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How To Avoid Estate Planning Malpractice Claims



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THROUGH THE DRAFTING OF WILLS AND TRUSTS, ESTATE PLANNING LAWYERS help protect their clients' interests after they're gone. Once the appointed executors and trustees start implementing the plan, it is all too common for someone to assert that he did not receive what he should have and point his finger at the lawyer.

The lawyer is suddenly accused of failing to represent the interests of someone she may never have met or, in some cases, never knew existed. The actual client is no longer available to explain his intentions, and often the legal services were provided years, even decades, earlier.

This article addresses some of the legal malpractice issues that arise in estate planning practice. The elements of an estate planning malpractice lawsuit are no different from the elements of malpractice claims in other substantive areas: (i) legal duty; (ii) breach of that

duty; (iii) causation; and (iv) damages. But estate planning lawyers need to pay particular attention to whose interests they are representing and document their clients' instructions diligently.

Clear record-keeping is essential because in many cases estate planning malpractice claims are filed years after the fact. When that happens, your files might be the best – and if you're lucky, the only – evidence you need to prove that you complied with the client's directives.

Who can sue?

In estate planning malpractice lawsuits, whether a legal duty exists is frequently litigated because the plaintiff is usually not the client who engaged the attorney.

Third-party beneficiaries. While the general rule is that an attorney owes legal duties only to his clients, the Illinois Supreme Court in *Pelham v. Griesheimer* held that in limited circumstances,

Estate planning lawyers are uniquely exposed to legal malpractice liability. This article explores these unique risks – including the third-party beneficiary rule and the modified statute of repose – and offers tips for minimizing the risk of malpractice claims.

a non-client may state a claim for malpractice: “[f]or a nonclient to succeed in a negligence action against an attorney, he must prove that the *primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party.*”¹ The supreme court recently reaffirmed this narrow third-party beneficiary exception in *In re Estate of Powell*.²

Plaintiffs seeking to use this exception must adduce specific proof of an intent to “directly benefit” them and cannot state a claim merely by asserting that (i) the attorney’s work directly affected them or (ii) they were incidental beneficiaries of the legal services.³

One relevant factor is whether the services were provided in an adversarial or nonadversarial setting (e.g., probate litigation or will drafting, respectively). Plaintiffs have an easier time proving standing to sue as third-party beneficiaries in a nonadversarial context. Nonetheless, the “paramount consideration” is “whether the attorney acted at the direction of or on the behalf of the client to directly benefit or influence the third party.”⁴ Thus, even in a nonadversarial setting, plaintiffs must prove that the client intended them to be direct beneficiaries of the services.

Beneficiaries named in a will or trust have successfully stated third-party-beneficiary claims against the attorneys who drafted the document.⁵ But plaintiffs have not been successful in asserting claims against attorneys retained by an executor to represent the estate, since their legal duties are owed to the estate and not to any specific beneficiary.⁶ Otherwise, the attorney’s duty to ensure proper administration of the estate would conflict with the duty to maximize each beneficiary’s interest in the assets.⁷

Plaintiffs unnamed in the will. Can someone not named in a will or trust bring a legal malpractice claim against the estate planning lawyer who drafted the documents? Rulings in other jurisdictions have varied,⁸ and Illinois courts have not addressed the issue.

But plaintiffs bringing claims under Illinois law must prove that the primary purpose of the legal representation was for their benefit. That would appear to be a tall order for someone not named in the decedent’s estate planning documents, but it is at least theoretically possible.

Implied-in-fact relationship. It is possible for a trust beneficiary to state a malpractice claim against the trust’s attorneys by alleging an implied-in-fact attorney-client relationship. That’s what happened in *Scanlan v. Eisenberg*, a federal decision applying Illinois law.⁹

In *Scanlan*, the plaintiff alleged that attorneys were simultaneously representing the trustee and the beneficiary, as well as other parties. The court, which applied federal notice pleading standards, found that the claim was plausible because the plaintiff alleged

1. *Pelham v. Griesheimer*, 92 Ill. 2d 13, 21 (1982) (emphasis added).

2. *In re Estate of Powell*, 2014 IL 115997, ¶ 14.

3. See, e.g., *Reddick v. Suits*, 2011 IL App (2d) 100480, ¶ 43.

4. *Id.*

5. See, e.g., *McLane v. Russell*, 131 Ill. 2d 509 (1989).

6. See, e.g., *In re Estate of Lis*, 365 Ill. App. 3d 1, 18 (1st Dist. 2006).

7. *Jewish Hospital of St. Louis, Missouri v. Boatmen’s National Bank of Belleville*, 261 Ill. App. 3d 750, 763 (5th Dist. 1994).

8. Compare *Ferguson v. O’Bryan*, 996 N.E.2d 428, 433 (Ind. Ct. App. 2013) (unnamed beneficiary could bring malpractice claims), with *Franicevich v. Peterson*, No. A138435, 2014 WL 126098, *4 (Cal. Ct. App. 1st Dist. Jan. 14, 2014) (unnamed beneficiary could not bring malpractice claim).

9. *Scanlan v. Eisenberg*, 913 F. Supp. 2d 591 (N.D. Ill. 2012).

TAKEAWAYS >>

- According to the Illinois Supreme Court, “[f]or a nonclient to succeed in a negligence action against an attorney, he must prove that the *primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party.*” It is not enough for the plaintiff to merely assert that the attorney’s work directly impacted the plaintiff or that the plaintiff was an incidental beneficiary of the legal services.

- While most malpractice claims against an attorney are subject to a six-year statute of repose, malpractice claims based on negligently drafted estate planning documents that do not have legal effect until the client’s death may be brought within two years of the client’s death or within the time period to file claims against the estate or to challenge the validity of a will—without regard to when the alleged negligence occurred.

- While a plaintiff usually must present expert testimony that the estate planning attorney’s conduct fell below the applicable standard of care, expert testimony is not required if the alleged malpractice is so obvious or egregious that even a non-lawyer would be able to conclude that the attorney’s conduct was deficient.

CLEAR RECORD-KEEPING IS ESSENTIAL BECAUSE IN MANY CASES ESTATE PLANNING MALPRACTICE CLAIMS ARE FILED YEARS AFTER THE FACT.

that the attorneys had represented her throughout her adult life, acted as her personal counsel when she needed legal advice, including about matters relating to the trusts of which she was a beneficiary, and sent her communications marked personal and confidential.¹⁰

Scanlan is a good illustration of the dangers of representation creep and the importance of documenting the scope of your representation. The recent Illinois decision in *Meriturn Partners, LLC v. Banner & Witcoff, Ltd.* is another good

example.¹¹

In that case, the plaintiffs successfully argued that the LLC's attorney represented both the company and a group of outside investors. The appellate court, citing *Powell*, explained that even had there not been an actual attorney-client relationship between the attorney and the investors, they were the intended third-party beneficiaries of the attorney-client relationship.¹²

Exceptions to the six-year statute of repose for legal malpractice claims

Most malpractice claims against attorneys are subject to the six-year statute of repose in section 13-214.3(c) of the Illinois Code of Civil Procedure.¹³ The statute bars claims brought by clients, as well as claims brought by non-clients, such as third-party beneficiaries of the legal services.¹⁴ Subsection (d) of the statute, however, contains an important exception directly applicable to estate planning lawyers. It provides:

When the injury caused by the act or omission does not occur until the death of the person for whom the professional services were rendered, the action may be

commenced within 2 years after the date of the person's death unless letters of office are issued or the person's will is admitted to probate within that 2 year period, in which case the action must be commenced within the time for filing claims against the estate or a petition contesting the validity of the will of the deceased person, whichever is later, as provided in the Probate Act of 1975.¹⁵

Under this subsection, malpractice claims based on negligently drafted estate planning documents that do not take effect until the client's death may be brought within the shorter of 1) two years of the death or 2) the window for filing claims against the estate or challenging the validity of a will – regardless when the negligence was alleged to have occurred.

Illinois courts have consistently held that injuries caused by negligently drafted estate planning documents occur at the time of the client's death, assuming they were modifiable prior to that point. In *Fitch v. McDermott, Will & Emery, LLP*, the appellate court explained that section 13-214.3(d) applied because the negligently drafted estate planning document could have been revoked or modified at any time prior to, and thus did not cause injury until, the client's death.¹⁶

When the estate planning document is *not* intended to be modifiable prior to a client's death – e.g., an irrevocable trust created and funded during the settlor's lifetime or a quitclaim deed executed and recorded during the grantor's lifetime – the modified statute of repose in section 13-214.3(d) does not apply. This is true even if the alleged negligence could have been corrected had it been discovered prior to the client's death.

For example, in *Snyder v. Heidelberger* a client had instructed his attorney to prepare a quitclaim deed to convey title to real property to the client and his wife as

ISBA RESOURCES >>

- ISBA Free CLE, *2nd Annual Elder Law Bootcamp: Basics and Beyond* (Apr. 2015), <http://onlinecle.isba.org/store/seminar/seminar.php?seminar=45437>.
- Robert J. Kolasa, *Avoiding Malpractice Under the New Estate Tax Portability Rules*, Trusts & Estates (July 2014), <http://www.isba.org/sections/trustsestates/newsletter/2014/07/avoidingmalpracticeundernewestateta>.
- Helen W. Gunnarsson, *Statute of Repose Bars Legal Malpractice Claim*, 99 Ill. B.J. 382 (Aug. 2011), <http://www.isba.org/ibj/2011/08/lawpulse/statuteofreposebarslegalmalpractice>.
- Michael Sue, *Exception to Six-Year Statute of Repose for Attorney Malpractice Applies to Any Mechanism, Be It Probate or Non-Probate Distribution*, Trusts & Estates (Nov. 2002), <http://www.isba.org/sections/trustsestates/newsletter/2002/11/exceptiontosixyearstatuteofreposefo>.
- Anne E. Thar, *Malpractice Prevention Update: Nice Guys Finish Last in Wills and Estate Planning*, 88 Ill. B.J. 235 (Apr. 2000), <http://www.isba.org/ibj/2000/04/niceguysfinishlastinwillsandestatep>.

10. *Id.* at 596-97.

11. *Meriturn Partners, LLC v. Banner & Witcoff, Ltd.*, 2015 IL App (1st) 131883, ¶ 14.

12. *Id.*

13. 735 ILCS 5/13-214.3.

14. *Evanston Insurance Co. v. Riseborough*, 2014 IL 114271, ¶ 23.

15. 735 ILCS 5/13-214.3(d).

16. *Fitch v. McDermott, Will & Emery, LLP*, 401 Ill. App. 3d 1006, 1022-23 (2d Dist. 2010).

joint tenants with rights of survivorship.¹⁷ The attorney prepared the deed and it was signed and recorded, but he failed to recall that he had previously prepared (and the client had signed and recorded) a deed in trust conveying title to a land trust. Upon the client's death, ownership of the property passed to the beneficiary listed in the land trust agreement (the client's son) rather than to the client's widow (as surviving joint tenant).

The Illinois Supreme Court held that the injury occurred when the attorney drafted the quitclaim deed, reasoning that the client intended that he and his wife take possession of the property immediately. Accordingly, section 13-214.3(d) did not extend the statute of repose beyond six years.

Will I need an expert witness?

The general rule is that a plaintiff must present expert testimony that the estate planning attorney's conduct fell below the applicable standard of care, and each party usually hires a standard-of-care expert. Expert testimony is not required if the alleged malpractice is so obvious that even a non-lawyer could tell the attorney's conduct was deficient. For example, in *Sorenson v. Fio Rito*, the appellate court explained that no expert testimony was required to prove that an attorney hired to handle a decedent's estate failed to take any actions at all.¹⁸

A related issue is whether a judge or a jury will determine whether the alleged breach caused damages. While causation is generally a fact issue for the jury, it is sometimes a question of law. For example, a court would likely decide causation when the factual issue is how a court would have ruled but for the alleged malpractice.¹⁹ Illinois courts have held that it is inappropriate for juries to

make findings that the Illinois legislature affirmatively delegated to the judiciary.²⁰

Is reformation a potential remedy?

Is reforming the estate plan to conform to the testator's intent an option? No. Malpractice plaintiffs are seeking money damages to make them whole. Reformation of the negligently drafted will or trust is not a traditional remedy. The seventh circuit noted that reformation is not a malpractice remedy when addressing evidentiary issues relating to proving the testator's intent in *Ennenga v. Starns*.²¹

What about inter vivos trusts?

This article has focused primarily on wills and trusts that do not come into being until the death of the testator – i.e., testamentary trusts. The same principles apply to the assortment of inter vivos, or living, trusts that are created and sometimes funded during the settlor's life. They are frequently used by estate planning lawyers, both in their revocable and irrevocable versions.

When a party alleges that a living trust was negligently drafted, the familiar questions arise. To whom does the attorney owe a duty? When did the cause of action accrue? What are the damages? The question of the grantor's actual intent is less likely to be disputed if the grantor is still alive when the malpractice suit is brought.

A major issue for living trusts, however, is whether the document can be modified to cure any alleged defects. If the negligently drafted document is unambiguous and rights under it have already vested in third-parties, it may be too late to undo the negligence.

If, however, the document can be

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reformed or rescinded, the resulting damages may be limited to the fees incurred to fix it. While this kind of damage mitigation is worth exploring, it is outside the scope of this article.

Document carefully

Estate planning lawyers are uniquely exposed to malpractice liability, largely because of the third-party beneficiary rule and the modified statute of repose. To minimize the risk of being sued for malpractice, estate planning lawyers should carefully document what the client wants, who he or she intends to be the direct beneficiaries of the work, and the scope of the engagement. When it comes to avoiding malpractice claims, clear engagement letters, termination letters, and thorough record-keeping are as important as knowing the substance of the law. **EB**

17. *Snyder v. Heidelberger*, 2011 IL 111052, ¶¶ 12-18.

18. *Sorenson v. Fio Rito*, 90 Ill. App. 3d 368, 374 (1st Dist. 1980).

19. See, e.g., *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 212-14 (2006).

20. *First National Bank of LaGrange v. Lowrey*, 375 Ill. App. 3d 181, 203 (1st Dist. 2007).

21. *Ennenga v. Starns*, 677 F.3d 766, 779 (7th Cir. 2012).