AVOIDING THE ESTATE PLANNING "BLUE SCREEN OF DEATH" – COMMON NON-TAX ERRORS AND HOW TO PREVENT THEM

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SAN ANTONIO ESTATE PLANNER'S COUNCIL

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EDUCATION

B.A., Summa Cum Laude, Eastern Michigan University (1976)
J.D., Summa Cum Laude, Ohio State University (1979)
LL.M., University of Illinois (1983)
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PROFESSIONAL ACTIVITIES

Bar memberships: United States Supreme Court, Texas, Ohio (inactive status), Illinois (inactive status)
Member: The American College of Trust and Estate Counsel (Academic Fellow); American Bar Foundation; Texas Bar Foundation; American Bar Association; Texas State Bar Association

CAREER HISTORY

Private Practice, Columbus, Ohio (1980)
Instructor of Law, University of Illinois (1980-81)
Professor, St. Mary's University School of Law (1981-2005)
Visiting Professor, Boston College Law School (1992-93)
Visiting Professor, University of New Mexico School of Law (1995)
Visiting Professor, Southern Methodist University School of Law (1997)
Visiting Professor, Santa Clara University School of Law (1999-2000)
Governor Preston E. Smith Regent's Professor of Law, Texas Tech University School of Law (2005 – present)
Visiting Professor, La Trobe University School of Law (Melbourne, Australia) (2008 & 2010)
Classes taught include Estate Planning, Wills & Estates, Trusts, Property, U.C.C.

SELECTED HONORS AND ACTIVITIES

Order of the Coif
Chancellor's Council Distinguished Teaching Award (Texas Tech University) (2010)
Outstanding Professor Award – Phi Alpha Delta (Texas Tech University Chapter) (2010) (2009) (2007) (2006)
President's Excellence in Teaching Award (Texas Tech University) (2007)
Professor of the Year – Phi Delta Phi (St. Mary's University chapter) (1988) (2005)
Student Bar Association Professor of the Year Award – St. Mary's University (2001-2002) (2002-2003)
Russell W. Galloway Professor of the Year Award – Santa Clara University (2000)
Outstanding Faculty Member – Delta Theta Phi (St. Mary's University chapter) (1989)
Distinguished Faculty Award – St. Mary's University Alumni Association (1988)
Most Outstanding Third Year Class Professor – St. Mary's University (1982)
State Bar College – Member since 1986
Keeping Current Probate Editor, *Probate and Property* magazine (1992-present)
Guest lecturer on estate planning topics for attorney and non-attorney organizations

SELECTED PUBLICATIONS

Author and co-author of numerous law review articles, books, and book supplements including FAT CATS AND LUCKY DOGS – HOW TO LEAVE (SOME OF) YOUR ESTATE TO YOUR PET (2010); WILLS, TRUSTS, AND ESTATES: EXAMPLES AND EXPLANATIONS (4th ed. 2007); TEACHING MATERIALS ON ESTATE PLANNING (3d ed. 2005); 9 & 10 TEXAS LAW OF WILLS (Texas Practice 2002); TEXAS WILLS AND ESTATES: CASES AND MATERIALS (5th ed. 2006); TEXAS WILL MANUAL SERVICE; 12, 12A, & 12B WEST'S TEXAS FORMS — ADMINISTRATION OF DECEDENTS' ESTATES AND GUARDIANSHIPS (3rd ed. 2007); 19-19A WEST'S LEGAL FORMS — REAL ESTATE TRANSACTIONS (2002); *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000); *Estate Plans: The Durable Power of Attorney For Property Management*, 59 TEX. B.J. 314 (1996); *Enhancing Self-Determination Through Guardian Self-Declaration*, 23 IND. L. REV. 71 (1990); *Statutory Will Methodologies — Incorporated Forms vs. Fill-in Forms: Rivalry or Peaceful Co-Existence?*, 94 Dick. L. Rev. 231 (1990); *Ante-Mortem Probate: A Viable Alternative*, 43 ARK. L. REV. 131 (1990); *The Will Execution Ceremony — History, Significance, and Strategies*, 29 S. TEX. L. REV. 413 (1988); *Videotaping the Will Execution Ceremony — Preventing Frustration of Testator's Final Wishes*, 15 ST. MARY'S L.J. 1 (1983).

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AVOIDING THE ESTATE PLANNING "BLUE SCREEN OF DEATH" – COMMON NON-TAX ERRORS AND HOW TO PREVENT THEM[1]

I. INTRODUCTION

Have you ever been using your computer and unexplainably encountered the dreaded "blue screen of death" where work completely disappears and is replaced by a blue screen with white text indicating that an unrecoverable system error has occurred and that you must restart your computer and lose all unsaved data? If you have, you know the frustration and anger that follows especially because there was nothing you could do to prevent it. In the estate planning context, a malpractice action can be considered a blue screen equivalent. But, unlike the virtually unpreventable computer error, you have the ability to reduce tremendously the likelihood of estate planning "crashes."

This article discusses the potential liability of estate planners for malpractice, the common mistakes attorneys may make while preparing estate plans, and the risky but commonly seen practice of preparing estate plans for both spouses. I hope that by pointing out potentially troublesome areas, the reader will avoid the ramifications of drafting a flawed estate plan: frustration of the client's intent, financial loss to the client or the beneficiaries, personal embarrassment, and claims of malpractice or breach of fiduciary duty. The list of errors in this article is not exclusive. The possibility for error exists everywhere and at any time. An estate planner must be ever vigilant and by "making a list and checking it twice" will increase the likelihood of preparing a legally sound estate plan. Coots-Gillespie, *Santa Claus is Coming to Town* (holiday song).

II. THE POTENTIAL OF MALPRACTICE LIABILITY FOR NEGLIGENT ESTATE PLANNING

A. Disgruntled or Omitted Beneficiary as Plaintiff[2]

1. The Privity Wall is Erected

The potential malpractice liability of an attorney for negligence in estate planning is great since estate planning requires an especially high degree of competence. See David Becker, *Broad Perspective in the Development of a Flexible Estate Plan*, 63 IOWA L. REV. 751, 759 (1978) ("comparatively few lawyers recognize the expertise and particular talents essential to estate planning"). A thorough knowledge is required of many areas of the law: wills, probate, trusts, taxation, insurance, property, domestic relations, etc. As one commentator has stated, "Any lawyer who is not aware of the pitfalls in probate practice has been leading a Rip Van Winkle existence for the last twenty years." Robert E. Dahl, *An Ounce of Prevention—Knowing the Impact of Legal Malpractice in the Preparation and Probate of Wills*, DOCKET CALL 9, 9 (Summer 1981).

When errors with the will or the will execution ceremony are discovered during the testator's lifetime,

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[1] Adapted from Gerry W. Beyer, *Avoiding the Estate Planning "Blue Screen of Death" – Common Non-Tax Errors and How to Prevent Them*, 1 EST. PLAN. & COMM. PROP. L.J. 61 (2008).

[2] Portions of this section are adapted from GERRY W. BEYER, TEXAS LAW OF WILLS §§ 53.1 & 53.10 (9 Tex. Prac. 3d ed. 2002).

the testator's only loss is the cost of having another will prepared and executed (unless, of course, tax benefits have been permanently lost). This is normally not the type of situation where malpractice liability will be litigated. The attorney may be able to avoid becoming a defendant by simply having the will re-executed without cost to the client and providing appropriate apologies for the inconvenience.

The problem is that errors usually do not manifest themselves until after the client's death. At this time, the testator's estate probably could sue the negligent attorney. However, the only damages would be the attorney's fees paid for drafting the will since there would be no other diminution of the estate funds caused by the error. Accordingly, if there is a flaw in the will or the will execution ceremony causing the will to be ineffective and that flaw can be traced to the conduct of the attorney in charge, it is the intended beneficiaries who now find themselves short-changed that are apt to bring a malpractice action.

Until recently, attorneys did not have to fear actions by these injured beneficiaries because the defense of lack of privity could be successfully raised. The general rule was that the attorney did not owe a duty to an intended beneficiary because there was no privity between the attorney and the beneficiary. This strict privity approach, however, is rapidly being replaced by the view that these beneficiaries may proceed with their actions against the drafting attorney despite the lack of privity.

2. The Privity Wall Begins to Crack

In 1958, the Supreme Court of California overruled the strict privity requirement in Biakanja v. Irving, 320 P.2d 16 (Calif. 1958), a case involving a notary public. The plaintiff received only a one-eighth intestate share of the decedent's estate rather than the entire estate because the attestation of the will was improper. The court rejected the body of common law requiring privity and determined that the imposition of a duty to third persons is a matter of policy and involves the balancing of six factors:

- the extent to which the transaction was intended to affect the plaintiff;
- the foreseeability of harm to the plaintiff;
- the degree of certainty that the plaintiff suffered injury;
- the closeness of the connection between the defendant's conduct and the injury suffered;
- the moral blame attached to the defendant's conduct; and
- the policy of preventing future harm.

The court concluded that the defendant must have been aware from the terms of the will itself that the plaintiff would suffer the very loss which occurred if faulty solemnization caused the will to be invalid. The court stated that such conduct needed to be discouraged and not protected by immunity from civil liability as would have been the case if this plaintiff, the only person who suffered a loss, were denied a valid cause of action. Accordingly, the notary was held liable for the difference between the amount which the intended beneficiary would have received had the will been valid and the intestate share.

Less than four years later, the California Supreme Court repeated essentially the same principle in Lucas v. Hamm, 364 P.2d 685 (Calif. 1961), cert. denied 368 U.S. 987 (1962). The court held that an attorney's liability for preparing a will could extend to the intended beneficiary. The court reasoned that:

> One of the main purposes which the transaction between defendant and the testator intended to accomplish was to provide for the transfer of property to plaintiffs; the damage to plaintiffs in the event of invalidity of the bequest was clearly foreseeable; it became certain, upon death of the testator without change of the will, that plaintiffs would have received the intended benefits but for the asserted negligence of defendant; and if persons such as plaintiffs are not permitted

> to recover for the loss resulting from negligence of the draftsman, no one would be able to do so, and the policy of preventing future harm would be impaired.

Id. at 688 (The court eventually held that the attorney was not negligent for failing to master a rule against perpetuities problem.)

Most jurisdictions have followed these California cases and have held attorneys liable to the intended beneficiaries. There are now fewer than ten states remaining that have retained the privity requirement in estate planning cases. See Martin D. Begleiter, *The Gambler Breaks Even: Legal Malpractice in Complicated Estate Planning Cases*, 20 GA. ST. U.L. REV. 277, 281-82 (2003).

3. Texas Lower Courts Consistently Keep the Privity Wall in Good Repair

The Fourth Court of Appeals, in the case of Berry v. Dodson, Nunley & Taylor, P.C., 717 S.W.2d 716 (Tex. App.—San Antonio 1986), writ dismissed by agreement, 729 S.W.2d 690 (Tex. 1987), became the first Texas court to address the issue. The decedent had a will which named his wife and his children by a former marriage as sole beneficiaries. While hospitalized with terminal cancer, the decedent hired the defendant attorney to prepare a new will which would add his wife's children as beneficiaries, change the trustees of the trusts to be set up for the benefit of the children, and leave his wife certain business interests.

Decedent died about two months after the attorney's initial consultation in the hospital. The attorney had prepared a draft of a new will but it was never executed. The old will was probated, making the decedent's wife and children angry, and thus they brought a malpractice action against the attorney.

After examining the facts and concluding that no privity existed between the attorney and decedent's wife and her children, the court held that this lack of privity precluded a negligence action by the intended beneficiaries. The court recognized the growing trend in other jurisdictions to permit an intended beneficiary to recover in the absence of privity, but it refused to break with the general Texas privity requirement.

The Texas Supreme Court granted the intended beneficiaries a writ of error; however, before it could be heard, the case was dismissed by agreement of the parties.

A subsequent court of appeals case on the same issue is Dickey v. Jansen, 731 S.W.2d 581 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.). The alleged negligence was the failure of the attorney to draft a testamentary trust provision that would operate under Louisiana law for certain of testator's Louisiana mineral interests. The majority followed *Berry* and did not allow the intended beneficiaries to recover. The dissenting opinion by Chief Justice Evans, however, strongly argued that the intended beneficiaries had stated a cause of action.

In Thomas v. Pryor, 847 S.W.2d 303 (Tex. App.—Dallas 1992), judgment set aside without reference to the merits, 863 S.W.2d 462 (Tex. 1993), an intended beneficiary sued an attorney who prepared decedent's will through a pro bono legal aid program. The will was not admitted to probate because it was not witnessed. The court, consistent with prior cases, held that the lack of privity between the attorney and the intended beneficiary barred the action. The court decided that the privity rule is supported by public policy and that "disturbing consequences could occur if an attorney were held liable to third parties." The court was concerned that liability to third parties "would inject undesirable self-protective reservations into the attorney's counseling role." Id. (quoting Bell v. Manning, 613 S.W.2d 335, 339 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.)).

The Texas Supreme Court granted writ to decide whether the privity bar should be lifted. As in *Berry,* the parties settled before the case could be heard. On the day set for oral argument, the court set aside the judgment of the appellate court without reference to the merits and remanded the case to the trial court for

entry of judgment in accordance with the settlement agreement of the parties. Thomas v. Pryor, 863 S.W.2d 462 (Tex. 1993).

In Thompson v. Vinson & Elkins, 859 S.W.2d 617 (Tex. App.—Houston [1st Dist.] 1993, writ denied), the residuary beneficiaries of decedent's will brought suit against the law firm hired by the trustee to represent the decedent's estate and trust in distributing the trust's assets. The court held that the beneficiaries did not have standing to bring a claim for professional negligence against the law firm because they were not in privity with the law firm.

4. The Supreme Court of Texas Buttresses the Privity Wall

In 1996, the Supreme Court of Texas finally decided the issue in Barcelo v. Elliott, 923 S.W.2d 575 (Tex. 1996), when it held that the beneficiaries do not have a claim against the drafting attorney. In *Barcelo*, an attorney prepared an estate plan for a client. After the client's death, a probate court held that an inter vivos trust included in the plan was invalid and unenforceable as a matter of law. The beneficiaries sued the attorney for negligence and breach of contract. Consistent with prior Texas cases, the lower courts and the Supreme Court of Texas dismissed the beneficiaries' claims because the beneficiaries were not in privity with the attorney.

The court rejected the trend in other states to relax the privity barrier in the estate planning context. The court held that

> the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent. This will ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation.

Id. at 578. Allowing disappointed will and trust beneficiaries to sue

> would subject attorneys to suits by heirs who simply did not receive what they believed to be their due share under the will or trust. This potential tort liability to third parties would create a conflict during the estate planning process, dividing the attorney's loyalty between his or her client and the third-party beneficiaries.

Id.

The court provided the following example of this type of conflict.

> Suppose * * * that a properly drafted will is simply not executed at the time of the testator's death. The document may express the testator's true intentions, lacking signatures solely because of the attorney's negligent delay. On the other hand, the testator may have postponed execution because of second thoughts regarding the distribution scheme. In the latter situation, the attorney's representation of the testator will likely be affected if he or she knows that the existence of an unexecuted will may create malpractice liability if the testator unexpectedly dies.

Id.

The court's opinion "insulates an entire class of negligent lawyers from the consequences of their wrongdoing." Id. at 579 (Cornyn, J. dissenting opinion).

5. The Appellate Courts Respect the Wall

In Guest v. Cochran, 993 S.W.2d 397 (Tex. App.—Houston [14th Dist.] 1999, no pet.), the parents hired an attorney who was a close friend of the preferred child. The slighted children alleged that the

attorney conspired with the preferred child so that the preferred child would obtain a disproportionate amount of the parents' estates via an irrevocable inter vivos trust and other non-probate arrangements. However, the parents never signed these instruments. The wills did not contain bypass trusts to save estate taxes on the unified credit amount. In addition, the attorney did not advise the surviving spouse or the executors of the deceased spouse's estate that the surviving spouse could disclaim a portion of the estate to reduce the size of her estate which would be subject to the estate tax upon her death. As a result, the estate of the second parent to die paid $60,000 in estate taxes. The trial court granted summary judgment in favor of the attorney.

The appellate court affirmed the summary judgment on the slighted children's individual claims against the attorney for malpractice following *Barcelo*. The court rejected the argument that *Barcelo* was bad law and that the lower court should decide differently because of the ever changing landscape of Texas law.

In Longaker v. Evans, 32 S.W.3d 725 (Tex. App.—San Antonio 2000, pet. withdrawn), the settlor terminated an inter vivos trust resulting in certain assets passing to the settlor's brother instead of his son. The son asserted that Brother, an attorney, violated his fiduciary duty to the settlor by assisting her to terminate the trust. The appellate court determined that this claim failed for a variety of reasons. First, the settlor was not damaged by the termination, even if it were improper, because all of the trust's assets were in the settlor's estate. Second, Brother did not owe the son a duty because there was no attorney-client relationship between Son and Brother. In addition, there was evidence showing the settlor was acting upon her own wishes when she terminated the trust.

6. Attempts to Run Around the Wall

a. Create Attorney-Client Relationship with Beneficiary

The shield from liability attorneys acquired under *Barcelo* does not provide absolute protection. Beneficiaries and attorneys may act with regard to each other to such an extent that an attorney-client relationship actually exists which consequently eliminates the protection extended by *Barcelo*.

The case of Vinson & Elkins v. Moran, 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr), is instructive. The beneficiaries of the will sued the law firm hired by the executors alleging malpractice on various grounds including the failure to reveal conflicts of interest. The law firm asserted that this lawsuit must fail because there was no privity of contract between the law firm and the beneficiaries (citing *Barcelo*) and because the law firm represented the executors personally, not the beneficiaries (citing Huie v. DeShazo, 922 S.W.2d 920 (Tex. 1996)). The beneficiaries claimed, however, that the parties acted in such a way to create an attorney-client relationship between the law firm and the beneficiaries which then served as the basis for the suit. The jury found that an attorney-client relationship existed between the law firm and the beneficiaries. After a detailed review of the evidence, the appellate court held that there was sufficient evidence to support the jury's decision. Thus, the law firm could be subject to liability for malpractice.

In Estate of Arlitt v. Paterson, 995 S.W.2d 713 (Tex. App.—San Antonio 1999, pet. denied), a husband died leaving a 1983 will and a 1985 codicil which substantially reduced the size of the share of a daughter, one of his four children. This daughter contested the will and codicil. The contest dragged on for many years. His wife, individually and as the executor of her husband's will, along with the other children sued the attorneys who drafted the will and codicil. They alleged that the attorneys represented the husband and the wife jointly in preparing the estate plan and that they were negligent in so doing. The attorneys responded that they were not liable for a variety of reasons such as lack of privity, expiration of the period of limitations, and lack of subject matter jurisdiction. The trial court granted the attorneys' motion for summary judgment without specifying a reason. The appellate court reversed.

The appellate court began its malpractice discussion by holding that the two year statute of limitations for legal malpractice claims may not have expired because it does not begin to run until the wife and the other children discover or reasonably should have discovered the wrongfully caused injury. The attorneys had failed to conclusively prove that the wife and her other children filed their malpractice claims more than two years after they discovered or reasonably should have discovered the wrongfully caused injury. Thus, the trial court improperly granted the attorneys' motion for summary judgment.

The court then focused on privity. The court recognized that an attorney retained by a testator to draft a will owes no professional duty of care to persons named as beneficiaries under the will. The court concluded that the wife and her other children must establish that they were in privity of contract with the attorneys to move forward with a malpractice claim. With regard to the other children, the court held that there was no evidence that the husband was acting as the other children's agent when he consulted with the attorney and there was no evidence that the attorneys represented the other children. Thus, the summary judgment denying these claims was affirmed. Likewise, the summary judgment was proper against the wife in her capacity as her husband's executor.

The court next examined the wife's personal claim for malpractice. Wife claimed that privity existed between the wife and the attorneys because they jointly represented the wife and the husband in the estate planning process. On the other hand, the attorneys argue that they represented only the husband and thus there was no privity. The court determined that *Barcelo* would not prevent the wife's personal claim because she could qualify as a represented beneficiary. "The *Barcelo* rule thus does not deny a cause of action to one of two joint clients." Id. at 721. Accordingly, the trial court's summary judgment against the wife personally was improper because there is a material issue of fact as to whether the attorneys represented the wife as well as her husband.

b. Assert Negligent Misrepresentation

Texas courts recognize the tort of negligent misrepresentation as described by § 552 of the Restatement (Second) of Torts. Federal Land Bank Ass'n of Tyler v. Sloane, 825 S.W.2d 439, 442 (Tex. 1991). "The elements of a cause of action for the breach of this duty are: (1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies 'false information' for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation." Id. at 442.

In 1999, the Supreme Court of Texas held in the case of McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787 (Tex. 1999), that attorneys, just like other professionals, could incur liability for negligent misrepresentation. The court explained that:

> a negligent misrepresentation claim is not equivalent to a legal malpractice claim. * * * Under the tort of negligent misrepresentation, liability is not based on the breach of duty a professional owes his or her clients or others in privity, but on an independent duty to the nonclient based on the professional's manifest awareness of the nonclient's reliance on the misrepresentation and the professional's intention that the nonclient so rely. * * * Therefore, an attorney can be subject to a negligent misrepresentation claim in a case in which she is not subject to a legal malpractice claim. * * * The theory of negligent misrepresentation permits plaintiffs who are not parties to a contract for professional services to recover from the contracting professionals.

Id. at 792.

The case of Estate of Arlitt v. Paterson, 995 S.W.2d 713 (Tex. App.—San Antonio 1999, pet. denied), appears to be the first case discussing negligent misrepresentation in a will drafting context. Husband died leaving a 1983 will and a 1985 codicil which substantially reduced the size of the share of one of his

four children. This child contested the will and codicil. The contest dragged on for many years. Wife, individually and as the executor of Husband's will, along with the other children sued the attorneys who drafted the will and codicil. They alleged that the attorneys represented Husband and Wife jointly in preparing the estate plan and that they were negligent in so doing. The attorneys responded that they were not liable for a variety of reasons such as lack of privity, expiration of the period of limitations, and lack of subject matter jurisdiction. The trial court granted the attorneys' motion for summary judgment without specifying a reason. The appellate court reversed.

The appellate court began by recognizing that a plaintiff must show privity to prevail on a legal malpractice claim. However, privity is not needed to establish a duty not to negligently misrepresent. The court explained that a negligent misrepresentation claim is not the same as a malpractice claim and that an attorney may be subject to a negligent misrepresentation claim even though the attorney is not subject to a malpractice claim. The appellate court remanded these claims because the attorneys' motion did not address the negligent misrepresentation claims and thus it was error for the trial court to render judgment against Wife and the other children.

c. Sue Under the Deceptive Trade Practices Act

The beneficiaries in Vinson & Elkins v. Moran, 946 S.W.2d 381 (Tex. App.—Houston [14th Dist.] 1997, writ dism'd by agr.), sued the law firm under the Texas Deceptive Trade Practices Act. The law firm challenged the lower court's finding that the beneficiaries were consumers under the Act. To qualify as consumers, the beneficiaries must first "have sought or acquired the goods or services by purchase or lease, and second, the goods or services purchased must form the basis of the complaint."

The court held that the beneficiaries were not consumers. The court was "not persuaded that the Texas Legislature intended the Act to apply to causes of action by will beneficiaries against the attorneys hired by the executors of the estate." The beneficiaries were merely "incidental beneficiaries" of the contract between the law firm and the executors. This type of benefit is not enough to give the beneficiaries consumer status. The court supported its holding with public policy arguments. For example,

> [i]f consumer status were conferred on estate beneficiaries, the existence of minor beneficiaries, residual beneficiaries, or others similarly situated could extend the period of time in which an action could be brought against attorneys hired by the executors for years after the representation ended and the estate was closed. We find the public interest in the finality of probate proceedings includes actions against attorneys who represent executors in the administration of the estate. A suit against an attorney would necessarily involve revisiting the original administration of the estate, and might very well affect the original distributions. Thus, public policy weighs against conferring consumer status on estate beneficiaries.

Id. at 408–09.

The court reached similar conclusions in Wright v. Gundersen, 956 S.W.2d 43 (Tex. App.—Houston [14th Dist.] 1996, no writ). The testator's will gave his IRAs to his children. However, this bequest was ineffective because the testator's brother was designated as the beneficiary of the IRAs. The daughter, both individually and as the executrix of the testator's estate, sued the attorney who drafted the will for violations of DTPA, breach of contract, and negligence for not advising the testator to make the appropriate changes to the IRA beneficiary cards. The trial court granted summary judgment in favor of the attorney.

The appellate court affirmed the summary judgment against the daughter individually. There was no attorney-client relationship between the attorney and the daughter at the time of the alleged malpractice. In addition, the daughter could not claim that she had standing to bring the action as a third party beneficiary of the contract between the testator and the attorney. However, the court reversed the

summary judgment on the negligence claim against the daughter in her representative capacity because the attorney failed to ask for it.

The appellate court also affirmed the trial court's summary judgment against the daughter on the DTPA claim. The daughter, in her representative capacity, did not present proof to defeat the attorney's summary judgment motion. The court also affirmed against the daughter in her individual capacity because she did not qualify as a "consumer." The daughter did not hire the attorney to draft the documents and did not pay the attorney.

In Guest v. Cochran, 993 S.W.2d 397 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (discussed above on page 4), the court affirmed the summary judgment on the slighted children's individual claims against the attorney for violations of DTPA following Wright v. Gundersen. The slighted children were not consumers because they did not seek or acquire any goods or services from the attorney. (Note that effective September 1, 1995, the DTPA was amended to exempt most claims for damages based on the rendering of legal services Texas Business & Commerce Code § 17.49. The claims in this case were brought before the effective date of this amendment).

B. Personal Representative of the Estate as Plaintiff

When a personal representative brings an action against the drafting attorney for malpractice, however, the privity shield is of no defensive value because the client was in privity with the attorney and the personal representative is merely stepping into the client's position. The leading case demonstrating this principle is Belt v. Oppenheimer, Blend, Harrison & Tate, Inc. 192 S.W.3d 780 (Tex. 2006), in which the executors sued the attorneys who prepared the testator's will asserting that the attorneys provided negligent advice and drafting services. The executors believed that the testator's estate incurred over $1.5 million in unnecessary federal estate taxes because of the malpractice. The briefs reveal that the main problem was that the testator did not form a family limited partnership or take other steps which could have led to a lowering of the estate's value.

Both the trial and appellate courts agreed that the executors had no standing to pursue the claim because of lack of privity. Belt v. Oppenheimer, Blend, Harrison & Tate, Inc., 141 S.W.3d 706 (Tex. App.—San Antonio 2004). The appellate court explained that privity was mandated by *Barcelo* and thus the court had no choice but to affirm the trial court's grant of a summary judgment in favor of the attorneys.

The Supreme Court of Texas reversed and held that "there is no legal bar preventing an estate's personal representative from maintaining a legal malpractice claim on behalf of the estate against the decedent's estate planners." The court did not express an opinion as to whether the attorneys' conduct actually amounted to malpractice.

Below are some of the key points made by the court:

- ***Barcelo* remains good law.** The court did not overturn *Barcelo*. The court explained that an attorney owes no duty to a non-client, such as a will beneficiary or an intended will beneficiary, even if the individual is damaged by the attorney's malpractice. The court reiterated the policy considerations supporting *Barcelo*:

  > [T]he threat of suits by disappointed heirs after a client's death could create conflicts during the estate-planning process and divide the attorney's loyalty between the client and potential beneficiaries, generally compromising the quality of the attorney's representation. * * * [S]uits brought by bickering beneficiaries would necessarily require extrinsic evidence to prove how a decedent intended to distribute the estate, creating a "host of difficulties." * * * [B]arring a cause of action for estate-planning

> malpractice by beneficiaries would help ensure that estate planners "zealously represent[ed]" their clients.

- **Policies are different regarding suits by personal representatives.** The policy considerations discussed above do not apply to suits by personal representatives. The court explained that unlike cases "when disappointed heirs seek to dispute the size of their bequest or their omission from an estate plan," these policy considerations do not apply "when an estate's personal representative seeks to recover damages incurred by the estate itself." The court also pointed out that "while the interests of the decedent and a potential beneficiary may conflict, a decedent's interests should mirror those of his estate." The court wrapped up its opinion by concluding that "[l]imiting estate-planning malpractice suits to those brought by either the client or the client's personal representative strikes the appropriate balance between providing accountability for attorney negligence and protecting the sanctity of the attorney-client relationship."
- **Possible "recasting" is possible.** The court recognized the problem which may arise because a beneficiary is often appointed as the estate's personal representative. The court's holding creates "an opportunity for some disappointed beneficiaries to recast a malpractice claim for their own 'lost' inheritance, which would be barred by *Barcelo*, as a claim brought on behalf of the estate." The court minimized this possibility by stating that "[t]he temptation to bring such claims will likely be tempered, however, by the fact that a personal representative who mismanages the performance of his or her duties may be removed from the position." The court also pointed out that any recovery goes to the estate, not the beneficiary, unless recovery flows through to the beneficiary under the terms of the will.
- **The decedent's personal representative has capacity and standing.** The court explained that it is well-accepted law that a decedent's personal representative has the capacity to bring a survival action on behalf of the decedent's estate. The court then had to address an issue of first impression in Texas, that is, does a legal malpractice claim in the estate-planning context survive a deceased client. The court explained that the common law allowed causes of action for acts affecting property rights to survive and that estate-planning negligence that results in "the improper depletion of a client's estate involves injury to the decedent's property." Thus, the court held that "legal malpractice claims alleging pure economic loss survive in favor of a deceased client's estate." Consequently, the executors had standing to bring the malpractice claim.
- **Malpractice claim accrues during the decedent's lifetime.** The court explained that the alleged malpractice occurred during the testator's lifetime even though the alleged damage (increased estate tax liability) did not occur until after the decedent's death. Thus, the court disapproved a contrary holding in the lower court case of Estate of Arlitt v. Patterson, 995 S.W.2d 713, 720 (Tex. App.—San Antonio 1999, pet. denied). The court pointed out that the testator could have brought the claim himself if he had discovered the malpractice prior to his death and recovered his attorney's fees and the costs incurred to restructure his estate plan.
- **Discovery rule applies running of statute of limitations.** In a footnote, the court addressed the issue of when the statute of limitations begins to run. The court stated that

> while an injury occurred during the decedent's lifetime for purposes of determining survival, the statute of limitations for such a malpractice action does not begin to run until the claimant "discovers or should have discovered through the exercise of reasonable care and diligence the facts establishing the elements of [the] cause of action." * * * In this

case, the "claimant" may be either the decedent or the personal representative of the decedent's estate.

C. Malpractice Outside of Estate Planning Context

Smith v. O'Donnell, 288 S.W.3d 417 (Tex. 2009), the executor sued the decedent's former attorneys for malpractice in advising the decedent in his capacity as the executor of his wife's estate. The lower court ruled in favor of the attorneys basing its judgment on the fact that the decedent's executor and the estate lacked privity of contract with the attorneys. The Supreme Court of Texas granted a petition for review without reference to the merits, vacated the lower court's judgment, and remanded so the lower court could take into account the holding in *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006). *O'Donnell v. Smith*, 197 S.W.3d 394 (Tex. 2006).

On remand, the Court of Appeals began its analysis by holding that *Belt* was not limited to estate planning malpractice actions. Accordingly, the court explained that the executor stepped into the decedent's shoes and could bring whatever malpractice action the decedent could have brought while alive, even if it did not involve the planning of the decedent's estate. The court relied on language in the *Belt* decision which provided that "legal malpractice claims alleging pure economic loss survive in favor of a deceased client's estate." The court then examined the evidence and concluded that although there was no evidence that the attorneys acted with malice or breached fiduciary duties, there was a triable issue as to what damages were attributable to the attorneys' acts. The court remanded the case to the trial court to determine whether the attorneys' acts amount to malpractice. *O'Donnell v. Smith*, 234 S.W.3d 135 (Tex. App.—San Antonio 2007). The attorneys appealed.

The Texas Supreme Court affirmed. The court agreed with the Court of Appeals that the executor is in the same position as the decedent. If the decedent had not died, the decedent could have brought the malpractice action and thus the executor may bring the action on the decedent's behalf. The court explained that the concerns about third-party malpractice suits (e.g., by disgruntled beneficiaries) do not apply in this type of case as the estate's suit is the same as the one the client would have brought; the attorney-client relationship is not jeopardized by the attorney considering the impact on a third party. The court did not address whether Attorneys' actions constituted malpractice.

A two-judge dissent asserted that this case falls under the *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996), rule which precludes a malpractice action by a non-client (e.g., an unhappy beneficiary) against the decedent's attorney for malpractice because of lack of privity.

III. POOR CLIENT INTERACTIONS

A. Failure to Gather Sufficient Information

The attorney must conduct a very detailed client interview and compile a vast array of data before preparing the estate plan. Information concerning the client's assets, liabilities, family situation, disposition desires, and related matters must be gathered. Failure to obtain relevant facts makes it difficult or impossible to draft an appropriate estate plan. A client may not reveal certain important information merely because the attorney did not ask; the client may not realize the material's significance. Detailed client interview forms and checklists increase the likelihood of discovering relevant information.

B. Believing Client Without Independent Verification

A client unskilled in legal matters may inadvertently (or even intentionally) mislead the estate planner. To avoid unexpected surprises, the attorney should ask for supporting documentation whenever possible regarding family matters (e.g., marriages, divorces, birth of children, adoptions), ownership of assets (e.g., deeds, stock certificates, bonds), employee benefits (e.g., retirement plans, bonus plans, annuities),

bank accounts (e.g., statements, passbooks, certificates of deposit, account contracts, signature cards), debts (e.g., promissory notes, deeds of trust, mortgages), life insurance (e.g., policies and beneficiary designations), and other relevant matters (e.g., powers of attorney, directives to physicians).

Clients frequently believe that documents reflect specific facts when in actuality they do not. A simple example is instructive. The client tells the attorney that he has a large certificate of deposit in his name and his best friend's name. The client explains he wants this certificate to pass to his friend, rather than to his family under his will. He assures the attorney that the certificate is in survivorship form and the attorney does not independently verify this assertion. When the client dies, the attorney discovers that the friend's name was either not on the certificate or that the certificate lacked survivorship language. The friend goes away empty-handed and the client's intent is frustrated.

C. Neglecting Communications With Client

The attorney must be aware of the importance of maintaining communication with the client both during and after the preparation of the estate plan. During the estate planning process, the client may have questions or wish to make changes. This is often the case once a client begins thinking seriously about the disposition of family heirlooms. A better estate plan will result if the attorney promptly returns telephone calls and answers letters.

After the estate plan is complete, the attorney needs to maintain contact with the client unless the attorney makes it very clear that the representation does not continue beyond document execution. The client should understand that wills need to be changed when there is a change in circumstances, e.g., birth, marriage, adoption, death, substantial increase or decrease in assets, change in state of domicile, or change in state or federal law.

D. Failure to Act Timely

An estate plan should be completed in a timely fashion. *See generally* Gerald P. Johnston, *Legal Malpractice in Estate Planning and General Practice*, 17 MEM. ST. U. L. REV. 521, 534-36 (1987) ("Procrastination may be an even greater problem in the trusts and estates field than it is in other areas.") Obviously, this is imperative if the client is elderly or seriously ill. Prompt estate planning is also necessary even if a client is young and in perfect health at the time of the initial interview; the person could have a fatal automobile accident or heart attack on the way home. It may be wise to have the client execute a simple will, even a holographic one, at the time of the initial interview to accomplish at least a portion of the client's estate planning objectives. A one page will leaving all the client's property to the surviving spouse and appointing the spouse as the independent executor is often a desirable alternative to an intestate division between the spouse and children such as would occur with community property if all the deceased spouse's descendants were not also the surviving spouse's descendants (Prob. Code § 45(b)) or if the deceased spouse owned separate property (Prob. Code § 38(b)).

E. Failure to Document Unusual Requests

If a client makes an estate planning decision that the attorney fears may appear suspicious to others or might be viewed as evidence of the attorney's negligence, special steps are necessary. For example, a married individual may want to leave the entire estate to the spouse or more than $1,000,000 to a non-spouse and thus incur federal estate tax liability which could easily have been avoided. The attorney should explain the potential outcomes to the client in writing and then have the client sign a copy acknowledging that the client is aware of the ramifications of the decision.

F. Failure to Recognize Circumstances that Might Increase the Likelihood of a Will Contest

The attorney must always be on guard when drafting instruments which may supply incentive for

someone to contest a will or other estate planning document. Anytime an individual would take more through intestacy or under a prior will, the potential for a will contest exists, especially if the estate is large. The prudent attorney must recognize situations which are likely to inspire a will contest and take steps to reduce the probability of a will contest and the chances of its success. *See* Gerry W. Beyer, *Drafting in Contemplation of Will Contests*, PRAC. LAW., Jan. 1992, at 6.

IV. ERRORS IN WILL DRAFTING

A. Poor Proofreading of Documents

Many mistakes in estate planning documents are the result of poor proofreading. In a fast-paced office, time pressure may appear to restrict the attorney's opportunity to carefully review the documents. Under no circumstances should a client sign an estate planning document without the attorney and the client carefully reading and studying the final draft. It may also be advisable for another attorney to review the documents. Major errors (e.g., a misplaced decimal point in a legacy or an important provision omitted) as well as seemingly minor errors (misspelling of beneficiary's name) may provide the focus of later litigation.

B. No Specific Provision Regarding Ademption

Ademption, i.e., failure of a gift, occurs when the item given in the will is no longer in the testator's estate at time of death. *See* Rogers v. Carter, 385 S.W.2d 563 (Tex. Civ. App.—San Antonio 1964, writ ref'd n.r.e.). For example, if the will gives Blackacre to X and testator sells or gifts Blackacre prior to death, X takes nothing under this provision of the will. In addition, the intended beneficiary will normally not receive the equivalent value via proceed tracing or otherwise. *See* Shriner's Hospital for Crippled Children of Texas v. Stahl, 610 S.W.2d 147 (Tex. 1980); Opperman v. Anderson, 782 S.W.2d 8 (Tex. App.—San Antonio 1989, writ denied).

Accordingly, it is important for specific gifts to contain an express statement of the testator's intent if the item is not in the estate. The testator should explain either that ademption causes the intended beneficiary to go home empty-handed or provide a substitute gift (e.g., other specific property, money, or a greater share of the residuary).

C. No Specific Provision Regarding Lapse

Lapse occurs when a gift fails because the beneficiary predeceases the testator. Unless the anti-lapse statute applies, the subject matter of the gift will then pass under the will's residuary clause, or, if the lapsed gift was the residuary, via intestacy. The anti-lapse statute saves the gift for the beneficiary's descendants if the beneficiary was a descendant of the testator (e.g., child, grandchild) or if the beneficiary was a descendant of the testator's parent (e.g., brother, sister, niece, nephew). Prob. Code § 68(a).

To prevent the result of lapse from being governed by rules that may not comport with the testator's intent, each gift should expressly indicate who receives the property in the event of lapse. For example, the testator could make an express gift over to a contingent beneficiary, indicate that the gift passes to the descendants of a deceased beneficiary, or merely state that the gift passes via the residuary clause.

D. Including Payment of "Just Debts" Provision

The traditional, but inappropriate, direction to the executor to pay "just debts" should not be included in a will.

> A specific will clause requiring that the executor pay all of the testator's "just debts" raises the question whether the executor is required to pay debts barred by limitations, and whether the executor is required to pay installments on long-term indebtedness that are not yet due.

Bernard E. Jones, *10 Drafting Mistakes You Don't Want to Make in Wills and Trusts (and How to Avoid Them)*, in UNIVERSITY OF TEXAS SCHOOL OF LAW CLE, 8TH ANNUAL ESTATE PLANNING, GUARDIANSHIP, AND ELDER LAW CONFERENCE, Tab B, at 5 (2006).

E. Failure to Discuss Exoneration

Texas had long followed the doctrine of exoneration, that is, debts on specifically gifted property were paid from other estate assets so that the beneficiary receives the asset unencumbered, rather than just the testator's equity. See Currie v. Scott, 187 S.W.2d 551 (Tex. 1945).

The doctrine has been abolished for wills executed on or after September 1, 2005. A specific gift passes subject to each debt secured by the property that exists on the date of the testator's death under new Probate Code § 71A. However, the testator may expressly provide in the will for the debts against a specific gift to be exonerated. Accordingly, the will should expressly indicate whether debts against specifically gifted property are to be exonerated and if so, from what property.

F. Failure to Extend Survival Period

Unless the will states otherwise, a beneficiary need only outlive the testator by 120 hours to take under the will. Prob. Code § 47(c). This length of time is typically too short. The purpose of requiring survival is to prevent multiple administrations of the same property within a short period of time and thus save administration expenses and estate tax. This goal, however, is not effectuated by a 120 hour period; probate takes considerably longer than five days. Therefore, a testator should consider extending the survival period to a more realistic length of time, e.g., three, six, nine, or twelve months. (Note that a survival period of over six months will prevent a gift to a surviving spouse from qualifying for the marital deduction. I.R.C. § 2056(b)(3)).

G. Failure to Address Abatement

The Probate Code mandates the order in which gifts fail if the estate has insufficient property to satisfy all testamentary gifts. Prob. Code § 322B. This order may or may not be in accordance with the testator's intent. Thus, the attorney must ascertain the relative strength of each gift and make certain the testator's primary beneficiaries receive preferential treatment either under the statute or by expressly altering the abatement order.

H. Failure to Address Tax Apportionment

Apportionment refers to whether transfers that occur because of a person's death (e.g., gifts under a will, life insurance proceeds, survivorship bank accounts) will be reduced by the amount of estate tax attributable to the transfers. A detailed apportionment scheme is provided in the Probate Code. Prob. Code § 322A. This scheme may or may not reflect the testator's intent. As a result, the testator must be carefully questioned regarding tax apportionment desires in cases where the estate may be large enough to have estate tax liability.

I. Lack of Provision Regarding Pretermitted Children

Under certain circumstances, children born or adopted after will execution are entitled to a share of the testator's estate. Prob. Code § 67. This automatic alteration of an established estate plan could have a devastating effect on the testator's disposition desires. For example, assume that the testator executes a

will leaving the testator's entire estate to the American Red Cross. Thereafter, testator has a child and then dies without changing the will. The testator's intent to leave property to the American Red Cross would be completely ignored and the entire estate would pass to the child.

Three methods may be used to avoid the application of the pretermitted child statute. First, the will could expressly provide for the pretermitted heir, e.g., "I leave all my property to my children." Second, the will could mention the pretermitted child, e.g., "I intentionally make no provision for any child who may be hereafter born or adopted." Third, the testator may provide for the pretermitted child in some other manner such as by naming the child as a beneficiary of a life insurance policy.

All wills should address the pretermitted child issue, even those of individuals beyond child bearing years. It is becoming increasingly common for parents to adopt grandchildren and older individuals to adopt disadvantaged children — situations which increase the likelihood of triggering the pretermitted child statute.

J. Failure to Address Adopted and Non-Marital Children Issues

The attorney must carefully question the testator to ascertain the testator's desires regarding children who may be adopted or born out-of-wedlock. The testator may or may not wish these children to share in the estate in the same manner as biological children or children born during marriage. This issue is of particular importance when the testator makes class gifts. *See* Martin D. 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).

K. Failure to Externally Integrate Testamentary Documents

External integration is the process of establishing the testator's will by interpreting and construing various testamentary instruments left by the testator. The documents are pieced together to give effect to the latest statement of the testator's intent. Thus, a new will should be accurately dated and revoke all prior wills and codicils to clarify the testator's most recent desires. Unless special circumstances exist, use of codicils should be avoided because codicils increase the chance of external integration problems.

L. Inadequate Incorporation by Reference

If the testator intends to incorporate an extraneous document by reference, care must be taken to make certain the document is in existence at the time of incorporation and sufficiently identified so that no other document could reasonably be referred to by the description. *See* Allday v. Cage, 148 S.W. 838 (Tex. Civ. App.—Fort Worth 1912, no writ). To avoid potential problems, especially if the document is short, the attorney should consider including the material within the body of the will rather than relying on an incorporation. When a pour over provision is included, the Probate Code requirements should be satisfied. Prob. Code § 58a.

M. Referencing a Tangible Personal Property Memo

A limited number of states and Uniform Probate Code § 2-513 authorize a testator to use a separate writing to dispose of tangible personal property even though that writing (a) does not meet the requirements of a will and thus could not be probated as a testamentary instrument, (b) was not in existence at the date of will execution and thus could not be incorporated by reference, and (c) exists for no reason other than to dispose of property at death and thus could not be a fact of independent significance. Texas is *not* one of these states and thus a will should not use this technique.

N. Improper Internal Integration

The will should fit neatly together as a unified document. All pages should be typed or printed on the same kind of paper, all pages should be the same size, the type style should be consistent throughout the will, the entire will should be typed or printed with the same ribbon or toner cartridge, each page should be numbered *ex toto* (e.g., page 3 of 5), and blank spaces should be avoided. In addition, all pages should be securely fastened together. These precautions help reduce the chance of the testator or third parties inserting or removing pages. In addition, these steps make it easier to show that the pages present at the time of the will execution ceremony are the same pages offered for probate.

O. Use of Ambiguous Language

Ambiguity is one of the most frequent causes of will litigation. Care must be taken to phrase the will clearly and precisely. Words must be chosen to avoid doubt as to their intended meaning. If potentially ambiguous words are used, unambiguous definitions should be included. An attorney should be especially leery of using the following words and phrases: *cash* (Stewart v. Selder, 473 S.W.2d 3 (Tex. 1971)), *money* (West Tex. Rehabilitation Ctr. v. Allen, 810 S.W.2d 870 (Tex. App.—Austin 1991, no writ)), *funds* (Id.), *personal property* (Gilkey v. Chambers, 207 S.W.2d 70 (Tex. 1947)), *issue* (Munger v. Munger, 298 SW 470 (Tex. Civ. App.—Dallas 1927, writ ref'd)), and *heirs* (Federal Land Bank v. Little, 130 Tex. 173, 107 S.W.2d 374 (1937)).

The descriptions of specific gifts (In re Estate of Cohorn, 622 S.W.2d 486 (Tex. App.—Eastland 1981, writ ref'd n.r.e.)) and designations of beneficiaries (Hultquist v. Ring, 301 S.W.2d 303 (Tex. Civ. App.—Galveston 1957, writ ref'd n.r.e.)) should be precise especially in light the Supreme Court of Texas opinion in San Antonio Area Foundation v. Lang, 35 S.W.3d 636, 637 (Tex. 2000), holding that "extrinsic evidence is not admissible to construe an unambiguous will provision."

P. Inadvertent Creation of Election Will

"The principal of election is, that he who accepts a benefit under a will, must adopt the whole contents of the instrument, so far as it concerns him; conforming to its provisions, and renouncing every right inconsistent with it." Philleo v. Holliday, 24 Tex. 38, 45 (1859). Election provisions are occasionally placed in wills where one spouse wants to dispose of the entire interest in some or all of the community property. The surviving spouse may consent to the disposition of the surviving spouse's share of the community assets because the will gives the spouse a significant interest in the deceased spouse's community or separate property. Attorneys must be careful, however, not to inadvertently create an election situation. Although there is a presumption that an election will be imposed only if the will is open to no other construction (Wright v. Wright, 154 Tex. 138, 274 S.W.2d 670 (1955)), an attorney could create an election scenario without intending to do so. Thus, a provision should be included in the will expressly stating the testator's intent regarding election.

Q. Use of Precatory Language

Instructions in a will regarding the disposition of property must be mandatory to be enforceable. Precatory language, such as *I wish*, *I would like*, and *I recommend*, is normally considered suggestive in nature and not binding on the beneficiary. *See* Wattenburger v. Morris, 436 S.W.2d 234 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.); Najvar v. Vasek, 564 S.W.2d 202 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.). Precatory language has no place in a will. If the testator wishes to express non-mandatory desires, a separate non-testamentary document should be used. If the testator insists on placing such language in the will, the attorney should add language indicating that the suggestions are merely precatory and have no binding effect.

R. Violation of Rule Against Perpetuities

The Texas Constitution provides that "[p]erpetuities . . . are contrary to the genius of a free government, and shall never be allowed." TEX. CONST. art. I, § 26. Under the Rule Against Perpetuities, an interest is not good unless it must vest, if at all, not later than 21 years after some life in being at the time of the creation of the interest, plus a possible period of gestation. Care must be taken when drafting wills to make certain the rule is not violated. If the Rule is violated, the Texas courts must reform or construe the interest to effect the ascertainable general intent of the testator. Prop. Code § 5.043(a).

S. Inadequate Tax Planning

An attorney, even one who infrequently prepares estates with tax consequences, must be able to recognize situations where tax planning is needed and then make certain the testator obtains proper advice. A commonly cited excuse for inadequate tax planning is a false belief that the estate is too small to incur estate tax. Just because property is not in a decedent's probate estate, does not mean it will escape taxation. Life insurance proceeds, trusts, retirement plans, and other assets may be includable in the decedent's estate for tax purposes. Thus, the attorney must be certain to inquire about all types of assets and determine if it is likely that the client will obtain significant additional assets, e.g., via an inheritance from a wealthy parent. The areas posing the greatest danger of error are special use valuation, the generation-skipping tax, and the marital deduction. *See* Martin D. 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, 238-39 (1990). It is beyond the scope of this article to review the potential errors in tax planning. *See* id. at 233-42.

T. Failure to Provide for Independent Administration

If the testator wishes to obtain the benefits of independent administration, appropriate language must be inserted in the testator's will. Prob. Code § 145. Failure to include this language means additional delay, either because a full dependent administration is needed or because of the time it takes to obtain consent of all beneficiaries and court approval of an independent administration. To avoid these problems, it is essential that the testator's desires regarding administration be documented in the will.

U. Failure to Indicate Alternate or Successor Executor

A will should indicate at least one executor who would serve if the named executor is unwilling or unable to serve (e.g., dies, resigns, is or becomes incompetent, or does not want to assume fiduciary responsibilities). Naming an alternate/successor executor will save the time and expense of locating a successor as well as having the estate managed by a person selected by the testator rather than by the court or the beneficiaries. Prob. Code § 154A (independent administration); §§ 223-27 (dependent administration).

V. Lack of Provision Regarding Bond

The personal representative must post bond unless bond is waived in the testator's will (Prob. Code § 195(a)), the personal representative is a corporate fiduciary (§ 195(b)), or bond is waived by the court in an independent administration (§ 145(p)). Although bond does provide some protection to beneficiaries from evil personal representatives, bond is expensive and reduces the amount of property available to the beneficiaries. The client's desires regarding bond must be ascertained and those wishes made clear in the will.

W. Lack of Compensation Provision

The Probate Code § 241 provides the method for determining a personal representative's

compensation. The testator may have a different intent, either that the personal representative is to serve without compensation or that a different method be used to compute compensation. Thus, the will should contain an express statement of testator's intent regarding compensation for the personal representative. *See* Stanley v. Henderson, 139 Tex. 160, 164, 162 S.W.2d 95, 97 (1942).

X. Naming Drafting Attorney, Attorney's Relative, or Attorney's Employee as a Beneficiary

Attorneys are often asked by family members, friends, and employees to prepare wills, trusts, and other documents involved with the gratuitous transfer of property. These same individuals may also want the attorney to name him- or herself as one of the beneficiaries of the gift. This common occurrence is fraught with legal and ethical problems, that is, the attorney may not be able to claim the gift and may be subject to professional discipline.

1. Effect on Validity of Gift

Under Roman law, the drafter of a will could take no benefit under the will. *See* Elmo Schwab, *The Lawyer As Beneficiary*, 45 TEX. B.J. 1422 (1982) (discussing ancient doctrine of "qui se scrip sit heredem"). The common law of Texas law did not follow this strict approach. Instead, these circumstances gave rise to an inference of undue influence which the attorney could rebut by showing either that (1) the testator was related to the attorney by blood or marriage, or (2) the testator actually desired the attorney to be a beneficiary. For example, in Oglesby v. Harris, 130 S.W.2d 449, 451 (Tex. Civ. App.—Austin 1939, writ dism'd judgmt cor.), the court permitted the attorney to receive the property because "the estate was of practically nominal value, and the beneficiary [attorney] was an old friend and benefactor of the deceased, to whom the deceased was largely indebted if not in fact legally, at least morally, for assistance rendered in his dire extremity."

In 1997, the Texas Legislature removed all discretion from the court to decide the propriety of a testamentary gift from a client to the drafting attorney when it added § 58b to the Texas Probate Code. The section was designed to reduce overreaching by attorneys who prepare wills in which they or closely connected individuals are named as beneficiaries. The statute has been amended several times as the Texas Legislature attempts to fine-tune which gifts to deem void and when a close family relationship between the testator and the beneficiary will permit a gift to take effect despite the self-serving nature of the transaction. Here is a brief explanation of the operation of the statute as of the conclusion of the 2005 Legislature.

a. Presumption of Void Gift

A gift to the drafting attorney or a person closely related to attorney is void.

b. Beneficiaries Within Scope of Void Presumption

Gifts to the following individuals are presumed void:

- Attorney who prepares the will.
- Attorney who supervises the preparation of the will.
- Parent of the attorney.
- Descendent of the attorney's parent (e.g., child, grandchild, brother, sister, niece, nephew, etc.)
- Employee of the attorney
- Spouse of any of the above individuals

Note how many closely related beneficiaries (e.g., grandparents, aunts, uncles, cousins) are not within the scope of the void presumption.

c. Exceptions to Void Presumption

Gifts to the following individuals are permitted:

- Beneficiary is the testator's spouse (attorney may write self-beneficiary will for his/her spouse).
- Beneficiary is the testator's ancestor or descendant (attorney may write self-beneficiary will for parent, grandparent, child, grandchild, etc.).
- Beneficiary is related to the testator within the third degree of consanguinity or affinity (attorney may write self-beneficiary will for brother, sister, aunt, uncle, etc.).

Note that if a bona fide purchaser buys property for value from a beneficiary with a void gift, the purchaser is protected.

2. Effect on Ethical Duties

Texas Disciplinary Rule of Professional Conduct 1.08(b) prohibits a lawyer from preparing a will not only if the attorney is a beneficiary, but also if the beneficiary is the attorney's parent, child, sibling, or spouse. There are two exceptions to the general admonition.

The first exception is when the client is related to the donee. Although permitted, the prudent attorney should avoid drafting for relatives unless the disposition in the will is substantially similar to that which would occur under intestacy. Note also that it is uncertain how "related" should be defined, i.e., by blood and/or by marriage, and how close of a relationship is sufficient.

The second exception is if the gift is not substantial. It is uncertain what "substantial" means. Does it depend on size of the testator's estate or the size of beneficiary's estate? For example, 75% of a small estate may be a very small amount whereas 1% of a large estate may be huge vis-à-vis the attorney's own holdings. Accordingly, a prudent attorney should not rely on this exception to excuse a self-beneficiary will.

Y. Naming Drafting Attorney as Executor

The former Ethical Considerations provided that "[a] lawyer should not consciously influence a client to name him as executor [in a will]. In these cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety." STATE BAR OF TEXAS, ETHICAL CONSIDERATIONS ON CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-6 (1972). This rule was interpreted to mean that a lawyer may be named as the executor for an estate "provided there is no pressure brought to bear on the client, and such appointments represent the true desire of the client." State Bar of Texas, Comm. on Interpretation of the Canons of Ethics, Op. 71 (1953). Despite the authority to do so, the attorney must exercise great care to avoid potential claims of overreaching or conflict of interest. *See* Howard M. McCue III, *Flat-Out of the Will Business—A Recent Malpractice Case Results in an Expensive Settlement for Both Lawyer and Executor*, TR. & EST., Sept. 1988, at 66 (discussing San Antonio lawsuit which was settled when law firm agreed to pay over $4 million to plaintiff; the attorney who drafted the will had named attorneys employed by the firm as executors). It is wise to have the client sign a plain language disclosure statement which explains the ramifications of the attorney serving as the executor. *See* Larry W. Gibbs, *The Lawyer's Professional Responsibility in Estate Planning and Probate—Common Solutions and Practical Problems, in* STATE BAR OF TEXAS,

PRACTICAL WILL DRAFTING AND REPRESENTING THE ESTATE AND BENEFICIARIES IN HARD TIMES, ch. F, 2-6, 24-26 (1987) (includes sample disclosure form).

V. IMPROPER WILL EXECUTION

The will execution ceremony provides a fertile field for error. "The majority of estate planning malpractice cases have involved execution errors." Martin D. 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, 218 (1990). The importance of the ceremony is manifest; without a proper execution, the will has no effect regardless of the testator's intent. A careless, hurried, or casual ceremony increases the likelihood that an error will occur. The best way to increase the chances that the ceremony encompasses all of the required formalities is to have a detailed form or checklist of elements and follow it closely for every ceremony. *See* Gerry W. Beyer, *The Will Execution Ceremony — History, Significance, and Strategies*, 29 S. TEX. L. REV. 413 (1988).

A. Ceremony Conducted by Non-Attorney

The will execution ceremony should be conducted by the attorney, not by the client or the attorney's staff. There are reports of attorneys mailing or hand-delivering unsigned wills to clients along with will execution instructions. *See* Hamlin v. Bryant, 399 S.W.2d 572, 575 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.). *See generally* Gerald P. Johnston, *Legal Malpractice in Estate Planning and General Practice*, 17 MEM. ST. U.L. REV. 521, 529 n.43 (1987). Even if the instructions are correct, there is little assurance that they will be correctly followed. *See* Martin D. 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, 221 n.160 (1990).

Some attorneys may allow law clerks or paralegals to supervise the ceremony. This practice is questionable not only because it increases the probability of error, but because the delegation of responsibility may be considered a violation of professional conduct rules proscribing the aiding of a non-lawyer in the practice of law. *See* Palmer v. Unauthorized Practice Comm. of the State Bar, 438 S.W.2d 374, 376 (Tex. Civ. App.—Houston [14th Dist.] 1969, no writ); Gerry W. Beyer, *The Role of Legal Assistants in the Estate Planning Practice*, EST. PLAN. DEV. FOR TEX. PROF., April 1989, at 1, 2-3. *See generally* Gail E. Cohen, *Using Legal Assistants in Estate Planning*, PRAC. LAW., Oct. 15, 1984, at 73; Robert S. Mucklestone, *The Legal Assistant in Estate Planning*, 10 REAL PROP. PROB. & TR. J. 263 (1975).

B. Beneficiary Present During Ceremony

The testator, the disinterested witnesses, the notary, and the supervising attorney are the key players in the will execution ceremony. In the normal situation, no one else should be present. It is especially important to make certain no beneficiary under the will attends the ceremony as a precaution against claims of overreaching and undue influence.

C. No Testator Signature

The will must contain the testator's signature. Prob. Code § 59. An unsigned will is of no effect, regardless of other evidence proving the testator's intent, unless the testator's signature appears on the self-proving affidavit in which case the affidavit's signature is sufficient. Prob. Code § 59. If a testator is using a proxy signatory, appropriate documentation of why the testator is not personally signing is needed as well as evidence that the proxy signed at the testator's direction and in the testator's presence.

D. Testator Signs Wrong Will

When wills for several people are being executed simultaneously, e.g., husband and wife, the possibility exists that they will sign the wrong wills. *See* Estate of Pavlinko, 148 A.2d 528 (1959). In this case, neither will would be valid; the signing testator lacked intent for the signed document to be the will and the other document lacks the testator's signature. To avoid this possibility, only one will should be executed at a time and the wills should be inspected closely to ascertain that they were not inadvertently switched.

E. Lack of Sufficient Number of Witnesses

A non-holographic will requires a minimum of two competent witnesses. Prob. Code § 59. Failure to have at least two witnesses is fatal to will validity. If the witnesses sign the self-proving affidavit rather than the will, the attestation will be sufficient although the self-proving affidavit fails. Prob. Code § 59.

F. Witnesses Fail to Attest in Testator's Presence

Although the testator is not required to actually see the witnesses sign the will, the attestation must take place in the testator's presence. Prob. Code § 59. The term presence means a conscious presence, that is, "the attestation must occur where testator, unless blind, is able to see it from his actual position at the time, or at most, from such position as slightly altered, where he has the power readily to make the alteration without assistance." Nichols v. Rowen, 422 S.W.2d 21, 24 (Tex. Civ. App.—San Antonio 1967, writ ref'd n.r.e.); *see also* Morris v. Estate of West, 643 S.W.2d 204, 206 (Tex. App.—Eastland 1982, writ ref'd n.r.e.) (attestation deemed to be outside of testator's presence because testator could not have seen witnesses sign without walking four feet to office door and fourteen feet down a hallway).

G. Using Beneficiary as Witness

A will beneficiary should not serve as one of the two required witnesses to a non-holographic will. Under Texas law, a gift to an attesting beneficiary is generally void. Prob. Code § 61. If the beneficiary is an heir who would have inherited had there been no will, then the beneficiary takes the smaller of the gift under the will and what the beneficiary's intestate share would have been. Prob. Code § 61. Alternatively, the gift may be saved via corroboration by one or more disinterested and credible persons. Prob. Code § 62.

H. Improperly Completed Self-Proving Affidavit

A self-proving affidavit may be invalid for many reasons. The notary might fail to swear the testator or witnesses. *See* Broach v. Bradley, 800 S.W.2d 677 (Tex. App.—Eastland 1990, writ denied) (self-proving affidavit invalid because the notary had not properly sworn the witnesses). The testator and both witnesses might not sign the affidavit. Although the testator or witnesses sign the affidavit, one or more may not have signed the will. In this case, the signatures on the affidavit may be used to bootstrap the will but the self-proving affidavit would then be ineffective. Prob. Code § 59. Although not a condition to the affidavit's validity, the notary should record the ceremony in the notary's record book. Gov't Code § 406.014. This record may provide helpful evidence if a will contest ensues.

I. Execution of Duplicate Originals

A testator should never execute duplicate originals. Problems arise when, at time of death, all of the duplicate originals cannot be located. The general presumption is that the destruction of one duplicate original by the testator with the intent to revoke operates to revoke all copies. However, this presumption may be rebutted by evidence that to avoid confusion resulting from having multiple last wills, the testator

destroyed one of them intending to strengthen the validity of the other. *See* Combs v. Howard, 131 S.W.2d 206 (Tex. Civ. App.—Fort Worth 1939, no writ).

VI. ERRORS IN TRUST DRAFTING

Special opportunities for error exist in trust drafting. Many of the items discussed in the will drafting section are applicable to trust drafting as well. These problems include the following: no specific provision regarding ademption, no specific provision regarding lapse, failure to discuss exoneration, inadequate incorporation by reference, trust not properly internally integrated, use of ambiguous language, use of precatory language, inadequate tax planning, poor proofreading of trust documents, failure to indicate alternate trustee or method to select a successor, lack of provision regarding bond, lack of compensation provision, naming the drafting attorney as a beneficiary and/or a trustee, and representation of both spouses.

A. Failure to Address Principal and Income Issues

The Trust Code contains extensive provisions regarding the method of crediting a receipt or charging an expenditure to the principal or income of the trust. Trust Code ch. 116. Depending on the circumstances, this may or may not be in accordance with the settlor's intent. Thus, the trust instrument should contain an express provision addressing how allocation of principal and income should be done (e.g., specific rules, follow the Trust Code rules, or left to the trustee's discretion).

B. Omission of Spendthrift Provision

If the trust is silent on the issue, the beneficiary has tremendous control over the beneficiary's trust interest; the beneficiary may sell it or give it away. In addition, the beneficiary's creditors may reach the beneficiary's interest to satisfy their claims. The vast majority of settlors, however, want to prevent the beneficiary from transferring the trust interest either voluntarily or involuntary. Thus, a spendthrift provision is appropriate in almost all trusts. Trust Code § 112.035 ("A declaration in a trust instrument that the interest of a beneficiary shall be held subject to a "spendthrift trust" is sufficient to restrain voluntary or involuntary alienation of the interest by a beneficiary to the maximum extent permitted by [the Trust Code].")

C. Misstating Ability to Revoke

The settlor must decide on the revocability of the trust. If the settlor desires flexibility, retention of the ability to revoke is paramount; however, if the settlor seeks tax benefits, the trust usually must be irrevocable. Under Texas law, a trust is presumed revocable unless the trust instrument expressly makes it irrevocable. Trust Code § 112.051(a). Thus, if the trust is created for tax reasons and lacks an express irrevocability provision, the tax advantages may be lost. Likewise, if the settlor actually intends a revocable arrangement, inclusion of an irrevocability clause would be intent defeating.

VII. OTHER TROUBLESOME MISTAKES

A. Improper Document Preservation

It is important for estate planning documents to be stored in appropriate locations. If documents are not available to the appropriate person when needed, the client may lose the benefits of executing the documents. The disposition of an executed document is simple in some cases. For example, a medical power of attorney should be delivered to the agent. In other cases, however, the proper receptacle for the document is less easily ascertained.

The proper disposition of a will is often a controversial issue. The original will should normally be stored in a secure location where it may be readily found after the testator's death. Thus, some testators keep the will at home or in a safe deposit box, while others prefer for the drafting attorney to retain the will. The attorney should not suggest retaining the original will because the original is then less accessible to the testator. When the drafting attorney retains a will, the testator may feel pressured to hire the attorney to update the will and the executor or beneficiaries may feel compelled to hire that attorney to probate the will. Some courts in other jurisdictions hold that an attorney may retain the original will only "upon specific unsolicited request of the client." State v. Gulbankian, 196 N.W.2d 733, 736 (Wis. 1972).

If a will contest is likely, the client must be informed of the dangers of retaining the will, i.e., it increases the opportunity for unhappy heirs to locate and then alter or destroy the will. The attorney may need to urge the testator to find a safe storage place that will not be accessible to the heirs, either now or after death, but yet a location where the will is likely to be found and probated while simultaneously making certain not to suggest that the attorney retain the will.

B. Failure to Provide Client With Sufficient Post-Estate Plan Instructions

After the will and other estate planning documents are executed, the client should be informed of several important matters. For example, the client needs to realize that the client must reconsider the plan if the client's life or circumstances change due, for example, to births or adoptions, deaths, divorces, marriages, change in feelings toward beneficiaries and heirs, a significant change in size or composition of estate, change in state of domicile, or change in state or federal law. The client must also be told that mark-outs, interlineations, and other informal changes to estate planning documents, especially attested wills, are usually of no effect. *See* Leatherwood v. Stephens, 24 S.W.2d 819 (Tex. Comm'n App. 1930, judgment adopted). Not only should these and other matters be discussed with the client in person, they should also be provided to the client in written form.

C. Failure to Use Disclaimers Where Appropriate

Texas law permits the beneficiary of a will, trust, insurance policy or like arrangement, as well as an heir, to disclaim property. Prob. Code § 37A & Trust Code § 112.010. A proper disclaimer has many potential benefits including tax savings under I.R.C. § 2518, liability avoidance (e.g., property has potential liability connected with it such as buried hazardous waste), and protecting assets from the disclaimant's creditors. The attorney must be aware of these and other reasons to disclaim property and give advice accordingly. *See generally* Ronald A. Brand & William P. LaPiana, Disclaimers in Estate Planning: A Guide to Their Effective Use (1990); Bruce D. Steiner, *Disclaimers: Post-Mortem Creativity*, Prob. & Prop., Nov./Dec. 1990, at 43.

D. Failure to Plan for Disability and Death

Research has demonstrated that approximately one-half of the population of the United States will be disabled for ninety days or more. *See* John L. Lombard, Jr., *10 Reasons Why You Should Be Recommending the Durable Power of Attorney to Clients*, PROB. & PROP., Jan./Feb. 1987, at 28, 28. A person age 60 or younger is more likely to become disabled within the next year than to die. Nonetheless, attorneys are often lax in planning for the possibility that their clients will suffer from a debilitating disease, accident, or general deterioration of mental function due to senility or other disabling cause. Attorneys must recognize that disability planning is at least as important as death planning and make appropriate arrangements. The techniques which the attorney and client should evaluate include the following: stand-by trust, wage replacement insurance, long-term care insurance, a durable power of attorney for property management, a medical power of attorney, a self-declaration of guardian, a directive to physicians, an anatomical gift statement, and a body disposition instrument.

VIII. ESTATE PLANNING FOR BOTH SPOUSES – GOOD IDEA?[3]

Today you are meeting with a new estate planning client. During the initial telephone contact, the client indicated a need for a simple plan, "nothing too complex" were the exact words. As you enter your reception area to greet the client, you are surprised to see *two* people waiting—the client and the client's spouse. The client explains that the client wants you to prepare estate plans for both of them. Your mind immediately becomes flooded with thoughts of the potential horrors of representing both husband and wife. You remember stories from colleagues about their married clients who placed them in an awkward position when one spouse confided sensitive information that would be relevant to the estate plan with the admonition to "not tell my spouse." You also recall the professional ethics rules which prohibit representing clients with conflicting interests. What do you do? What is the best way to protect the interests and desires of the client and the client's spouse and still avoid ethical questions as well as potential liability?

This scenario is replayed many times each day in law offices across Texas and the United States. The joint representation of a husband and wife in drafting wills and establishing a coordinated estate plan can have considerable benefits for all of the participants involved. However, depending on the circumstances, joint representation may result in substantial disadvantages to either or both spouses and may subject the drafting attorney to liability. The attorney's duties of loyalty and confidentiality in joint representations, as well as how conflict situations should be handled, whether the conflict is apparent initially or arises during the representation, can be gleaned from the Texas Disciplinary Rules of Professional Conduct.

A. Models of Representation for Married Couples

When a married couple comes to an attorney's office for estate planning advice, the chances are that they are unaware of the different forms of representation which are available or the specific factors they must consider to determine which form of representation is appropriate. The attorney has the burden to use his or her skills of observation and information gathering and apply the relevant professional conduct rules to help the couple to make a choice that best fits their situation.

1. Family Representation

Under the concept of family representation, the attorney represents the family as an entity rather than its individual members. This approach attempts to achieve a common good for all of the participants and thus the attorney's duty is to the family interest, rather than the desires of one or both of the spouses. However, representation of the family does not end the potential for conflict between the spouses, instead it broadens the potential basis of conflict by adding other family members to the equation. Further, even where there is no conflict of purposes between the spouses, the attorney may feel an obligation to the family to discourage or even prevent the spouses from effectuating their common desires where those desires do not benefit the family as a whole (e.g., where the spouses choose not to take advantage of tax saving tools, such as annual exclusion gifts, in favor of retaining the assets to benefit themselves). This type of representation, at least for spousal estate planning purposes, is unnecessarily complicated and may even frustrate the common desires of the spouses. This model of representation has not been clearly recognized by the courts.

2. Joint Representation

Joint representation is probably the most common form of representation estate planners use to

[3] Portions of this section are adapted from GERRY W. BEYER, TEXAS LAW OF WILLS §§ 53.4 -53.7 (9 Tex. Prac. 3d ed. 2002).

develop a coordinated estate plan for spouses. Joint representation is based on the presumption that the husband, wife, and attorney will work together to achieve a coordinated estate plan. In situations where the attorney does not discuss the specific representative capacity in which he or she will serve, joint representation serves as the "default" categorization. Despite its widespread acceptance, however, joint representation has its pitfalls.

A critical issue faced by an attorney who represents multiple parties is the attorney's obligation to make sure that the representation complies with the Texas Rules of Professional Conduct. Most relevant in the joint representation of husband and wife is Rule 1.6 which prohibits representation where it "involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer * * *" Additionally, the Rule provides that if in the course of multiple representation such a conflict becomes evident, the lawyer must withdraw from representing one or both of the parties.

The rule does, however, contain a savings clause which permits the attorney to accept or continue a representation where a conflict of interest exists if (1) the attorney believes that the representation will not be materially affected, and (2) both of the parties consent to the representation after full disclosure of all of the potential disadvantages and advantages involved. Many attorneys, regardless of whether potential conflicts are apparent, take advantage of this part of the rule and routinely disclose all advantages and disadvantages and then obtain oral and/or written consent to the representation. This approach exceeds the minimum requirements of the rule and helps protect all participants from unanticipated results. Of course, there are still situations which cannot be overcome by disclosure and consent, such as where the attorney gained relevant, but confidential, information during the course of a previous representation of one of the parties. In this type of situation, the attorney has no choice but to withdraw from the joint representation and recommend separate counsel for each spouse.

The dangers of joint representation are discussed in greater detail in § B, below.

3. Separate Concurrent Representation of Both Spouses

The theory of separate concurrent representation in a spousal estate planning context is that a single attorney will undertake the representation of both the husband and the wife, but as separate clients. All information revealed by either of the parties to the attorney is fully protected by confidentiality and evidentiary privileges, regardless of the information's pertinence to establishing a workable estate plan. Thus, one spouse may provide the attorney with confidential information that undoubtedly would be important for the other spouse to have in establishing the estate plan, but the attorney would not be able to share the information because the duty of confidentiality would be superior to the duty to act in the other spouse's best interest. Proponents of this approach claim that informed consent given by the parties legitimizes this form of representation. However, due to the confusion it creates for the attorney regarding to whom the duty of loyalty is owed and whose best interest is to be served, it is hard to understand why any truly informed person would consent. The dual personality that this form of representation requires of the attorney has resulted in it being dubbed a "legal and ethical oxymoron." Geoffrey C. Hazard, Jr., *Conflict of Interest in Estate Planning for Husband and Wife*, 20 PROB. LAW. 1, 11 (1994).

4. Separate Representation

A final option for the attorney and the married clients is for each of the spouses to seek his or her own separate counsel. This approach is embraced by many estate planning attorneys as the best way to protect a client's confidences and ensure that the client's interests are not being compromised or influenced by another. By seeking independent representation, spouses forego the efficiency, in terms of money and time spent, that joint representation offers, but they gain confidence that their counsel will protect their individual priorities rather than be diluted by the priorities of the spouse. Additionally, separate

representation substantially decreases the potential that the attorney will be trapped in an ethical morass because of unanticipated conflicts or unwanted confidences.

B. Dangers of Joint Representation

1. Creates Conflicts of Interest

A conflict of interest between the spouses or between the spouses and their attorney can arise for many reasons. These conflicts often do not become apparent until well into the representation. If the attorney is skillful (or lucky), the conflict can be resolved and the joint representation continued. In other cases, however, the conflict may force the attorney to withdraw from representing one or both of the spouses.

a. Accommodating Non-Traditional Families

With the frequency of remarriage and blended families in today's society, it is not surprising that non-traditional families are a ripe source of conflict. A step-parent spouse may not feel the need or desire to provide for children that biologically are not his or her own. This fact can come into direct conflict with the expectations of the parent spouse who may feel that the children are entitled to such support and that the step-parent spouse is just being selfish. Alternatively, the spouses may be in conflict over how the estate plan should provide for "our" children, "your" children, and "my" children, and whether any of these classifications should receive preferential treatment.

b. Bias Toward Spouse if Past Relationship With Attorney Exists

Where one of the spouses has a prior relationship with the drafting attorney, regardless of whether that relationship is personal or professional, there is a potential for conflict. The longer, closer, and more financially rewarding the relationship between one of the spouses and the attorney, the less likely the attorney will be free from that spouse's influence. See James R. Wade, *When Can A Lawyer Represent Both Husband and Wife in Estate Planning?,* PROB. & PROP., March/April 1987, at 13. Because the spouses rely on the attorney's independent judgment to assist them in effectuating their testamentary wishes, it is important that neither of the parties has any actual or perceived disproportionate influence over the attorney.

c. Differing Testamentary Goals Between Spouses

Spouses may also have different ideas and expectations regarding the forms and limitations of support provided by their estate plan to the survivor of them, their children, grandchildren, and so forth. By including need-based or other restrictions on property, one spouse may believe that the other spouse will be "protected" while that spouse may view the limitations as unjustifiable, punitive, or manipulative. If one spouse has children from a prior relationship, that spouse may wish to restrict the interest of the non-parent spouse via a QTIP trust or other arrangement to the great dismay of the other spouse who would prefer to be the recipient of an outright bequest. No one distribution plan may be able to satisfy the desires of both spouses.

d. Power Struggle Between Spouses

One spouse may dominate the client side of the attorney-client relationship. If one spouse is unfamiliar or uncomfortable with the prospect of working with an attorney or if one spouse is unable, for whatever reason, to make his or her desires known to the drafting attorney and instead simply defers to the other spouse, it will be difficult for the attorney to fairly represent both parties.

e. Lack of Stability in the Marriage

If the attorney seriously questions the stability of the marriage, it will be practically impossible to create an estate plan which contemplates the couple being separated only by death. As one commentator explained, "[N]o court would permit a lawyer to go forward when such a situation involves partners in a partnership or the principals in a close corporation, or a trustee and beneficiary of a trust, or a corporation and its officers. The courts will not take a different view when the clients are husband and wife." Geoffrey C. Hazard, Jr., *Conflict of Interest in Estate Planning for Husband and Wife*, 20 PROB. LAW. 1, 14 (1994).

The case of In re Taylor, 67 S.W.3d 530 (Tex. App.—Waco 2002, no pet.), is instructive. A law firm represented both the husband and wife in the preparation of their estate plans, including wills and powers of attorney, as well as some business matters. Later, the law firm undertook to represent the husband in divorce proceedings against the wife. The wife sought to have the law firm disqualified from representing the husband. The trial court denied her motion and she appealed.

The appellate court conditionally granted the wife's request for a writ of mandamus directing the trial court to vacate the order denying her motion to disqualify the law firm. The record was clear that the law firm represented both the husband and wife with regard to the business and estate matters and thus there would be a conflict of interest for the law firm to represent the husband in the divorce action. The wife did not consent to the law firm's representation of the husband in the divorce and thus the law firm is disqualified. The trial court's failure to grant the wife's motion was a clear abuse of discretion.

f. Existence of Substantial Amount of Separate Property

Significant conflict may arise if one spouse has a separate estate that is of substantially greater value than that of the other spouse, especially if the wealthier spouse wants to make a distribution which differs from the traditional plan where each spouse leaves everything to the survivor and upon the survivor's death to their descendants. The attorney may generate a great deal of conflict among all of the parties if, to act in the best interest of the not-so-wealthy spouse, the attorney provides information regarding that spouse's financial standing under the contemplated distribution, if the wealthy spouse were to die first.

Conflict may also exist in situations where one spouse wants to make a gift of property which the other spouse believes is that spouse's separate property and therefore not an item which the first spouse is entitled to give. The potential for this type of conflict is especially great where the spouses have extensively commingled their separate and community property.

2. Forces Release of Confidentiality and Evidentiary Privileges

Joint representation may force spouses to forego their normal confidentiality and evidentiary privileges. Disclosure of all relevant information is the only way to work toward the common goal of developing an effective estate plan. In subsequent litigation between the spouses regarding the estate plan, none of the material provided to the attorney may be protected. However, release of these privileges protects the attorney by eliminating the potential conflict between the attorney's duty to inform and the duty to keep confidences.

3. Discourages Revelation of Pertinent Information

The fact that there is no confidentiality between the spouses in joint representation situations may not be a problem if the spouses have nothing to hide and have common estate planning goals. On the other hand, joint representation can place one or both of the spouses in the compromising position of having to reveal long held secrets in the presence of his or her spouse, e.g., the existence of a child born out-of-wedlock. Even worse is the scenario where the spouse withholds the information leaving the other spouse

vulnerable and unprotected from the undisclosed information which, if known, may have resulted in a significantly different estate plan.

4. Increases Potential of Attorney Withdrawal

A potential conflict which becomes an actual conflict during the course of representation may not prevent the attorney from continuing the representation if the spouses previously gave their informed consent. However, if the conflict materially and substantially affects the interests of one or both of the spouses, the attorney must carefully consider the negative impact that the conflict will have on the results of the representation and on the attorney's independent judgment. The prudent action may be withdrawal. A midstream withdrawal can be very disruptive to the estate planning process and result in a substantial loss of time (and even money) to both the spouses and the attorney.

5. Creates Conflicts Determining When Representation Completed

There is some question as to whether a spouse who sought joint representation in the creation of his or her estate plan can, at a later date, return to the same attorney for representation as an individual. The determination as to when the joint representation ends is quite settled with respect to subsequent attempts to unilaterally revise the estate plan—it does not end. Any subsequent representation of either spouse which relates to estate planning matters would constitute information that the attorney would be obligated to share with the other spouse/client. Regarding other legal matters, representation "should be undertaken by separate agreement, maintaining a clear line between those matters that are joint and those matters that are individual to each client." Teresa Stanton Collett, *And the Two Shall Become One ... Until the Lawyers Are Done,* 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 101, 141 (1993).

C. Recommendations

Decisions regarding the form of representation most appropriate for a husband and wife seeking estate planning assistance could be made by the attorney alone, based on his or her past experiences, independent judgment, and skills of observation regarding the potential for conflict between the spouses. The better course of action is for the attorney to explain the choices available to the spouses along with the related advantages and disadvantages and then permit the spouses to decide how they would like to proceed. The only two viable options are joint representation and representation of only one spouse. See Malcolm A. Moore, *Representing Both Husband and Wife Ethically*, ALI-ABA EST. PLAN. COURSE MAT. J., April 1996, at 5, 7. As previously mentioned, representation of the family as an entity and separate concurrent representation by one attorney are appropriate forms of representation for a husband and wife only in extremely rare cases.

1. Representation of Only One Spouse

This form of representation allows each of the spouses to be fully autonomous in dealing with their attorney. Only the information the client spouse is comfortable with sharing is revealed to the other spouse. As one commentator explained, "it [separate representation for each spouse] is consistent with the present dominant cultural view of marriage as a consensual arrangement and is most consistent with the assumptions about the attorney-client relationship." Teresa Stanton Collett, *And the Two Shall Become One ... Until the Lawyers Are Done,* 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 101, 128 (1993).

Where it is obvious to the attorney that the couple would be best served by this style of representation, it is the attorney's responsibility to convince the couple of this fact. Examples of facts that alert the attorney that separate representation is probably the best choice include situations where the marriage was not the first for either or both of the parties, where there are children from previous relationships, where

one party has substantially more assets than the other, and where one spouse is a former client or friend of the consulted attorney.

When recommending separate representation, the attorney should take care to point out that this suggestion is not an inference that their relationship is unstable or that one or both parties may have something to hide. Instead, it is merely a reflection that each spouse has his or her own responsibilities, concerns, and priorities which may or may not be exactly aligned with those of the other spouse. Accordingly, and the best way to achieve a win-win result and reduce present and future family conflict is for each spouse to retain separate counsel.

2. Joint Representation of Both Spouses

Despite the potential dangers to clients and attorneys alike, joint representation is the most common form of representation of husband and wife for estate planning matters. With appropriate and routine use of waiver and consent agreements, the attorney may undertake this type of representation with a minimum of risk to the attorney and a maximum of efficiency for the clients. Unfortunately, however, use of disclosure and consent agreements is far from a standard procedure. One survey revealed that over forty percent of the estate planning attorneys questioned do not, as a matter of practice, explain to the couple the potential for conflict that exists in such a representation, much less put such an explanation in writing. One attorney stated that he only felt it was necessary to discuss potential conflicts where the representation involved a second or more marriage, and that he only put it in writing if he felt a real problem was indicated in the first meeting. Another respondent failed to disclose the potential for conflict because he was afraid it would appear as if he were issuing a disclaimer for any mistakes he might make. Finally, it seems that denial of the existence of potential conflicts occurs on the part of the attorney as well as the spouses, as evidenced by one practitioner's statement, "I have a hard time believing that I should tell clients who have been married for a long time and who come in together to see me that there may be problems if they get a divorce." Francis J. Collin, Jr., et al., A Report on the Results of a Survey About Everyday Ethical Concerns in the Trust and Estate Practice, 20 ACTEC NOTES 201 (1994).

The ABA Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 05-434 which address conflicts which may arise when an attorney represents several members of the same family in estate planning matters.

The Opinion validates the common practice of one lawyer representing several members of the same family. The basis of this authorization is that the interests of the parties may not be directly adverse and that more than conflicting economic interests are needed before the attorney may not represent both.

The Opinion recognizes, however, that current conflict of interest may result even without direct adversity if there is a significant risk that representation of one client will materially limit the representation of another.

Despite the "permission" granted by this Opinion, I continue to think the representation of more than one family member in estate planning matters is problematic. A potential conflict may turn into a real conflict at a later time leaving the attorney in an untenable position. It is simply not worth the risk. I believe it is better for a lawyer to owe 100% of his or her duties to one and only one family member. There will then never be doubt whom the attorney represents or what actions the attorney should take if something "gets sticky," True, practitioners may lose some business and some clients may have higher legal fees but I believe this is preferable to the alternative.

Many attorneys, nonetheless, will continue to represent spouses jointly. Attorneys who do so are strongly recommended to (1) provide the spouses with full disclosure and (2) obtain the spouses' written informed consent, regardless of the perceived potential for conflict.

a. Full Disclosure

Informed consent is not possible without full disclosure. Because estate planning attorneys often meet one or both of the spouses for the first time the day of the initial appointment, it is not possible for the attorney to know more about the couple than what he or she sees and hears during the interview. Because there is no way to be sure which specific issues are relevant to the spouses, it is extremely important for the attorney to discuss as many different potential conflicts as are reasonably possible. Even if the attorney has some familiarity with the couple, it is better to cover too many possibilities than too few.

The amount of disclosure that must be provided for the consent given to be considered "informed" is different for each client. The attorney has the responsibility to seek information from the parties to be sure that all relevant potential conflicts are addressed as well as the effects of certain other incidents, such as divorce or death of one of the spouses. It is also a good idea to include a discussion of the basic ground rules of the representation detailing exactly what is and is not confidential, rights of all parties to withdraw, and other procedural matters such as attendance at meetings and responsibility for payment of fees.

b. Oral disclosure

An oral discussion of potential conflicts which exist or which may arise between the couple will allow the attorney to gather information about the clients while disseminating information for them to use in making their decisions. Oral disclosure also permits a dialogue to begin which may encourage the clients to ask questions and thereby create a more expansive description of the advantages and disadvantages of joint representation as they apply to the couple.

c. Written Disclosure

Though there is no rule or standard which requires that disclosure or the clients' consent be evidenced by a written document, the seriousness and legitimacy that go along with a signed agreement serve as additional protection for all participants. By documenting the disclosure statement and each client's individual consent to the joint representation, the couple may be forced to reconsider the advantages and disadvantages of joint representation and may feel more committed to the agreement. Additionally, if there are any issues which they do not feel were addressed in the document, they may be more likely to express them so that the issue can also be included in the agreement. Finally, reducing the agreement to written form helps protect the attorney should any future dispute arise regarding the propriety or parameters of the representation.

IX. CONCLUSION

Just like the release of the Windows 7 is likely to reduce blue screen errors, using common sense and being aware of the issues discussed in this article should reduce the likelihood of a successful malpractice action alleging that an attorney was negligent in providing estate planning services.