Legacy or Liability?

10 Common Pitfalls for Will, Trust, and Estate Lawyers

By Sean Ginty, JD, Assistant Vice President of Risk Control

It is estimated that the Baby Boomer generation will transfer more than $120 trillion to succeeding generations.[1] This so-called "Great Wealth Transfer" will reverberate in the will, trust, and estate area of practice ("w/t/e AOP") for years to come. Liability exposure risks for w/t/e lawyers accompany this staggering amount of money.

When an estate contains significant assets, stakes are raised and emotions among beneficiaries, actual or purported, can become volatile. Add in the complexity and evolving nature of the w/t/e AOP and lengthy time horizons, where statutes of limitation can be tolled for decades, an environment exists where malpractice claims arise frequently[2] and can be difficult to defend.

1
Frustrating the Client's Intent

Lack of privity between a lawyer and the intended beneficiaries of an estate plan is no longer a bar to a professional liability claim in most jurisdictions. Lawyers must carefully listen to and adhere to the client's wishes, knowing that any error on the lawyer's part that causes the client's intent to be frustrated may result in a lawsuit brought by such beneficiaries against the attorney. As one court opined:

> [W]hen an attorney undertakes to fulfill the testamentary instructions of his client, he realistically and in fact assumes a relationship not only with the client but also with the client's intended beneficiaries. The attorney's actions and omissions will affect the success of the client's testamentary scheme; and thus, the possibility of thwarting the testator's wishes immediately becomes foreseeable. Equally foreseeable is the possibility of injury to an intended beneficiary.[3]

2
Missed Deadlines

Lawyers failing to comply with deadlines may result in legal malpractice exposure. For example, a lawyer acting as executor of an estate and performing legal services in that role who neglects to submit an inventory of the estate's assets within the statutory or court-ordered deadline could cause financial harm to the estate due to delays in distribution or adverse tax consequences. Per the American Bar Association's Profile of Legal Malpractice Claims, 2020-2023 ("ABA Profile"), administrative errors, such as failing to react to a calendar or deadline, comprised more than one-third of the errors that led to claims reported in the ABA Profile.[4] Law firms should ensure that they have reliable dual calendaring systems in place and train their lawyers and support staff on how to use such systems.

3
Conflict of Interest

Conflicts arise more readily in the w/t/e AOP than most other areas of practice ("AOPs") due to the usual involvement of multiple parties with competing interests. In an Illinois case, a law firm represented the wife

[1] Forbes, "The Great Wealth Transfer: 6 Reasons Why It Might Fall Short," by Joseph Coughlan, June 02, 2005.
[2] American Bar Association, Profile of Legal Malpractice Claims: 2020-23, pp. 10-11.
[3] Heyer v. Flaig, 449 P.2d 161 (Cal. 1969).
[4] American Bar Association, Profile of Legal Malpractice Claims: 2020-23, pp. 20-22.

in her role as administrator of her husband's estate.[5] The wife and the decedent's son from a prior marriage were the sole beneficiaries of the estate. The son moved to have the wife removed as administrator due to alleged mismanagement of the estate, and the wife agreed to resign as administrator. When the law firm continued to represent the wife in her capacity as an heir, the son and the successor administrator sued the wife's law firm for legal malpractice, contending that the law firm advanced the wife's interest in the estate's assets over that of the estate itself. The appellate court ruled in favor of the son and the successor trustee in reversing and remanding the lower court's grant of a summary judgment for the law firm, opining that:

> [I]t seem [sic] axiomatic to this court that when an attorney is retained by an administrator for the purpose of administering the estate, its client is in actuality the administrator and the estate due to the symbiotic nature of their concurrent existence. The administrator only acts to serve the estate, and the estate cannot act but through the name of the administrator. Thus, we find the attorney-client relationship between an attorney and an estate to be inherent when the attorney is retained to assist in the administration of the estate.[6]

Law firms must employ conflict of interest checking systems and use them for all new clients and new matters.

4
Poor Communication and Verification with Clients

Consider an estate planning attorney who, at the client's request, drafts a will to transfer his interest in a brokerage account to his three children in equal shares. Unfortunately, the lawyer failed to instruct his client to change the name of the designated beneficiary so that the brokerage account's funds would pass through to the client's estate and neglected to follow up with the client to confirm that such a change had occurred. Once the client died, all the funds in the brokerage account went to a former spouse, the designated beneficiary on the brokerage account, instead of his three children. The lawyer could face claim liability for failing to take reasonable steps to ensure that the brokerage account's designated beneficiary had been updated in alignment with his client's wishes.

Do not assume that clients will automatically follow through on instructions from their lawyers. Lawyers need to document important instructions to clients as well as attempts to verify that the client complied with such directives.

[5]Estate of Hudson by Caruso v. Tibble, 99 N.E.3d 105 (Ill. App. 1st 2018).
[6] Id at 114.

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Tips for Will, Trust, and Estate Lawyers

- Decline representation of both testator/decedent and beneficiary of estates
- Engage certified public accountants to provide advice regarding tax implications of estate plan
- Engage certified public accountants in the filing of tax returns
- Manage trust assets responsibly and pay any taxes due on estate assets in a timely manner
- When acting as trustee, remember your fiduciary duty to act in the best interests of the trust as opposed to a particular beneficiary
- Perform audit/reconciliation of trust accounts annually
- Do not make distributions of trust assets before all creditors and tax obligations are satisfied
- Dual authorization should be required for checks meeting a certain monetary threshold
- To protect client confidentiality and avoid potential undue influence claims, hire foreign language interpreters when necessary
- Use engagement letters and include a "No Continuing Duty to Update on Changes in the Law" clause when applicable
- Use closure letters and suggest that former clients contact you for future legal services when they experience major life events that affect their current trust and estate plans

5
Dabbling/Inexperience Can Lead to Claims

The w/t/e AOP can be highly complex and involve assets worth millions of dollars, which often exceed the limits of liability in a law firm's lawyers professional liability policy. Lawyers lacking experience in this area of practice should not accept a matter unless they are willing to devote the necessary time and effort to provide competent representation to the client. Co-counseling or consulting with a mentor experienced in this area of practice may mitigate risk exposures to lawyers new to the w/t/e AOP.

6
Drafting Errors

Testamentary documents must be reviewed carefully to avoid errors that can lead to claims exposure. For example, discrepancies in specific bequests, such as "I give fifty thousand dollars ($5,000) to my nephew" contains conflicting dollar amounts. Such an error could lead to a claim. Ambiguous wording or forgetting to include important language or clauses can also result in financial losses to intended beneficiaries, which can lead to a legal malpractice claim. An overreliance on forms and templates can also result in drafting errors when attorneys fail to consider the unique aspects of each representation that may require deviation from standard forms and templates. Lawyers need to carefully review any testamentary documents and, if possible, have at least one other law firm lawyer or support staff member review them to minimize the chances of a drafting error.

7
Undue Influence

Lawyers have a duty to ensure that clients are acting with their own volition and are not subject to undue influence. This issue is particularly relevant in the w/t/e AOP, where elderly clients, some with diminished physical and mental capabilities, may be especially vulnerable to a manipulative relative, friend, or caretaker. Lawyers are empowered to take protective action when they reasonably believe that their client suffers from diminished capacity, faces substantial physical, financial, or other harm unless action is taken, and cannot act in his or her own interest.[7] If a lawyer has a reasonable suspicion that someone is exercising undue influence over a client, especially in connection with a requested change to testamentary documents, the lawyer should speak in private with the client to gather facts and make an informed decision as to how to best proceed. If the lawyer is still not satisfied that the client is acting freely and voluntarily, she should make no requested changes to the testamentary documents, document her concerns about undue influence by a third party, and decide how to best protect the interest of the client while maintaining as normal a lawyer-client relationship with the client as possible.

Conversely, if the lawyer believes that the client's proposed change to a testamentary document reflects the client's genuine wishes and is not caused by undue influence, careful documentation of the client's reasons for the revisions is critical. A video recording of the client signing the updated documents while explaining why she desires such changes can provide powerful evidence to refute allegations of undue influence.

8
Lack of Testamentary Capacity

Most courts hold that at the outset of the attorney-client relationship and its pendency, lawyers need to make a basic assessment of a client's mental capacity.[8] Even in jurisdictions that do not hold this majority view, such as Illinois, there are circumstances where such an assessment of the client is necessary. For example, if a lawyer is aware of a client's diminished capacity but fails to take any protective action, the lawyer may be liable for any resulting damages.[9] In one real-life case, the lawyer modified the client's will to benefit one son, who had a gambling problem, over the interests of her other son. The lawyer made the requested change to the will despite knowing that the client suffered from dementia and suffered from memory loss. The other son sued the lawyer for legal malpractice, and the Illinois appellate court reversed and remanded the lower court's dismissal of the other son's lawsuit.[10]

Lawyers should look for signs of a client's diminished mental capacity and, if such a condition exists, take "reasonably necessary protective action" when warranted.[11]

9
The Unofficial Advisor

Some clients will bring an unofficial advisor with them when meeting with a lawyer. In most instances, the advisor will be a relative, friend, or caregiver. Such an advisor may serve as a translator if the client speaks a foreign language. Clients in cognitive decline may need an advisor to help them better understand the legal services and advice being rendered to help effectuate their estate plan.

[7] ABA Model Rule of Professional Conduct 1.14(b).

[8] Id.
[9] Carey v. Hartz et al., 256 N.E.3d 469 (Ill. App. (1st) 2024).
[10] Id.
[11] American Bar Association Model Rule of Professional Conduct 1.14: Client with Diminished Capacity.

Lawyers need to exercise caution when dealing with an unofficial advisor. At the outset, the lawyer should clearly state that the lawyer is not entering into an attorney-client relationship with the unofficial advisor and provide written documentation of that statement to the unofficial advisor. If it is necessary for the unofficial advisor to be present for discussions between the lawyer and client, such as providing translation services, the lawyer should document for the client file why the unofficial advisor is attending such meetings to preserve the attorney-client privilege. If the unofficial advisor's presence is not necessary, the lawyer should exclude the unofficial advisor from discussions between the lawyer and client and warn the client not to disclose the substance of any part of their discussions to the unofficial advisor or any other third party.

Failing to set boundaries with an unofficial advisor can cause myriad problems, including interference with the attorney-client relationship, breaching confidentiality and the attorney-client privilege, and potential malpractice claims. The lawyer should advise the client, both orally and in writing, not to rely on a non-lawyer advisor for legal advice. Lawyers may need to withdraw from representations where the unofficial advisor's interference materially affects the lawyer's ability to represent the client in an effective manner.

10
Failure to Update Testamentary Documents or Advise on Changes to the Law

Lawyers and clients need to agree on whether a representation will be limited in scope or time or be open and continuous and memorialize that decision in an engagement agreement. Any ambiguities as to the duration of or existence of an ongoing lawyer-client relationship will likely be held against the lawyer.

Changes and revisions to laws and rules in the will, trust, and estate area of practice occur frequently. If these changes happen during the pendency of an attorney-client relationship, the lawyer may need to alert clients to the changes and update related testamentary documents.

Problems may arise if these changes occur when the lawyer thinks that the representation has ended but the client believes otherwise. Closure letters, wherein the lawyer informs the client that the representation has concluded, constitute an effective risk management tool in these circumstances. Including a "No Continuing Duty to Update on Changes in the Law" clause in an engagement agreement (and restating it in a closure letter) may also protect lawyers from later claims contending that they failed to provide appropriate legal advice or services due to a change in the law after the attorney-client relationship had ended.

Conclusion

As evidenced by the 10 common pitfalls described above, which are a non-exhaustive list, many potential liability traps exist for the unwary practitioner in this area of practice. However, keeping these pitfalls in mind, listening to and following the client's wishes, documenting important conversations and decisions, and maintaining competence in this area of the law will serve the interests of the client and any intended beneficiaries as well as the lawyer. Please see the *ORLSI Strategy Tips for Will, Trust, and Estate Lawyers* sidebar on page 2 of this article for further guidance.

For more information, contact your broker or ORLSI representative.

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