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NO. 67527-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

TERRY PARKS,

Appellant,

v.

JANYCE LYNN FINK and
FINK LAW GROUP, PLLC

Respondents.

BRIEF OF RESPONDENTS

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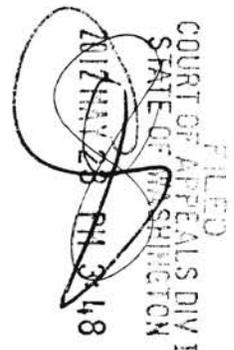


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I. INTRODUCTION

Appellant Terry Parks sued attorney Janyce Lynn Fink and her firm Fink Law Group, PLLC (collectively referred to hereafter as “Ms. Fink”) for legal malpractice. Ms. Fink never represented Mr. Parks in any capacity at any time. The issue presented in this appeal is whether Ms. Fink’s professional duty as a lawyer encompassed appellant Terry Parks. And if a duty to Mr. Parks existed (which Ms. Fink contests), to what extent does the record support the conclusion that Ms. Fink’s acts or omissions caused Mr. Parks harm?

This appeal relies heavily on arguments not raised at the trial court level. In fact, Mr. Parks appears to have wholly abandoned the expert testimony of attorney Bruce Moen on which his opposition to Ms. Fink’s motion for summary judgment was principally based: namely, that Ms. Fink’s alleged error was in not returning to Mr. Balko’s hospital room within “72 hours” of his inadvertent signature of a draft will, to have Mr. Balko re-sign his will before two witnesses.

The trial court was correct in concluding as a matter of law that, under the circumstances of this case, Ms. Fink owed no duty to Mr. Parks.

Allowing a putative beneficiary of a draft will to maintain a malpractice action against a decedent's attorney would unduly burden the legal profession. The evidence in the record also overwhelmingly demonstrates a break in the causal connection between Ms. Fink's acts or omissions and Mr. Parks' alleged harm. Ms. Fink respectfully requests that the order granting her summary judgment of dismissal be affirmed.

II. RESTATEMENT OF ISSUES

A. Does Terry Parks have standing to sue Ms. Fink for legal malpractice where he was never her client and where his claim is based, as a putative beneficiary only, on a document that does not satisfy the requirements of a will in Washington?

B. Does an attorney breach her duty of loyalty to her client by not compelling the client to act contrary to the client's wishes?

C. Does an attorney who prepares a will for a client owe a duty to a putative beneficiary to force the client to execute the will properly?

D. Would a lawyer's duty of loyalty to her client be materially compromised if the lawyer has a concurrent duty to a nonclient who is interested in the outcome of the matter in which the client is interested?

E. Does Terry Park's claim of malpractice fail because he cannot establish legal causation?

III. RESTATEMENT OF THE CASE

This appeal examines the trial court's ruling that attorney Janyce Fink owed no duty of care to Mr. Terry Parks, a nonclient. The summary judgment which this appeal challenges addressed the existence of duty as a legal question, therefore not involving an evaluation of factual issues. Mr. Parks' heavy emphasis upon the alleged existence of genuine issues of material fact is accordingly misplaced.

This lawsuit involves a truncated time period: November 9, 2005 to September 26, 2006. Less than one year. All salient events necessary to resolve this appeal transpired during this period. Ironically, the time elapsed between the testator's signing a valid and enforceable will *disinheriting* Mr. Parks and the date of the alleged malpractice – April 26, 2006 – is significantly shorter: only five months.

Mr. John J. Balko (now deceased) signed a will on November 9, 2005 (the "November 2005 will"), leaving his entire estate to Mrs. Betty Parks, Terry Parks' mother, and leaving Terry Parks and his "charity" nothing

whatsoever, either as a residual legatee or in any other capacity. CP 140-45. This November 2005 will was prepared by Seattle probate attorney Alan L. Montgomery. CP 191. Ms. Fink played no part in that will. CP 65. The November 2005 will (which was ultimately probated) contained a clerical error: it misnamed Betty “Parks” as Betty “Rich,” a nonexistent person. CP 9, 48-50, 77, 192.

Ms. Fink had performed various legal tasks for Mr. Balko for many years. *See* Supp. CP __ (Sub No. 56). She discovered this clerical error shortly after it was committed. CP 66. She offered to prepare a new will correcting the error and she did so. CP 60, at 109:16-110:5; CP 55; CP 66, at ll. 15-18; CP 334-335. Late in the day on April 26, 2006, Ms. Fink met Mr. Balko, a patient at the Seattle Cancer Care Alliance, alone in his hospital room. CP 66, at ll. 15-16; CP 335. She handed the draft new will to him for his initial comments. Mr. Balko had never before seen the new draft will, and he had therefore not yet approved it. He marked up the draft, and then for reasons never fully explained he signed it. CP 54; CP 55; CP 60, at 109:16-110:5; CP 66-67; CP 335, at ¶ 4. No third parties (including Mr. Parks) were present in Mr. Balko’s hospital room during this attorney-client

meeting. CP 335, at ¶ 4. Ms. Fink's testimony about the events of April 26th stands uncontroverted.

Ms. Fink was experienced in preparing and finalizing wills having been responsible for administering and executing many wills during her career. CP 59, at 99:6-15. She did not invite or bring any witnesses with her into Mr. Balko's hospital room on April 26, 2006, because there was no reason for her to do so. CP 335, at ¶ 4; CP 60, at 109:16-110:5. She did not intend to conduct a will signing ceremony the same day she was showing Mr. Balko a draft will for the first time, and she would not have invited witnesses or others into his hospital room without his express permission. CP 55; CP 335, at ¶ 4. She did not discuss Mr. Balko's business with him in front of other people. CP 59, at 97:5-7. Nothing was "botched" by Ms. Fink, either on April 26, 2006, or within "72 hours."

The draft will Ms. Fink prepared left John Balko's estate to "Betty Parks," and made no reference to Terry Parks. It contained several blanks requiring Mr. Balko's attention. Mr. Balko hand-wrote the following into one of the blanks:

"If Betty Parks does not survive me, I give the residue of my estate as follows: Terry Parks

(son of Betty Parks).” [Italics indicates hand-writing in the blank space]

CP 146-48. Had the draft will been witnessed that day or 72 hours thereafter (as Mr. Parks now insists), and had Mr. Balko died shortly thereafter, Terry Parks would have received nothing. Betty Parks would have inherited it all to do with as she pleased. Conceivably, she could have made no provision for Mr. Parks. Any conclusion to the contrary would be pure conjecture.

Ms. Fink took the draft will back to her office. That she took that document with her when she left Mr. Balko’s hospital room is of no significance because Mr. Balko did not like his personal and private papers lying around in the hospital. Ms. Fink testified that it was often her practice to take documents she had discussed with Mr. Balko with her rather than leaving them. CP 56, at 25:13-26:17.

After revising the draft will to include Mr. Balko’s changes, Ms. Fink attempted to schedule a formal will signing. Mr. Balko would not cooperate. CP 335, at ¶¶ 5-8; CP 67-71. He repeatedly told Ms. Fink that he would deal with the will “when I’m better.” CP 62; CP 67, at lines 1-2 & 19-21; CP 335, at ¶ 5. He equivocated about the contents of the draft will at meetings with Ms. Fink subsequent to April 26. CP 67, at 3-13; CP 241-245. And, he flat

out refused to sign the revised will in front of two witness and a notary. CP 69, at lines 23-25. This evidence is likewise uncontroverted.

Over the ensuing months, Ms. Fink wrote three letters which she hand-delivered to Mr. Balko expressly warning him that he could not rely on the document he signed in April of 2006. CP 335-352. The letters are dated September 24, 2006, January 18, 2007, and March 31, 2007. *Id.* On September 24, 2006, she wrote as follows:

“We prepared a new Will for you, which you signed, but elected to not have witnessed due to your physical infirmities and inability to leave the UW Hospital/ SCCA until recovered from your cancer. **This second Will is not enforceable until you execute it in front of witnesses, as required by Washington State law. Until you properly execute your new Will, your old Will controls who benefits from your estate.** I strongly urge you to execute another copy of your new Will and have it properly witnessed this week.”
[Emphasis added]

CP 337-38. Recognizing the clear implication of these letters, Mr. Parks engaged computer expert David P. Stenhouse to image and examine Ms. Fink’s computer hard-drive to determine the genuineness of the letters. CP

7-8, 12. The letters are genuine. There is no evidence in the record to the contrary.¹ *See, e.g.*, CP 237, at lines 11-19.

Two days after September 24, on September 26, 2006, Mr. Balko contacted attorney Alan Montgomery and alerted him to the Betty “Rich” error in the November 2005 will. CP 191-94. Mr. Montgomery offered to redraft the will immediately to correct the error. According to Mr. Montgomery (whose sworn testimony is uncontroverted), Mr. Balko declined the offer of a new will because he wanted to think about other changes before making a new will. CP 191-192.

John Balko died on July 14, 2007, having never signed a will superseding the November 2005 will, despite Ms. Fink’s efforts. Ms. Fink and Mr. Parks diligently searched Mr. Balko’s records to ascertain whether he had signed a new will without their knowledge, but found nothing.² CP 70-72. The November 2005 will was admitted to probate and, over Mr. Parks’ opposition, was fully administered. CP 48-50. Mr. Balko’s estate

¹ Mr. Parks did not offer any testimony by his computer expert on summary judgment. *See* CP 320-323.

² Mr. Parks had access to Mr. Balko’s papers shortly after his death, and denied Ms. Fink access to those records on at least one occasion. CP 70-71; Supp. CP ___, at ¶ 12 (Sub. No. 56).

passed in accordance with the terms of the November 2005 will. CP 48-50. Mr. Parks received nothing. CP 48-50. Mr. Parks blames Ms. Fink for losing the inheritance.

IV. SUMMARY OF ARGUMENT

The trial court dismissed Terry Parks' Complaint holding as a matter of law that Ms. Fink owed no legal duty to Mr. Parks.³ (7/7 RP 1-9) Construing the seminal opinion of Trask v. Butler, 123 Wn.2d 835, 872 P.2d 1080 (1994), the court held that the Trask requirements for the establishment of a lawyer's duty to a nonclient were not satisfied and that the burden upon the legal profession of extending a legal duty to a nonclient would create untenable conflicts of interest. (7/7 RP 8-9)

The dismissal of Mr. Parks' claims is also supported by uncontroverted evidence in the record of an intervening, superseding cause: Mr. Balko's awareness of the unenforceability of the April 2006 draft will as evidenced by the action he took in response to Ms. Fink's letter of September 24, 2006, and his voluntary election on September 26, 2006, to do nothing

³ Ms. Fink's affirmative defenses included lack of standing and lack of duty. Supp. CP ___, at ¶¶ 22-23.

about it after speaking to attorney Montgomery because he was contemplating “other changes.” CP 191-192.

The gravamen of Mr. Parks’ appeal is that there are unresolved factual issues regarding Mr. Balko’s testamentary intent and whether Ms. Fink was negligent in failing to force Mr. Balko to sign his will before two witnesses “within 24 to 72 hours” after he signed the draft will on April 26, 2006. CP 206, at ¶ 6. Furthermore, Mr. Parks argued to the trial court that all the warnings given to Mr. Balko by Ms. Fink regarding the need to sign a new will became irrelevant after 72 hours; that the error was irremediable.⁴ CP

⁴ These are the opinions expressed by Mr. Parks’ expert, attorney Bruce Moen, and were the principal bases of Mr. Parks’ opposition to summary judgment. CP 203, 205, 207, 212. No mention of this “72 hour” rule appears in Mr. Parks’ brief on appeal. However, it is axiomatic that an expert’s opinion is absolutely required to establish the standard of care by which a defendant’s conduct must be measured. Petersen v. State of Wash., 100 Wn.2d 421, 437, 671 P.2d 230 (1983)(citing Stafford v. Hunter, 66 Wn.2d 269, 270 (1965); Tieg v. St. John’s Hosp., 63 Wn.2d 369, 375 (1963)). Mr. Parks implies that Ms. Fink’s letters of warning are themselves subject to dispute. There is no evidence in the record to support this position. As noted above, Mr. Parks hired a computer expert to test whether the letters were genuine, but failed to offer any testimony by his computer expert on summary judgment. Mr. Parks’ argument that the letters are not genuine is pure conjecture. *See, e.g.*, Boguch v. Landover Corp., 153 Wn. App. 595, 615, 224 P.3d 795 (2009)(affirming grant of summary judgment in favor of defendants where plaintiff’s theory required trier of fact to rely on “speculation or conjecture”); Chamberlain v. Department of Transp., 79 Wn. App. 212, 215-16, 901 P.2d 344

205, 241, 243, 244. Not only is there no legal support for this novel proposition, but there is case law directly to the contrary. CP 206, at ¶ 8.

V. ARGUMENT

It is agreed by all parties that Ms. Fink was never Terry Parks' lawyer. CP 334. There are certain limited instances wherein courts have held that a lawyer owes a duty to a nonclient, but the trial court determined that this is not one of them. The trial court correctly concluded as a matter of law that this case does not fit into any recognized exception to the general rule, that a lawyer owes no duty to a nonclient and that to rule to the contrary in this instance would burden the legal profession with untenable conflicts of interest. (7/7 RP 8-9)

A. Standard of Review

Review of a trial court's grant of summary judgment is de novo such that the court of appeals engages in the same inquiry as the trial court. Barker

(1995)("More than speculation or mere possibility is required to successfully oppose summary judgment."). It is also inconsistent with Mr. Moen's testimony that he had no reason to question the validity of the letters. CP 232, 234, 237. Mr. Parks' unfounded conjecture is further belied by John Balko's telephone call to Mr. Montgomery regarding his November 2005 will just two days after Ms. Fink's September 24, 2006 written warning regarding his subsequent draft will. CP 192.

v. Advanced Silicon Materials, LLC, 131 Wn. App. 616, 623, 128 P.3d 633 (2006), *review denied*, 158 Wn.2d 1015 (2006). Summary judgment is proper “if the pleadings, . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” CR 56(c); Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). “A material fact is one that affects the outcome of the litigation.” Owen v. Burlington N. & Santa Fe R.R. Co., 153 Wn.2d 780, 789, 108 P.3d 1220 (2005). When considering summary judgment, the court must construe all facts and evidence in the light most favorable to the nonmoving party. But,

“a nonmoving party may not rely on speculation or on argumentative assertions that unresolved factual issues remain. After the moving party submits adequate affidavits, the nonmoving party must set forth specific facts which sufficiently rebut the moving party’s contentions and disclose the existence of a genuine issue as to a material fact.”

White v. State, 131 Wn.2d 1, 9, 929 P.2d 396 (1997)(citing Meyer v. Univ. of Wash., 105 Wn.2d 847, 852 (1986)).

Rule 56(e) thus requires the non-moving party to go beyond the pleadings and to make an affirmative showing on all issues to which it will

have the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). In doing so, the evidence relied upon by the nonmoving party must be admissible at trial. Dunlap v. Wayne, 105 Wn.2d 529, 535, 716 P.2d 842 (1986)(“A court cannot consider inadmissible evidence when ruling on a motion for summary judgment.”). The evidence relied upon by Mr. Parks does not meet this standard in large part (*see* CP 251-258 and 7/1 RP 4),⁵ and in any event, is not material to the resolution of the legal issues of standing and duty presented by this appeal.

B. Standing and Duty: The Trial Court Correctly Concluded That Under *Trask v. Butler Terry Parks Has No Legal Standing To Assert a Malpractice Claim Against Ms. Fink*

To establish a claim of legal malpractice, a plaintiff must prove four elements:

“(1) the existence of an attorney-client relationship, which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney’s breach of the duty and the damage incurred.”

⁵ *See also* Supp. CP __ (Sub. No. 205).

Versuslaw, Inc. v. Stoel Rives, LLP, 127 Wn. App. 309, 320, 111 P.3d 866 (2005). As the test suggests, “[t]raditionally, the only person who could bring a lawsuit for attorney malpractice was the attorney’s client.” Trask, 123 Wn.2d at 840. In limited circumstances, the courts in Washington and in other states have expanded standing to assert a claim of malpractice beyond the traditional privity of contract rules. *Id.* The Washington Supreme Court in Trask adopted a multi-factor balancing test to determine whether an attorney owes a duty to a nonclient. *Id.* at 842-843.

“The intent to benefit the plaintiff is the first and threshold inquiry in our modified multi-factor balancing test, which we construe to have the following elements:

- (1) the extent to which the transaction was intended to benefit the plaintiff;
- (2) the foreseeability of harm to the plaintiff;
- (3) the degree of certainty that the plaintiff suffered injury;
- (4) the closeness of the connection between the defendant’s conduct and the injury;
- (5) the policy of preventing future harm; and

(6) the extent to which the profession would be unduly burdened by a finding of liability.”

Id. at 843. Under this test, as the Washington Supreme Court explained, “the threshold question is whether the plaintiff is an intended beneficiary of the transaction to which the advice pertained.” *Id.* When the answer to that initial question is “no,” no further inquiry is required. *Id.* If further inquiry is needed, the court must evaluate public policy (factors 5 and 6) before “finding a duty to a third party.” *Id.* at 1085 (citing 1 R. Mallen & J. Smith *Legal Malpractice* § 7.9 (3d ed. 1989)).

The seminal issue at summary judgment and on appeal is whether Mr. Parks had standing to assert a malpractice claim against Ms. Fink. Absent a recognized legal duty to the claimant, there is no reason to measure an attorney’s conduct against a standard of care: a claimant has no justiciable basis for suing an attorney for malpractice if no duty exists. Trask, 123 Wn.2d at 840, 845. (*see* 7/1 RP 5-6) The trial court’s focus in analyzing Ms. Fink’s motion for summary judgment was on the existence *vel non* of a duty in light of public policy. (7/7 RP 3).

Answering in the negative, the trial court observed that Mr. Parks cited no cases which support a duty under the facts of this case. (7/7 RP 5)

The court found two out-of-state cases cited by Ms. Fink to be authoritative, both of which evaluate the impact of extending a duty to a nonclient in terms of public policy. Sisson v. Jankowski, 809 A.2d 1265 (N.H. 2002), involved circumstances analogous to the present case. The disgruntled brother of a deceased testator sued the testator's lawyer Jankowski for malpractice. The Sisson court framed the issue as follows:

“Whether . . . an attorney's negligent failure to arrange for his or her client's timely execution of a will and/or an attorney's failure to provide reasonable professional advice with respect to the client's testamentary options . . . gives rise to a viable common law claim against that attorney by an intended beneficiary of the unexecuted will.”

Id. at 1265-66.

The plaintiff Sisson argued that the testator intended to will his entire estate to him, thus disinheriting an estranged brother. Jankowski prepared a will clearly stating this intention, which she brought to the testator's hospital room to obtain his signature, accompanied by two witnesses. The testator wanted changes made however, and he did not sign the will that day. The testator passed away before Ms. Jankowski could return with the changes. The court observed that Ms. Jankowski's delay in returning may have been

unreasonable. The estranged brother received a portion of the estate in the ensuing probate, and the disappointed brother sued.

Although the court in Sisson stated that there was no question about decedent's testamentary intent, it nonetheless held that Ms. Jankowski owed no duty to the plaintiff. The court's reasoning is instructive and will therefore be quoted at length:

“After weighing the policy considerations the parties identify, we conclude that the potential for conflict between the interests of a prospective beneficiary and a testator militates against recognizing a duty of care. ‘It is the potential for conflict that is determinative, not the existence of an actual conflict.’ [Citation omitted] Whereas a testator and the beneficiary of a will have a mutual interest in ensuring that an attorney drafts the will non-negligently, a prospective beneficiary may be interested in the will's prompt execution, while the testator or testatrix may be interested in having sufficient time to consider and understand his or her estate planning options. As the Massachusetts Supreme Judicial Court recognized:

‘Confronting a last will and testament can produce complex psychological demands on a client that may require considerable periods of reflection. An attorney frequently prepares multiple

drafts of a will before the client is reconciled to the result. The most simple distributive provisions may be the most difficult for the client to accept.’

[Citation omitted]

Creating a duty, even under the unfortunate circumstances of this case, could compromise the attorney’s duty of undivided loyalty to the client and impose an untenable burden upon the attorney-client relationship. To avoid potential liability, attorneys might be forced to pressure their clients to execute their wills summarily, without sufficiently reflecting upon their estate planning options.”

Id. at 1269-70.

The second case the trial court found authoritative is Radovich v. Locke-Paddon, 35 Cal. App. 4th 946, 41 Cal. Rptr. 2d 573 (1995). (7/7 RP 9) In Radovich, a putative heir sued the decedent’s attorney for malpractice claiming the lawyer had delivered a draft will to the decedent in the hospital for her review, but did not return in time to have the will properly executed before the decedent passed away. The court found that no duty existed, evaluating the same policies (factors 5 & 6) identified in Trask.

“We agree with *Krawczyk* [*v. Stingle*, 543 A.2d 733 (Conn. 1988)] that imposition of

liability in a case such as this could improperly compromise an attorney's primary duty of undivided loyalty to his or her client, the decedent. In a sense this is factually a stronger case for the point than was *Krawczyk*: here, notwithstanding his inexplicable delay in preparing the draft will in the first place, Locke-Paddon did get the draft to the decedent more than two months before she died. . . . [I]mposition of liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily, without the additional consideration the decedent in the case said she intended to give them”

Id. at 965.

Ms. Fink cited additional cases to the trial court which similarly support the broadly accepted proposition that a delay in obtaining full execution of estate planning documents – even a negligent delay – does not create a legal duty to a nonclient. *See Hall v. Kalfayan*, 190 Cal. App. 4th 927, 118 Cal. Rptr. 3d 629 (Cal. 2010); *Rydde v. Morris*, 675 S.E.2d 431 (S.C. 2009). Mr. Parks does not distinguish these authorities, yet their reasoning and evaluation of policy considerations is instructive here.

For example, in *Hall*, the California Court of Appeals concluded “that a prospective beneficiary of a will cannot maintain an action for legal malpractice against the attorney who drafted the will but did not have it

executed before the death of the testator.” 190 Cal. App. 4th at 929. There, the attorney met with his client several times to discuss her testamentary intentions, but because a conservatorship had been established, court approval was required for any new estate planning documents. A hearing to approve a new will was scheduled, but then delayed. The client passed away without the court’s approval of the estate plan. Hall sued claiming that the attorney had failed to timely perform his duties thereby depriving him of the majority of the estate. Hall’s suit was dismissed on summary judgment because the attorney owed no duty to Hall – who was not his client and who was not the beneficiary of the *executed* estate plan. *Id.* at 932-33.

The Hall court found the Radovich opinion authoritative, and noted that the policy concerns recognized there and in other opinions required this result:

““The difficulty . . . is that any disappointed potential beneficiary—even a total stranger to the testator—could make factual allegations similar in most respects to those in the second amended complaint; and, without requiring an explicit manifestation of the testator’s intentions, the existence of a duty—a legal question—would always turn on the resolution of disputed facts and could never be decided as a matter of law.’ (*Chang v. Lederman, supra*, 172 Cal. App. 4th at p. 83.)

The court thus concluded that it would place an undue burden on the profession to hold that estate planners owe a duty of care to unnamed potential beneficiaries. ‘Without a finite, objective limit on the identity of individuals to whom they owe a duty of care, the burden on lawyers preparing wills and trusts would be intolerable.’ (*Id.* at p. 84.)

We agree with the *Radovich* and *Chang* courts that there is a need for a clear delineation of an attorney’s duty to nonclients. The essence of the claim in the case before this court is that Kalfayan failed to complete the new estate plan for Ms. Turner and have it executed on her behalf by her conservator before her death, thereby depriving Hall of his share of her estate. In the absence of an executed (and in this instance, approved) testamentary document naming Hall as a beneficiary, Hall is only a potential beneficiary. Kalfayan’s duty was to the conservatorship on behalf of Ms. Turner; he did not owe Hall a duty of care with respect to the preparation of an estate plan for Ms. Turner.

* * * *

This conclusion is particularly appropriate in this case, where Ms. Turner herself had not expressed a desire to have a new will prepared and had only limited conversation with Kalfayan about the disposition of her estate. In addition, there is no certainty that the court would have approved the PSJ. We also observe that extending Kalfayan’s duty to

potential beneficiaries of Ms. Turner's estate would expose him to liability to her niece, whose share of the estate would have been reduced. This is precisely the type of unreasonable burden on an attorney that militates against expanding duty to potential beneficiaries.”

Id. at 937-38.

Finding the reasoning of Krawczyk and Sisson persuasive, the South Carolina Supreme Court in 2009, also rejected the extension of liability (*i.e.*, a duty) to prospective beneficiaries where a deceased's attorney did not have his client's estate plan executed before he died. Rydde v. Morris, 675 S.E.2d 431 (S.C. 2009). In Rydde, the testator hired an attorney to prepare her estate plan one month prior to her death from lung cancer. Five days after receipt of a completed estate planning questionnaire, the attorney delivered to the testator a portion of the requested estate plan documents. These documents were not executed and did not include a will. The testator shortly thereafter became incapacitated and then died while in a drug-induced sleep. The individuals identified in the questionnaire as prospective beneficiaries sued the attorney. *Id.* at 432. The court dismissed the complaint on a Rule 12(b)(6) motion, stating in part:

“Our decision today not to impose a duty on an attorney in favor of a prospective beneficiary for alleged negligent failure to draft a will follows the law in other jurisdictions. We find persuasive the reasoning of decisions from New Hampshire, Connecticut, and Florida. We reference these three jurisdictions, for these states recognize generally that an attorney owes a duty to a non-client intended beneficiary of an executed will where it is shown that the testator's intent has been defeated or diminished by negligence on the part of the attorney, resulting in loss to the beneficiary. Having relaxed the traditional privity requirement in legal malpractice claims, these states nevertheless draw the line and refuse for compelling policy reasons to permit a malpractice claim by a non-client for negligent failure to draft a will.”

Id. at 433 (emphasis added).

The rationale applied in Krawczyk, Sisson, Hall, and Rydde is equally applicable here and is consistent with the multi-factor test adopted in Trask. The trial court correctly applied this reasoning in light of Trask and concluded that Ms. Fink owed no duty to Mr. Parks. (7/7 RP 4-9) If it had ruled to the contrary, the potential liability of an estate planning attorney would be unlimited, and could even preclude the offering of such legal services altogether. The bare fact that Mr. Parks' name was handwritten into a *draft* will for Mr. Balko cannot outweigh the undue burden on the legal

profession that would be imposed by extending a duty between attorney and nonclient here. On April 26, 2006, the date upon which the alleged malpractice occurred, Ms. Fink's sole duty ran to Mr. Balko. A concurrent duty to Mr. Parks would have created an irreconcilable conflict of interest.

C. **The Trask Balancing Test: The Extension of the Duty of Care Advocated by Terry Parks Would Impose an Unreasonable Burden on the Legal Profession by Creating an Irreconcilable Conflict of Interest**

The fundamental issue presented here is how to balance the six factors set forth in Trask. See 123 Wn.2d at 843. The trial court focused primarily on the sixth element: "(6) the extent to which the profession would be unduly burdened by a finding of liability." *Id.* at 843. (7/7 RP 7-9) The trial court found that the duty owed by a lawyer to a testator in the preparation of a will is in conflict with a potential heir's interest in inheriting. (7/7 RP 9) Reconciling these competing duties would impose an unreasonable burden on lawyers engaged in estate planning practices.

In Trask, the Washington Supreme Court concluded that no duty was owed by the testator's lawyer to a disappointed putative heir because "the unresolvable conflict of interest an estate attorney encounters in deciding whether to represent the personal representative, the estate, or the estate heirs

unduly burdens the legal profession.” 123 Wn.2d at 845. The opinion is consistent with the trial court’s order here.

Mr. Parks contends that on the operative date – April 26, 2006 (and apparently sometime up to “72 hours” thereafter) – Ms. Fink accreted a previously nonexistent duty to insure that Mr. Parks inherited John Balko’s estate. *See, e.g.*, CP 238. In specific, he argues that Ms. Fink was duty bound to force Mr. Balko to re-sign the April 2006 draft document in front of witnesses. The conflict between Mr. Balko’s interest in disposing of his estate as he saw fit and Mr. Parks’ interest in receiving all of Mr. Balko’s estate is palpable.

Consistent with Sisson and Radovich, *supra*, the Washington Supreme Court in Trask concluded that policy considerations strongly militate against the recognition of a concurrent duty to a putative heir:

“The policy considerations against finding a duty to a nonclient are the strongest where doing so would detract from the attorney’s ethical obligations to the client. This occurs where a duty to a nonclient creates a risk of divided loyalties because of a conflicting interest or of a breach of confidence.”

123 Wn.2d at 844. Janyce Fink owed an unalloyed duty of loyalty to her client John Balko. *See, e.g.*, Cmt. 1 to RPC 1.7 (“Loyalty and independent

judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client, or a third person, or from the lawyer's own interests." She advised him of the potential risk of not correcting the error in the November 2005 will. CP 335, 337, 343, 352. She warned Mr. Balko in writing three separate times of the need to have his signature witnessed. *Id.* Mr. Balko, for reasons of his own, declined to take Ms. Fink's advice. CP 57; CP 335.

As the trial court correctly observed, Mr. Balko had over a year to sign a new, properly witnessed will before he died, and he elected not to do so. (7/7 RP 4) This was his right, and Ms. Fink was duty-bound to protect that right regardless of how that impacted Terry Parks. RPC 1.2(a)(amended effective 2006).⁶ Nor does the law require a client to follow his lawyers' advice. Hines v. Data Lines Sys., Inc., 53 Wn. App. 283, 291, 766 P.2d 1109 (1989)(dismissing misrepresentation claim against law firm because law firm

⁶ RPC 1.2(a) states in relevant part: "a lawyer shall abide by a client's decision concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued."

“cannot force its client to follow its advice.”), *rev'd in part on other grounds*, 114 Wn.2d 127, 788 P.2d 8 (1990).

The dilemma caused by this conflict of interest was aptly described by the California Court of Appeals in Hall, and bears repeating: “The difficulty . . . is that any disappointed potential beneficiary – even a total stranger to the testator – could make factual allegations similar in most respects [to those pleaded here]. . . , and without requiring an explicit manifestation of the testator’s intentions, the existence of a duty – a legal question – would always turn on the resolution of disputed facts and could never be decided as a matter of law.” Hall, 190 Cal. App. 4th at 935. The main theme of Mr. Parks’ appeal is that disputed facts relating to the intention of the testator and the conduct of Ms. Fink preclude determination of duty on summary judgment. This argument is emblematic of the concern stated in Hall.

D. The Cases Cited by Appellant Are Inapposite and Do Not Support the Legal Conclusion that Terry Parks Has Standing

Most of the cases cited by Mr. Parks are easily distinguishable because they deal with professional errors committed in the drafting of the will. In other words, an error was made in the document itself which

rendered the instrument unenforceable. Here, there is no dispute that the April 2006 draft will would have been legally sufficient (ignoring the uncompleted blanks) if fully witnessed.

Three cases cited by Mr. Parks (which were not cited to the trial court) merit a brief discussion. Auric v. Continental Casualty Company, 331 N.W.2d 325 (Wis. 1983), addressed a situation where the lawyer representing the testator admitted that he negligently “forgot” to have a second witness sign the will. The testator came to the lawyer’s office for the sole purpose of formally signing a will to replace an existing will. The lawyer arranged for two witnesses to be present (himself and his secretary), but his secretary did not sign the will as a witness. *Id.* at 327, 329 (“Here Crawford admits that he negligently supervised the execution of the will.”). The court found, after taking into account Wisconsin’s unique constitution, that the attorney owed a duty to the putative heir whose inheritance was affected, characterizing it as a “duty to properly supervise the execution of the will.” *Id.* at 329.

This decision is distinguishable for several reasons. First, Mr. Balko had never before seen or commented on the draft document Ms. Fink brought to his hospital room on April 26, 2006. There were blanks to be discussed and completed. CP 66-67. Second, it is uncontroverted that Ms. Fink did not

come to Mr. Balko's room on April 26 to obtain a fully executed will, or that John Balko expected to sign a will that day. CP 55. By contrast, the testator in Auric came to the lawyer's office for the sole purpose of a formal will signing.

Mr. Parks makes much of Mr. Balko signing the April 26th draft document. This is not legally significant. According to the unchallenged testimony of Ms. Fink's expert attorney Watson Blair, "It is not uncommon to have clients fill in blanks on document and then write their name in the signature block (as another blank) and then give the document to the attorney to be retyped." CP 229-230. When they do, the handwritten changes are typed into a new draft, which if approved by the client, is then signed before attesting witnesses. CP 230.

There are many valid reasons why a person is reticent about finalizing a will. In Sisson the court pointed out that

"[c]onfronting a last will and testament can produce complex psychological demands on a client that may require considerable periods of reflection. An attorney frequently prepares multiple drafts of a will before the client is reconciled to the result. The most simple distributive provisions may be the most difficult for the client to accept."

809 A.2d at 1269-70. At the meeting of April 26th there was no “duty to properly supervise the execution of the will” because the meeting was not intended by anyone to be the date of execution. (*See* 7/1 RP 12-14) There is no evidence in the record to the contrary.

The second case cited by Mr. Parks is Licata v. Spector, 26 Conn. Supp. 378, 225 A.2d 28 (1966). This forty-six year old decision involved “drafter’s negligence,” wherein a legal error was committed by the lawyer in the drafting of the will. The Licata will was declared invalid for “lacking the required number of witnesses.” 225 A.2d at 30. The decision does not say how this occurred except to observe that it was due to the negligence of the drafter. *Id.* In contrast, the draft will furnished by Ms. Fink to Mr. Balko on April 26, 2006, contained no drafting errors. Mr. Balko’s unsolicited signature on the document was not an error by Ms. Fink and it did not create a legal duty. CP 227-231; CP 240, at lines 18-25.

The third case cited by Mr. Parks, Biakanja v. Irving, 49 Cal.2d 647, 320 P.2d 16 (Cal. 1958), does not involve an attorney. The defendant, a notary public and non-attorney, prepared a will which contained no witness attestations. Instead, the document was simply “notarized.” 49 Cal.2d at 648. When challenged by an attorney in the probate proceedings, the notary

arrogantly “admonished me [the opposing attorney] to the effect that I was a young lawyer, I’d better go back and study my law books some more, that anybody knew a will which bore a notarial seal was a valid will, didn’t have to be witnessed by any witnesses.” *Id.* The court did not agree with the notary, affirming the lower court’s finding of negligence. *Id.* at 651.

But the result of Biakanja does not dictate the same result here. Biakanja involved a drafter’s error and justified imposing a duty. Here no such drafting error exists. Moreover, because Biakanja did not involve alleged negligence by an attorney, it did not consider the undue burden on the legal profession, a factor later adopted by California courts in attorney malpractice cases and which is dispositive here under Trask. Compare Radovich, 35 Cal. App. 4th at 965 with Biakanja, 49 Cal.2d at 650. See also the California Court of Appeal’s recent discussion of Biakanja in Hall. Hall, 190 Cal. App. 4th at 933-935.

In addition, in the cases of Biakanja, Lucas v. Hamm, 15 Cal. Rptr. 821, 364 P.2d 685 (1961), and Heyer v. Flaig, 74 Cal. Rptr. 225, 449 P.2d 161 (1969), also relied upon by Mr. Parks (*see infra*), there is clearly no potential for a conflict of interest to develop between the attorney and the client and the attorney and the beneficiary because the testator’s intent was

clear. In other words, but for the negligence of the attorney or drafter the will or document would not have been invalid. Here, however, the extension of a duty to a nonclient *does* impose an intolerable conflict of interest because Mr. Balko's intent is not clear and never will be. This places the attorney in a conflict of interest not only between the the client testator and the potential beneficiaries of the unexecuted document but between the client testator and the beneficiaries named in the pre-existing will. Thus, where the testator's intent is not manifestly evident, the result should and must be different: no duty to the nonclient.

This policy rationale is consistent with another reason why Mr. Balko's unsolicited signature is not legally significant. The law in Washington (and virtually every other state) provides that the only competent evidence of the testamentary intent of a decedent is what is set forth in a fully attested last will and testament. *See, e.g.,* RCW 11.12.020(1).⁷ The document on which Mr. Parks rests his entire case is merely a piece of paper

⁷ "Every will shall be in writing signed by the testator or by some other person under the testator's direction in the testator's presence, and shall be attested by two or more competent witnesses, by subscribing their names to the will, or by signing an affidavit that complies with RCW 11.20.020(2), while in the presence of the testator and at the testator's direction or request"

with a signature on it. It never ripened into a “will” because it was never witnessed. It was never witnessed at Mr. Balko’s election. *See, e.g.*, CP 57, at 29:10-31:18; CP 58, at 33:12-34:3 & 36:3-6; CP 66-70. There is no testimony in the record which contradicts this, either directly or by inference.

In any case, the issue presented on summary judgment was not what testamentary intention Mr. Balko’s signature imparted, but rather whether Mr. Balko intended the April 26th draft to be his will. The Montgomery communications of September 26, 2006, taken in conjunction with the three Fink admonitions, support the conclusion that he may not have considered the April 26th document to be the operative testamentary instrument at all when he died in the summer of 2007. Whereas several of the cases cited by Mr. Parks leave no question of the intent of the testator on the date of the alleged malpractice, this is certainly not the case here.

Plaintiff cites several other cases readily distinguishable on the ground that they involved fully executed and valid wills which contained drafting errors. In Heyer v. Flaig, 74 Cal. Rptr. 225, 449 P.2d 161 (1969), the court was asked to determine whether an intended beneficiary of a fully executed and valid will had a right of action against an attorney who failed to fulfill the testamentary directions of the testatrix. In stark contrast, this lawsuit is not

premised on a valid executed will, as Mr. Parks freely admits. Similarly, Lucas v. Hamm, 15 Cal. Rptr. 821, 364 P.2d 685 (1961), involved the negligent drafting of a will, namely a residuary trust which violated the rule against perpetuities. And in Needham v. Hamilton, 459 A.2d 1060 (D.C. App. 1983), the court dealt with the negligent drafting of a will, not its execution.⁸ Moreover, as was the case in Licata, Biakanja, and Heyer, the testatrix's intent was clear in Needham: she wanted her nephew named as the residuary beneficiary but when the final will was printed and executed, the entire residuary clause was inadvertently omitted. The error, however, was not discovered until after the testatrix died and hence could not be corrected by her.

Both In re Estate of Treadwell v. Wright, 115 Wn. App. 238, 61 P.3d 1214 (2003), and In re Guardianship of Karan, 110 Wn. App. 76, 86, 38 P.3d 396 (2002), involve guardianships gone awry. Unlike an attorney for a testator, in the guardianship context an attorney hired by the guardian owes a duty to the ward because the purpose of a guardianship is "to preserve the ward's property for his or her own use." Karan, 110 Wn. App. at 85.

⁸ The court's passing reference to "execution" is dicta.

Therefore no conflict of interest exists between the guardian and the ward. The same is not true of an attorney for a testator or personal representative, as was aptly recognized by the Karan court:

“Finally, Trask notes that imposing liability in that case would create an impossible ethical conflict for lawyers, because the interests of the beneficiaries and the personal representative of a deceased’s estate are frequently at odds. The parties are legal adversaries. But, again, that is not the case here. A potential conflict of interest arises when the lawyer simultaneously represents clients with opposing interests. In contrast to Trask, the legitimate interests of the guardian here are inseparable from those of the ward.”

Id. at 86. This sentiment was echoed in the many cases cited in Ms. Fink’s motion for summary judgment. *See, e.g.,* Sisson, 809 A.2d at 1269-70 (“It is the potential for conflict that is determinative, not the existence of an actual conflict. . . . Creating a duty, even under the unfortunate circumstances of this case, could compromise the attorney’s duty of undivided loyalty to the client and impose an untenable burden upon the attorney-client relationship.”). The Treadwell and Karan cases are not instructive here.

Next, appellant’s own description of Bohn v. Cody, 119 Wn.2d 357, 832 P.2d 71 (1992), shows that it is readily distinguishable. Only under the

“extreme facts” of that case, did the court find a duty to notify a third-party to seek independent counsel. It does not address the conflicts which arise from forcing a client to have a draft will witnessed to the benefit of putative beneficiaries and to the detriment of actual beneficiaries. Indeed, it did not arise in the context of a will at all.

Finally, Mr. Parks cites to cases wherein the plaintiffs were the actual clients of the attorney. For example, Ward v. Arnold, 52 Wn.2d 581, 583-84, 328 P.2d 164 (1958), involved a malpractice claim brought by the actual client: “The complaint plainly states that the defendant’s services were engaged by the plaintiff, that the advice was given to her, and that the will with attached instruction was sent to her.” The malpractice claimed by the client was that she was advised by the attorney that she did not need her husband to sign a will at all. *Id.* This is factually dissimilar from the instant case.

Similarly, Schirmer v. Nethercutt, 15 Wash. 172, 288 P. 265 (1930), involved a claim brought by the actual client: “In his complaint herein respondent alleged that on February 28, 1926, for a valuable consideration then paid to appellant he employed appellant as an attorney for the purpose of drawing the last will and testament . . . of grandmother of respondent

...” *Id.* at 174. And, there was no question of the testator’s intent or desire to execute a will. These cases are clearly factually distinguishable and do not analyze the Trask factors, which are dispositive of Mr. Parks’ appeal.

E. The Court Can Affirm on an Additional Ground: Lack of Causation

The court may affirm the trial court’s summary judgment grant if it is supported by any ground in the record, even if the trial court did not rely on that ground in its order. *See LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989). In addition to the absence of a duty to Mr. Parks, Mr. Parks’ malpractice claim also fails because he cannot establish legal causation. In the context of a malpractice action,

“Proximate causation has two elements, cause in fact and legal causation. Causation in fact refers to the ‘but for’ consequence of an act, that is, the immediate connection between an act and an injury. Legal causation is based on policy considerations determining how far the consequence between and act should extend.”

Smith v. Preston Gates Ellis, LLP, 135 Wn. App. 859, 864, 147 P.3d 600 (2006)(internal quotations & citations omitted). The undisputed evidence is that Mr. Balko refused against legal advice to take necessary action to have his 2006 Draft Will witnessed or a new will prepared, whether by Ms. Fink,

Mr. Montgomery, or someone else. Furthermore, Mr. Parks' own evidence is that in September 2006 Mr. Balko "wanted to think about it more" before changing his "2005 Will." CP 192, at ¶¶ 5-6.

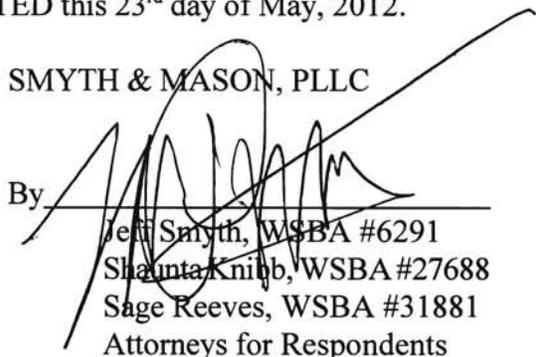
Mr. Parks presented no prima facie evidence that "but for" defendants' alleged noncompliance with the 72 hour rule, Mr. Balko would have executed the April 2006 draft document before two witnesses. *See Boguch v. Landover Corp.*, 153 Wn. App. 595, 612-15, 224 P.3d 795 (2009)(analogizing to attorney malpractice case to affirm summary judgment in negligence action by vendor against real estate professionals because vendor offered "no evidence that, in absence of the inaccurate photograph, the property would have sold within a certain price range"). Stated another way, by ignoring Ms. Fink's warnings, Mr. Balko's inaction constituted an intervening superseding cause. *See Cramer v. Department of Highways*, 73 Wn. App. 516, 521, 870 P.2d 999 (1994)("[W]here the defendant's negligence, if any, was superseded by the action of the plaintiff or third party as a matter of law, a trial court may grant summary judgment for the defendant."). Mr. Parks' failure to establish this causation element defeats his claim.

VI. CONCLUSION

The trial court's grant of summary judgment should be affirmed. The trial court correctly concluded as a matter of law that under the circumstances of this case Ms. Fink owed no duty to Mr. Parks. Moreover, the evidence in the record overwhelmingly demonstrates no causal connection between Ms. Fink's alleged acts or omissions and Mr. Parks' alleged harm.

RESPECTFULLY SUBMITTED this 23rd day of May, 2012.

SMYTH & MASON, PLLC

By 

Jeff Smyth, WSBA #6291
Shaunta Knibb, WSBA #27688
Sage Reeves, WSBA #31881
Attorneys for Respondents

CERTIFICATE OF SERVICE

Dory Satt-Yun Tai makes the following statement under penalty of perjury under the laws of the State of Washington:

1. I am a legal assistant at the law firm of Smyth & Mason, PLLC. I make this declaration of my own personal knowledge about matters of which I am competent to testify.

2. On May 23, 2012, I caused a true and correct copy of the foregoing to be filed with the clerk and served on counsel of record at the address and in the manner indicated below:

Office of the Clerk Washington State Court of Appeals Division I 600 University Street Seattle, WA 98101	<input checked="" type="checkbox"/> Via Messenger
--	--

Vic S. Lam Law Offices of Vic S. Lam, P.S. 701 Fifth Avenue, Suite 4200 Seattle, WA 98104-7047	<input type="checkbox"/> Via Facsimile Transmission
	<input type="checkbox"/> Via Email Transmission
	<input type="checkbox"/> Via U.S. Mail
	<input checked="" type="checkbox"/> Via Hand Delivery

Attorney for Appellant Terry Parks

DATED at Seattle, Washington, this 23rd day of May, 2012.



Dory Satt-Yun Tai, Legal Assistant

APPENDICES

Informed Consent

[14] In order for the communication to the client to be adequate it must be accomplished in a manner that can be easily understood by the client.

Screened

[15] See Rules 1.10 and 6.5 for specific screening requirements under the circumstances covered by those Rules.

Other

[16] For the scope of the phrase "information relating to the representation of a client," which is not defined in Rule 1.0, see Comment [19] to Rule 1.6.

TITLE 1. CLIENT-LAWYER RELATIONSHIP

RULE 1.1 COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

Maintaining Competence

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. [Comment adopted effective September 1, 2006.]

RULE 1.2. SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN LAWYER AND CLIENT

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(e) [Reserved].

(f) A lawyer shall not purport to act as a lawyer for any person or organization if the lawyer knows or reasonably should know that the lawyer is acting without the authority of that person or organization, unless the lawyer is authorized or required to so act by law or a court order.

[Amended effective October 1, 2002; October 29, 2002; September 1, 2006; September 1, 2011.]

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.14.

Independence from Client's Views or Activities

[5] Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular

disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, e.g., Rules 1.1, 1.8 and 5.6.

See also Washington Comment [14].

Criminal, Fraudulent and Prohibited Transactions

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is

criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Paragraph (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate criminal or fraudulent avoidance of tax liability. Paragraph (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of paragraph (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

Additional Washington Comments (14–17)

Agreements Limiting Scope of Representation

[14] An agreement limiting the scope of a representation shall consider the applicability of Rule 4.2 to the representation. (The provisions of this Comment were taken from former Washington RPC 1.2(c).) See also Comment [11] to Rule 4.2 for specific considerations pertaining to contact with an otherwise represented person to whom limited representation is being or has been provided.

Acting as a Lawyer Without Authority

[15] Paragraph (f) was taken from former Washington RPC 1.2(f), which was deleted from the RPC by amendment effective September 1, 2006. The mental state has been changed from "willfully" to one of knowledge or constructive knowledge. See Rule 1.0(f) & (j). Although the language and structure of paragraph (f) differ from the former version in a number of other respects, paragraph (f) does not otherwise represent a change in Washington law interpreting former RPC 1.2(f).

[16] If a lawyer is unsure of the extent of his or her authority to represent a person because of that person's diminished capacity, paragraph (f) of this Rule does not prohibit the lawyer from taking action in accordance with Rule 1.14 to protect the person's interests. Protective action taken in conformity with Rule 1.14 does not constitute a violation of this Rule.

[17] Paragraph (f) does not prohibit a lawyer from taking any action permitted or required by these Rules, court rules, or other law when withdrawing from a representation, when terminated by a client, or when ordered to continue representation by a tribunal. See Rule 1.16(c).

[Comment adopted effective September 1, 2006; amended effective September 1, 2011.]

RULE 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

[1] [Washington revision] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with diligence in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

[5] [Reserved.]

[Comment adopted effective September 1, 2006.]

against using such information to the disadvantage of the former client.

Additional Washington Comments (19–26)

[19] The phrase “information relating to the representation” should be interpreted broadly. The “information” protected by this Rule includes, but is not necessarily limited to, confidences and secrets. “Confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested be held in confidence or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

Disclosure Adverse to Client

[20] Washington’s Rule 1.6(b)(2), which authorizes disclosure to prevent a client from committing a crime, is significantly broader than the corresponding exception in the Model Rule. While the Model Rule permits a lawyer to reveal information relating to the representation to prevent the client from “committing a crime . . . if it is reasonably certain to result in substantial injury to the financial interests or property of another and the furtherance of which the client has used the lawyer’s services.” Washington’s Rule permits the lawyer to reveal such information to prevent the commission of any crime.

[21] [Reserved.]

[22] [Reserved.]

[23] The exception to the general rule prohibiting unauthorized disclosure of information relating to the representation “should not be carelessly invoked.” *In re Boelter*, 139 Wn.2d 91, 985 P.2d 328 (1999). A lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of avoidable disclosure.

[24] Washington has not adopted that portion of Model Rule 1.6(b)(6) permitting a lawyer to reveal information related to the representation to comply with “other law.” Washington’s omission of this phrase arises from a concern that it would authorize the lawyer to decide whether a disclosure is required by “other law,” even though the right to confidentiality and the right to waive confidentiality belong to the client. The decision to waive confidentiality should only be made by a fully informed client after consultation with the client’s lawyer or by a court of competent jurisdiction. Limiting the exception to compliance with a court order protects the client’s interest in maintaining confidentiality while insuring that any determination about the legal necessity of revealing confidential information will be made by a court. It is the need for a judicial resolution of such issues that necessitates the omission of “other law” from this Rule.

Withdrawal

[25] After withdrawal the lawyer is required to refrain from disclosing the client’s confidential information except as otherwise permitted by Rules 1.6 or 1.9. A lawyer is not prohibited from giving notice of the effect of withdrawal by this Rule, Rule 1.8(b), or Rule 1.9(c). If the lawyer’s services will be used by the client in

furthering a course of criminal or fraudulent conduct, the lawyer must withdraw. See Rule 1.16(a)(1). Upon withdrawal from the representation in such circumstances the lawyer may also disaffirm or withdraw any opinion, document, affirmation, or the like. If the client is an organization, the lawyer may be in doubt about whether contemplated conduct will actually be carried out by the organization. When a lawyer requires guidance about compliance with this Rule in connection with an organizational client, the lawyer may proceed under the provisions of Rule 1.13(b).

Other

[26] This Rule does not relieve a lawyer of his or her obligations under Rule 5.10 of the Rules for Enforcement of Lawyer Conduct.

[Comment adopted effective September 1, 2006; amended effective September 1, 2006; September 1, 2011.]

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

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

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

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

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

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

(2) the representation is not prohibited by law;

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

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

[Amended effective September 1, 1995; September 1, 2006.]

Comment

General Principles

[1] Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client. Concurrent conflicts of interest can arise from the lawyer’s responsibilities to another client, a former client or a third person or from the lawyer’s own interests. For specific Rules regarding certain concurrent conflicts of interest, see Rule 1.8. For former client conflicts of interest, see Rule 1.9. For conflicts of interest involving prospective clients, see Rule

1.18. For definitions of “informed consent” and “confirmed in writing,” see Rule 1.0(e) and (b).

[2] Resolution of a conflict of interest problem under this Rule requires the lawyer to: 1) clearly identify the client or clients; 2) determine whether a conflict of interest exists; 3) decide whether the representation may be undertaken despite the existence of a conflict, i.e., whether the conflict is consentable; and 4) if so, consult with the clients affected under paragraph (a) and obtain their informed consent, confirmed in writing. The clients affected under paragraph (a) include both of the clients referred to in paragraph (a)(1) and the one or more clients whose representation might be materially limited under paragraph (a)(2).

[3] A conflict of interest may exist before representation is undertaken, in which event the representation must be declined, unless the lawyer obtains the informed consent of each client under the conditions of paragraph (b). To determine whether a conflict of interest exists, a lawyer should adopt reasonable procedures, appropriate for the size and type of firm and practice, to determine in both litigation and non-litigation matters the persons and issues involved. See also Comment to Rule 5.1. Ignorance caused by a failure to institute such procedures will not excuse a lawyer’s violation of this Rule. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see Comment to Rule 1.3 and Scope.

[4] If a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, unless the lawyer has obtained the informed consent of the client under the conditions of paragraph (b). See Rule 1.16. Where more than one client is involved, whether the lawyer may continue to represent any of the clients is determined both by the lawyer’s ability to comply with duties owed to the former client and by the lawyer’s ability to represent adequately the remaining client or clients, given the lawyer’s duties to the former client. See Rule 1.9. See also Comments [5] and [29].

[5] Unforeseeable developments, such as changes in corporate and other organizational affiliations or the addition or realignment of parties in litigation, might create conflicts in the midst of a representation, as when a company sued by the lawyer on behalf of one client is bought by another client represented by the lawyer in an unrelated matter. Depending on the circumstances, the lawyer may have the option to withdraw from one of the representations in order to avoid the conflict. The lawyer must seek court approval where necessary and take steps to minimize harm to the clients. See Rule 1.16. The lawyer must continue to protect the confidences of the client from whose representation the lawyer has withdrawn. See Rule 1.9(c).

See also Washington Comment [36].

Identifying Conflicts of Interest: Directly Adverse

[6] Loyalty to a current client prohibits undertaking representation directly adverse to that client without that client’s informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. The client as to whom the representation

is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer’s ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client’s case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer’s interest in retaining the current client. Similarly, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.

[7] Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.

Identifying Conflicts of Interest: Material Limitation

[8] Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer’s ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer’s other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer’s ability to recommend or advocate all possible positions that each might take because of the lawyer’s duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, whether it will materially interfere with the lawyer’s independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

See also Washington Comment [37].

Lawyer’s Responsibilities to Former Clients and Other Third Persons

[9] In addition to conflicts with other current clients, a lawyer’s duties of loyalty and independence may be materially limited by responsibilities to former clients under Rule 1.9 or by the lawyer’s responsibilities to other persons, such as fiduciary duties arising from a lawyer’s service as a trustee, executor or corporate director.

Personal Interest Conflicts

[10] The lawyer’s own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer’s own conduct in a transaction is in serious question, it

may be difficult or impossible for the lawyer to give a client detached advice. Similarly, when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client. In addition, a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest. See Rule 1.8 for specific Rules pertaining to a number of personal interest conflicts, including business transactions with clients. See also Rule 1.10 (personal interest conflicts under Rule 1.7 ordinarily are not imputed to other lawyers in a law firm).

[11] [Washington revision] When lawyers representing different clients in the same matter or in substantially related matters are related as parent, child, sibling, or spouse, or if the lawyers have some other close familial relationship or if the lawyers are in a personal intimate relationship with one another, there may be a significant risk that client confidences will be revealed and that the lawyer's family or other familial or intimate relationship will interfere with both loyalty and independent professional judgment. See Rule 1.8(1). As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers before the lawyer agrees to undertake the representation. Thus, a lawyer so related to another lawyer ordinarily may not represent a client in a matter where that lawyer is representing another party, unless each client gives informed consent. The disqualification arising from such relationships is personal and ordinarily is not imputed to members of firms with whom the lawyers are associated. See Rules 1.8(k) and 1.10.

[12] [Reserved.]

Interest of Person Paying for a Lawyer's Service

[13] A lawyer may be paid from a source other than the client, including a co-client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client. See Rule 1.8(f). If acceptance of the payment from any other source presents a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's own interest in accommodating the person paying the lawyer's fee or by the lawyer's responsibilities to a payer who is also a co-client, then the lawyer must comply with the requirements of paragraph (b) before accepting the representation, including determining whether the conflict is consentable and, if so, that the client has adequate information about the material risks of the representation.

Prohibited Representations

[14] Ordinarily, clients may consent to representation notwithstanding a conflict. However, as indicated in paragraph (b), some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When the lawyer is representing more than one client, the question of consentability must be resolved as to each client.

[15] Consentability is typically determined by considering whether the interests of the clients will be

adequately protected if the clients are permitted to give their informed consent to representation burdened by a conflict of interest. Thus, under paragraph (b)(1), representation is prohibited if in the circumstances the lawyer cannot reasonably conclude that the lawyer will be able to provide competent and diligent representation.

See Rule 1.1 (Competence) and Rule 1.3 (Diligence).

[16] [Washington revision] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states other than Washington limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest. See Washington Comment [38].

[17] Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

See also Washington Comment [38].

Informed Consent

[18] Informed consent requires that each affected client be aware of the relevant circumstances and of the material and reasonably foreseeable ways that the conflict could have adverse effects on the interests of that client. See Rule 1.0(e) (informed consent). The information required depends on the nature of the conflict and the nature of the risks involved. When representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved. See Comments [30] and [31] (effect of common representation on confidentiality).

[19] Under some circumstances it may be impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent. In some cases the alternative to common representation can be that each party may have to obtain separate representation with the possibility of incurring additional costs. These costs, along with the benefits of securing separate representation, are factors that may be considered by the affected client

in determining whether common representation is in the client's interests.

See also Washington Comment [39].

Consent Confirmed in Writing

[20] Paragraph (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing. Such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See Rule 1.0(b). See also Rule 1.0(n) (writing includes electronic transmission). If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See Rule 1.0(b). The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

Revoking Consent

[21] A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other client and whether material detriment to the other clients or the lawyer would result.

Consent to Future Conflict

[22] [Reserved.]

Conflicts in Litigation

[23] Paragraph (b)(3) prohibits representation of opposing parties in the same litigation, regardless of the clients' consent. On the other hand, simultaneous representation of parties whose interests in litigation may conflict, such as coplaintiffs or codefendants, is governed by paragraph (a)(2). A conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than one codefendant. On the other hand, common representation of persons having similar interests in civil litigation is proper if the requirements of paragraph (b) are met.

[24] Ordinarily a lawyer may take inconsistent legal positions in different tribunals at different times on behalf of different clients. The mere fact that advocating a legal position on behalf of one client

might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest. A conflict of interest exists, however, if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client. Factors relevant in determining whether the clients need to be advised of the risk include; where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients' reasonable expectations in retaining the lawyer. If there is significant risk of material limitation, then absent informed consent of the affected clients, the lawyer must refuse one of the representations or withdraw from one or both matters.

[25] When a lawyer represents or seeks to represent a class of plaintiffs or defendants in a class-action lawsuit, unnamed members of the class are ordinarily not considered to be clients of the lawyer for purposes of applying paragraph (a)(1) of this Rule. Thus, the lawyer does not typically need to get the consent of such a person before representing a client suing the person in an unrelated matter. Similarly, a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.

Nonlitigation Conflicts

[26] Conflicts of interest under paragraphs (a)(1) and (a)(2) arise in contexts other than litigation. For a discussion of directly adverse conflicts in transactional matters, see Comment [7]. Relevant factors in determining whether there is significant potential for material limitation include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that disagreements will arise and the likely prejudice to the client from the conflict. The question is often one of proximity and degree. See Comment [8].

[27] For example, conflict questions may arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may be present. In estate administration the identity of the client may be unclear under the law of a particular jurisdiction. Under one view, the client is the fiduciary; under another view the client is the estate or trust, including its beneficiaries. In order to comply with conflict of interest rules, the lawyer should make clear the lawyer's relationship to the parties involved.

[28] Whether a conflict is consentable depends on the circumstances. For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference in interest among

them. Thus, a lawyer may seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis; for example, in helping to organize a business in which two or more clients are entrepreneurs, working out the financial reorganization of an enterprise in which two or more clients have an interest or arranging a property distribution in settlement of an estate. The lawyer seeks to resolve potentially adverse interests by developing the parties' mutual interests. Otherwise, each party might have to obtain separate representation, with the possibility of incurring additional cost, complication or even litigation. Given these and other relevant factors, the clients may prefer that the lawyer act for all of them.

See also Washington Comment [40].

Special Considerations in Common Representation

[29] In considering whether to represent multiple clients in the same matter, a lawyer should be mindful that if the common representation fails because the potentially adverse interests cannot be reconciled, the result can be additional cost, embarrassment and recrimination. Ordinarily, the lawyer will be forced to withdraw from representing all of the clients if the common representation fails. In some situations, the risk of failure is so great that multiple representation is plainly impossible. For example, a lawyer cannot undertake common representation of clients where contentious litigation or negotiations between them are imminent or contemplated. Moreover, because the lawyer is required to be impartial between commonly represented clients, representation of multiple clients is improper when it is unlikely that impartiality can be maintained. Generally, if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good. Other relevant factors are whether the lawyer subsequently will represent both parties on a continuing basis and whether the situation involves creating or terminating a relationship between the parties.

[30] A particularly important factor in determining the appropriateness of common representation is the effect on client-lawyer confidentiality and the attorney-client privilege. With regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised.

[31] As to the duty of confidentiality, continued common representation will almost certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation. This is so because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit. See Rule 1.4. The lawyer should, at the outset of the common representation and as part of the process of obtaining each client's informed consent, advise each client that information will be shared and that the

lawyer will have to withdraw if one client decides that some matter material to the representation should be kept from the other. In limited circumstances, it may be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential. For example, the lawyer may reasonably conclude that failure to disclose one client's trade secrets to another client will not adversely affect representation involving a joint venture between the clients and agree to keep that information confidential with the informed consent of both clients.

[32] When seeking to establish or adjust a relationship between clients, the lawyer should make clear that the lawyer's role is not that of partisanship normally expected in other circumstances and, thus, that the clients may be required to assume greater responsibility for decisions than when each client is separately represented. Any limitations on the scope of the representation made necessary as a result of the common representation should be fully explained to the clients at the outset of the representation. See Rule 1.2(c).

[33] Subject to the above limitations, each client in the common representation has the right to loyal and diligent representation and the protection of Rule 1.9 concerning the obligations to a former client. The client also has the right to discharge the lawyer as stated in Rule 1.16.

See also Washington Comment [41].

Organizational Clients

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

[35] A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director or should cease to act as the corporation's lawyer when conflicts of interest arise. The lawyer should advise the other members of the board that in some circumstances matters discussed at board meetings while the lawyer is present in the capacity of director might not be

protected by the attorney-client privilege and that conflict of interest considerations might require the lawyer's recusal as a director or might require the lawyer and the lawyer's firm to decline representation of the corporation in a matter.

Additional Washington Comments (36-41)

General Principles

[36] Notwithstanding Comment [3], lawyers providing short-term limited legal services to a client under the auspices of a program sponsored by a nonprofit organization or court are not normally required to systematically screen for conflicts of interest before undertaking a representation. See Comment [1] to Rule 6.5. See Rule 1.2(c) for requirements applicable to the provision of limited legal services.

Identifying Conflicts of Interest: Material Limitation

[37] Use of the term "significant risk" in paragraph (a)(2) is not intended to be a substantive change or diminishment in the standard required under former Washington RPC 1.7(b), i.e., that "the representation of the client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests."

Prohibited Representations

[38] In Washington, a governmental client is not prohibited from properly consenting to a representational conflict of interest.

Informed Consent

[39] Paragraph (b)(4) of the Rule differs slightly from the Model Rule in that it expressly requires authorization from the other client before any required disclosure of information relating to that client can be made. Authorization to make a disclosure of information relating to the representation requires the client's informed consent. See Rule 1.6(a).

Nonlitigation Conflicts

[40] Under Washington case law, in estate administration matters the client is the personal representative of the estate.

Special Considerations in Common Representation

[41] Various legal provisions, including constitutional, statutory and common law, may define the duties of government lawyers in representing public officers, employees, and agencies and should be considered in evaluating the nature and propriety of common representation.

[Comment adopted effective September 1, 2006.]

**RULE 1.8. CONFLICT OF INTEREST:
CURRENT CLIENT: SPECIFIC
RULES**

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

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

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

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

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

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

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

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

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

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

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

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

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

(h) A lawyer shall not:

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

TERRY PARKS, a single man,

Plaintiff,

vs.

JANYCE LYNN FINK, an individual, and FINK
LAW GROUP PLLC, a Washington professional
limited liability company,

Defendants.

Case No.: 10-2-04520-1 SEA

**DEFENDANTS' AMENDED
ANSWER, AFFIRMATIVE
DEFENSES AND
COUNTERCLAIMS**

In an amended answer to plaintiff's complaint ("Complaint"), defendants hereby admit, deny and alleges as follows:

I. PARTIES

1. Defendants lack knowledge of the truth or falsity of the statements as to where Mr. Parks is a resident contained in paragraph 1 of the Complaint herein and, therefore, **DENY** same.

2. With regard to Paragraph 2 of the Complaint, defendant Janyce Fink **ADMITS** she is a resident of King County, Washington, and has been continually licensed attorney practicing law in the State of Washington since 1995.

3. With regard to Paragraph 3 of the Complaint, defendant Fink Law Group PLLC **ADMITS** that it is professional limited liability company formed and existing under the laws of the state of Washington, located in King County, Washington, and that the professional services provided by Ms. Fink to John J. Balko, Jr. ("Mr. Balko") were in the course and scope of her working for the law firm, Fink Law Group, PLLC.

1 13. Defendants **ADMIT** that after Mr. Balko's death, Mr. Parks asked to see Mr. Balko's
2 2005 will. Defendants permitted Mr. Parks to view Mr. Balko's 2005 Will and the "draft" wills of
3 Mr. Balko. All remaining allegations in paragraph 13 of the Complaint are **DENIED**.

4 14. Defendants **ADMIT** that after Mr. Balko's death, Ms. Fink told Mr. Parks that Mr.
5 Balko was given copies of blank and "draft" wills for future reference and/or use, that Mr. Balko
6 might have signed a will of some sort without Ms. Fink's knowledge, and that Mr. Parks
7 accompanied Ms. Fink while she inventoried Mr. Balko's safe deposit boxes. All remaining
8 allegations in paragraph 14 of the Complaint are **DENIED**.

9 15. Defendants **ADMIT** that after Mr. Balko's death, Ms. Fink asked attorney William
10 Dussault if she should allow Mr. Parks to accompany her inventory of Mr. Balko's safe deposit
11 boxes; whether he knew if Mr. Balko had revoked his 2005 will; to draft a memo relative to the 2006
12 "draft" will; and to assist Mr. Parks with any questions he had relative to same. All remaining
13 allegations in paragraph 15 of the Complaint are **DENIED**.

14 16. Defendants lack knowledge of the truth or falsity of the statements contained in
15 paragraph 16 of the Complaint and therefore **DENY** same.

16 17. Paragraph 17 of the Complaint herein calls for a legal conclusion. Defendants **DENY**
17 all allegations therein.

18 **IV. CAUSE OF ACTION – LEGAL MALPRACTICE**

19 18. Paragraph 18 of the Complaint calls for a legal conclusion. Defendants **DENY** all
20 allegations therein.

21 19. Paragraph 19 of the Complaint calls for a legal conclusion. Defendants **DENY** all
22 allegations therein.

23 20. Paragraph 20 of the Complaint calls for a legal conclusion. Defendants **DENY** all
24 allegations therein.

25 **V. AFFIRMATIVE DEFENSES**

26 21. Failure to State a Claim Upon Which Relief Can be Granted. Plaintiff has failed to
27 state a claim upon which relief can be granted.

28 22. Lack of Standing. Plaintiff lacks standing to bring the claims stated in the Complaint.

29 23. Lack of Duty: Defendants owe no duty to Plaintiff.

30 24. Breach of Duty: Defendants aver that if there was any duty owed to plaintiff (which is
31 expressly denied), there was no breach of that duty.

1 **XII. THE TORT OF OUTRAGE**

2 35. On several occasions, motivated solely by greed, plaintiff Parks has threatened the
3 life of Ms. Fink, including by a letter he delivered to her on or about September 16, 2008, wherein
4 he states as follows:

5 "To: jayne [sic] fink (fat, ugly, stinkin [sic] cunt, whore, bitch) [sic]

6 You are the biggest liar, most despicable [sic] excuse for a human being, ever to set foot
7 on god's green earth. I condemn you to a living hell while on earth, and eternal damnation in
8 hell a.d. You and I both know the truth, about what happened the final week before Johnny
9 died and the few weeks following his death - how do you live with yourself knowing what
10 you do? Your legal skills consist of total abuse and exploitation of your clients. You
11 manipulate the law for your own financial benefit. You must use the paper the "Washington
12 State Court Rules: Rules of Professional Conduct" is written on, for toilet paper; because,
13 you sure as hell don't abide by them. You and your ethics are the shit on that toilet paper,
14 and should be flushed into a cesspool where you belong. You literally robbed and stole from
15 a charity who's [sic] mission is to help find and prevent [sic] missing children. You screwed
16 over Johnny Balko, insulted his generous and innocent spirit, and made a complete mockery
17 of his final wishes, plans, and dreams - you phony scum - you never cared about him, only
18 about stealing what you could from him, and from his mother - may god's great anger and
19 fierce vengeance strike you down to your death -

20 **FUCK YOU, AND THE WHORE BITCH WHO BROUGHT YOU INTO THIS
21 WORLD!**

22 Terry Parks"

23 36. Mr. Parks' death threats and insults, and this lawsuit, are motivated solely by his
24 anger at being left out of the will of a man, John Balko, to whom he was distantly related.

25 37. Mr. Parks makes no allegations that the "draft" will on which he bases this lawsuit
26 was negligently prepared. In fact, his lawsuit depends upon this court's conclusion that the "draft"
27 will was entirely proper in form, but was not fully executed consistent with Washington's laws of
28 descent and distribution.

38. Mr. Parks acts are unacceptable in civilized society and constitute outrageous
conduct, actionable under the laws of the state of Washington.

39. Ms. Fink has suffered injury and loss as a result of Parks' outrageous conduct, for
which she is entitled to recover damages from Parks in an amount to be proved at time of trial.

Summary Judgment Hearing Date: July 1, 2011
Trial Date: August 8, 2011

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

TERRY PARKS,

Plaintiff,

v.

JANYCE LYNN FINK, an individual, and
FINK LAW GROUP PLLC, a Washington
professional limited liability company,

Defendants.

NO. 10-2-04520-1 (SEA)

**DEFENDANTS' OBJECTION TO
LATE FILED SUBMISSIONS OF
PLAINTIFF RE DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT OF DISMISSAL**

Defendants above-named hereby object to the following pleadings and declarations submitted to the court by the plaintiff on Wednesday, July 6, 2011 (5 days after the hearing on defendants' summary judgment motion):

- 1. Plaintiff's Supplemental Submission, dated July 6, 2011;
- 2. Supplemental Declaration of Vic S. Lam in Opposition to Defendants' Motion for Summary Judgment, dated July 6, 2011; and
- 3. Supplemental Declaration of Victoria "Laurie" Doyle, dated July 5, 2011.

Each of the above pleadings was filed in violation of King County Local Rule 7(b)(4)(G), which provides: "Any material offered at a time later than required by this rule, and any reply material which is not in strict reply, will not be considered by the court over objection of counsel except upon the imposition of appropriate terms, unless the court orders otherwise." (Emphasis added).

