DISCIPLINARY MATTERS
RELATED TO ESTATES PRACTICE

NEW RULES ON ADVANCE FEES
RETAINERS AND FLAT FEES

December 1, 2010
King County Bar – Real Property, Probate & Trust Section

by
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Mr. Beitel’s views are his own, and do not represent an official or unofficial position of the WSBA.
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# LAWYER DISCIPLINE IN ESTATE PRACTICE

## Practice Areas of Disciplinary Actions and Diversions in 2009

<table>
<thead>
<tr>
<th>Area of Practice</th>
<th>Disbarments</th>
<th>Resignations in Lieu of Disbarment</th>
<th>Suspensions</th>
<th>Reprimands</th>
<th>Admonitions</th>
<th>Diversions</th>
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## DISCIPLINARY ACTIONS

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Matters Diverted from Discipline | 32 | 74 | 69 | 63 | 43 | 22

## Source of Grievances Filed

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<td>20%</td>
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<td>Other Lawyers</td>
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<td>Other</td>
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<td>16%</td>
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## Practice Area of Grievances - 2009

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<td>Criminal Law</td>
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<td>Family Law</td>
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<td>Torts</td>
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<td>Estates/Probates/Wills</td>
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<tr>
<td>Real Property</td>
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</tr>
<tr>
<td>Commercial Law</td>
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<tr>
<td>Other</td>
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<td>Unknown</td>
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Discipline Matters Related to Probate & Estates Practice

In September, 2010, Tacoma lawyer Richard D. Shepard (WSBA No. 16194) was suspended for two years by Supreme Court opinion (239 P.3d 1066) for his involvement with a living trust scam that targeted seniors. Mr. Shepard agreed to a business arrangement with a non-lawyer who met with seniors in their homes to sell them living trust packages. The non-lawyer exaggerated the costs and difficulties of probate, sold trusts that were not needed and not understood by the seniors. Most clients would have been better served by executing simple wills and advance medical directives rather than executing the living trusts. Although part of the package sold by the non-lawyer was a fee agreement to pay Mr. Shepard $200 per client to review the estate planning documents, Mr. Shepard never accompanied the non-lawyer to the sales meetings, reviewed the clients financial situations or discussed other estate planning options with the potential clients. Mr. Shepard did not draft or produce the trust packages. These were produced by a contract paralegal service and were sent to Mr. Shepard along with the questionnaire that had been completed by the clients. Mr. Shepard did not, however, carefully review the documents, but only called the clients to verify that the information on the questionnaire was accurate. The non-lawyer then delivered the trust packages to the clients. There was no follow up by Mr. Shepard to make sure the trusts were properly executed. In addition the non-lawyer sold a variety of insurance products to the seniors.

In October, 2009, Mercer Island lawyer Philip M. King (WSBA No. 1470) was disbarred by the Washington Supreme Court upon a Stipulation that had been approved by the disciplinary Board. The discipline was based on findings and conclusions that had been entered by the King County Superior Court (02-4-3322-6) in the estate proceedings related to Mr. King’s mother. The Superior Court found that Mr. King, who had served as the personal representative of the estate, had breached his fiduciary duty to the estate and had committed fraud against the estate by commingling estate funds with his personal funds and using estate funds to pay his personal expenses. The Court also found that Mr. King had over-distributed estate assets to himself, leaving insufficient funds to pay the amounts due to other beneficiaries.
The will of Mr. King’s mother left her estate in three equal portions to (1) Mr. King; (2) Mr. King’s sister; and (3) Six grandchildren. For at least five years before Ms. King’s death, Mr. King served without compensation as Ms. King’s attorney-in-fact under a general power of attorney. In the two years before Ms. King’s death, Mr. King transferred over $300,000 from Ms. King’s accounts to his personal bank account for his personal use. Upon Ms. King’s death and Mr. King’s appointment as personal representative, he only disclosed to the estate $65,000 of his debts to the estate, concealing the remainder of the money that he had taken. The Superior court removed him as personal representative and ordered him to pay the new personal representative $244,538.27 for the estate.

Mr. King’s conduct violated RPC 8.4(b) (crime of embezzlement) and RPC 8.4(c) (dishonesty, fraud, deceit and misrepresentation).

In June, 2009, Spokane lawyer Stephen K. Eugster (WSBA No. 2003) was suspended for 18 months by a 5-4 opinion of the Washington Supreme Court. (166 Wn.2d 293). The dissenting four members of the Court would have disbarred Mr. Eugster. This discipline was based on conduct involving failure to abide by a client’s objectives, disclosing confidential information, using information related to the representation to the client’s disadvantage, failure to surrender a client’s file, failure to protect a client’s interests, disobeying an obligation under the rules of a tribunal, and conduct prejudicial to the administration of justice.

Mrs. S, an 87-year-old widow, hired Mr. Eugster in June 2004. Mrs. S had recently moved into an assisted-living facility after the death of her husband. Mr. Eugster had previously represented her only son (RS) in the early 1990s in a dissolution matter. The objective of Mrs. S in contacting Mr. Eugster was to remove RS from his position of control over her affairs and to assist her with estate planning. In 2003, before her husband’s death, Mrs. S and her husband had executed new wills drafted by another attorney. Under those wills, RS would inherit the home of Mr. and Mrs. S, and the daughter of RS would be the beneficiary of a residual trust. The wills also created a supplemental-needs trust for the surviving spouse and named RS as the trustee, with the discretion to make or withhold payments. The wills specified the trust was irrevocable and could not, absent a court order, be changed.

In late 2003, dissatisfied with the wills, Mrs. S contacted Attorney B, who changed the beneficiary of a life-insurance policy from RS back to Mrs. S. RS discovered that Mrs. S had hired Attorney B and became “very upset.” He saw his mother’s consultations as a betrayal of family trust and questioned her competence. In January 2004, RS had a psychologist examine his mother for testamentary capacity. The psychologist concluded that Mrs. S had testamentary capacity.

In February 2004, upon the death of Mr. S, RS became the personal representative of his father’s estate and acted as trustee of the supplemental-needs trust for the benefit of Mrs. S. RS also assumed control over the payment of bills, because he did not believe his mother was capable of doing so. During this time, the relationship between RS and his mother continued to deteriorate. Mrs. S felt RS was manipulating her estate and denying her adequate funds so he could preserve more for himself and his daughter after her death. The relationship became even more
strained as RS continued to refuse her requests for money. Mrs. S hoped removing her son from authority over her affairs would help mend their relationship. Mrs. S hired Mr. Eugster in June 2004 to “short-circuit” RS’s control over her affairs and also to retrieve certain items of personal property from RS. Mr. Eugster had Mrs. S revise her estate-planning scheme by creating a revocable living trust. Mrs. S was named the trustee, with Mr. Eugster serving as successor trustee and RS as secondary successor trustee. To protect Mrs. S, consistent with the existing testamentary trust and consistent with her desire that RS not control her finances, Mr. Eugster was given power of attorney both generally and for health care.

In July 2004, Mr. Eugster met with RS to discuss the supplemental-needs trust created by Mr. S’s will. He also consulted with Mrs. S’s financial planner and made preparations to sell the family home of Mr. and Mrs. S. As to recovering Mrs. S’s personal property, Mr. Eugster located the items she requested but assured her by letter that RS was keeping them safe. In August, Mr. Eugster wrote Mrs. S to assure her of RS’s good intentions toward her and recommended RS resume control over her affairs. Mrs. S responded by seeking counsel of another attorney (Attorney C). On September 9, 2004, Attorney C wrote Mr. Eugster notifying him that Attorney C now represented Mrs. S and explicitly revoking Mr. Eugster’s power of attorney. Mr. Eugster responded by letter stating that he did not “believe that [Mrs. S] is competent. A guardianship should be established for her person and her estate….”

Attorney C then sent a letter to Mr. Eugster that his services as Mrs. S’s attorney were terminated and requesting that her files be forwarded to his office. In addition, the letter stated that Mrs. S “fully expects any and all communications with you to remain confidential and not be passed on to [RS].” Attorney C also asked Mr. Eugster to advise him of any changes in Mrs. S’s competence since the execution of her trust in July where witnesses testified she was of sound mind.

Around the same time, Mrs. S removed Mr. Eugster as her successor trustee of her trust and named a new successor trustee (NTM Services). Under the durable power of attorney prepared by Attorney C, NTM Services was entitled to reimbursement for all costs and expenses and “shall be entitled to receive at least annually, without court approval, reasonable compensation for services performed on the principal’s behalf.” On October 8, 2004, NTM Services informed RS that Mrs. S had resigned as trustee and had named NTM Services as successor. Attorney C and NTM Services also attempted to get RS, as trustee of Mr. S’s testamentary trust, to pay $2,000 per month to them for “one-half of her support.” Mr. Eugster deemed the requested payment improper under the special-needs trust.

On September 27, 2004, Mr. Eugster petitioned the court to appoint a guardian for Mrs. S. He filed the guardianship action pursuant to former RPC 1.13, “Client Under a Disability.” Mr. Eugster signed his name on the line marked “Petitioner/Attorney” and represented that he was the current attorney for Mrs. S. RS served as the co-petitioner at the behest of Mr. Eugster, and provided some of the information for the petition. Mr. Eugster disclosed to RS his belief that Mrs. S lacked competence. RS eventually hired an attorney to represent him in the guardianship proceeding. The petition listed Mrs. S’s personal and financial information, characterized her as unable to manage her person and estate, and described her as “delusional.” In the petition, RS was nominated to act as Mrs. S’s guardian. The petition for appointment of guardian was served
on Mrs. S in the common room of her assisted-living facility, which humiliated her. Mr. Eugster filed the petition based upon his personal judgment without conducting any formal investigation into the medical or psychological state of Mrs. S. Three months before he filed the guardianship petition, Mr. Eugster had Mrs. S sign a new trust, powers of attorney, and a will that he had prepared, indicating he had no concerns about her testamentary capacity at that point. The last date that either Mr. Eugster or RS personally talked to Mrs. S was two months before filing the petition.

Mr. Eugster appeared before a judge seeking appointment of a guardian on October 19, 2004. He assured the court that he had reviewed the ethical issues involved with him seeking to appoint a guardian. Mr. Eugster told the court he believed his actions were ethically viable, and the court asked Mr. Eugster to brief the issue. Mr. Eugster did not supply a brief. Instead, by letter dated October 21, 2004, Mr. Eugster purported to decline his service as successor trustee over Mrs. S’s trust and as attorney-in-fact. On October 26, 2004, the guardian ad litem (GAL) appointed to evaluate Mrs. S concluded she was not suffering from any incapacity and was capable of handling her own affairs. He noted Mrs. S’s strained relationship with and distrust of her son, RS. The GAL concluded Mrs. S did not need a guardian, but that if the court did appoint one, the guardian should not be RS. On November 17, 2004, Mr. Eugster withdrew his signature from the guardianship petition. By stipulation of the parties, the court dismissed the guardianship petition on February 1, 2005. Mrs. S paid $13,500 to defend herself in the guardianship action.

Mr. Eugster’s actions violated former RPC 1.2(a), requiring a lawyer to abide by a client’s decisions concerning the objectives of representation; former RPC 1.6(a), prohibiting a lawyer from revealing confidences or secrets relating to representation of a client unless the client consents after consultation; former RPC 1.8(b) and former RPC 1.9(b), prohibiting a lawyer who is representing a client from using information, confidences, or secrets relating to the representation of a client to the disadvantage of the client unless the client consents after consultation; former 1.9(a), prohibiting a lawyer who has formerly represented a client in a matter from representing 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 consents in writing after consultation and a full disclosure of the material facts; former RPC 1.15(d), requiring a lawyer to take steps to the extent reasonably practicable to protect a client’s interests, such as surrendering papers and property to which the client is entitled; former RPC 3.4(c), prohibiting a lawyer from knowingly disobeying an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; and former 8.4(d), prohibiting a lawyer from engaging in conduct that is prejudicial to the administration of justice.

In August, 2007, Spokane lawyer David Hellenthal (WSBA No. 18311) was suspended for 18 months based on his stipulation to discipline. [Note: reinstatement following the suspension is conditioned on a showing of fitness to practice.] Mr. Hellenthal represented a partially paralyzed client who received Social Security Disability Insurance, Medicare and Medicaid benefits. The client’s mother died leaving him an inheritance of $170,000, and Mr. Hellenthal was hired to preserve the client’s eligibility for government benefits. Mr. Hellenthal prepared a “special needs” trust agreement by which he inherited the trust assets if the client died without a will, knowing that the client had no will, which constituted a substantial gift to himself in violation of RPC 1.8(c), a conflict of interest between the lawyers own interests and the interests of the client.
in violation of RPC 1.7(b) and dishonest conduct in violation of RPC 8.4(c). Because no provision was made in the trust agreement for repayment of the government benefits upon the client’s death and because there was no provision for court approval, the trust did not qualify as a special needs trust sanctioned by the Medicaid regulations. None of this was explained to the client, in violation of RPC 1.4. Mr. Hellenthal also stipulated that his fee was unreasonable, in violation of RPC 1.5(a). For the trust and an agreement to provide financial care services for life, he characterized his fee as a “nonrefundable” 20% of the client’s inheritance, which was $33,500. When the client hired a new lawyer, Mr. Hellenthal refunded $25,869.13, but he stipulated that the remaining $7,130.87 fee was still unreasonable for work that other Spokane area lawyers charge only $1,000 to $3,500 to do. Mr. Hellenthal stipulated to making restitution to his former client of $5,130.87 (along with accumulated interest), which would reduce his fee to $2,000.

The discipline was also based on Mr. Hellenthal’s practice of representing both husbands and wives in situations where one of the couple is seeking Medicaid eligibility for long term care. Mr. Hellenthal regularly recommended a legal separation that transferred virtually all of the assets to the non-custodial individual, thereby impoverishing the custodial client with no assurance that the other spouse would use the transferred to assets for the benefit of the custodial spouse, without disclosing to the joint clients the implications and risks of common representation and the conflicts involved and obtaining the written waivers required by RPC 1.7.

In May, 2007, Seattle lawyer Robert L. Butler (WSBA No. 448) resigned in lieu of disbarment. Mr. Butler managed the financial affairs for an elderly individual under a power of attorney. Upon the individual’s death, he filed a probate matter in which he served as the personal representative, but delayed closing the estate for ten years. After he was removed as personal representative, it was learned that prior to being named personal representative, he had converted $25,000 of the elderly individual’s funds to his own use.

In May, 2007, lawyer Thomas W. Nawalany (WSBA No. 32465), who practices in Portland, OR, was reprimanded based on a reprimand by the Supreme Court of Oregon. At the best of a caregiver for a dementia patient, Mr. Nawalany drafted a will leaving all of the patient’s property to the caregiver, with the caregiver’s 19-year-old son as the personal representative. He also drafted a durable power of attorney appointing the caregiver’s 19-year-old son as attorney in fact. Mr. Nawalany had no prior relationship with the patient and only met her when he had her execute the will and the power of attorney, and did not devote sufficient time to determine the patient’s competency. After the patient’s death, a will contest determined that the care giver had undue influence over the patient and invalidated the will and the caregiver was criminally convicted of criminal mistreatment of the patient.

In January, 2007, Lynnwood lawyer Thomas J. Brothers (WSBA No. 9653) was disbarred following a stipulation to discipline. The discipline was based on his conduct between 1997 and 2000 involving unreasonable fees, conflicts of interest, trust account irregularities, the practice of law while suspended, and commission of criminal acts. In the 1990s, Mr. Brothers provided estate-planning advice and representation to a husband and wife. At the time of the husband’s death in 1997, the estate had assets of approximately $7 million, largely in marketable securities. One of the children (the Client ) was named the personal representative of the estate, as well as trustee of certain estate entities. In August 1997, the Client hired Mr. Brothers to set-
tle the estate and to provide representation regarding minimizing the ultimate estate taxation by utilizing limited liability companies (LLCs) to transfer assets prior to the wife’s death.

Upon the wife’s death in March 1999, the Client hired Mr. Brothers to settle the wife’s estate. Mr. Brothers did not enter into a written fee agreement with the Client, did not keep any time records to support his fees, and did not provide regular monthly billings. Between September 1997 and June 1998, Mr. Brothers charged fees totaling $41,490 for settling the husband’s estate and creating the LLCs. Upon the death of the wife, Mr. Brothers and the Client orally agreed to a fee of one percent of the gross taxable estate for settling the estate. This fee would have been $51,332. Shortly before filing the estate tax return in June 2000, Mr. Brothers and the Client engaged in a series of discussions regarding his fee. Based in part on Mr. Brothers’s estimation of the hours spent on the matter, the Client agreed to pay a fee of $179,166. Mr. Brothers did not give the Client any consideration for agreeing to the increased fee, did not advise her to seek the advice of independent counsel, and neither sought nor obtained the Client’s consent to the conflict of interest arising out of the renegotiation of the fee arrangement.

The $179,166 included an advance fee of $50,000 for services expected to be rendered in the future. Mr. Brothers and the Client agreed that Mr. Brothers would account for the advance fee on an hourly basis, but Mr. Brothers did not deposit any portion of the $50,000 into a trust account, nor did he provide any accounting. A reasonable fee for settling both estates would have been $45,000. Mr. Brothers collected fees of $220,656 for his work on the combined estates.

In December 1999, in a prior disciplinary proceeding, the Supreme Court suspended Mr. Brothers from the practice of law for three months. At the time, Mr. Brothers was advised of his suspension and about the obligation under the former Rules for Lawyer Discipline requiring him to provide notice of his suspension to all clients. Mr. Brothers concealed his suspension from the Client and continued to provide her with ongoing advice and representation. In December 1999, Mr. Brothers signed a sworn affidavit pursuant to former Rule for Lawyer Discipline 8.3 attesting to compliance with his duties on suspension. In the affidavit, Mr. Brothers falsely stated, “I was representing no clients at the time of suspension.”

The stipulated disciplinary violations included: RPC 1.5(a), requiring a lawyer’s fee to be reasonable; former RPC 1.7(b), prohibiting a lawyer from representing a client if the representation of that client may be materially limited by the lawyer’s own interests; former RPC 1.14(a), requiring all funds of clients paid to a lawyer or law firm be deposited in one or more identifiable interest-bearing trust accounts; former RPC 1.15(a)(1), requiring a lawyer to withdraw from the representation of a client if the representation will result in a violation of the Rules of Professional Conduct or other law; former RPC 1.8(a), prohibiting a lawyer who is representing a client in a matter from entering into a business transaction with a client unless the transaction and its terms are fair and reasonable and fully disclosed and transmitted in writing to the client, the client is given opportunity to seek the advice of independent counsel, and the client consents; RPC 8.4(b), prohibiting a lawyer from committing a criminal act (here, the unlawful practice of law and false swearing) that reflects adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects; RPC 8.4(c), prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; former RLD 1.1(a) (prohibiting a lawyer from committing any act involving moral turpitude, or corruption, or any unjustified act of
assault or other act which reflects disregard for the rule of law), former RLD 1.1(l) (prohibiting a lawyer from engaging in the practice of law while suspended for any reason), former RLD 8.1(a) (imposing duties upon suspension), and former RLD 8.2 (requiring a disbarred or suspended lawyer to discontinue the practice of law).

In June, 2006, Snohomish lawyer Carleton F. Knappe (WSBA No. 5697) was admonished for having contacted directly the personal representative of an estate when he knew the PR to be represented by a lawyer, in violation of RPC 4.2.

In April, 2006, Vancouver lawyer J. Marvin Benson (WSBA No. 9078) was reprimanded. Mr. Benson had prepared a durable power of attorney (DPA) for a client in 1998, appointed the client’s son as her power of attorney. When the son contacted Mr. Benson in 2002, claiming that the DPA had been lost, Mr. Benson provided the son with a new blank original DPA for the mother to sign. Although Mr. Benson was aware that his client had dementia, he did nothing to ascertain her competency to execute the replacement DPA. The son then used the DPA to transfer assets to himself. When one of the client’s other sons petitioned for guardianship, Mr. Benson sought to be appointed as attorney for the ward, without obtaining the consent of either the ward or the petitioner. By assisting an incompetent in executing a DPA, Mr. Benson violated RPC 1.4 and RPC 1.13. In purporting to act as the ward’s lawyer without consent, Mr. Benson violated RPC 1.2(f), RPC 1.4 and RPC 1.13.

In May, 2005, the Supreme Court approved a stipulation suspending for two years Valencia, California lawyer Vicki L. Walser (WSBA No. 25536). Ms. Walser affiliated herself with non-lawyers who marketed living trust packages. She delegated legal functions to non-lawyers and assisted non-lawyers in the unauthorized practice of law. She failed to adequately explain the documents that had been drafted for the “customers,” and failed to ascertain that the documents were suitable and were properly executed.

In February, 2005, the Supreme Court approved a stipulation suspending Lynnwood lawyer Sandra L. Davis (WSBA No. 12618) for 18 months. Ms. Davis drafted a will for a testator with whom the mother of Ms. Davis had resided for eight years as a domestic partner, but unmarried. The will left the mother of Ms. Davis $10,000 and the residue of the estate to the testator’s children. Ms. Davis was disciplined for violating RPC 1.8(c) in drafting the will leaving her mother the $10,000 [note, this might have a different result under the changes to RPC 1.8(c) which includes domestic partners under the new “other relative or individual with whom the lawyer of the client maintains a close, familial relationship.”]. Ms. Davis was also disciplined for delaying distribution of the residue of the estate to the children and for mischaracterizing as estate assets the funds in a joint account that passed to one of the testator’s children outside of probate.

In February, 2005, the Supreme Court approved a stipulation disbarring Everett lawyer Randall St. Mary (WSBA No. 4331). Mr. St. Mary was the personal representative of an estate and trustee of the testamentary trust. Mr. St. Mary also probated the estate. He was disbarred for taking estate funds for his own use to purchase stocks and pay his debts, in transactions considered to be acts of theft. He was also disciplined for making unsecured loans to himself without full disclosure and consent from the beneficiaries and without the beneficiaries having the oppor-
In February 2004 Bellevue lawyer Charles B. Allen (WSBA No. 9193) resigned in lieu of disbarment after charges were filed alleging that he had entered into an arrangement to “review” living trusts that had been sold by insurance agents employed by two California corporations, Family First Estate Planning, Inc. and Family First Insurance Services. Allen was aware that these were commissioned sales agents who were not supervised by any lawyer in recommending that their customer purchase the estate planning packages. Allen was paid $75.00 each to review the “applications” for living trusts that had been filled out by the insurance agents who met with the clients. Allen had little or no contact with many of the clients who purchased living trusts and did not review with the clients the legal and financial implications of the use of a living trust. Allen was facing charges that his conduct violated RPC 1.4 (failure to communicate), RPC 1.3 (lack of diligence), RPC 1.1 (incompetence), RPC 5.5(b) (assisting the unauthorized practice of law), RPC 5.4(a) (sharing fees with non-lawyers), RPC 1.8(h) (prospectively limiting his liability without giving opportunity for independent representation), and RPC 1.7(b) (conflict of interest in not informing clients of his personal interest in maintaining his relationship with Family First).

In June 2003 Lynnwood lawyer Thomas J. Brothers (WSBA No. 9653) was suspended for one year for charging an unreasonable fee in an estate matter. In re the Disciplinary Proceedings Against Thomas J. Brothers, 149 Wn.2d 575, 70 P.3d 940 (2003). Brothers charged an admittedly unreasonable fee of $36,000 for a simple quit claim deed in violation of RPC 1.5(a). Brothers had prepared a living trust for an elderly client in 1994. In 1996 his client consulted him about one of her two sons who was causing problems. Brothers adjusted her estate plan by creating an irrevocable living trust naming the “good” son as trustee and as the sole legatee. Soon after, when the client decided to sell her home, it was discovered that the client had used another attorney in 1987 to create a previous living trust that named the “bad” son as successor trustee. This was unknown to Brothers when he created the 1994 and 1996 living trusts, and for that reason, the attempted transfer of the client’s home into the 1994 and 1996 trusts was ineffective because the client had not transferred the home as trustee of the previous living trust. Brothers advised that the client execute a quit claim deed as trustee of the 1987 living trust to the 1996 living trust.

Brothers advised his client that if the “bad” son challenged the transfer, it could entail a substantial amount of legal work and quoted his hourly rate. The client instead chose to agree to an alternative fee proposal of one-third the value of the house. Preparing the quit claim took less than an hour of the lawyer’s time, and a month later he collected a fee of $36,663 for his work. Nothing else was required as the “bad” son never challenged the transaction. At the hearing Brothers testified that he charged other clients as little as $50 to prepare a quit claim to transfer a piece of real property into a living trust. Following the disciplinary hearing, Brothers refunded the entire fee along with 12% interest. On appeal, Brothers did not challenge the conclusion that this was an unreasonable fee, but challenged the finding that his conduct in charging the unreasonable fee was knowing, claiming that his state of mind was negligent. The court rejected Mr. Brothers’ argument, noting that “outright dishonesty is not a necessary element to a finding that an attorney acted knowingly.” Id. at 585. The court gave “great weight” to the aggravating fac-
tor that Mr. Brothers’ had been previously disciplined for withdrawing $25,000 from an estate account without establishing a basis for the fee. *Id.* at 586.

Justice Sanders filed a concurring opinion, noting that he was concurring only because Brothers had conceded that his fee was excessive. Justice Sanders opined that “in the context of a flat or contingent fee agreement, the services actually rendered as viewed through the lens of 20-20 hindsight do not necessarily an ‘excessive fee’ make.” *Id.* at 588. The 1996 changes to the Rules of Professional Conduct, however, amended the first sentence of RPC 1.5(a). Instead of just providing that “A lawyer’s fee must be reasonable,” it now provides that “A lawyer shall not make an agreement for, charge, or collect an unreasonable fee,” which clearly imposes a duty to review the reasonableness of a fee when circumstances dramatically alter the amount of work that is required for the representation.

In June 2003 the Supreme Court approved a stipulation to a two-year suspension of Mercer Island lawyer Michael J. Scaringi (WSBA No. 18595) for his involvement with a living trust marketing scheme by a group of California corporations, known as American Heritage Professional Services, Inc., Family First Estate Planning and Family First Insurance Services. Scaringi affiliated himself with various non-lawyers who were engaged in direct marketing of living trusts to consumers without sufficient supervision or review. Scaringi stipulated that the Bar could prove that he had violated RPC 5.3 requiring supervision of non-lawyers, RPC 5.5(b) prohibiting assisting the unauthorized practice of law, RPC 1.3 requiring diligent representation, RPC 1.4(b) requiring communication to clients and RPC 1.7(b) requiring a lawyer such as Scaringi to have disclosed the conflict of interest growing out of his continuing business relationship with the living trust corporations.

In April, 2003 Cheney lawyer Steven C. Miller (WSBA No. 6234), was disbarred for his misconduct related to an aged and frail client. *In re the Disciplinary Proceeding Against Steven C. Miller*, 149 Wn.2d 262, 66 P.3d 1069 (2003). Miller wrote himself into the client’s will (leaving the entire estate to himself), borrowed substantial sums from the client, and then submitted a loan application to a credit union that failed to disclose the loan from the client. The will was set aside by the Superior Court on the finding that it was the product of undue influence. The Superior Court also invalidated what Miller claimed to be an inter vivos gift by which the client had “forgiven” the loan.

Miller defended the RPC 1.8(c) charges by claiming that he had not “prepared an instrument,” giving him a gift because he had his legal assistant draft the will. The Court rejected this, noting that Miller had instructed the legal assistant as to provisions of the will, including the substantial gift to himself. *Id.* at 278. [Note: RPC 1.8(c) has since been amended to require that a lawyer not “solicit any substantial gift from a client.”] Equally ineffective against the RPC 1.8(c) charge was Miller arranging for the client to meet with two other lawyers to review and witness the execution of the will. There is no waiver or consent provision to RPC 1.8(c). The prohibition is non-waivable. Miller’s counsel suggested to the Court that had the other lawyers recopied the will onto their letterhead, that there would have been no violation of RPC 1.8(c). At footnote 21, *Id.* at 279, the Court rejected this notion and pointed out that the only way to have avoided violation of RPC 1.8(c) would have been for the client to have been referred to independent counsel and for the client in her own words to have told the independent counsel what she
The Court upheld the RPC 1.8(a) charges for the loans from the client noting that

To justify a transaction between an attorney and his or her client, the attorney has the burden to prove: "‘(1) there was no undue influence; (2) he or she gave the client exactly the same information or advice as would have been given by a disinterested attorney; and (3) the client would have received no greater benefit had he or she dealt with a stranger.’” McMullen, 127 Wn.2d at 164 (quoting In re Disciplinary Proceeding Against McGlothlen, 99 Wn.2d 515, 525, 663 P.2d 1330 (1983).

*Id.* at 279. With this sort of burden, borrowing money from a client is very, very risky business.

In March, 2003, Moses Lake lawyer **John L. McKean** (WSBA No. 13294) was suspended for six months and placed on probation for six months for entering into a business arrangement with a client to shield the client from creditors, financing the business with funds borrowed from the lawyer’s trust account, and using the lawyer’s trust account for his own business purposes. In re the Disciplinary Proceeding Against John L. McKean, 148 Wn.2d 849, 64 P. 3d 1226 (2003). The Court considered the most serious charges to have been loaning money to a company that he helped a client form, and that he had an interest in. McKean took these funds from funds he was holding in his trust account as the personal representative of an estate. He was charged with violating the trust account rule, RPC 1.14. The Court rejected McKean’s defense that he had the legal authority as the personal representative of the estate to make a loan of the estate’s money. *Id.* at 865-66. The Court also rejected McKean’s argument that he had no duty to the heirs of the estate because they were not his clients. *Id.* at 866. The Court held that making the loans from his trust account violated RPC 1.14 despite any legal authority he may have had as personal representative to have invested the funds.

In rejecting McKean’s argument that he owed no duty to the heirs of the estate because they were not his client, the Court noted in footnote 12 (*Id.*) that

McKean was not only the lawyer, but also was the personal representative of the estate. This heightened his ethical duty. We will not address the ethically precarious territory a lawyer enters when he takes on the roles of both attorney and personal representative for an estate, but we will let it suffice to note that in order to chart such territory successfully, a lawyer must be extremely alert to potential ethical violations.

Although the decision only deals with McKean’s ethical and disciplinary liability, the Court’s decision makes it apparent that when a lawyer is acting as both the personal representative of an estate and as the lawyer for an estate, the lawyer must comply with the most rigorous of the standards that apply to either role. This is consistent with previous decisions in which the Court has not been impressed with lawyers trying to draw too fine a distinction between their actions as a personal representative versus their actions as a lawyer for the estate. The following
language from *In re Talbot*, 107 Wn.2d 335, 336-37, 728 P.2d 595 (1986) is instructive:

Talbot drew a will in which he named himself as alternate executor. He accepted the duties of the executor . . . . Talbot did nothing to process the estate proceedings for which he had accepted responsibility. . . . Talbot was sued by the deceased’s heirs. Twice he was ordered to appear to a show cause hearing; twice he failed to appear. Talbot’s response, while not completely comprehensible, seems to be that no one ever appointed him as personal representative, that he, therefore, had no duty and in any event he was not potentially acting as a lawyer but as a potential executor. Enough said; professionals do not spin such fine webs to evade their clear obligations to trusting clients. The heirs suffered a loss . . . due to his inaction in protecting estate assets. Such unprofessional conduct will not be tolerated.

(emphasis added). Talbot was disbarred.
Supreme Court Adopts Changes to Rules of Professional Conduct on Advance Fees and Fee Agreements
(Adapted with permission from the Washington State Bar News, December 2008)

A. Summary

In 1990, in an attempt to clarify the distinction between client fee payments that must be held in a trust account and those that should not be, the WSBA Board of Governors approved Formal Ethics Opinion No. 186, entitled “The Proper Handling of Advance Fee Deposits and Retainers.” In 2005, Formal Opinion 186 was withdrawn following the Supreme Court’s decision in In re Discipline of DeRuiz, 152 Wn.2d 558, 99 P.3d 881 (2004), in which the Court disciplined a lawyer for failing to returned unearned money, rejecting the lawyer’s argument that a flat fee paid in advance for specific services was a “retainer” earned at the point of receipt. The withdrawal of Formal Opinion 186 created a void in guidance for lawyers with respect to the proper handling of advance fee payments. For this reason, in October 2007, the WSBA Board of Governors submitted suggested amendments to RPC 1.5 and RPC 1.15A to clarify these issues.

Following a public comment period, the Court adopted amendments to RPC 1.5 and 1.15A, effective November 18, 2008. A new paragraph (f) in RPC 1.5 creates two exceptions to the general rule that fees paid in advance of services remain the property of the client and must be kept in trust. The exceptions are: (1) availability retainers, and (2) flat fees for specified services. The rule, for both types of fee agreements, requires a writing signed by the client. Flat fees require an additional disclosure substantially similar to the form set out in the rule, the purpose of which is to advise the client that the fee will immediately be placed into the lawyer’s operating account, that payment of a flat fee in advance does not impair the client’s right to terminate the client-lawyer relationship, and that the flat fee structure does not extinguish the possibility that the client may, or may not, have the right to a refund. The rule also requires the lawyer to take reasonable and prompt action to resolve a dispute relating to a designated flat fee or retainer. Companion amendments to RPC 1.15A clarify that except for a fee properly characterized as a retainer or flat fee under RPC 1.5(f), a lawyer must deposit fees paid in advance into a trust account, to be withdrawn by the lawyer only as fees are earned or expenses incurred.
B. Here are the new rule changes regarding advance fees and fee agreements:

**RPC 1.15A SAFEGUARDING PROPERTY**

(a) – (b) [Unchanged.]
(c) A lawyer must hold property of clients and third persons separate from the lawyer’s own property.
   
   (1) A lawyer must deposit and hold in a trust account funds subject to this Rule pursuant to paragraph (h) of this Rule.
   
   (2) Except as provided in Rule 1.5(f), and subject to the requirements of paragraph (h) of this Rule, a lawyer shall deposit into a trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.
   
   (3) A lawyer must identify, label and appropriately safeguard any property of clients or third persons other than funds. The lawyer must keep records of such property that identify the property, the client or third person, the date of receipt and the location of safekeeping. The lawyer must preserve the records for seven years after return of the property.

(d) – (j) [Unchanged.]

**RULE 1.5 FEES**

(a)-(e) [Unchanged.]

[NEW SECTION]

(f) Fees and expenses paid in advance of performance of services shall comply with Rule 1.15A, subject to the following exceptions:

   (1) A lawyer may charge a retainer, which is a fee that a client pays to a lawyer to be available to the client during a specified period or on a specified matter, in addition to and apart from any compensation for legal services performed. A retainer must be agreed to in a writing signed by the client. Unless otherwise agreed, a retainer is the lawyer’s property on receipt and shall not be placed in the lawyer’s trust account.

   (2) A lawyer may charge a flat fee for specified legal services, which constitutes complete payment for those services and is paid in whole or in part in advance of the lawyer providing the services. If agreed to in advance in a writing signed by the client, a flat fee is the lawyer’s property on receipt, in which case the fee shall not be deposited into a trust account under Rule 1.15A. The written fee agreement shall, in a manner that can easily be understood by the client, include the following: (i) the scope of the services to be provided; (ii) the total amount of the fee and the terms of payment; (iii) that the fee is the lawyer’s property immediately on receipt and will not be placed into a trust account; (iv) that the fee agreement does not alter the client’s right to terminate the client-lawyer relationship; and (v) that the client may be entitled to a refund of a portion of the fee if the agreed-upon legal services have not been completed. A statement in substantially the following form satisfies this requirement:

   [Lawyer/law firm] agrees to provide, for a flat fee of $__________, the following services: ____________________________. The flat fee shall be paid as follows: ____________________________. Upon [lawyer’s/law firm’s] receipt of all or
any portion of the flat fee, the funds are the property of [lawyer/law firm] and will not be placed in a trust account. The fact that you have paid your fee in advance does not affect your right to terminate the client-lawyer relationship. In the event our relationship is terminated before the agreed-upon legal services have been completed, you may or may not have a right to a refund of a portion of the fee.

(3) In the event of a dispute relating to a fee under paragraph (f)(1) or (f)(2) of this Rule, the lawyer shall take reasonable and prompt action to resolve the dispute.

New Comments [12] – [16] to RPC 1.5:

Payment of Fees in Advance of Services

[12] In the absence of a written agreement between the lawyer and the client to the contrary that complies with paragraph (f)(1) or (f)(2), all advance payments are presumed to be deposits against future services or costs and must, until the fee is earned or the cost incurred, be held in a trust account pursuant to Rule 1.15A. See Rule 1.15A(c)(2). This fee structure is known as an “advance fee deposit.” Such a fee may only be withdrawn when earned. See Rule 1.15A(h)(3). For example, when an advance fee deposit is placed in trust, a lawyer may withdraw amounts based on the actual hours worked. In the case of a flat fee that constitutes an advance fee deposit because it does not meet the requirements of paragraph (f)(2), the lawyer and client may mutually agree, preferably in writing, on a reasonable basis for determining when portions of the fee have been earned, such as specific “milestones” reached during the representation or specified time intervals that reasonably reflect the actual performance of the legal services.

[13] Paragraphs (f)(1) and (f)(2) provide exceptions to the general rule that fees received in advance must be placed in trust. Paragraph (f)(1) describes a fee structure sometimes known as an “availability retainer,” “engagement retainer,” “true retainer,” “general retainer,” or “classic retainer.” Under these rules, this arrangement is called a “retainer.” A retainer secures availability alone, i.e., it presumes that the lawyer is to be additionally compensated for any actual work performed. Therefore, a payment purportedly made to secure a lawyer’s availability, but that will be applied to the client’s account as the lawyer renders services, is not a retainer under paragraph (f)(1). A written retainer agreement should clearly specify the time period or purpose of the lawyer’s availability, that the client will be separately charged for any services provided, and that the lawyer will treat the payment as the lawyer’s property immediately on receipt and will not deposit the fee into a trust account.

[14] Paragraph (f)(2) describes a “flat fee,” sometimes also known as a “fixed fee.” A flat fee constitutes complete payment for specified legal services, and does not vary with the amount of time or effort expended by the lawyer to perform or complete the specified services. If the requirements of paragraph (f)(2) are not met, a flat fee received in advance must be deposited initially in the lawyer’s trust account. See Washington Comment [12].

[15] If a lawyer and a client agree to a retainer under paragraph (f)(1) or a flat fee under paragraph (f)(2) and the lawyer complies with the applicable requirements, including obtaining agreement in a writing signed by the client, the fee is considered the lawyer’s property on receipt and must not be deposited into a trust account containing client or third-party funds. See Rule 1.15A(c) (lawyer must hold property of clients separate from lawyer’s own property). For definitions of the terms “writing” and “signed,” see Rule 1.0(n).

[16] In fee arrangements involving more than one type of fee, the requirements of paragraphs (f)(1) and (f)(2) apply only to the parts of the arrangement that are retainers or flat fees.
For example, a client might agree to make an advance payment to a lawyer, a portion of which is a flat fee for specified legal services with the remainder to be applied on an hourly basis as services are rendered. The latter portion is an advance fee deposit that must be placed in trust under Rule 1.15A(c)(2). If the requirements of paragraph (f)(2) are met regarding the flat fee portion, those funds are the lawyer’s property on receipt and must not be kept in a trust account. If the payment is in one check or negotiable instrument, it must be deposited intact in the trust account, and the flat fee portion belonging to the lawyer must be withdrawn at the earliest reasonable time. See Rule 1.15A(h)(1)(ii) & (h)(4). See also Comment [10] to Rule 1.15A (explaining prohibition on split deposits). Although a signed writing is required under paragraphs (f)(1) and (f)(2) only for the retainer or flat fee portion of the fee (and only if the lawyer and client agree that the fee will be the lawyer’s property on receipt), the lawyer should consider putting the entire arrangement in writing to facilitate communication with the client and prevent future misunderstanding. See Washington Comment [11].

[Amended effective September 1, 2006, November 18, 2008.]
C. Is It Still Ethical To Call An Advance Fee “Non-refundable” or “Earned on Receipt”? 

A fairly common fee agreement goes something like:

My fee will be $250 per hour. Services will commence upon client paying a non-refundable retainer of $2,500 to be billed against at the hourly rate. Thereafter, the client will be billed monthly.

Is this still permissible under the new rule? It is probably misleading. Under the new rules, the only “retainer” is an availability retainer. RPC 1.5(f)(1) and Comment [13]. The $2,500 is not an availability retainer under RPC 1.5(f)(1) because it will be billed against for services. As such, under the new rules it is an advance fee that must be held in trust and can only be withdrawn when the fees are earned. RPC 1.15A(c)(2) and RPC 1.5 Comment [12]. If the fees are never earned, they must be refunded at the conclusion of the representation. RPC 1.16(d). As such, the $2,500 “retainer” is actually a fully refundable advance fee deposit and to call it non-refundable is misleading and a potential violation of RPC 7.1. The fee agreement should be corrected to read:

My fee will be $250 per hour. Services will commence upon client paying a non-refundable retainer or an advance fee deposit of $2,500 to be billed against at the hourly rate. Thereafter, the client will be billed monthly.

Another common fee agreement goes something like:

My fee for preparation of your will, durable power of attorney and directive to physicians is $2,500 which is payable in advance of services, is fully earned on receipt and non-refundable.

A flat fee paid in advance must be deposited into a trust account and only withdrawn when earned unless the flat fee meets the requisites of RPC 1.5(f)(2). This fee agreement fails to meet the RPC 1.5(f)(2) requirement to state that:

• the fee is the lawyer’s property immediately upon receipt and will not be placed in a trust account;
• that payment of the fee in advance does not alter the client’s right to terminate the client-lawyer relationship; and
• that the client may be entitled to a refund of a portion of the fee if the agreed upon legal services have not been completed.

The fee agreement should be corrected to read:

My fee for preparation of your will, durable power of attorney and directive to physicians is $2,500 which is payable in advance of services, is fully earned on receipt and non-refundable. Upon my receipt of this fee, the funds are my property and will not be placed in a trust account. The fact that you have paid your fee in advance does not affect your right to terminate the client-lawyer relationship.
In the event our relationship is terminated before the agreed-upon legal services have been completed, you may or may not have right to a refund of a portion of the fee.

Absent a fee agreement that substantially states the above, the $2,500 that you thought was a fully earned or non-refundable flat fee, will be presumed to be an advance fee deposit that must be held in trust until earned. RPC 1.5 Comment [12]. As such, use of the terms “fully earned on receipt” and “non-refundable,” are likely misleading and should be avoided. Note: Comment [12] to RPC 1.5 does point out that when an advance flat fee must be placed in trust because the fee agreement does not meet the requisites of RPC 1.5(f)(2),

[T]he lawyer and the client may mutually agree, preferably in writing, on a reasonable basis for determining when portions of the fee have been earned, such as specific “milestones” reached during the representation or specified time intervals that reasonably reflect the actual performance of the legal services.

So, is it ever permissible to refer to a fee as “non-refundable”? With the possible exception of an availability retainer that meets the requirements of RPC 1.5(f)(1), probably not. Even a flat fee that meets the requirements of RPC 1.5(f)(2) and therefore does not have to be held in trust, is permissible only with a written agreement that agrees that some refund may be possible if the agreed upon services are not provided. As to the availability retainer, such fees must still meet the test of RPC 1.5(a), requiring that “[a] lawyer shall not make an agreement for, charge, or collect an unreasonable fee.” Division III of the Court of Appeals recently noted that “[c]ontracts for attorney fees are continually reviewed for reasonableness throughout the relationship of the client and attorney. (citation omitted).” Forbes v. American Building Maintenance Co. West, 148 Wn.App. 273, 291, 198 P.3d 1042 (2009). If a lawyer is not able to meet the requirements of an availability retainer due to unforeseen events that make the lawyer no longer available (i.e., illness or incapacity), even an availability retainer that met the test of RPC 1.5(f)(1) at its inception may need some refund to meet the continuing reasonableness standard. As such, a cautious lawyer will no longer use the term “non-refundable” or “earned on receipt” to describe a fee.