

**PRACTICE ERRORS IN TRUST PLANNING AND ADMINISTRATION --
WHAT YOU DON'T KNOW AND WHO YOU MIGHT NOT KNOW ARE
WHAT COUNT**

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**I. STANDING TO SUE: NOT THE PROTECTION IT ONCE WAS FOR THE
CONFUSED OR THE CARELESS**

**A. The Privity Requirements Gives Way (in Some States) to California's
"Balancing of Factors Test"**

A California attorney's failure to comprehend the rule against perpetuities and his consequent preparation of a trust later held to be void by reason of violating such rule is cited frequently as the landmark case which signaled an end to lack of privity as a viable defense to an action for attorney malpractice in estate planning. *See Lucas v. Hamm*, 364 P.2d 685 (California 1961), *cert. denied* 368 U.S. 987 (1962). The California court held that whether an attorney could be sued for negligence in the discharge of his duties as legal counsel by a person not his client (and hence not in privity) was a matter of public policy requiring a balancing of six factors (the so called balancing of factors test) including:

- (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 had suffered injury;
- (4) the closeness of the connection between the defendant's conduct and the injury;

- (5) the policy of preventing future harm; and
- (6) whether imposing liability placed an undue burden upon the legal profession.

Lucas, 364 P.2d at 687-88.

The balancing of factors test has since been adopted by numerous other states for the purpose of determining whether an aggrieved beneficiary has a right to action against an attorney he has never engaged as counsel. *See e.g., Blair v. Ing*, 21 P.3d 452, 465 (Hawaii 2001).

Technically, the *Lucas* decision justified a potential right of recovery not only upon the balancing of factors test but also upon breach of contract to an intended third party beneficiary. A subsequent California court has held that the contract theory of recovery is superfluous because absent negligence there can be no ground for recovery. *See Heyer v. Flaig*, 449 P.2d 161, 164 (California 1969). A fact sometimes overlooked regarding *Lucas* is that, although the defendant attorney lost his procedural claim of immunity from suit based upon privity, he avoided being held liable for negligence because the California Supreme Court concluded that the attorney had exercised sufficient skill and that his error based upon a failure to comprehend the rule against perpetuities, which it characterized a “technicality-ridden legal nightmare”, could not be construed as negligence. *Lucas*, 364 P.2d, 685, 690. Fifteen years later, a California appellate court cast doubt on whether the holding of *Lucas* regarding absence of negligence by reason of the complexity of the perpetuities rule remained valid. *See Wright v. Williams*, 47 Cal. App. 3d 802, 809 n.2 (Cal. App. 2nd Dist, 1975). Commentators have also doubted the correctness of the *Lucas* court’s decision on the issue of negligence given the ready availability of a “savings clause” to those unwilling or unable to grasp the essence of the perpetuities rule. *See Begleiter, Attorney Malpractice in Estate Planning -- You’ve Got to Know When to Hold Up, Know When to Fold Up*, 38 U. Kan. L. Rev. 193, 232 (1990).

B. The “Florida-Iowa Rule”

Several states have been unwilling to embrace the balancing of factors test and have instead focused upon the question whether the testator’s intent, as expressed within the four corners of the will, has been frustrated by attorney negligence. Critics of the Florida-Iowa rule correctly note that it is arbitrary and effectively limits the species of malpractice for which recovery may be had by a beneficiary who is not a client to errors in the execution of testamentary documents because there may be no resort in the application of such rule to extrinsic evidence of attorney malpractice.

Some commentators have unconditionally disparaged the Florida-Iowa rule while noting with some exasperation that an increasing number of states have been attracted to this rule. *See* Begleiter, *First Let’s Sue All the Lawyers -- What Will We Get: Damages for Estate Planning Malpractice*, 51 *Hastings L.J.* 325, 327 n.20 (2000). Other commentators, while criticizing the methodology of the Florida-Iowa rule, have acknowledged that there is nonetheless sound rationale for placing some limits of the balancing of factors test. *See* Fogel, *Attorney v. Client -- Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 *Tenn. L. Rev.* 261, 291 (2001).

C. Hold-Outs for Strict Privity

Nebraska, New York, Texas, Virginia, Ohio and Maryland are cited in commentary as holdouts for imposition of a strict privity requirement as of 1999. *See* Begleiter, 51 *Hastings L.J.* 325, 327, n. 19. To Begleiter’s 1999 list, one may add the State of Alabama. *See Robinson v. Benton*, 2002 WL 1044713 (Alabama 2002) (unanimous ruling by the Alabama Supreme Court holding that a devisee under a will had no standing as a third party beneficiary to bring a legal action against the attorney who had drafted a will and then failed to destroy same per testator’s instructions because there was no privity of contract between the devisee and the attorney).

D. Concern for the Attorney Duty of Client Loyalty -- An Explanation for the Mixed Reception Accorded the “Balancing of Factors Test”

The condemnation of a strict privity rule and of the logically flawed Florida-Iowa rule are universal, but a powerful rationale explains the continuing resistance by so many states to the California inspired balancing of factors test. Bradley Fogel, in a long thoughtful analysis, attributes resistance to the balancing of factors rule to the potential it holds for dividing an attorney’s loyalty between the client and the beneficiaries. He observes that the failure of courts and many commentators “. . . to recognize the potential for conflict is the result of a myopic view of estate planning. Under this view, the estate planning attorney is merely a scrivener who translates a client’s instructions into appropriate language for inclusion in a will or other document . . . in fact the estate planning attorney’s role is much more that of an advisor than a scrivener.” See Fogel, 68 Tenn. L. Rev. 261, 312.

The Maryland Court of Appeals decision in *Noble v. Bruce*, 709 A.2d 1264 (Maryland 1998) addressed the problem of divided loyalty in the context of an attorney’s putative negligent failure to use a “bypass” trust for the purpose of reducing aggregate federal estate taxes prospectively payable by two spouses. The attorney alleged that he had advised his deceased clients while both were still alive regarding the possible use of bypass trusts, and that they had rejected the option by reason of their unwillingness to accept any loss of access to their assets after the death of the first spouse. Alabama’s high court, in opting for a continuing strict privity requirement earlier this year, cited the underlying theme of concern for the protection of an attorney’s duty of first loyalty to his client rather than to prospective beneficiaries (as elucidated by Texas, Iowa, Maryland and Colorado Supreme courts when rejecting elimination of the privity defense in the context of estate planning) as the reason for its own decision. See *Robinson*, 2002 WL 1044713.

Restatement (Third) Of Law Governing Lawyers § 51 [Duty of care to non-clients] (2000) states that a lawyer owes a duty of care to a non-client when and to the extent that

the lawyer knows that a client intends, as one of the primary objectives of the representation, that the lawyer's services benefit the non-client, that such duty would not significantly impair the lawyer's performance of obligations to the client, and that the absence of such a duty would make enforcement of those obligations to the client unlikely. Comment f in respect of § 51 explains that there must be adequate evidence of the intent to benefit the non-client, without which no claim should lie because the threat of liability premised upon the allegation of disappointed beneficiaries ". . . would tend to discourage lawyers from following client's instructions adversely affecting third persons." Fogel, who calls for a balancing of factors test supplemented by a requirement of "clear and convincing evidence" in support of a plaintiff contention of attorney malpractice characterizes the *Restatement* rule as "arguably consistent" with his own proposed rule. *See* Fogel, 68 Tenn. L. Rev. 261, 330 n. 417.

E. Privity Remains the Majority Rule for Claims of Malpractice in Estate or Trust Administration

A substantial majority of American states continue to cite privity as a ground for denying a beneficiary the right to sue a fiduciary's counsel for malpractice. Beneficiaries in such circumstances must seek compensation through a surcharge proceeding against the fiduciary, who in turn might be expected to institute his or its own action against the negligent attorney. *See* Ross, *Conservatorship Litigation and Lawyer Liability: A Guide Through the Maze*, 31 Stetson L. Rev. 757, 777-778 (2002).

A California appellate court citing conflict of interest as a basis for upholding the privity defense in the administration context has remarked ". . . [p]articularly in the case of services rendered for the fiduciary of a decedent's estate, we would apprehend great danger in finding stray duties in favor of beneficiaries. Typically in estate administration conflicting interests vie for recognition. The very purpose of the fiduciary is to serve the interests of the estate, not to promote the objectives of one group of legatees over the interests of conflicting claimants." *See Goldberg v. Frye*, 217 Cal. App. 3d 1258, 1269 (Cal. App. 4th Dist. 1990).

In the somewhat analogous situation, a California appellate court relying upon *Goldberg* denied the right of a successor administrator to bring an action against an attorney who had counseled a prior administrator. *See Borrisoff v. Taylor & Faust*, 117 Cal. Rptr. 2d 138 (Cal. App. 1st. Dist. 2002). It is perhaps significant that the California Supreme Court has recently granted review in respect of one issue addressed by the appellate court in *Borrisoff*. *See Borrisoff*, 47 P.3d 222, 120 Cal. Rptr. 2d 429 (California 2002).

The privity defense played a key role in a recent Maryland Federal Court decision. *See Murphy v. Maryland Comptroller of the Treasury*, 207 F. Supp. 2d 400 (2002). The federal government and the State of Maryland prevailed in a contest over the priority of entitlement to funds generated by a successful malpractice action against an estate's attorney, the government arguing successfully that Maryland's adherence to a strict privity rule meant that the funds could only have been recovered by plaintiff in his capacity as estate administrator and not in his capacity as beneficiary (with the result that the funds belonged to the estate which was the subject of tax liens). The Federal District Court cited *Noble*, 709 A.2d 1264, 1274 (beneficiaries had no standing to sue attorney hired by personal representative to help administer the estate).

II. THE STATUTE OF LIMITATIONS -- ENHANCED RELEVANCE; COMPETING DOCTRINES

A. The Occurrence Rule

So long as a strict privity rule precluded a beneficiary from bringing an action against decedent's counsel for malpractice, the traditional rule that the statute of limitations in respect of malpractice began to run as from the moment when a will or trust had been drafted merely added meaningless insult to uncompensated injury. In most cases, the statute would have run even before the decease of the testator or settlor and hence well before the aggrieved beneficiary might have any opportunity to discover.

Once an aggrieved beneficiary is freed from the bonds of a strict privity rule, the rule applicable to the determination when the statute of limitations commences to run becomes important. Contemporaneous with its adoption of the balancing of factors rule, the Supreme Court of the State of Hawaii rejected the traditional “occurrence rule” in favor of a “discovery rule” in order to provide plaintiff beneficiaries with a meaningful opportunity for recovery. *See Blair*, 21 P.3d 452, 468-472.

B. The Damage - Injury Rule

California and numerous other jurisdictions replaced the “occurrence rule” with a “damage-injury rule” whereunder a cause of action for attorney malpractice does not accrue until injury or damage has occurred. The rule was first developed in a California Supreme Court case. *See Heyer*, 449 P.2d 161, 168 (defective advice regarding the pretermitted spouse rule could not damage the affected daughters of the decedent until after the testatrix’s death; by causing the statute of limitations to run from such point, the court circumvented the two-year limit as measured from the drafting of the decedent’s will).

C. The Discovery Rule

The modern trend in California and elsewhere favors the discovery rule which has been borrowed from the medical malpractice arena and is now applied by a majority of states either by statute or judicially. Hawaii grafted the “discovery rule” onto its six-year statute of limitations for legal malpractice in *Blair*, 21 P.3d 52, 472 subject to the acknowledgment that the legislature might wish to shorten the statute of limitations as it runs from point of discovery. Cal. Civ. Proc. § 340.6 (West 2002) allows an action against an attorney for a wrongful act or omission (other than actual fraud) which is commenced within one year after the plaintiff discovers or through use of reasonable diligence should have discovered the wrongful act or omission, or within four years from the date of the wrongful act or omission, whichever occurs first, but it provides that the running of the statute is tolled if the plaintiff has not sustained actual injury.

D. Continuous Representation Rule

The continuous representation rule, like the discovery rule, is borrowed from medical malpractice. New York was the first to apply the doctrine, but it does not appear to have been widely followed in estate planning malpractice cases involving non-client beneficiary claims (perhaps for the reason that beneficiaries frequently utilize different counsel from the counsel who acted for the deceased testator or settlor).

E. Tension Between Statutes of Repose and Damages Which Are Speculative

There is an irreconcilable tension between “statutes of repose” which bar an action for malpractice after a certain number of years from occurrence of the act and an inability in some cases to quantify damages or even to represent to a certainty that there will be damages until a distant future date. A typical example is the situation in which an attorney violates the rule against perpetuities but does so in a manner which will likely be rescued by a “wait and see” rule sometime in a course of the passing of 90 years from the date of the creation of a potentially offending interest. California’s statute tolls the running of the statute until a plaintiff has sustained actual injury (many other states do not), but even in the case of California one may question the practicality of a remedy which might not be fashioned until more than 90 years after the failure of an interest created in potential violation of the rule against perpetuities. One commentator has proposed the solution of an estimate of potential damage and a funding of a trust for the benefit of future injured parties (if any) with the balance being refundable to the offending attorney (or insurance carrier). *See* Begleiter, 51 Hastings L.J. 325, 361-363. Query whether this is as practical as the commentator suggests other than in cases of particularly egregious malpractice involving very large financial losses.

III. AN ATTORNEY IS AS VULNERABLE TO SUIT FOR A BADLY DRAFTED OR IMPLEMENTED TRUST AS FOR A DEFECTIVELY DRAFTED OR EXECUTED WILL

A. Balancing of Factors Test Is as Applicable to Intervivos Trust as to a Testamentary Instrument

An early attempt by a defendant attorney to avoid a malpractice claim on the ground of distinguishing difference between a will and an intervivos trust failed when a California intermediate appellate court held that the principles enunciated in *Lucas* (the “balancing of factors test”) “. . . are equally applicable to intervivos trusts, like the instrument here in issue, as there is no rational basis for any distinction.” *See Bucquet v. Livingston*, 57 Cal. App. 3d 914, 922 (Cal. App. 1st Dist. 1976) (a case in which legal counsel drafting a marital deduction trust negligently conferred a “general power of appointment” upon the surviving spouse in respect of the “marital half”). Because living trusts, whereunder a settlor (or settlors who are husband and wife) commonly declare himself or themselves trustee of all or certain of their assets (the so called “living trust”), are commonplace and are recognized in the United States as legally valid testamentary substitutes which avoid probate and are not construable as “mere agencies”, attorney malpractice in estate planning is as likely to manifest itself in a negligently prepared intervivos trust as in a will. *See, e.g., Blair*, 21 P.3d 452.

Because a living trust comes into being upon its declaration and in some instances (*see discussion infra*) may involve the appointment of persons other than the settlor as trustee and (whether or not it involves appointment of persons other than the settlor as trustee) may involve retitling of certain properties, the possibility exists for discovery of an alleged error in an intervivos trust sooner than would be the case with a will. In *Blair*, the defendant attorney argued that, if the “discovery rule” must apply, the plaintiff appellants should have discovered his alleged errors more than 7 years prior to death of the first spouse when the decedent settlors executed amendments to their living trusts. *See Blair*, 21 P.3d 452, 469. The Hawaii Supreme Court in *Blair* deferred to the trial court on remand for the determination of the date of discovery.

B. Failure to Fund an Intervivos Trust . . . Kansas Finds Comparative Fault

The reluctance of a settlor to give advance notice to family members of his estate plan can be accommodated in the United States if a unilateral declaration of trust is made whereunder the settlor serves as trustor and trustee and already holds possession of or title to the proposed *res* of the trust because no registration of the trust deed is required and no alteration of title or sequestering of tangible personalty is required. *See Taliaferro v. Taliaferro*, 921 P.2d 803 (Kansas 1996); cited with approval in *Hatch v. Lallo*, 2002 WL 462862 (Ohio App. 9th Dist. 2002). The American approach to trust formation might appear lackadaisical to those trained in English trust law, but it should be noted that the Kansas Supreme Court did state in its opinion that

“Although the settlor-trustee’s subsequent treatment of trust property without regard to the duties imposed by the trust might be consistent with the absence of an intent to create a trust *ab initio*, it is equally consistent with the conclusion that a trust which was created was subsequently breached. Thus, it is the commended practice to execute documents of transfer. Such documents might help prove the settlor intended a declaration to be operative to create a trust, help prevent a challenge to the trust as the testamentary disposition, and avoid the necessity of probating the property, but they are not required by the Law of Trusts. [Citation to II.A. *Scott On Trusts*, § 179.3 p.509 (4th ed. 1987)]”

See Taliaferro, 921 P.2d 803, 811.

A Kansas case which preceded *Taliaferro*, gave evidence of how an attorney may become exposed to malpractice in the circumstance where the trustor names persons in addition to himself as trustees, fails to advise all such persons of their status as trustee, and fails to insist upon the trustor’s execution and registration of a grant deed to accomplish the transfer of realty to the trust. *See Pizel v. Zuspann*, 795 P.2d 42 (Kansas

1990). The malpractice litigation in *Pizel* was produced by an earlier intermediate appellate court decision holding the intervivos trust in question void because (a) no present trust intent existed at the time the trust instrument was executed, (b) the delivery of deeds executed by the settlor to the trustee under the trust instrument was insufficient and (c) the requirement for a valid intervivos trust that a named trustee accept trust property and deal with it as trustee for the benefit of others had never been fulfilled. *See Pizel v. Pizel*, 643 P.2d 1094 (Kansas App. 1982). Although both attorneys in the *Pizel* case were found negligent, their negligence was a shared negligence with fault being apportioned 5% to the drafting attorney, 35% to the attorney who should have seen to the proper implementation of the trust and the balance to the settlor and the three named trustees.

C. Does the Drafter of a Trust Have Perpetual Duties in Respect of Same?

To the dismay of many estate planning attorneys, the language of the original Kansas Supreme Court decision in *Pizel v. Zuspahn* held that the drafting attorney “had a continuing duty to assure that [the settlor’s] intent to pass the land to his nephews was realized . . .” and that the drafting attorney’s “ . . . alleged failure to adequately advise [the settlor] of the steps needed to effectuate the trust constituted a special obligation that was continuous in nature . . .” The defendant attorneys with the support of an *amicus* brief filed by the Kansas Bar Association asked for the reconsideration or deletion of the language which might be construed to extend into perpetuity a drafting attorney’s obligation with respect to a trust. As a result, the Supreme Court acknowledged that criticism of its chosen words was justified and revised its opinion to read that the drafting attorney had “. . . failed to carry out the terms and conditions of his employment by not adequately advising [the settlor] of the steps necessary to effectuate the trust . . .” and that it was “the failure to advise that resulted in injury to [the settlor] and his intended third party beneficiaries.” *See Pizel v. Zuspahn*, 803 P.2d 205, 206 (Kansas 1990). This clarification is now cited by commentary for the proposition that an attorney’s continuing

duties are limited with respect to a “dormant” estate planning client (*See* discussion *infra*).

IV. SUBSTANTIVE REQUIREMENTS AND THE MEASURE OF DAMAGES

A. Tortious Negligence, Breach Of Contract Or An Inseparable Hybrid?

California and other courts have used both the balancing of factors test which is grounded in negligence and a third party beneficiary of contract theory to permit non-clients to bring a cause of action against an attorney for malpractice in estate planning. California, although recognizing both negligence and third party beneficiary claims, has concluded (as noted *supra* in I.A.) that the debate over whether the action lies in tort or in contract is “conceptually superfluous ... since the crux of the action must lie in tort in any case”, *Heyer*, 449 P.2d 161, 164; and a leading commentator has opined that “... the precise [legal] theory on which a legal malpractice claim is posited is largely irrelevant, for in either instance a lawyer is required to exercise due care in representing clients consistent with a lawyer’s training and profession.” *See* Johnston, *Legal Malpractice in Estate Planning – Perilous Times Ahead for the Practitioner*, 67 Iowa L. Rev. 629, 629-30 n.1 (1982). The Supreme Court of Hawaii has recently acknowledged that Hawaii has “... generally characterized legal malpractice actions brought by clients as ‘hybrids of tort and contract’. [citing *Higa v. Mirikitani*, 517 P.2d 1, 5 (Hawaii 1973)]” *See Blair*, 21 P.3d 452, 463.

Only a very small handful of states, principally Pennsylvania, construe an action for malpractice as a contract based action while at the same time purporting to reject the California balancing of factors test to the extent grounded in tort. *See Guy v. Liederbach*, 459 A.2d 744, 751 (Pennsylvania 1983). The distinguishing features of Pennsylvania law have been the subject of substantial academic commentary, but there appears to be no practical relevance to the distinction between a tort based and a contract based action where (as is the case in Pennsylvania) it follows the California approach

rather than the narrower “Florida-Iowa rule” in permitting where “appropriate” harmed beneficiaries who have not been named in a will or trust, as well as those expressly named therein, to bring an action for malpractice).

B. The Essential Elements of the Cause of Action

As noted by the California court in *Bucquet* and numerous other cases and commentaries, the elements of a cause of negligence based action for professional malpractice are well defined. They include: (1) the duty of the professional to use such skill, prudence and diligence as other members of his profession commonly possess and exercise; (2) breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional negligence. *See Bucquet*, 57 Cal. App. 3d 914, 920-21. Recall that in *Lucas* the California Supreme Court determined that the level of skill of a California attorney was not such as to require an understanding of the rule against perpetuities, but the court in *Bucquet* had no difficulty holding that an attorney should understand the workings of the general power of appointment rule for federal transfer tax purposes.

C. The Measure of Damages

For legal malpractice actions in estate planning which are grounded upon negligence the basis for recovery is the value of the bequest lost by the plaintiff; where the court adheres to the contract or third party beneficiary theory of malpractice liability, the measure of damages is the beneficiary’s loss of expectancy; but as noted by an extensive commentary on the subject, the leading case adopting the contract theory measured the damages in a contract-based action “as the amount of the bequest to a beneficiary.” *See Begleiter*, 51 Hastings L. J. 325, 332 n.59 and 334 n.76.

Although the Pennsylvania court’s adherence to a contract-based theory of recovery has been ascribed to a desire to limit damages to the “expectancy of the non-client beneficiary” and to preclude punitive damages or damages for negligent infliction

of emotional distress (which may be achieved in some tort actions), the Hawaii Supreme Court has argued that the fear of such damages associated with a tort action is misplaced. See *Blair*, 21 P.3d 452, 463-64 (punitive damages are generally unavailable absent wanton, malicious or fraudulent conduct which is difficult to conceive in a legal malpractice action in the estate planning context, and damages for negligent infliction of emotional distress are generally unavailable for purely economic losses; and as a consequence "... damages for a legal malpractice claim arising in the estate planning context based upon negligence will rarely, if ever, include damages other than consequential damages ...").

V. A SAMPLER OF COMMON ESTATE PLANNING ERRORS AND WHAT CONDUCT MAY PRECIPITATE THEM

A. Failure to Properly Execute or Draft

The largest single generator of malpractice actions in estate planning is improper document execution. The California case which first introduced the balancing of factors test concerned a will drafted by, and improperly executed under the supervision of, a non-attorney notary public who caused the will to be notarized but failed to seek attestation witnessing with the result that the will was denied probate and the plaintiff received only an intestate share. See *Biakanja v. Irving*, 320 P.2d 16 (Calif. 1958). Because *Biakanja* entailed malpractice by a notary (and incidental unauthorized practice of law, discussed *infra*), *Lucas* which addressed attorney error but essentially copied the balancing of factors test first enunciated in *Biakanja* is credited with establishing the precedent for the assault on privity. Execution errors do not involve subtle points of law, they are manifest on the face of the document and they do not require introduction of extrinsic evidence for the purpose of proving the testator or settlor's true intentions. In consequence, even under the stringent Florida-Iowa rule, a defendant attorney responsible for an execution error is very vulnerable to non-client beneficiary claims save perhaps in those few states which are holdouts for a strict privity rule.

Simple drafting errors such as the erroneous omission of a residuary clause or the mistaken substitution in a codicil of the wrong set of charitable beneficiaries are also fertile ground for malpractice actions, but unlike execution errors, drafting errors often require extrinsic evidence which may be kept out of consideration if a court adheres to the Florida-Iowa rule for the purpose of determining standing. Provision for a *per capita* rather than a *per stirpes* division or for a payment to remoter issue when a child attains the age of 50 (forgetting to provide that this shall occur only if the child has failed to attain the age of 50 years and that he shall take outright at such age if he does not sooner die) are typical examples of drafting errors.

No single factor explains all execution errors or simple drafting errors, but leading causes of this species of malpractice include excessive delegation of responsibility to non-attorney staff and junior attorneys, excessive haste and slipshod work fostered by the insidious perception that estate planning (as opposed to the frequently lucrative estate administration) should function as a “loss leader” and finally the pervasive problem of lack of quality peer review. A liability insurer has cited use of a peer review process as one of the three key preventive measures to minimize attorney liability, and substantial commentary supports the contention that excessive delegation, the “loss leader” approach and the lack of effective peer review of documentation are responsible for a very significant number of malpractice producing errors in execution and drafting. *See generally*, Johnston, *Legal Malpractice in Estate Planning and General Practice*, 17 Mem. St. U. L. Rev. 521, 527 *et seq.* (1987), Urda, *Malpractice Claims in Estate Planning*, 41 Res Gestae 12 (March 1998); and O’Malley et al., *Lawyer Liability in Trusts and Estates Practice*, SC13 ALI-ABA 177, 185 *et seq.* (1997).

B. Planning Complexities Beyond a Practitioner’s Ken

Only a modest number of reported cases involving estate planning malpractice relate to errors involving complex issues (perhaps because such errors are harder to prove and courts have thus far been more sympathetic in respect of errors on complicated points

of law), but it has already been 25 years since a California intermediate appellate court gave warning that it would closely scrutinize for validity the defense that an error should be excused by reason of technicality of law and the existence of difficult choices among possible different courses of action. *See Bucquet*, 57 Cal. App. 3d 914, 923 n.8. When estate planning merges with tax planning, the potential for error is materially heightened by reason of the complexity and fluidity of the tax law. *See, e.g., Horne v. Peckham*, 97 Cal. App. 3d 404 (Cal. App. 3d Dist. 1979).

Errors in planning and drafting attributable to complex estates, powers and trust laws, probate law or tax law are frequently attributable to either a failure to refer a complex task to a properly qualified professional or to a failure to properly research, either of which may lead to an uninformed “cut and paste” approach to document drafting which often results in inappropriate inclusions or deletions of language whose import is not understood by the attorney. *Horne v. Peckham* is cited by numerous commentators for the proposition that a failure to research may constitute actionable malpractice. *See Begleiter*, 38 U. Kan. L. Rev. 193, 242-243. The case is also cited as evidence of what can go wrong when a generalist “dabbles” in estate planning. *See O’Malley et al.* SC13 ALI-ABA 177, 187. One professor, who spent several years in private practice, surmises that a reluctance in the estate planning context to associate another attorney with appropriate expertise might be attributable to “. . . a tendency, at least among general practitioners, not to refer estate planning work to others, perhaps due to a concern that the attorney to whom work is referred will, in the future, be asked to undertake work for the client in areas where the referring attorney previously had rendered services.” *See Johnston*, 17 Mem. St. U. L. Rev. 521, 531.

C. Failure to Minimize Taxes or Properly Allocate Tax Payments

A commentator surveying the entire landscape of malpractice as it affects the tax practitioner dryly observes “there seems to be a reasonably large number of reported malpractice cases in the estate and gift tax areas.” *See Todres, Malpractice and the Tax*

Practitioner: An Analysis of the Areas in Which Malpractice Occurs, 608 PLI/Lit 741, 792 (June 1999). Perhaps this is so because it does not take an actual error such as occurred in the *Bucquet* or the *Horne* case to produce a malpractice claim attributable to tax planning in document preparation. Very frequently, disappointed beneficiaries will attack, either because the plan adopted by a deceased testator or settlor has failed to minimize taxes or because of unhappiness about the manner in which tax payments are allocated. Sometimes, as in *Bucquet* and in *Blair*, the tax planning error is obvious and inexcusable, but in other cases, a will or trust which fails to minimize taxes may simply represent the informed wishes of the deceased testator or settlor.

Many effective tax avoidance plans are premised upon an accelerated termination of control and possession of assets or upon reduced flexibility and access for a surviving spouse. In *Noble*, 709A.2d 1264, the defendant attorney alleged that he had discussed a “bypass trust” with the decedent testators, and that they had instructed him that they were unwilling to accept any loss of access to their assets after the death of the first spouse. The Maryland Supreme Court seemed to sympathize with the defendant attorney and declined to allow recovery by non-client beneficiaries, but appearances can be deceiving. Professor Fogel, who has closely studied *Noble v. Bruce* (including the briefs submitted in respect of same) because it is illustrative of the potential conflict between an attorney’s first duty of loyalty to his client and his fear of future claims by disappointed heirs (about which Professor Fogel expresses significant concern) explains that based on the record for *Noble*, the defendant attorney appears not to have understood the difference between a “pour-over trust” and a “bypass trust”, but that plaintiff’s counsel inexplicably made no effort to capitalize upon defendant counsel’s self-implicating testimony. *See* Fogel, 68 Tenn. L. Rev. 261, 317 n.360.

For the attorney who properly apprehends that a tax saving opportunity is being waived by a client in deference to other larger personal interests, the common recommendation is a letter to client reciting the rationale for not fully realizing potential

tax savings or an inclusion of explanatory language in the will, trust agreement or other operative document.

The tax payment clause is a particular source of postmortem dispute. This clause is too often regarded as boilerplate. If its consequences in the context of the facts affecting a particular testator are not properly understood, the result can be inadvertent disinheritance of certain beneficiaries. More than one commentator has observed that “considering that the federal estate tax may be over half of value of the estate [depending upon the year of death and what tax law applies], the apportionment of the tax burden may be the most significant dispositive decision made by the client.” *See* Fogel, 68 Tenn. L. Rev. 261, 321 n.377 (in turn citing Blattmachr and Hastings, *The Tax Apportionment Laws - - Often the Most Important Provision in the Will*, N.Y. St. B. J., Apr. 1998, at 26).

D. Undue Influence

Family members or close personal friends of a decedent are not the only persons who are potentially subject to a claim of undue influence if beneficiaries are disappointed. Cases exist in which a will has been successfully challenged because the attorney preparing same has himself exerted undue or improper influence over testator. In one instance undue influence was held to have been exercised because the attorney for the testator was also acting as an attorney for the principal beneficiary under the will. *See Haynes v. First National State Bank of New Jersey*, 432 A.2d 890 (New Jersey 1981). In another, where the lawyer for the testator was also a principal beneficiary under the will, there was a hardly surprising finding of undue influence. *See Kirschbaum v. Dillon*, 567 N.E. 2d 1291 (Ohio 1991).

Practitioners should not anticipate that attorney undue influence cases only occur where the attorney is acting in conscious bad faith. Consider the circumstance in which a good client of the firm requests almost as a “favor” that an attorney draft a will for the client’s aged parent (whom the attorney has never met or meets only after preparing the

will) on the basis of received instructions from the intermediary client. *See* O'Malley et al., SC13 ALI-ABA 177, 181. Consider also the case in which the attorney responding to the request of a corporate fiduciary (knowledgeable about the bounds of unauthorized practice of law but keen to keep tight control of its client), permits himself to act as a mere scrivener, and in doing so commits a drafting error which would not likely have occurred had the attorney been more proactive in dealing directly with the client and confirming instructions. *See Connecticut Junior Republic v. Sharon Hospital*, 488 A.2d 190 (Connecticut 1982) (subsequently overruled, but here cited as illustrative of what can occur when an attorney acts on instructions of an intermediary).

Professor Johnston cites *Connecticut Junior Republic* as an example of an unwarranted delegation of tasks and of the perils of an attorney's acquiescing to the role of scrivener out of deference to a bank trust officer having superior specialty knowledge, but this case might be a prime example of a corporate fiduciary acting contrary to its own best interests by exercising subtle economic power to keep the independent attorney at arm's length from the client with resulting ultimate harm both to the corporate fiduciary and to the putatively independent counsel. *Cf.* Johnston, 17 Mem. St. U.L. Rev. 521, 536-537.

E. Conflicts of Interest

Conflicts of interest have been identified as the single most important trend in the production of new malpractice cases in the context of trusts and estates planning. *See e.g.*, O'Malley et al. SC13 ALI-ABA 177, 189. The common habit of representing both spouses in respect of their estate planning is one obvious reason. A very recent California case is illustrative of the potential peril. *See Friedman v. Friedman*, 100 Cal. App. 4th 65 (Cal. App. 2nd Dist. 2002). In *Friedman*, a divorcing spouse who was seeking to overturn a postnuptial agreement which she herself had sought several years earlier cited as a ground for voiding the contract an alleged conflict of interest inherent in a law firm's dual representation of her and her husband for estate planning and such

firm's subsequent representation of the husband, but not the wife, with respect to a postnuptial agreement. The wife, who was alleging the conflict of interest, had at the time of reviewing and entering into the postnuptial agreement declined to seek her own separate counsel because she was herself an attorney and according to court findings "a bright woman" and "a trained attorney with three years of experience as a civil litigator at the time this event took place." The court in *Friedman* held the dual representation in respect of the estate planning was at most a "technical violation" and not serious enough to render the agreement unenforceable. The perilous implications are evident for the law firm which represents both parties in one matter (*viz.* estate planning), as is often common, but only one party in another (*viz.* marital property contracts) where dual representation under American rules (but not civil law rules) is barred by ethical considerations.

Conflict may also arise where a law firm insinuates itself into the estate planning for a client for whom it has performed services on commercial matters without adequate knowledge to perform the estate planning work and with manifest intent to entrench itself on the business side by causing its own appointment as a fiduciary. *See Willeford v. Willingham*, 84-PC-3158 (Bexar County, Texas Probate Court 1987), an unreported case which has been the subject matter of extensive commentary that focuses upon the dangers of wearing the "hats" of both fiduciary and attorney. The widow of B.R. Willeford, a San Antonio, Texas developer, won a \$4.3 million settlement after successfully convincing a jury that the prestigious San Antonio law firm of Foster Lewis et al. (a) had a conflict of interest when it drew a will that named the drafter as co-executor, empowered such person to name his firm as attorney for the estate, and exonerated the executor for negligence, and (b) mismanaged the assets of the estate (albeit in the context of a failing state economy).

In addition to the \$4.3 million settlement payment, Foster Lewis was required to relinquish claims for attorney and executor fees valued at approximately \$1.7 million; but

as bad a result as this appears for the defendant law firm, it needs be noted that the jury had originally awarded the aggrieved widow damages of \$24.4 million. Although the *Willeford* case cannot be found in published case reports or on-line, citations to numerous press reports and to speculation regarding the confidential terms of settlement are widely available in secondary sources, *See e.g.*, O'Malley et al., SC13 ALI-ABA 177; 189, Link, *Developments Regarding the Professional Responsibility of the Estate Administration Lawyer: The Effect of the Modern Rules of Professional Conduct*, 25 Real. Prop. Prob. & Tr. J. 1, 8, n.13 (Spring 1991); and McCue and Hasenbalg, *The Estate Planner as Defendant in Malpractice Litigation*, C453 ALI-ABA 45, 55-58 (September 7, 1989).

California, since 1991, has provided by statute that a trustee may be removed where it is the sole trustee and is the person who drafted the trust instrument (whether or not such person is named in the trust as a beneficiary by the transferor) “. . . unless based upon any evidence of the intent of the settlor and all other facts and circumstances . . . the court finds that it is consistent with the settlor's intent that the trustee continue to serve and that this intent was not the product of fraud, menace, duress or undue influence.” *See* Cal. Prob. Code § 15642(b)(6). A waiver by the settlor of the foregoing provision is against public policy and void, but § 15642(b)(6) does not apply if the instrument is reviewed by an independent attorney who (a) counsels the settlor about the nature of his or her intended trustee designation, and (b) signs and delivers to the settlor and to the designated trustee a certificate in a prescribed statutory form (which is part of Cal. Prob. Code § 15642).

A conflict of interest having material potential adverse implications for a law firm may also arise where the firm acts as corporate or litigation counsel to a company and at the same time provides estate planning counsel to senior executives (such counsel typically being performed by attorneys different from and, in large firms, out of routine contact with the attorneys working on business law or litigation matters for the company). This situation, if not properly managed within the law firm, may produce a conflict of

interest problem if the company and the executive (for whom the law firm has done estate planning) later become adverse to each other, and the law firm has failed to carefully craft its engagement letter to permit disassociation from the executive client.

Consider also the implications of a possible obligation to provide continuing counsel and the potential for conflict of interest if the law firm has kept the executive's executed testamentary documents in its will safe. *See* O'Malley et al., SC13 ALI-ABA 177, 181 and Ross, *Ethical Guideline for the Estates and Trust Lawyer: The ACTEL Commentaries on the Model Rules of Professional Conduct and Notes on Ethics 2000*, SF79 ALI-ABA 1601, 1611 (April 23, 2001) (execution of estate planning documents and completion of related matters normally ends the period of active representation of an estate planning client, but at such time unless the representation is terminated by the lawyer or client, the representation becomes dormant awaiting activation by the client as may be evidenced by the lawyer's continued retention of original documents executed by the client). The continuing contemporaneous representation of company and senior executive whose estate planning is dormant can lead to an "imputed knowledge within the law firm" which may arguably render the estate planning attorney liable for not knowing what his colleagues on the commercial side are doing where their actions might have material bearing on the executive's estate plan. Commentators suggest that the exposure to imputed knowledge of this sort may be negated by explicit provisions in a carefully drafted exit letter following the execution of the will and completion of the active phase of the estate planning. *See* O'Malley et al., SC13 ALI-ABA 177, 181.

VI. TRUST COMPANIES: WHAT IS THE UNAUTHORIZED PRACTICE OF LAW AND WHAT ARE ITS CONSEQUENCES

A. Unauthorized Practice of Law

The definition of what constitutes an unauthorized practice of law is delegated to the individual states. Although there is a lack of uniformity in the rules governing unauthorized practice and only rather sporadic enforcement of same, even in the case of

egregious on-line pandering via the internet by pseudo-trust companies which purport to know more and do it cheaper than attorneys and established financial institutions, some reasonably well-defined parameters have emerged in American practice for the purpose of establishing how attorneys and financial institutions engaged in estate planning and fiduciary administration should allocate tasks. Financial institutions with justification may perceive that their experienced staff members (many of whom are trained in the law) are specialists more qualified than a general independent attorney to provide the legal advice necessary for a client to reach sound conclusions with respect to estate planning, and that there is a public interest in their making such advice available to their prospective customers. Ohio's Supreme Court has considered this argument and has held that the appropriate approach, where legal issues or problems are involved, is for the financial institution to convey its expert advice to counsel for the client who is a customer or prospective customer of the bank. *See Green v. Huntington National Bank*, 212 N.E. 2d 585, 588 (Ohio 1965).

One of the most complete discussions of the boundary line between attorney duties and trust company duties in the context of estate planning is found in an often cited Connecticut case, *State Bar Association of Connecticut v. Connecticut Bank and Trust Co.*, 140 A.2d 863 (Connecticut 1958). The court in *State Bar of Connecticut* held that a decision by a trust department officer or employee that no uncertain or unclear issue is implicated in a particular transaction, and that no controversy is likely to arise and that independent outside counsel need not be retained will not serve to legalize the performance of the acts by the trust officer or employee where they in fact constitute the unauthorized practice of law. *State Bar Association of Connecticut*, 140 A.2d 863, 871.

In a subsequent further consideration of the question precisely what defendants Connecticut Bank and Trust Company and Hartford National Bank and Trust Company could lawfully do without involvement of the client's independent counsel, the Connecticut Supreme Court of Errors ruled that

(1) in giving general information to customers on such matters as taxes, trusts, and wills, without giving specific advice or charging of fee, while urging the customers to consult their own attorneys, the defendant is not engaged in the illegal practice of law, but is performing acts incidental to its authorized fiduciary business;

(2) in preparing and filing in the probate courts the various applications, petitions, accounts, inventories, etc., pertaining to trusts, the defendant is performing ordinary and incidental services relative to trusts, unless the problem involved is such that their solution is commonly understood to be the practice of law; and

(3) the work of preparing and filing tax returns for the defendant as fiduciary, in dealing with, and appearing before, tax authorities, may properly be done by regular employees of the defendant, either lawyers or laymen, to the extent that tax problems of a type such that their solution would commonly be understood to be the practice of law are not involved.

See State Bar Association of Connecticut v. Connecticut Bank and Trust Co., 153 A.2d 453, 457 n.3 (Connecticut 1959).

B. What Consequence If by an Unauthorized Practice of Law Harm is Done to a Beneficiary?

If a trust company, without intervention and assistance of a client's own legal counsel, involves itself in trust or will drafting and thereafter a problem arises, it is likely to be accused of negligence and is unlikely to recover from the corpus of the trust it has created attorney fees and other costs entailed in its defense. *See e.g., Kronzer v. First National Bank of Minneapolis*, 235 N.W. 2d 187 (Minnesota 1975).

In *Kronzer*, the defendant bank reasoned that it could draft a trust instrument and amendments using its own employees because its client was himself an attorney. The

bank was acting at its peril because the client attorney was at such time 85 years old, long retired from the practice of law and according to aggrieved heirs, suffering from cerebral arteriosclerosis, which deprived him of testamentary capacity and rendered him subject to the undue influence of certain relatives. Plaintiffs asserted negligence per se premised upon an unauthorized practice of law by the defendant bank and in the alternative actual negligence. Although the defendant bank escaped liability by reason of a technical construction of the Minnesota statute and a failure on the part of the defendants to prove proximate cause, the conduct of the defendant bank was characterized by the court as arguably improper and the bank was denied recovery from the trust of its attorney fees incurred in defending the action, the court observing that “. . . the bank’s defense of this action could in no way benefit the trust.” *Kronzer*, 235 N.W. 2d 187, 196.

Even where a trust company has caused a client to engage the services of an outside legal counsel for the purpose of creating and implementing an estate plan, there is no guarantee such action will shield the trust company from a later claim of negligence or breach of contract, but the results for the defendant bank are likely to be much better where an attorney has been involved. *See e.g., Taylor v. Marshall & Isley Trust Company*, 647 N.W. 2d 468 (Wis. App. 2002). Defendant trust company in *Taylor* recommended to its client that she engage the services of independent counsel, such services were engaged and a will and trust were put in place in accordance with client instructions. Client, however, married less than four months after the execution of her will and died less than a month after marrying and before her trust had been fully funded and without altering the terms of her will.

Claimant godchildren lost their case against the bank for alleged negligence in its failure to fund the revocable trust with all of the decedent settlor’s assets (no duty imposed by the terms of the trust agreement except at settlor’s direction). Plaintiff godchildren’s further claim that the defendant trust company had an affirmative duty to warn its client of possible problems with her estate plan if she would remarry was

rejected on the ground that it had been the client's attorney who had drafted the will and provided advice regarding the consequences of later marriage, and that for the defendant bank to have undertaken an obligation to counsel on the consequences of marriage would have been improper as it would have constituted the unauthorized practice of law. *See Taylor*, 647 N.W. 2d 468 citing to *Green*, 212 N.E. 2d 585, 587-588 - - In effect a case holding an Ohio bank had engaged in unauthorized practice of law served seventeen years later as a defense for a Wisconsin trust company wrongly faulted for not having practiced law.

VII. CONFLICTS OF LAW - - WHOSE LAW APPLIES TO DETERMINE WHETHER MALPRACTICE HAS OCCURRED

A. The Place Where the Attorney Practices or the Residence of the Injured Client?

According to recent commentary, there are only approximately 20 lawyer malpractice cases that have arisen in the United States which involve conflicts of law due to activities crossing one or more state lines. *See Vagts, Professional Responsibility in Transborder Practice: Conflict and Resolution*, 13 Geo. J. Legal Ethics 677, 696 (2000). The reported cases address claims arising out of commercial transactions rather than estate planning, but the rules established for the determination of governing law should have equal bearing in the context of an estate planning malpractice claim.

The *Restatement (Second) On Conflicts Of Law* § 145 (1971) provides that the rights and liabilities of parties with respect to an issue in tort are determined by the local law of the state in respect of which an issue has the most significant relationship to the occurrence and to the parties. A few states such as California have indicated a preference for "government interest analysis over contact analysis". As noted *supra* at IV.A, some dispute exists over whether a beneficiary claim against a defendant attorney for malpractice is grounded in contract or tort. The weight of authority favors tort. The Arizona Court of Appeals, when considering which law should govern the standard of care exercisable by an attorney, cited as persuasive an earlier decision involving

accountant malpractice which had held “a professional malpractice action does not ‘arise’ from contract, but rather from tort”. The Arizona High Court accordingly decided that plaintiffs must maintain a negligence action rather than a breach of contract action. *See Collins v. Miller & Miller, Ltd.*, 943 P.2d 747, 754-756 (Arizona 1996).

The tendency of the courts, where multiple different state contacts may be shown, is to look primarily to the place where the attorney has been retained and practices for the purpose of determining standard of care. *See Collins*, 943 P.2d 747, 754. Likewise, in a case considering whether the defense of lack of privity should protect a New York attorney from a malpractice claim, a federal court held that New York state law should govern because “[a] state has a strong interest in regulating the conduct of a law firm licensed to practice within its borders, and a law firm consents to be so regulated when it locates its offices in a particular state . . . That principle exerts extra force here because New York, by adopting an attorney-protective strict privity rule, has articulated a strong interest in protecting its resident attorneys from suits by non-clients. Likewise, New York attorneys are entitled to rely on that protection when they practice law in New York.” *See LNC Investments Inc. v. First Fidelity Bank, N.A.*, 935 F. Supp. 1333 (S.D.N.Y. 1996). *LNC Investments* may be read to suggest that a New York-based estate planning attorney working on a multi-jurisdictional estate plan might have a considerable advantage over a California-based attorney in the event malpractice is committed which adversely affects a beneficiary non-client of the erring attorney.

Vagts takes mild issue with the notion that the place where an attorney practices should necessarily determine governing law for the purpose of determining whether malpractice has occurred observing that “. . . [a] state where a plaintiff client is resident or has business may want to enforce a higher standard of behavior than prevails in the attorney’s state . . .”. *See Vagts*, 13 Geo. J. Legal Ethics 677, 695. *D.B. Lilly Co. v. Fisher*, 18 F.3d 1112 (3rd Cir. 1994) evidences that a court will not necessarily be bound by the law of the jurisdiction where a law firm is located. In *Lilly*, the federal court

determined that “. . . [t]he place where the injury occurred is Delaware which is also the center of the web of relationships between the parties . . . Delaware has an interest in compensating victims for injuries resulting from legal malpractice and provides a cause of action for such injuries . . . Moreover, Delaware has a particular stake in protecting its legal consumers from negligent attorneys when the resulting injury occurs in Delaware.” See *D.B. Lilly Co.*, 18 F.3d 1112, 1119.

B. Can Exposure to Foreign Malpractice Law be Contained?

How effective are professional corporations and limited liability partnerships for limiting the reach of malpractice claims? Would it be effective to include in an engagement letter a choice of law which would for example protect a New York law firm’s expectation of a privity defense? Vagts raises these questions and suggests that a non-American jurisdiction might pierce the professional corporation or limited liability partnership and reasons that a choice of law clause in an engagement letter might run afoul of the model rule of professional conduct prohibiting an agreement prospectively limiting a lawyer’s liability to a client for malpractice. See Vagts, 13 *Geo. J. Legal Ethics* 677, 697-698. These conclusions beg the further questions (a) whether a U.S. court would agree to enforce a foreign judgment against an attorney practicing in the U.S. if the liability were premised upon a foreign court’s disregard of liability shields commonly accepted in the United States and (b) why it should be that a choice of law expressed in an engagement letter to have one’s conduct measured by the standards of the jurisdiction in which one practices should be deemed either an abuse of bargaining power or an unacceptable attempt to limit liability for malpractice. There is no clear present answer to these questions.

This article should not be construed as legal advice or opinion, since legal opinions are only given to clients in response to inquiries involving specific facts.