

1.8(l)

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Clerk of the Supreme Court  
The Supreme Court of the State of Washington  
PO Box 40929  
Olympia, WA  
98504-0929

Re: Comment; Amendments to the Rules of Professional Conduct  
Opposition to Proposed Rule 1.8(l)

To the Justices of the Supreme Court of the State of Washington:

CLERK

APR 14 2005 11:08 AM  
OFFICE OF THE CLERK  
STATE OF WASHINGTON

I. Opposition to Proposed Rule 1.8(l)

I write to voice my very strong opposition to Proposed Revised Rule 1.8(l).

The Proposed Rule should be replaced with a bright line "No Gifts to In-Family Lawyers" Rule.

II. My Relevant Professional Experience

I am currently collaborating in the prosecution of an action alleging Undue Influence, Fraud, and Negligence against an attorney in Ohio, a state that follows a rule somewhat similar to the Proposed Rule. The sworn relevant facts of record are as follows:

- \* Over a fifteen-year period, the son of decedent, a licensed trial attorney, litigated four major family matters through trial and appeal

in the states of California and Nebraska. His work eventually saved decedent from the imposition of a ruinous Internal Revenue Service tax lien. But for the work of decedent's litigator son, decedent would have been rendered destitute for the last ten years of decedent's life.

- \* At all relevant times, the daughter of decedent was married to an Ohio attorney who specialized in the practiced of Ohio Probate and Estate law (hereafter, "Daughter's specialist-attorney-husband").
- \* When decedent's son asked decedent's daughter to participate in decedent's litigated matters in California and Nebraska, the daughter of decedent flatly refused.
- \* As a reflection of the combination of the absence of medical care in Nebraska and her worsening health, decedent moved to Ohio to be near decedent's daughter when the tax litigation was complete.
- \* At the request of decedent's daughter and daughter's specialist-attorney-husband, decedent executed what decedent apparently thought was a valid last will and testament.
- \* Daughter's specialist-attorney-husband counseled decedent regarding the will, drafted the will, supervised the execution of the will, and along with an employee of decedent, executed the will (as one of two attesting witnesses).
- \* The will provided for the equal distribution of decedent's assets between decedent's son and daughter.
- \* Daughter's specialist-attorney-husband also drafted a power of attorney giving his wife, decedent's daughter, full power to conduct the business and legal affairs of decedent. Decedent executed the power of attorney.

- \* During the last thirty years of life, decedent suffered four major diseases: she was also medically diagnosed as" senile."
- \* Decedent's daughter and her daughter specialist-attorney-husband saw to it that (senile) decedent never received the advice of independent, competent Probate counsel or Estate Planning counsel.
- \* Four years prior to death, decedent was prescribed the then newly marketed, genetically engineered drug, Enbrel. Within a few days after receiving the drug, decedent contracted sepsis (blood poisoning). Decedent spent two weeks in Intensive Care and underwent two emergency surgeries. Decedent never fully recovered.
- \* Decedent's daughter and daughter's specialist-attorney-husband resided two miles from decedent's home and had regular contact with decedent. They witnessed decedent's pain and suffering cause by the Enbrel blood poisoning, hospitalization, surgeries and recovery.
- \* Four months after, the Food and Drug Administration nationally warned of a linkage between blood poisoning and Enbrel. Decedent's attending physician filed an Adverse Drug Reaction report with the Food and Drug Administration linking decedent's use of Enbrel with her blood poisoning.
- \* Decedent's son contacted counsel for the manufacturer of Enbrel, arranged for decedent to be interviewed by nationally reputable Ohio-based products liability plaintiffs counsel, and attempted to help decedent begin the Ohio personal injury claims negotiation process.
- \* Despite repeated requests from decedent's son for their assistance, decedent's daughter and daughter's specialist-attorney-husband knowingly refused to help decedent prosecute the powerful Enbrel personal injury claim.

- \* Decedent's daughter kept secret all information regarding the status of decedent's financial affairs, and the extent to which she and daughter's specialist-attorney-husband were structuring decedent's financial and legal affairs using right of survivorship securities.
- \* One month after decedent's death, decedent's daughter and her attorney husband told decedent's son that decedent's daughter had taken 95% of decedent's known estate.
- \* Daughter's specialist-attorney-husband stated orally and in writing:
  - i. "Decedent's estate need not be probated;"
  - ii. "Because his wife would receive one-half of decedent's estate he was subject to a conflict of interest;"
  - iii. "He was willing to handle matters necessary to windup decedent's estate and would do so without charging his customary fees IF decedent's son would execute a written waiver of the conflict of interest."
  - iv. "If decedent's son was unwilling to execute the written waiver of the conflict of interest, decedent's son and decedent's daughter would have to retain separate counsel to resolve the matter."
- \* Decedent's daughter retained counsel who sought appointment as counsel to decedent's estate.
- \* Daughter's retained counsel either failed to investigate the matter or fraudulently withheld information that would have barred him from seeking appointment as counsel for the estate.

- \* Decedent's son challenged decedent's daughter's capacity to serve as executrix for decedent's estate and the right of daughter's retained counsel to act as counsel to decedent's estate.
- \* Decedent's daughter refused to provide ANY information regarding the facts in question.
- \* Decedent's son submitted a twenty-one page letter seeking "Good Faith" negotiation of the dispute to decedent's daughter: decedent's daughter did NOT reply to the letter.
- \* Daughter's retained counsel has sought to charge all of the expenses of his work as 'expenses chargeable to decedent's estate': decedent's daughter has yet to pay one penny out of pocket. By contrast, decedent's son has born all related fees and expenses out of pocket.
- \* Decedent's daughter severed her relationship with her brother.
- \* The matter has been fully briefed and argued before the Ohio Probate Court having jurisdiction.
- \* Decedent's son has filed disciplinary petitions against daughter's specialist-attorney-husband and daughter's retained counsel with the Ohio State Bar Association. Numerous additional ethical charges are pending.
- \* The matter has been under submission since December 2003.

### III. Comment in Opposition to the Proposed Rule

Proposed Rule 1.8(1) is utterly unsuited for continued endorsement by this Court. The sworn facts of record in the noted dispute demonstrate the Reality of Modern practice.

The Proposed Rule is the latest revision of the failed, fatally flawed, unworkable "In-Family Attorney" Rule. The Proposed Rule is based on the supposition that the "In Family Attorney" will provide competent, unbiased, ethical professional services, services free of the corroding effects of vicarious economic benefit. As shown by the fact pattern above, that supposition is fatally flawed and out of touch with the reality of modern day social structures.

The Proposed Rule is a fossilized remnant of a bygone era, a time when fairness and honesty were honored within the nuclear family; a time when only one family member might have obtained licensing as a competent Wills and Probate attorney; a time when communication with competent Wills, Probate and Estate counsel was far more difficult and expensive. Times have changed. Law schools churn out far more attorneys than can actually find work. Mass communication media, the Internet in particular, make the distribution of competent, low cost, testamentary suggestion available on an instantaneous basis.

The Proposed Rule is in direct opposition with the national trend. Professionally competent Wills, Probate and Estate counsel do not involve themselves in conflict-ridden, emotion-laden family testamentary matters: they know better. Unlike daughter's specialist-attorney-husband, competent counsel refuse to place themselves in the position of explaining to members of their family, and to a triers of fact, how their professional actions, which worked to favor themselves and another family member, comply with the letter and the spirit of the professional rules of practice and the laws of undue influence, fraud, negligence and fiduciary duty.

The Proposed Rule improperly fails to protect those most in need of non-conflicted advice. When he counseled decedent, daughter's specialist-attorney-husband established in the mind of the testator an understanding that the diseased, emotionally dependent, senile decedent thought decedent's daughter and decedent's son were to share equally in decedent's estate. At the same time, daughter's specialist-attorney-husband counseled decedent

to use a non-testamentary procedure by which he and his wife would take 95% of decedent's known assets! How can it be said that those actions comply with the applicable legal and professional standards of practice? They reek of conflict of interest, indeed of knowing breach of fiduciary duty knowingly practiced on an old, sick, feeble testator by an "In Family Attorney."

The Proposed Rule continues the skewed, inexplicable policy whereby attorneys who are subject to conflicts of interest may remain silent when dealing with "relatives" about their conflict, yet they must warn competent businesspersons of their conflict. In essence, the Proposed Rule furthers the policy that the interests of young, healthy, aggressive, competent business persons are to be given higher legal protection and recourse than the interests of the old, sick, dependent, and incompetent. That Policy is Wrong.

The Proposed Rule promotes un-professional, negligent, and fraudulent conduct. As demonstrated by the noted facts, the rule provides layers of procedural and evidentiary protection that encourage subtle attempts by an "In Family" attorney to gain initial influence and actual control over a family member's estate, and with the passage of time, to direct non-testamentary gifts of estate assets that vicariously favor the attorney.

The Proposed Rule promotes the unfair, unjust administration of probate estates. Hiding behind the limits of pre-filing discovery and the limited jurisdiction of the probate court, a negligent or cunning attorney can effectively structure long-term events that hinder the administration of justice. That power includes the ability to structure testamentary affairs such that "disfavored family members" must dispute unjust probate events using out of pocket funds while "favored family members" can allocate their costs of defense as charges against the probate estate!

The Proposed Rule greatly increases the chance of family discord and disruption. Those family members receiving the favor of an "In Family"

attorney's negligent or fraudulent construction of the law will surely support that position. "Non favored" family members are left to scratch their heads and justifiably wonder, "How can this be so?! What's going on here?! Is this Just??" Should "non-favored family members" dispute the "In Family" attorney's negligent or fraudulent construction, they risk loss of family relationships, the exact result noted above.

In summary the Proposed Rule is anachronistic; contrary to the advancing standard of professional practice; fails to protect the incompetent testator; paradoxically works to promote and shield "In Family" attorney Undue Influence, Fraud, and Negligence; works to destroy familial relationships; wastes familial resources; and wastes highly limited judicial resources. The Old Failed Rule Should Be Abolished.

#### IV. Suggested Wording of Rule 1.8(l)

In lieu of the foregoing, I respectfully suggest that this Court consider the immediate adoption of the following highly specific, bright-line rule abolishing the concept of and protections given to the "In Family Lawyer." The New Revised Rule:

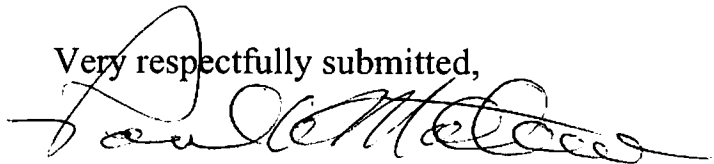
"(c)(i) A lawyer shall not solicit any gift from a client to the lawyer; to the lawyer's children, grandchildren, siblings, parents, or grandparents; to the lawyer's spouse; or to the lawyer's spouse's children, grandchildren, siblings, parents, or grandparents.

(c)(ii) A lawyer shall not counsel, draft, correct, or supervise the execution of, or execute as a witness, any instrument that would directly or indirectly provide a testamentary, intervivos, survivorship, or joint tenancy gift to the lawyer; to the lawyer's children, grandchildren, siblings, parents,

or grandparents; to the lawyer's spouse; or to the lawyer's spouse's children, grandchildren, siblings, parents, or grandparents.

(c)(iii) A lawyer solicited to create an instrument bestowing a gift on the lawyer; the lawyer's children, grandchildren, parents or grandparents; the lawyer's spouse; or the lawyer's spouse's children, grandchildren, parents, grandparent, parent, sibling, child or grandchild persons, shall refer the request to a competent, disinterested lawyer."

Very respectfully submitted,



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35067 (Active)

Copy to:

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