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Wills, Trusts and Estates Practice: Minimizing Exposure to Claims from Third-Party Beneficiaries

The attorney-client relationship is an important part of the American legal system. Attorneys have a duty to represent and counsel their clients to the best of their abilities. Attorneys also owe a fiduciary duty to their clients. In the wills, trusts and estates context, clients typically retain attorneys to represent them and prepare documents detailing their intent regarding the disposition and distribution of estate assets upon death.

Some attorneys may focus on the client's desires and wishes without any concern for the third-party beneficiaries of the estate or trust, (e.g., the client's spouse, children, siblings, other heirs, relatives and others named by the client).

However, under certain circumstances, attorneys may also owe duties to third-party beneficiaries of wills, trusts and estates with whom they have never consulted. An increasing number of jurisdictions have ruled that attorneys owe duties to these beneficiaries.[1] Given the large aging population in the United States, these types of claims may increase in the future.

One difficulty for the wills, trusts and estates lawyer is that the witness best qualified to testify about the desired distribution of the estate assets is the deceased client. Lawyers who handle matters involving wills, trusts and estates need to understand and properly document, in writing, their client's intentions in order to minimize the risk of possible professional liability exposure from third-party beneficiaries. Proper documentation is a crucial element to the defense of such claims.

BACKGROUND OF PRIVITY AND THIRD-PARTY BENEFICIARY LIABILITY:

Historically, lack of privity shielded an attorney from liability to third-party beneficiaries, absent fraud or collusion by the attorney.[2] A minority of jurisdictions still adhere to this strict privity requirement, ruling that allowing liability to third-party beneficiaries creates a conflict of interest in the estate planning process, dividing the lawyer's loyalty between the client and the third-party beneficiaries.[3] The majority of jurisdictions that have considered this issue, however, reject this view.

The majority view holds that attorneys are not immune from liability when the main purpose of the representation—to transfer property and/or funds to a beneficiary—has been frustrated due to the attorney's failure to exercise ordinary care.[4] Additionally, according to this view, third-party beneficiaries frequently receive no protection against neglectful wills, trusts and estates attorneys when privity prevents them from bringing legal malpractice claims since a lawyer's malpractice in this area of practice is usually not discovered until the client-testator has died.[5]

MANAGING THE RISKS OF THIRD-PARTY BENEFICIARY LIABILITY IN WILLS, TRUSTS AND ESTATES:

Wills, trusts and estates lawyers need to obtain current and accurate information regarding the assets and liabilities of their clients to ensure that the legal advice given and instruments drafted accomplishes the clients' interests. Lawyers should consider adopting the following methods to assist in protecting themselves against these third-party beneficiary legal malpractice claims (although these methods are presented in the context of a wills, trusts and estates practice, they can be adapted to all legal practice areas):

1 Max N. Pickelsimer, *Attorney Malpractice in Will Drafting: Will South Carolina Expand Privity to Impose a Duty to Intended Beneficiaries of a Will?*, South Carolina Law Review (Spring 2007).

2 *Savings Bank v. Ward,* 100 U.S. 195, 205-06 (1879)
3 Alabama, Arkansas, Maine, Maryland, Nebraska, Ohio, Texas and Virginia.
4 Alaska, Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, New Hampshire, New York, Oregon, Pennsylvania, South Dakota, Virginia, Vermont, Washington and Wisconsin.
5 Lucia Ann Silecchia, *New York Attorney Malpractice Liability to Non-Clients: Toward a Rule of Reason & Predictability*, 15 Pace L. Rev. 391, 445-46 (1995)

CREATE A CLIENT PROFILE:

In order to meet client needs and expectations, lawyers should consider creating a written template which will form a client profile containing basic personal data. Information that should be in the template includes:

- assets, including those held jointly or under a separate name, those held by entities, and whether they secure indebtedness;
- liabilities, with the same detail as listed above;
- whether the client is the beneficiary of any trust;
- whether the client owns any life insurance policies;
- the dates of birth of the client's children, spouse, or partner; and
- whether the client is subject to any premarital, postmarital, or separation agreements.[6]

The requirement that the client completes a client profile and assumes responsibility for documenting all assets and liabilities is necessary to defend the attorney against third-party beneficiary allegations that the attorney failed to inquire about assets or liabilities which were not documented in the client's estate profile. Accordingly, the client ideally should complete the client profile at the outset of the formation of the attorney-client relationship.

DISCUSS THE CLIENT'S EXPECTATIONS AND DOCUMENT THE SCOPE OF THE REPRESENTATION IN WRITING:

As the written client profile is being completed, the attorney and client should also come to an agreement on the terms of their professional relationship. Misunderstandings about the scope of an attorney's representation or the intentions of the client can lead to client disputes and malpractice claims. The client's objectives and the professional legal services the attorney will perform must be discussed and documented in detail.

In some estate related engagements, a client may retain more than one professional. In such cases, the client agreement should acknowledge that the attorney provided only professional legal services and no other professional advice or services, and that the agreement is accepted by both the attorney and the client in reliance upon the advice provided by the professional retained by the client.

In addition to delineating the scope of the work to be performed in the engagement letter, lawyers should avoid sharing fees with or paying for retained experts. Instead, they should direct their clients to enter into these agreements with a particular expert separately. If the lawyer recommends an expert to a client, the lawyer should take reasonable steps to ensure that the person is competent in the relevant area of expertise or concentration. Maintaining separation between the lawyer and the client-retained expert may help reduce the lawyer's potential liability in the event the expert's work fails to meet the expectations of the client.

After the lawyer and client have had a detailed discussion concerning the client's expectations and reached agreement regarding the scope of the representation, the agreement should be reduced to writing in an engagement letter. A straightforward, easily understandable, but comprehensive engagement letter provides the first, and often the best, opportunity for the lawyer to shape and memorialize the client's expectations and the attorney-client relationship. The engagement letter serves to help prevent misunderstandings and assist in the defense of malpractice claims. For wills, trusts and estates lawyers, a good engagement letter contains the following elements:

- the specific identity of the client (clearly state that other family members and intended beneficiaries are not clients);
- the scope of the representation, including a specific description of the services to be performed (if services have been offered and declined by the client, identify them);
- the estate planning goals of the client;
- the client's duties and obligations (including informing the attorney of all relevant assets and liabilities);
- the terms of the representation (including fees, billing procedures and staffing);
- an explanation of responsibility for retaining and paying for outside experts such as tax advisors (if the client is selecting and retaining experts, state this clearly and disclaim responsibility for supervising their services);
- a provision for withdrawal from the representation if an ethical conflict arises that cannot be resolved; and
- a firm policy regarding retention and destruction of the client file, and delineation of responsibility to maintain original copies of trust, will and estate documents.

6 Deidre G. O'Byrne, *Legal Malpractice and the New York Estate Planning Lawyer*, Aspatore (November 2010).

Depending upon the client's level of sophistication, the lawyer should consider reviewing the letter with the client point by point, providing him or her with the opportunity to raise any questions or concerns. Once the client demonstrates an understanding and agreement with the terms of the engagement letter, lawyers should: have the client sign and date the letter to acknowledge consent; retain the original; provide a copy of the executed letter to the client; document any subsequent changes or modifications to the terms of the representation; send a copy of the documented changes to the client; and maintain a copy in the file.

CONSULT WITH THE CLIENT ON TAX ISSUES AFFECTING WILLS, TRUSTS AND ESTATES:

Many third-party beneficiary lawsuits stem from disputes over the tax burden imposed upon a trust or estate. Beneficiaries may look to hold wills, trusts and estates lawyers liable when taxes deplete most or all of the estate's property or funds. In addition, many third-party beneficiaries seek to hold lawyers responsible if the method of handling and distributing the estate resulted in a greater tax liability than if another method or instrument had been utilized.

The engagement letter should clearly state whether or not the lawyer will render professional legal services with respect to tax issues affecting the trust or estate. Lawyers handling such matters must be competent to do so. Most state disciplinary rules recognize that attorneys can competently handle cases in new areas of law if they invest the time and effort to study the relevant law and master the applicable procedural requirements. Lawyers venturing beyond their areas of concentration should consider associating with experienced counsel.

In establishing estate plans, clients may have more overriding concerns than minimizing taxes, and are not obligated to optimize tax reduction in their plans. The prudent lawyer will memorialize conversations regarding taxation with the client, indicating that while more favorable tax liability plans were presented, the client chose a different plan for a specified reason, which should also be documented.[7]

USE CENTRALIZED CALENDARS AND DEADLINE TRACKING SYSTEMS:

Many lawyers assume that their knowledge and experience in the substantive aspects of their practice will sufficiently safeguard them from legal malpractice claims. National claims statistics, however, suggest that administrative errors—which can beset even the most talented, intelligent lawyer—actually spawn almost a third of all legal malpractice cases.[8] The key to reducing such errors is to have in place good, easy to follow procedures supported by effective systems, and staff who strictly adhere to those procedures.

Centralized calendars and deadline tracking systems can help reduce the risk of missing an important step in completing a project and may speed up the completion process of that project.[9] For example, a lawyer drafting a testamentary trust should consider creating a checklist with the following data and corresponding deadlines for completion, where appropriate:

- selection and appointment of trustee and successor trustees;
- delineation of powers of trustee with respect to investments, allocation of principal and income, discretionary powers;
- tenure of trustee, including provisions allowing for resignation and removal;
- detailed descriptions of trust property;
- identification of beneficiaries;
- purpose of the trust;
- duration of the trust;
- execution of trust.[10]

Missed steps, lost documents, miscommunication and overlooked laws and regulations can lead to legal malpractice claims. Developing thorough calendars and checklists and using them regularly is the best means of preventing these mistakes. Habitual of these systems by lawyers and their support staff can assist in protecting the lawyer against both administrative errors and malpractice claims.

7 *Id.*

8 *Profile of Legal Malpractice Claims 2004-2007,* ABA Standing Committee on Lawyers' Professional Liability, p. 11.
9 Jonathan G. Blattmachr, *Looking Back and Looking Ahead: Preparing Your Practice for the Future: Do Not Get Behind the Change Curve,* 36 ACTEC J. 1, 53 (Summer 2010).
10 John Bourdeau, J.D., Sonja Larsen, J.D., and Karl Oakes, J.D., 34 Standard Pennsylvania Practice 2d § 160:50.

EMPLOY PROPER DOCUMENT RETENTION AND DESTRUCTION POLICIES:

Attorneys must have access to the client file to defend themselves in the event of a claim. Document retention and destruction policies should specifically address matters involving wills, trusts and estates.[11] Due to the often long period between drafting documents and any subsequent third-party claim, documents in the client file must be retained for a very long period: usually, until some agreed upon period following the death of the client. The formation of trusts providing support to estate beneficiaries post death may necessitate retaining the file many years beyond the client's death. Records should be retained until all statutes of limitation or repose have expired, even if the practice is merged or sold. This necessitates a consistent and organized storage procedure for both hard and electronic documents. The document retention policy should be communicated to the client in the engagement agreement and, again at the end of the representation.

CONCLUSION:

Wills, trusts and estates lawyers should be concerned about liability and duties to both their own clients and third-party beneficiaries. Legal malpractice claims pursued by third-party estate and trust beneficiaries are likely to be on the rise.[12] Attorneys should establish, in writing, a clear understanding with the client regarding engagement scope and responsibilities. Client files should contain detailed documentation regarding the client's assets and liabilities; intent and understanding of the handling and distribution of the client's assets; all communications with the client and any third parties such as advisers, experts, or beneficiaries; and any analysis performed relative to the establishment of the will, trust or estate plan. Documentation is not just a defensive practice; it is an important element in effective client service and practice management.

11 The CNA guide, *Creating a Record Retention and Destruction Policy* can be downloaded at no charge at: **https://www.lawyersinsurance.com/spln1/lawyerspbc/lawWAR/static_html/rmanagement.html**

12 Deidre G. O'Byrne, *Legal Malpractice and the New York Estate Planning Lawyer*, Aspatore (November 2010).

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