ESCAPING THE ESTATE PLANNING "BLUE SCREEN OF DEATH" WITH COMPETENT AND ETHICAL PRACTICES

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Bar memberships: United States Supreme Court, Texas, Ohio (inactive status), Illinois (inactive status)
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Editor-in-Chief, REPTL Reporter, State Bar of Texas (2013-present)
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Private Practice, Columbus, Ohio (1980)
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Visiting Professor, Boston College Law School (1992-93)
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Visiting Professor, La Trobe University School of Law (Melbourne, Australia) (2008 & 2010)
Visiting Professor, The Ohio State University Moritz College of Law (2012)

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Estate Planning Hall of Fame, National Association of Estate Planners & Councils (2015)
ABA Journal Blawg 100 Hall of Fame (2015)
Outstanding Professor Award – Phi Alpha Delta (Texas Tech Univ.) (2016) (2015) (2013) (2010) (2009) (2007) (2006)
Excellence in Writing Awards, American Bar Association, Probate & Property (2024, 2012, 2001, & 1993)
President's Academic Achievement Award, Texas Tech University (2015)
Outstanding Researcher from the School of Law, Texas Tech University (2017 & 2013)
Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)
President's Excellence in Teaching Award (Texas Tech University) (2007)
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (1988) (2005)
Student Bar Association Professor of the Year Award – St. Mary's University (2001-2002) (2002-2003)
Russell W. Galloway Professor of the Year Award – Santa Clara University (2000)
Distinguished Faculty Award – St. Mary's University Alumni Association (1988)
Most Outstanding Third Year Class Professor – St. Mary's University (1982)
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SELECTED PUBLICATIONS

WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (8th ed. 2022); FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); TEACHING MATERIALS ON ESTATE PLANNING (5th ed. 2023); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2024); TEXAS WILLS, TRUSTS, AND ESTATES (2018); 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIAN-SHIPS (4th ed. 2019); *When You Pass on, Don't Leave the Passwords Behind: Planning for Digital Assets*, PROB. & PROP., Jan./Feb. 2012, at 40; *Wills Contests – Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L.J. 1 (2011); *Digital Wills: Has the Time Come for Wills to Join the Digital Revolution?*, 33 OHIO N.U.L. REV. 865 (2007); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990).

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ESCAPING THE ESTATE PLANNING "BLUE SCREEN OF DEATH" WITH COMPETENT AND ETHICAL PRACTICES

I. INTRODUCTION

"This thorn in my side is from the tree I've planted."[1]

All it takes is one careless act to place you in the hot seat for months or years where you might watch your personal, professional, and financial life crumble around you.

An estate planner may become a defendant in a case involving an estate he or she planned in two main ways. First, the attorney may have performed his or her services in a negligent manner potentially creating exposure to malpractice liability. A recent study revealed that 10.67% of malpractice claims are based on conduct relating to estate, trust, and probate.[2] Second, the attorney's conduct may have lapsed below ethically acceptable standards.

This article reviews the exposure an estate planner may have to malpractice liability and then focuses the reader's attention on ethical issues that may arise while preparing or executing the plan. I hope that by pointing out potentially troublesome areas, the reader will avoid the ramifications of drafting a flawed estate plan or having a lapse of ethical good judgment, which may lead to the frustration of the client's intent, financial loss to the client or the beneficiaries, personal embarrassment, and possible disciplinary action.

II. THE POTENTIAL OF MALPRACTICE LIABILITY FOR NEGLIGENT ESTATE PLANNING[3]

A. Disgruntled or Omitted Beneficiary as Plaintiff

1. The Privity Wall is Erected

Because estate planning requires an especially high degree of competence, the potential malpractice liability of an estate planning attorney for negligence is great.[4] Estate planning requires a thorough knowledge of many areas of the law, such as: wills, probate, trusts, taxation, insurance, property, and domestic relations. As one commentator has stated, "Any lawyer who is not aware of the pitfalls in probate practice has been leading a Rip Van Winkle existence for the last twenty years."[5]

When discovery of errors with the will or the will execution ceremony occurs during the testator's lifetime, the testator's only loss is the cost of having another will prepared and executed (unless, of course, tax or other benefits have been permanently lost). This is normally not the type of situation where malpractice liability litigation will arise. The attorney may be able to avoid becoming a defendant by simply having the will re-executed without cost to the client and providing appropriate apologies for the inconvenience.

The problem is that errors usually do not manifest themselves until after the client's death. At this time, the testator's estate could probably sue the negligent attorney. However, the only damages would be the attorney's fees paid for drafting the will since there would be no other diminution of the estate funds caused by the

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[1] Metallica, *Bleeding Me* (track 7, Load) (1996).

[2] James Podgers, *Dubious Honor*, A.B.A. J., Dec. 2012, at 58.

[3] Portions of this section are adapted from GERRY W. BEYER, TEXAS LAW OF WILLS §§ 53.1 & 53.10 (9 Tex. Prac. 4th ed. 2020).]

[4] *See* David Becker, *Broad Perspective in the Development of a Flexible Estate Plan*, 63 IOWA L. REV. 751, 759 (1978) ("comparatively few lawyers recognize the expertise and particular talents essential to estate planning").

[5] Robert E. Dahl, *An Ounce of Prevention—Knowing the Impact of Legal Malpractice in the Preparation and Probate of Wills*, DOCKET CALL 9, 9 (Summer 1981).

error. Accordingly, if there is a flaw in the will or the will execution ceremony causing the will to be ineffective and that flaw can be traced to the conduct of the attorney in charge, it is the intended beneficiaries who now find themselves short-changed that are apt to bring a malpractice action.

Traditionally, attorneys did not have to fear actions by these injured beneficiaries because they could successfully raise the defense of lack of privity. The general rule was that the attorney did not owe a duty to an intended beneficiary, a non-client, because there was no privity between the attorney and the beneficiary. However, the view that these beneficiaries may proceed with their actions against the drafting attorney despite the lack of privity has replaced this strict privity approach.

2. The Privity Wall Begins to Crack

In 1958, the Supreme Court of California overruled the strict privity requirement in *Biakanja v. Irving*, a case involving a notary public.[6] The plaintiff received only a one-eighth intestate share of the decedent's estate rather than the entire estate because the attestation of the will was improper.[7] The court rejected the body of common law requiring privity and determined that the imposition of a duty to third persons is a matter of policy and involves the balancing of six factors:

1. the extent to which the transaction was intended to affect the plaintiff;
2. the foreseeability of harm to the plaintiff;
3. the degree of certainty that the plaintiff suffered injury;
4. the closeness of the connection between the defendant's conduct and the injury suffered;
5. the moral blame attached to the defendant's conduct; and
6. the policy of preventing future harm.[8]

The court concluded that the defendant must have been aware from the terms of the will itself that the plaintiff would suffer the very loss that occurred if faulty solemnization caused the will to be invalid.[9] The court stated that such conduct needed to be discouraged and not protected by immunity from civil liability as would have been the case if this plaintiff, the only person who suffered a loss, were denied a valid cause of action.[10] Accordingly, the court held the notary liable for the difference between the amount that the intended beneficiary would have received had the will been valid and the intestate share.[11]

Less than four years later, the California Supreme Court repeated essentially the same principle in *Lucas v. Hamm*.[12] The court held that an attorney's liability for preparing a will could extend to the intended beneficiary.[13] The court reasoned that:

> One of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to plaintiffs in the event of invalidity of the bequest was clearly foreseeable; it became certain, upon death of the testator without change of the will, that plaintiffs would have received the intended benefits but for the asserted negligence of defendant; and if persons such as plaintiffs are not permitted to recover for the loss resulting from negligence of the draftsman, no one would be able to do so, and the policy of preventing future harm would be impaired.[14]

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[6] Biakanja v. Irving, 320 P.2d 16 (Calif. 1958).

[7] *Id.* at 17.

[8] *Id.* at 19.

[9] *Id.*

[10] *Id.* at 651.

[11] *Id.*

[12] Lucas v. Hamm, 364 P.2d 685 (Calif. 1961), *cert. denied*, 368 U.S. 987 (1962).

[13] *Id.* at 689.

[14] *Id.* at 688. (The court eventually held that the attorney was not negligent for failing to master a rule against perpetuities problem.)

Most jurisdictions have followed these California cases and have held attorneys liable to the intended beneficiaries. There are now fewer than ten states remaining that have retained the privity requirement in estate planning cases.[15]

3. Current Status of the Privity Wall – Generally

As discussed above, the privity doctrine allowed only *clients* to bring a legal malpractice action against attorneys in estate planning cases.[16] As many courts began to relax the privity wall to allow beneficiaries to bring a malpractice claim, states adopted one of three approaches to legal malpractice in estate planning cases: (1) the broad cause of action; (2) the "Florida-Iowa" rule; and (3) the strict privity approach.[17]

States following the broad cause of action approach determine whether a beneficiary can bring a malpractice claim against an estate planning attorney by applying a multi-factor balancing test[18] and thus the broad cause of action approach is also known as the balancing factors test. These factors are typically like those enumerated above from the *Biakanja* case.[19]

The Florida-Iowa rule is a narrower cause of action compared to the broad cause of action.[20] States following the Florida-Iowa rule allow a beneficiary to maintain a malpractice claim against the estate planning attorney only if the client's will (as expressed in the will) is frustrated; thus, the malpractice "must be apparent on the face of the will."[21]

Lastly, some courts retain the strict privity rule so that the lack of privity "between the estate planning attorney and the beneficiaries is an absolute bar to legal malpractice claims."[22]

Some states do not adopt these three approaches strictly, but will have a "relaxed privity" approach. The relaxed privity approach generally requires privity, but with exceptions in certain circumstances (the exceptions vary from state to state).

These approaches have been adopted by various states. Although Hawaii and Montana are unclear as to whether privity is required, other states use the aforementioned rules to elucidate the privity requirement. States using the balancing factors approach generally do not require privity.[23] However, in states where privity is required, courts undertake either a relaxed[24] or strict[25] privity approach or the Florida-Iowa approach.[26] Contrastingly, Oregon, Montana and Hawaii are states that address estate planning malpractice on a case-by-case basis.[27]

4. New Mexico

New Mexico adopted the modified multi-factor balancing test in *Leyba v. Whitley*.[28] Under this test, the client's intent to benefit the plaintiff is the threshold factor. The court then will examine the following elements:

- the extent to which the transaction was intended to benefit the plaintiff;
- the foreseeability of harm to the plaintiff;
- the degree of certainty that the plaintiff suffered injury;
- the closeness of the connection between the defendant's conduct and the injury;
- the policy of preventing future harm; and

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15 *See* Martin D. Begleiter, *The Gambler Breaks Even: Legal Malpractice in Complicated Estate Planning Cases*, 20 GA. ST. U.L. REV. 277, 281-82 (2003).

16 Bradley E.S. Fogel, *Estate Planning Malpractice: Special Issues in Need of Special Care*, PROB. & PROP., July/Aug. 2003, at 20.

17 *Id.*

18 *Id.* (derived from the California Supreme Court in Lucas v. Hamm, 56 Cal. 2d 583 (Cal. 1961)).

19 Biakanja v. Irving, 320 P.2d 16, 19 (Calif. 1958)

20 *Id.*

21 *Id.*

22 *Id.*

23 *Infra*, Appendix.

24 *Infra*, Appendix.

25 *Infra*, Appendix.

26 *Infra*, Appendix.

27 *Infra*, Appendix.

28 907 P.2d 172, 179 (N.M. 1995).

- the extent to which the profession would be unduly burdened by a finding of liability.[29]

5. Texas

Texas has retained the strict privity approach.[30]

B. Personal Representative of the Estate as Plaintiff

When a personal representative brings an action against the drafting attorney for malpractice, the privity shield is of no defensive value because the client was in privity with the attorney and the personal representative is merely stepping into the client's position. The leading case demonstrating this principle is *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.,*, a 2006 Supreme Court of Texas case in which the executors sued the attorneys who prepared the testator's will asserting that the attorneys provided negligent advice and drafting services.[31] The executors believed that the testator's estate incurred over $1.5 million in unnecessary federal estate taxes because of the malpractice.[32] The briefs reveal that the main problem was that the testator did not form a family limited partnership or take other steps that could have led to a lowering of the estate's value.

Both the trial and appellate courts agreed that the executors had no standing to pursue the claim because of lack of privity.[33] The appellate court explained that privity was mandated by a prior Supreme Court of Texas case and thus the court had no choice but to affirm the trial court's grant of a summary judgment in favor of the attorneys.[34]

The Supreme Court of Texas reversed and held that "there is no legal bar preventing an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent's estate planners."[35] The court did not express an opinion as to whether the attorneys' conduct actually amounted to malpractice.[36]

Other states with a strict privity approach that have followed Texas and allowed the personal representative of the decedent's estate to bring a legal malpractice claim against the estate planning attorney include Florida, Maine, Montana, New York, and Ohio.

The Florida Supreme Court has recognized a limited exception to the strict privity requirement of the intended third party beneficiary.[37] In *Espinosa v. Sparber et al.*, the Florida Supreme Court concluded there was no extrinsic evidence to show the plaintiff was an intended third party beneficiary.[38] However, the court did state that "[the decedent's] estate, however, stands in the shoes of the testator and clearly satisfies the privity requirement."[39]

In 1999, Maine's Supreme Judicial Court addressed the issue of legal malpractice in estate planning in *Nevin v. Union Trust Co.*[40] The Supreme Judicial Court concluded that "[w]hen there is a personal representative to assert the financial claims on behalf of the estate . . . the better rule appears to be not to allow individual beneficiaries to assert claims . . . ."[41] Maine restricted their exception to the strict privity approach by stating a third party beneficiary does not have standing when there is no privity between them and the estate planning attorney and when there is a personal representative of the estate.[42]. Maine follows the reasoning of Texas in declaring that the personal representative of

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[29] *Id.*

[30] Barcelo v. Elliott, 923 S.W.2d 575 (Tex. 1996).

[31] Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780 (Tex. 2006).

[32] *Id.* at 782.

[33] Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 141 S.W.3d 706 (Tex. App.—San Antonio 2004).

[34] *Id.* at 708 (citing Barcelo v. Elliott, 923 S.W.2d 575 (Tex. 1996)).

[35] *Belt*, 192 S.W.3d at 782.

[36] *See id.* at 789.

[37] Espinosa v. Sparber et al., 612 So. 2d 1378 (Fla. 1993).

[38] *Id.* at 1380.

[39] *Id.*

[40] Nevin v. Union Trust Co., 726 A.2d 694 (Me. 1999).

[41] *Id.* at 701.

[42] *Id.*

the estate stands in the shoes of the client (therefore, privity exists).[43]

In 2010, New York agreed with Texas that the estate stands in the shoes of the decedent, and thus "has the capacity to maintain the malpractice claim on the estate's behalf."[44]

In *Hosfelt v. Miller*, the Ohio Court of Appeals held that the personal representative of a decedent's estate stands in the shoes of the decedent.[45] Although Ohio has not specifically examined the issue of a personal representative of the estate as the plaintiff, "[t]he outcomes of various Ohio cases seem to presume . . . that a personal representative of the estate has standing to assert legal malpractice claims."[46]

Kansas is the only state up to date that has distinguished the reasoning of the Texas Supreme Court in *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.* The Kansas Supreme Court stated that "a cause of action does not survive in favor of a personal representative of a decedent unless it accrued in favor of the decedent in his or her lifetime."[47] The Kansas Supreme Court only distinguished *Belt* in regards to when a legal malpractice claim accrues, therefore, Kansas does not completely reject the notion of a personal representative of the decedent's estate as the plaintiff in a legal malpractice suit against the estate planning attorney.[48]

III. POTENTIALLY NEGLIGENT CONDUCT

A. Poor Client Interactions

1. Failure to Gather Sufficient Information

The attorney must conduct a very detailed client interview and compile a vast array of data before preparing the estate plan. This includes gathering information concerning the client's assets, liabilities, family situation, disposition desires, and related matters. Failure to obtain relevant facts makes it difficult or impossible to draft an appropriate estate plan. A client may not reveal certain important information merely because the attorney did not ask; moreover, the client may not realize the material's significance. Detailed client interview forms and checklists increase the likelihood of discovering relevant information.

2. Believing Client Without Independent Verification

A client unskilled in legal matters may inadvertently (or even intentionally) mislead the estate planner. To avoid unexpected surprises, the attorney should ask for supporting documentation whenever possible. This may include:

1. Information regarding family matters—marriages, divorces, birth of children, adoptions;
2. Ownership of assets—deeds, stock certificates, bonds;
3. Employee benefits—retirement plans, bonus plans, annuities;
4. Bank accounts—statements, passbooks, certificates of deposit, account contracts, signature cards;
5. Debts—promissory notes, deeds of trust, mortgages;
6. Life insurance—policies and beneficiary designations; and
7. Other relevant matters—powers of attorney, directives to physicians.

Clients frequently believe that documents reflect specific facts when in actuality they do not. A simple example is instructive. The client tells the attorney that he has a large certificate of deposit in his name and his best friend's name. The client explains he wants this certificate to pass to his friend, rather than to his family under his will. He assures the attorney that the certificate is in survivorship form and the attorney does not independently verify this assertion. When the client dies, the attorney discovers that the friend's name was either not on the certificate or that the

[43] *Id.*

[44] Estate of Schneider v. Finmann, 907 N.Y.2d 119, 121 (N.Y. 2010) (quoting Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 192 S.W.3d 780, 787 (Tex. 2006)).

[45] Hosfelt v. Miller, No. 97-JE-50, 2000 WL 1741909 (Ohio Ct. App. 2000).

[46] *Id.* at *5.

[47] Jeanes v. Bank of America, *N.A.*, 295 P.3d 1045, 1052 (Kan. 2013).

[48] *Id.* at 1051.

certificate lacked survivorship language. The friend goes away empty-handed and the client's intent is frustrated.

3. Neglecting Communications With Client

The attorney must be aware of the importance in maintaining communication with the client both during and after the preparation of the estate plan. During the estate planning process, the client may have questions or wish to make changes. This is often the case once a client begins thinking seriously about the disposition of family heirlooms. A better estate plan will result if the attorney promptly returns telephone calls and answers letters.

After the estate plan is complete, the attorney should maintain contact with the client unless the attorney makes it very clear that the representation does not continue beyond document execution. The client should understand that a change in circumstances necessitates a change to the will. This may include birth, marriage, adoption, death, substantial increase or decrease in assets, change in state of domicile, or change in state or federal law.

4. Failure to Act Timely

An estate plan should be completed in a timely fashion.[49] Obviously, this is imperative if the client is elderly or seriously ill. Prompt estate planning is also necessary even if a client is young and in perfect health at the time of the initial interview; the person could sustain a fatal automobile accident or heart attack on the way home. Thus, may be wise to have the client execute a simple will, even a holographic one, at the time of the initial interview to accomplish at least a portion of the client's estate planning objectives. A one page will leaving all the client's property to the surviving spouse and appointing the spouse as the independent executor is often a desirable alternative to an intestate division between the spouse and children; such as would occur with community property if all the deceased spouse's descendants were not also the surviving spouse's descendants[50] or if the deceased spouse owned separate property.[51]

5. Failure to Document Unusual Requests and Recognize Situations Leading to a Will Contest

If a client makes an estate planning decision that the attorney fears may appear suspicious to others or might be viewed as evidence of the attorney's negligence, special steps are necessary. For example, a married individual may want to leave the entire estate to the spouse or more than amount not subject to federal or state estate tax to a non-spouse and thus incur estate tax liability that could have easily been avoided. The attorney should outline and explain the potential outcomes to the client in writing and then have the client sign a copy acknowledging that the client is aware of the ramifications of the decision.

The attorney must always be on guard. when drafting unusual requests or instruments that may supply incentive for someone to contest a will or other estate planning documents. Anytime an individual takes more through intestacy or under a prior will, the potential for a will contest exists, especially if the estate is large. The prudent attorney must recognize situations that are likely to inspire a will contest and then take steps to reduce the probability of a will contest and the chances of its success.[52]

B. Errors in Will Drafting[53]

1. Poor Proofreading of Documents

Many mistakes in estate planning documents result from poor proofreading. In a fast-paced office, time pressure may restrict the attorney's opportunity to carefully review the documents.

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[49] *See generally* Gerald P. Johnston, *Legal Malpractice in Estate Planning and General Practice*, 17 MEM. ST. U. L. REV. 521, 534-36 (1987) ("Procrastination may be an even greater problem in the trusts and estates field than it is in other areas.").

[50] TEX. EST. CODE ANN. § 201.003 (West 2014).

[51] *Id*. § 201.002.

[52] *See* Gerry W. Beyer, *Wills Contests – Prediction and Prevention*, 4 EST. PLAN. & COMM. PROP. L.J. 1 (2011).

[53] This section was prepared under Texas law. The general principles, however, should be applicable under the law of most jurisdictions.

Under no circumstances should a client sign an estate planning document without both the attorney and the client carefully reading and analyzing the final draft. It may also be advisable for another attorney to review the documents. Major errors (e.g., a misplaced decimal point in a legacy or an important provision omitted), as well as seemingly minor errors (misspelling of beneficiary's name), may provide the focus of later litigation.

2. No Specific Provision Regarding Ademption and Lapse

Ademption, i.e., failure of a gift, occurs when the item given in the will is no longer in the testator's estate at time of death.[54] For example, if the will gives Blackacre to X and testator sells or gifts Blackacre prior to death, X takes nothing under this provision of the will. In addition, the intended beneficiary will normally not receive the equivalent value via proceed tracing or otherwise.[55] Accordingly, it is important for specific gifts to contain an express statement of the testator's intent if the item is not in the estate. The testator should explain either that ademption causes the intended beneficiary to go home empty-handed or provide a substitute gift (e.g., other specific property, money, or a greater share of the residuary).

Unlike ademption, lapse occurs when a gift fails because the beneficiary predeceases the testator. Unless the anti-lapse statute applies, the subject matter of the gift will then pass under the will's residuary clause, or, if the lapsed gift was the residuary, via intestacy. The anti-lapse statute saves the gift for the beneficiary's descendants if the beneficiary was a descendant of the testator (e.g., child, grandchild) or if the beneficiary was a descendant of the testator's parent (e.g., brother, sister, niece, nephew).[56]

To prevent the result of lapse from being governed by rules that may not comport with the testator's intent, each gift should expressly indicate who receives the property in the event of lapse. For example, the testator could make an express gift over to a contingent beneficiary, indicate that the gift passes to the descendants of a deceased beneficiary, or merely state that the gift passes via the residuary clause.

3. Including Payment of "Just Debts" Provision

The traditional, but inappropriate, direction to the executor to pay "just debts" should not be included in a will.

> A specific will clause requiring that the executor pay all of the testator's "just debts" raises the question whether the executor is required to pay debts barred by limitations, and whether the executor is required to pay installments on long-term indebtedness that are not yet due.[57]

4. Failure to Discuss Exoneration and Abatement

Texas had long followed the doctrine of exoneration, that is, debts on specifically gifted property paid from other estate assets so that the beneficiary receives the asset unencumbered, rather than just the testator's equity.[58] The doctrine has been abolished for wills executed on or after September 1, 2005. A specific gift passes subject to each debt secured by the property that exists on the date of the testator's death under Estates Code §§ 255.252, .253. However, the testator may expressly provide in the will for the debts against a specific gift to be exonerated. Accordingly, the will should expressly indicate whether debts against specifically gifted property are to be exonerated and if so, from what property.

While exoneration is possible, the Estates Code mandates the order in which gifts fail if the estate has insufficient property to satisfy all

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[54] *See* Rogers v. Carter, 385 S.W.2d 563 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.).

[55] *See* Shriner's Hospital for Crippled Children of Texas v. Stahl, 610 S.W.2d 147 (Tex. 1980); Opperman v. Anderson, 782 S.W.2d 8 (Tex. App.—San Antonio 1989, writ denied).

[56] TEX. EST. CODE ANN. §§ 255.153, .154 (West 2014).

[57] Bernard E. Jones, *10 Drafting Mistakes You Don't Want to Make in Wills and Trusts (and How to Avoid Them)*, in UNIVERSITY OF TEXAS SCHOOL OF LAW CLE, 8TH ANNUAL ESTATE PLANNING, GUARDIANSHIP, AND ELDER LAW CONFERENCE, Tab B, at 5 (2006).

[58] *See* Currie v. Scott, 187 S.W.2d 551 (Tex. 1945).

testamentary gifts.[59] This order may or may not be in accordance with the testator's intent. Thus, the attorney must ascertain the relative strength of each gift and ensure the testator's primary beneficiaries receive preferential treatment either under the statute or by expressly altering the abatement order.

5. Failure to Extend Survival Period

Unless the will states otherwise, a beneficiary need only outlive the testator by 120 hours to take under the will.[60] This length of time is typically too short. The purpose of requiring survival is to prevent multiple administrations of the same property within a short period of time and thus save administration expenses and estate tax. This goal, however, not effectuated by a 120 hour period; probate takes considerably longer than five days. Therefore, a testator should consider extending the survival period to a more realistic length of time, e.g., three, six, nine, or twelve months. (Note that a survival period of over six months will prevent a gift to a surviving spouse from qualifying for the marital deduction).[61]

6. Failure to Address Tax Apportionment

Apportionment refers to whether transfers that occur because of a person's death (e.g., gifts under a will, life insurance proceeds, survivorship bank accounts) will be reduced by the amount of estate tax attributable to the transfers. The Estates Code provides a detailed apportionment scheme.[62] This scheme may or may not reflect the testator's intent. As a result, the testator must be carefully questioned regarding tax apportionment desires in cases where the estate may be large enough to have estate tax liability.

7. Failure to Address Pretermitted, Adopted, and Non-Marital Children

Under certain circumstances, children born or adopted after will execution are entitled to a share of the testator's estate.[63] This automatic alteration of an established estate plan could have a devastating effect on the testator's disposition desires. For example, assume that the testator executes a will leaving the testator's entire estate to the American Red Cross. Thereafter, testator has a child and then dies without changing the will. The testator's intent to leave property to the American Red Cross would be completely ignored and the entire estate would pass to the child.

Three methods may be used to avoid the application of the pretermitted child statute:

1. The will could expressly provide for the pretermitted heir, e.g., "I leave all my property to my children."
2. The will could mention the pretermitted child, e.g., "I intentionally make no provision for any child who may be hereafter born or adopted."
3. The testator may provide for the pretermitted child in some other manner such as by naming the child as a beneficiary of a life insurance policy.

All wills should address the pretermitted child issue, even those of individuals beyond child bearing years. It is becoming increasingly common for parents to adopt grandchildren and older individuals to adopt disadvantaged children — situations such as this increase the likelihood of triggering the pretermitted child statute.

The attorney must also carefully question the testator to ascertain the testator's desires regarding children who may be adopted or born out-of-wedlock. The testator may or may not wish these children to share in the estate in the same manner as biological children or children born during marriage. This issue is of particular importance when the testator makes class gifts, especially to grandchildren.[64]

8. Inadequate Incorporation by Reference

If the testator intends to incorporate an extraneous document by reference, the

[59] TEX. EST. CODE ANN. § 355.109 (West 2014).

[60] *Id.* §§ 121.101, .102.

[61] I.R.C. § 2056(b)(3) (1997).

[62] TEX. EST. CODE ANN. § 124.006 (West 2014).

[63] *Id.* § 252.052-.056.

[64] *See* Begleiter, *supra* note 15, at 232.

practitioner must make certain the document is in existence at the time of incorporation and sufficiently identified so that no other document could reasonably be referred to by the description.[65] To avoid potential problems, especially if the document is short, the attorney should consider including the material within the body of the will rather than relying on an incorporation. When a pour over provision is included, the Estates Code requirements should be satisfied.[66]

9. Failure to Externally and Internally Integrate Testamentary Documents

External integration is the process of establishing the testator's will by interpreting and construing various testamentary instruments left by the testator. The documents are pieced together to give effect to the latest statement of the testator's intent. Thus, a new will should be accurately dated and revoke all prior wills and codicils to clarify the testator's most recent desires. Because codicils increase the chance of external integration problems, they should be avoided unless special circumstances exist.

Proper internal integration guarantees the will fits neatly together as a unified document. Print all pages on the same kind and size of paper, use the same type style throughout the will, print the will with the same ribbon, ink cartridge, or toner cartridge, number each page in *ex toto* format (e.g., page 3 of 5), and avoid blank spaces. Additionally, securely fasten all pages together. These precautions help reduce the chance of the testator or third parties inserting or removing pages. Moreover, these steps easily demonstrate that the pages present at the time of the will execution ceremony are the same pages offered for probate.

10. Imprecise Use of Language

Ambiguity is one of the most frequent causes of will litigation. Care must be taken to phrase the will clearly and precisely. Choose words to avoid doubt as to their intended meaning. If potentially ambiguous words are used, unambiguous definitions should be included. An attorney should be especially leery of using the following words and phrases: *cash*,[67] *money*,[68] *funds*,[69] *personal property*,[70] *issue*,[71] and *heirs*.[72] The descriptions of specific gifts[73] and designations of beneficiaries[74] should be precise even though Texas law now permits extrinsic evidence to contradict the clear language of the will.[75]

Instructions in a will regarding the disposition of property must be mandatory to be enforceable. Precatory language, such as *I wish*, *I would like*, and *I recommend*, is normally considered suggestive in nature and not binding on the beneficiary.[76] Precatory language has no place in a will. The testator should use a non-testamentary separate document if he or she wishes to express

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[65] *See* Allday v. Cage, 148 S.W. 838 (Tex. Civ. App.—Fort Worth 1912, no writ).

[66] TEX. EST. CODE ANN. § 254.001 (West 2014); *contra* Unif. Probate Code § 2-513. A limited number of states and the UPC authorize a testator to use a separate writing to dispose of tangible personal property even though that writing: (a) does not meet the requirements of a will and thus could not be probated as a testamentary instrument, (b) was not in existence at the date of will execution and thus could not be incorporated by reference, and (c) exists for no reason other than to dispose of property at death and thus could not be a fact of independent significance. *Id.* Texas is *not* one of theses states and a will should not use this technique.

[67] Stewart v. Selder, 473 S.W.2d 3, 9 (Tex. 1971).

[68] West Tex. Rehabilitation Ctr. v. Allen, 810 S.W.2d 870, 874 (Tex. App.—Austin 1991, no writ).

[69] *Id.*

[70] Gilkey v. Chambers, 207 S.W.2d 70, 73 (Tex. 1947).

[71] Munger v. Munger, 298 SW 470, 475 (Tex. Civ. App.—Dallas 1927, writ ref'd).

[72] Federal Land Bank v. Little, 130 Tex. 173, 179; 107 S.W.2d 374, 377 (1937).

[73] In re Estate of Cohorn, 622 S.W.2d 486, 488 (Tex. App.—Eastland 1981, writ ref'd n.r.e.).

[74] Hultquist v. Ring, 301 S.W.2d 303, 306 (Tex. Civ. App.—Galveston 1957, writ ref'd n.r.e.).

[75] TEX EST. CODE ANN §§ 255.451-.455 (legislatively overruling San Antonio Area Foundation v. Lang, 35 S.W.3d 636, 637 (Tex. 2000)).

[76] *See* Wattenburger v. Morris, 436 S.W.2d 234, 239-40 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.); Najvar v. Vasek, 564 S.W.2d 202, 210 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

non-mandatory desires. If the testator insists on placing such language in the will, the attorney should add language indicating that the suggestions are merely precatory and have no binding effect.

11. Inadvertent Creation of Election Will

"The principal of election is, that he who accepts a benefit under a will, must adopt the whole contents of the instrument, so far as it concerns him; conforming to its provisions, and renouncing every right inconsistent with it."[77] Election provisions are occasionally placed in wills where one spouse wants to dispose of the entire interest in some or all of the community property. The surviving spouse may consent to the disposition of the surviving spouse's share of the community assets because the will gives the spouse a significant interest in the deceased spouse's community or separate property. Attorneys must be careful, however, not to inadvertently create an election situation. Although there is a presumption that an election will be imposed only if the will is open to no other construction, an attorney could create an election scenario without having this intention.[78] Thus, the will should include a provision expressly stating the testator's intent regarding election.

12. Violation of Rule Against Perpetuities

The Texas Constitution provides that "[p]erpetuities . . . are contrary to the genius of a free government, and shall never be allowed."[79] Under the Rule Against Perpetuities, an interest is not good unless it must vest, if at all, not later than twenty-one years after some life in being at the time of the creation of the interest, plus a possible period of gestation.[80] Drafting wills demands extra precaution to ensure the rule is not violated. If the Rule is violated, the Texas courts must reform or construe the interest to effect the ascertainable general intent of the testator.[81]

13. Inadequate Tax Planning

An attorney, even one who infrequently prepares estates with tax consequences, must be able to recognize situations where tax planning is needed and then ensure the testator obtains proper advice. A commonly cited excuse for inadequate tax planning is a false belief that the estate is too small to incur estate tax. While property may not be in a decedent's probate estate, this does not mean it will escape taxation. Life insurance proceeds, trusts, retirement plans, and other assets may be includable in the decedent's estate for tax purposes. Thus, the attorney must inquire about all types of assets and determine whether the client will obtain significant additional assets (e.g., via an inheritance from a wealthy parent). The areas posing the greatest danger of error are special use valuation, the generation-skipping tax, and the marital deduction.[82] It is beyond the scope of this article to review the potential errors in tax planning.

14. Failure to Provide for Independent Administration

If the testator wishes to obtain the benefits of independent administration, appropriate language must be inserted in the testator's will.[83] Failure to include this language means additional delay, either because a full dependent administration is needed or because of the time it takes to obtain consent of all beneficiaries and court approval of an independent administration. To avoid these problems, it is essential that the testator's desires regarding administration be documented in the will.

15. Lack of Provisions Regarding Personal Representative

A will should indicate at least one executor who would serve if the named executor is unwilling or unable to serve (e.g., dies, resigns, is or becomes incompetent, or does not want to assume

[77] Philleo v. Holliday, 24 Tex. 38, 45 (1859).

[78] Wright v. Wright, 154 Tex. 138, 143; 274 S.W.2d 670, 674 (1955).

[79] TEX. CONST. art. I, § 26.

[80] TEX. PROP. CODE ANN. § 5.043(a) (West 2007).

[81] *Id.*

[82] *See* Begleiter, *supra* note 15, 238-39.

[83] TEX. EST. CODE ANN. §§ 401.001-.008 (West 2014).

fiduciary responsibilities). Naming an alternate/successor executor will save the time and expense of locating a successor as well as having the estate managed by a person selected by the testator rather than by the court or the beneficiaries.[84]

Once designated, the personal representative must post bond unless bond is waived in the testator's will,[85] the personal representative is a corporate fiduciary,[86] or bond is waived by the court in an independent administration.[87] Although bond does provide some protection to beneficiaries from evil personal representatives, bond is expensive and reduces the amount of property available to the beneficiaries. The client's desires regarding bond must be ascertained and those wishes made clear in the will.

The Estates Code provides the method for determining a personal representative's compensation.[88] The testator may have a different intent, either that the personal representative is to serve without compensation or that a different method be used to compute compensation. Thus, the will should contain an express statement of testator's intent regarding compensation for the personal representative.[89]

C. Improper Will Execution[90]

The will execution ceremony provides a fertile field for error. One researcher concluded that "[t]he majority of estate planning malpractice cases have involved execution errors."[91] The importance of the ceremony is manifest; without a proper execution, the will has no effect regardless of the testator's intent. A careless, hurried, or casual ceremony increases the likelihood that an error will occur. The best way to increase the chances that the ceremony encompasses all of the required formalities is to have a detailed form or checklist of elements and follow it closely for every ceremony.[92]

1. Ceremony Procedure

The will execution ceremony should be conducted by the attorney, not by the client or the attorney's staff. There are reports of attorneys mailing or hand-delivering unsigned wills to clients along with will execution instructions.[93] Even if the instructions are correct, there is little assurance that they will be correctly followed.[94] Some attorneys may allow law clerks or paralegals to supervise the ceremony. This practice is questionable not only because it increases the probability of error, but because the delegation of responsibility may be considered a violation of professional conduct rules proscribing the aiding of a non-lawyer in the practice of law.[95]

The testator, the disinterested witnesses, the notary, and the supervising attorney are the key players in the will execution ceremony. In the normal situation, no one else should be present. It

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84 *Id.* § 404.005 (independent administration); §§ 361.152-.155 (dependent administration)

85 *Id.* § 305.101.

86 *Id.*

87 *Id.* § 401.005.

88 TEX. EST. CODE ANN. §§ 352.001-.004 (West 2014).

89 *See* Stanley v. Henderson, 139 Tex. 160, 164, 162 S.W.2d 95, 97 (1942).

90 This section was prepared under Texas law. The general principles, however, should be applicable under the law of most jurisdictions.

91 Begleiter, *supra* note 15, at 218.

92 *See* Gerry W. Beyer, *The Will Execution Ceremony — History, Significance, and Strategies*, 29 S. TEX. L. REV. 413 (1988); Gerry W. Beyer, *How to Conduct a Modern Texas Will Execution*, EST. PLAN. DEVEL. FOR TEX. PROF., Jun. 2015, at 1.

93 *See* Hamlin v. Bryant, 399 S.W.2d 572, 575 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.). *See generally* Gerald P. Johnston, *Legal Malpractice in Estate Planning and General Practice*, 17 MEM. ST. U.L. REV. 521, 529 n.43 (1987).

94 *See* Begleiter, *supra* note 15, at 221 n.160.

95 *See* Palmer v. Unauthorized Practice Comm. of the State Bar, 438 S.W.2d 374, 376 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ); Gerry W. Beyer & Kerri M. Griffin, *The Role of Legal Assistants in the Estate Planning Practice*, EST. PLAN. DEV. FOR TEX. PROF., Jan. 2012, at 1, 2-3. *See generally* Gail E. Cohen, *Using Legal Assistants in Estate Planning*, PRAC. LAW., Oct. 15, 1984, at 73; Robert S. Mucklestone, *The Legal Assistant in Estate Planning*, 10 REAL PROP. PROB. & TR. J. 263 (1975).

is especially important to make certain no beneficiary under the will attends the ceremony as a precaution against claims of overreaching and undue influence.

2. The Testator's Signature

The will must contain the testator's signature.[96] An unsigned will has no effect, regardless of other evidence proving the testator's intent, unless the testator's signature appears on the self-proving affidavit in which case the affidavit's signature is sufficient.[97] If a testator is using a proxy signatory, appropriate documentation of why the testator is not personally signing is needed as well as evidence that the proxy signed at the testator's direction and in the testator's presence.

When wills for several people are being executed simultaneously (e.g., husband and wife), the possibility exists that they will sign the wrong wills.[98] In this case, neither will would be valid; the signing testator lacked intent for the signed document to be the will and the other document lacks the testator's signature. To avoid this possibility, only one will should be executed at a time and the wills should be inspected closely to ascertain that they were not inadvertently switched.

3. Lack of Sufficient Witnesses

A non-holographic will requires a minimum of two competent witnesses.[99] Failure to have at least two witnesses is fatal to will validity. If the witnesses sign the self-proving affidavit rather than the will, the attestation will be sufficient although the self-proving affidavit fails.[100]

Although the testator is not required to actually see the witnesses sign the will, the attestation must take place in the testator's presence.[101] The term presence means a conscious presence, that is, "the attestation must occur where testator, unless blind, is able to see it from his actual position at the time, or at most, from such position as slightly altered, where he has the power readily to make the alteration without assistance."[102]

A will beneficiary should not serve as one of the two required witnesses to a non-holographic will. Under Texas law, a gift to an attesting beneficiary is generally void.[103] If the beneficiary is an heir who would have inherited had there been no will, then the beneficiary takes the smaller of the gift under the will and what the beneficiary's intestate share would have been.[104] Alternatively, the gift may be saved via corroboration by one or more disinterested and credible persons.[105]

4. Improperly Completed Self-Proving Affidavit

A self-proving affidavit may be invalid for many reasons. The notary might fail to swear the testator or witnesses.[106] The testator and both witnesses might not sign the affidavit. Although the testator or witnesses sign the affidavit, one or more may not have signed the will. In this case, the signatures on the affidavit may be used to bootstrap the will but the self-proving affidavit would be ineffective.[107] Although not a condition to the affidavit's validity, the notary should record the ceremony in the notary's record

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[96] TEX. EST. CODE ANN. §§ 251.051-106 (West 2014).

[97] *Id.*

[98] *See* Estate of Pavlinko, 148 A.2d 528 (1959).

[99] TEX. EST. CODE ANN. §§ 251.051-.106 (West 2014).

[100] *Id.*

[101] *Id.*

[102] Nichols v. Rowen, 422 S.W.2d 21, 24 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.); *see also* Morris v. Estate of West, 643 S.W.2d 204, 206 (Tex. App.—Eastland 1982, writ ref'd n.r.e.) (attestation deemed to be outside of testator's presence because testator could not have seen witnesses sign without walking four feet to office door and fourteen feet down a hallway).

[103] TEX. EST. CODE ANN. § 254.002 (West 2014).

[104] *Id.*

[105] *Id.*

[106] *See* Broach v. Bradley, 800 S.W.2d 677 (Tex. App.—Eastland 1990, writ denied) (self-proving affidavit invalid because the notary had not properly sworn the witnesses).

[107] TEX. EST. CODE ANN. §§ 251.051-.106 (West 2014).

book.[108] This record may provide helpful evidence if a will contest ensues.

5. Execution of Duplicate Originals

A testator should never execute duplicate originals. Problems arise when, at time of death, all of the duplicate originals cannot be located. The general presumption is that the destruction of one duplicate original by the testator with the intent to revoke operates to revoke all copies. However, this presumption may be rebutted by evidence that to avoid confusion resulting from having multiple last wills, the testator destroyed one of them intending to strengthen the validity of the other.[109]

D. Errors in Trust Drafting[110]

Special opportunities for error exist in trust drafting. Many of the items discussed in the will drafting section are applicable to trust drafting as well.

1. Failure to Address Principal and Income Issues

The Trust Code contains extensive provisions regarding the method of crediting a receipt or charging an expenditure to the principal or income of the trust.[111] Depending on the circumstances, this may or may not be in accordance with the settlor's intent. Thus, the trust instrument should contain an express provision addressing how to allocate principal and income (e.g., specific rules, follow the Trust Code rules, or left to the trustee's discretion).

2. Omission of Spendthrift Provision

If the trust is silent on the issue, the beneficiary has tremendous control over the beneficiary's trust interest; the beneficiary may sell it or give it away. In addition, the beneficiary's creditors may reach the beneficiary's interest to satisfy their claims. However, the vast majority of settlors want to prevent the beneficiary from transferring the trust interest either voluntarily or involuntary. Therefore, a spendthrift provision is appropriate in almost all trusts.[112]

3. Misstating Ability to Revoke

The settlor must decide on the revocability of the trust. If the settlor desires flexibility, retention of the ability to revoke is paramount; however, if the settlor seeks tax benefits, the trust usually must be irrevocable. Under Texas law, a trust is presumed revocable unless the trust instrument expressly makes it irrevocable.[113] Thus, if the trust is created for tax reasons and lacks an express irrevocability provision, the tax advantages may be lost. Likewise, if the settlor actually intends a revocable arrangement, inclusion of an irrevocability clause would be intent defeating.

E. Other Troublesome Mistakes

1. Improper Document Preservation

It is important for estate planning documents to be stored in appropriate locations. If documents are not available to the appropriate person when needed, the client may lose the benefits of executing the documents. The disposition of an executed document is simple in some cases. For example, a medical power of attorney should be delivered to the agent. Yet, in other cases, the proper receptacle for the document is less easily ascertained.

The proper disposition of a will is often a controversial issue. The original will should normally be stored in a secure location where it may be readily found after the testator's death. Thus, some testators keep the will at home or in a safe deposit box, while others prefer for the drafting attorney to retain the will. The attorney should not suggest retaining the original will

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[108] TEX. GOV'T CODE § 406.014 (West 2017).

[109] *See* Combs v. Howard, 131 S.W.2d 206 (Tex. Civ. App.—Fort Worth 1939, no writ).

[110] This section was prepared under Texas law. The general principles, however, should be applicable under the law of most jurisdictions.

[111] TEX. PROP. CODE ANN. ch. 116 (West 2007).

[112] *Id.* § 112.035 ("A declaration in a trust instrument that the interest of a beneficiary shall be held subject to a "spendthrift trust" is sufficient to restrain voluntary or involuntary alienation of the interest by a beneficiary to the maximum extent permitted by [the Trust Code].")

[113] *Id.* § 112.051(a).

because the original is then less accessible to the testator. When the drafting attorney retains a will, the testator may feel pressured to hire the attorney to update the will and the executor or beneficiaries may feel compelled to hire that attorney to probate the will. Some courts in other jurisdictions hold that an attorney may retain the original will only "upon specific unsolicited request of the client."[114]

If a will contest is likely, the client must be informed of the dangers of retaining the will, i.e., it increases the opportunity for unhappy heirs to locate and then alter or destroy the will. The attorney may need to urge the testator to find a safe storage place that will not be accessible to the heirs, either now or after death, but yet a location where the will is likely to be found and probated. Simultaneously, make certain not to suggest that the attorney may retain the will.

2. Failure to Provide Client With Sufficient Post-Estate Plan Instructions

After the will and other estate planning documents are executed, the client should be informed of several important matters. For example, the client needs to realize that he or she must reconsider the plan if the client's life or circumstances change due to one of the following:

- Births or adoptions,
- Deaths,
- Divorces,
- Marriages,
- Change in feelings toward beneficiaries and heirs,
- A significant change in size or composition of estate,
- Change in state of domicile, or
- Change in state or federal law.

The client must also be told that mark-outs, interlineations, and other informal changes to estate planning documents, especially attested wills, are usually of no effect.[115] Not only should these and other matters be discussed with the client in person, they should also be provided to the client in written form.

3. Failure to Use Disclaimers Where Appropriate

Texas law permits the beneficiary of a will, trust, insurance policy or like arrangement, as well as an heir, to disclaim property.[116] A proper disclaimer has many potential benefits including tax savings under I.R.C. § 2518, liability avoidance (e.g., property has potential liability connected with it such as buried hazardous waste), and protecting assets from most of the disclaimant's creditors. The attorney must be aware of these and other reasons to disclaim property and give advice accordingly.[117]

4. Failure to Plan for Disability and Death

Research has demonstrated that approximately one-half of the population of the United States will be disabled for ninety days or more.[118] A person age sixty or younger is more likely to become disabled within the next year than to die. Nonetheless, attorneys are often lax in planning for the possibility that their clients will suffer from a debilitating disease, accident, or general deterioration of mental function due to senility or other disabling cause. Attorneys must recognize that disability planning is at least as important as death planning and make appropriate arrangements. The techniques which the attorney and client should evaluate include the following:

- Stand-by trust,
- Wage replacement insurance,
- Long-term care insurance,
- A durable power of attorney for property management,
- A medical power of attorney,

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[114] State v. Gulbankian, 196 N.W.2d 733, 736 (Wis. 1972).

[115] *See* Leatherwood v. Stephens, 24 S.W.2d 819 (Tex. Comm'n App. 1930, judgment adopted).

[116] TEX. EST. CODE ANN. §§ 122.001-.153 (West 2014); TEX. PROP. CODE ANN. § 112.010 (West 2015); TEX. PROP. CODE ANN. ch. 240 (West 2015).

[117] *See generally* Ronald A. Brand & William P. LaPiana, Disclaimers in Estate Planning: A Guide to Their Effective Use (1990); Bruce D. Steiner, *Disclaimers: Post-Mortem Creativity*, PROB. & PROP., Nov./Dec. 1990, at 43.

[118] *See* John L. Lombard, Jr., *10 Reasons Why You Should Be Recommending the Durable Power of Attorney to Clients*, PROB. & PROP., Jan./Feb. 1987, at 28.

- A mental health treatment declaration,
- A self-declaration of guardian,
- Directive to physicians,
- An anatomical gift statement, and
- A body disposition instrument.

IV. POTENTIAL EXPOSURE FOR BREACHES OF PROFESSIONAL RESPONSIBILITY

A. Estate Planning for Both Spouses[119]

Today you are meeting with a new estate planning client. During the initial telephone contact, the client indicated a need for a simple plan, "nothing too complex" were the exact words. As you enter your reception area to greet the client, you are surprised to see *two* people waiting—the client and the client's spouse. The client explains that the client wants you to prepare estate plans for both of them. Your mind immediately becomes flooded with thoughts of the potential horrors of representing both husband and wife. You remember stories from colleagues about their married clients who placed them in an awkward position when one spouse confided sensitive information that would be relevant to the estate plan with the admonition to "not tell my spouse." You also recall the professional ethics rules which prohibit representing clients with conflicting interests. What do you do? What is the best way to protect the interests and desires of the client and the client's spouse and still avoid ethical questions as well as potential liability?

This scenario is replayed many times each day in law offices across Texas and the United States. The joint representation of a husband and wife in drafting wills and establishing a coordinated estate plan can have considerable benefits for all of the participants involved. However, depending on the circumstances, joint representation may result in substantial disadvantages to either or both spouses and may subject the drafting attorney to liability. The attorney's duties of loyalty and confidentiality in joint representations, as well as how conflict situations should be handled, whether the conflict is apparent initially or arises during the representation, can be gleaned from the Texas Disciplinary Rules of Professional Conduct.

1. Models of Representation for Married Couples

When a married couple comes to an attorney's office for estate planning advice, it is likely they are unaware of the different forms of representation that are available, in addition to the specific factors they must consider to determine which form of representation is appropriate. The attorney has the burden to use his or her skills of observation and information gathering and apply the relevant professional conduct rules to help the couple to make a choice that best fits their situation.

a. Family Representation

Under the concept of family representation, the attorney represents the family as an entity rather than its individual members. This approach attempts to achieve a common good for all of the participants and thus the attorney's duty is to the family interest, rather than the desires of one or both of the spouses. However, representation of the family does not end the potential for conflict between the spouses, instead it broadens the potential basis of conflict by adding other family members to the equation. Further, even where there is no conflict of purposes between the spouses, the attorney may feel an obligation to the family to discourage or even prevent the spouses from effectuating their common desires where those desires do not benefit the family as a whole (e.g., where the spouses choose not to take advantage of tax saving tools, such as annual exclusion gifts, in favor of retaining the assets to benefit themselves). This type of representation, at least for spousal estate planning purposes, is unnecessarily complicated and may even frustrate the common desires of the spouses. This model of representation has not been clearly recognized by the courts.

b. Joint Representation

Joint representation is probably the most common form of representation estate planners

[119] Portions of this section are adapted from GERRY W. BEYER, TEXAS LAW OF WILLS §§ 53.4 -53.7 (9 Tex. Prac. 4th ed. 2020).

use to develop a coordinated estate plan for spouses. Joint representation is based on the presumption that the husband, wife, and attorney will work together to achieve a coordinated estate plan. In situations where the attorney does not discuss the specific representative capacity in which he or she will serve, joint representation serves as the "default" categorization. Despite its widespread acceptance, however, joint representation has its pitfalls.

A critical issue faced by an attorney who represents multiple parties is the attorney's obligation to make sure that the representation complies with the Texas Rules of Professional Conduct. Most relevant in the joint representation of husband and wife is Rule 1.6 which prohibits representation where it "involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer * * *." Additionally, the Rule provides that if in the course of multiple representation such a conflict becomes evident, the lawyer must withdraw from representing one or both of the parties.

The rule does, however, contain a savings clause which permits the attorney to accept or continue a representation where a conflict of interest exists if: (1) the attorney believes that the representation will not be materially affected, and (2) both of the parties consent to the representation after full disclosure of all of the potential disadvantages and advantages involved. Many attorneys, regardless of whether potential conflicts are apparent, take advantage of this part of the rule and routinely disclose all advantages and disadvantages and then obtain oral and/or written consent to the representation. This approach exceeds the minimum requirements of the rule and helps protect all participants from unanticipated results. Of course, there are still situations which cannot be overcome by disclosure and consent, such as where the attorney gained relevant, but confidential, information during the course of a previous representation of one of the parties. In this type of situation, the attorney has no choice but to withdraw from the joint representation and recommend separate counsel for each spouse.

The dangers of joint representation are discussed in greater detail below.

c. Separate Concurrent Representation of Both Spouses

The theory of separate concurrent representation in a spousal estate planning context is that a single attorney will undertake the representation of both the husband and the wife, but as separate clients. All information revealed by either of the parties to the attorney is fully protected by confidentiality and evidentiary privileges, regardless of the information's pertinence to establishing a workable estate plan. Thus, one spouse may provide the attorney with confidential information that undoubtedly would be important for the other spouse to have in establishing the estate plan, but the attorney would not be able to share the information because the duty of confidentiality would be superior to the duty to act in the other spouse's best interest. Proponents of this approach claim that informed consent given by the parties legitimizes this form of representation. However, due to the confusion it creates for the attorney regarding to whom the duty of loyalty is owed and whose best interest is to be served, it is hard to understand why any truly informed person would consent. The dual personality that this form of representation requires of the attorney has resulted in it being dubbed a "legal and ethical oxymoron."[120]

d. Separate Representation

A final option for the attorney and the married clients is for each of the spouses to seek his or her own separate counsel. This approach is embraced by many estate planning attorneys as the best way to protect a client's confidences and ensure that the client's interests are not being compromised or influenced by another. By seeking independent representation, spouses forego the efficiency, in terms of money and time spent, that joint representation offers, but they gain confidence that their counsel will protect their individual priorities rather than be diluted by the priorities of the spouse. Additionally, separate representation substantially decreases the potential that the attorney will be trapped in

[120] Geoffrey C. Hazard, Jr., *Conflict of Interest in Estate Planning for Husband and Wife*, 20 PROB. LAW. 1, 11 (1994).

an ethical morass because of unanticipated conflicts or unwanted confidences.

2. Dangers of Joint Representation

a. Creates Conflicts of Interest

A conflict of interest between the spouses or between the spouses and their attorney can arise for many reasons. These conflicts often do not become apparent until well into the representation. If the attorney is skillful (or lucky), the conflict can be resolved and the joint representation continued. In other cases, however, the conflict may force the attorney to withdraw from representing one or both of the spouses.

(1) Accommodating the Modern Family

With the frequency of remarriage and blended families in today's society, it is not surprising that non-traditional families are a ripe source of conflict. A step-parent spouse may not feel the need or desire to provide for children that biologically are not his or her own. This fact can come into direct conflict with the expectations of the parent spouse who may feel that the children are entitled to such support and that the step-parent spouse is just being selfish. Alternatively, the spouses may be in conflict over how the estate plan should provide for "our" children, "your" children, and "my" children, and whether any of these classifications should receive preferential treatment.

(2) Bias Toward Spouse if Past Relationship With Attorney Exists

Where one of the spouses has a prior relationship with the drafting attorney, regardless of whether that relationship is personal or professional, there is a potential for conflict. The longer, closer, and more financially rewarding the relationship between one of the spouses and the attorney, the less likely the attorney will be free from that spouse's influence.[121] Because the spouses rely on the attorney's independent judgment to assist them in effectuating their testamentary wishes, it is important that neither of the parties has any actual or perceived disproportionate influence over the attorney.

(3) Opposing Objectives Between Spouses

Spouses may also have different ideas and expectations regarding the forms and limitations of support provided by their estate plan to the survivor of them, their children, grandchildren, and so forth. By including need-based or other restrictions on property, one spouse may believe that the other spouse will be "protected" while that spouse may view the limitations as unjustifiable, punitive, or manipulative. If one spouse has children from a prior relationship, that spouse may wish to restrict the interest of the non-parent spouse via a QTIP trust or other arrangement to the great dismay of the other spouse who would prefer to be the recipient of an outright bequest. No one distribution plan may be able to satisfy the desires of both spouses.

(4) Power Struggle Between Spouses

One spouse may dominate the client side of the attorney-client relationship. If one spouse is unfamiliar or uncomfortable with the prospect of working with an attorney or if one spouse is unable, for whatever reason, to make his or her desires known to the drafting attorney and instead simply defers to the other spouse, it will be difficult for the attorney to fairly represent both parties.

(5) A Faltering Marriage

If the attorney seriously questions the stability of the marriage, it will be practically impossible to create an estate plan which contemplates the couple being separated only by death. As one commentator explained:

> [N]o court would permit a lawyer to go forward when such a situation involves partners in a partnership or the principals in a close corporation, or a trustee and beneficiary of a trust, or a corporation and its officers. The courts will not take a

[121] *See* James R. Wade, *When Can A Lawyer Represent Both Husband and Wife in Estate Planning?*, PROB. & PROP., March/April 1987, at 13.

different view when the clients are husband and wife.[122]

The case of *In re Taylor,* is instructive.[123] A law firm represented both the husband and wife in the preparation of their estate plans, including wills and powers of attorney, as well as some business matters.[124] Later, the law firm undertook to represent the husband in divorce proceedings against the wife.[125] The wife sought to have the law firm disqualified from representing the husband.[126] The trial court denied her motion and she appealed.[127]

The appellate court conditionally granted the wife's request for a writ of mandamus directing the trial court to vacate the order denying her motion to disqualify the law firm.[128] The record was clear that the law firm represented both the husband and wife with regard to the business and estate matters and thus there would be a conflict of interest for the law firm to represent the husband in the divorce action.[129] The wife did not consent to the law firm's representation of the husband in the divorce and the law firm was disqualified.[130] The trial court's failure to grant the wife's motion was a clear abuse of discretion.[131]

(6) Unbalanced Estate Assets Between Spouses

Significant conflict may arise if one spouse has a separate estate that is of substantially greater value than that of the other spouse, especially if the wealthier spouse wants to make a distribution which differs from the traditional plan where each spouse leaves everything to the survivor and upon the survivor's death to their descendants. The attorney may generate a great deal of conflict among all of the parties if, to act in the best interest of the not-so-wealthy spouse, the attorney provides information regarding that spouse's financial standing under the contemplated distribution, if the wealthy spouse were to die first.

Conflict may also exist in situations where one spouse wants to make a gift of property which the other spouse believes is that spouse's separate property and therefore not an item which the first spouse is entitled to give. The potential for this type of conflict is especially great where the spouses have extensively commingled their separate and community property.

b. Forces Release of Confidentiality and Evidentiary Privileges

Joint representation may force spouses to forego their normal confidentiality and evidentiary privileges. Disclosure of all relevant information is the only way to work toward the common goal of developing an effective estate plan. In subsequent litigation between the spouses regarding the estate plan, none of the material provided to the attorney may be protected. However, release of these privileges protects the attorney by eliminating the potential conflict between the attorney's duty to inform and the duty to keep confidences.

c. Discourages Revelation of Pertinent Information

The fact that there is no confidentiality between the spouses in joint representation situations may not be a problem if the spouses have nothing to hide and have common estate planning goals. On the other hand, joint representation can place one or both of the spouses in the compromising position of having to reveal long held secrets in the presence of his or her spouse, e.g., the existence of a child born out-of-wedlock. Even worse is the scenario where the spouse withholds the information leaving the other spouse vulnerable and unprotected from the undisclosed information which, if known, may have resulted in a significantly different estate plan.

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122 Geoffrey C. Hazard, Jr., *Conflict of Interest in Estate Planning for Husband and Wife*, 20 PROB. LAW. 1, 14 (1994).

123 In re Taylor, 67 S.W.3d 530 (Tex. App.—Waco 2002, no pet.).

124 *Id.* at 531.

125 *Id.* at 532.

126 *Id.*

127 *Id.* at 533.

128 *Id.*

129 *Id.*

130 *Id.* at 534.

131 *Id.*

d. Increases Potential of Attorney Withdrawal

A potential conflict which becomes an actual conflict during the course of representation may not prevent the attorney from continuing the representation if the spouses previously gave their informed consent. However, if the conflict materially and substantially affects the interests of one or both of the spouses, the attorney must carefully consider the negative impact that the conflict will have on the results of the representation and on the attorney's independent judgment. The prudent action may be withdrawal. A midstream withdrawal can be very disruptive to the estate planning process and result in a substantial loss of time (and even money) to both the spouses and the attorney.

e. Creates Conflicts Determining When Representation Completed

There is some question as to whether a spouse who sought joint representation in the creation of his or her estate plan can, at a later date, return to the same attorney for representation as an individual. The determination as to when the joint representation ends is quite settled with respect to subsequent attempts to unilaterally revise the estate plan—it does not end. Any subsequent representation of either spouse which relates to estate planning matters would constitute information that the attorney would be obligated to share with the other spouse/client. Regarding other legal matters, representation "should be undertaken by separate agreement, maintaining a clear line between those matters that are joint and those matters that are individual to each client."[132]

3. Recommendations

Decisions regarding the form of representation most appropriate for a husband and wife seeking estate planning assistance could be made by the attorney alone, based on his or her past experiences, independent judgment, and skills of observation regarding the potential for conflict between the spouses. The better course of action is for the attorney to explain the choices available to the spouses along with the related advantages and disadvantages and then permit the spouses to decide how they would like to proceed. The only two viable options are joint representation and representation of only one spouse.[133] As previously mentioned, representation of the family as an entity and separate concurrent representation by one attorney are appropriate forms of representation for a husband and wife only in extremely rare cases.

a. Representation of Only One Spouse

This form of representation allows each of the spouses to be fully autonomous in dealing with their attorney. Only the information the client spouse is comfortable with sharing is revealed to the other spouse. As one commentator explained, "it [separate representation for each spouse] is consistent with the present dominant cultural view of marriage as a consensual arrangement and is most consistent with the assumptions about the attorney-client relationship."[134] Where it is obvious to the attorney that the couple would be best served by this style of representation, it is the attorney's responsibility to convince the couple of this fact. Examples of facts that alert the attorney that separate representation is probably the best choice include situations where the marriage was not the first for either or both of the parties, where there are children from previous relationships, where one party has substantially more assets than the other, and where one spouse is a former client or friend of the consulted attorney.

When recommending separate representation, the attorney should take care to point out that this suggestion is not an inference that their relationship is unstable or that one or both parties may have something to hide. Instead, it is merely a reflection that each spouse has his or her own responsibilities, concerns, and priorities which may or may not be exactly aligned with those of the other spouse. Accordingly, and the best way to achieve a win-win result and reduce present

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[132] Teresa Stanton Collett, *And the Two Shall Become One ... Until the Lawyers Are Done*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 101, 141 (1993).

[133] See Malcolm A. Moore, *Representing Both Husband and Wife Ethically*, ALI-A.B.A. EST. PLAN. COURSE MAT. J., April 1996, at 5, 7.

[134] Collet, *supra* note 130, at 128.

and future family conflict is for each spouse to retain separate counsel.

b. Joint Representation of Both Spouses

Despite the potential dangers to clients and attorneys alike, joint representation is the most common form of representation of husband and wife for estate planning matters. With appropriate and routine use of waiver and consent agreements, the attorney may undertake this type of representation with a minimum of risk to the attorney and a maximum of efficiency for the clients. Unfortunately, however, use of disclosure and consent agreements is far from a standard procedure. One survey revealed that over forty percent of the estate planning attorneys questioned do not, as a matter of practice, explain to the couple the potential for conflict that exists in such a representation, much less put such an explanation in writing. One attorney stated that he only felt it was necessary to discuss potential conflicts where the representation involved a second or more marriage, and that he only put it in writing if he felt a real problem was indicated in the first meeting. Another respondent failed to disclose the potential for conflict because he was afraid it would appear as if he were issuing a disclaimer for any mistakes he might make. Finally, it seems that denial of the existence of potential conflicts occurs on the part of the attorney as well as the spouses, as evidenced by one practitioner's statement, "I have a hard time believing that I should tell clients who have been married for a long time and who come in together to see me that there may be problems if they get a divorce."[135] The A.B.A. Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 05-434 that addresses conflicts which may arise when an attorney represents several members of the same family in estate planning matters.[136]

The Opinion validates the common practice of one lawyer representing several members of the same family.[137] The basis of this authorization is that the interests of the parties may not be directly adverse and that more than conflicting economic interests are needed before the attorney may not represent both.

The Opinion recognizes, however, that current conflict of interest may result even without direct adversity if there is a significant risk that representation of one client will materially limit the representation of another.[138]

Despite the "permission" granted by this Opinion, I continue to think the representation of more than one family member in estate planning matters is problematic. A potential conflict may turn into a real conflict at a later time leaving the attorney in an untenable position. It is simply not worth the risk. I believe it is better for a lawyer to owe 100% of his or her duties to one and only one family member. This way, there will never be doubt whom the attorney represents or what actions the attorney should take if something "gets sticky," True, practitioners may lose some business and some clients may have higher legal fees but I believe this is preferable to the alternative.

Many attorneys, nonetheless, will continue to represent spouses jointly. Attorneys who do so are strongly recommended to (1) provide the spouses with full disclosure and (2) obtain the spouses' written informed consent, regardless of the perceived potential for conflict.

Informed consent is not possible without full disclosure. Because estate planning attorneys often meet one or both of the spouses for the first time the day of the initial appointment, it is not possible for the attorney to know more about the couple than what he or she sees and hears during the interview. Because there is no way to be sure which specific issues are relevant to the spouses, it is extremely important for the attorney to discuss as many different potential conflicts as are reasonably possible. Even if the attorney has some familiarity with the couple, it is better to cover too many possibilities than too few.

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[135] Francis J. Collin, Jr., et al., A Report on the Results of a Survey About Everyday Ethical Concerns in the Trust and Estate Practice, 20 ACTEC NOTES 201 (1994).

[136] A.B.A. Comm. On Ethics and Professional Responsibility, Formal Op. 05-434 (2004).

[137] *Id.*

[138] *Id.*

The amount of disclosure that must be provided for the consent given to be considered "informed" is different for each client. The attorney has the responsibility to seek information from the parties to be sure that all relevant potential conflicts are addressed as well as the effects of certain other incidents, such as divorce or death of one of the spouses. It is also a good idea to include a discussion of the basic ground rules of the representation detailing exactly what is and is not confidential, rights of all parties to withdraw, and other procedural matters such as attendance at meetings and responsibility for payment of fees.

An oral discussion of potential conflicts that exist or that may arise between the couple will allow the attorney to gather information about the clients while disseminating information for them to use in making their decisions. Oral disclosure also permits a dialogue to begin that may encourage the clients to ask questions and thereby create a more expansive description of the advantages and disadvantages of joint representation as they apply to the couple.[139]

B. Representation of Non-Spousal Relatives

Representation of more than one family member raises a number of ethical concerns such as avoiding conflicts of interest, maintaining confidences, and preserving independent professional judgment. These issues are analogous to those discussed with regard to the representation of both spouses. The safest course of action would be to decline to represent two individuals from the same family, especially a parent and his or her child.

C. Naming Drafting Attorney, Attorney's Relative, or Attorney's Employee as a Beneficiary

Attorneys are often asked by family members, friends, and employees to prepare wills, trusts, and other documents involved with the gratuitous transfer of property. These same individuals may also want the attorney to name him- or herself as one of the beneficiaries of the gift. This common occurrence is fraught with legal and ethical problems, since the attorney may not be able to claim the gift and may be subject to professional discipline.

1. Effect on Validity of Gift

Under Roman law, the drafter of a will could take no benefit under the will.[140] Under modern law, the general rule still prohibits the drafter of a will from taking a benefit under the will. However, forty-six states and the District of Columbia has adopted the Model Rules of Professional Conduct (MRPC), including Rule 1.8(c), which prohibits an attorney from preparing a will giving the attorney or a person related to the attorney a substantial gift, unless the recipient is related to the client.[141] The MRPC prohibits the drafter of the will from benefiting under the will, but with an exception if the attorney or person related to the attorney is related to the client. Although forty-six states and the District of Columbia have adopted the MRPC, there are various exceptions to the rule of the drafter being a beneficiary under the will, which varies from state to state. This also brings up the question concerning the validity of such gifts.

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[139] Though there is no rule or standard which requires that disclosure or the clients' consent be evidenced by a written document, the seriousness and legitimacy that go along with a signed agreement serve as additional protection for all participants. By documenting the disclosure statement and each client's individual consent to the joint representation, the couple may be forced to reconsider the advantages and disadvantages of joint representation and may feel more committed to the agreement. Additionally, if there are any issues which they do not feel were addressed in the document, they may be more likely to express them so that the issue can also be included in the agreement. Finally, reducing the agreement to written form helps protect the attorney should any future dispute arise regarding the propriety or parameters of the representation. (Excellent forms are available on the website of the American College of Trust and Estate Counsel: http://www.actec.org/publications/engagement-letters/ (last visited Jun. 28, 2020).

[140] *See* Elmo Schwab, *The Lawyer As Beneficiary*, 45 TEX. B.J. 1422 (1982) (discussing ancient doctrine of "qui se scrip sit heredem").

[141] *ACTEC Commentaries on the Model Rules of Professional Conduct*, ACTEC, http://www.actec.org/publications/commentaries/ (last visited Jun. 28, 2020).

If the drafter of the will is a beneficiary under the will, many states provide that this benefit raises a presumption of undue influence, while some states automatically void the gift.[142] Generally, a violation of the MRPC Rule 1.8(c) will not automatically void the gift, but instead the appropriate authority can impose a penalty ranging from a private reprimand to disbarment (determined on a case-by-case basis).[143]

2. Effect on Ethical Duties

The MRPC Rule 1.8(c) states, "[a] lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship."[144]

The MRPC Rule 1.8(c) does not apply if the gift is not a *substantial* gift.[145] While it is unclear whether a non-substantial gift is acceptable, the comment to Rule 1.8(c) indicates that it is, "a simple gift such as a present given at a holiday or as a token of appreciation is permitted."[146] However, the standard for what constitutes a substantial gift and should not be relied on by a drafter of the will who is also the beneficiary.

The MRPC provides an exception for attorneys (or someone related to the attorney) to receive gifts from clients. The exception applies when the recipient is related to the client. However, a prudent attorney should look to see how "related" is defined, as it may vary from state to state. Additionally, the rule does not prohibit the attorney from appointing another lawyer to draft the will, but the appointment would be subject to the general conflict rules.[147]

D. Naming Drafting Attorney as a Fiduciary

The former Ethical Considerations provided that "[a] lawyer should not consciously influence a client to name him as executor [in a will]. In these cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety."[148] This rule was interpreted to mean that a lawyer may be named as the executor for an estate "provided there is no pressure brought to bear on the client, and such appointments represent the true desire of the client."[149]

Despite the authority to do so, the attorney must exercise great care to avoid potential claims of overreaching or conflict of interest.[150] It is wise to have the client sign a plain language disclosure statement that explains the ramifications of the attorney serving as the executor.[151] It is not uncommon for a will to have a provision exonerating the executor from liability for acts of ordinary negligence. A standard such clause is: "No executor shall be liable for its acts or omissions, except for willful misconduct or gross

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142 Gerry W. Beyer, *Wills, Trusts, & Estates*, § 10.3.3.1 (Aspen Publishers, 6th ed. 2015).

143 *Id.*

144 MODEL RULES OF PROF'L CONDUCT R. 1.8(c) (2006).

145 N. Gregory Smith, *Beware of Clients Bearing Gifts*, 54 LA. B.J. 250, 251 (Dec. 2006/Jan. 2007).

146 MODEL RULES OF PROF'L CONDUCT R. 1.8(c) cmt. (2006).

147 *Id.*

148 TEX. STATE BAR R., EC 5-6 (Tex. Code of Prof'l Resp.), *reprinted in* 23 BAYLOR L. REV. 697, 763 (1971).

149 Comm. on Interpretation of the Canons of Ethics, State Bar of Tex., Op. 71 (1953), *reprinted in* 18 BAYLOR L. REV. 195, 226-27 (1966).

150 *See* Howard M. McCue III, *Flat-Out of the Will Business—A Recent Malpractice Case Results in an Expensive Settlement for Both Lawyer and Executor*, TR. & EST., Sept. 1988, at 66 (discussing San Antonio lawsuit which was settled when law firm agreed to pay over $4 million to plaintiff; the attorney who drafted the will had named attorneys employed by the firm as executors).

151 *See* Larry W. Gibbs, *The Lawyer's Professional Responsibility in Estate Planning and Probate—Common Solutions and Practical Problems, in* STATE BAR OF TEXAS, PRACTICAL WILL DRAFTING AND REPRESENTING THE ESTATE AND BENEFICIARIES IN HARD TIMES, ch. F, 2-6, 24-26 (1987) (includes sample disclosure form).

negligence." These exculpatory clauses are generally upheld by Texas courts.[152] However, if the executor doubled as the attorney who drafted the will, it is not clear whether such a clause would be upheld in light of Rule 1.08(g) of the Texas Disciplinary Rules of Professional Conduct which states:

> A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.[153]

E. Naming Drafting Attorney as Fiduciary's Attorney

The Model Rules do not prohibit at attorney from including a provision directing a fiduciary to retain a particular lawyer's services.[154] Most wills and trusts, however, do not contain these types of provisions; hence, the inclusion of such a clause may raise suspicions that the attorney improperly influenced his or her client. In addition, many courts will treat this type of provision as merely precatory and thus not binding on the fiduciary.

F. Fiduciary Hiring Self as Attorney

A fiduciary with special skills may be tempted to employ him- or herself to provide those services to the estate or trust. For example, the trustee may be an attorney, accountant, stockbroker, or real estate agent. If the trustee succumbs to the temptation, the trustee will create a conflict of interest situation. As a fiduciary, the trustee should seek the best specialist possible within the trust's budget. However, as a specialist, the trustee wants to get the job and secure favorable compensation. Dual roles permit the trustee to engage in schizophrenic conversations such as, "This is too complicated for my trustee mind so I need to consult myself using my attorney brain."

Courts typically presume that self-employment is a conflict of interest and will not permit trustees to recover extra compensation for the special services. However, the court may permit the trustee to receive compensation in dual capacities if the trustee can prove that the trustee acted in good faith for the benefit of the trust and charged a reasonable fee for the special services.

G. Attorney as Document Custodian

It is important for estate planning documents to be stored in appropriate locations. If documents are unavailable to the appropriate person when needed, the client may lose the benefits of executing the documents. The disposition of an executed document is simple in some cases. For example, a medical power of attorney should be delivered to the agent. In other cases, however, the proper receptacle for the document is less easily ascertained.

The proper disposition of a will is often a controversial issue. The original will should normally be stored in a secure location where it may be readily found after the testator's death. Thus, some testators keep the will at home or in a safe deposit box, while others prefer for the drafting attorney to retain the will. The attorney should not suggest retaining the original will because the original becomes less accessible to the testator. When the drafting attorney retains a will, the testator may feel pressured to hire the attorney to update the will and the executor or beneficiaries may feel compelled to hire that attorney to probate the will. In other jurisdictions some courts hold that an attorney may retain the original will only "upon specific unsolicited request of the client."[155]

If a will contest is likely, the client must be informed of the dangers associated with retaining the will (i.e., it increases the opportunity for unhappy heirs to locate and then alter or destroy

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[152] *See* Corpus Christi Nat'l Bank v. Gerdes, 551 S.W.2d 521 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

[153] Tex. Rules Disciplinary Rules Prof'l Conduct R. 1.08(g), *reprinted in* Tex. Gov't Code Ann., tit. 2 subtit. G, app. A (West 2005).

[154] *See* MODEL RULES OF PROF'L CONDUCT R. 1.8 (2006).

[155] State v. Gulbankian, 196 N.W.2d 733, 736 (Wis. 1972).

the will). The attorney may need to urge the testator to find a safe storage place that will not be accessible to the heirs, either now or after death, but rather a location where the will is likely to be found and probated. Simultaneously, make certain not to suggest that the attorney retain the will.

H. Capacity of Representation

Generally, when an attorney represents a client, it is clear as to whom the attorney owes a duty. However, it is not as clear as to whom the client is when the attorney represents a fiduciary, such as custodian or guardian for a minor, an executor, trustee, or personal representative.[156] Most jurisdictions have no laws regarding this issue, and those that have tried to provide some guidance adopts one of three major approaches: (1) the traditional theory, (2) the joint-client theory, or (3) the entity theory.[157]

The traditional theory dictates that the fiduciary is the client. The American Bar Association has adopted this approach and those jurisdictions that have provided a clear ruling regarding who the client is, the traditional theory also seems to be the most prevalent theory.[158] Some states that have indicated following the traditional approach are South Carolina, Michigan, and California (although California has not enacted specific legislation, California's case law indicates the adoption of the traditional theory).[159] In 2013, Indiana enacted legislation adopting the traditional theory.[160] Additionally, the Texas Supreme Court also adopted the traditional theory in *Huie v. DeShazo*.[161]

The joint-client theory finds that a "beneficiary is entitled to essentially the same duties as the fiduciary is entitled" and therefore is a joint-client with the fiduciary.[162] Professor Hazard illustrates the joint-client theory with a triangle metaphor: the first leg is the attorney-fiduciary relationship, the second leg is the fiduciary-beneficiary relationship, and the third leg is the attorney-beneficiary relationship. Although courts that follow the joint-client theory recognizes that the beneficiary and the fiduciary are both clients of the attorney, there is disagreement as to whether the two clients are equal in relation to the attorney.[163] Jurisdictions that seem to follow the joint-client theory include Nevada, Washington, Delaware, New Jersey, and Arizona.[164]

Under the third approach, the entity theory, "the estate is considered a separate legal entity and the estate, not the fiduciary or the beneficiary, will be considered the client."[165] The estate is treated as if the client was a business entity.[166] Similar to how a corporation would act through an agent, the estate "would act through the fiduciary as its agent."[167] Under the entity theory, the attorney for the fiduciary would become a co-agent of the estate and therefore, responsible to the estate instead of the fiduciary agent.[168] As a co-agent of the estate, the attorney would owe not only a duty to the estate, but also to all interested parties, including beneficiaries.[169] Michigan used to follow the entity approach, however, an amendment to the Michigan Probate Code clarified to whom an attorney owes a duty to and adopted the traditional theory.[170]

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156 Kennedy Lee, *Representing the Fiduciary: To Whom Does the Attorney Owe Duties?*, 37 ACTEC L.J. 469 (2011).

157 *Id.*

158 *Id.* at 471.

159 *Id.*

160 2013 Ind. Acts 99.

161 Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996).

162 Kennedy Lee, *Representing the Fiduciary: To Whom Does the Attorney Owe Duties?*, 37 ACTEC L.J. 469, 477 (2011).

163 *Id.*

164 *Id.*

165 *Id.* at 485.

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.*

170 *Id.*

V. CONCLUSION

"Sleep with one eye open. Grippin' your pillow tight."[171]

Now that doesn't sound like any fun, does it? However, if you are careful and follow the advice in this article, you can endeavor to make your estate planning practice free from malpractice and ethical issues. And then, you can get the good night's sleep you deserve.

[171] Metallica, *Enter Sandman* (track 1, Metallica) (1991).

APPENDIX

The following table attempts to summarize the approaches to estate planning malpractice adopted by the various states.[1] Please note that this table is a "work in progress" so if you notice anything which needs to be corrected, updated, or revised, I would greatly appreciate your sharing your comments with me.

Jurisdiction	Privity Required?	Approach	Authority	Comments
Alabama	Yes	Strict Privity	*Robinson v. Benton*, 842 So. 2d 631 (Ala. 2002); Alabama Legal Services Litigation Act, Ala. Code § 6-5-570 (1975), *et. seq*	Alabama follows the strict privity approach
Alaska	Yes	Strict Privity	*Linck v. Barokas & Martin*, 667 P.2d 171 (Alaska 1983)	Alaska follows the strict privity approach
Arizona	No	Broad cause of action (balancing factors)	*Capitol Indem. Corp. v. Fleming*, 58 P.3d 965 (Ariz. 2002)	Arizona follows the broad cause of action & balanced 6 factors. "[T]he determination of whether, in a specific case, the attorney will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injuries suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm."
Arkansas	Yes – generally	Relaxed Privity	*Pettus v. McDonald*, 36 S.W.3d 745 (Ark. 2001); Ark. Code Ann. § 16-62-101; Ark. Code Ann. § 16-22-310	Arkansas has 2 exceptions to the requirement of privity: (1) there is no privity for fraudulent acts, omissions, decisions, or conduct or for intentional misrepresentation; and (2) if the person is the

[1] The excellent assistance of Ms. Eva Hung, J.D., Consultant, Ryan (Houston, Texas) in the preparation of this table is recognized with great appreciation.

Jurisdiction	Privity Required?	Approach	Authority	Comments
				intended third party beneficiary
California	No	Balancing Factors	*Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958); *Lucas v. Hamm*, 56 Cal. 2d 583 (Cal. 1961)	California was the first state to have a case challenge the traditional strict privity bar against estate planning attorneys and established a new approach by balancing various factors to determine a beneficiary's standing
Colorado	Yes	Strict Privity	*Bewley v. Semler*, 432 P.3d 582 (Colo. 2018); *Baker v. Wood, Ris & Hames, P.C.*, 364 P.3d 872 (Colo. 2016); *Glover v. Southard*, 894 P.2d 21 (Colo. App. 1994)	Colorado utilizes a 3-part test to "strictly limit" attorney's liability to third parties
Connecticut	Yes – generally	Relaxed Privity	*Krawczyk v. Stingle*, 543 A.2d 733 (Conn. 1988); Robert F. Phelps, Jr., *Representing Trusts & Trustees – Who is the Client & Do Notions of Privity Protect the Client*, 66 CONN. B.J. 211 (June, 1992)	Connecticut generally requires privity, however, Connecticut has also recognized an exception to the privity doctrine: on public policy grounds, the plaintiff must establish he or she is the intended or foreseeable beneficiary. Connecticut courts will also utilize a balancing test to determine whether an adequate public policy exists for the exception to apply
Delaware	Yes	Unclear	*Pinckney v. Tigani*, Not Reported in A.2d (Del. 2004)	It is unclear whether Delaware requires privity in estate planning malpractice cases, however, the court in *Pinckney* stated "the court is unwilling to abandon privity outright in Delaware." *Pinckney*, at *8.
D.C.	Yes – generally	Relaxed Privity	*Needham v. Hamilton*, 459 A.2d 1060 (D.C. 1983); *Hopkins v. Akins*, 637 A.2d 424 (D.C. 1993)	District of Columbia (D.C.) generally requires privity, however, in certain situations, an exception to intended third party beneficiaries may apply. *See Hopkins v. Akins*.
Florida	Yes – generally	Relaxed Privity	*DeMaris v. Asti*, 426 So. 2d 1153 (Fla. Dist. Ct. App. 1983)	Florida utilizes a narrow exception to the general privity rule that for the exception to apply, there must be a frustrated intent of the testator.

Jurisdiction	Privity Required?	Approach	Authority	Comments
				Florida's case law, combined with Iowa's, eventually developed into one of the 3 approaches states now take (the Florida-Iowa approach).
Georgia	Yes – generally	Relaxed Privity	*Young v. Williams*, 645 S.E.2d 624 (Ga. Ct. App. 2007); Mary F. Radford, *Redfearn Wills & Administration in Georgia*, 1 GA. WILLS & ADMIN. IN GA. § 4:11.	Up until *Young v. Williams*, Georgia did not have a definitive position of whether privity is required. In *Young*, Georgia's court of appeals indicated a requirement for privity with a possible, narrow exception of the "foreseeable beneficiary" (i.e., intended third party beneficiary).
Hawaii	Silent	Case-by-Case	*Blair v. Ing*, 21 P.3d 452 (Haw. 2001)	Hawaii is generally silent on whether privity is required, however, Hawaii approaches estate planning malpractice on a case-by-case basis. For example, in *Blair v. Ing*, Hawaii adopted the third party beneficiary approach because the case approach was too broad.
Idaho	Yes – generally	Florida-Iowa	*Harrigfeld v. J.D. Hancock*, 364 F.3d 1024 (Idaho 2004)	Idaho generally requires privity, unless the case falls into the narrow exception of the Florida-Iowa approach (the frustrated intent of the testator).
Illinois	Yes – generally	Relaxed Privity	*Pelham v. Griesheimer*, 92 Ill. 2d 13 (Ill. 1982); *Phelps v. Land of Lincoln Legal Assistance Found. Inc.*, 55 N.E.3d 1268 (Ill. Ct. App. 2016)	Illinois generally requires privity, however, Illinois will allow recovery if the case falls within the intended third party beneficiary exception. Illinois applies the "intent to directly benefit test" to determine whether a case falls under the exception
Indiana	Yes – generally	Relaxed Privity	*Walker v. Lawson*, 526 N.E.2d 968 (Ind. 1988); Ind. Practice Series, *Anderson's Wills, Trusts, & Estate Planning*, § 1:5 Malpractice Concerns	Indiana deviated from the strict privity concept and allows for suits by non-clients, but only if the non-client is the intended third party beneficiary.
Iowa	Yes – generally	Florida-Iowa	*Schreiner v. Scoville*,	Iowa allows for non-clients to

Jurisdiction	Privity Required?	Approach	Authority	Comments
			410 N.W.2d 679 (Iowa 1987)	sue estate planning attorneys for malpractice, but only if they are the specific, intended beneficiaries as expressed in the testator's testament. Iowa's exception combined with Florida's frustrated intent of the testator created the Florida-Iowa approach.
Kansas	Yes – generally	Relaxed Privity	*Pizel v. Zuspann*, 795 P.2d 42 (Kan. 1990); *Jeanes v. Bank of America, NA*, 295 P.3d 1045 (Kan. 2013) (claim of alleged malpractice resulting in excessive estate tax arose after death and thus not recoverable).	Kansas generally requires privity of contract, however, Kansas will allow a legal malpractice claim against an estate planning attorney if the non-client is a foreseeable, intended third party beneficiary.
Kentucky	No relevant case law located			
Louisiana	Yes – generally	Relaxed Privity	*Succession of Killingsworth*, 292 So. 2d 536 (La. 1973)	Louisiana requires privity but will allow non-client suits if the non-client is an intended third party beneficiary (analogous to Louisiana's privity laws in contract).
Maine	Yes	Strict Privity	*Nevin v. Union Trust Co.*, 726 A.2d 694 (Me. 1999)	Maine follows the strict privity approach. The only way to bring a legal malpractice suit against an estate planning attorney is if the plaintiff is the client or when the estate is represented by a personal representative that stands in the place of the client. *See Nevin*, 726 A.2d at 701.
Maryland	Yes – generally	Relaxed Privity	*Ferguson v. Cramer*, 709 A.2d 1279 (Md. 1998); *Noble v. Bruce*, 709 A.2d 1264 (Md. 1998); Jessica Rizer, *Litigating the Existence, Extent and Scope of the Attorney-Client Relationship*, 40 MD. B.J. 50, Jan./Feb.,	Although Maryland will sometimes allow the narrow exception of intended third party beneficiaries, Maryland still adheres to the strict privity approach as closely as it can.

Jurisdiction	Privity Required?	Approach	Authority	Comments
			2007	
Massachusetts	Yes – generally	Relaxed Privity	*Williams v. Ely*, 668 N.E.2d 799 (Mass. 1996); *Spinner v. Nutt*, 631 N.E.2d 542 (Mass. 1994)	Massachusetts generally requires privity, however, it allows the intended third party beneficiary exception.
Michigan	Yes – generally	Florida-Iowa	*Ginther v. Zimmerman*, 491 N.W.2d 282 (Mich. 1992)	Michigan states that where the intent of the testator is not frustrated, then there is no duty owed to the party and will not give rise to a malpractice action against the estate planning attorney.
Minnesota	Yes – generally	Relaxed Privity	*Marker v. Greenberg*, 313 N.W.2d 4 (Minn. 1981); *Admiral Merch. Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261 (Minn. 1992); *McIntosh Cnty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538 (Minn. 2008)	*McIntosh* held that the third-party must be a direct and intended beneficiary of the attorney's services and if so, then use balancing factors to determine the extent of the duty owed. *See McIntosh*, 745 N.W.2d at 547.
Mississippi	No relevant case law located.			There appears to be no relevant case law.
Missouri	No	Balancing Factors	*Donahue v. Shughart, Thomson, & Kilroy, P.C.*, 900 S.W.2d 624 (Mo. 1995)	Missouri balances six factors to determine whether attorneys owe a legal duty to non-clients. In this case, the actual client had executed a document. In *Alberts v. Turnbull Conway, P.C.*, 641 S.W.3d 370 (Mo. Ct. App. 2022), held no duty to non-client because client never executed the documents due to alleged malpractice (delay).
Montana	Unclear	Case-by-Case	*Stanley L. & Carolyn M. Watkins Trust et al. v. Lacosta*, 92 P.3d 620 (Mont. 2004); *Harrison v. Lovas*, 234 P.3d 76 (Mont 2010)	Montana is unclear whether a duty is owed to a non-client and has decided to leave the issue of standing to bring a legal malpractice suit against an estate planning attorney to the trier of fact. Montana did state that the balancing approach could apply though. *See Stanley*, 92 P.3d at 438.

Jurisdiction	Privity Required?	Approach	Authority	Comments
Wisconsin	No	Relaxed Privity	*Auric v. Continental Cas. Co.*, 331 N.W.2d 325 (Wis. 1983); *Beauchamp v. Kenmeter*, 625 N.W.2d 297 (Wis. Ct. App. 2000); *MacLeish v. Boardman & Clark LLP*, 294 N.W.2d 799 (Wis. 2019)	Wisconsin applied the balancing factors in *Auric*, moving away from its traditional strict privity approach. However, Wisconsin's court of appeals narrowed the balancing factors in *Beauchamp* by refusing to extend *Auric* and instead applying the test of whether the plaintiff was a named beneficiary. The Supreme Court of Wisconsin upheld both decisions in *Macleish*.
Wyoming	No	Balancing Factors	*In re Estate of Drwenski*, 83 P.3d 457 (Wyo. 2004)	Wyoming elected to follow the balancing factors approach, but with an emphasis on whether the plaintiff is an intended third party beneficiary.

Jurisdiction	Privity Required?	Approach	Authority	Comments
				Although it is unclear as to when a duty might be owed, Montana has stated that intended beneficiaries who merely hope for, but do not have legal entitlement to a revised beneficiary status, do not have standing. *See Harrison*, 234 P.3d at 78.
Nebraska	Yes	Strict Privity	*Perez v. Stern*, 777 N.W.2d 545 (Neb. 2010)	Nebraska has traditionally adhered to the strict privity approach, however, in *Perez*, Nebraska can be seen as relaxing strict privity and stating that an attorney owed a duty to a decedent's minor children.
Nevada	No	Balancing Factors	*Charleson v. Hardesty*, 839 P.2d 1303 (Nev. 1992); Anthony L. Barney, *Preventing & Litigating Trust Disputes* (2009); N.R.S. 162.310; *Canarelli v. Eighth Judicial Dist. Ct.in and for Cty. of Clark*, 464 P.3d.114 (Nev. 2020)	Nevada has elected to adopt the balancing factors test, but has passed legislation stating that an attorney of a fiduciary does not assume a duty of care to the beneficiaries, solely as a result of the attorney client relationship.
New Hampshire	Yes – generally	Relaxed Privity	*Sisson v. Jankowski*, 809 A.2d 1265 (N.H. 2002); *Riso v. Dwyer*, 135 A.3d 557 (N.H. 2016)	New Hampshire generally requires strict privity, however, it has recognized the exception of a foreseeable, intended third party beneficiary applies in certain circumstances.
New Jersey	No	4 Point Analysis	*Rathblott v. Levin*, 697 F. Supp. 817 (D.N.J. 1988); Joseph C. Mahon, *Intent, Process & Liability in Estate Planning*, 210 N.J. LAW. 26, Aug. 2001	New Jersey adopts an approach stating that privity of contract is not necessarily required and instead adopts a four point analysis to overcome the privity requirement.
New Mexico	No	Balancing Factors	*Leyba v. Whitley*, 907 P.2d 172 (N.M. 1995)	New Mexico adopts the balancing factors approach in determining whether an attorney owes a duty to a non-client.

Jurisdiction	Privity Required?	Approach	Authority	Comments
New York	Yes – generally	Strict Privity	*Estate of Schneider v. Finmann*, 15 N.Y.3d 306 (N.Y. 2010)	New York still generally requires privity in legal malpractice suits against estate planning attorneys, however, it has recognized that a decedent's estate has privity against the decedent's attorney. *See Schneider*, 15 N.Y.3d at 308-10.
North Carolina	No	Balancing Factors	*Jenkins v. Wheeler*, 316 S.E.2d 354 (N.C. 1984)	North Carolina adopted a six factors balancing test in an action by a non-client against an estate planning attorney.
North Dakota	No relevant estate planning case located.		*Johnson v. Bronson*, 830 N.W.2d 59 (N.D. 2013).	"The elements of a legal malpractice action against an attorney for professional negligence are [1] the existence of an attorney-client relationship, [2] a duty by the attorney to the client, [3] a breach of that duty by the attorney, and [4] damages to the client proximately caused by the breach of that duty." By requiring the attorney-client relationship, it may be inferred that North Dakota would follow a strict privity approach.
Ohio	Yes	Strict Privity	*Simon v. Zipperstein*, 512 N.E.2d 636 (Ohio 1987); *Elam v. Hyatt Legal Services*, 541 N.E.2d 616 (Ohio 1989)	Ohio is in the minority of states that still follows the strict privity approach. However, in *Elam*, the court noted that "[a] beneficiary whose interest in an estate is vested is in privity with the fiduciary of the estate, and where such privity exists the attorney for the fiduciary is not immune from liability to the vested beneficiary for damages arising from the attorney's negligent performance."
Oklahoma	Yes – generally	Relaxed Privity	*Leak-Gilbert v. Fahle*, 55 P.3d 1054 (Okla. 2002)	Oklahoma recognizes an exception for intended third party beneficiaries to bring a malpractice action against an estate planning attorney.
Oregon	Yes – generally	Case-by-Case	*Hale v. Groce*, 744 P.2d 1289 (Or.	Oregon has only extended the attorney's duty to third parties

Jurisdiction	Privity Required?	Approach	Authority	Comments
			1987); *Roberts v. Fearey*, 986 P.2d 690 (Or. Ct. App. 1999); *Caba v. Baker*, 145 P.3d 174 (Or. 2006); *Frakes v.Nay*, 295 P.3d 94 (Or. Ct. App. 2012);	on a case-by-case basis. To determine whether a third party beneficiary can sustain a negligence claim against an attorney, Oregon courts read *Hale* and *Caba* together and apply a two-pronged test.
Pennsylvania	Yes – generally	Relaxed Privity	*Estate of Agnew v. Ross*, 152 A.3d 247 (Pa. 2017)	Pennsylvania generally requires privity but recognizes the intended third party beneficiary exception. The plaintiff must be mentioned in an executed document to maintain the action as a third party beneficiary.
Rhode Island	No	Balancing Factors	*Am. Kennel Club Museum of the Dog v. Edward & Angell, LLP*, 2002 WL 1803923 (R.I. 2002)	Rhode Island has adopted the balancing factors approach.
South Carolina	No	Relaxed Privity	*Fabian v. Lindsey*, 765 S.E.2d 132 (2014 S.C.); William P. LaPiana, *The Privity Barrier Falls in South Carolina*, EST. PLAN., March 2015, at 42.	South Carolina recognizes a cause of action, in both tort and contract, by a third-party. Recovery is limited to beneficaries named in the estate planning document or otherwise identified in the document by their status.
South Dakota	Yes – generally	Relaxed Privity	*Friske v. Hogan*, 698 N.W.2d 526 (S.D. 2005)	South Dakota traditionally followed the strict privity approach, and still generally follows it. However, South Dakota has recognized the intended third beneficiary exception.
Tennessee	Yes – generally	Relaxed Privity	*Collins v. Binkley*, 750 S.W.2d 737 (Tenn. 1988)	Tennessee generally follows the strict privity approach but has applied the intended third party beneficiary exception to some cases.
Texas	Yes	Strict Privity	*Belt v. Oppenheimer, Blend, Harrison, & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006); *Smith v. O'Donnell*, 288 S.W.3d 417 (Tex. 2009)	Texas adheres to the strict privity approach, however, in *Belt*, Texas recognized that a legal malpractice suit may be brought on behalf of the estate (such as by the estate's personal representative).

Jurisdiction	Privity Required?	Approach	Authority	Comments
Utah	Yes	Strict Privity	*Atkinson v. IHC Hospitals, Inc.*, 798 P.2d 733 (Utah 1990)	Utah seems to still follow the strict privity approach as it has yet to fully address the theory of a non-client recovering for a legal malpractice claim against an estate planning attorney.
Vermont	Yes – generally	Relaxed Privity	*Hedges v. Durrance*, 834 A.2d 1 (Vt. 2003); *Strong v. Fitzpatrick*, 169 A.3d 783 (Vt. 2017)	Vermont does not directly state the approach that it follows, however, it can be inferred that Vermont generally follows the strict privity rule but allows the intended third party beneficiary exception to apply when applicable.
Virginia	No	Balancing	*Thorsen v. Richmond Society for the Prevention of Cruelty to Animals*, 786 S.E.2d 453 (Va. 2016).	Drafting lawyer may be liable to intended beneficiaries of the estate plan as third party beneficiaries of the contract between the testator and the lawyer.
Virginia as of 6/29/20	Yes	Strict Privity	Va. Code § 64.2-520.1	A malpractice claim can be brought only by the client or the client's personal representative within 3 (unwritten contract) or 5 (written contract) years after completion of the representation in which the malpractice occurred. No third party may sue the attorney unless there is a written agreement that expressly grants standing by specific reference to the statute.
Washington	No	Balancing Factors and Relaxed Privity	*Benjamin v. Singleton*, 436 P.3d 389 (Wash. Ct. App. 2019); *Parks v. Fink*, 292 P.3d 1275 (Wash. Ct. App. 2013); *Trask v. Butler*, 872 P.2d 1080 (Wash. 1994)	Washington combines both the broad cause of action and applies the intended third party beneficiary exception. The intent to benefit the plaintiff is the first and threshold inquiry in Washington's multi-factor balancing test. *See Trask*, 872 P.2d at 842.
West Virginia	Yes – generally	Relaxed Privity	*Calvert v. Scharf*, 619 S.E.2d 197 (W. Va. 2005)	West Virginia follows the strict privity approach unless the plaintiff is the intended third party beneficiary and the testator's intent has been frustrated.

Jurisdiction	Privity Required?	Approach	Authority	Comments
Wisconsin	No	Relaxed Privity	*Auric v. Continental Cas. Co.*, 331 N.W.2d 325 (Wis. 1983); *Beauchamp v. Kenmeter*, 625 N.W.2d 297 (Wis. Ct. App. 2000); *MacLeish v. Boardman & Clark LLP*, 294 N.W.2d 799 (Wis. 2019)	Wisconsin applied the balancing factors in *Auric*, moving away from its traditional strict privity approach. However, Wisconsin's court of appeals narrowed the balancing factors in *Beauchamp* by refusing to extend *Auric* and instead applying the test of whether the plaintiff was a named beneficiary. The Supreme Court of Wisconsin upheld both decisions in *Macleish*.
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SAEPC SOUTHERN ARIZONA ESTATE PLANNING COUNCIL

Estate Planner's Day 2025

Escaping the Estate Planning "Blue Screen of Death" With Competent and Ethical Practices

Dr. Gerry W. Beyer
Governor Preston E. Smith Regents Professor of Law
Texas Tech University School of Law

1

Talking with deceased family members

2

2

Unexpected problem results from long life

Betty Ashley

3

3

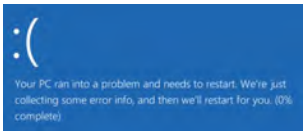
Making funerals friendlier

4

4

Overview of Presentation

1. Potential of estate planning malpractice liability and how to avoid it.
   - 10.6% of malpractice claims are estate planning related.
2. Ethical issues facing estate planners.



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Malpractice Liability -- History

1. Contract privity required thus disgruntled beneficiaries had no standing.

PRIVITY

- Good = attorney's loyalty only to client
- Bad = no remedy for egregious malpractice

6

6

Malpractice Liability -- Changes

2. Privity not needed:
   - Will beneficiary is a third-party beneficiary of a contract, and/or
   - Tort action (negligence of attorney damaged will beneficiary)

7

7

Malpractice Liability – Modern Status

1. Privity still required
2. Abandon requirement generally
   - Allow extrinsic evidence
   - Prohibit extrinsic evidence
3. Abandon requirement but only if plaintiff is mentioned in the will (*not* a beneficiary "wannabe")

8

8

Malpractice Liability – Arizona

- Arizona follows a balancing test to determine if an attorney is liable to a third person such as a will beneficiary who is not in privity.
  1. The extent to which the transaction was intended to affect the plaintiff.
  2. The foreseeability of harm to plaintiff.
  3. The degree of certainty that the plaintiff suffered injury.
  4. The closeness of the connection between the attorney's conduct and the injuries suffered.
  5. The moral blame attached to the attorney's conduct.
  6. The policy of preventing future harm.
     - *Fickett v. Superior Court of Pima County*, 558 P.2d 988, 990 (Ariz. Ct. App. 1976), quoted with approval in *Capitol Indem. Corp. v. Fleming*, 58 P.3d 965 , 967 (Ariz. 2002).

9

9

Poor Client Interaction

- 1. Failure to gather sufficient information.

10

10

Poor Client Interaction

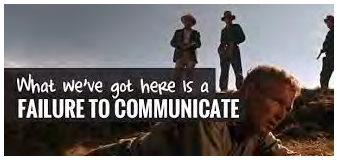
- 2. Believing client without independent verification

11

11

Poor Client Interaction

- 3. Neglecting communications with client



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Poor Client Interaction

- 4. Failure to act timely

13

13

Poor Client Interaction

- 5. Failure to document unusual requests

14

14

Poor Client Interaction

- 6. Failure to recognize will contest omens:
  - Disinheriting close relatives for distant relatives, friends, or charities
  - Unequal division among children
  - Excessive restrictions on gifts to heirs
  - Elderly or disabled testator (sad, but true)
  - Sudden or significant change in disposition plan
  - Strangely acting client

15

15

Errors in Will Drafting

- 1. Proof proofreading of documents
  - "I leave $10.000 to my friend, Barry Allen."
  - "I found inspiration in cooking my family and my friends."
  - The texting lookout:
    - "The police are no where."
    - "The police are now here."

16

16

Errors in Will Drafting

- 2. No provision regarding ademption

17

17

Errors in Will Drafting

- 3. No provision regarding lapse

18

18

Errors in Will Drafting

- 4. Including "just debts" provision

19

19

Errors in Will Drafting

- 5. Failure to discuss exoneration

EXONERATION

20

20

Errors in Will Drafting

- 6. Failure to extend survival period

21

21

Errors in Will Drafting

- 7. Failure to address abatement

22

22

Errors in Will Drafting

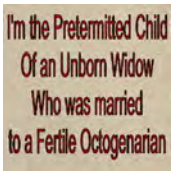
- 8. Failure to address tax apportionment

23

23

Errors in Will Drafting

- 9. Lack of provision regarding pretermitted children



24

24

Errors in Will Drafting

- 10. Failure to address adopted, non-marital, and ART children/grandchildren

25

25

Errors in Will Drafting

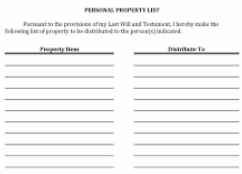
- 11. Failure to externally integrate documents

26

26

Errors in Will Drafting

- 12. Referencing a tangible personal property document unless allowed by state law.
  - Allowed in Arizona § 14-2513
  - *Not* allowed in many other states so it could end up being worthless.



PERSONAL PROPERTY LIST

Pursuant to the provisions of my Last Will and Testament, I hereby make the following list of property to be distributed to the person(s) indicated.

Property Item	Distribute To

27

27

Errors in Will Drafting

- 13. Improper internal integration

28

28

Errors in Will Drafting

- 14. Use of ambiguous language
  - "I leave my sister, Pat, my house."
    - Sister = Pam
    - Brother = Pat

29

29

Errors in Will Drafting

- 15. Use of precatory language
  - I hope
  - I wish
  - I desire
  - I recommend
  - It would be nice if

30

30

Errors in Will Drafting

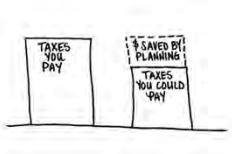
- 16. Violation of Rule Against Perpetuities

31

31

Errors in Will Drafting

- 17. Inadequate tax planning



32

32

Errors in Will Drafting

- 18. Failure to indicate alternate or successor executors

33

33

Errors in Will Drafting

- 19. Lack of provision regarding bond


34

34

Errors in Will Drafting

- 20. Lack of compensation provision

35

35

Improper Will Execution

- 1. Ceremony conducted by a non-lawyer

36

36

Improper Will Execution

- 2. Beneficiary present during will execution

37

37

Improper Will Execution

- 3. No testator signature

Error- No Signature

38

38

Improper Will Execution

- 4. Testator signs wrong will

39

39

Improper Will Execution

- 5. Lack of sufficient number of witnesses

40

40

Improper Will Execution

- 6. Presence requirements not satisfied
  - Testator signs or acknowledges a prior signature in witnesses' presence.
  - Witnesses attest in testator's presence.
  - Witnesses attest in each other's presence.

41

41

Improper Will Execution

- 7. Beneficiary as a witness

42

42

Improper Will Execution

- 8. Improperly completed self-proving affidavit

ARIZONA SELF-PROVING AFFIDAVIT

I, _____, the testator, sign my name to this instrument this ____ day of _____, _____, and being first duly sworn, do declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly, or willingly direct another to sign for me, that I execute it as my free and voluntary act for the purposes expressed in that document and that I am eighteen years of age or older, of sound mind and under no constraint or undue influence.

Testator's Signature _____

43

43

Improper Will Execution

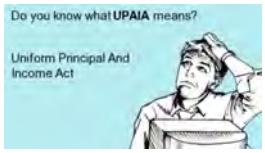
- 9. Execution of duplicate originals

44

44

Errors in Trust Drafting

- 1. Failure to address principal and income issues



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Errors in Trust Drafting

- 2. Omission of spendthrift provision

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Errors in Trust Drafting

- 3. Misstating ability to revoke

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Other Troublesome Areas

- 1. Improper document preservation
  - Secure
  - Easy to locate
  - Safe from "evil" destruction
  - Available when needed

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Other Troublesome Areas

- 2. Failure to give client sufficient post-execution instructions
  - Don't make self-help changes.
  - Review on regular basis.

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Other Troublesome Areas

- 3. Failure to consider disclaimers
  - Tax savings
  - Liability avoidance
  - Creditor avoidance

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Other Troublesome Areas

- 4. Failure to provide complete estate plan
  - Durable power of attorney
  - Medical power of attorney
  - Designation of guardian
  - Living will
  - Body disposition document
  - Anatomical gifts
  - Mental health treatment declaration
  - HIPAA authorization

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Estate Planning for Spouses

- The scenario

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Estate Planning for Spouses

- Inherently dangerous:
  - 50% of marriages end in divorce
  - Many married people are unhappy
  - Many married people are cheating
- But, benefits:
  - Two clients
  - Tightly integrated and coordinated estate plan
  - Lower cost than if each spouse has own attorney

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Estate Planning for Spouses -- Dangers

- 1. Conflicts of interest
  - Family structure
  - One spouse's past relationship with attorney
  - Differing testamentary goals
  - Power difference between spouses
  - Stability of marriage

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Estate Planning for Spouses -- Dangers

- 2. Release of confidentiality and evidentiary privileges

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Estate Planning for Spouses -- Dangers

- 3. Discourages client disclosure of pertinent information

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Estate Planning for Spouses -- Dangers

- 4. Withdrawing from representation of both may be necessary if conflict later surfaces

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Estate Planning for Spouses -- Dangers

- 5. Difficulty determining when representation complete

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Estate Planning for Spouses – If you do,

- Disclose early.
- Disclose completely.
- Clients sign detailed written disclosure document.
- Include time representation ends.

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Representation of Non-Spousal Relatives

- Basically, same issues as with spouses.

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Attorney as Will Drafter and Beneficiary

- Unless closely related:
  - May cause loss of gift.
    - Often, presumption of undue influence
  - May subject attorney to discipline.

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Drafting Attorney as Fiduciary

- Allowed, but
- Be very careful – do not suggest or exert influence.
- Query why even want the job??
- Exculpatory clauses unlikely to work.

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Fiduciary Hiring Self as Attorney

- Dangerous practice
  - Motive to self-hire to receive attorney fees.
  - Reduces checks & balances.

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Drafting Attorney as Custodian of Will

- Safety vs. pressure to hire attorney to:
  - Revise will, or
  - Probate will.
- Always give or receive receipt and retain in client's file.

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Questions?

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