third party beneficiaries who were intended to benefit by the transactions in which the attorneys participated, as a matter of law (over a strong dissent which believe such conclusion inherently factual) attorney Brock had no duty to monitor the testator's situation following the completion of the active phase of estate planning representation, and the second attorney in the same firm had no duty to review prior representation in order to assure that the later representation did not prejudice the apparent intent of the earlier representation.

Based upon *Stanglund v. Brock*, while it may be good practice to send reminder notices to estate planning clients to urge them to review their estate planning

documentation and to advise them of changes in the law or other changes which could affect their estate planning, the lawyer seemingly has no duty to do so. Further, according to the ACTEC Commentaries to RPC 1.4, doing so does not convert "dormant representation," within which the lawyer owes only a continuing duty of confidentiality, to "active representation," which would implicate a number of other rules as well. A number of practitioners, however, disagree saying that sending such reminders creates a continuing duty to provide such reminders.

Very often, clients will ask that lawyers retain the original of their estate planning documents for safekeeping. That custodial relationship may suggest a continuing client relationship and a continuing duty to monitor the continued efficacy of the client's estate plan. Accordingly, the best practice, though one perhaps seldom followed, would be to enter into a custodial agreement with the client providing that the attorney will store such documents for safekeeping but that such safekeeping arrangement imposes no continuing duties upon the attorney.

10.3 What is the "Same or a Substantially Related Matter?" As set forth in the Guidelines, and illustrated by the cases there cited, if the new transaction is materially connected to the former transaction, or if secrets shared in the former representation would be germane to the current representation, the matters are deemed to be "substantially related."

10.4 How Adverse Must the Current Matter be to be "Materially Adverse?" The Guidelines, based upon the ABA/BNA Lawyers' Manual On Professional Conduct, state that any degree of adversity, whether or not "material," is probably enough to implicate the Rule. The Guidelines, therefore, state that the word "materially" should be read out of the Rule.

11. IMPUTED DISQUALIFICATION. Under RPC 1.10, if one lawyer in a firm is disqualified from representation under Rules 1.7, 1.8(c), 1.9, or 2.2, all lawyers in the firm are similarly disqualified, even if the lawyer being disqualified practices from a different office, in a different state, and has never heard of and knows nothing about the conflicting client. Note that situations could arise under which a lawyer was disqualified under Rules other than the foregoing Rules, and in those situations, imputed disqualification would not arise.

11.1 Might Co-Counsel Lead to Imputed Disqualification? One of the bases for imputed disqualification is that confidential information will be shared among all lawyers in a firm. Generally, Courts have held that such premise would not apply to cause imputed disqualification as a consequence of a co-counsel relationship. Nonetheless, other Courts have held that the disqualification of one firm would infect co-counsel, and, in the author's judgment, it is far more likely that sensitive information will be shared among co-counsel than it is that

confidential information will be shared with lawyers in a wholly different location.

11.2 What Happens When a New Lawyer Joins the Firm? A lawyer's conflicts travel with him or her. Nonetheless, RPC 1.10(b) and 1.10(c), echoed in WSBA Informal Ethics Opinion 1022 (1986), permit the firm to represent a client whose interest is adverse to a client "carried" by the new lawyer if the disqualifying new lawyer is effectively screened from both the conflicting matter and the fee resulting therefrom, the former client is advised of the screening mechanism, and the firm can demonstrate that no confidences were shared prior to the implementation of the screening mechanism.

12. RETENTION OR SAFEKEEPING OF CLIENT FUNDS OR OTHER PROPERTY. As you may recall, Washington adopted RPC 1.15A, which required that at least annually, the lawyer advise each client for whom the lawyer was holding "property" of the retention of that "property." The Rule broadly defined "property," and thus, on its face, would have required annual disclosure to each client for whom the lawyer was holding estate planning documents, Minute Books, funds, or other property. At the urging of the Real Property, Probate and Trust and other Sections of the Bar, the Rule has been changed, retroactively to September 1, 2006, to require that the lawyer advise clients at least annually that the lawyer holds "funds" on behalf of the client.