ESTATE PLANNING RELATED MALPRACTICE CLAIMS

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The Attorney’s Playbook

Best Practices to Avoid, and Possible Defenses To,

Estate Related Legal Malpractice Claims

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I. Introduction:

A. The Estate Planning Team: Typically comprised of many professionals and advisors, including, but certainly not limited to:

- Lawyers
- Brokers, money managers, and financial planners
- Insurance agents, brokers, or advisors
- Accountants
- Pension or retirement consultants

B. A Note About Specialization

- Know your limits and be careful how you hold yourself out to the public
- Take a team approach; do not be afraid to refer a client to a specialist for complex matters
- Define your limitations

II. Background - The Elements of a Legal Malpractice Claim in New York:

1. The existence of an attorney-client relationship (the “privity” requirement);
2. Negligence (that the attorney failed to exercise that degree of skill commonly exercised by an ordinary member of the legal community);
3. Actual and ascertainable damages; and
4. A proximate cause between the actual and ascertainable damages caused and the acts or omissions of the attorney.

Leff v. Fulbright & Jaworski LLP, 78 A.D.3d 531 (1st Dept. 2010); McCoy v. Feinman, 99 N.Y.2d 295 (2002); Brooks v. Lewin, 21 A.D.3d 731 (1st Dept 2005); Pellegrino v. File, 291 A.D.2d 60, 63 (1st Dept. 2002); Zarin v. Reid & Priest, 184 A.D.2d 385, 387-88 (1st Dept. 1992);

A. Privity - Generally

1. Traditionally – “Strict Privity” – Now the Minority View Across The Country: The idea that absent fraud, collusion, malicious acts, or similar circumstances, only those in direct privity (a contractual relationship) or a relationship sufficiently close to “privity” has standing to raise a legal malpractice claim. Fredriksen v. Fredriksen, 30 A.D.3d 370 (2d Dept. 2006).
2. **Trend – “Relaxed Privity”:** which permits a legal malpractice claim to vest in someone other than the “client.”

B. **Privity – In the Estate Planning Context**

1. **Pre-2010: Strict Privity:** Prevented surviving spouses, children, other beneficiaries and personal representatives from bringing claims against the estate planning lawyer for legal malpractice absent fraud, collusion, malicious acts or similar circumstances.

2. **June 2010:** The New York Court of Appeals relaxed the privity rule and held that a personal representative may sue an estate planning attorney for negligence in estate planning. *Schneider v. Finmann, 15 NY3d 306 (2010).*
   - Court held the estate essentially “stands in the shoes” of a decedent and, therefore, has the capacity to maintain the malpractice claim on the estate's behalf.
   - This is consistent with EPTL 11–3.2(b), which generally permits the personal representative of a decedent to maintain an action for “injury to person or property” after that person's death.
   - Limited to the personal representative of an estate; not extended to third-parties or beneficiaries.
   - Some likely effects of the *Schneider* decision: (1) broadens the class of potential claimants; (2) likely creating an increased number of legal malpractice actions being filed against estate planners; (3) causing higher malpractice insurance premiums; and (4) a greater degree of scrutiny over the estate planning attorney’s practices, acts and omissions.

III. **COMMON FIDUCIARY FUMBLES, BEST PRACTICES AND DEFENSES**

A. **Failure to Know The Players: Understand Who has Standing to Sue**

   **BEST PRACTICE:** Remember that in NY only “personal representatives” have standing to sue.
   - A plaintiff’s unilateral, subjective belief that she was represented by the attorneys who represented her husband was insufficient to create an attorney-client relationship (as related to her late husband's estate planning). *Leff v. Fulbright & Jaworski LLP, supra.*
   - See also, *Allmen vs. Fox Rothschild*, 34 Misc.3d 1224(A) (NY Sup. Ct. New York Cty. 2012)

   **BEST PRACTICE:** Consider an application for limited letters. **SCPA § 702**

B. **Failure to Properly Scout: Collect Adequate Information**

   **BEST PRACTICE:** Ask questions – a lot of them.
   - The client may not think something is important when it really is (e.g., an adopted child; posthumously conceived children, etc).

   **BEST PRACTICE:** Obtain copies of all wills, trusts, and other advance directives previously executed by the client.
**BEST PRACTICE:** Consider a client questionnaire to obtain specific information about the client, his/her family (a family tree), assets and any “skeletons in the closet.”

- To identify early on what planning areas are relevant to a particular client;
- To manage client (and your) expectations;
- To create a record of client representations, their understanding of assets and planning objectives;

**BEST PRACTICE:** Use a diary system to ensure that communications with a client are frequent.

**BEST PRACTICE:** Identify and possibly diffuse the potential “challengers.”

C. Failure to Have a Written Client Playbook: Documentation is Key

**BEST PRACTICE:** Document, Document, Document and Document!

- Consider client questionnaires (see above)
- Document, date and sometimes witness recommendations to a client and, in particular, that advice which the client affirmatively accepts or rejects.
- Consider waivers – particularly useful if there is an obvious danger of tax consequences. If the client signs that they were made aware of the consequences yet nevertheless chose to ignore it, you might mitigate (or alleviate altogether) a contest down the line.
- Consider checklists to be used by all attorneys and staff members (also good for litigation)

D. Failure to Anticipate the Offense: Be Mindful of Possible Causes of Action

**BEST PRACTICE:** Understand all the elements of a legal malpractice cause of action.

**BEST PRACTICE:** Be cognizant of good faith claims vs. frivolous claim.

**BEST PRACTICE:** Identify the central tasks of the estate planning attorney, and whether the negligent performance of any of those tasks is sufficient grounds for pleading a claim.

- *Schneider* only examined one “central task” of aspect of estate planning services -- negligent advice allegedly resulting in enhanced estate tax liability. Some others might include:
  - Drafting errors in both wills and trusts
  - Improper execution
  - Improperly completed self-proving affidavits
  - Failing to properly draft/supervise the execution of a will or trust instrument. *Goldberg v. Bosworth*, 215 N.Y.S.2d 849 (NY Sup. Ct. Kings Cty. 1961); see also *Biakanja v. Irving*, 49 Cal. 2d 647 (Cal. 1958) (notary public negligently failed to direct proper attestation of a will became liable in tort to an intended beneficiary who suffered damage because of the invalidity of the instrument).

Failure to consider the impact of the testator’s post will marriage or afterborn children

E. Failure to Tackle the Statute of Limitations and Continuous Representation Doctrine

**BEST PRACTICE:** Understand the 3 year statute of limitation on a legal malpractice claim.

- Discovery of the negligence or breach, and the time at which damages are incurred, are irrelevant. “[W]hat is important is when the malpractice was committed and not when the client discovered it.” *Shumsky*, supra; see also, *Allmen*, supra.
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**BEST PRACTICE:** Don’t get blitzed by the Continuous Representation doctrine.

- The continuous representation doctrine stays the time to bring a legal malpractice action when the lawyer’s continuous representation relates “specifically to the matter in which the attorney committed the alleged malpractice.” *Shumsky*, supra at 167-8 (2001).
- Requires an ongoing, continuous, developing, and mutually dependent relationship between the client and the lawyer on a particular and specific matter.
- One party’s unilateral belief that the relationship exists (or has ended) is insufficient. *Hadda v. Lissner & Lissner LLP*, 99 A.D.3d 476 (1st Dept.s 2012); *Leff v. Fulbright & Jaworski LLP*, supra; *Solondz v. Barash*, 225 A.D.2d 996 (3d Dept. 1996).

- In estate planning this is not always practical or desired.

**BEST PRACTICE:** Need to balance relationships with clients without simultaneously exposing himself or herself to a never-ending period of exposure.

**BEST PRACTICE:** Consider Multiple Engagement Letters

- Pro: If carefully drafted, you may not be responsible for everything under the sun.
- Pro: Each stage of your representation will be clearly defined. See, *Hadda*, supra.
- Con: Multiple engagement letters may offend some clients.

**BEST PRACTICE:** Consider Termination Letters:

- Pro: If specific projects and time frames are clearly delineated the statute of limitations might be more clearly defined, decreasing the possibility of an argued toll pursuant to the continuous representation doctrine. This provides closure on an otherwise endless spectrum of time for potential claims of malpractice.
- Con: risk of alienation with long-term clients.

**BEST PRACTICE:** Consider language which confirms the representation has ended, that the client may periodically receive communications for informational purposes but which does not constitute a continuation of your representation. Simultaneously advise that you always welcome the opportunity to help and be re-engaged in the future.

F. Failure to Avoid Double Coverage: Identify Conflicts of Interest

**BEST PRACTICE:** Be weary of wearing multiple hats

**BEST PRACTICE:** Consider obtaining a proper waiver or consent
I. Malpractice Claims, Generally

Malpractice – Error or omission proximately causing damages
  o Two types of claims - Malpractice v. Breach of Fiduciary Duty Claims
    ▪ Malpractice - the departure from professional standards
    ▪ Breach of fiduciary duty - a failure to act in the best interest of the client.
    ▪ Different law, damages, defenses and outcomes result from the two types of claims.
      • Example – if a CPA is named as a trustee, they become a fiduciary by operation of law regardless of an error or omission, this creates fiduciary duties owed both to the beneficiaries and the trust.
      • A CPA can work for other clients, even those adverse to one another, but where there is a fiduciary duty, a duty of loyalty exists and the CPA cannot work for competing clients.
• CPA should avoid crossing into fiduciary territory to limit exposure. Sometimes, it is inevitable, but if at all possible, it should be avoided.
• The CPAs role as fiduciary is a separate presentation.
  o Over aggressive asset management resulting in diminished value can lead to liability for diminishment of asset value, liability can attach even though someone else was the asset manager if the CPA knew about the assets being aggressively managed, such as by receiving monthly account statements
  o Malpractice Damages - are proximately caused when they result from the error itself – usually interest and penalties, remediation costs and fees
  o Tax liability is not usually a damage, as it was owed regardless of the CPA
    ▪ However, it can be under certain circumstances
      • Example case 1. – Overpayment due to miscalculation of gift tax, no audit by the IRS, and IRS time to review expires. The overpayment of tax that may not be recovered is the damage.
      • Example case 2. – Transfers are made designed to be an incomplete gift, but the trust document’s language raises questions of whether the gift was a completed gift. Had the trust been drafted properly no tax was due, but the property later appreciates and when a gift tax return is finally prepared a tax is due on the appreciation, the tax is now a damage.

II. Best Practices To Avoid Claims

Areas of Involvement for Accountants In Estate Planning and Administration

  o CPA can determine the maximum tax savings from a gift giving program
  o Trust administration - example, they may send annual Crummey notices
  o Life insurance planning – CPA has knowledge of client’s lifestyle and saving practices for planning life and disability insurance
  o Family business planning – advise on buy-sell and redemption agreements, which may require life insurance planning to survive
  o Estate Administration - CPA’s involvement may prevent mistakes in administration
    ▪ Common that only one spouse had knowledge of the financial circumstances
    ▪ Surviving spouse may be overcome with grief
    ▪ Mistakes include leaving assets out of administration and estate tax returns
  o Prepare estate tax return – requires fair market value information for all assets
  o Liquidity planning – in order to satisfy estate tax liabilities, the CPA is involved in analyzing which assets could be sold, taking into account cash flow, reduction of debt, and reinvestment opportunities and selecting assets for a “Bypass trust” – but decision on which assets to sell is the client’s
  o Probate – where planning has not avoided probate the CPA can be involved in probate as the estate may be a separate taxable entity which, with careful planning can create significant income tax savings
Most common errors by CPA’s are:

1. Failure to timely file gift tax returns
2. Late filing of estate tax returns
3. Not accounting for previous taxable gifts
4. Miscommunication with Attorneys

1. Gift tax returns (form 709) due April 15 of the year following gift, and it is not uncommon that with the rush of tax season these returns are simply overlooked

- **Example case 3.** – Initial intake papers indicate that the attorneys would file gift tax return, but later the accountants agreed to file the return. Mistakes were made on the return. Who is to blame?
  - **Best practice** – diary gift tax return on calendar
  - **Best practice** – clearly define in writing the roles of the accountant and the roles of the attorneys
  - **Most Important Best Practice** - Get an Engagement Letter
    - Identifies work to be done by CPA
    - Identifies responsibilities of client and others
    - Limits liability
    - Addresses Dispute Resolution

2. Estate tax returns (form 706) are due 9 months after death and can be extended another 6 months (form 4768). Mistakes include:

   - **Waiting to the last month to prepare the return.** Grief stricken clients may not run to the accountants to file the return and often do not have readily available information on assets necessary to file a return.
     - **Best practice** – calendar and schedule an appointment to discuss tax planning within the first two months of the date of death
     - Gives the CPA ability to ascertain what appraisal or other investigative work is required, including:
       - Land appraisals
       - Contacting general partners of partnerships
       - Contacting brokers for date of death statements

   - **Waiting until the due date to file an extension**
     - It must be received on or prior to the due date, if after it is rejected.
     - **Best practice** – prepare the form 4768 6-month extension in advance of first meeting and have client sign it and file it, even if estate return will be filed on time

   - **Valuation Risks** – assets for which valuation is not easily determined
Best practice – refrain from appraising values and encourage client to obtain the written report a professional appraiser and confirm (and document) when an independent qualified appraisal is or is not needed
- If audit, CPA must testify to valuation which could hurt the return’s credibility
- Realtor’s letter not enough for basis of appraisal
- Must stand up to IRS’s standards and calculations
- Needs comparable properties’ values
- Valuing non-liquid assets or closely held entity interests

- **Erring on the “high side” in valuing capital assets** on the no-tax estate tax return of that first deceased spouse.
  - Problem when second spouse dies the IRS may use the high values of the first spouse’s return as starting point to value the assets forcing the preparer to justify the values
  - **Best practice** – be fair in appraisals on both returns and use a professional appraiser
  - **Best practice** – keep the client and the client’s other professionals informed and get the client’s informed consent to any action

**Conclusions**

1. **CPA is in a Unique Position to Help Client Avoid Pitfalls**
   - CPA sees client at least annually
   - Aware of clients current and prospective worth, cash flow needs and family concerns
   - In a position to guide client on
     - What new plans should be considered
     - Whether existing plans are being respected or whether client is taking actions inconsistent with the estate plan
     - Accountants can readily see if a client has acquired property or accounts

2. **Be aware that any mistakes that increase costs to the estate are recoverable in malpractice actions**

3. **Start early and get an extension early**

4. **Use an Engagement Letter**

5. **Diligent use of calendaring**

6. **Use professionals for appraisal services wherever possible or required**

7. **Give Notice of Potential Problems to the insurer as quickly as possible**
   - They can help defray the cost of working the problem
   - Failure to give notice could cost you your coverage
Questions?

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Thank you!