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**Memorial Day:
Duties to Deceased Clients**

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When we think about our duties to former clients, we usually focus on the former client rule, RPC 1.9. That rule embraces both our duties of confidentiality and loyalty to former clients.¹ We instinctively know that these duties can last a long time. Generally, however, they continue even beyond the death of the client involved. The duties of confidentiality and loyalty to deceased clients often arise in relatively unusual settings. As an example of the former, litigants over a deceased client's property may subpoena the file of a lawyer who did work for the client concerning the property involved. With the latter, a lender may ask a lawyer to foreclose a trust deed that the lawyer negotiated for a deceased client.

In this column, we'll survey both the duties of confidentiality and loyalty to deceased clients. Before we do, however, three qualifiers are in order.

First, we'll focus on *human* clients. While former corporate clients that have undergone restructurings, bankruptcy, or dissolution can present similar issues, they are sufficiently different that we'll leave them for another day.²

Second, although we'll discuss the extent to which a personal representative may assert or waive confidentiality or conflicts, it is important to remember that as agents our authority to act for our principal—the client—generally ends under RCW 2.44.010 at the client's death.³

Finally, although confidentiality and conflicts are recurring issues involving deceased clients, they are by no means the only ones. WSBA Advisory Opinion 2188 (2008), for example, addresses handling funds held in trust when a client dies. ABA Formal Opinion 95-397 (1995), in turn, discusses the duty to disclose a client's death when negotiating the settlement of a personal injury claim.

Confidentiality

RPC 1.9(c) outlines our duty of confidentiality to former clients:

A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.⁴

The Washington Supreme Court has long held that the attorney-client privilege survives the death of the client.⁵ The United States Supreme Court reached the same conclusion.⁶ WSBA Advisory Opinion 175 (rev. 2009) applies this point to the broader duty of confidentiality under the RPCs.⁷ The influential Restatement of the Law Governing Lawyers takes the same approach to the duty of confidentiality from a national perspective.⁸

In many routine circumstances, a client during their lifetime will have given the lawyer instructions for the release of information following death—such as notifying the intended personal representative and beneficiaries of the client’s wishes or releasing the client’s original will so it can be admitted to probate. Confidentiality issues can loom larger, however, for the balance of the lawyer’s file—such as notes reflecting conversations with the deceased client regarding the relative allocation of assets under a will—and in situations in which there is a dispute among the beneficiaries.⁹ In still other instances, the lawyer’s file may be subpoenaed in a dispute tangential to the work the lawyer did for the deceased client.¹⁰

Following the death of a client, a personal representative appointed in probate ordinarily steps into the shoes of the decedent to either invoke or waive privilege.¹¹ WSBA Advisory Opinion 175 takes a generally consistent approach under the broader confidentiality rule, noting that disclosures to a personal representative beyond privilege may be impliedly authorized by the nature of the decedent’s representation.¹² WSBA Advisory Opinion 2041 (2003), however, cautions that making any required disclosures to a personal representative does

not create an attorney-client relationship between the deceased client's lawyer and the personal representative.¹³

Depending on the circumstances and the sensitivity of the information involved, a lawyer should also independently assess whether to release the information concerned even if the personal representative has waived privilege.¹⁴ If, for example, the deceased client had told the lawyer that certain information should not be revealed under any circumstances, the lawyer should seek direction from the probate court notwithstanding the personal representative's waiver.

If no personal representative has been appointed, the deceased client's lawyer in most instances is expected to assert privilege and confidentiality pending appointment of a personal representative or further direction from a court.¹⁵ On the latter, RPC 1.6(b)(6) allows a lawyer to reveal confidential information in response to a court order. Washington Superior Court Civil Rule 45(c)-(d) and Federal Rule of Civil Procedure 45(d)-(e) provide avenues for court intervention. Both Washington state and federal procedure permit a court to review material *in camera* without waiving privilege to determine whether production is required.¹⁶

Absent a personal representative, courts can provide useful direction to lawyers. At the same time, this is not a circumstance that lawyers encounter often. Given the sensitivity of the duty of confidentiality, malpractice insurance carriers today often provide counsel to their law firm insureds in this situation to help them navigate responding to a file subpoena and associated requests for testimony regardless of whether there is any claim against the law firm.

Loyalty

RPC 1.9(a) speaks to the duty of loyalty to former clients:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

While rare, conflicts can arise involving deceased clients. Although Washington has not yet spoken directly¹⁷ to the issue, cases from other states have held that the former client conflict rule—RPC 1.9(a)—applies with equal measure when the former client is dead.¹⁸ In *In re Hostetter*, 238 P.3d 13 (Or. 2010), for example, a lawyer was disciplined under Oregon's version RPC 1.9(a) when he represented a lender collecting on loans he had negotiated for a client who subsequently died. Similarly, in *Hutchinson v. Hutchinson*, 2013 WL 6510761 (Conn. Super. Ct. Nov. 14, 2013) (unpublished), a lawyer was

disqualified under Connecticut's version of RPC 1.9(a) from representing the plaintiff in a quiet title action that turned on an agreement he had negotiated for a former client who later died. The courts in *Hostetter* and *Hutchinson* both noted that while the former clients were dead, the former client conflict rule is premised on a matter in which the lawyer's current client is adverse to the "interests" of the former client—which can survive and, if so, are represented by the decedent's estate.¹⁹ As with privilege, a personal representative is generally able to waive former client conflicts that arise from work a lawyer or law firm did for a deceased client.²⁰

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¹ Washington RPC 1.9 is based on its ABA Model Rule counterpart. RPC 1.9(c) focuses on the duty of confidentiality to former clients. RPC 1.9(a), in turn, addresses the duty of loyalty to former clients (while also underscoring the duty of confidentiality). For general discussions of these duties, see, respectively, *In re Cross*, 198 Wn.2d 806, 500 P.3d 958 (2021), and *Plein v. USAA Casualty Insurance Company*, 195 Wn.2d 677, 463 P.3d 728 (2020). See also ABA Formal Op. 479 (2017) (discussing confidentiality under ABA Model Rule 1.9 for information that has become "generally known"); Restatement (Third) of the Law Governing Lawyers (Restatement) § 132 (2000) (discussing former client conflicts).

² See generally Henry Sill Bryans, *Business Successors and the Transpositional Attorney-Client Relationship*, 64 Bus. Law. 1039 (2009) (discussing ABA Model Rule 1.9 and attorney-client privilege in the context of business restructurings).

³ See generally Douglas J. Ende, 15 Wash. Prac., Civil Procedure §52.3 (3d ed. 2023) ("An attorney's authority to act for a client is terminated by the client's death."); *Vincent v. Vincent*, 16 Wn. App. 213, 219, 554 P.2d 374 (1976) ("A client's death terminates the relation of attorney and client and the attorney's authority to act by virtue thereof[.]").

⁴ RPC 1.9(a) also addresses confidentiality through its reference to "substantially related matter[s]." Comment 3 to RPC 1.9 notes that matters can be "substantially related" when they put a former client's confidential information at risk.

⁵ See *Martin v. Shaen*, 22 Wn.2d 505, 511, 156 P.2d 681 (1945) ("[T]he privilege does not terminate with the cessation of the protected relationship, but continues thereafter, even after the death of the person to whom the privilege is accorded[.]").

⁶ See *Swidler & Berlin v. United States*, 524 U.S. 399, 403-411, 118 S. Ct. 2081, 141 L. Ed.2d 379 (1998).

⁷ Advisory Opinion 175 cites both RPC 1.9(c) and RPC 1.6, which is the duty of confidentiality to current clients that is effectively incorporated into RPC 1.9(c) through the reference to other "Rules."

⁸ See Restatement, *supra*, § 60, cmt. e ("The duty of confidentiality . . . extends beyond the death of the client.").

⁹ See *Martin v. Shaen*, *supra*, 22 Wn.2d at 511; see generally Robert H. Aronson, Maureen A. Howard, and Jennifer Marie Aronson, *The Law of Evidence in Washington* § 9.05[8](f) (rev. 5th ed. 2023) (Aronson) (noting that Washington has not recognized a "testamentary exception" to privilege when there is a dispute among beneficiaries); *In re Estate of Covington*, 450 F.3d 917, 925-26 (9th Cir. 2006) (surveying Washington law on the testamentary exception).

¹⁰ See, e.g., *Young v. Rayan*, 27 Wn. App.2d 500, 533 P.3d 123 (2023) (law firm estate planning files subpoenaed in context of real estate dispute).

¹¹ See *Martin v. Shaen*, *supra*, 22 Wn.2d at 511; see generally Aronson, *supra*, § 9.05[4] (“The privilege may be asserted or waived by a client’s personal representative after the client’s death.”).

¹² Some states have limited the extent to which information can be shared with a personal representative to that necessary to settle the estate. See generally ABA, *Annotated Model Rules of Professional Conduct* 139 (10th ed. 2023) (surveying authority). Washington has not yet addressed this issue precisely. The Restatement (Third) of the Law Governing Lawyers (Restatement) § 77, cmt. d (2000), addresses situations in which a personal representative may have interests adverse to the decedent. In that circumstance, the Restatement suggests seeking guidance from the court involved.

¹³ In rare instances, there may be disputes over the authority of a personal representative that may ultimately call for court-determination. See, e.g., *Matter of Estate of Burroughs*, 2021 WL 321513 (Wn. App. Feb. 1, 2021) (unpublished) (differing instructions from original and successor personal representatives on assertion of attorney-client privilege); see also *Harris v. Griffith*, 2 Wn. App.2d 638, 413 P.3d 51 (2018) (discussing lawyer conflicts in the context of dueling proposed personal representatives).

¹⁴ See Maine Board of Overseers Op. 192 (2007) (discussing interplay between a personal representative’s waiver and a lawyer’s need to independently assess the duty of confidentiality); see also Restatement, *supra*, § 77, cmt. d (discussing seeking guidance of the probate court).

¹⁵ See RPC 1.6, cmt. 15 (“Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.”); see also ABA Formal Ops. 94-385 (1994) and 473 (2016) (responding to subpoenas of law firm files).

¹⁶ See *Snedigar v. Hoddersen*, 114 Wn.2d 153, 166-67, 786 P.2d 781 (1990); *United States v. Zolin*, 491 U.S. 554, 568-69, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989); see, e.g., *Grassmueck v. Ogden Murphy Wallace, P.L.L.C.*, 213 F.R.D. 567, 569 (W.D. Wash. 2003) (ordering *in camera* review of law firm files).

¹⁷ WSBA Advisory Op. 2155 (2007) notes the potential application of RPC 1.9 to deceased clients.

¹⁸ RPC 1.8(b) also frames a lawyer’s impermissible use of a client’s information to the disadvantage of that client as a conflict.

¹⁹ See also *Stark County Bar Association v. Phillips*, 544 N.E.2d 237 (Ohio 1989) (disciplining lawyer under similar circumstances for former client conflict and noting that the lawyer’s law firm had been disqualified in the underlying proceeding as well); *Trust Corp. of Montana*, 701 F.2d 85, 87 (9th Cir. 1983) (noting trial court found law firm had a conflict in defending wrongful death case when decedent was former client and the firm had learned material confidential information in the earlier representation); *Fiduciary Trust Internat. of California v. Superior Court*, 160 Cal. Rptr.3d 216 (Cal. App. 2013) (law firm that had prepared will for decedent disqualified from representing trustees adverse to decedent’s interest in substantially related matter).

²⁰ See generally *In re Hostetter*, *supra*, 238 P.3d at 22 (noting that the personal representative is charged with representing the decedent’s “interests” that form the conflict); Linn Davis, *Addressing Ethical Issues After the Death of a Client*, 82 Or. St. B. Bull. 9, 11-12

(Aug./Sept. 2022) (analyzing conflict waivers in this context under the statutory powers of a personal representative); see *also* RCW 11.48.010 (powers of personal representative).