

Practice Focus: Trust, Estate and Probate

HOW TO AVOID THE POTENTIAL PITFALLS FOR TRUST, ESTATE AND PROBATE ATTORNEYS

Marian C. Rice
L'Abbate, Balkan, Colavita
& Contini, L.L.P.
1001 Franklin Avenue
Garden City, NY 11530
Direct Dial: 516.837.7415
E-Mail: mrice@lbccclaw.com

Trust, estate and probate lawyers provide a broad range of client services, from estate planning, to tax advice, to estate administration and other related subjects. The ABA Standing Committee on Professional Liability's statistical survey has shown a slight but steady increase in claims asserted against trust and estate attorneys -- from approximately 7% to 9% -- in the two decades since the figures were first compiled. While the ABA statistics do not track claim severity by practice area, the provable damages in claims arising in the trust, estate and probate area ordinarily are easily quantifiable and can be significant. Here are some of the common causes of those claims.

Dabbling

Your cousin is going on a trip and confides she's never had a will. If you just run that "simple" will off the form that's been in the computer for at least a decade, she'll feel better. Don't do it. Like many other areas of practice, the field of trusts and estates is highly specialized and technical. Boilerplate forms or provisions not specifically tailored to the individual client's current situation provide a constant source of claims. You cannot provide effective legal services in the area of trusts and estates by attending a CLE seminar and using a form. Even though you figure your cousin would never sue you (which sometimes is true), depending on jurisdiction you could face a claim from disappointed beneficiaries who don't share the same bond.

Conflict of Interests

It is not at all unusual for a third party, perhaps a relative or family friend, to initiate contact with a trusts and estates attorney on behalf of an elderly potential client. Regardless of the extent of the relationship with the third party, never forget to serve the best interests of the client. To ensure that all parties are aware whose interests are being represented, the client's identity should be specified in the engagement letter. Non-clients must also be alerted to the fact that their interests are not being protected by the attorney.

There are legitimate estate-planning reasons for divesting title in property owned by the elderly client and for giving third parties the right to act for the elderly

client. Always be certain, however, that contemplated transfers through testamentary bequests or non-probate transfers of property are actually what the client wishes and are structured to protect the client throughout his or her lifetime. Where the wishes of the third party and the client conflict, the attorney is there to protect the client.

Problematic conflicts may also arise in the simultaneous representation of spouses in the estate planning context. Take care to ensure that both spouses' interests are completely aligned or refer the representation of one spouse to independent counsel.

Another area of concern arises where the financial planner is leading the way – and the way does not seem in the best interests of the client. Relying upon the excuse that the attorney was just the “scrivener” of an estate planning device developed by the financial planner and the client may not prevent a claim by the client. If an accountant or financial planner is a significant source of business, the independent professional judgment of the attorney may be called into question if the strategy proves not to be sound. This can complicate otherwise straightforward malpractice claims.

Scope of Services

In addition to identifying the client, a clearly written engagement letter should define the scope of the attorney's services. Equally as important is to specify legal services that the attorney will not perform. If you are not providing accounting services for the estate or preparing a Medicaid application for an elderly client, be certain that the engagement letter says so and, if possible, identify the professional who is undertaking these services. If the client has not retained a professional to perform needed services excluded under the terms of the retainer, advise the client in writing about the need to seek professional assistance in the omitted areas.

Claims by Non-Clients

In most areas of practice, an attorney may only be sued by a client. But in most jurisdictions, trusts and estate lawyers are an exception to this general rule. Many states permit the beneficiary of an estate to sue an attorney whose negligence caused the testator's intended disposition of the bequest to the beneficiary to fail. To protect yourself against a claim by a dissatisfied beneficiary, the testator's wishes should be clearly documented, preferably in a document generated by the testator, and the testamentary documents should be checked and re-checked to ensure compliance with the testator's wishes.

Recognizing the potential for client dissatisfaction is the most effective way of preventing claims. It is hoped that by alerting you to some of the more common claim scenarios facing trust, estate, and probate attorneys, you will be able to avoid problems before they occur.