Approaches to Estate Planning for an Expected Will Contest

or

The Lawyer as Exhibit "A"

by

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INTRODUCTION: ATTACK ON THE LAWYER: THE UNHAPPY EXHIBIT "A."

In any Will contest, the lawyer who drafted the Will and prepared the estate plan will be called upon to testify at deposition and trial. The attorney-client privilege is likely to be waived by the parties or by the court. The attack on the Will is also an attack upon the lawyer's preparation of the Will. Specially, the Petitioners to a Will contest will allege that the lawyer failed to meet the standard of care, failed to document the file properly, and missed obvious "red flags" that the client was being overreached. In short, the estate planning lawyer did a bad job.

This begs the question as to what is the standard of care, especially for the elderly and frail client who is making a major departure from prior estate plans.

It also raises the issue of what tools are available for the estate planner to strengthen an estate plan from an attack.

The lawyer as a witness may be seen as self-serving because the lawyer now has a vested interest that the Will be upheld and that the lawyer's work be validated. Accordingly, the lawyer's testimony will be admissible but may be given less weight than the lawyer hopes.

DISCUSSION: CAREFUL PREPARATION AND THE LAWYER AS A HAPPIER EXHIBIT "A"

I. PRELIMINARY CONSIDERATIONS.[1]

A. Red Flags

1. A significant departure from an earlier Will or Wills.
2. Multiple marriages and issue from an earlier marriage.
3. Disinheritance of family members.
4. Unequal treatment of siblings or of the same class.
5. High degree/ long term involvement of one child during the decline of the parent to the exclusion of other children.
6. The hurry-up, deathbed Will.
7. Unequal participation by a sibling in the care of an impaired parent.
8. Unequal participation in the family business.
9. The introduction of the new prospective client by a person benefiting from the new plan. This introduction will have tainted your office as to the second element of burden shifting and you should consider a referral to another office.

What is the standard of care to adequately represent the client in each of the above scenarios? Consider what would be the testimony of other local estate planners testifying as experts at trial? We cannot answer that question here, but it would be a useful exercise to think through at the beginning of your representation and perhaps to consult with a potential expert at the very beginning.

Consider 1) making and preserving admissible evidence such as medical reports and creating favorable witnesses and 2) whether the expense will be cost effective. The costs will be more typical of litigation expenses than of estate planning expenses. But it may dissuade the potential plaintiff/ claimant during the CR 11 investigation or it may shorten the trial by setting the stage for motions for partial SJ on key issues.

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[1] The provisions at RCW 11.54 for a Family Support Award may avert the need for a Will contest when the value of the net estate is less than the amount of the Basic Award provided at RCW 11.54.020 and defined at RCW 6.13.030(2). The amount in King County exceeds $800,000. Each county will have a different amount depending upon the median sale prices of single-family residences. Although the amount of the award can be reduced, there are limitations upon the discretion of the court. RCW 11.54.060. See Estate of Lada Mnatsakanova, no. 85014-8-1, court of Appeals, Division One, unpublished opinion filed 2/20/2024. The intentions of the deceased and the estate plan is not a factor unlike the Omitted Spouse statute at RCW 11.12.095. Since Family Support comes from "property of the decedent," this would apply to both probate and nonprobate assets. Thus a testator who seeks to divert funds away from a spouse or to a trust for the protection of a minor may have their plans thwarted by an application for a Family Support by the estranged spouse or a GAL for a minor.

B. Not Improper to Plan for a Challenge.

"It is not improper in a contentious family situation to recognize and raise the prospect of a Will challenge so that preparation of the Will may be handled in a manner that not only avoids impropriety, but the appearance of impropriety." *In re Trust & Estate of Meltzer*, 167 Wn. App. 285 (2012).

The representation for the anticipated contest should be set forth in the engagement letter in addition to the actual estate planning. The cost of preparing for the prospect of a Will contest is likely to be substantially greater than an estate plan with no anticipation of a contest.

C. Who Will be the Witnesses?

Outside Counsel and Collaborative Effort: Who should be the witness? The original estate planner or, alternatively, a lawyer associated with the planner to implement the defense, oversee the execution and the subsequent ratifications? The latter should be a lawyer with courtroom experience.

The witness, although a fact witness, will be cast into a role similar to an expert witness. A lawyer with trial experience will have more of a comfort level with testifying at depositions and at trial.

The lawyer testifying at trial will be presented as a competent professional. The lawyer's testimony must be credible. The lawyer must also be attentive during cross-examination, create a good record for an appeal, and be observant of the Judge and the ruling on objections. The art of testifying at trial is an acquired skill.

A related issue is the coordination between the defense lawyers and the estate lawyers overseeing the administration. Consider how to work with the estate lawyers (during the probate administration) and to coordinate the lawyers doing the administration with the lawyers doing the defense. There may be issues about the timelines for filing an Inventory, for claims, for Will contest, and for cash reserves for taxes and for litigation costs. There may be issues that involve the sale of assets (the need for liquidity), the inventory, partial distributions, and other such issues. Caution: any bargaining with the heirs/ contestant to gain leverage in the litigation by, for example, a partial distribution is a breach of fiduciary duty.

Caution: potential conflicts within the family. Review whether the estate planner has provided multiple representations of different family members. This might be particularly true when there is planning for the transition of a family business between generations. The ABA opines that such representation is permissible in ABA Formal Ethics Op. 428 (2002). Similarly, the ACTEC Commentary on RPC 1.7 is similar. American College of Trust and Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Fifth Edition, 2016. A contest arising from an estate plan might cause conflicts for the lawyer where there were none before.

Caution, Fees: Fact witnesses are not paid more than the statutory, de minimis fee. This may be burdensome for professional witnesses (lawyers, accountants, financial planners) when they are required to attend depositions and trial. But they are entitled to their hourly rate if asked for their opinion on any matter. One suggestion to protect the fees of professional witnesses is to make a provision in the Will that the PR is directed to set aside sufficient funds to pay for the normal hourly rates of any lawyers, accountants, medical providers and mental health evaluators for services rendered in the defense of the Will whether at deposition, conferences, and at trial.

D. Who is the Client?

Is this a long standing client with a new estate plan? Or is this a new client accompanied by a person who will benefit from the new plan?

If the latter, then you may have to reject the potential client because your office is already tainted. See *In Re Estate Of Ganjian*, 55 Wn.2d 360 (1959) and *Estate of Beck*, 79 Wash. 331 (1914). Any person who has selected your office, called and made the appointment, and driven the client to your office may have already "participated" in the making of the will. Such activity meets the second of the three elements to shift the burden of persuasion in a Will contest. (The three elements are fiduciary relationship, participation, and an unnatural benefit.)

Allowing the person accused of over-reaching to participate in the preparation of the Will damages your credibility and thus makes you less effective as a witness. Merely excluding that person from the actual interview is not sufficient to cure.

When someone does arrive with a potential client to change their Will by benefiting them, you should be hesitant to accept the new client because your office is already tainted. You can, however, be retained by the other person as a client and advise them as to the elements of undue influence that can shift the burden. Your representation would be to blunt that possibility of burden shifting by recommending a long separation of your client from the person intending the proposed Will changes, having no involvement whatever in selecting the office to do the Will, having no involvement in transporting the person to the lawyer, and to remain totally separated during the weeks surrounding the preparation and execution of the new Will. Also, locating additional persons who may serve as independent witnesses.

RPC 1.4 Communication and RPC 1.7 and RPC 1.8(b) Conflicts and the Use of Information. There are potential dangers to accepting the person as a new client who benefits under the new Will. If you decide to decline representation of the person (testator) intending to change their Will, then you should make this determination early and prior to any legal advice to either of them. If you do represent the person standing to benefit, then you have a duty to communicate per RPC 1.4 regarding their objectives. If you do this in the presence of the other person, you have waived the attorney-client privilege. If you give general preliminary advice to both of them, you may have inadvertently created a attorney-client relationship and a conflict per RPC 1.7. (You may also have created an attorney-client relationship in violation of your obligations of your carrier to have an engagement letter.) The use of any information gleaned in that initial conference will likely violate RPC 1.8(b) [Conflicts: Current Clients] when there is an inadvertent creation of the attorney-client relationship with both persons by saying too much in the presence of both.

A more difficult situation is the situation of an elderly married couple in a short-term marriage whereby one spouse has significant separate property and no community property. You can represent either one of the spouses, but there is no good way to separate them in anticipation of the first and second elements of burden shifting.

E. Engagement Letter RPC 1.5 and 3.3

The engagement letter is subject to discovery and is admissible evidence. So care should be taken with the engagement letter, both as to the purpose of your unusual representation and also because the fees will likely be substantially greater than estate planning when no litigation is anticipated.

RPC 1.5(b) states:

> "**The scope of the representation** and the basis or rate of the fee and expenses for which the client will be **responsible shall be communicated to the client, preferably in writing**, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate." Emphasis added.

The description of the scope of representation is the beginning of the story that the defense lawyer wants to put before the court at trial. So take pains to accurately describe the scope of your engagement. RPC 1.5(b) requires it. It will also introduce your testimony on the motives of your client and exactly why they hired your office. For example, the engagement letter can have language such as: "You have asked my office to represent you regarding estate planning and additionally to take extra steps to defend the Will in what you believe may be a potential challenge to your estate planning including a Will contest. Specifically, you wish that this office takes any appropriate steps to uphold the Will if the validity is attacked in litigation and to prepare a defense now while you are still alive and can assist in the process. This process may involve the association of a defense law firm, engaging your accountants and financial advisors and medical testing. We agree to undertake such representation. Of course, our office cannot guarantee the success of the defense in litigation but we will use our best efforts to consider such a future defense. We have advised that such representation is more time intensive and thus more expensive than the more typical estate planning where litigation is not anticipated."

Of course, you should tailor the language to your specific situation. But the idea is to document the motives and concerns of your client which will be signed by your client on the engagement letter and is admissible in evidence.

You and the client should also go over the engagement letter with a second lawyer from your office. You are certain to be questioned at a deposition as to how you reviewed the engagement letter with your new client, how many minutes were involved and like matters. A second lawyer who sits in will be helpful.

RPC 3.3 Candor to the Tribunal. If the letter is admitted into evidence, you are likely to be questioned as to whether you took any liberties with the description of your client's concerns. In other words, whether the engagement letter was "gilding the lily." If so, then you would have violated the duty of candor to the tribunal. In addition to losing all credibility with the court and damage to your professional reputation, you would be subject to a Bar complaint. Consequently, you should have another lawyer present from your office or a co-counsel present who can vouch that you did not guild the lily in the engagement letter.

II. BEYOND THE PRELIMINARIES: BEGINNING THE DEFENSE

A. Meeting With the Client

Your weakest scenario as a witness at trial is to testify that you alone met with an elderly frail client, except for two perfunctory witnesses that spent 10 minutes at the execution of the Will.

You should always meet with the client together with other lawyers/ legal assistants from your office. More witnesses will bring more credibility to your testimony. The use of friends or other family as witnesses is less effective and may result in an instant waiver of the attorney-client privilege.

Take your time. The 30-60-90-minute meetings will have more weight than a 15 minute meeting.

Do not refer the client to an associating lawyer, but be present at the introduction. The introduction of the client to the new defense lawyer should be by the estate planning lawyer to the litigation defense lawyer because it creates more professional witnesses to testify.

B. Documenting Mental Capacity

Depending upon the age, vitality and health of the client, it may be best to obtain a independent opinion of mental capacity. The opinion should be made a part of your office file. The medical provider or the PhD should be aware of the legal standards for mental capacity to make a Will and should know of the differences between medical assessments and legal analysis. Consider how to make the opinion admissible and not subject to medical privilege such a written direction from the client.

Mental competency can be different for the following activities:

1. Testamentary
2. Guardianship RCW 11.88
3. Domicile
4. Power of Attorney
5. Inter Vivos Trust (different from testamentary trusts and see Gifts)

6. Gifts (higher standard than just intent and delivery?) In re Slocum's Estate 83 Wash 158, 145 Pac 204 and Tucker v Brown, 199 Wash. 320, 325, 92 P.2d 221 (1939)

You should ascertain the appropriate level of mental competence required and get testing and/ or the written opinion of professional witnesses and include those tests/ opinions in your office file. This practice will not only aid in the defense of the Will, but will aid you and your expert on whether you met the standard of care in preparing the estate plan. It may also ease the admissibility of the reports into evidence when the admissibility of the reports if the admissibility of the reports is opposed.

A video deposition may be a useful tool if appropriate. The videotape should be prepared with its admissibility in mind. A professional videographer should make the recording. The professional videographer should preserve the original until offered into evidence. Caution: consider how the client will present in a video or an audio. Consider also whether the video will be of the actual execution or only as a demonstration of mental capacity, state of mind, and reasoning ability.

C. Documenting the File.

Make detailed file notes of all conversations with the client including conversations that go beyond their assets and planning. Examples are their interests, any views expressed on family issues, social issues, their motives for the plan and your own subjective impressions of their presentation. Were they mentally sharp? Playful or serious, talkative or quiet and other subjective impressions. This will help to paint a picture of the client. The memos will create an evidentiary record. The lawyer creating the memos must be familiar with the rules of evidence and prepare for laying a foundation for admissibility.

D. Will Provisions – Drafting

1. Selection of the PR

The PR has a common law duty to defend the Will. If the PR is also a major recipient under the Will, then the PR will be attacked for protecting their own financial interest. The advantage of being the PR is that the PR can control the defense of the estate and that the PR can control any mediated settlement. That advantage, however, may be worth a trade-off to a neutral PR who will conduct the defense with no taint of self-interest.

It may also be worthwhile to bar any family member from being the PR for two reasons: 1) to preserve any family harmony and 2) by deflecting the Petitioner's arguments that the PR is simply acting in their own self-interest. To achieve this, you can add language in the Will that none of the interested parties to the Will should be appointed as PR.

See also, II.E below Protection of Defense Fees.

2. Use of NPs

Consider a provision in the Will that the court shall not grant NPs. In that event, the administration shall proceed subject to the jurisdiction of the court so that all parties may have access to the court to resolve disputes, to construe the provisions of the Will if necessary, to approve disbursements for obligations of the estate, fees, and for partial and full distributions. Consider whether Rathbone could apply here or whether Rathbone is limited to its facts? In re Rathbone, Washington State Supreme Court, No. 94356-7 Decided: March 15, 2018.

3. Precatory Language

Consider using precatory language to explain the motive of the new inheritance provisions. For example, "to my friend Frank, I bequeath the sum of $250,000 because of the great good times that we enjoyed fishing and camping together which has greatly enriched my retirement years" or "I have reduced the bequest from my last Will to my son Sonny because we seem to have grown apart and I disapprove of his life-choices during the five years prior to the execution of this Will."

The drafter can also talk directly to the court with a precatory provision such as "OK for the PR to spend every last penny" in defending my estate plan in an effort to deflect arguments that the court should limit fees.

4. Using the In Terroram Clause Coupled With a Specific Bequest to Tempt the Contestant Not to Sue.

Consider a specific bequest coupled with an in terroram clause. The bequest should be just large enough to tempt the likely contestant to not bring the action. It should never be a percentage because then the disgruntled person has standing to object to other administrative steps (including fees) until the conclusion of the administration. For example, "I bequeath the sum of $100,000 to my daughter Dorothy" and also having an in terroram clause. That would present an election to Dorothy to take the $100,000 (or whatever amount may be tempting to Dorothy) or to bring a Will contest. The $100,000 is likely to be less than the litigation expenses and so we can tell the client that it may be cost effective to avoid litigation.

Reason: Any unpaid legatee has standing as a "party" to attack via accounting (or other issues) and to support an attack on the fees being expended to defend the Will. A specific bequest liquidates the amount to be distributed. That bequest can be distributed and thus destroys their standing as a party to participate further. But you cannot distribute a specific bequest until after the Will is upheld. But it could block them from arguing against defense costs when the Will is upheld at great expense.

Use of In Terroram clauses with a specific bequest is essentially a buy-off of a potential Will contestant.

5. Standing and the Difficult Legatee During Administration.

If we anticipate a troublesome person for the administration of the estate, then they can be removed by distributing their full bequest. It is useful to leave a fix amount rather than a percentage. A specific bequest when paid will remove the standing of that legatee to participate further. If a family member is a likely trouble maker, then change any percentage into a specific bequest. Once distributed to that person, they lose their standing to join with other problematic legatees and they are gone. This can also help to reduce the number of parties involved if there are disputes over such issues as construing the Will or an heir filing a disputed Creditor Claim. Rather than giving remote family members small residuary percentages, it may be better to give fixed amounts in a family with a history of dysfunction. In that way, the small interests can be cashed out and then lose their standing to participate in the disputes by taking sides.

E. Creating Allies as Co-Respondent

Consider whether the Testator will add some large respectable charities to the residuary clause. For example, leave 80% to a favored person and 10 percent to each of two well regarded charities. The two charities will retain counsel and assist in the defense of the Will. The two other residuary legatees will defuse the focus on only one person who has been accused of overreaching.

F. Protection of Defense Fees.

When the PR is named in the residue, it is common (in my experience) for the Petitioner to ask the court to prevent the PR from using the estate funds to pay for the defense. The thrust of their argument is that it is inherently unfair that the Petitioner has to pay their respective fees while the PR/legatee gets a free ride on defense fees by paying from the estate. If both Petitioner and the Respondent are named in the residue, then the Petitioner is also effectively paying defense costs from their own shrinking residuary share. This notwithstanding that the case law is clear: the PR has common law duty to defend and the defense costs get paid from the residue. [See Appendix A for discussion] Some courts, however, feel that this is unfair and will restrain the use of estate funds for defense.

The argument to pay from the estate is greatly strengthened when the PR is a neutral party. The argument to pay is also strengthened when there are major charities defending themselves as Co-Respondents. Consequently, you can protect the ability of the estate to defend the contest by either naming a neutral PR or encouraging the testator to add reputable charities in the residue or both.

G. Revocation and Dependent Relative Revocation (DRR). RCW 11.12.080.

Revoke the Will and then rebut DRR by the inclusion of language that "in the event that this Will is set aside in a Will contest, that it is my wish that the earlier estate plan is not revived pursuant to the application of DRR" or similar. "I wish to independently repudiate said estate plan and would prefer that my estate pass by intestacy that to revive my earlier plan." Also use such language to ratify a few months later to create multiple events at different points of time to defend the estate plan

H. Execution of Documents and the Creation of Multiple, Separate Events

In a typical Will contest, the focus of attention is on only one moment in time; namely at the moment of signing of the Will. The burden of counsel is to rebut the presumption of competency at that one moment or to establish that the document was the product of undue influence at that one moment. Both the creation of the estate plan and the revocation of the earlier estate plan are coupled together. If the Will fails, then the recital of the revocation of the earlier Will fails. The preparation of a defensible plan can create multiple events at different times which will increase the burden on the Petitioner. For example, separating the events of revocation of a Will from the execution of a later Will to after execution ratifications of the Will. This will force the Petitioner to produce evidence of mental infirmity/ influence at different points of time. In the case of undue influence, the influence may be inferred to be continuous in nature but separation of events gives the opportunity of affirming your client's intent. If your client can ratify the plan at 30 days and 180 days, then it strengthens the defense.

1. Separate the Revocation from the Execution

Typically, the revocation of an earlier Will is contained in a revocation clause of the later Will. The revocation can also be done independently a few days after the execution of the Will. An example of a Revocation is set forth at Appendix B. Note, however, that revocation is governed by RCW 11.12.040. It does not provide explicitly for revocation by a written document, but does set forth "cancellation." Consequently, conservative practice would be to revoke by the later Will, by a written revocation, and by destruction all three.

2. Subsequent Ratification by Separate Writing

Wahington does not provide for pre-mortem validation of a Will by statute. The same effect can be created by ratification. After the execution of the Will, consider another meeting with the client before you and another lawyer from your office to ratify the Will in writing. There could be multiple written ratifications several months apart.

Practical Tip: Advise the client to have no contact or communication with the person being benefited under the new Will. The ratification(s) will be more effective if accompanied by a separation in time from the potential undue influencer.

3. Dependent Relative Revocation -Rebut the Application by Separate Writings

See RCW 11.12.080. When a Will is successfully invalidated in a Will contest, the Petitioner will seek to revive an earlier more favorable Will under the Doctrine of Dependent Relative Revocation. If you can create documentary and admissible evidence that the testator did not want to revive an earlier Will, it may kill the motivation of the Petitioner and lessen the odds of a Will contest.

4. Witnesses at Execution

Witnesses and More Witnesses at the Execution. At the execution of the Will, it may be useful to have more than the statutory two witnesses. Although only two will sign as witnesses, it is helpful to have additional witnesses. Professionals are especially credible

witnesses such as other lawyers, accountants, and financial planners. Additionally, witnesses who have known the testator for a long time are helpful with testimony that the mentality of the testator is consistent with behavior and attitudes of the past. Rather than just "declaring" the Will, conduct a direct examination of the client as to motives for the change in estate plan. Guide the conversation so that the client can demonstrate such elements of mental alertness as to orientation of time and place, of ability to recall past events to show memory, of reasoning and logic, to communicate, etc. Immediately after the execution of the documents, the attorney should make a memo to the file of the event. If available, include among the witnesses to the event such professionals as:

a. Medical
b. Lawyers/ Financial Planners/ CPAs
c. Family/ Social Friends
d. Videotape: To film or not to film? This can be tricky if the client has good days/ bad days. Also, consider that the videotape is an out of court statement (hearsay) and that its admissibility is likely limited to show testamentary capacity. The lawyer's foundation questions to the client should include mental capacity, memory, and reasoning as well as motive. Consequently, the video may be of the event of execution or immediately preceding the execution to show only evidence of capacity and motive. The video should be conducted by a professional videographer who will maintain the original and thus lay a foundation that the video has not been altered when offered into evidence.

Caution: If there is a person taking an unusually large share under the Will or Trust, that person should have no involvement with the client on the day of the signing. They should not drive the client to your office, for example. In fact, it would be best if your client can eliminate all contact with that person for 30 days or so prior to the planning and execution of the Will. Otherwise, that person may have "participated" in the estate planning and thus meet one of the three elements to shift the burden.

I. Post Execution Evidence

1. Ratifications
2. Witnesses
3. See H.4., above.

J. Credible Witnesses for Each Writing

1. Engagement letter
2. Memos to the file
3. Execution of estate planning documents
4. Execution of ratifications

III. BEYOND PLANNING: THE LITIGATION COMMENCED

Hopefully, the implementation of the above will be known to the potential contestant during the CR 11 investigation and will dissuade the contestant from filing. If the contest is filed, then the defense will be conducted by an independent defense lawyer who will manage such issues as the attorney-client privilege, the credibility of the estate planning lawyers and other witnesses, and those of the files as evidence.

Lawyer Testimony, Multitasking

Credible testimony

Observing the Judge

Creating the record

Will Contest: Evidentiary Issues Unique to the Estate Planner

Lawyer testimony, multitasking
- Credibility
- Observing the Judge
- Creating the record
- Foreseeability during cross examination

1. The Attorney-Client Privilege
   See Appendix C.
2. Credibility of Lawyer
3. Lawyer's File
   a. Engagement letter
   b. Well drafted file notes and Memos
   c. Copies of all docs together with Witnesses
   d. Medical reports
   e. Time entries and statements
4. Admissibility of Ratifications
5. Availability of Witnesses

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See Appendices A, B, C and D.

Appendix A. Authority for the Duty to Defend the Plan

Appendix B. Sample Forms to Revoke a Will and/or to avoid the application of DDR

Appendix C. Approaches to the Application of the Attorney-Client Privilege

Appendix D. RPCs

RPC 1.4	Communication
RPC 1.5(b)	Fees
RPC 1.7	Conflict of Interest: Current Clients
RPC 1.8	Conflict of Interest: Current Clients: Specific Rules
RPC 3.3	Candor Toward the Tribunal

APPENDIX A

CASE LAW AUTHORITY FOR THE DUTY TO DEFEND THE ESTATE PLAN

Common Law Duty to Defend the Estate. *Estate of Winslow vs Winslow,* 30 Wn. App. 575 (1981), *Estate of Kvande vs. Olsen*, 74 Wn. App. 65 (1994), *Tucker vs. Brown*, 20 Wn.2d 740 (1944), and *Estate of Wilson vs. Livingston*, 8 Wn. App. 519 (1973).

"It is the duty of an executor or administrator to defend all suits that may be brought against the estate and to protect the estate from invalid and doubtful claims and obligations. He should interpose against such claims every legal objection that industry and care can furnish. When the estate is sued, an executor may not, by a bill of interpleader, call on legatees and heirs whose interest he must protect, to assume the burdens of litigation which his office imposes on him." Tucker v Brown, above, quoting with approval from 21 Am. Jur. 496, 497, Executors and Administrators, Sec 223.

The above is common law duty is, to the best of Respondent's knowledge, a fundamental rule of probate law and has no exceptions. This estate was sued and the estate has mounted a defense. The Co-PRs need the ability to pay retained counsel for the defense.

The Court's authority to enter the Order Staying Payment flows from the probate jurisdiction rather than from the civil jurisdiction herein. Because the cases were consolidated, the Court can exercise both jurisdictions concurrently. This can result in the conflicting interest being advocated by the Petitioners as here. Petitioners sue the estate and then attempt to hamper the defense of the estate by cutting off payments to the defense lawyers. This represents a jump by Petitioners from the TEDRA lawsuit to the court's probate jurisdiction and then using that probate jurisdiction for an advantage back in the TEDRA lawsuit. Although Petitioners argue that they are preventing "waste," they are really seeking a tactical litigation advantage.

APPENDIX B

SAMPLE FORMS

CANCELLATION (REVOCATION) OF LAST WILL AND TESTAMENT PER RCW 11.12.040
AND
WRITING TO EVIDENCE THE INTENT NOT TO REVIVE ANY EARLIER WILL PER RCW 11.12.080

Cancellation and Revocation. The undersigned hereby cancels and revokes *[NOTE to counsel: consider also revocation by destruction]* all Wills that are dated prior to the date of my last Will and Testament dated November 2, 2018 including, but not limited to that Last Will and Testament dated the 5th day of October, 2004. I have executed a new Will on November 2, 2018 which also revokes all prior Wills. I am making this separate revocation because I anticipate a Will contest and, in the event that the Will of November 2, 2018 is invalidated by the court, I wish to have in place an independent revocation and cancellation so as to prevent the revival of said earlier Wills.

Motive for Change in Estate Plan. My motive in making these changes is that I am dissatisfied with John Doe because ___ *(explain in detail the source of unhappiness and why the new Will doesn't seem unfair to the Testator)* Consequently, I have elected to direct the disposition of my estate to others and wish to dissuade John Doe from seeking my remaining estate through litigation after my demise.

No Revival of Earlier Wills Application of Dependent Relative Revocation RCW 11.12.080. One of the purposes of this Revocation of Will is to provide a disincentive for a Will contest against my new Will by rendering the earlier Will [or "all earlier Wills]" favoring John Doe permanently revoked by declaring my intention not to revive any prior Wills *[or Codicils if appropriate per the facts of your client]* under the legal doctrine of Dependent Relative Revocation. It is my intention to rebut any presumption or argument that I would have intended to revive said earlier Will in the event that a court should invalidate my present Will and estate plan favoring [whomever].

DATED:

_____

Titus Testator

APPENDIX B (continued)

STATE OF WASHINGTON)

) ss.

COUNTY OF KING)

The undersigned, each being duly sworn on oath, each for himself, testifies as follows:

The within instrument, entitled Revocation of Last Will and Testament and consisting of two (2) pages, was on the date thereof by him signed, published and declared by him to be his Revocation of Last Will and Testament on which this Affidavit is written, in the presence of us, who at his request and in his presence and in the presence of each other, have subscribed our names as witnesses thereto.

This Revocation of Last Will and Testament of Titus Testator was signed and executed by him at Seattle, Washington, on the date set out in said Revocation, in the presence of the undersigned witnesses. He thereupon published the instrument as, and declared it to be his Revocation of Last Will and Testament, and requested us to sign the same as witnesses. At the request of him, the other witness and I subscribed our names as witnesses thereto.

At the time of executing this instrument, said testator, the other witness and I were of legal age and said testator appeared to be of sound and disposing mind and memory, and not acting under any apparent duress, menace, or influence.

I have witnessed this Will and made this affidavit at the request of said Titus Testator.

WITNESSES:

_____ residing at _____

_____ residing at _____

APPENDIX B (continued)

STATE OF WASHINGTON)

) ss.

COUNTY OF KING)

This is to certify on this ___ day of _____. 2018 before me a Notary Public in and for the State of Washington duly commissioned and sworn, personally came Titus Testator, to me known to be the individual described in and who executed the within instrument, and acknowledged to me that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

WITNESS my hand and official seal the day and year in this certificate first above written.

_____

Print name: _____

Notary Public in and for the State of

Washington, residing at Seattle.

My commission expires: _____

[DRAFTING NOTE PER CONTRACTUAL WILLS: SEE RCW 11.12.060]

RCW 11.12.060 provides that remedies to enforce a contractual Will survives a revocation and you should advise your client accordingly and in writing.]

APPENDIX C

ATTORNEY – CLIENT PRIVILEGE

Privilege and Waiver, Case law

The attorney who drafted, witnessed, or oversaw the execution of the Will is likely to be a witness at some point whether an interview the CR 11 investigation, during discovery or at trial. The interview or the testimony will concern privileged communications with a deceased client. Can the lawyer testify without violating the privilege? The short answer is "No". Death does not destroy the privilege. *Martin v. Shaen*, 22 Wn.2d 505 (1945).

RCW 5.60.060(2) is the statutory authority when the lawyer is served with a subpoena regarding any privileged information as follows:

"RCW 5.60.060 Who are disqualified -- Privileged communications.

> (2)(a) An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment."

The privilege may be asserted by either the lawyer, the PR, or the heirs. The PR may waive the privilege. *In Re Estate of Thomas*, 165 Wash. 42 (1931). But *should* the lawyer testify if both the PR and the heirs waive the privilege? Again, the answer is "No" because of possible client "*secrets*" and Formal Opinion No. 175 of the Washington State Bar Association. The privilege embraces both "confidences" and "secrets" of the client. The "confidences" are probably all that the parties are seeking discovery. But a blanket waiver may disclose "secrets" as well. Secrets can include any information which is embarrassing. *Seventh Elect Church v. Rogers*, 102 Wn.2d 527 (1984). Caution on inadvertence waiver: see *Boettcher v. Busse*, 583 (1954) which held: "The bar of the statute may be waived. [cites] If the bar of the statute is waived, or, if evidence of conversations or transactions with the decedent by parties in interest is admitted without objection, the evidence is entitled to the same credence and weight as any other evidence received."

Consequently, the lawyer interviewed for a CR 11 investigation or subpoenaed for deposition or trial should assert the privilege until otherwise directed after a court hearing and an order on this issue. The basis for obtaining an Order directing the lawyer to testify is found in Cummings v. Sherman, 16 Wn.2d 88 (1943) which held: "It is generally considered that the rule of privilege does not apply in litigation, after the client's death, between parties, all of whom claim under the client; and, so, where the controversy is to determine who shall take by succession the property of a deceased person and both parties claim under him, neither can set up a claim of privilege against the other as regards, the communications of deceased with his attorney."

Practice Tip: If the testimony of the drafting lawyer is sought, then apply for an Order allowing the testimony after the issuance of the subpoena and prior to the date of the deposition.

APPENDIX D

SELECTED RPCs

RPC 1.4
COMMUNICATION

(a) A lawyer shall;

(1) promptly inform the client of any decision of circumstance with respect to which the client's informed consent, as defined in Rule 1.0A(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[Originally effective September 1, 1985; amended effective September 1, 2006; April 14, 2015.]

APPENDIX D (Continued)

RPC 1.5
FEES

(b) The scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation, except when the lawyer will charge a regularly represented client on the same basis or rate. Any changes in the basis or rate of the fee or expenses shall also be communicated to the client. Upon the request of the client in any matter, the lawyer shall communicate to the client in writing the basis or rate of the fee.

[Amended effective September 1, 1990; amendment to RPC (c)(2) effective September 18, 1990, suspended September 18, 1990; suspension lifted December 12, 1990; amended effective September 1, 2006; November 18, 2008.]

APPENDIX D (Continued)

RPC 1.7
CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing (following authorization from the other client to make any required disclosures).

[Originally effective September 1, 1985; amended effective September 1, 1995; September 1, 2006.]

APPENDIX D (Continued)

RPC 1.8
CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, expect as permitted or required by these Rules.

[Adopted effective September 1, 1985; amended effective September 1, 1993; June 27, 2000; September 1, 2006; April 24, 2007; September 1, 2008; September 1, 2011; April 14, 2015.]

RPC 3.3
CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by the opposing party; or

(4) offer evidence that the lawyer knows to be false.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding.

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is

prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.

(e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(f) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

[Originally effective September 1, 1985; amended effective September 1, 2006; April 14, 2015.]