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FOSTER PEPPER PLLC

October 9, 2006

Justice Charles W. Johnson  
Supreme Court of Washington  
Temple of Justice  
PO Box 40929  
Olympia WA 98504-0929

Re: RPC 1.15A(e)  
Pamela McClaran and Stephen R. Crossland's August 14, 2006 letter

Dear Justice Johnson:

We have received copies of the August 14, 2006 letter to you from Pamela McClaran and Stephen R. Crossland, two members of the Executive Committee of the Real Property, Probate and Trust Section, regarding their concerns about Rule 1.15A(e) of the newly-revised Rules of Professional Conduct. We are sending you this letter to provide a staff analysis of the issues raised in their letter. In short, it appears that Ms. McClaran and Mr. Crossland may have interpreted the rule to be much broader than intended and may not be aware of the substantial benefits to the profession and the public the rule provides.

#### **Purpose of RPC 1.15A(e)**

RPC 1.15A sets forth a lawyer's obligations regarding client property, including funds in trust accounts. Paragraph (e) of that rule requires lawyers who are holding client property to provide at least an annual accounting to the client. Our auditors frequently find that lawyers have undistributable funds in their trust account. These lawyers either cannot identify ownership of the funds or can no longer find the client because so much time has passed since their last contact with the client. Often these funds have been in the account for years and the client was apparently unaware or forgot that the lawyer was holding the funds. In such situations, the funds must be sent to the State's Unclaimed Property Fund and a client may be deprived of funds rightfully belonging to him or her. The annual accounting is intended to rectify this by ensuring that lawyers tell clients at least once a year that funds are being held on the client's behalf. That way the client can make an informed decision about whether the lawyer should continue to hold the funds. This also keeps the lawyer in touch with the client so the lawyer is aware if the client has moved, and soon enough so that the lawyer is in a better position to locate the client.

The rule also applies to non-monetary property for similar reasons – clients should know that the lawyer has the property so they can make an informed decision about whether

they want the lawyer to continue holding it, and also so the lawyer is able to find the client when the property needs to be returned.

Although not the purpose of the rule, the annual accounting also assists clients who may need additional legal services by reminding them about the matter. For example, a client who recently re-married might be prompted by the annual notification to revise a will to include the new spouse.

### **Definition of “Property” Has Not Changed**

RPC 1.15A does not define “property,” but Comment [5] states that it “includes original documents affecting legal rights such as wills or deeds.” This is no different from the scope of the former rule on safeguarding client property, RPC 1.14, which was interpreted to apply to documents as well as funds. In 1989, the Rules of Professional Conduct Committee issued an informal opinion regarding disposal of files of a deceased lawyer that were in another lawyer’s possession. The Committee determined that RPC 1.14 required the lawyer to “safeguard original wills, deeds or other client property . . . .” WSBA Informal Opinion 1258 (1989). A copy of this Informal Opinion is enclosed.

Ms. McClaran and Mr. Crossland construe Comment [5] as making the rule apply to all documents held by the lawyer, including client files. The intent and actual wording of the comment is much narrower; it applies only to documents that would affect legal rights of a client or third party, *i.e.*, a document like an original will or deed. Unlike the documents mentioned by Ms. McClaran and Mr. Crossland, such as a letter from opposing counsel, there is a special need for an original will because a will can be rescinded by destroying it. As Ms. McClaran and Mr. Crossland’s letter references “will vaults,” it appears the authors agree that original wills have special value entitling them to special treatment. As their letter notes, law firms currently keep original wills in a separate secure location, where they are inventoried and readily accessible. Otherwise, it would be impossible for the firm to respond to a will search. In such situations, it would take very little time to use such a list to generate a form letter to the clients for the annual accounting. In short, we believe many of the concerns in the August 14, 2006 letter result from an overly-broad interpretation of the scope of the rule.

Similarly, the conclusion that the rule applies to all deeds is not supported by Comment [5]. Rather, under the comment, the rule applies only to deeds that affect legal rights. This would not include conformed copies of deeds, since, as the August 14, 2006 letter notes, they “have no real significance as original documents because they have been recorded.”

The Rules of Professional Conduct Committee routinely addresses such issues of rule interpretation through its ethics opinions. We would encourage any members concerned about this rule to ask the RPC Committee to issue an opinion on the scope of documents that fall within the ambit of RPC 1.15A(e). The interpretive guidance obtained in this

fashion may well resolve the issue and obviate the need to modify a rule so soon after its adoption following a long rule-making and comment period.

### **Effect of Rule on Will Retention by Law Firms**

The authors of the August 14, 2006 letter also worry that clients would be harmed if law firms were discouraged from retaining original wills. In fact, our Professional Responsibility Counsel, who respond daily to lawyers' questions regarding their ethical duties, discourage lawyers from keeping original wills. Rather, they recommend that the clients be advised of the option to deposit the wills under seal in the recently-created will registries at the Superior Courts. See RCW 11.12.265 (permitting filing of wills under seal); RCW 36.18.016(27) (cost of filing only \$20). This eliminates the recurring problem of families who are unable to locate the decedent's will because they do not know which law firm drafted the document. It also eliminates the burden on surviving spouses or lawyer-colleagues of deceased lawyers who find original wills among the deceased lawyer's files and then need to locate numerous former clients to return the documents. Our Ethics Line receives many calls of this nature and the callers (who are frequently nonlawyer spouses or children) often expect the Bar Association to take over the obligations of caring for the original wills, an expensive and time-consuming project we are simply not equipped to handle. Recently, our Ethics Line received a call from a lawyer who had come into possession of over one thousand original wills that were without a home due to a law firm's dissolution.

Using the will registry also makes it more likely that the correct will is admitted to probate. For example, a client who had a lawyer draft and retain a will might later hire a second firm to draft a new will without notifying the first lawyer. If the client's family is only aware of the first representation, the wrong will could be admitted to probate.

Before the will registry was created, law firms did provide a service to clients in retaining original wills, as Ms. McClaran and Mr. Crossland note. There was also a benefit to the firms in that they were often hired by the beneficiaries to probate the estate. However, now that there is the will registry, we believe that the better course is for lawyers to encourage their clients to deposit the will in the will registry. In such cases, no annual accounting is required.

### **Conclusion**

As the new rules took effect on September 1, 2006, the annual accounting is not required until September 1, 2007. That should give any members of the Association adequate time to seek an opinion from the RPC Committee and to inventory original wills and any other documents similarly affecting legal rights. Any lawyers who do not wish to comply with the annual accounting requirement will have the option of returning the property to the client or, in the case of wills, of recommending to clients that they deposit the will in the will registry.

We would appreciate if you would circulate this letter to the other members of the Supreme Court Rules Committee. If you or any of the other committee members would like any of the background materials from the adoption of this rule, please let us know.

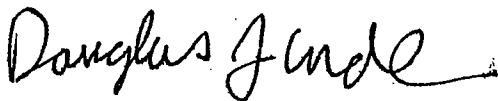
Sincerely,



Anne I. Seidel  
Chief Disciplinary Counsel



Chris Sutton  
Professional Responsibility Counsel



Douglas J. Ende  
Assistant General Counsel & Professional Responsibility Counsel

Enc. (Informal Opinion 1258)

cc: M. Janice Michels  
Robert D. Welden  
Stephen R. Crossland  
Pamela McClaran  
Nan Sullins



# WSBA

Informal Opinion: 1258  
Year Issued: 1989

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The Committee considered your inquiry concerning the disposal of files of a deceased lawyer which are in your custody which include various documents including original wills and other original legal documents. The Committee was of the opinion that the requirements of RPC 1.14 regarding the safeguarding of client property require that you continue to safeguard original wills, deeds, or other client property if you cannot locate the clients to return it to them, but that other file materials that are not client property may be destroyed.

Informal opinions are provided for the education of the Bar and reflect the opinion of the Rules of Professional Conduct Committee. Informal opinions are provided pursuant to the authorization granted by the Board of Governors, but are not individually approved by the Board and do not reflect the official opinion of the Bar association. Laws other than the Washington State Rules of Professional Conduct may apply to the inquiry. The committee's answer does not include or opine about any other applicable law than the meaning of the Rules of Professional Conduct. Informal opinions are based upon facts of the inquiry as presented to the committee.