JOSHUA R. FURMAN LAW

I Did What?

Malpractice Traps for the California Trusts and Estates Attorney

Presented by Joshua R. Furman
(818) 646-4300
jrf@furmanlawyers.com

Sole practitioner in civil litigation and appeals focusing on attorney-client disputes. Licensed in California and District of Columbia. Certified specialist in Legal Malpractice Law by the State Bar of California Board of Legal Specialization.

"The lay litigant enters a temple of mysteries whose ceremonies are dark, complex and unfathomable. Pretrial procedures are the cabalistic rituals of the lawyers and judges who serve as priests and high priests. The layman knows nothing of their tactical significance. He knows only that his case remains in limbo while the priests and high priests chant their lengthy and arcane pretrial rites."

(*Daley v. County of Butte* (1964) 227 Cal.App.2d 380, 392.)

Hot Takeaways:

- Caution and vigilance
- Client communication
- Avoid assumptions about client intent or knowledge
- Avoid assumptions based on past practices
- Adopt assumptions about future conflict

Malpractice in Drafting – Forms!

MEMORANDUM OF AGREEMENT REGARDING PROPERTY STATUS

The undersigned parties are married and living together as husband and wife.

During the time of their marriage, the parties have owned community property. It has always been their intent to maintain the community character of their property. However, for reasons of convenience and without intent to transfer an interest between one another, the parties have and may take record title in one or both of their names or in the name of a nominee. Or, the parties may hold title to property in joint tenancy form or in the form of a revocable living trust.

The parties wish to avoid confusion and provide a record of their intent regarding the past, present, and future status of their property. Therefore, the parties make this Memorandum to record their understanding that regardless of the form of title or ownership in which their property is held, all property owned by the parties as of this date or subsequently acquired, other than property described below or property subsequently acquired by gift or inheritance, is their community property. However, the parties agree that the right of reimbursement as described in Family Code Section 2640 shall remain in force as to property that constituted separate property at the date of this Agreement.

Property that is the SEPARATE PROPERTY of either **Valerie Anne Yale** or **Bryan John Knight** shall be described as follows:

NONE.

Dated: May 21, 2010

Valerie Anne Yale — VALERIE ANNE YALE

Bryan John Knight — BRYAN JOHN KNIGHT

(*Yale v. Bowne* (2017) 9 Cal.App.5th 649 [affirming judgment on verdict in unpublished portion of decision].)

Malpractice in Drafting – The Testator or Grantor is Your Only Client (Maybe)

Drafting attorney can be held liable to third party beneficiaries of the estate under the *Biakanja/Lucas* factors, but your duty of loyalty remains to the client.

The final factor is typically decisive:
"[W]hether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession."
(*Lucas v. Hamm* (1961) 56 Cal.2d 583, 589.)

Malpractice in Drafting – The Testator or Grantor is Your Only Client (Maybe)

Examples across the spectrum:

- *Chang v. Lederman* (2009) 172 Cal.App.4th 67 (no liability)
- *Hall v. Kalfayan* (2010) 190 Cal.App.4th 927 (no liability)
- *Paul v. Patton* (2015) 235 Cal.App.4th 1088 (liability)
- *Osornio v. Weingarten* (2004) 124 Cal.App.4th 304 (liability)
- *Bucquet v. Livingston* (1976) 57 Cal.App.3d 914 (liability)
- *Heyer v. Flaig* (1969) 70 Cal.2d 223 (liability)

Malpractice Trap in Drafting – Just Because You Can Doesn't Mean You Should (or Can)

The following trust provision is void:

> The time, place, subject matter, and content of any such consultation with legal counsel, *all communication (written or oral) between the Trustee and legal counsel, and all work product of legal counsel* shall be privileged and confidential and *shall be absolutely protected and free from any duty or right of disclosure to any successor Trustee or any beneficiary and any duty to account*.

(*Morgan v. Superior Court* (2018) 23 Cal.App.5th 1026.)

Malpractice Trap in Drafting – Sure It's Unambiguous, Let's Reform it Anyway

"[W]e hold that the categorical bar on reformation of unambiguous wills is not justified and that reformation is permissible if clear and convincing evidence establishes an error in the expression of the testator's intent and establishes the testator's actual specific intent at the time the will was drafted."

(*Estate of Duke* (2015) 61 Cal.4th 871.)

JOSHUA R. FURMAN LAW

Malpractice Trap in Drafting – Sure It's Unambiguous, Let's Ignore it Anyway

"The issue, aptly framed by respondent, is whether a trial court may amend or reform a will to excuse the testator's failure to comply with sections 631, subdivision (b) and 632, which expressly prohibit the court from validating gifts that require a specific reference to the power of appointment. Reformation as urged by the [Appellants] eviscerates the statutes' requirement of a 'specific' reference."

(*Estate of Eimers* (2020) 49 Cal.App.5th 97.)

JOSHUA R. FURMAN LAW

Malpractice Trap in Drafting – No Contest Clauses are Getting SLAPPed Around

"Unlike certain other kinds of actions, the anti-SLAPP statutory scheme does not create any exception to the anti-SLAPP procedure for actions to enforce no contest clauses. … A judicial challenge to a trust or other protected instrument involves a 'writing made before a … judicial proceeding.' … An action to enforce a no contest provision is necessarily based upon such conduct, and therefore falls within the express statutory definition of conduct that arises from protected petitioning conduct under step one of the anti-SLAPP procedure."

(*Key v. Tyler* (2019) 34 Cal.App.5th 505.)

Malpractice Trap in Drafting – No Contest Clauses are Getting SLAPPed Around

Silver Lining:

The anti-SLAPP procedure forces the party filing the contest to demonstrate the prima facie merits of their case at the outset of the proceeding.

JOSHUA R. FURMAN LAW

Malpractice in Trust Administration – The Trustee is Your Only Client (Maybe)

Erect a wall between work on behalf of the trustee in their capacity as trustee and work on behalf of the trustee subject to personal claims for, e.g., breach of trust or removal.

Whittlesey v. Aiello (2002) 104 Cal.App.4th 1221 ("counsel must seek compensation from the parties who stand to gain from the litigation, not the trust").

Moeller v. Superior Court (1997) 16 Cal.4th 1124 ("the predecessor may be able to avoid disclosing advice to a successor trustee by hiring a separate lawyer and paying for the advice out of its personal funds").

Malpractice in Trust Administration – The Trustee is Your Only Client (Maybe)

In communications with your client as administering trustee, always bear in mind that the attorney-client privilege belongs to the ***office of the trustee***, not the trustee personally.

If your client is removed or replaced, the successor trustee will have access to all privileged material for the benefit of the trustee as trustee.

Question and Answer

Joshua R. Furman
(818) 646-4300
jrf@furmanlawyers.com

Sole practitioner in civil litigation and appeals focusing on attorney-client disputes. Licensed in California and District of Columbia. Certified specialist in Legal Malpractice Law by the State Bar of California Board of Legal Specialization.

JOSHUA R. FURMAN LAW