

V.

"ETHICAL CONSIDERATIONS IN PROBATE"

Materials prepared by Jeffrey R. Ropp, Attorney at Law

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Jeffrey R. Ropp is a principal at Winston & Cashatt, Lawyers, whose practice includes fiduciary representation, business law, and estate planning. His estate planning practice includes drafting wills, trusts, probate, durable powers of attorney and health care directives, along with developing asset protection strategies, probate, advising the elderly and advising clients on federal estate and gift tax issues. He received his law degree from Gonzaga University School of Law and also holds a Master of Laws in Taxation from the University of Florida. Mr. Ropp is an active member of the Washington State Bar Association, Spokane Estate Planning Council, and National Academy of Elder Law Attorneys. He is a frequent lecturer on trust, probate and estate planning topics.

ETHICAL CONSIDERATIONS IN PROBATE

A. Ethical Rules Affecting Elder Law. Attorneys are governed by the Rules of Professional Conduct. The Rules of Professional Conduct applicable to this discussion include Client-Lawyer Relationship, (RPC 1.1-1.18), Counselor (RPC 2.1-2.14), Advocate (RPC 3.19), Truthfulness in Statements to Others (RPC 4.1), Communication (RPC 1.4); Confidentiality of Information (RPC 1.6); Conflicts of Interest: Current Clients (RPC 1.7); Conflicts of Interest: Current Clients Specific Rules (RPC 1.8); Imputation of Conflicts of Interest: General Rule (RPC 1.10) and Dealing With Clients With Diminished Capacity (RPC 1.14). The full Rules of Professional Conduct can be found at the Washington State Bar Association website, that being www.wsba.org. The following discussion focuses on conflicts of interest, confidentiality and disclosure. Focus will be primarily the areas of conflicts of interest that a lawyer encounters, and steps that can be taken to avoid such conflicts of interest which are rampant.

1. Who's Your Client: Conflicts of Interest and Red Flag Situations. (RPC 1.7-1.10) Administration of a probate estate presents multiple situations where conflicts of interest may exist. These include:

- Family dynamics;

- Multiple people attending attorney meetings;
- Assets passing outside of probate administration;
- Minors, missing heirs, incompetent heirs;
- Dealing with grief and not moving forward;
- Family members as fiduciaries;
- Fiduciaries with claims (creditor claims, fees or assets passing outside of administration);
- Representing multiple fiduciaries;
- Representing multiple family member heirs;
- Estate litigation;
- Misunderstandings and expectations as to what decedent said versus what a beneficiary receives (I was always told that . . .);
- Confusion regarding who the attorney (you) represents;
- Fees.

A. Conflict of Interest Applicable Rules.

The conflict of interest rules relevant to our discussion are RPC 1.7; Current client; RPC 1.8; Conflicts of Interest current client; Specific Rules; RPC 1.9 Duties to former clients and RPC 1.10 Imputation of conflicts of interest; General Rule.

The rules are provided in the Appendix to this Article.

B. Conflicts of Interest: RPC 1.7.

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 (1), a lawyer may represent a client if:

1) the lawyer reasonable 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).

This Rule as applied to representation assisting with probate administration is pretty clear: Your client is the Personal Representative. Note 40 provides that: “Under Washington case law, in estate administration matters the client is the personal representative of the estate.” The direct application of RPC 1.7 seems obvious. An attorney should not represent “the family” or any person other than the personal representative.

The conflicts and potential conflicts arise when the personal representative and/or heirs (family) are unclear as to who the attorney represents. The following are strategies to minimize and avoid potential and real conflicts of interest.

1. Initial Meeting(s). These should be limited to the attorney and the nominated personal representative.

- Avoid multiple family members in the room;
- Make it clear who you represent (and say it in writing);
- Address communication issues (such as do you permit heirs to call for status updates or to present question);

2. Communications in Writing. Make it clear in your first correspondence that you represent the personal representative. See sample letter included in the Appendix material.

3. Independent Representation. Make it clear that each beneficiary is entitled to their own attorney and that you do not represent them.

C. Representing the Personal Representative as Fiduciary and as a Beneficiary: RPC 1.8. Representing the personal representative in their individual capacity (as well as in their role as a fiduciary) is permissible but usually a bad idea. A personal representative may also be a beneficiary of the estate, a creditor or a claimant to an asset passing outside the probate estate (like joint tenancy with rights of survivorship, beneficiary designation or pay-on death accounts). RPC 1.8 does permit such dual representation if the lawyer reasonably believes that the lawyer is able to provide competent and diligent representation to each affected client, is not prohibited by law, and each affected client gives informed consent confirmed in writing.

Example 1: The personal representative is a residuary beneficiary of a probate estate. This would likely not present an insurmountable problem (with disclosure and consent). Since the personal representative's personal interests are aligned with those of the estate and not in conflict.

Example 2: The personal representative is a joint tenant with right of survivorship to a bank account held with the decedent. This is a classic conflict problem and arises frequently. As a fiduciary, the personal representative is obligated to maximize the estate for the beneficiaries, but as

a surviving joint tenant wants to keep that money. An attorney should not represent the personal representative in their individual capacity and should refer them out.

D. Attorney Fees. (RPC 1.5). RPC 1.5 governs attorney's fees and agreements and provides the following:

- Fees and expenses must be reasonable
- Factors to consider in determining the reasonableness of fees
 - Time and labor required and novelty and difficulty of situation
 - Likelihood of preclusion of other employment
 - Fee customarily charged in locality
 - Results obtained and amount involved
 - Time limitation imposed by client or by circumstances
 - Nature and length of professional relationship with client

- Experience, reputation and ability of attorney performing services
- Fixed fee or contingent fee
- Confirmation in writing of fee agreement
- Contingency fees
- Retainers
- Flat fees

D. Attorney Acting as Fiduciary.

1) Lawyer Drafting Will. An attorney who drafts a Will and in that Will names him or herself as Executor may find him or herself disqualified because of a conflict of interest, appearance of a conflict of interest, or have fees denied. In re the estate of Shaunessey, the court was not pleased with an attorney who drafted a Will and named himself as fiduciary (or beneficiary).

Under this one is a general rule an attorney naming him or herself as Executor should be a course of last resort. This is reserved for clients who have no other sound choices and should be rare.

2) RCW 11.48.010 Duties of Personal Representatives. An attorney acting as a fiduciary (Executor) is a fiduciary. As such the attorney is charged with collecting all debts of the deceased, paying obligations, providing notice to creditors and beneficiaries and to prosecute or abstain from prosecuting actions relevant to the estate. The Personal Representative (attorney) owes to the beneficiaries fiduciary duties to act in the estate's best interest. As such, an attorney must exercise utmost good faith and due diligence.

APPENDIX

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). [Adopted effective September 1, 1985; Amended effective September 1, 1995; September 1, 2006.]

RPC 1.8

CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of an independent lawyer on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(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, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include spouse, child, grandchild, parent, grandparent or other relative or individual with who the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not, while representing a client in connection with contemplated or pending litigation, advance or guarantee financial assistance to a client, except that:

(1) a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, provided the client remains ultimately liable for such expenses; and

(2) in matters maintained as class actions only, repayment of expenses of litigation may be contingent on the outcome of the matter.

(f) A lawyer shall not accept compensation for representing a client from one 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 client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, confirmed in writing. The lawyer's disclosure shall include the existence and nature of all the

claims or pleas involved and the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented by a lawyer in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of an independent lawyer in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not:

(1) have sexual relations with a current client of the lawyer unless a consensual sexual relationship existed between them at the time the client-lawyer relationship commenced; or

(2) have sexual relations with a representative of a current client if the sexual relations would, or would likely, damage or prejudice the client in the representation.

(3) For purposes of Rule 1.8(j), "lawyer" means any lawyer who assists in the representation of the client, but does not include other firm members who provide no such assistance.

(k) While lawyers are associated in a firm with other lawyers or LLLTs, a prohibition in the foregoing paragraphs (a) through (i) of this Rule or LLLT RPC 1.8 that applies to anyone of them shall apply to all of them, except that the prohibitions in paragraphs (a), (h), and (i) of LLLT RPC 1.8 shall apply to firm lawyers only if the conduct is also prohibited by this rule.

(l) A lawyer who is related to another lawyer or LLLT as parent, child, sibling, or spouse, or who has any other close familial or intimate relationship with another lawyer or LLLT, shall not represent a client in a matter directly adverse to a person who the lawyer knows is represented by the related lawyer or LLLT unless:

(1) the client gives informed consent to the representation; and

(2) the representation is not otherwise prohibited by Rule 1.7.

(m) A lawyer shall not:

(1) make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm:

(i) to bear the cost of providing conflict counsel; or

(ii) to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law

firm personnel; or (2) knowingly accept compensation for the delivery of indigent defense services from a lawyer who has entered into a current agreement in violation of paragraph (m)(1). [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 1.9 DUTIES TO FORMER CLIENTS (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing. (b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client (1) whose interests are materially adverse to that person; and (2) about whom that lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing. (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client. [Adopted effective September 1, 1985; Amended effective September 1, 2006.]

RPC 1.10

IMPUTATION OF CONFLICTS OF INTEREST: GENERAL RULE

(a) Except as provided in paragraph (e), while lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11. However, lawyers appointed or assigned to represent indigent members of the public (public defenders) are subject to this rule regardless of whether they are government employees.

(e) When the prohibition on representation under paragraph (a) is based on Rule 1.9(a) or (b), and arises out of the disqualified lawyer's association with a prior firm, no other lawyer in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified unless:

(1) the personally disqualified lawyer is screened by effective means from participation in the matter and is apportioned no part of the fee therefrom;

(2) the former client of the personally disqualified lawyer receives notice of the conflict and the screening mechanism used to prohibit dissemination of information relating to the former representation;

(3) the firm is able to demonstrate by convincing evidence that no material information relating to the former representation was transmitted by the personally disqualified lawyer before implementation of the screening mechanism and notice to the former client.

Any presumption that information protected by Rules 1.6 and 1.9(c) has been or will be transmitted may be rebutted if the personally disqualified lawyer serves on his or her former law firm and former client an affidavit attesting that the personally disqualified lawyer will not participate in the matter and will not discuss the matter or the representation with any other lawyer or employee of his or her current law firm, and attesting that during the period of the lawyer's personal disqualification those lawyers or employees who do participate in the matter will be apprised that the personally disqualified lawyer is screened from participating in or discussing the matter. Such affidavit shall describe the procedures being used effectively to screen the personally disqualified lawyer. Upon request of the former client, such affidavit shall be updated periodically to show actual compliance with the screening procedures. The law firm, the personally disqualified lawyer, or the former client may seek judicial review in a court of general jurisdiction of the screening mechanism used, or may seek court supervision to ensure that implementation of the screening procedures has occurred and that effective actual

compliance has been achieved. (f) When LLLTs and lawyers are associated in a firm, an LLLT's conflict of interest under LLLT RPC 1.7 or LLLT RPC 1.9 is imputed to lawyers in the firm in the same way as conflicts are imputed to lawyers under this rule. Each of the other provisions of this Rule also applies in the same way when LLLT conflicts are imputed to lawyers in the firm. [Adopted effective September 1, 1985 Amended effective September 1, 1992; September 1, 2006; September 1, 2011; April 14, 2015.]

DATE

NAME

ADDRESS

Re: Estate of DECEDENT

Dear Heirs:

My name is Jeffrey R. Ropp, and I am the attorney for PERSONAL REPRESENTATIVE, the Personal Representative of the Estate of DECEDENT. The purpose of this letter is to first make inquiry of you as required by Washington State law regarding any information you may have which would assist the Personal Representative in ascertaining the existence and identity of any creditors of this Estate.

If you have knowledge or information relating to any claimant or creditor of this Estate, please provide the name, address and, if possible, telephone number of said claimant to either the Personal Representative of the Estate, PERSONAL REPRESENTATIVE, ADDRESS or to me at this office. It is very important that any creditors that might have claims against the Estate of the Decedent be permitted an opportunity to file a claim in this matter so that their claim might be dealt with effectively. Your assistance in this regard is most appreciated.

The second purpose of this letter is to clarify our role in this proceeding. We represent PERSONAL REPRESENTATIVE in his/her capacity as Personal Representative only and do not represent any person, individually, who is or may be an heir of this Estate. Each heir is entitled to his or her own independent representation.

Please find enclosed a copy of the Last Will and Testament of the Decedent, and a copy of the Notice of Probate Proceedings evidencing the appointment of PERSONAL REPRESENTATIVE as Personal Representative of the Estate. Should you have any questions in this regard, please feel free to contact me at your convenience.

Very truly yours,

JEFFREY R. ROPP

Enclosures