Legal Malpractice Issues in Trust and Probate Cases and Counsel's Liability to Non-Clients: When Does it Arise and When it Doesn't, and What to Do When You Spot it

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<u>When you may need to send your client to a lawyer specializing in legal malpractice:</u>

#1) Defending the Surcharge Claim- What appears to be <u>clear</u> legal malpractice by prior counsel:

Here, a negative result for the trustee in a surcharge claim *is almost a certainty* given the advice (or in this case the lack thereof) given by the trustee's prior attorney.

Assume you take over the defense the surcharge claim is based on alleged failure of the trustee to comply with the Uniform Prudent Investor's Act (Probate Code 16040 *et. seq.*) because there was no review of the investment portfolio after the death of the trustor. The defense fees are being paid by the assets of the Trust.

You also learn that the prior attorney who drafted the estate plan and then represented your client as the successor trustee had no discussion with the trustee about the UPIA. In this regard, the client was never told by her attorney that the UPIA includes a requirement that within a reasonable amount of time of accepting the trusteeship the trustee shall review the trust assets and act to bring the assets in compliance with the UPIA (Probate Code section 16049.)

You hire a financial professional as a consultant/possible expert witness to evaluate the portfolio that existed on the date of death and to provide you with an analysis of whether the UPIA was violated by your client. Your consultant/possible expert witness advises you that the portfolio that existed on date of death was not properly diversified under the UPIA, and had the portfolio been reviewed and brought in compliance with the UPIA, then the investment losses at issue would have been avoided. In light of this evaluation by your consultant/possible expert, you are concerned that any presentation by you at trial will be unsuccessful and a surcharge judgment will be entered against your client.

1. Is the Statute of Limitation on the client's claim against the prior attorney for legal malpractice running? If so, when did it begin to run?

2. Under these facts, is there benefit in securing a tolling agreement or is there more benefit in filing an action for malpractice?

    a. Assume a legal action for malpractice is filed, and you learn that the prior attorney only has $250,000 in coverage, and that it is "a burning limits policy," what now?

#2) Defending the Surcharge Claim- What appears to be <u>potential</u> legal malpractice by prior counsel:

Here, a negative result for the trustee in a surcharge claim *could be* as result of advice given by the trustee's prior attorney.

Assume the trustee being sued by the beneficiaries for surcharge based on taking alleged excessive trustee fees. Because of a lack liquidity with respect to the trust assets, the fees and costs being incurred by the trustee in defending the action are being paid personally by the trustee, with a potential right of reimbursement from the trust if she successfully defends the claim.

The prior attorney for the trustee (who is lay person) advised her to take a trustee fee, on an annual basis, based on a calculation of 2% of the value of the trust assets. The trust assets exceed $5M for the years that the percentage-based fee was taken. You learn that the prior attorney indicated, in response to questions asked by the trustee, that it was not necessary to keep contemporaneous time records regarding tasks and services rendered by the trustee.

Your client tells you that she spent significant time on the trust administration and that she *may* be able to recreate time records as to the tasks performed and the time spent through review of her records (e.g., emails and her personal calendar). You are concerned that even if the client is able recreate her time records, the fee she took at the advice of her prior counsel may greatly exceed what may be considered "reasonable" given the actual time spent by the trustee and what the court may determine is a reasonable hourly rate for services rendered.

So, while you are prepared to defend your client, and believe that you may be able to make a presentation at trial that could defend the fee taken by your client, in the back of your mind you are wondering whether your client may have a claim for legal malpractice against her former attorney for the advice given about how the fee should be calculated and taken.

1. Is the Statute of Limitation on the client's potential claim against the prior attorney for legal malpractice running? If so, when did it begin to run?

2. Under these facts, is there benefit in securing a tolling agreement or is there more benefit in filing an action for malpractice?

    a. Assuming tolling agreement obtained from prior attorney for six months. However, after the six month period, the litigation is continuing and the attorney refuses to sign an extension of the tolling agreement. What now?

3. The client is a good friend of the prior attorney and does not want to approach the prior attorney for a tolling agreement. What is your advice to you client?

#3) Trust as Drafted Fails to Reflect Client's Intent re Distribution of Residual

Client partially completes a questionnaire prepared by the estate planning attorney, and thereafter schedules an office appointment to pursue preparation of an estate plan. The client is unmarried with children from a prior marriage and is in her 70s. The questionnaire asks for basic information with no questions or explanations about how to treat the residue, if any, of an estate or defines residue of an estate.

Client meets with estate planning lawyer who prepares contemporaneous notes about how the client wants her estate distributed. In the meeting, client specifically advises the drafting attorney the residue of the estate is to go to her nephew.

After the meeting concludes, the drafting lawyer prepares the estate plan relying solely on the information the client included in the questionnaire without consulting his contemporaneously prepared notes from the client meeting. The draft of the trust prepared by the estate planning lawyer left the residue of the client's estate to the client's significant other, not the nephew. The estate planning attorney sent the draft of the trust to the client without highlighting or explaining why the residue was left to the significant other and not the nephew. The client reviewed the trust, making handwritten changes and then executed the document before a notary. In her handwritten changes, the client lined out the entire residuary bequest provision to the significant other, and then just inserted her nephew's initials without more. The client also lined out the specific bequest to the significant other and handwrote in a different but more lucrative bequest than as set forth in the original trust.

The client thereafter dies, and the significant other files a petition claiming the nephew unduly influenced and financially abused the decedent. The petition ultimately resolves at mediation favorably to the nephew but not until nephew incurs substantial attorneys' fees and costs exceeding six figures.

1. Is the Statute of Limitation on the client's claim against the prior attorney for legal malpractice running? If so, when did it begin to run?

2. What issues are involved in claims against estate planners for legal malpractice?

3. What if the estate planner retires right after doing this estate plan and the testator dies five years later. What issue is presented?

#4) Selection Case list

Selected Cases

1. Case Creating Malpractice Liability of Drafting Attorney to Non-Clients

    a. *Lucas v. Hamm* (1961) 56 Cal.2d 583

    Supreme Court case which expanded the duty of Estate Planning attorneys to non-client beneficiaries who were the intended beneficiaries of the attorney's services.

2. Case Creating Direct Liability of Attorney for Trustee to Non-Clients

    a. *Wolf v. Mitchell* (1999) 76 Cal.App. 4th 1030

    Trust beneficiary brings action against trustee for breach of fiduciary duty (looting the trust) and names the attorney for the trustee as a defendant for "actively participating" in the wrongful conduct. Summary judgment in favor of defendants reversed on appeal. Court noted that Section 326 of the Restatement Second of Trust provides that "[a] third person who, although not a transferee of trust property, has notice that a trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust.

        1. *See also, City of Alascadero v. Merrill Lynch, Pierce, Fenner & Smith Inc.* (1998) 68 Cal. App. 4th 445 [trust beneficiaries made claims against Merrill Lynch for alleged direct misrepresentations to the beneficiaries, actively participating with the trustee in breach of trust and acting for their own financial gain].

3. Cases where Malpractice Liability Found

    a. *Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656

    Intended trust beneficiaries had a cause of action for malpractice against a Drafting Lawyer who prepared an amendment to the trust but failed to obtain Court approval of the amendment as required by a conservatorship order.

    b. *Osornio v. Weingarten* (2004) 124 Cal.App.4th 304

    Drafting Attorney owed beneficiary, a care custodian and presumptively disqualified beneficiary under the Probate Code, a duty to advise the Testator the intended beneficiary would be disqualified as a beneficiary unless the Testator obtained a Certificate of Independent Review.

c. *Borissoff v. Taylor & Faust* (2004) 33 Cal.App.4th 523

Successor Trustee/Fiduciary may bring a claim for legal malpractice against the predecessor Trustee/Fiduciary's attorney for malpractice causing damages to the Estate.

d. *Garcia v. Borelli* (1982) 129 Cal.App.3d 24

Drafting Attorney accepted representation of co-executors – wife and son - after the Decedent died. In drafting the Will, the attorney failed to adequately effect Decedent's intent that certain joint tenancy property be disposed of as community property at his death, and if the Drafting Attorney had done so, the son, would have inherited an interest in the property. The co-executor son was forced to litigate the matter to determine heirship with a settlement ultimately reached but leaving the son with less than he would have inherited had the Will been drafted properly. Co-executor's son then filed a malpractice action against the Drafting Attorney. In addition to the malpractice claim, the co-executor's son alleged breach of ethical duties based on a conflict of interest on the part of the Drafting Attorney in undertaking representation of the wife and son.

e. *Bucquet v. Livingston* (1976) 57 Cal.App.3d 914

Trust beneficiaries had malpractice claim against attorney whose allegedly negligent tax advice to trustor in drafting trust resulted in reduction of beneficiaries' shares

4. Cases where Malpractice Liability Not Found

a. *Chang v. Lederman* (2009) 172 Cal.App.4th 67

Estate Planning/Drafting Attorney does not owe a duty to un-named potential beneficiaries. Attorney who drafts Will or Trust is not exposed to malpractice liability to non-client potential beneficiaries in absence of an executed Will or Trust expressly reflecting the Decedent's intent to benefit the non-client.

b. *Radovich v. Locke-Paddon* (1995) 35 Cal.App.4th 946

Malpractice liability will not lie against the Drafting Attorney to potential intended beneficiaries based on the Drafting Lawyer's alleged delay in failing to obtain Decedent's execution of a Will or Trust.

c. *Moore v. Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 Cal.App.4th 1287

A Drafting Attorney owes no duty to beneficiaries of a Will or Trust or to a beneficiary under a previous Will or Trust to ascertain and document the testamentary capacity of the client or the Testator.

d. *Ventura County Humane Society v. Holloway* (1974) 40 Cal.App.4th 897

Drafting Attorney who prepared Will that ambiguously named a charity (Society of Prevention of Cruelty to Animals [local or national]), a non-existent organization, was not exposed to claims of malpractice by potential beneficiaries (Charities with similar names) on theory they were unable under the Will or Trust due to the erroneous spelling of the beneficiary's name.

e. *Hall v. Kalfayan* (2010) 190 Cal.App.4th 197

Estate Planning/Drafting Attorney holds no duty to beneficiaries of Will or Trust Decedent never signed; in other words, no duty exists on the Drafting Lawyer to make sure the Decedent signs the Estate Planning documents before he or she dies.

f. *Baranian v. Clark* (2004) 123 Cal.App.4th 1012

Estate Planning/Drafting Attorney owes no duty to second guess a client regarding disposition of assets. In this case, the Testator left significant assets to a boyfriend and not her children. Trust and Will was drafted in accordance with Testator's intent.

5. Statute of Limitations - Attorney Malpractice CCP 340.6

a. Action for malpractice shall be commenced within one year after plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission.

OR

b. Four years from the date the wrongful act or omission, whichever occurs first.

c. The running of the statute of limitations is tolled during the time that any of the following exist:

i. **The Plaintiff has not sustained actual injury**
ii. **The Attorney continues to represent the Plaintiff regarding the specific subject matter in which the wrongful act omission occurred.**

iii. The Attorney willfully conceals the facts constituting the wrongful act or omission when such facts are known to the Attorney which will toll only the four-year statute of limitations.
iv. The Plaintiff is under a legal or physical disability restricting his or her ability to commence legal action.

PA SD
Probate Attorneys of San Diego

CERTIFICATE OF ATTENDANCE

PROVIDER: PROBATE ATTORNEYS OF SAN DIEGO NO. 16517

TITLE: **"Legal Malpractice Issues in Trust and Probate Cases and Counsel's Liability to Non-clients: When Does it Arise and When it Doesn't and What to do When You Spot It"**

PRESENTED BY: Robert Caietti, Esq. and James J. Brown, Esq.

DATE: April 18, 2018 TIME: 12:00 – 1:15

LOCATION: The Handlery Hotel, 950 Hotel Circle North, San Diego, CA 92108

This activity qualifies for Participatory Credit.

Total California MCLE Credit Hours for the above activity: **1 hour**, including the following subfield credits:

Legal Ethics **1.0**

Recognition and Elimination of Bias ________

Competence Issues

BELOW TO BE COMPLETED BY ATTORNEY AFTER PARTICIPATION IN THE ABOVE REFERENCED ACTIVITY

By signing below, I certify that I participated in all, or some*, of the activity described above and am therefore entitled to the following MCLE credit hours:

Total California MCLE Credit Hours: 1.0, including the following subfield credits:

Legal Ethics **1.0**

Recognition and Elimination of Bias ________

Competence Issues ________

You may not claim subfield credits unless the provider is granting credit in those areas above.

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Signature: ____

*partial participation hours must be pro-rated