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Supreme Court No. 95861-1

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 75246-4-I (Consolidated with No. 15-4-06640-1 SEA)

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

In re the Estate of
TAYLOR GRIFFITH
Deceased.

KENNETH GRIFFITH and JACKIE GRIFFITH

Petitioners,

v.

BRADLEY J. MOORE,
in his capacity as personal representative,

Respondent,

and

MICHAEL B. KING;
CARNEY BADLEY SPELLMAN, P.S.; *et al.*,

Lawyer Appellants/Petitioners.

LAWYER APPELLANTS' PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER AND COURT OF APPEALS DECISION

Michael B. King, Carney Badley Spellman, P.S., Jacquelyn A. Beatty, and Karr Tuttle Campbell seek review of the published decision terminating review in *Harris v. Griffith*, 2 Wn. App. 2d 638, 413 P.3d 51 (2018), issued by Division I of the Court of Appeals on March 5, 2018 (the "Opinion") (a copy of the slip opinion is attached as Appendix A).

II. ISSUES PRESENTED FOR REVIEW

This case presents the following issues warranting this Court's review:

1. Judicial Override of RCW 2.44.030. By making the fact of a lawyer's appearance conclusive proof of the existence of an attorney-client relationship, the Opinion judicially overrides RCW 2.44.030,[1] which allows litigants to challenge the authority of a lawyer who files an appearance.

2. Direct Contradiction with Prior Determinations of this Court. By making the fact of a lawyer's appearance conclusive proof of the existence of an attorney-client relationship, the Opinion ignores this Court's well-established test for an attorney-client relationship as set forth in *Bohn v. Cody*, 119 Wn.2d 357, 832 P.2d 71 (1992), and other cases by this and other Washington courts, and as recognized by Washington Comment [11] to Rule of Professional Conduct ("RPC") 1.18.

3. Negative, Unintended Consequences for Clients, Lawyers, and the Courts. By making the fact of a lawyer's appearance conclusive

[1] A copy of RCW 2.44.030 is attached as Appendix B.

proof of the existence of an attorney-client relationship, the Opinion creates negative consequences for clients, lawyers, and the courts. The simple assertion by a lawyer of an attorney-client relationship would be sufficient to create such a relationship even over the client's protest. The Opinion also fails to recognize that lawyers, as humans, make mistakes. Binding lawyers to harmless mistakes does not serve the goals of the judicial system.

4. Limited and Saving Interpretation Not Possible. Even if the Opinion were somehow construed as holding only that the filing of an appearance creates a legal presumption in favor of an attorney-client relationship, the same vices would remain. Nothing in the entire *Bohn v. Cody* line of cases supports the existence of such a presumption in a dispute between an attorney and a would-be client.

For the reasons set forth in Section IV of this Petition, these issues warrant review under RAP 13.4(b)(1), 13.4(b)(2), and 13.4(b)(4).

III. STATEMENT OF THE CASE

On August 24, 2014, sixteen year old Taylor Griffith was involved in an automobile accident with a vehicle driven by Mr. Steven Harris. CP 983–84. The accident resulted in the deaths of Taylor and Mr. Harris, and multiple injuries to Mrs. Margaret Harris. *Id.* Through attorney David Beninger, Mr. Harris's Estate and Mrs. Harris (collectively, the "Harrises") brought claims against the Estate of Taylor Griffith (the "Estate") and Taylor's parents Kenneth and Jackie Griffith (the "Griffith Parents"). CP 982–87. Taylor's and the Griffith Parents' insurer, Travelers Home and

Marine Insurance Company, retained Michael Jaeger to defend the Estate and the Griffith Parents. *See* CP 988–89.

The Griffith Parents were the sole beneficiaries of the Estate. CP 819. The Estate's assets consisted of approximately $1000 and the contents of Taylor's bedroom. *Id.* The combined policy limit on the Travelers insurance policy was $200,000. CP 675, 676. From the beginning, it was clear that the Harrises' funeral, medical, and other costs and damages would far exceed the $201,000 available from a suit against the Estate alone, as well as any amount from the Griffith Parents if a judgment could be obtained against them. *See* CP 404–06.

On December 8, 2015, on a motion brought by Beninger—and over the Griffith Parents' objection—Brad Moore was appointed by a court commissioner as personal representative of the Estate. CP 1658–59; *see also* CP 1642–45. A week later, Jaeger filed a motion for revision at the direction of the Griffith Parents. CP 1663–75.

During the December 8, 2015 hearing the Harrises asserted the belief that the Estate, the Griffith Parents, or both had a viable bad faith claim against Travelers. CP 184–85. Travelers then offered to pay the costs for the Griffith Parents to retain personal counsel to advise them independently about assigning any potential bad faith claim to the Harrises as part of a settlement. *See* CP 469. The Griffith Parents hired Beatty as their personal counsel on December 15, 2015—the same day that the motion for revision challenging Moore's status as personal representative was filed.

See CP 461, 1663. Beatty never represented or claimed to represent the Estate at a time when Moore's status was not at issue.

On December 16, 2015, Jaeger amended his notice of appearance. CP 2254–55. While his original notice of appearance was on behalf of the "Defendants," his new notice specified "KENNETH GRIFFITH and JACKIE GRIFFITH; and BRADLEY J. MOORE, as Personal Representative of THE ESTATE OF TAYLOR GRIFFITH."[2] *Compare* CP 988–89 *with* CP 2254–55 (capitalization in original). On December 17, 2015, and after receiving Jaeger's amended notice, Beatty filed her notice of association for "defendants Kenneth Griffith, Jackie Griffith, and the Estate of Taylor Griffith (deceased)" only. CP 2273–74. Beatty's notice did not include Moore because she did not believe that she represented Moore. Instead, she believed that representation of the Estate meant representation of the interests of the Estate's beneficiaries: the Griffith Parents. *See* CP 446. Beatty's practice focuses on insurance matters and appeals; she is not a trusts and estates lawyer. CP 457–59.

Beatty did not perform any legal services for or at the direction of Moore at any time. *See* CP 439–53. Moore also never sought any legal advice from Beatty and never provided any confidential information to Beatty. CP 449. Indeed, Moore declared twice in unambiguous terms that

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[2] No one in this case has disputed that *Jaeger* represented Moore. The question here, however, is whether *Beatty and King* did so. The representations were different. But Court of Appeals' factual recitation appears to lump the three attorneys' actions together and ignores a great deal of what is uncontested in the record. *See generally* App. A.

Beatty did not represent him. On December 21, 2015, and in an email sent to Beatty and Beninger, among others, Moore said:

> Ms. Beatty: You do not represent me as Personal Representative of the Estate of Taylor Griffith. Mr. Jaeger represents me. The Estate's insurer is paying him to represent me. . . . To the extent your email implies that you represent the Griffith Estate, let's be clear that you do not. You have no authority to act in any way on behalf of the Griffith Estate. I did not hire you and I did not authorize anyone hiring you. You have no authority to make any decision that impacts the Griffith Estate.

CP 474. And at 4:51 p.m. on January 5, 2016, Moore emailed Beatty that:

> Let's be clear: I am the P.R. of the Griffith Estate. You do not represent me or the Estate (in spite of your prior representations to the Court to the contrary). . . . You are not authorized to make any representations on the Estate's behalf. As you told me yesterday at the courthouse, you represent Mr. and Mrs. Griffith.

CP 489.[3] No engagement letter or other similar correspondence exists between Beatty and Moore. Her engagement letter was with the Griffith Parents only. CP 469–70, 471–72.

On or about December 17, 2015, Travelers retained King as preservation of error counsel for the then-anticipated trial. CP 565. King understood his clients to be Travelers' insureds: the Griffith Parents and the Estate. *See* CP 566–67. Because the challenge to Moore's status was still unresolved, King believed that his representation required him to act in the objective best interests of the Estate until such resolution could occur.

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[3] Although these two emails reference Beatty and not King, it is plain from the entire record that the representation of Moore by Beatty or King rises and falls entirely together. Review by this Court would still be required, however, even if this Court believed that these emails were applicable only as to Beatty and not as to King. As described in this Petition, Moore's and King's actions vis-à-vis one another demonstrate that Moore did not hold a subjective and reasonable belief that King was Moore's attorney.

See id. King's practice focuses on appellate advocacy; he too is not a trusts and estates lawyer. Both King and Beatty believed that Moore was acting contrary to the interests of the Estate and its beneficiaries (the Griffith Parents), and sought to protect the Estate and its beneficiaries against Moore. *See* CP 449, 652–59. The Griffith Parents, likewise, wanted Moore removed and had directed Beatty and King to advocate for that result. CP 566.

King filed his notice of association on January 4, 2016 on behalf of the "Defendants." CP 2336–37. King's notice did not include Moore because he did not believe that he represented Moore, CP 566–67; and his notice was the same as the notice filed by Jaeger (on behalf of the "Defendants") when no personal representative had yet been appointed for the Estate, CP 988–89.

Like Beatty, King did not perform any legal services for or at the direction of Moore. CP 566–68. And also like Beatty, Moore did not seek any legal advice from King, did not convey any confidential information to King, and did not have any engagement letter or other similar communications with King. *See* CP 566–67. In fact, Moore did not have any communications with King until January 5, 2016. CP 566, 568.

On January 5, 2016, the Harrises suddenly dismissed the claims against the Griffith Parents without prejudice.[4] CP 2425–26. Beatty then asked the trial court to resolve the issue of Moore's status before trial began,

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[4] These claims have since been renewed. Beatty and King moved to add the amended complaint to the record on appeal on November 17, 2017, attached as Appendix C. The Court of Appeals denied the motion on December 18, 2017.

and the trial court asked Beninger for argument on that matter. CP 2426–27. Instead of directly answering the court's question, Beninger asked the trial court to have each attorney identify whom they represented given that the Griffith Parents had been dismissed. CP 2427. Jaeger, Beatty, and King each stated that they represented the Estate without making any reference to Moore. CP 2429. The trial court then moved on to other motions in limine without addressing Moore's status. CP 2430.

That afternoon, Beninger announced that he and Moore had reached an arbitration agreement—without any knowledge or involvement of Jaeger, Beatty, or King on Moore's behalf. CP 2453; *see also* CP 403. Later that same afternoon, and as already noted, Moore emailed Beatty: "Let's be clear: . . . You do not represent me or the Estate." CP 489.

Approximately an hour and a half after Moore once again told Beatty that she did not represent him, Moore sent his first and only instructions to either Beatty or King. CP 491–92. He instructed them both not to oppose the arbitration agreement. *Id.* Neither obeyed his order. Beatty and King both believed that Moore was not their client because his authority to act as personal representative was in dispute and because they believed they were entitled to protect the Estate against Moore. *See* CP 449, 652–69. In response to Moore's unexpected change of position, both Beatty and King told Moore that he was not their client, and both moved to withdraw from their representation of the Estate. CP 494–95, 604, 2358–59, 2378–79.

On January 27, 2016, Beatty and King filed a TEDRA complaint on behalf of the Griffith Parents and against Moore. CP 796–818. On March

31, 2016, and in a motion later joined by Moore, Beninger moved under RCW 2.44.020 and 2.44.030 to determine Beatty's and King's authority to act and to disqualify them on the ground that Beatty and King had previously represented Moore. CP 1–2, 4, 990–1002.

On April 27, 2016, the trial court ordered Beatty and King disqualified. CP 781–85. Judge Doyle based her decision solely on the fact that they had entered appearances on behalf of the Estate, which she believed constituted representation of Moore as a matter of law. *Id.* Thus, everything else in the record (which included not only the facts referenced above but also citations to *Bohn v. Cody*) was "beside the point," or irrelevant, because "Moore is the PR unless and until this Court removes him." CP 784.

The Petitioners timely appealed the trial court's disqualification order, and Division I of the Court of Appeals affirmed on the same bases as the trial court. *See generally* App. A. Although Beatty and King filed a motion for reconsideration, attached as Appendix D, the Court of Appeals denied reconsideration. The Petitioners now seek this Court's review.

IV. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. This Court should grant review to decide whether a party retains the right under RCW 2.44.030 to challenge an attorney's authority to act.

Under RCW 2.44.030, a purported client or representative of the opposing party may challenge an attorney's authority to act on the purported client's behalf. *See Johnsen v. Petersen*, 43 Wn. App. 801, 806, 719 P.2d 607 (1986). This is a long-recognized right in Washington courts. *See id.*

And it was invoked by the Harrises and Moore in aid of seeking disqualification. CP 1–2, 4, 990–1002.

The Opinion effectively nullifies this statute by judicial fiat. Under the Opinion, an irrebuttable presumption exists that an attorney's appearance alone is sufficient to create an attorney-client relationship, regardless of what else is in the record. App. A at 11. ("Moore's status as their client is controlled by the fact that Beatty and King entered formal notices of appearance . . . on behalf of the estate.") If an attorney always has authority to act as a result of entering a formal appearance, RCW 2.44.030 could never be invoked.

Absent a claim of unconstitutionality, courts must not interpret the law in a manner that renders a statute meaningless or without purpose. *John H. Sellen Constr. Co. v. State Dep't of Revenue*, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976). No party has argued that RCW 2.44.030 violates the constitution. Nonetheless, the Court of Appeals rendered RCW 2.44.030 illusory through the creation of its novel presumption. This Court should grant review under RAP 13.4(b)(4) because whether RCW 2.44.030 retains validity is an issue of substantial public importance that this Court should decide.

B. This Court should grant review because the Opinion conflicts with prior decisions by this Court and by the Court of Appeals.

1. The presumption expressed in the Opinion directly contradicts the test used by this and other courts to determine whether an attorney-client relationship exists.

The Opinion creates an irrebuttable presumption that a formal notice of appearance creates an attorney-client relationship regardless of the beliefs and actions of the purported client and purported attorney. App. A at 11. Even if this presumption were held only rebuttable, however, it would still flatly contradict the test set forth by this Court in *Bohn v. Cody*. The *Bohn v. Cody* test has been applied in all other Washington cases since 1992, is recognized in this Court's official comments to the Washington RPCs, and is consistent with the tests used by courts across the country, regardless of jurisdiction.

For at least a quarter century, the test to determine whether an attorney-client relationship exists has required the party asserting an attorney-client relationship to demonstrate that the purported client had a subjective and reasonable belief that an attorney-client relationship existed. *E.g.*, *Bohn*, 119 Wn.2d at 363. Every single decision of this Court since *Bohn v. Cody* has applied this *Bohn v. Cody* test.[5]

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[5] *E.g.*, *In re Jackson*, 180 Wn.2d 201, 229, 322 P.3d 795 (2014) (attorney discipline); *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 306, 45 P.3d 1068 (2002) (liability for non-lawyer providing lawyer-like functions); *Dietz v. Doe*, 131 Wn.2d 835, 843–44, 935 P.2d 611 (1997) (availability of attorney-client privilege); *Sherman v. State*, 128 Wn.2d 164, 189, 905 P.2d 355 (1995) (disqualification). Moore and the Harris Creditors argued below that the *Bohn v. Cody* test did not apply to motions to disqualify, an argument that cannot be reconciled with, *inter alia*, *Sherman*, 128 Wn.2d 164.

Washington Comment [11] to RPC 1.18 likewise requires application of the *Bohn v. Cody* test. This Comment provides in part that RPC 1.18 "is not intended to modify existing case law defining when a client-lawyer relationship is formed" and then cites *Bohn v. Cody* as that existing case law.[6] The *Bohn v. Cody* test is also applied in every case involving a "who is the client" question decided by the U.S. District Courts for the Districts of Washington,[7] and, except for the instant Opinion, by the Washington Court of Appeals.[8]

The framework of the *Bohn v. Cody* test is also substantively the same as the test used to determine the existence of an attorney-client relationship by the Restatement[9] and in every other case that Beatty and King have found, regardless of jurisdiction.[10] In addition, it is clear in absolutely all of these authorities that the burden of proof for the existence of an attorney-client relationship is on the party asserting the relationship,

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[6] *See also* Washington Comment [17] to the Scope section of the RPCs: "For purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists."

[7] *See, e.g.*, *McElmurry v. Ingebritson*, No. 2:16-cv-00419-SAB, 2017 WL 5346417, at *2 (E.D. Wash. Nov. 13, 2017) (slip op.) (legal malpractice); *Avocent Redmond Corp. v. Rose Elecs.*, 491 F. Supp. 2d 1000, 1003–04 (W.D. Wash. 2007) (disqualification). *Accord, e.g.*, *Global Enter., LLC v. Mongomery Purdue Blankinship & Austin PLLC*, 691 Fed. App'x 460 (Mem.) (9th Cir. 2017) (applying *Bohn v. Cody*).

[8] *See, e.g.*, *Ordal v. First Am. Title Ins. Co.*, 188 Wn. App. 1009, 2015 WL 3617813, at *2 (June 8, 2015) (unpublished) (legal malpractice); *State v. Reeder*, 181 Wn. App. 897, 910–11, 330 P.3d 786 (2014) (disqualification); *Broyles v. Thurston Cty.*, 147 Wn. App. 409, 442, 195 P.3d 985 (2008) (availability of attorney-client privilege).

[9] Restatement (Third), The Law Governing Lawyers § 14(1).

[10] *See, e.g.*, *Bartholomew v. Bartholomew*, 611 So. 2d 85, 86 (Fla. 1992) (disqualification); *New Destiny Treatment Ctr., Inc. v. Wheeler*, 950 N.E.2d 157, 162 (Ohio 2011) (legal malpractice); *Roderick v. Ricks*, 54 P.3d 1119, 1127 (Utah 2002) (citing *Bohn*, 119 Wn.2d at 363) (legal malpractice).

that the decision must be made on the basis of the record as a whole, and that there are no applicable presumptions—whether rebuttable or irrebuttable. *E.g.*, *Dietz*, 131 Wn.2d at 843–44; *Bohn*, 119 Wn.2d at 363.

The Court of Appeals was bound not simply to cite *Bohn v. Cody* one time, which it did (App. A at 10), but to apply it as this Court's precedent. *Gorman v. Pierce Cty.*, 176 Wn. App. 63, 76, 307 P.3d 795 (2013). Instead of doing so, however, the Opinion decided that all that the Court of Appeals or the trial court needed to know was that Beatty and King had asserted they were appearing on behalf of the Estate, which then meant as a matter of law that they represented Moore as well. App. A at 11. In addition, and like the trial court decision, the Opinion does not place the burden of proving the existence of an attorney-client relationship on the parties seeking to establish the relationship, nor does it consider the record as a whole. Although the Court of Appeals did not expressly address the allocation of the burden, the court clearly placed the burden of disproving a relationship on Beatty and King. App. A at 11 (stating that "Moore's statement that 'you do not represent me' falls short of demonstrating a subjective belief" and that "the circumstances did not make it reasonable to doubt" that an attorney-client relationship existed).

The Opinion thus does not consider how, in view of the entire record, Moore could or did carry his burden to show that he held a subjective and reasonable belief that Beatty and King were his attorneys. Instead, it identified only a single piece of evidence relating to the existence or nonexistence of a subjective and reasonable belief by Moore that he was

Beatty's and King's client—the *second* of the two emails in which Moore told Beatty that she did not represent him. App. A at 10–11. The court then found that that email simply demonstrated Moore's frustration with his attorneys. *Id.* But taken in the context of the record as a whole, Moore did not carry the burden of *proving* an attorney-client relationship. For example, the purported representation was bookended by two emails in which Moore expressly disclaimed an attorney-client relationship with Beatty. The first email denying the relationship was sent four days after Beatty filed her notice of appearance, at a time when Moore had not yet interacted with Beatty and thus had nothing to be frustrated about. The second email was sent fifteen days later. During those fifteen days, Moore's actions were entirely consistent with his two declarations that Beatty did not represent him, *i.e.*, he did not seek legal advice or any other assistance from Beatty, he did not share confidential information with Beatty, and he signed an arbitration agreement directly with the Harrises' attorney without Beatty's (or King's) knowledge or involvement. It also cannot be said that Moore, as a sophisticated lawyer, CP 720–27, did not know the implications of expressly disavowing an attorney-client relationship—twice and in writing.

Similarly, and although Moore was aware that King was assisting Jaeger with the case, Moore did not communicate or attempt to communicate with King until the evening of January 5—a fact wholly consistent with a shared understanding that no attorney-client relationship existed between Moore and King.

The Court of Appeals also ignored the metaphorical elephant in the room. Lawyers, like other human beings, make mistakes, and Beatty and King have not denied that their belief that they could represent the Estate and protect it against Moore without also representing Moore could well have been a mistake. As a matter of law, however, there is no legal basis on which to disqualify Beatty and King based only on that mistake—especially in the absence of any detrimental or reasonable reliance thereon by Moore or anyone else. *See, e.g.*, *City of Goldendale v. Graves*, 14 Wn. App. 925, 929–30, 546 P.2d 462 (1976) ("These attorneys are human, thus occasionally make mistakes. . . . It is our opinion that the mistake made by [defendant's] attorney, while reprehensible, did not prejudice an innocent third party . . ."). *Accord Koo v. Rubio's Rests., Inc.*, 109 Cal. App. 4th 719, 729, 135 Cal.Rptr.2d 425 (2003) (reversing disqualification on the ground that counsel's assertion that he had represented certain individuals was a mistake). The Opinion ignores any possibility of the existence of a mistake. Instead, the Opinion asserts that because it is "untenable" that one can claim to represent an Estate without also representing its then-personal representative, it follows as a matter of law that a statement of representation of an Estate is a conclusive statement of representation of the personal representative as well. App. A at 9.

This Court should grant review under RAP 13.4(b)(1) and (b)(2) to decide whether the test set forth in *Bohn v. Cody* is still the applicable test for Washington courts, attorneys, and parties; whether that test precludes any argument of fact or law that a statement of representation was made by

mistake; and/or whether that test is now invalid or is subject to burden-shifting whenever a statement about representation (whether made in court or out of court) is made.

2. The Informal Advisory Opinion cited as the sole authority in support of the Opinion is not applicable to this case.

The sole authority cited in the Opinion as supporting the appearance-is-conclusive-proof-of-representation standard is Washington State Bar Informal Advisory Opinion 1578 (1994) ("Opinion 1578").[11] App. A at 12. Opinion 1578 is not binding on the Court of Appeals,[12] this Court, or any other court. *Smith v. Legal Helpers Debt Resolution, LLC*, No. 11–5054 RJB, 2011 WL 13113725, at *6 (W.D. Wash. Oct. 24, 2011) ("Washington State Bar advisory opinions are not binding. They are persuasive, however, [when] there is no reason to deviate from [the] WSBA [opinion].")

There are multiple reasons to deviate from Opinion 1578 here. First, as already noted, it is inconsistent with a quarter century of settled law under

[11] The text of the informal advisory opinion provides:

> The Committee reviewed your inquiry wherein you had been retained by an insurer to represent a city and a police officer employed by the city. You filed a Notice of Appearance on behalf of each of those clients. Subsequently, you learned that there was a conflict of interest between the two clients. You ask whether you can continue to represent the city after proper withdrawal from representing the police officer. The Committee was of the opinion that for the purposes of RPC 1.9, the fact that you filed a Notice of Appearance means that the police officer is a former client and you must therefore comply with the requirements of RPC 1.9.

[12] For example, Division II recently issued an unpublished opinion that found no attorney-client relationship existed between a co-personal representative and the attorney that filed documents in the probate action. *Estate of Heinzinger*, 2 Wn. App. 2d 1027, 2018 WL 721384 (Feb. 6, 2018) (unpublished).

Bohn v. Cody. Opinion 1578, in fact, not only fails to cite *Bohn v. Cody* but cites no authority at all.

Second, the informal advisory opinion did not involve the additional facts present here. For example, Moore, the purported client in this instance, stated more than once that he was only represented by Jaeger and that no attorney-client relationships existed with Beatty and by extension King. And no less importantly, the lawyer in Opinion 1578 had expressly stated that he represented the policeman. In the present context, neither Beatty nor King ever stated to anyone that they represented Moore. They only stated that they represented the Estate; it was the trial court and the Court of Appeals—not Beatty or King—that construed this statement to be a claim of representation of Moore.

And third, the informal advisory opinion was decided two decades before Washington adopted RPC 1.18, the prospective client rule, and this Court's Comment [11] thereto, which, as noted, cites *Bohn v. Cody* as the existing case law defining when a lawyer-client relationship is formed. Since RPC 1.18 was not a part of the Washington RPCs when Opinion 1578 was issued, that opinion did not consider whether there was any other way to classify the policeman other than as an actual client. If RPC 1.18 had then been in force, the committee would have had to consider whether the policeman might have only been a prospective client with whom an actual attorney-client relationship had not yet been formed under the *Bohn v. Cody* test.

The weight to be afforded to this or any other WSBA informal advisory opinion which is inconsistent with this Court's precedent is an

issue of substantial public importance that this Court should decide. This Court should grant review under RAP 13.4(b)(4).

3. This Court has recognized that circumstances exist when a lawyer may need to act adversely to the interests of a client's legal representative in order to protect the interests of the client.

The Court of Appeals found it "untenable" to argue that Beatty or King could represent the Estate without also representing Moore as its personal representative. App. A at 9. This stands in direct contrast to the settled recognition that attorneys are sometimes entitled to act against the interests of a client's legal representative in order to protect the client's interests.

A variety of parties including corporations, minors, incapacitated persons, missing persons, and estates cannot take legal action except by and through a legal representative. When an attorney represents such a client, the attorney must generally take directions from the client's legal representative. RPC 1.14, cmt. [4]. Nonetheless, there are exceptions. For example, Washington Comment [4] to RPC 1.14 instructs an attorney representing a client with diminished capacity to "*ordinarily* look to the representative for decisions on behalf of the client." (emphasis added). "Ordinarily" is manifestly different language than "always" or "as an inevitable matter of law." And "ordinarily" is likely used because an attorney is empowered to take reasonable measures to protect the interests of a client with diminished capacity (and against the legal representative) when the attorney reasonably believes there is a risk of substantial physical, financial, or other harm to the client's interests. RPC 1.14, cmt. [5]; *cf.*

Kruger-Willis v. Hoffenburg, 198 Wn. App. 408, 417, 393 P.3d 844 (2017) (insurer-retained counsel must take action to protect the interests of an insured who is unwilling or unavailable to do so).

The point here is not that Beatty and King were necessarily correct in asserting that they could represent the Estate without also representing Moore. The point is that it cannot be said that such an attempt—even if held after the fact to be incorrect—is conclusive proof of the existence of an attorney-client relationship because any other conclusion would be "untenable." The law is simply not that inflexible. *See Trask v. Butler*, 123 Wn.2d 835, 845, 872 P.2d 1080 (1994) (leaving open the question of whether an attorney could represent the Estate against its personal representative).

Beatty and King believed in good faith that they could represent the Estate's interests against Moore, who they believed was taking actions adverse to the interests of the Estate and was certainly taking actions adverse to the interests of the Griffith Parents, who were the Estate's sole beneficiaries. *See* CP 449, 652–59. Whether attorneys may act in the best interests of the client-estate when doing so is against the interests of the estate's personal representative is an issue of substantial public importance that this Court should decide. This Court should grant review under RAP 13.4(b)(4).

C. This Court should grant review because the Opinion will result in negative consequences for clients, lawyers, and the courts.

1. The Opinion gives attorneys unprecedented power to unilaterally create an attorney-client relationship without client consent.

The Court of Appeals' holding that an attorney-client relationship is created by the attorney's mere appearance or statement of representation is an issue of substantial public importance that this Court should decide because it has negative consequences for clients. An attorney has never had, and should not now be given, the unfettered power to create an attorney-client relationship without client consent. *See* RCW 2.44.030; *Dietz*, 131 Wn.2d at 845 (attorney's claim that attorney-client relationship existed was alone insufficient to assert attorney-client privilege); *Grossman v. Will*, 10 Wn. App. 141, 148–49, 516 P.2d 1063 (1973) (woman not bound by the actions of an attorney hired by her husband without her consent). Nor should opposing counsel or courts be forced to deal with a claimed legal representative without authority to act. *See* RCW 2.44.030. This Court should grant review under RAP 13.4(b)(4).

2. The Opinion binds attorneys to mistaken statements of fact or law regardless of the parties' actions or beliefs.

The Court of Appeals' holding that an attorney-client relationship is created by an attorney's mere appearance or statement of representation is an issue of substantial public importance that this Court should decide because it also has negative consequences for attorneys. It binds attorneys to mistaken statements of law or fact without regard to the actions or beliefs of the parties involved.

As already noted, the Opinion fails to consider the evident possibility (or, in the view of the Court of Appeals, certainty) that Beatty and King had made a mistake. Until now, Washington courts have not bound attorneys to all mistakes—particularly when such mistakes have not cognizably harmed an innocent party. *See, e.g.*, *City of Goldendale*, 14 Wn. App. at 929–30. That state of affairs should not change now, and it certainly should not change under the facts of this case.

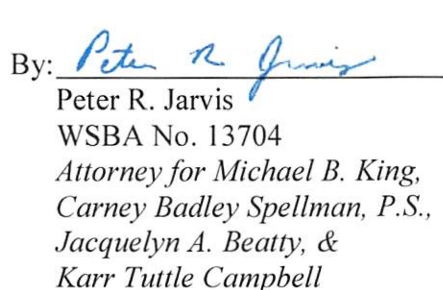
This Court should not allow adoption of an unqualified and unwavering rule of representation-by-mistake. Accordingly, this Court should grant review under RAP 13.4(b)(4).

V. CONCLUSION

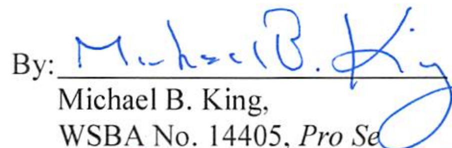
This Court should grant this Petition, and reverse the Court of Appeals and the trial court's disqualification order.

Respectfully submitted this 17th day of May, 2018.

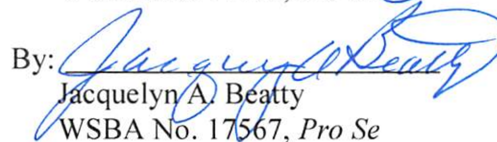
HOLLAND & KNIGHT LLP



By: ______________________
Peter R. Jarvis
WSBA No. 13704
Attorney for Michael B. King, Carney Badley Spellman, P.S., Jacquelyn A. Beatty, & Karr Tuttle Campbell



By: ______________________
Michael B. King,
WSBA No. 14405, *Pro Se*



By: ______________________
Jacquelyn A. Beatty
WSBA No. 17567, *Pro Se*

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 17th day of May, 2018.

Patti Saiden, Legal Assistant

APPENDIX
A

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2018 MAR -5 AM 8:27

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEFANIE HARRIS, individually and as Personal Representative of the Estate of STEVEN R. HARRIS (deceased); MARGARET HARRIS; and BRADLEY J. MOORE, in his capacity as Personal Representative of the ESTATE OF TAYLOR GRIFFITH, Respondents,	No. 75246-4-I
v.	DIVISION ONE
KENNETH GRIFFITH and JACKIE GRIFFITH; MICHAEL B. KING, and the law firm of CARNEY BADLEY SPELLMAN, P.S.; and JACQUELYN A. BEATTY, and the law firm of KARR TUTTLE CAMPBELL, Appellants.	PUBLISHED OPINION FILED: March 5, 2018

BECKER, J. — An insurance defense lawyer who files a notice of appearance on behalf of an estate may not, after withdrawing from representation of the estate, later act on behalf of another client to remove the personal representative of the estate. The personal representative is a former client, and the lawyer must comply with Rule of Professional Conduct (RPC) 1.9, either by withdrawing from representation of the other client or obtaining consent

from the estate's personal representative. A lawyer who does not comply is properly disqualified for having a conflict of interest.

FACTS

Sixteen-year-old Taylor Griffith was driving a pickup truck on State Route 202 on August 24, 2014. The truck crossed the center line and collided head-on with a car driven by Steven Harris. Both drivers were killed in the crash. Steven's wife, Margaret Harris, a passenger in his car, was seriously injured. Taylor was survived by his parents, Kenneth and Jackie Griffith. The Griffiths were insured by Travelers Home and Marine Insurance Company.

Margaret and her daughter, Stefanie Harris, as personal representative of the estate of Steven Harris, filed suit against Taylor's estate and his parents in December 2014. The complaint alleged that Taylor's estate and his parents were jointly and severally liable for the accident. The complaint further alleged that filing of the lawsuit was necessary because Travelers was not handling the claim in good faith, as evidenced by its failure to disclose the limits of the insurance carried by the Griffiths when requested by the plaintiffs to do so.

Attorney Michael Jaeger filed a notice of appearance on behalf of all defendants at the request of Travelers. In February 2015, Jaeger filed an answer. Trial was scheduled for January 4, 2016.

A personal representative had not been appointed for Taylor's estate. When a person dies intestate, as Taylor did, the next of kin have priority to be appointed to administer the estate so long as they petition within 40 days of the death.

RCW 11.28.120(2), (7). Otherwise, a court may appoint "any suitable person" as personal representative. RCW 11.28.120(7).

The Harris estate filed a petition in probate in November 2015, requesting appointment of Brad Moore as personal representative for Taylor's estate. The petition noted that the wrongful death complaint alleged liability not only on the part of Taylor's estate but also on the part of his parents, under the family car doctrine and other legal principles. The petition also mentioned the complaint's allegation that Travelers had acted in bad faith. The petition nominated Moore, an attorney experienced in matters of personal injury, as a suitable person to evaluate the assets and claims of Taylor's estate.

The Griffith parents, through Jaeger acting as attorney for "defendants," requested that Kenneth Griffith be appointed instead of Moore. The Griffith parents were the sole beneficiaries of their son's estate, which consisted only of his personal possessions and about $1,000. The parents denied having personal liability for Taylor's accident. They asserted that the references to Travelers in the petition were irrelevant to deciding who should be appointed as personal representative because Travelers was not a party to the suit.

At the hearing on the petition, the Harris estate argued that Moore was the more suitable personal representative because of his experience and understanding of the complexities of wrongful death litigation in a case where the estate's only real asset was its potential bad faith claim against its insurance company. The Griffiths objected to Moore, who is known as a plaintiff's attorney.

"I just feel like it's not independent enough . . . if you're considering appointing Brad."

The court commissioner ruled that given the potential for conflict between the Griffith parents and their son's estate, it was more untenable to appoint one of the parents than to appoint Moore. The commissioner expressed confidence that Moore would recognize his obligation as a fiduciary to be independent and impartial. The commissioner appointed Moore as personal representative by order dated December 8, 2015. The order specifically authorized Moore "to participate in litigation and to settle or assign claims" on behalf of Taylor's estate.

Jaeger did not initially acknowledge Moore as a client. Jaeger's first communication to Moore—on December 9, 2015—said he was planning to file a motion for revision of the order appointing Moore so that Kenneth Griffith could serve as personal representative. Moore responded, objecting that Jaeger had not consulted him about that. "I hope you do not take any actions against my interests. As it is, you haven't filed a Notice of Appearance on my behalf and I don't understand why. If you don't believe you represent me, then who do you claim to represent?" Moore asked Jaeger to provide his analysis of the estate's potential exposure in the wrongful death litigation and his strategy to defend the estate.

On December 15, 2015, Jaeger's firm filed the motion to revise, asserting that Moore was not suitable as the personal representative of the estate because he is a "plaintiff's personal injury practitioner."

On December 16, 2015, Jaeger filed an amended notice of appearance, stating he was counsel for the Griffith parents and counsel for Moore as the personal representative of Taylor's estate. On December 22, 2015, Jaeger told Moore that his goal was to protect the interests of the estate and the Griffith parents. He asked Moore to reconsider his refusal to step down as personal representative. He refused Moore's request for strategic advice: "We will not produce any sensitive case information given the pending motion for revision."

Around this time, Travelers appointed attorneys Jacquelyn Beatty and Michael King to serve as additional defense counsel. Beatty filed a notice in the wrongful death action associating herself with Jaeger on behalf of the Griffith parents and Taylor's estate. King filed a notice associating with Jaeger as counsel "for defendants."

On December 18, 2015, the court granted a motion by the plaintiffs for partial summary judgment. The order established that liability and causation were proven as to Taylor's estate, but not as to his parents. The order dismissed affirmative defenses pleaded by the Griffith parents and Taylor's estate.

On January 4, 2016, the first day of trial, Beatty introduced herself to the court as "personal counsel for the Griffiths." King was introduced as a lawyer "with the defense." The court heard argument on motions in limine and then concluded proceedings for the day after determining that a jury was not yet available.

The next day, January 5, 2016, the Harris plaintiffs moved to dismiss the Griffith parents without prejudice. Without objection, it was so ordered. This left

the amount of damages as the only remaining issue for the jury, with Taylor's estate as the only remaining defendant. At the request of plaintiffs, the court required each defense lawyer to identify his or her client in view of the dismissal of the Griffith parents. Jaeger, Beatty, and King all responded that they represented Taylor's estate:

> MR. JAEGER: I represent the estate, Your Honor.
> THE COURT: Okay.
> MS. BEATTY: Likewise.
> Mr. King?
> MR. KING: I also represent the estate. I was retained to represent the estate of Taylor Griffith and the Griffiths for preservation of error matters and prospectively looking down the line for an appeal.
> And since the Griffiths are no longer parties to the case, having been dismissed, now my responsibility is to the estate of Taylor Griffith.

The hearing continued with discussion of motions in limine, including a dispute about whether defense counsel could depose a doctor that evening. King argued that motion for the defense.

At the beginning of the afternoon session, the judge announced that she had been presented with a document signed by Moore and counsel for the plaintiffs by which they agreed to arbitrate any remaining issues between them. Over objection, the court signed an order for arbitration and concluded the trial.

Over the next few days, Beatty, King, and Jaeger filed notices withdrawing as counsel for Taylor's estate in the wrongful death action. The notices filed by Beatty and King stated that they continued as counsel for the Griffith parents. Beatty filed a notice of appearance on behalf of the Griffith parents in the probate action, in which the motion to revise the commissioner's order appointing Moore

was still pending. Represented by Beatty, the Griffith parents moved (1) for permission to participate as intervenors in the wrongful death action and (2) for a stay of the arbitration pending a ruling on whether Moore would be allowed to continue as personal representative. Over the plaintiffs' objection, the court granted both motions.

Represented by King, the Griffith parents filed a petition under the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW, to remove and replace Moore as personal representative. The court consolidated this petition with the pending motion to revise the commissioner's order appointing Moore. Both were set for consideration on April 29, 2016.

By motions filed on March 31, 2016, the Harrises alleged that under RPC 1.9, Beatty and King could not continue to represent the Griffith parents. Beatty and King responded that the rule did not apply because Moore was not their former client.

The court ruled that Moore was a former client of Beatty and King and that disqualification was warranted because of the conflict of interest. The court entered an order prohibiting Beatty and King from appearing on behalf of the Griffith parents in the wrongful death, probate, and TEDRA actions.[1] The disqualification order entered on April 27, 2016, is the subject of this appeal brought by King, Beatty, and the Griffith parents.

[1] A hearing on the TEDRA petition to remove Moore was held in May 2016. The Griffith parents were represented by new counsel. The court denied the petition. That order is the subject of a separate appeal before this court, In re Estate of Taylor Griffith, No. 75440-8-I.

ANALYSIS

A preliminary issue raised by respondents is whether the appellants have standing. Only an aggrieved party may seek appellate review. RAP 3.1. An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected. In re Guardianship of Lasky, 54 Wn. App. 841, 848-50, 776 P.2d 695 (1989). The court held in Lasky that an attorney removed as guardian of an incompetent adult had no standing to appeal the order removing him. Lasky does not control the standing issue here because the disqualification order was based on a determination that Beatty and King failed to comply with a rule of professional conduct. A court's formal finding of a lawyer's rule violation carries with it sufficient potential for adverse consequences to the lawyer to make the ruling appealable by the lawyer. United States v. Talao, 222 F.3d 1133, 1138 (9th Cir. 2000). Accordingly, we conclude Beatty and King have standing to appeal the disqualification order. Whether the Griffith parents also have standing need not be decided.

Whether an attorney's conduct violates a relevant rule of professional conduct is a question of law. Eriks v. Denver, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992). The relevant rule in this case is RPC 1.9(a). The rule prohibits lawyers from "switching sides" and representing a party adverse to a former client in the same or a substantially related matter. Teja v. Saran, 68 Wn. App. 793, 799, 846 P.2d 1375, review denied, 122 Wn.2d 1008 (1993). RPC 1.9(a) is based on the attorney's duty of loyalty to a client. Teja, 68 Wn. App. at 798-99. It provides as follows:

> 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.

RPC 1.9(a).

The sole issue in dispute is whether Moore is a former client of Beatty and King. The trial court correctly determined that he is, in the order quoted below:

> Moore is the client. Beatty and King represented Moore during the time they were counsel of record for the Estate. They entered notices of appearance for the Estate, and affirmed in open court, in answer to this judge's question, that they were, indeed, representing the Estate.
>
> Having represented the Estate, and thus Moore, the former client, Beatty and King could not then represent the Griffiths in the "substantially related" probate matter because the Griffiths' interests were "materially adverse" to those of Moore, who did not give his consent. In the probate matter, Beatty and King, on behalf of the Griffiths, are suing Moore, their former client. These clients' interests could not get any more adverse. . . .
>
> The Griffiths assert various arguments: no confidences were disclosed, Beatty and King never appeared on behalf of Moore, Moore did not regard them as his attorneys, no conflict existed between the Griffiths and the Estate, Moore and the Harris creditors never actually sought disqualification, their motives are tactical, and they waited too long.
>
> All of the above is beside the point. Brad Moore is the PR [personal representative] unless and until this Court removes him.

The appellants argue that the "estate" was their client but Moore was not. This argument is untenable. In probate, the attorney-client relationship exists between the attorney and the personal representative of the estate. Trask v. Butler, 123 Wn.2d 835, 840, 872 P.2d 1080 (1994). "There is no agency or individual other than the official 'personality' of the administrator or executor which can be pointed to as the 'estate.'" In re Estate of Peterson, 12 Wn.2d 686, 730, 123 P.2d 733 (1942). Once Moore was duly appointed as the personal representative of Taylor's estate, he was the client of Jaeger. Moore then also

became the client of Beatty and King when they associated with Jaeger as attorneys for the estate. When Beatty and King withdrew from representing the estate, Moore became their former client.

Beatty and King argue that Moore cannot be their former client because he never had a subjective, reasonable belief that they were his attorneys. They cite Bohn v. Cody, 119 Wn.2d 357, 832 P.2d 71 (1992). In Bohn, parents loaned money to their daughter. When the loan was not repaid, the parents sued the daughter's attorney on several theories, including that he gave them negligent advice about the transaction. The parents held a subjective belief that the attorney formed an attorney-client relationship with them when he discussed the transaction with them, answered questions about it, and prepared a document formalizing the transaction. Bohn, 119 Wn.2d at 363-64. But the attorney told the parents he was not their lawyer, and the parents were unable to show that his actions were inconsistent with that statement. For this reason, the court held the attorney did not represent the parents. The client's subjective belief "does not control the issue unless it is reasonably formed based on the attending circumstances, including the attorney's words or actions." Bohn, 119 Wn.2d at 363.

As evidence that Moore did not believe he was their client, Beatty and King quote from an e-mail sent by Moore to Beatty on the second day of the trial: "Let's be clear: I am the P.R. of the Griffith Estate. You do not represent me or the Estate (in spite of your prior representations to the Court to the contrary). . . . You are not authorized to make any representations on the Estate's behalf. As

you told me yesterday at the courthouse, you represent Mr. and Mrs. Griffith." Moore's peremptory tone is not surprising in view of the continuing effort by the Griffith parents to have Moore removed from administration of their son's estate. Considering the record as a whole, Moore's statement that "you do not represent me" falls short of demonstrating a subjective belief that the lawyers who had appeared for the estate owed him no duty of loyalty. It is more reasonably understood as an expression of Moore's frustration that the attorneys retained by Travelers to represent Taylor's estate were not communicating with him and were taking action on behalf of the estate without consulting him.

In addition, the circumstances did not make it reasonable to doubt that Beatty and King were in an attorney-client relationship with Moore. The issue of Moore's status as their client is controlled by the fact that Beatty and King entered formal notices of appearance in the wrongful death litigation on behalf of the estate.

As soon as Beatty and King filed their notices of appearance, they owed their client the duties discussed in Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 388-89, 715 P.2d 1133 (1986). "Both retained counsel and the insurer must understand that only the *insured* is the client." Tank, 105 Wn.2d at 388. Their client was Moore, the estate's personal representative. Beatty and King acted for the estate when they continued to participate in the wrongful death trial after the Griffith parents were dismissed. In answer to the court's question, they affirmed that they were still involved in the lawsuit as attorneys for the estate. Yet at the same time, they were advocating on behalf of their other

clients, the Griffith parents, to remove Moore as personal representative of their son's estate.

An advisory opinion issued by the Washington State Bar Association addresses the precise situation Beatty and King found themselves in—a potential violation of RPC 1.9 by a lawyer retained by an insurance company:

> The Committee reviewed your inquiry wherein you had been retained by an insurer to represent a city and a police officer employed by the city. You filed a Notice of Appearance on behalf of each of those clients. Subsequently, you learned that there was a conflict of interest between the two clients. You ask whether you can continue to represent the city after proper withdrawal from representing the police officer. *The Committee was of the opinion that for the purposes of RPC 1.9, the fact that you filed a Notice of Appearance means that the police officer is a former client and you must therefore comply with the requirements of RPC 1.9.*

WSBA Rules of Prof'l Conduct Comm., Advisory Op. 1578 (1994) (emphasis added).

We agree with the advice of the Bar. A lawyer appointed by an insurance company to defend two clients, and who files a notice of appearance on behalf of each of them, may not continue to represent only one of those clients without satisfying the requirements of RPC 1.9. Beatty and King could not continue to represent only the Griffith parents without Moore's waiver of the conflict. Because Beatty and King did not comply with the rule, the order disqualifying them was properly entered.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, J.

Schindler, J.

APPENDIX B

West's RCWA 2.44.030

2.44.030. Production of authority to act

Effective: July 22, 2011
Currentness

The court, or a judge, may, on motion of either party, and on showing reasonable grounds therefor, require the attorney for the adverse party, or for any one of several adverse parties, to produce or prove the authority under which he or she appears, and until he or she does so, may stay all proceedings by him or her on behalf of the party for whom he or she assumes to appear.

Credits

[2011 c 336 § 59, eff. July 22, 2011; Code 1881 § 3282; 1863 p 405 § 8; RRS § 132.]

Notes of Decisions (6)

West's RCWA 2.44.030, WA ST 2.44.030
Current with all effective legislation from the 2018 Regular Session of the Washington Legislature.

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APPENDIX

C

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Estate of: TAYLOR GRIFFITH, *Deceased*. KENNETH GRIFFITH and JACKIE GRIFFITH, *Appellants,* v. BRADLEY J. MOORE, in his capacity as personal representative, *Respondent,* and MICHAEL B. KING; CARNEY BADLEY SPELLMAN, P.S.; *et al*, *Aggrieved Parties/Appellants.*	NO. 75246-4-I MOVING APPELLANTS' MOTION TO ADD DOCUMENTS TO RECORD ON APPEAL

Introduction

One issue in this appeal is whether the aggrieved parties and appellants (Carney Badley Spellman, P.S., Michael B. King, Karr Tuttle Campbell, and Jacquelyn Beatty (collectively, "Moving Appellants") have standing. On this question, Moving Appellants respectfully ask the Court to order the addition of two documents (Exhibits 1 and 2, attached) to the record on appeal pursuant to RAP 9.11 and RPC 1.2. Exhibit 1 is an

Amended Complaint filed below reasserting claims against the Griffith Parents. Exhibit 2 is the trial court's Order staying proceedings below pending this appeal.

Analysis

Respondents contend that Moving Appellants lack standing in this apoeal because their proprietary, pecuniary, or personal rights were and are not at stake. Moving Appellants, however, predicted that among other things, "Respondents have taken, and will no doubt continue to take, additional actions based on the trial court finding of a RPC 1.9(a) violation, *and that if Respondents carried out their threat to sue the Griffith Parents again, "the Griffith Parents want, and are entitled to, assistance from"* Moving Appellants. Id. at 23 (emphasis added).

That prediction was prescient. On August 23, 2017, Respondent Harris Creditors renewed their suit against the Griffith Parents. (Ex. 1.) Among other things, the Amended Complaint:

- Again brings the Griffith Parents back in as defendants. (Ex. 1 ¶ 1.7.)
- Adds additional defendants including Moving Appellant Mike King ("King"). (Ex. 1 ¶ 1.12.) And
- With respect to now-defendant King, asserts in ¶3.3 that King's conduct was conduct which the trial court "has already found was improper and unethical requiring disqualification", in ¶4.6 that King "breached ethical rules requiring discipline" and in ¶8.4 that King "should be enjoined, restrained and prohibited from engaging in

> representation or conduct already found improper and requiring disqualification . . . ."

As reflected in Exhibit 2, the trial court subsequently stayed proceedings under the First Amended Complaint until this appeal and the TEDRA appeal have been resolved.[1]

These documents are directly relevant to the issues herein.

RAP 9.11 permits addition of these documents to the record. The rule provides that:

> The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

The rule would appear on its face to impose a strict limitation upon additions to the record. But In *Washington Federation of State Employees v. State*, 99 Wn.2d 878, 885, 665 P.2d 1337 (1983), the Supreme Court admitted to the appellate record documents created after initiation of the suit and in anticipation of oral argument before the court, holding it could and would waive the strict requirements of the rule: "t[T]his court may

[1] Moving Appellants have not sought to include the trial court briefing on the motion to stay in the record on appeal but would have no objection to its inclusion if the Court or Respondents so desire.

waive or alter the provisions of any Rule of Appellate Procedure in order to serve the ends of justice. RAP 1.2 and 18.8." *Accord Spokane Airports v. RMA, Inc.*, 149 Wn.App. 930, 206 P.3d 364 (2009).

The ends of justice are most definitely not served by allowing Respondents to get away with saying one thing to this Court and then something entirely different to the trial court in the same case.

Respectfully submitted this 17th day of November, 2017.

HOLLAND & KNIGHT, LLP

s/ Peter R. Jarvis
Peter R. Jarvis, WSBA No. 13704
111 SW 5th Ave Ste 2300
Portland OR 97204-3626
Attorneys for Carney Badley Spellman, P.S.; Michael B. King; Karr Tuttle Campbell; & Jacquelyn Beatty

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Holland & Knight LLP, over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

☒ Email to the following:

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DATED this 17th day of November, 2017.

s/ Kathy F. Kudrna
Kathy F. Kudrna, Legal Assistant

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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

STEFANIE HARRIS, individually, as assignee and Personal Representative of the Estate of STEVEN R. HARRIS; MARGARET HARRIS; and SCOTT HARRIS, Plaintiffs, v. ESTATE OF TAYLOR GRIFFITH; TRAVELERS HOME AND MARINE INSURANCE COMPANY; MICHAEL KING; MICHAEL A. JAEGER; KENNETH and JACKIE GRIFFITH; YOUR GARDEN, INC.; and JOHN DOES, Defendants.	CAUSE NO. 14-2-33004-9 SEA FIRST AMENDED COMPLAINT

COME NOW the Plaintiffs and defendant Estate of Taylor Griffith and stipulate and consent to amendment of the Complaint to add the parties, claims, crossclaims, relief and damages as set forth herein, and further admit and agree to the following allegations:

1. IDENTIFICATION OF PARTIES

1.1 STEVEN HARRIS was born March 24, 1946 and died August 24, 2014 in King County, Washington. He was the retired Chief of Police for the City of Redmond. Steven Harris had been married to Margaret Harris for over 50 years at the time of his death.

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1.2 MARGARET HARRIS was born August 23, 1946. Margaret Harris is the surviving spouse of Steven Harris.

1.3 STEFANIE HARRIS and SCOTT HARRIS are the natural children of Steven and Margaret Harris.

1.4 STEFANIE HARRIS is the court appointed Personal Representative of the Estate of Steven Harris and court authorized assignee of certain claims. As such Stephanie Harris is authorized to bring this action individually, as assignee, and on behalf of the Estate of Steven Harris and all beneficiaries.

1.5 TAYLOR GRIFFITH was born in May of 1998 and died on August 24, 2014. Taylor Griffith was an unemancipated 16 year old minor who resided with and was dependent upon his parents, KENNETH and JACKIE GRIFFITH, who are citizens of and reside in King County, Washington.

1.6 BRAD MOORE is the court appointed Personal Representative of the ESTATE OF TAYLOR GRIFFITH, and a citizen and resident of King County, Washington.

1.7 KEN and/or JACKIE GRIFFITH owned, provided and/or maintained the vehicle for the general use, pleasure and convenience of their son Taylor and/or other family members, and at the time of the fatal collision it was being driven by Taylor Griffith with the consent and permission of Ken and/or Jackie Griffith. It is agreed that the family car doctrine applies rendering Ken and/or Jackie Griffith vicariously liable for this fatal collision.

1.8 Ken and Jackie Griffith solely own and control YOUR GARDEN, INCORPORATED, as a family company organized under the laws of the State of Washington. On behalf of Your Garden Inc., Ken and/or Jackie Griffith employed, entrusted and instructed Taylor Griffith to perform work and services for the company leading to the fatal collision.

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1.9 Defendant TRAVELERS HOME AND MARINE INSURANCE COMPANY ("Travelers") insured the motor vehicle Taylor was driving at the time of the fatal collision. Travelers also insured Taylor, his Estate and Ken and Jackie Griffith under one or more policies of insurance which provided for liability, property, settlement, defense and other coverages and benefits applicable to the claims arising from the fatal collision with the Harris vehicle.

1.10 Travelers is a foreign insurance company listed with the Washington Insurance Commissioner's office as a Connecticut Insurance Company. Travelers is authorized to and did provide automobile liability and other insurance coverages and benefits subject to the laws of the State of Washington. Travelers managed, controlled, acted in concert and is responsible and liable for all adjusting or quasi-fiduciary claims handling activities arising from any claim under its policies. Travelers selected, managed, controlled, and/or acted in concert in the defense of its insureds, and is responsible and liable for the defense and acts of defendants Mr. Jaeger and Mr. King and their respective firms.

1.11 MICHAEL JAEGER was retained and appointed by Travelers to defend the Estate of Taylor Griffith, by and through its court appointed personal representative. Michael Jaeger represented the Estate of Taylor Griffith before and after the appointment of Brad Moore as the personal representative. Mr. Jaeger is an agent of the Lewis Brisbois law firm. Mr. Jaeger is a citizen and resident of Washington.

1.12 MICHAEL KING was retained and appointed by Travelers to defend the Estate of Taylor Griffith. Mr. King appeared for the Estate of Taylor Griffith after the appointment of Brad Moore as the court appointed personal representative. Mr. King is an agent of the Carney Badley law firm in Seattle. Mr. King is a citizen and resident of Washington.

1.13 Under well-established Washington law, automobile liability insurance is required

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and such policies are not purely private affairs but abound with public policy interests and considerations, including that the insurance should operate to protect the insureds like Taylor Griffith, his Personal Representative and parents, while also affording innocent members of the public, including injured third persons such as the Harris family, the maximum protection possible with timely disclosure and payment of benefits owed. See e.g. *Oregon Auto Insurance Co., v. Salzberg*, 85 Wn.2d 372 (1975) (liability insurance is a matter of public interest and benefits the insureds, injured parties and public); *Smith v. Safeco Ins Co.,* 112 Wn. App 645 (2002) (bad faith founded upon the insurer's failure to disclose liability limits upon request pre-suit).

1.14 Travelers wrongfully and without giving equal consideration to the interests of the Estate of Taylor Griffith, refused to disclose the liability insurance policy limits upon request pre-suit. Travelers also failed to seek permission of the Estate of Taylor Griffith to disclose policy limits pre-suit, which permission would have been granted as disclosure was in the best interests of Taylor Griffith's Estate.

1.15 It is agreed that Travelers' failure to disclose the liability policy limits before suit was <u>not</u> in the best interests of the Estate of Taylor Griffith, causing unnecessary litigation, lawsuit, injury, harm and damages to the Estate of Taylor Griffith and others.

1.16 Notice of the collision, deaths and injuries complained of was timely provided to Travelers. Travelers assumed the contractual claims handling and adjustment functions, including but not limited to disclosure of policy limits and terms, investigation, evaluation, negotiations, settlement, communications, protection, payment and defense, in compliance with the contract and Washington law. Travelers assigned out-of-state claims handlers, from Oregon or elsewhere, to perform these quasi-fiduciary adjusting functions in Washington, rendering Oregon law applicable for exemplary damages. Travelers, directly and/or through its selected agents, provided these

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functions of handling, adjusting and/or defending the claims. Travelers managed and controlled these functions, including the negotiations, settlement, payments and defense.

1.17 Travelers retained and assigned attorneys Michael Jaeger and Mike King, as agents of their respective law firms, to fulfill its contractual requirements to provide a defense for Taylor Griffith's Estate. Travelers managed and controlled the defense provided by Mr. Jaeger and Mr. King and their respective associates.

1.18 It is alleged that Travelers, directly and through its employed or retained adjusters, attorney agents and others, failed to fulfill its required contractual, ethical and legal duties, violating the public interest, precluding timely settlement, forcing unnecessary litigation, delaying or denying coverage and the payment of benefits and maximum coverage protection required for its insureds and those injured in an automobile collision, and more. This conduct is continuing and has already resulted in injury that includes unnecessary and expensive investigation costs, litigation, delayed payments, ethical violations and more, in violation of public policy, statutes, contract and common law.

1.19 Upon information and belief, Plaintiffs allege there may be other persons, partnerships or corporations having responsibility or liability in connection with this complaint. This complaint may be amended accordingly.

2. JURISDICTION AND VENUE

2.1 Jurisdiction and venue are proper in King County, Washington, as the claims arose in King County within the meaning of RCW 4.12.020, RCW 48.05.220, and RCW 19.86 *et. seq.*, defendants transacted business in the State of Washington, and Plaintiffs and one or more defendants are citizens of and reside in King County, Washington within the meaning of RCW 4.12.025, 28 U.S.C. §1332, and 28 U.S.C. §1441.

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2.2. Notice pursuant to the Insurance Fair Conduct Act ("IFCA") has been provided and properly served more than 20 days before the filing of these claims and cross claims. See Exhibit A, incorporated herein.

2.3 Any other applicable claims filing requirements have been met and this action is timely commenced.

3. SUMMARY NATURE OF CLAIMS

3.1 The claims arise from a fatal automobile collision on August 24, 2014 in King County Washington. Taylor Griffith, an unemancipated 16 year old minor insured by Travelers, was driving with permission a vehicle insured by Travelers and owned and entrusted by Ken Griffith, for the benefit of the Griffith family and/or business, when he crossed the centerline hitting the Harris vehicle lawfully traveling in the opposite direction. The WSP found Taylor Griffith to be at fault. Yet Travelers refused to disclose or offer insurance limits, foreclosed negotiations and settlement, forcing litigation and this action, which was commenced in December 2014. Dkt. 1.

3.2 Travelers was provided prompt and timely notice of the fatal collision. Travelers assumed control of the defense and all claims handling functions, including but not limited disclosure of policy limits, appointment of a personal representative, appointment of counsel, investigation, evaluation, communications, negotiations, settlement, payment and defense for each insured. Travelers assigned out-of-state claims handlers, from Oregon or elsewhere, to perform the quasi-fiduciary adjusting function in Washington, rendering Oregon law applicable for exemplary damages. Travelers, directly, vicariously or in concert with its employees and selected agents, mishandled and continues to mishandle one or more of these functions and duties, causing injury, harm, prejudice and/or damages.

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1 3.3 In response to its claims decisions and the lawsuit it compelled, Travelers selected,
2 retained, assigned, managed and/or controlled insurance defense attorneys Michael Jaeger and
3 Mike King to jointly represent the Estate of Taylor Griffith, Ken Griffith and Jackie Griffith,
4 despite the obvious conflicts, and under arrangements and control by Travelers that were not
5 disclosed, consented to or authorized, and which were misrepresented to the Court and parties, and
6 in which this Court has already found was improper and unethical requiring disqualification. *See*
7 Dkt. 211 (Ripley Decl.) and consolidated King County Cause No. 16-4-00622-9 SEA, Dkt. 103
8 (Order disqualifying), causing injury, harm and damage.
9 3.4 Further, retained defense counsel did not obtain authority to act from each client-
10 insured, including the court appointed Personal Representative of the Estate of Taylor Griffith, and
11 acted contrary to the instructions from that client, and misrepresented their authority and roles,
12 causing injury, harm and damage. See *Johnsen v. Petersen*, 43 Wn. App. 801 (1986) (RCW
13 2.44.020-.30 authorizes an adverse party to compel disclosure of the authority of opposing counsel
14 to appear and act, and to obtain damages, including fees or costs to "repair the injury" from
15 unauthorized or illegal acts).
16 3.5 As a result Taylor Griffith's Estate was determined legally liable for damages in
17 excess of policy limits by order of this Court on summary judgment. Dkt. 78. Excess judgments
18 were later adjudicated and entered by the Court. Dkt. 230. Assignment of claims and amendment
19 of the pleadings was authorized and approved by court orders. Dkt. 228.
20 The parties now assert claims and crossclaims for injury, harm, prejudice, damage,
21 injunctive and/or declaratory or other relief as follows:
22 **4. FAULT, NEGLIGENCE, BAD FAITH, STATUTORY and DISCIPLINARY and/or**
FIDUCIARY BREACH
23
24 4.1 Defendants are at fault and negligent within the meaning of RCW 4.22.015

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rendering them joint and severally liable for the judgment and all other injury, harm, prejudice, and damages.

4.2 Travelers failed to act in good faith, resulting in presumed harm, injury, prejudice and damage, estopping it from limiting or avoiding coverage, and rending it liable for the entire judgment against its insured(s), and for all other injury, harm and damage.

4.3 Travelers is at fault and negligent or reckless within the meaning of RCW 4.22.015, rendering it liable for the actions of and judgment against its insureds, and also at fault and liable for the actions and conduct of its employees, adjusters, agents, and retained attorneys, which have caused injury, harm, prejudice and damages.

4.4 Taylor Griffith, through Brad Moore as the Court-Appointed Personal Representative the Estate of Taylor Griffith, is at fault within the meaning of RCW 4.22 *et seq*. and summary judgment order, causing injuries, death and damages in an amount established by judgments.

4.5 Ken and Jackie Griffith, and Your Garden Inc., are directly and/or vicariously at fault and liable under the family car doctrine, respondeat superior, and/or negligent entrustment and supervision for the resulting judgment and all other injuries, damages and harm.

4.6 Michael Jaeger and Mike King are liable for all harm, injury, damages, fees and costs of repair under RCW 2.44, and in addition have breached ethical rules requiring discipline including but not limited to disgorgement and other equitable remedies.

4.7 Travelers, Michael Jaeger and Mike King are at fault, negligent, acted in concert, breached their fiduciary duty and standards of care of the legal profession, rendering them jointly liable for the judgment and all other injuries, damages and other statutory and common law relief.

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5. CONSUMER PROTECTION ACT ("CPA")

5.1 Defendant Travelers' actions are unfair or deceptive, in violation of the public interests and the Consumer Protection Act (CPA), RCW 19.86. *et seq.,* and RCW 2.44 *et seq.*, causing injury, harm, and damages.

5.2 Defendants Travelers, Mike King and/or Michael Jaeger acted in concert or as a joint venture in an unfair or deceptive manner, in violation of the public interests and statutes, including but not limited to the Consumer Protection Act (CPA), RCW 19.86. *et seq.,* and RCW 2.44 *et seq.*, causing injury, harm, and damages.

6. INSURANCE FAIR CONDUCT ACT (IFCA)

6.1 Defendant Travelers has violated and breached the Insurance Fair Conduct Act (IFCA) rendering it liable for treble the judgment and other damges, attorney fees and expenses, and all other caused injury, harm, and damages.

7. CONTRACT BREACH

7.1 Defendant Travelers' actions have resulted in the breach of the express or implied terms and conditions of the insurance contract, rendering it liable for the judgment and all other caused injury, harm and damages.

8. RELIEF SOUGHT

8.1 Judgment should be entered against defendants for all economic and non-economic, general and special, compensatory and exemplary damages, contribution or indemnity, disgorgement and/or restitution, as well as to satisfy the judgment and all pre- or post-judgment interest and for additional injury, damages and harm.

8.2 Judgment should be entered against defendants for treble damages, attorney fees, costs and expenses.

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8.3 Travelers has waived, forfeited and/or is estopped from denying or limiting liability insurance, coverage, benefits or proceeds owed as a result of their actions or conduct.

8.4 Defendants should be enjoined, restrained and prohibited from engaging in representation or conduct already found improper and requiring disqualification, as well as injunctive relief relating to other unlawful, unfair or deceptive acts and conduct.

8.5 Judgment should be entered for such other damages, relief and declaratory judgment as may arise or that may exist in law, equity or as the trier of facts feels is just.

DATED this 23rd day of August, 2017.

PETERSON WAMPOLD
ROSATO FELDMAN LUNA

/s/ Felix Gavi Luna
Felix Gavi Luna, WSBA 27087
Attorneys for Defendant Estate of Taylor Griffith
1501 - 4th Avenue, Suite 2800
Seattle, WA 98101
Telephone: (206) 624-6800
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was sent to the following parties in the manner indicated below:

William W. Spencer, Esq. Murray, Dunham & Murray 200 W. Thomas, Suite 350 P.O. Box 9844 Seattle, WA 98109 *Attorney for Estate of Taylor Griffith*	☒ E-Service/ Electronic Mail ☐ First Class Mail ☐ Messenger Service ☐ Overnight Delivery
Felix Luna, Esq. Peterson Wampold Rosato Luna Knopp 1501 - 4th Avenue, Suite 2800 Seattle, WA 98101 *Attorney for Estate of Taylor Griffith*	☒ E-Service/ Electronic Mail ☐ First Class Mail ☐ Messenger Service ☐ Overnight Delivery
Keith Petrak Byrnes Keller Cromwell LLP 1000 Second Avenue, 38th Floor Seattle, WA 98104 *Attorney for Brad Moore as Personal Representative of the Estate of Taylor Griffith*	☒ E-Service/ Electronic Mail ☐ First Class Mail ☐ Messenger Service ☐ Overnight Delivery
Brad Moore Stritmatter Kessler Whelan Withey 3600 15th Ave W, Suite 300 Seattle, WA 98119 *Personal Representative of the Estate of Taylor Griffith*	☒ E-Service/ Electronic Mail ☐ First Class Mail ☐ Messenger Service ☐ Overnight Delivery

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 23rd day of August, 2017, in Seattle, Washington.

/s/ Catherine M. Galfano

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Telephone: (206) 467-6090
Facsimile: (206) 467-6961
Cathy@LuveraLawFirm.com

Exhibit A

INSURANCE FAIR CONDUCT ACT

20 DAY NOTIFICATION SHEET

Attn:	**Submitted by:**
Office of the Insurance Commissioner Insurance Fair Conduct Act Claim Notification Office Support Unit P.O. Box 40257 Olympia, WA 98504-0257	**Name:** **Estate of Taylor Griffith** **Law Office:** **Brad J. Moore, Stritmatter Kessler Whelan Koehler Moore Kahler** **Address** **3600 15th Ave W., Seattle, WA 98119** **Phone** **206-448-1777** **Email** **brad@stritmatter.com** **Date** **February 22, 2016**

If you want to sue your insurance company under the Insurance Fair Conduct Act:

- ✓ Complete and submit this 20 day notification sheet stating your intent and its basis to:
  - the insurance company
  - the OIC – *no other documents are required with your submission to the OIC*
- ✓ All information provided to the OIC becomes subject to the public disclosure act. Please do not include any personal or confidential information such as medical records/information, social security numbers, banking information, driver's license information, etc. as we do not use it.
- ✓ Allow three business days for mailing and an additional twenty days before filing your lawsuit.

Insurance Company: **Travelers Ins. Company**

Complainant/Insured: **The Estate of Taylor Griffith by its Personal Representative, Brad J. Moore**

Line of Insurance: **Automobile Liability Insurance**

Reason for claim:

[X] WAC 284-30-330, "Specific Unfair Claims Settlement Practices Defined";

[X] WAC 284-30-370, "Standards for Prompt Investigation of Claims";

[X] WAC 284-30-380, "Standards for Prompt, Fair And Equitable Settlements Applicable To All Insurers";

[X] RCW 48.01.030, the insurer has violated the duty of good faith by putting its financial interests ahead of its insured's financial interests.

[X] An unfair claims settlement practice rule adopted and codified in chapter 284-30 of the Washington Administrative Code by the insurance commissioner intending to implement the Insurer Fair Claims Act; or

[X] RCW 48.30.015: The insurer has unreasonably denied the payment of benefits.

I am the legally appointed Personal Representative (P.R.) of the Estate of Taylor Griffith.

On August 24, 2014, Taylor Griffith drove his vehicle across the centerline of SR-202 and collided

head on with another vehicle driven by Steven Harris. Mr. Harris' wife, Margaret Harris, occupied the front passenger's seat. Taylor Griffith and Steven Harris both died in the crash. Margaret Harris sustained serious injuries in the crash. Her medical expenses to date total more than $300,000.

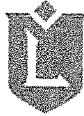
Following Travelers Ins. Co.'s refusal to disclose applicable policy limits to the Harris' counsel pre-filing, the Harris Estate and Mrs. Harris brought litigation against the Estate of Taylor Griffith and Taylor Griffith's parents, Kenneth and Jackie Griffith.

On December 18, 2015, the King County Superior Court entered an order on summary judgment finding the Griffith Estate's liability for the fatal crash as a matter of law and further finding that Mrs. Harris' medical expenses from the crash totaled more than $300,000.

As a Travelers' insured, the Griffith Estate had available policy limits of $100,000 per claim/$300,000 total for all claims. To date, Travelers has refused to unconditionally pay policy limits of $100,000 to the Harris Estate and $100,000 to Mrs. Harris for her separate personal injury claim. Travelers should immediately and unconditionally pay the Estate's policy limits to each of the claimants.

Please see the attached letter (Exhibit 1) from Plaintiffs' counsel to me, dated February 19, 2016 for additional background.

Travelers' conduct – e.g., refusing to provide me with independent counsel (as Travelers did for Kenneth and Jackie Griffith) or counsel that would substantively communicate with me after my appointment as Personal Representative or counsel that would follow my instructions as the client – forced me to hire independent counsel, Keith Petrak, to advise me. I have paid my independent counsel $9,519.54 in fees and costs to date, thereby further reducing the Estate's assets to cover creditor's claims. In addition, to date I have spent 57.5 hours of uncompensated time acting as the legally appointed Personal Representative of the Griffith Estate. My hourly rate for professional time is $500. Travelers should immediately reimburse me for what I've paid to Mr. Petrak and compensate me for the time I've spent acting as the Estate's P.R.



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Ralph J. Brindley
David M. Beninger
Robert N. Gellatly
Joel D. Cunningham

Andrew Hoyal
Patricia E. Anderson
Deborah L. Martin
John E. Gagliardi

Paul N. Luvera, Ret.
Lita Barnett-Luvera, Ret.

February 19, 2016

Via Email & U.S. Mail

Brad Moore
Stritmatter Kessler Whelan Withey
3600 15th Ave W, Suite 300
Seattle, WA 98119

Re: *Harris v. Taylor Griffith Estate*
IFCA NOTICE to Travelers Group Ins./Traveler's Home and Marine Ins. Co.

Dear Mr. Moore:

I'm following up to my email request to you as Personal Representative of Taylor Griffith's Estate regarding your collecting and paying out the liability insurance benefits covering the judgment liability of Taylor Griffith's Estate for the claims of the Harris family, and whether you have filed an IFCA notice with Traveler's Insurance to resolve coverage and/or payment of these benefits. What is the status?

As you know from the Harris family's complaint, liability was clear, yet Traveler's failed to disclose the insurance benefits or negotiate in good faith, foreclosing settlement and forcing a lawsuit against its insureds (Taylor Griffith's Estate and his parents) in December 2014. Traveler's then appointed one law firm to represent the conflicting interests of the Griffith defendants, while it continued to improperly control and provide an inadequate defense to both. Traveler's also failed to unconditionally offer policy limits to protect any of the Griffith defendants. Insurance law and contract require that each insured be treated separately and as if they alone are the only insured-defendant, irrespective of their wealth or ability to pay.

As a result, the Court entered summary judgment on December 18, 2015 establishing that Taylor Griffith's Estate was liable for the Harris family's wrongful death and damage claims, that there were no defenses to that liability, and that the minimal amount of undisputed damages owed was nearly $315,000.[1] Traveler's chose to protect the immediate liability of Mr. and Mrs. Griffith at the expense of a shared and joint liability with Taylor's Estate. Thus, Traveler's owes liability benefits on behalf of Taylor's Estate's for the partial judgment entered against it alone. Yet Traveler's has not paid those insurance benefits to indemnify or protect the separate and independent interests of Taylor's Estate.

---

[1] The disputed damages are millions more, with Traveler's retained defense counsel having agreed that the Harris family damage claims are at least $8 million (plus the value of the assigned bad faith claim), and Traveler's conceding the damages are at least $5 million.

A Professional Service Corporation
www.luveralawfirm.com

Brindley, Beninger, Cunningham & Gellatly, P.S.
6700 Columbia Center • 701 Fifth Avenue • Seattle, WA 98104 • OFFICE (206) 467-6090 FAX (206) 467-6961

Traveler's actions continue to be in bad faith and in violation of the insurance contract, established Washington case law and Washington insurance regulations. This includes, but is not limited to violating regulations found in WAC 284-30-330 (1), (2), (4-7), (9), (11 – 13) and (16). Its actions also violate WAC 284-30- 350 through -380.

As you also know, the insurance lawyers that Traveler's assigned to Taylor's parents have filed a TEDRA action claiming these bad faith claims are so clear and valuable that they should be pursued by Taylor's Estate and not assigned to settle as permitted by law (and the order appointing you as personal representative). It is very unusual for insurance-retained counsel to file pleadings with a court essentially admitting bad faith and misconduct by the very insurance company that is paying them.

Thus, if you have not collected the liability benefits owed by Traveler's Insurance to Taylor's Estate, have you filed the Insurance Fair Conduct Act (IFCA) notice with Traveler's Insurance to resolve or pursue these admittedly highly valuable claims (along with treble damages, costs and attorney fees) to protect Taylor's Estate?

I appreciate your attention and anticipated prompt response.

Sincerely,

DAVID M. BENINGER
Attorney at Law

DMB:cmg

cc: clients
Keith Petrak
William Spencer

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The Honorable Beth Andrus
Noted for Hearing: Oct. 4, 2017
Without Oral Argument

FILED
KING COUNTY, WASHINGTON
OCT 20 2017
SUPERIOR COURT CLERK
BY Matthew Menovcik
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

STEFANIE HARRIS, individually, as assignee and Personal Representative of the Estate of STEVEN R. HARRIS; MARGARET HARRIS; and SCOTT HARRIS,

Plaintiffs,

v.

ESTATE OF TAYLOR GRIFFITH; TRAVELERS HOME AND MARINE INSURANCE COMPANY; MICHAEL KING; MICHAEL A. JAEGER; KENNETH AND JACKIE GRIFFITH; YOUR GARDEN, INC.; and JOHN DOES,

Defendants.

NO. 14-2-33004-9 SEA

BMA

~~[PROPOSED]~~ ORDER ON DEFENDANT KING'S MOTION TO STAY PROCEEDINGS PENDING APPEAL

THIS MATTER comes before the Court on Defendant King's Motion to Stay Proceedings Pending Appeal. The Court has duly considered the pleadings, papers, declarations, and exhibits submitted by the parties, and the balance of the files and records herein.

NOW, THEREFORE, IT IS HEREBY ORDERED that:

1. Defendant King's Motion to Stay Proceedings Pending Appeal is GRANTED;

GORDON TILDEN THOMAS & CORDELL LLP
1001 Fourth Avenue, Suite 4000
Seattle, WA 98154
Phone (206) 467-6477
Fax (206) 467-6292

2. The above-captioned matter shall be STAYED pending the outcome of *In re the Estate of Taylor Griffith*, Division One, No. 75246-4-I; and

3. The parties shall file a joint status report with the Court within ten (10) days after resolution of the appeal to advise the Court as to the disposition thereof.

DATED this 19th day of October, 2017.

Beth M Andrus
The Honorable Beth Andrus
King County Superior Court

Presented by:

GORDON TILDEN THOMAS & CORDELL LLP
Attorneys for Defendant Michael King

By: *s/Mark Wilner*
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APPENDIX D

NO. 75246-4-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

In re the Estate of:

TAYLOR GRIFFITH,

Deceased.

KENNETH GRIFFITH and JACKIE GRIFFITH,

Petitioners,

v.

BRADLEY J. MOORE, in his capacity as personal representative,

Respondent,

and

MICHAEL B. KING; CARNEY BADLEY SPELLMAN, P.S.; *et al*,

Aggrieved Parties/Petitioners.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Theresa Doyle

<u>CORRECTED</u> APPELLANTS' MOTION FOR RECONSIDERATION

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I. IDENTITY OF MOVING PARTY

Appellants Michael B. King, Carney Badley Spellman, P.S., Jacquelyn A. Beatty, and Karr Tuttle Campbell (collectively, "Appellants") seek the relief described in Part II.

II. RELIEF REQUESTED

Pursuant to RAP 12.4, Appellants request that this Court reconsider its March 5, 2018, decision terminating review, a copy of which is enclosed as Appendix A (the "Opinion"). Appellants ask this Court to reconsider its determination that an attorney-client relationship existed between Moore as personal representative of the Estate and Appellants, and to reverse the trial court order disqualifying Appellants.[1]

III. FACTS RELEVANT TO MOTION

The complete factual background is set forth in the Appellants' Opening Brief at pages 4–26. The specific facts pertinent to this Motion are set forth below.

IV. GROUNDS FOR RELIEF AND ARGUMENT

The Court should reconsider its Opinion for two reasons. First, the Opinion appears to overlook or misapprehend several material facts. Second, the Opinion also appears to overlook or misapprehend several key legal principles.

---

[1] This Motion uses the same abbreviated descriptions for the names of parties as the Appellants' Opening Brief.

A. The Opinion appears to overlook or misapprehend important facts.

"Whether an attorney-client relationship exists is a question of fact." *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). As such, Appellants respectfully request that the Court reconsider its Opinion based on the five important factual points addressed below.

1. The uncertainty over Moore's continuing status as personal representative is an important fact.

Moore's status as personal representative was challenged on December 15, 2015, and was still unresolved during the January 5 hearings. CP 1663–75, 2426–27. This is material to the "untenability" question. Moore knew that Beatty and King were asserting that Moore should be removed as personal representative and that Mr. Griffith should be substituted in his place. *See, e.g.*, CP 2426–27. As a factual matter, this is pertinent to whether Beatty and King could consider themselves (or Moore could consider Beatty and King) as representing or intending to represent Moore rather than seeking to protect the Estate against Moore.

Beatty was hired to represent the Griffith Parents as their personal counsel. As Beatty told the trial court on January 5, 2016, "I represent [the Griffith Parents] personally. They are the sole beneficiaries of the estate, and there has been a request to have Mr. Griffith be substituted in as the PR." CP 2426–27. Even if, contrary to the arguments below, the way in

which Beatty expressed herself is deemed to be legally untenable, the fact is that she believed that she could represent the Estate adversely to Moore, and that Moore was aware of her position.

King was hired as preservation-of-error counsel. Insurer-retained counsel may, and sometimes must, take actions to protect the insured when the insured is unavailable or unwilling to do so. *Kruger-Willis v. Hoffenburg*, 198 Wn. App. 408, 417, 393 P.3d 844 (2017). As insurer-retained counsel for an estate whose personal representative's authority was being challenged by the Estate's beneficiaries, King proceeded in the manner he believed best protected the interests of the Estate while the authority of the personal representative was still unresolved. Even if King expressed himself in a legally untenable manner, what King intended to do, and what he did do, was represent the Estate adversely to Moore. Moore understood that King did not represent him.

2. The significance of what Beatty and King did not say in their notices of association is an important fact.

On December 16, 2015, Jaeger amended his notice of appearance to state that he represented the Griffiths and "BRADLEY J. MOORE, as Personal Representative of THE ESTATE OF TAYLOR GRIFFITH." CP 2254–55 (capitalization in original). On December 17, 2015, and after receiving Jaeger's amended notice, Beatty filed her notice of association with Jaeger only "on behalf of defendants Kenneth Griffith, Jackie

Griffith, and the Estate of Taylor Griffith (deceased)." CP 2273–74. Beatty's notice did not include Moore—a fact consistent with her belief that she did not represent Moore.

King filed a notice of association on January 4, 2016, on behalf of the "Defendants." CP 2336–37. The captioned defendants at that time were "Kenneth Griffith and Jackie Griffith; Estate of Taylor Griffith (deceased)," while the captioned plaintiffs were "Stefanie Harris, as Personal Representative of the Estate of Steven R. Harris (deceased) and Margaret Harris." *Id.* The captioned plaintiffs included the personal representative; the captioned defendants did not. Again, King's non-inclusion of Moore reflects that King did not view Moore as his client. King believed at the time that associating on behalf of the "Defendants" meant associating on behalf of the Griffith Parents and the Estate but not its challenged personal representative.[2]

3. Beatty was not *Tank* counsel.

Tank counsel is counsel retained by an insurer to defend an insured as part of the insurer's contractual duty to defend the insured. *See generally Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 715 P.2d 1133 (1986). Although the Opinion suggests at page 11 that Beatty was *Tank* counsel, she was not.

---

[2] Similarly, and as noted in the Opinion at page 6, Beatty and King stated in open court on January 5, 2016, that they represented "the Estate" but did not include Moore.

Beatty was retained as personal counsel for the Griffith Parents. CP 469–70. When it became clear that the Harris Creditors believed that the Estate, the Griffith Parents, or both might have a bad faith claim against Travelers, Travelers agreed to pay for personal counsel to advise the Griffith Parents vis-à-vis assigning that potential bad faith claim as part of a settlement of the wrongful death action. *See* CP 461, 469–70. Beatty was not hired to and did not agree to defend the litigation as a whole.

4. Moore's pattern of interactions with Beatty is important to this analysis.

The Opinion cites only one communication between Beatty and Moore, an email sent at 4:51 p.m. on January 5, 2016, which states: "Let's be clear: I am the P.R. of the Griffith Estate. You do not represent me or the Estate. . . ." (App. A at 10–11.) This statement is described as "an expression of frustration" by Moore "that the attorneys retained by Travelers to represent Taylor's estate were not communicating with him and were taking action on behalf of the estate without consulting him." *Id.* The misapprehensions of the record here are twofold.

First, the fact that Beatty and King were not communicating with Moore and were acting contrary to his directions is wholly consistent with Beatty's and King's stated non-representation of and adversity to Moore.

Second, the statement "You do not represent me or the Estate," spoken by a highly sophisticated lawyer, is an unequivocal statement of

non-representation. In fact, Moore said the same thing in December 2015 when he emailed Beatty that "You do not represent me as Personal Representative of the Estate of Taylor Griffith. Mr. Jaeger represents me. . . . To the extent your email implies that you represent the Griffith Estate, let's be clear that you do not. . . . I did not hire you and I did not authorize anyone hiring you." CP 474. Whether or not they also reflect frustration, statements that "*you do not represent me*" and that "*I did not hire you and I did not authorize anyone hiring you*" are statements of fact that unambiguously refute a subjective (or reasonable) belief that an attorney-client relationship existed.

Below is a timeline of all of the communications and other interactions involving Beatty and Moore that occurred before the January 5, 2016 email cited by the Court on pages 10–11 of the Opinion:

- On December 21, 2015, Beatty responded to an email that Beninger had sent directly to Moore. She stated, "I have been retained as the Griffiths' personal counsel." CP 474–75. She did not purport to represent Moore as personal representative.

- Moore responded to Beatty's email that same day: "Ms. Beatty: You do not represent me as Personal Representative of the Estate of Taylor Griffith. Mr. Jaeger represents me. The Estate's insurer is paying him to represent me. . . . To the extent that your email implies that you represent the Griffith Estate, let's be clear that you do not. You have no authority to act in any way on behalf of the Griffith Estate. I did not hire you and I did not authorize anyone to hire you. You have no authority to make any decision that impacts the Griffith Estate." CP 474. Beninger was copied on this email.

- On December 23, 2015, Beatty sent an engagement letter to the Griffiths, clarifying her role as the Griffiths' "personal counsel." CP 469–70. She did not send an engagement letter to Moore.

- On December 24, 2015, Beninger sent an email to Beatty demanding that she clarify whether she has the authority to negotiate and, if so, on whose behalf. CP 478. Beatty responded later that day, "I am personal counsel for the Griffiths. I have authority to negotiate with you on their behalf." CP 480. Moore was copied on both emails.

- On December 31, 2015, Beatty was copied on an email sent from Moore to Jaeger expressing frustration with *Jaeger's* representation. CP 487. This email was not directed at Beatty, nor did she have reason to understand it to be.

- At approximately 9:12 a.m. on January 5, 2016, the Griffiths were dismissed without prejudice from the wrongful death action. CP 2425–26. Judge Doyle asked each attorney at the defense table to identify whom they represented. Jaeger said, "I represent the estate, Your Honor." CP 2429. Beatty echoed, "Likewise." *Id.* This came only minutes after Beatty had represented to the court that "I represent [the Griffiths] personally. They are the sole beneficiaries of the estate, and there has been a request to have Mr. Griffith be substituted in as the PR." CP 2426–27. Beatty then asked the court to address the issue of Moore's status before trial. CP 2427. Beatty intended to advocate for Moore's removal, and Moore knew that.

- At that same time, Judge Doyle asked if there was a conflict or motion to disqualify. CP 2428. Moore, who was present in court, did not voice concern or otherwise object.

- At roughly 1:46 p.m. that same day, Beninger announced that he and Moore had reached an arbitration agreement. CP 2453. Beatty was neither included in nor aware of these negotiations, as one would expect Moore's lawyer to be. *See* CP 2453–54.

- At 4:51 p.m. on January 5, Moore emailed Beatty: "Let's be clear: . . . You do not represent me or the Estate. . . ." (App. A at 10–11 (quoting CP 489.).)

Beatty received her only instructions from Moore at 6:20 p.m. on January 5, 2016. CP 491–92. Moore then, and only then, instructed Jaeger, Beatty, and King to sign off on the arbitration agreement. *Id.* This was a 180-degree pivot from Moore's unequivocal email an hour and a half before that Beatty did not represent him. Beatty replied by letter on January 7, 2016, that "I have not been retained by you in your capacity as PR. For that reason and others that should be discernable from this communication, I decline your 'instruction to immediately sign off on the Agreement to Arbitrate [etc.]'" CP 494–95 (alteration in original).

Beatty also moved on January 7, 2016, to withdraw from her representation of the Estate—approximately fifty-four (54) hours after telling the trial court that she represented the Estate. During those 54 hours, Beatty did not take any actions on behalf of Moore as personal representative or the Estate, and she was both told by Moore that she did not represent him and told Moore that she did not represent him.

5. Moore's lack of interactions with King is important to this analysis.

King filed a notice of association on behalf of the "Defendants" on January 4, 2016. CP 2336–37. He filed a brief on behalf of the Griffith Parents that afternoon that opposed jury instructions on the family car doctrine. *See* 2339–46. Moore believed that any opposition to imposition

of the family car doctrine was adverse to the Estate's interests as Moore saw them. *See* CP 381, 386.

After King's statement to the trial court on January 5, 2016, that he represented the Estate, he sat at counsel table for the rest of the morning while Jaeger and Beninger argued motions before the court. During the morning hearing, King only spoke to ask Judge Doyle's preferences on briefing a written motion that she requested in response to Jaeger's oral motion. CP 2443. He and his office prepared that briefing before the hearing that afternoon. *See* CP 2451. Neither King nor any other attorney from his firm consulted with Moore regarding the briefing, and Moore did not attempt to speak to King about that brief.

During the afternoon hearings, and after Beninger presented the arbitration agreement that he and Moore had entered into without consulting Beatty or King, King asked Judge Doyle to resolve Moore's status before she accepted the arbitration agreement. CP 2458. This request was, and was no doubt understood by Moore to be, adverse to Moore.

King received his first communication from Moore at 6:20 p.m. on January 5, 2016, in an email addressed to Jaeger, Beatty, and King. CP 491. The email instructed them not to oppose the arbitration agreement. *Id.* King believed that Moore's instructions were adverse to the interests of

the Estate and—because King did not believe he represented Moore—he did not follow them.

On January 7, 2016, Moore reiterated that he did not want Jaeger to oppose the arbitration agreement. CP 611–12. Moore copied King on this email. He also copied Keith Petrak, Moore's new attorney. King responded later that day, stating that Moore's actions had "made it impossible for [him] to continue as counsel for the estate, *as long as [Moore] remain[ed] its PR*. . . ." CP 604 (emphasis added). King concluded the email by explaining that he planned to withdraw, *id.*, and he moved to do so the next morning, CP 2378. King's motion to withdraw was filed approximately seventy-four (74) hours after he had stated to Judge Doyle that he represented the Estate.

During the time that King purportedly represented Moore as personal representative, King believed that he could represent the Estate without also representing the personal representative until Moore's status had been resolved. Not only did King perform absolutely no legal work for Moore, but he took actions that Moore knew to be adverse to Moore. *See* CP 647.

Finally, and despite the fact that Moore was present in court on January 5, 2016, when Beatty and King stated that they represented the Estate and Judge Doyle asked about conflicts and disqualification, Moore

remained silent. CP 2428–29. In other words, given a crystal clear and cost-free opportunity to object to a conflict on the ground that Beatty and King were his lawyers but were acting contrary to his interests, Moore chose to pass.

B. There are several key legal principles that the Court should reconsider.

1. The Opinion does not expressly address the burden of proof.

Under Washington law, the party asserting the existence of an attorney-client relationship bears the burden of proving that such relationship existed. *E.g.*, *Dietz v. Doe*, 131 Wn.2d 835, 844, 935 P.2d 611 (1997); *State v. Reeder*, 181 Wn. App. 897, 911, 330 P.3d 786 (2014); 6 WASH. PRAC., WASH. PATTERN JURY INSTR. CIV. WPI 107.01 (6th ed.). In other words, Beatty and King did not have the burden to prove that Moore was not their client. The burden was on Moore and/or the Harris Creditors.

Although the Opinion does not expressly address the issue, it can be read to place that burden on Beatty and King. The Opinion states that "the circumstances did not make it reasonable to doubt that Beatty and King were in an attorney-client relationship with Moore." (App. A at 11.) The Opinion should therefore be revised to reflect the allocation of the burden and the consequences of that burden.

2. The Opinion appears to answer the "who is a client" question as a matter of law rather than a question of fact.

The "who is a client" question is not a matter of law. *Bohn*, 119 Wn.2d at 363. There is no irrebuttable presumption that an assertion by a lawyer that he or she represents someone as a client creates an attorney-client relationship. In fact, there is not even a *rebuttable* one. *See, e.g.*, *Dietz*, 131 Wn.2d at 844 (attorney's assertion that Doe was his client was insufficient alone to establish an attorney-client relationship for the purposes of attorney-client privilege); *Estate of Heinzinger*, No. 49771–9–II, slip op. at 11–12 (Wn. App. Feb. 6, 2018) (unpublished) (enclosed as Appendix B[3]). *Accord Koo v. Rubio's Rests., Inc.*, 109 Cal. App. 4th 719, 729, 135 Cal.Rptr.2d 415 (2003) (attorney's statement to the court alone was insufficient to create an attorney client relationship).

Instead, "Whether an attorney-client relationship exists is a question of fact." *Bohn*, 119 Wn.2d at 363. As such, the court must evaluate whether the party asserting the attorney-client relationship presented facts that show the putative client had a subjective and reasonable belief that the attorney was his attorney. *Id.*

[3] Since this opinion is brand new, it was not previously briefed, argued, or called to the Court's attention. Appellants have enclosed a copy of the slip opinion for the Court's review.

In February 2018, for example, Division II of the Washington Court of Appeals affirmed the lower court's decision not to disqualify an attorney who had filed documents on behalf of three co-personal representatives and then subsequently took adverse action on behalf of the two of the co-personal representatives against the third. *Estate of Heinzinger*, No. 49771–9–II, slip op. at 11–12. The third co-personal representative asserted that he believed that the attorney was representing all three co-personal representatives, including him. *Id.* at 5. However, the attorney and third co-personal representative had only spoken once, the attorney had never told the third co-personal representative that he represented the third co-personal representative's interests, and the third co-personal representative had other counsel. *Id.* at 5–6. The attorney did not believe that he represented the third co-personal representative and did not intend to create an attorney-client relationship with the third co-personal representative when he filed documents on behalf of all three co-personal representatives. *Id.*

Division II cited *Bohn v. Cody* for the proposition that "[w]hether an attorney-client relationship exists is a question of fact." *Id.* at 11. It then found that the facts presented—that the attorney never agreed to represent the third co-personal representative and never made any assurance to the third co-personal representative that he was representing the third co-

personal representative's interests—supported the lower court's finding that "no attorney-client relationship existed." *Id.* at 6, 11.

This Court's Opinion will likely be read as creating an irrebuttable presumption that, as a matter of law, the formal appearance of an attorney creates an attorney-client relationship, regardless of the beliefs and actions of the parties. (App. A at 11.) Such a presumption would contradict Division II's recent decision in *Estate of Heinzinger* and over twenty-five (25) years of Washington case law. Appellants respectfully ask the Court to revise the Opinion and clarify whether the Court intends to create such a new presumption and to address how the presence or absence of that presumption is pertinent to the present case.

3. The Opinion appears to overlook the possibility of a mistake.

Lawyers, like all human beings, make mistakes.[4] One kind of mistake that a lawyer can make is in the misidentification of a client. *See, e.g.*, *Koo*, 109 Cal. App. 4th at 729. The Opinion does not consider the possibility of a mistake. Instead, the Opinion states that it is "untenable" to assert that one could represent an estate without also representing the then-personal representative. (App. A at 9.)

[4] The Supreme Court has recognized this for more than a century. *See, e.g.*, *O'Toole v. Phoenix Ins. Co.*, 39 Wash. 688, 692–93, 82 P. 175 (1905) (vacating costs imposed as a result of an attorney's "honest mistake").

Even if one assumes *arguendo* that such an assertion would be legally untenable, that does not mean that the assertion was anything other than a mistake. In addition, nothing in the Opinion explains why, if this was a mistake, Beatty or King must be absolutely bound by it as a matter of law. No one has ever argued, for example, that principles of judicial, equitable, or any other form of estoppel apply to this situation.

4. It is not legally "untenable" to believe that an attorney can represent an estate apart from its personal representative, especially when the fitness of the personal representative is actively in dispute.

For at least four reasons, the statement of legal untenability also appears to reflect an overlooking or misapprehension of the law.

First, *Trask v. Butler*, 123 Wn.2d 835, 845, 872 P.2d 1080 (1994), expressly discusses the prospect of a lawyer having to choose between representing an estate and representing a personal representative. Since there is no Washington authority stating that there are no situations in which such a choice is permissible, the subject is an open one.

Second, Official Comment [5] to Washington Rule of Professional Conduct 1.14 allows a lawyer to take "reasonable protective action" when it appears that a fiduciary, such as a personal representative, seems to be harming the interests of the person or entity for whom the fiduciary is responsible, such as an estate. Regardless of whether this Court believes that "reasonable protective action" was in fact necessary here, it cannot be

said that Beatty's and King's attempts to protect the Estate against Moore fell so far outside of the framework of Official Comment [5] as to be wholly beyond the pale.

Third, Travelers unquestionably had a duty as an insurer to protect the Estate. This is clear, *inter alia*, from the recent Washington Court of Appeals decision in *Kruger-Willis v. Hoffenburg*, 198 Wn. App. 408, 393 P.3d 844 (2017). If the wrong language was used to effectuate that protection, that would not mean that the effort to provide protection was untenable.

Fourth, and finally, the legal untenability argument fails because Appellants' argument is not factually untenable for the reasons in Section IV.A. In addition, Moore's emails to Beatty reflect his assertions—twice—that Beatty does not represent Moore *or the Estate*. If Beatty and King used the same dual linguistic approach that Moore used, the untenability argument vanishes.

5. The Opinion misapplies *Bohn v. Cody*.

The Opinion correctly notes at page 10 that *Bohn v. Cody* has been the lead Washington case on the "who is a client" question for a quarter century. Nonetheless, the Opinion asserts at page 11 that:

> Considering the record as a whole, Moore's statement that "you do not represent me" falls short of demonstrating a subjective belief that the lawyers who had appeared for the estate owed him no duty of loyalty. It is more reasonably

> understood as an expression of Moore's frustration that the attorneys retained by Travelers to represent Taylor's estate were not communicating with him and were taking action on behalf of the estate without consulting him.

But the question under *Bohn v. Cody* is not whether Moore believed that Beatty and/or King owed him a "duty of loyalty." Every putative client who has ever asserted an attorney-client relationship asserts a belief that the putative lawyer owed a duty of loyalty. The point is that in this class of situations, a duty of loyalty exists *if but only if* an attorney-client relationship exists. Thus, an express and repeated denial of the existence of an attorney-client relationship (such as those made by Moore) defeats the existence of any such relationship.

6. Advisory Opinion 1578 does not support the Court's analysis.

The only authority cited in the Opinion in support of the proposition that the existence of an attorney-client relationship is "controlled" by a formal notice of appearance is an informal advisory opinion issued by the Washington State Bar in 1994. (*See* App. A at 11–12.) Appellants would like to draw attention to several aspects of this portion of the Opinion that appear to have been overlooked or misunderstood.

First, the informal advisory opinion was decided in 1994—more than a decade before the adoption of RPC 1.18, which governs duties to a

prospective client. The committee that issued the informal advisory opinion had neither reason nor need to consider whether the then-nonexistent "prospective client" category might in some or all instances be a proper assessment of the situation before the committee.

Second, the informal advisory opinion does not consider key facts that are present here. The informal advisory opinion says nothing about the result that would be reached if, at virtually the same time as the filing of the notice of appearance, the policeman had expressly said "you do not represent me." It further does not appear to contemplate what the result would be if the attorney did not intend to represent the police officer at the time the attorney filed his notice of association or was simply mistaken. Here, both Beatty and King believed, correctly or incorrectly, that they could represent the Estate without also representing Moore, and it was wholly clear that that, and nothing else, was what they were attempting to do.[5]

Third, this portion of the Opinion is effectively a categorical statement that no actions by an attorney or a prospective or putative client can ever counter a formal appearance. The Opinion does not explain, how

[5] Similarly, nothing in the informal advisory opinion asserts that the policeman did not subjectively and reasonably believe he was the lawyer's client. Stated another way, the question in this case is not whether the filing of a notice of appearance could ever constitute some evidence of the existence of an attorney-client relationship. The question in this case is whether, as the Opinion appears to assert, it can never be rebutted.

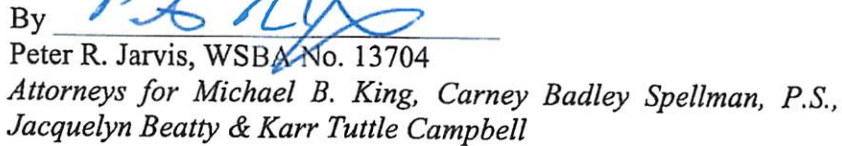
such a statement can be reconciled with 25 years of questions of fact under *Bohn v. Cody*.

V. CONCLUSION

Appellants therefore ask this Court to reconsider its Opinion and reverse the trial court's disqualification of Appellants.

Respectfully submitted this ___ day of March, 2018.

HOLLAND & KNIGHT, LLP



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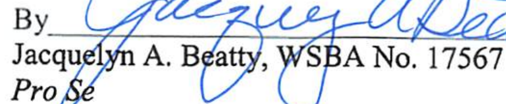

By______________________
Jacquelyn A. Beatty, WSBA No. 17567
Pro Se

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 9TH day of April, 2018.

Patti Saiden, Legal Assistant

APPENDIX A

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2018 MAR -5 AM 8:27

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEFANIE HARRIS, individually and as Personal Representative of the Estate of STEVEN R. HARRIS (deceased); MARGARET HARRIS; and BRADLEY J. MOORE, in his capacity as Personal Representative of the ESTATE OF TAYLOR GRIFFITH,	No. 75246-4-I
Respondents,	DIVISION ONE
v.	
KENNETH GRIFFITH and JACKIE GRIFFITH; MICHAEL B. KING, and the law firm of CARNEY BADLEY SPELLMAN, P.S.; and JACQUELYN A. BEATTY, and the law firm of KARR TUTTLE CAMPBELL,	PUBLISHED OPINION
Appellants.	FILED: March 5, 2018

BECKER, J. — An insurance defense lawyer who files a notice of appearance on behalf of an estate may not, after withdrawing from representation of the estate, later act on behalf of another client to remove the personal representative of the estate. The personal representative is a former client, and the lawyer must comply with Rule of Professional Conduct (RPC) 1.9, either by withdrawing from representation of the other client or obtaining consent

from the estate's personal representative. A lawyer who does not comply is properly disqualified for having a conflict of interest.

FACTS

Sixteen-year-old Taylor Griffith was driving a pickup truck on State Route 202 on August 24, 2014. The truck crossed the center line and collided head-on with a car driven by Steven Harris. Both drivers were killed in the crash. Steven's wife, Margaret Harris, a passenger in his car, was seriously injured. Taylor was survived by his parents, Kenneth and Jackie Griffith. The Griffiths were insured by Travelers Home and Marine Insurance Company.

Margaret and her daughter, Stefanie Harris, as personal representative of the estate of Steven Harris, filed suit against Taylor's estate and his parents in December 2014. The complaint alleged that Taylor's estate and his parents were jointly and severally liable for the accident. The complaint further alleged that filing of the lawsuit was necessary because Travelers was not handling the claim in good faith, as evidenced by its failure to disclose the limits of the insurance carried by the Griffiths when requested by the plaintiffs to do so.

Attorney Michael Jaeger filed a notice of appearance on behalf of all defendants at the request of Travelers. In February 2015, Jaeger filed an answer. Trial was scheduled for January 4, 2016.

A personal representative had not been appointed for Taylor's estate. When a person dies intestate, as Taylor did, the next of kin have priority to be appointed to administer the estate so long as they petition within 40 days of the death.

RCW 11.28.120(2), (7). Otherwise, a court may appoint "any suitable person" as personal representative. RCW 11.28.120(7).

The Harris estate filed a petition in probate in November 2015, requesting appointment of Brad Moore as personal representative for Taylor's estate. The petition noted that the wrongful death complaint alleged liability not only on the part of Taylor's estate but also on the part of his parents, under the family car doctrine and other legal principles. The petition also mentioned the complaint's allegation that Travelers had acted in bad faith. The petition nominated Moore, an attorney experienced in matters of personal injury, as a suitable person to evaluate the assets and claims of Taylor's estate.

The Griffith parents, through Jaeger acting as attorney for "defendants," requested that Kenneth Griffith be appointed instead of Moore. The Griffith parents were the sole beneficiaries of their son's estate, which consisted only of his personal possessions and about $1,000. The parents denied having personal liability for Taylor's accident. They asserted that the references to Travelers in the petition were irrelevant to deciding who should be appointed as personal representative because Travelers was not a party to the suit.

At the hearing on the petition, the Harris estate argued that Moore was the more suitable personal representative because of his experience and understanding of the complexities of wrongful death litigation in a case where the estate's only real asset was its potential bad faith claim against its insurance company. The Griffiths objected to Moore, who is known as a plaintiff's attorney.

"I just feel like it's not independent enough . . . if you're considering appointing Brad."

The court commissioner ruled that given the potential for conflict between the Griffith parents and their son's estate, it was more untenable to appoint one of the parents than to appoint Moore. The commissioner expressed confidence that Moore would recognize his obligation as a fiduciary to be independent and impartial. The commissioner appointed Moore as personal representative by order dated December 8, 2015. The order specifically authorized Moore "to participate in litigation and to settle or assign claims" on behalf of Taylor's estate.

Jaeger did not initially acknowledge Moore as a client. Jaeger's first communication to Moore—on December 9, 2015—said he was planning to file a motion for revision of the order appointing Moore so that Kenneth Griffith could serve as personal representative. Moore responded, objecting that Jaeger had not consulted him about that. "I hope you do not take any actions against my interests. As it is, you haven't filed a Notice of Appearance on my behalf and I don't understand why. If you don't believe you represent me, then who do you claim to represent?" Moore asked Jaeger to provide his analysis of the estate's potential exposure in the wrongful death litigation and his strategy to defend the estate.

On December 15, 2015, Jaeger's firm filed the motion to revise, asserting that Moore was not suitable as the personal representative of the estate because he is a "plaintiff's personal injury practitioner."

On December 16, 2015, Jaeger filed an amended notice of appearance, stating he was counsel for the Griffith parents and counsel for Moore as the personal representative of Taylor's estate. On December 22, 2015, Jaeger told Moore that his goal was to protect the interests of the estate and the Griffith parents. He asked Moore to reconsider his refusal to step down as personal representative. He refused Moore's request for strategic advice: "We will not produce any sensitive case information given the pending motion for revision."

Around this time, Travelers appointed attorneys Jacquelyn Beatty and Michael King to serve as additional defense counsel. Beatty filed a notice in the wrongful death action associating herself with Jaeger on behalf of the Griffith parents and Taylor's estate. King filed a notice associating with Jaeger as counsel "for defendants."

On December 18, 2015, the court granted a motion by the plaintiffs for partial summary judgment. The order established that liability and causation were proven as to Taylor's estate, but not as to his parents. The order dismissed affirmative defenses pleaded by the Griffith parents and Taylor's estate.

On January 4, 2016, the first day of trial, Beatty introduced herself to the court as "personal counsel for the Griffiths." King was introduced as a lawyer "with the defense." The court heard argument on motions in limine and then concluded proceedings for the day after determining that a jury was not yet available.

The next day, January 5, 2016, the Harris plaintiffs moved to dismiss the Griffith parents without prejudice. Without objection, it was so ordered. This left

the amount of damages as the only remaining issue for the jury, with Taylor's estate as the only remaining defendant. At the request of plaintiffs, the court required each defense lawyer to identify his or her client in view of the dismissal of the Griffith parents. Jaeger, Beatty, and King all responded that they represented Taylor's estate:

> MR. JAEGER: I represent the estate, Your Honor.
> THE COURT: Okay.
> MS. BEATTY: Likewise.
> Mr. King?
> MR. KING: I also represent the estate. I was retained to represent the estate of Taylor Griffith and the Griffiths for preservation of error matters and prospectively looking down the line for an appeal.
> And since the Griffiths are no longer parties to the case, having been dismissed, now my responsibility is to the estate of Taylor Griffith.

The hearing continued with discussion of motions in limine, including a dispute about whether defense counsel could depose a doctor that evening. King argued that motion for the defense.

At the beginning of the afternoon session, the judge announced that she had been presented with a document signed by Moore and counsel for the plaintiffs by which they agreed to arbitrate any remaining issues between them. Over objection, the court signed an order for arbitration and concluded the trial.

Over the next few days, Beatty, King, and Jaeger filed notices withdrawing as counsel for Taylor's estate in the wrongful death action. The notices filed by Beatty and King stated that they continued as counsel for the Griffith parents. Beatty filed a notice of appearance on behalf of the Griffith parents in the probate action, in which the motion to revise the commissioner's order appointing Moore

was still pending. Represented by Beatty, the Griffith parents moved (1) for permission to participate as intervenors in the wrongful death action and (2) for a stay of the arbitration pending a ruling on whether Moore would be allowed to continue as personal representative. Over the plaintiffs' objection, the court granted both motions.

Represented by King, the Griffith parents filed a petition under the Trust and Estate Dispute Resolution Act (TEDRA), chapter 11.96A RCW, to remove and replace Moore as personal representative. The court consolidated this petition with the pending motion to revise the commissioner's order appointing Moore. Both were set for consideration on April 29, 2016.

By motions filed on March 31, 2016, the Harrises alleged that under RPC 1.9, Beatty and King could not continue to represent the Griffith parents. Beatty and King responded that the rule did not apply because Moore was not their former client.

The court ruled that Moore was a former client of Beatty and King and that disqualification was warranted because of the conflict of interest. The court entered an order prohibiting Beatty and King from appearing on behalf of the Griffith parents in the wrongful death, probate, and TEDRA actions.[1] The disqualification order entered on April 27, 2016, is the subject of this appeal brought by King, Beatty, and the Griffith parents.

[1] A hearing on the TEDRA petition to remove Moore was held in May 2016. The Griffith parents were represented by new counsel. The court denied the petition. That order is the subject of a separate appeal before this court, In re Estate of Taylor Griffith, No. 75440-8-I.

ANALYSIS

A preliminary issue raised by respondents is whether the appellants have standing. Only an aggrieved party may seek appellate review. RAP 3.1. An aggrieved party is one whose proprietary, pecuniary, or personal rights are substantially affected. In re Guardianship of Lasky, 54 Wn. App. 841, 848-50, 776 P.2d 695 (1989). The court held in Lasky that an attorney removed as guardian of an incompetent adult had no standing to appeal the order removing him. Lasky does not control the standing issue here because the disqualification order was based on a determination that Beatty and King failed to comply with a rule of professional conduct. A court's formal finding of a lawyer's rule violation carries with it sufficient potential for adverse consequences to the lawyer to make the ruling appealable by the lawyer. United States v. Talao, 222 F.3d 1133, 1138 (9th Cir. 2000). Accordingly, we conclude Beatty and King have standing to appeal the disqualification order. Whether the Griffith parents also have standing need not be decided.

Whether an attorney's conduct violates a relevant rule of professional conduct is a question of law. Eriks v. Denver, 118 Wn.2d 451, 457-58, 824 P.2d 1207 (1992). The relevant rule in this case is RPC 1.9(a). The rule prohibits lawyers from "switching sides" and representing a party adverse to a former client in the same or a substantially related matter. Teja v. Saran, 68 Wn. App. 793, 799, 846 P.2d 1375, review denied, 122 Wn.2d 1008 (1993). RPC 1.9(a) is based on the attorney's duty of loyalty to a client. Teja, 68 Wn. App. at 798-99. It provides as follows:

> 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.

RPC 1.9(a).

The sole issue in dispute is whether Moore is a former client of Beatty and King. The trial court correctly determined that he is, in the order quoted below:

> Moore is the client. Beatty and King represented Moore during the time they were counsel of record for the Estate. They entered notices of appearance for the Estate, and affirmed in open court, in answer to this judge's question, that they were, indeed, representing the Estate.
>
> Having represented the Estate, and thus Moore, the former client, Beatty and King could not then represent the Griffiths in the "substantially related" probate matter because the Griffiths' interests were "materially adverse" to those of Moore, who did not give his consent. In the probate matter, Beatty and King, on behalf of the Griffiths, are suing Moore, their former client. These clients' interests could not get any more adverse. . . .
>
> The Griffiths assert various arguments: no confidences were disclosed, Beatty and King never appeared on behalf of Moore, Moore did not regard them as his attorneys, no conflict existed between the Griffiths and the Estate, Moore and the Harris creditors never actually sought disqualification, their motives are tactical, and they waited too long.
>
> All of the above is beside the point. Brad Moore is the PR [personal representative] unless and until this Court removes him.

The appellants argue that the "estate" was their client but Moore was not. This argument is untenable. In probate, the attorney-client relationship exists between the attorney and the personal representative of the estate. Trask v. Butler, 123 Wn.2d 835, 840, 872 P.2d 1080 (1994). "There is no agency or individual other than the official 'personality' of the administrator or executor which can be pointed to as the 'estate.'" In re Estate of Peterson, 12 Wn.2d 686, 730, 123 P.2d 733 (1942). Once Moore was duly appointed as the personal representative of Taylor's estate, he was the client of Jaeger. Moore then also

became the client of Beatty and King when they associated with Jaeger as attorneys for the estate. When Beatty and King withdrew from representing the estate, Moore became their former client.

Beatty and King argue that Moore cannot be their former client because he never had a subjective, reasonable belief that they were his attorneys. They cite Bohn v. Cody, 119 Wn.2d 357, 832 P.2d 71 (1992). In Bohn, parents loaned money to their daughter. When the loan was not repaid, the parents sued the daughter's attorney on several theories, including that he gave them negligent advice about the transaction. The parents held a subjective belief that the attorney formed an attorney-client relationship with them when he discussed the transaction with them, answered questions about it, and prepared a document formalizing the transaction. Bohn, 119 Wn.2d at 363-64. But the attorney told the parents he was not their lawyer, and the parents were unable to show that his actions were inconsistent with that statement. For this reason, the court held the attorney did not represent the parents. The client's subjective belief "does not control the issue unless it is reasonably formed based on the attending circumstances, including the attorney's words or actions." Bohn, 119 Wn.2d at 363.

As evidence that Moore did not believe he was their client, Beatty and King quote from an e-mail sent by Moore to Beatty on the second day of the trial: "Let's be clear: I am the P.R. of the Griffith Estate. You do not represent me or the Estate (in spite of your prior representations to the Court to the contrary). . . . You are not authorized to make any representations on the Estate's behalf. As

you told me yesterday at the courthouse, you represent Mr. and Mrs. Griffith." Moore's peremptory tone is not surprising in view of the continuing effort by the Griffith parents to have Moore removed from administration of their son's estate. Considering the record as a whole, Moore's statement that "you do not represent me" falls short of demonstrating a subjective belief that the lawyers who had appeared for the estate owed him no duty of loyalty. It is more reasonably understood as an expression of Moore's frustration that the attorneys retained by Travelers to represent Taylor's estate were not communicating with him and were taking action on behalf of the estate without consulting him.

In addition, the circumstances did not make it reasonable to doubt that Beatty and King were in an attorney-client relationship with Moore. The issue of Moore's status as their client is controlled by the fact that Beatty and King entered formal notices of appearance in the wrongful death litigation on behalf of the estate.

As soon as Beatty and King filed their notices of appearance, they owed their client the duties discussed in Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 388-89, 715 P.2d 1133 (1986). "Both retained counsel and the insurer must understand that only the *insured* is the client." Tank, 105 Wn.2d at 388. Their client was Moore, the estate's personal representative. Beatty and King acted for the estate when they continued to participate in the wrongful death trial after the Griffith parents were dismissed. In answer to the court's question, they affirmed that they were still involved in the lawsuit as attorneys for the estate. Yet at the same time, they were advocating on behalf of their other

clients, the Griffith parents, to remove Moore as personal representative of their son's estate.

An advisory opinion issued by the Washington State Bar Association addresses the precise situation Beatty and King found themselves in—a potential violation of RPC 1.9 by a lawyer retained by an insurance company:

> The Committee reviewed your inquiry wherein you had been retained by an insurer to represent a city and a police officer employed by the city. You filed a Notice of Appearance on behalf of each of those clients. Subsequently, you learned that there was a conflict of interest between the two clients. You ask whether you can continue to represent the city after proper withdrawal from representing the police officer. *The Committee was of the opinion that for the purposes of RPC 1.9, the fact that you filed a Notice of Appearance means that the police officer is a former client and you must therefore comply with the requirements of RPC 1.9.*

WSBA Rules of Prof'l Conduct Comm., Advisory Op. 1578 (1994) (emphasis added).

We agree with the advice of the Bar. A lawyer appointed by an insurance company to defend two clients, and who files a notice of appearance on behalf of each of them, may not continue to represent only one of those clients without satisfying the requirements of RPC 1.9. Beatty and King could not continue to represent only the Griffith parents without Moore's waiver of the conflict. Because Beatty and King did not comply with the rule, the order disqualifying them was properly entered.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, J.

Schindler, J.

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

February 6, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Estate of ANNE M. HEINZINGER, Deceased CATHERINE BLOOM, MARGARET HEINZINGER, Respondents, v. JOHN CHARLES HEINZINGER and KELLEY HEINZINGER, Appellants, NICKLAUS C. HEINZINGER, Defendant.	No. 49771-9-II UNPUBLISHED OPINION

SUTTON, J. — John Heinzinger and Kelley Heinzinger appeal the superior court's order granting John's[1] sisters' motion for summary judgment on their Trust and Estate Dispute Resolution Act (TEDRA), ch. 11.96A RCW, petition regarding their mother's estate. John argues that the superior court erred by (1) deciding his sisters' motion for summary judgment because he

[1] We refer to the parties by their first names for clarity. We intend no disrespect.

had invoked mandatory arbitration under TEDRA; (2) granting the summary judgment motion because there are genuine issues of material fact related to his alleged defenses of unclean hands, laches, ratification, and waiver; and (3) denying his motion to disqualify his sisters' attorney. We hold that the superior court (1) did not err by deciding the motion for summary judgment, (2) did not err by granting the motion for summary judgment, and (3) did not err by denying John's motion to disqualify his sisters' attorney. Accordingly, we affirm.

FACTS

In 1993, Anne and Lee Heinzinger executed mutual wills. The mutual wills provided that upon the death of the first spouse, the deceased's estate would be placed in a credit trust for the benefit of the surviving spouse. Upon the death of the second spouse, the estate would be divided equally between the couple's three children: John, Catherine Bloom, and Margaret Heinzinger. Anne designated Lee as the sole executor of her estate. However, if Lee predeceased her, Anne designated her children as co-executors of her estate.

In 1995, Lee died. Anne admitted Lee's will to probate and Lee's estate was distributed consistently with the terms of the 1993 mutual will. Lee's estate included a piece of property located at 81 Heinzinger Road.

In 2001, Anne created the "Heinzinger Road Trust" (Trust). Anne deeded the 81 Heinzinger Road property to the Trust and named John's son, Nicklaus Heinzinger, as the beneficiary of the Trust. In the original Trust, Margaret was named the life beneficiary of the Trust. Margaret was also named the successor trustee to be appointed after Anne's death. In 2006, Anne amended the Trust. The 2006 amendment to the Trust designated John as both the life beneficiary and the successor trustee of the Trust.

Anne died in 2013. The siblings disputed who should be appointed as personal representative of Anne's estate. Margaret and Catherine wanted Catherine to be appointed sole personal representative of the estate, but John disagreed and argued that all three siblings should be appointed as co-personal representatives of the estate. During this time, John was represented by his attorney, Mario Bianchi, and Catherine was represented by her own attorney, Suzanne Howle. Eventually, the siblings agreed to submit Anne's 1993 mutual will to probate with all three siblings appointed as co-personal representatives.

Margaret and Catherine retained Ted Knauss to prepare the documents and to submit Anne's will to probate. The will was submitted to probate in Jefferson County on March 28, 2014. All three siblings were named co-personal representatives of the estate.

On October 1, Margaret and Catherine, through attorney Knauss, filed a TEDRA petition against John as the trustee of the Trust. The petition stated that the Trust must be reformed to comport with the terms of Anne's and Lee's mutual wills. The petition requested that the Trust be reformed to name Catherine, Margaret, and John as co-trustees with the direction to distribute the property in the Trust equally between the three siblings consistent with the terms of the mutual wills. The TEDRA petition was consolidated with the probate of Anne's will. John, represented by attorney Bianchi, responded to the petition alleging the affirmative defenses of unclean hands, laches, ratification, and waiver.[2]

[2] John also asserted estoppel, assumption of risk, and statute of limitations; however, John appears to have abandoned these claims on appeal.

A. Mediation and Arbitration

The parties agreed to mediation under TEDRA. However, the mediation was unsuccessful. On March 17, 2015, John submitted a demand for arbitration under TEDRA. On April 6, Margaret and Catherine responded with their proposed list of arbitrators. The parties did not agree to an arbitrator and neither party filed a petition with the court to appoint an arbitrator under the TEDRA provision in RCW 11.96A.310.

On November 16, Margaret and Catherine filed a motion for summary judgment. John filed a motion to strike the motion for summary judgment and filed a petition for appointment of an arbitrator under TEDRA provision RCW 11.96A.310. A superior court commissioner granted the motion to strike because the motion for summary judgment was untimely, but the commissioner ruled that the motion for summary judgment could be refiled.

John then filed a motion to revise the commissioner's ruling arguing that summary judgment was inappropriate because arbitration had been invoked under TEDRA. The superior court concluded that TEDRA allowed it to decide a motion for summary judgment at any time, even after arbitration had been commenced under TEDRA. Accordingly, the superior court denied John's motion to revise.

B. Summary Judgment

In his response to summary judgment, John argued that there were genuine issues of material fact as to his defenses. He asserted that Margaret went with her mother to the attorney who established the Trust. John also presented the early versions of the Trust which designated Margaret as the trustee and life beneficiary of the Trust. He also asserted that Margaret told Catherine about the creation of the Trust in 2004.

Margaret filed her own declaration refuting John's allegations. Margaret agreed that she drove her mother to the office of the attorney who created the Trust. However, Margaret also declared that she did not know the attorney nor did she have any involvement in the decision to create the Trust. Margaret also stated that Anne never shared any of her legal plans with her. Margaret also never saw a copy of the Trust. She also denied telling Catherine about the existence or terms of the Trust.

The superior court concluded that the creation of the Trust conflicted with the terms of Anne's 1993 mutual will, and thus the Trust was invalid. The superior court granted Margaret and Catherine's motion for summary judgment. The superior court ordered that the property titled in the Trust be returned to Anne's estate and distributed under the terms of Anne's 1993 mutual will.

C. MOTION TO DISQUALIFY

John also filed a motion to disqualify Margaret and Catherine's attorney, Knauss, based on an alleged conflict of interest. In support of his motion, John filed a declaration in which he alleged that he believed that Knauss was representing him, along with his sisters, in the probate of Anne's will. John stated that he believed that Knauss had been retained as the attorney for all the siblings, representing them as the co-personal representatives of Anne's estate for the probate of Anne's will. He also stated that he had a phone conversation with Knauss in which Knauss assured John that he would keep John informed of all the proceedings related to the probate of Anne's will.

Knauss filed a declaration in response to John's motion to disqualify. Knauss stated that he was retained to represent Margaret and Catherine and never intended to represent John. Knauss also stated that he believed John was represented by attorney Bianchi in all matters. Knauss agreed that he had a single conversation with John after he began representing Margaret and Catherine in

the probate of Anne's estate. He stated that during the phone conversation, he told John that John would receive any documents filed during the probate of Anne's estate but he did not tell John that he was representing him.

The superior court found that John had not presented any credible evidence supporting his assertion that he believed Knauss was representing him. The superior court found that Knauss's declaration was credible. Based on Knauss's declaration, the superior court found that no attorney-client relationship existed between John and Knauss. Because there was no attorney-client relationship, the superior court concluded that there was no conflict of interest and denied John's motion to disqualify.

John appeals the superior court's order granting Margaret and Catherine's motion for summary judgment and the superior court's order denying his motion to disqualify.

ANALYSIS

I. Summary Judgment During TEDRA Arbitration

John argues that the superior court erred by deciding the sisters' motion for summary judgment because the parties had commenced TEDRA arbitration at the time of the summary judgment motion. Specifically, John argues that RCW 11.96A.280 prohibits summary judgment while TEDRA arbitration is pending. However, both RCW 11.96A.100 and the Mandatory Arbitration Rules (MAR) provide the superior court with the authority to decide motions for summary judgment at any time under TEDRA, including after arbitration under TEDRA has been commenced. Accordingly, the superior court did not err by deciding the sisters' motion for summary judgment.

A. LEGAL PRINCIPLES

Statutory interpretation is a question of law, which we review de novo. *In re Estate of Jones*, 152 Wn.2d 1, 8-9, 93 P.3d 147 (2004). When interpreting statutes, we determine and give effect to the legislature's intent. *In re Estate of Mower*, 193 Wn. App. 706, 713, 374 P.3d 180, *review denied*, 186 Wn.2d 1031 (2016). We first look to the plain language of the statute. *Mower*, 193 Wn. App. at 713. When the plain language of the statute is unambiguous, we apply that plain meaning. *In re Estate of Burton*, 189 Wn. App. 630, 635, 358 P.3d 1222 (2015). We assess the plain meaning of the statute within the context of the statute and related provisions. *Mower*, 193 Wn. App. at 713. In cases of statutory inconsistencies, the later and more specific statute controls over the earlier and more general one. *Anderson v. Dussault*, 181 Wn.2d 360, 371, 333 P.3d 395 (2014).

RCW 11.96A.280 provides that when a TEDRA action is submitted to arbitration under RCW 11.96A.260-.320, that "judicial resolution of the matter . . . is available only by complying with the . . . arbitration provisions" of those statutes. However, RCW 11.96A.100(9) states, "Any party may move the court for an order relating to a procedural matter, including . . . summary judgment, in the original petition, answer, response, or reply, or in a separate motion, or at any other time."

Under RCW 11.96A.310(5)(a), the MARs apply to all arbitrations under TEDRA. MAR 1.3(a) states,

> A case filed in the superior court remains under the jurisdiction of the superior court in all stages of the proceeding, including arbitration. Except for the authority expressly given to the arbitrator by these rules, all issues shall be determined by the court.

MAR 3.2(b)(1) provides that the superior court shall decide motions for summary judgment.

B. Superior Court Had the Authority To Decide the Motion for Summary Judgment

John argues that the plain language of RCW 11.96A.280 prohibits the superior court from deciding a motion for summary judgment after the parties have commenced arbitration under TEDRA. However, when RCW 11.96A.280 is read within the context of all the other relevant statutes, John's argument fails.

RCW 11.96A.100's plain language states that a party may move for summary judgment at any time. And there is no conflict between RCW 11.96A.100 and RCW 11.96A.280 because the MARs also provide for the superior court to decide motions for summary judgment while arbitration is pending. Because the MARs reserve the authority to decide summary judgment motions to the superior court and explicitly state that the superior court retains jurisdiction while arbitration is pending, the MARs allow the superior court to decide summary judgment motions even while arbitration is pending under TEDRA. And because arbitration under TEDRA is governed by the MARs, the superior court may decide summary judgment motions after arbitration is commenced under TEDRA.

Because TEDRA and the MARs provide authority for the superior court to decide motions for summary judgment at any time, the superior court did not err by deciding the motion for summary judgment even after arbitration had commenced.

II. Summary Judgment Defenses

John argues that the superior court erred by granting Margaret and Catherine's motion for summary judgment because there were genuine issues of material fact as to the following defenses: (1) unclean hands, (2) laches, (3) ratification, and (4) waiver. The superior court properly concluded that Lee's and Anne's mutual wills governed the distribution of the property at 81

Heinzinger Road and the Trust violated the terms of the mutual wills. And John's affirmative defenses do not defeat summary judgment. Accordingly, we affirm the superior court's order granting Margaret and Catherine's motion for summary judgment.

Mutual wills reflect an agreement by the testators as to how their estates are to be distributed after both have died. *Newell v. Ayers*, 23 Wn. App. 767, 769, 598 P.2d 3 (1979). When a party takes under a mutual will, that party becomes bound by the terms of the agreement made in the mutual will. *Tacoma Sav. & Loan Ass'n v. Nadham*, 14 Wn.2d 576, 596-97, 128 P.2d 982 (1942). Because Anne took Lee's estate under the mutual wills, she was bound by the mutual wills' terms to distribute the entire estate equally between their surviving children. The Trust violated the mutual wills' terms by distributing estate property to Nicklaus rather than Margaret, Catherine, and John. John concedes that the Trust violates the mutual wills. Therefore, the Trust was invalid and the superior court properly granted summary judgment.

John asserts that his alleged affirmative defenses defeat summary judgment. But John has not provided any authority to support the proposition that the affirmative defenses he raises can bar an action to enforce a mutual will. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none."). Therefore, we are not persuaded to reverse the superior court's otherwise proper order granting the sisters' motion for summary judgment.

Even if we accepted John's proposition that affirmative defenses could bar the enforcement of mutual wills, the affirmative defenses that he raises in this case are legally inapplicable. John argues that the equitable doctrines of unclean hands and laches apply. However, it is unclear how,

even if Margaret has come before the court with unclean hands, Catherine would be barred from bringing the action or that Margaret's or Catherine's prior knowledge of the Trust would prevent Anne's estate from enforcing the terms of her mutual will.

Moreover, John has not established the elements of either unclean hands or laches. "It is well settled that a party with unclean hands cannot recover in equity." *Miller v. Paul M. Wolff Co.*, 178 Wn. App. 957, 965, 316 P.3d 1113 (2014). Here, John's alleged facts about Margaret's involvement in the creation of the Trust do not rise to the level of unclean hands.

Laches is considered an implied waiver resulting from knowledge of conditions and acquiescing to them. *Lopp v. Penninsula Sch. Dist. No. 401*, 90 Wn.2d 754, 759, 585 P.2d 801 (1978). The elements of laches are (1) knowledge or reasonable opportunity to discover the cause of action, (2) an unreasonable delay in commencing the cause of action, and (3) damage resulting from the unreasonable delay. *Lopp*, 90 Wn.2d at 759. John alleges that the sisters both knew about the creation of the Trust by 2004 and could have brought an action to invalidate the Trust at any time. However, John has not alleged any facts that establish damages as a result of the failure to bring an action to invalidate the Trust earlier. Therefore, John's alleged facts do not establish laches.

John also claims that the contract defenses of waiver and ratification apply. However, the contract formed under mutual wills is between the creators of the mutual wills—in this case, Lee and Anne. The only person who could ratify or waive a challenge to the change to the distribution of Anne's estate contrary to the terms of the mutual wills was Lee, and Lee was deceased. Therefore, no contract-based defenses can be asserted against Margaret and Catherine.

III. Motion To Disqualify Attorney

Finally, John argues that the superior court abused its discretion by denying his motion to disqualify the sisters' attorney for a conflict of interest. We disagree with John and hold that the superior court did not err in denying John's motion to disqualify counsel.

We review the superior court's decision on a motion to disqualify counsel for an abuse of discretion. *See Pub. Util. Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 811-12, 881 P.2d 1020 (1994). A superior court abuses its discretion when its decision is based on untenable grounds or reasons. *Union Bank, N.A. v. Vanderhoek Assocs., LLC*, 191 Wn. App. 836, 842, 365 P.3d 223 (2015).

John argues that the superior court erred by denying the motion to disqualify counsel because there was a current conflict of interest based on the alleged attorney-client relationship between the sisters' attorney and John as co-personal representative of Anne's estate. Whether an attorney-client relationship exists is a question of fact. *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). We review a superior court's findings of fact to determine whether they are supported by substantial evidence. *In re Estate of Miller*, 134 Wn. App. 885, 890, 143 P.3d 315 (2006). We do not review the superior court's credibility determinations. *Kim v. Lakeside Adult Family Home*, 185 Wn.2d 532, 551, 374 P.3d 121 (2016).

Here, the superior court found that attorney Knauss's declaration was credible. Knauss's declaration provides substantial evidence for the superior court's finding that there was no attorney-client relationship between John and Knauss because Knauss stated that he never agreed to represent John, and Knauss never made any assurances to John that Knauss was representing John's interests. Therefore, the superior court did not abuse its discretion by denying John's

motion to disqualify Knauss. Accordingly, we affirm the superior court's order denying John's motion to disqualify Knauss.

IV. Attorney Fees and Costs on Appeal

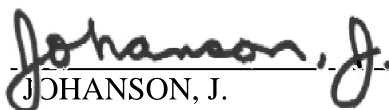
Margaret and Catherine request that we award them attorney fees and costs on appeal under RAP 18.1 and RCW 11.96A.150. Under RCW 11.96A.150, we may order costs, including reasonable attorney fees, as we determine to be equitable. Under RAP 18.1 and RCW 11.96A.150, we award reasonable attorney fees and costs to Margaret and Catherine in an amount to be determined by a commissioner of this court.

We affirm.

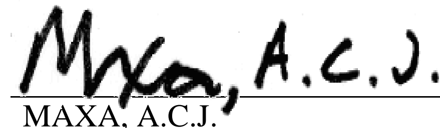
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

SUTTON, J.

We concur:



JOHANSON, J.



MAXA, A.C.J.

CARNEY BADLEY SPELLMAN

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