

LAW UPDATES



Estate Planning and Administration: Protect Yourself and Your Client

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Oregon malpractice statistics show that the number of claims filed against estate planning and administration lawyers is consistently high, as compared with other areas of law. Similarly, the amount of money paid by the PLF on these claims is also high.

In the last two years, the PLF has seen a marked increase in the number of malpractice claims in this area of law. The good news is that following the suggestions listed below will help you reduce your chances of a malpractice claim.

Failure to Include a Beneficiary. Ask questions about the client's family. It might be helpful to have the client draw a family tree. This is especially helpful if the client does not have children. In general, it is safer to leave bequests to a class of beneficiaries, rather than to specifically named beneficiaries. For example, a bequest to "my children" or "my grandchildren"

is less prone to errors than naming the children or grandchildren individually.

Intentionally Omitting a Beneficiary. Be very careful when a beneficiary is being omitted from an estate plan. Ask your client specifically why a particular beneficiary is being omitted, and retain those notes in your file. It might also be a good idea to specifically state in the will or trust that a particular beneficiary has been omitted, to show intention and not oversight.

Capacity. If capacity might be an issue, have a long conversation with the client to document your client's intent, and to document lack of undue influence. Ask the four questions we learned in law school: 1) who are the natural objects of the client's bounty; 2) what is the nature and extent of the client's property; 3) does the client understand the nature of the act being performed; and 4) does

the client know the scope and contents of the will or trust. (For a further discussion see: “Protecting an Estate Plan Against Contests,” *Oregon State Bar Estate Planning and Administration Section Newsletter*, October 2001, by Philip N. Jones and James R. Cartwright.)

Avoid a Claim of Undue Influence. Be very careful to avoid a claim of undue influence, especially if the client is making an unnatural disposition or is omitting a child or grandchild. Carefully review the seven factors that the Oregon Supreme Court has held are present in a case of undue influence: 1) procurement; 2) lack of independent advice; 3) secrecy and haste; 4) change in attitude following close association with a new beneficiary; 5) change in dispositive plan; 6) unnatural or unjust bequest; and 7) susceptibility to influence. (For a further discussion of the seven factors see: “Protecting an Estate Plan Against Contests,” *Oregon State Bar Estate Planning and Administration Section Newsletter*, October 2001, by Philip N. Jones and James R. Cartwright.)

Retirement Accounts. Ask about your client’s retirement accounts, and be sure to coordinate the beneficiary designations with the estate plan. Be very careful before you name the estate as the beneficiary of a retirement account, because that might have detrimental income tax consequences. Similarly, be careful when you name a trust as a beneficiary of a retirement account to make sure that the required technical provisions are contained in the trust. Also, be very careful when making taxable withdrawals from retirement accounts during the administration of an estate or trust. You should familiarize yourself with the provisions of the SECURE Act, which significantly changed the distribution of inherited retirement accounts beginning in 2020. If you are not sure about how to best coordinate a retirement plan with an estate plan, associate with an ERISA attorney.

Transferring Assets to a Client’s Trust. When you are drafting trusts, make clear to your client, preferably in writing, which assets you will help transfer to the client’s trust and which assets the client is responsible for transferring to the trust. If you are asked to prepare a deed for a

trust you have not drafted, do not prepare the deed until you have received a copy of the trust and have reviewed its terms.

Joint Trusts. Joint trusts are very popular with married couples because the couple can manage their trust assets jointly, in a manner very similar to joint ownership. However, a problem may lurk in the administration of a joint trust after the first death. Many joint trusts provide that the trust assets will be divided into two equal shares at the first death. This division is crucial to implement any estate tax planning contained in the trust. It might also be important for family reasons, especially in a second marriage. When you are administering a joint trust following a death:

- Carefully follow the provisions of the trust.
- If the trust provides that the assets be divided, divide the assets and change the title to the assets to reflect which half of the formerly joint trust now owns each of the assets.
- If the trust provides for a further division of the deceased spouse’s half into subtrusts for estate tax planning purposes, make the required divisions and change the title to the assets to reflect which subtrust owns which assets.

When you are drafting a joint trust, impress upon your clients the need to seek legal advice to get help in dividing the joint trust after the first death.

Administering Wills or Trusts. When administering a will or trust, read the entire will or trust, including any codicils or amendments to it, very carefully. Pay particular attention to the boilerplate, especially no-contest provisions. It is a good idea to keep notes and review the trust and your notes from time to time during the process of administration.

Amending Wills or Trusts. Be very careful when amending only a portion of a will or trust. Read the entire will or trust, including any codicils or amendments to it, very carefully. Think of it as a game of pick-up sticks. If you change one provision, be aware of what other provisions might be affected.

Document Your Client's Intent. Keep careful notes and write letters to your client outlining what the estate plan does and doesn't do. If there is something that might be controversial, or if your client does not accept something that you recommended, document it in a letter to your client. Careful file notes are helpful, but a letter to the client gives the client the opportunity to let you know if the client does not understand or objects to any of the provisions of the estate plan. The client will not be available as a witness when the estate or trust is administered. Your letter to the client is evidence that the client understood and agreed to the plan.

Consider Unexpected Order of Death. Ask your client questions about what they would like to do if people die in an unexpected order. The client naturally thinks their children and grandchildren will survive them. Ask your client what should happen with their assets if a child or grandchild dies before the client, and then incorporate those wishes into the estate plan.

Specific Bequests and Residue. Make sure to review the residue language of every will and trust you draft. It can be easy to overlook the residue, especially when a client is making many specific bequests. As a general rule, encourage your client to think in terms of percentages for bequests, rather than specific assets that they might not still own when they die.

If Your File is Subpoenaed. If your file is subpoenaed (for example, in a will contest), call the PLF before responding to the subpoena for advice on how to proceed.

Payments from a Probate Estate. Carefully review with the personal representative the rules about what can and cannot be paid from a probate estate. In general, ask your client to call you before payments are made to ensure that the payments do not require court approval. In particular, frequently remind your client that no distributions can be made to a beneficiary, to the personal representative, or to attorneys without prior court approval.

Claims in Probate. Educate your personal representatives that they should call you

immediately if they receive an invoice, or if they learn of a debt of the decedent, that they might consider contesting. Remind them that claims that are not disallowed within 60 days must be paid and cannot be disputed after the 60 days have expired.

Small Estate Affidavits. Small estate affidavits can be used for estates of limited size, but they generally cannot be used for adversarial proceedings, such as a will contest. If you have an adversarial issue, you need to convert the small estate into a full probate. Otherwise, after the four-month notice period in the small estate affidavit has expired, the small estate proceeding is final and you cannot later challenge or change the outcome.

Special Needs Trusts. Drafting a special needs trust is prone to errors because such trusts have very technical requirements. When in doubt, consult with a special needs trust specialist.

Attorney Acting as Fiduciary. As a general rule, it is best if an attorney does not act as a personal representative, trustee, or trust protector. However, it is appropriate in some circumstances. If you act as a fiduciary, keep a very close eye on conflicts of interest.

Emails. As a general rule, be discreet in your emails, even intra-office emails. Keep in mind the old adage – imagine the email being read in court or printed on the front page of your local newspaper.

Free Advice. Take advantage of the free advice in the Oregon State Bar's BarBooks publications *Administering Oregon Estates* and *Administering Trusts in Oregon*. The Estate Planning Section listserv can also be a good source for advice; just be sure to verify the advice with your own research before you act upon it, and be certain you do not reveal any client confidences.

As you can see, many of these suggestions have a common theme: document, document, document.

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