CHAPTER 19

Prophylaxis for Probate Practitioners: Malpractice Protection and Malpractice Prevention

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Synopsis

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The writer gratefully acknowledges the contributions of his Connecticut colleagues, Stuyvesant K. Bearns, Alexander J. Holland, Myles J. Laffey, Donald P. Richter, Peter C. Schwartz and James W. Venman and of Michael R. Kos and George W. Spellmire, Jr., of Chicago and Robert E. O'Malley of Washington, D.C., in identifying some of the "sins" discussed in this paper.

(Matthew Bender & Co., Inc.)

"Watch it now. Watch it. Here it comes, here it comes. Watch it. It'll get you." "Wooly Bully," recorded by Sam the Sham and the Pharaohs.

¶ 1900 Introduction

¶ 1900.1 Scope of Presentation

An overview of malpractice policy provisions, particularly as they affect the estate planning and probate lawyer. An exploration of various "sins" and how to avoid perdition or obtain absolution. Because they have been thoroughly dealt with elsewhere, the subjects of conflicts of interest, privity, the statute of limitations and ethics will not be discussed in this paper, except tangentially.[1]

¶ 1900.2 Statistics

46% of all malpractice claims have their origins in fee disputes.

7% of all malpractice claims are in the estates and trusts area.

The most common cause of malpractice liability is the failure either to know of deadlines or to "calendar" crucial dates (21.4%). The second greatest risk factor is not knowing the law (9.47%).

In the trust and estate area, the predominant errors are failure to know the law (12.2%), failure to obtain clients' consent (9.9%), planning errors (9.9%) and failure to follow the clients' instructions (7.2%).[2]

¶ 1901 Your Professional Liability Policy

¶ 1901.1 An Overview of Policy Provisions

A. What is covered?

1. Serving as a Fiduciary

Policy "A". Errors, etc. "arising out of the conduct of the Insured's profession as an attorney . . . personal representative, administrator or executor . . . *for which the Insured also serves as the estate's attorney."* (emphasis added) *Query:* Would this policy cover a lawyer acting as a trustee?

Policy "B". Services rendered *as a lawyer,* including acts as "administrator, conservator, executor, guardian, trustee, receiver, or in any other similar fiduciary capacity." (emphasis added) This might cover the lawyer who is an executor but is not the estate's attorney.

Policy "C". Services as "administrator, conservator . . . executor . . . trustee, or in any similar fiduciary capacity" except "as to any loss sustained by the Insured as *the* beneficiary or distributee." (emphasis added)

Policy "D". "Services rendered while acting as an administrator, conservator, executor, guardian, trustee or similar fiduciary: however, not if the Insured is *a* Beneficiary or Distributee of any trust or estate." (emphasis added) *Query:* Your client leaves you his fishing rod in his will, and names you as executor. Are you covered? Does this mean that "family" matters should not be undertaken?

Policy "E". Services as an "administrator, conservator, executor, guardian, trustee or in any other fiduciary capacity, provided that such services are a component of the Insured's profession as an attorney. *Query:* Does this cover investment errors, etc.?

2. Disciplinary Proceedings

Policy "C". "The company shall defend any claim . . . seeking damages . . . . Damages means a judgment or settlement . . . and does not include fines or statutory penalties or sanctions whether imposed by law or otherwise."

Policy "D". "The company shall also provide defense for any Disciplinary Proceedings . . . resulting from a Wrongful Act covered by the Policy."

Policy "E". "The company shall have at its sole option the right but not the obligation to . . . defend any suit or other proceeding brought . . . by any . . . regulatory or disciplinary official or agency alleging an act, error or omission which may, in the Company's sole judgment, subject the Insured to Claims for Damages covered by this Policy."

Policy "G". "The insurance does not apply to any . . . proceeding . . . by any . . . quasi-governmental regulatory agency partly or wholly seeking to impose disciplinary action, including, but not limited to, reprimand, suspension or disbarment."

Policy "H". "The company shall also defend any proceeding or suit brought by any governmental regulatory agency [except criminal proceedings] seeking non-pecuniary relief." *Note:* Under this definition, the carrier was required to provide a defense in a grievance proceeding.[3]

B. What is not covered?

Lawyers are often called upon to perform "non-legal" functions, such as serving as a director of a bank to which they also may be trust counsel. It is vital that the organization upon whose board we are serving has sufficient directors' and officers' liability coverage because our professional liability policy may give us no solace. One policy denies coverage for serving on the board of a business, charity, club, etc. unless "the Insured is providing incidental legal services in the ordinary course of the Insured's business and for which a fee . . . is charged and collected." Not only might we not have coverage for serving as an "ordinary" fiduciary, but many policies specifically deny coverage for serving as a pension plan fiduciary, unless we are a "fiduciary" "solely because of the rendering of legal advice."

Clients are looking for "one stop shopping," and often turn to estate lawyers as "financial planners." Policy "A" denies coverage for "any claim based upon . . . the rendering of investment advice . . . to any person in connection with the purchase or sale of any investment or property, including, but not limited to, securities, real property . . . ."

Note: Policies "C" and "E" provide coverage for services performed "in a lawyer-client relationship . . . , although such services could be performed wholly or partly by non-lawyers."

Query: Would these policies cover "investment advice" incident to estate planning?

There do not appear to be any reported cases regarding "ordinary" investment advice. Several decisions deal with what might be characterized as "promotional" activities, rather than investment counsel. In *Jensen v. Snellings,*[4] a policy covering "professional services as a lawyer" imposed a duty to *defend* where the attorney had recommended specific investments in "tax shelters." The Court did *not* discuss the carrier's *duty to pay* the claim. Where a lawyer was acting as a "business agent,"

soliciting investments in partnerships which he had formed, he was not rendering "professional service" and coverage was denied.[5]

C. "Claims made" Policies and "Tail" Coverage

Professional liability policies are written on a "claims made" basis. Coverage will be denied unless the claim was made against the insured, *and* the claim was first reported to the company, during the policy period. Because many of the "sins" which we commit in estate planning will not even be discovered for many years, the fact that coverage was in force when the error was made is of no consequence. It is *vitally important* to have coverage continuously in force and, when a lawyer retires, to purchase so-called "tail" coverage, for claims arising after he leaves the practice.[6] In selecting a "run-off" policy, it is very important to consider the "expansion" of the statute of limitations. Courts are increasingly holding that the statute runs from the time that the harm is discovered. Therefore, a policy which is keyed to the statutory period might be of little or no value. The policy should not only cover claims made during the lawyer's lifetime, but should also inure to the benefit of his estate.

Millwright v. Romer,[7] is an example of the extremely long "incubation period" of potential liability. The defendant had drafted a will creating a testamentary trust in 1944, and the decedent died in 1945. Thirty-three years later, the trust was challenged on the grounds that it violated the rule against perpetuities. In 1980, a malpractice action was brought against the long retired draftsman. He "won" on statute of limitation grounds. However, in a less lenient jurisdiction, a retired lawyer who did not obtain proper "run off" coverage could suffer a substantial loss.

D. A Useful Checklist

In considering various policies, a checklist by Duke Nordlinger Stern is extremely helpful. This checklist covers policy provisions in great detail and uses a "rating scale" approach to help in selecting the most appropriate coverage.[8]

¶ 1901.2 When Fire Breaks Out

A. Reporting

At the first sign of difficulty, notify your carrier *in the manner provided in the contract.* If the contract specifies "registered mail," it doesn't mean "Federal Express." If the contract says that to be effective by a specific date, notice must be "received," it means received. The familiar "timely mailing" rule of the Revenue Code may not apply. "Claims made" policies only cover claims made within the policy term. Coverage will only be available if the claim was first made to the insurer during the policy period and if the insured gives written notice to the Company, stating the facts and circumstances of the claim.

B. Don't undermine yourself

Avoid "fraternizing with the enemy." Do not communicate with opposing counsel. A natural tendency is to be his colleague. He is your enemy. It's too bad that there is no civil equivalent of the *Miranda* rule.

In *specific* situations, "confession and avoidance" *may* be advantageous, but watch out! For example, if an executor, acting on his lawyer's advice, had "mis-distributed" assets, it might be possible, with the approval of the Probate Court, to obtain waivers and releases of liability from the "rightful" heirs. "Scriveners' errors" may sometimes be "corrected" in a construction or reformation proceeding. But *watch out,* because asking heirs to sign waivers or initiating a reformation action could be construed as a confession of guilt. It is far better to notify your carrier and take all of your cues from your defense counsel.

C. Do not make "Voluntary" Payments

Some insurance policies provide that the insured shall not make voluntary payments. Doing so may, at best, be an admission. At worst, these payments can void your coverage.[9]

¶ 1901.3 The Duty to Defend — Broader than the Duty to Pay

An insurer may have to defend against claims for which it has no duty to pay. The issue is not whether a cause of action exists,

but rather whether there is a *possibility* that coverage would be available, based solely upon the allegations in the complaint.[10] Where there is *any* doubt as to whether the complaint states a cause of action, entitling the insured to a defense, the doubt will be resolved in the insured's favor.[11] If the company does not defend, and the lawyer settles with the plaintiff in a reasonable manner, the company may have to provide indemnity.[12]

The issue of the Company's duty to defend becomes relevant where allegations are made regarding conduct as a fiduciary or as to other acts for which coverage might not be available. This is a consideration in selecting a policy. For example, one contract provides that "The company will not pay claims based upon intentional, fraudulent, etc., acts," but "the company will provide a defense for any such claims . . . ." Most other policies commit the company to providing a defense, even if the allegations of the complaint are "groundless, false or fraudulent."

¶ 1902 When Does the Relationship (And Our Exposure to Liability) Begin?

To establish the attorney-client relationship, it is sufficient that the lawyer's advice on matters within his professional competence is being sought and that the lawyer gives that advice. It does not matter that the advice was being rendered gratis. In order for a malpractice action to lie, the plaintiff must prove that an attorney-client relationship existed as to the specific claimed delict. It is not sufficient to prove that the relationship existed in general.[13]

The attorney-client relationship may arise subjectively in the mind of the "client." If that subjective opinion had a reasonable basis in fact, a court or jury might find that, even though the lawyer had no intention of being the individual's attorney, the relationship, and the basis for malpractice liability, arose. "Existence of an attorney-client relationship may be established by the client's reasonable perception, as well as by the more common consensual basis for such a relationship."[14]

A. Fable Number One: "The New Client"

A "new client" calls about the probate of his mother's estate. At the first meeting, there is some discussion of the decedent's assets, the will, and the beneficiaries' individual situations. The

lawyer explains his role as counsel to the fiduciary and his estimated fees. The "client" says that he will "think it over" and call back. Two years later, the lawyer finds himself a malpractice victim because he did not mention the possible tax benefits of disclaimers. Far fetched? Perhaps not. **MORAL:** *Every* time a putative client enters our gates and no engagement ensues, we should write him a "non-engagement" letter stating, in no uncertain terms, that no relationship exists.[15]

B. Fable Number Two: "The Outer Limits"

Lawyer Jones has just finished a squash match with his friend, Smedley Multibux. They are in the locker room "chatting." Multibucks says that he has read something about "Do It Yourself Will" software, and that his estate is "simple." Jones idly says that some of the programs are reasonably good, as long as assets are not in excess of the "exemption." Multibucks, thinking that his own "assets" are modest, and ignoring an extremely large life insurance policy that he owns, of which his grandchildren are the beneficiaries, "drafts" a will under which bequests to his children are completely vitiated by estate and generation skipping taxes. Multibux dies, and his children look to Jones for relief. **MORAL:** Although these facts are also a little outlandish, never underestimate the ire, and sense of greed, of less than amused would-be beneficiaries. It is far better (although, from a "practice development" perspective, difficult) not to give anything which might be characterized as "professional advice" in a casual or social setting.

¶ 1903 Opportunities to "Sin" and Means to Attain "Absolution"

¶ 1903.1 "Delay"

More than 20% of malpractice claims are based upon a lawyer's "missing" a crucial date. For example, in *Sorenson v. Fio Rio,*[16] the lawyer failed to meet statutory deadlines in filing inheritance and estate tax forms. The former client was awarded damages plus interest and attorney's fees. This type of "deadline" delay can be most easily avoided by creating a "tickler" system — diarying all critical dates on individual lawyers' calendars, on a master calendar maintained for the office or department and, if possible, on a "chart" placed in a "visible" area.

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A more difficult issue is potential liability for not producing documents "on time." In *Krawczyk v. Stingle,*[17] the Court did not excuse delay but, instead, focused on the lawyer's undivided duty to her client. They stated that:

> "the imposition of liability to third parties for negligent delay in the execution of estate planning documents would not comport with a lawyer's duty of undivided loyalty to the client," and noted that "[p]rophylactic principles of public policy counsel against rules of liability that promote . . . conflict of interest."[18]

The "delay" in *Krawczyk* was relatively short. The first meeting with the client was held on May 8, at which the client indicated that he was "soon" to have open heart surgery. The documents were to be signed on May 19, however, the client had a heart attack on the 17th. *Query:* What might the effect have been if counsel had "sat on" the documents for a longer term.

A lawyer is not guilty of malpractice if he attends to his clients' needs within a reasonable time. However, if we *promise* a "delivery date," we are possibly increasing our exposure to liability.

One way to keep documents "on the track" is to use a "Document Flow Chart." Each client's documents can be entered on the Chart, with various "steps" in the drafting process, who is responsible at each stage and the dates that those steps are completed. Not only is the Flow Chart useful in the drafting process, but also to keep track of the execution of documents, the entry of "tickler" dates and post-execution responsibilities. Periodic attention to the Chart will give us an overview of the status of all documents which we currently have "in the mill."

ETHICAL CONSIDERATION

Rule 1.3 of the Model Rules of Professional Conduct provides that: "A lawyer shall act with reasonable diligence and promptness in representing a client." Comment 2 states "Perhaps no professional short-coming is more widely resented than procrastination . . . ."

Professor Hazzard notes that:

> "Procrastination is all too common a failing in the profession, is a special cause of resentment against lawyers generally, and is entirely inexcusable. Published statistics

consistently indicate that procrastination is one of the most common bases of complaints against lawyers."[19]

C. Document Execution

There is often an appreciable time lapse between the client's receiving "discussion drafts" and the signing of the documents. If documents are merely sent to clients for review, and no "follow up" is done, might an aggrieved party claim that we have breached some duty if the documents were not signed within a reasonable time? On the "ounce of prevention" theory, it would appear prudent to establish a protocol regarding draft documents.

We should call the client within a reasonable time after he has received the documents to arrange a convenient time to discuss them. Records of all calls may be entered on the Document Flow Chart. If the client, after some period of time, continues to be unresponsive, we should send him an "on hold" letter, explaining the consequences of not signing the documents and informing him that we are de-activating his file.

¶ 1903.2 Ignorance of the Law

In the estate and trust area, failure to know and apply the law correctly is the leading cause of professional liability. The Indiana Appellate Court used the words "unmistakable malpractice" in describing the conduct of a lawyer who failed to advise his client of the effect of pretermitting his spouse.[20]

A. Misadvice on Intestate Heirs

In *Ward v. Arnold,*[21] a lawyer advised his client that her husband did not have to execute his "sweetheart" will because a spouse would automatically receive everything as an heir. The wife, relying on this advice, neglected to have an improperly executed will re-executed. A portion of her assets passed to her brother-in-law.

B. Tax Issues

In *Link v. Barokas & Martin,*[22] the decedent died while his estate plan was in the process of development. His entire three million dollar estate passed to his wife. His lawyers and

accountants were held negligent for not advising the advantage of a timely disclaimer.

Tax errors are not confined to complex areas such as special use valuation and generation skipping. Probably the most common tax mistake has been the failure to check the "QTIP" box on the Federal Estate Tax Return. Once the Return was filed, it was virtually impossible to correct this problem because the election or non-election is irrevocable. With the most recent version of the return, this may no longer be a concern, however, other QTIP "horribles," such as not electing out of QTIP for annuities and the "reverse" QTIP election, may still plague us.[23]

C. Assets wrongly distributed

In a New Mexico case, assets were distributed per stripes among the heirs. However, the statute of descent and distribution provided for a per capita disposition. After failing to have the estate re-opened in order that the error might be corrected,[24] the aggrieved parties brought suit in Federal court alleging malpractice. The facts were not in dispute, and the court granted summary judgment for the plaintiff.[25]

¶ 1903.3 Referrals

A. Duty to Refer

In *Horne v. Peckham,* an often-cited California case, a general lawyer erred in the funding of a "Clifford" trust. The court held that a lawyer has a duty to refer a client to a specialist if a reasonably prudent practitioner would do so. Further, by failing to refer the matter to competent counsel, he was deemed to have had the specialist's level of knowledge and skill.[26]

B. Referrals Not Properly Made

By referring clients to other professionals, not just lawyers, but accountants, life underwriters, trust officers and investment advisors, we may be making an implied warranty that we have some information as to the "refer-ee's" abilities. This is especially true if we make a specific recommendation, rather than provide a "list." The basis of a referral is sometimes friendship or the prospect of mutual benefit, rather than actual knowledge

of the recommended individual's competence. This can be dangerous. "Casual" referrals in social situations should be avoided. To our clients, and perhaps to others, we are always lawyers and are never "off duty."

Equally risky is the policy of some corporate fiduciaries with respect to recommending lawyers for estate planning and settlement. The "Statement of Co-operation between Trust Departments and Lawyers" provides, in general, that the lawyer who drafted the documents will be retained to settle the estate. If the lawyer is not competent, this policy poses at least two potential difficulties. First, the bank may be deprived of the benefit of objective counsel. Second, and more importantly, if a "mistake" occurs, it will be more difficult for the fiduciary to limit its liability by having obtained an opinion from its lawyer. Thirdly, the bank's policy manual or evidence of a "course of conduct" may be available to the plaintiff by way of discovery or deposition.

C. Referral Fees and Retaining "Control"

It is better to have no economic interest in matters that we refer to other lawyers. A minor interest can turn us into co-counsel, with joint and several liability. By retaining a pecuniary interest, or through a "fee splitting" arrangement with special counsel, the referring attorney could be liable as a "joint venturer."[27]

If the specialist is selected and compensated by the referring lawyer, he may become the referror's agent. It is far better to offer the client a "list" of specialists, to discuss their qualifications, and to allow the client to make the choice.

More importantly, the "refer-ee" should make the client "his" client for the purpose of the particular engagement, and should bear the collection risk. In the best of all possible worlds, referring counsel should confirm with the client, in writing, the facts that the client has made the selection, and that he is not involved in the engagement. However, in the real world in which we live and practice, the referring lawyer generally will want to attend meetings, be in on some of the "planning," and be compensated for his contributions. We must be aware of the substantial risks in retaining a role in the representation.[28]

If the referring lawyer recommends special counsel, but takes no active or supervisory role, he will probably not be jointly liable for the specialist's errors.[29] However, liability can be imposed for negligent selection of special counsel.[30] In one case, although the issue was the taxability of fees paid to the referring firm as a "conduit," for re-payment to lawyers retained by the firm, the court stated as dicta: "Referring law firms are neither liable to their clients for [the engaged firm's] malpractice, nor can they recover from the engaged law firm for such malpractice."[31]

¶ 1903.4 Liability as a "Power Holder"

It may be useful to have an "independent" individual have the authority to remove trustees, either to avoid the Draconian effects of Rev. Rul. 79–353[32] or because a trustee may be physically or emotionally unfit to serve.[33] Does the mere existence of the power or the fact that, in some cases, the lawyer "inserted" himself into the role, create any affirmative duty to oversee the trustee's performance or to consult with the beneficiaries?

¶ 1903.5 Improper Designation of Beneficiaries

In *Ventura County Humane Society for Prevention of Cruelty to Children and Animals v. Holloway*,[34] the decedent left the bulk of his extremely substantial estate to charities, one of which was named as the "Society for the Prevention of Cruelty to Animals (National or Local)." A plethora of SPCAs claimed the bequest. Although the court failed to find the lawyer guilty of malpractice, the case has been criticized as an "anomaly" that is "likely to have little precedential or persuasive value beyond its immediate facts."[35]

It is very easy to look up names of charities in the IRS publication, "Cumulative List of Organizations." Proper names and addresses of many groups may be found in the "Encyclopedia of Associations," available in public libraries. Charities and associations should be identified in the will not only by their proper corporate name, but also by including their addresses. It is also prudent to provide for the possibility that a named charitable beneficiary may merge, consolidate, change its name or go out of existence, especially when drafting "perpetual" trusts.

¶ 1903.6 Review All Documents

All deeds and other title documents should be examined. In *Lilyhorn v. Dier,*[36] the lawyer drafted a will leaving a large parcel of land to the client's son. Unfortunately, the client had only a life estate in the property. As a result, the would-be devisee was totally disinherited. Do not take the client's word for the legal effect of these documents. If the client is reluctant to have us review them, we should write him a letter stating, in categorical terms, that we are relying on *his* representations as to his assets, family relationships and obligations. If an agreement was executed under the law of another jurisdiction, engage carefully selected local counsel and secure a written opinion.

¶ 1903.7 Failure to Perform Adequate Research

A. Duty to Research the Law

Although *Smith v. Lewis*[37] arose in a divorce context, there is a message in it for probate lawyers. The defendant lawyer was held negligent because he had failed to adequately research the community property character of military retirement benefits. The court noted that although a lawyer does not guarantee the soundness of his opinions, he assumes an obligation to undertake reasonable research to make a well informed decision as to a course of conduct. The defendant was possibly correct as to the law, but his failure to conduct "*any* reasonable research" was viewed by the court as evidence of negligence.

Once again, it is important to understand the difference between malpractice and "being wrong." In the absence of a "contract," we are not required to obtain perfect results, but only to exercise the degree of care, skill and judgment which a reasonably prudent lawyer, in similar circumstances, would exercise. If the law on the issue in question is unsettled, and if the lawyer can prove that he conducted adequate research, he will probably not be guilty of malpractice, even though he reached a "wrong" result.

Where, contrary to the almost non-existent research in *Smith v. Lewis,* counsel had undertaken exhaustive research and was "fully aware of the then controlling precedents and relevant literature," he was absolved of liability on summary judgment, even though "in hindsight [his] professional advice

ultimately proved erroneous."[38] To this end, we should retain all of our research notes in the file to show that we acted "reasonably."

B. Duty to Research Facts

Professor Begleiter has observed that we may have a duty to go beyond researching "the law."

> "The duty to research may also extend to factual matters. That is, the attorney may have a duty to conduct a reasonable factual investigation of the testator's assets, family and beneficiaries."[39]

The duty to research facts (not the legal effect of facts) does not appear to have been, as yet, judicially imposed.

¶ 1903.8 Clients and Assets in Other Jurisdictions

To some extent, this cannot be avoided. A client generally wants to have "a" lawyer who is familiar with his situation and objectives. Although they may have substantial holdings in foreign jurisdictions, and may even be foreign domiciliaries, they typically want "their" lawyer to either "handle" everything or, at least be the "captain" of the team. One writer has cogently noted that a client "will consider his one-jurisdictional lawyer's familiarity with his affairs in all relevant jurisdictions to be more important than the lawyer's lack of detailed knowledge of the laws of each."[40] This selfsame client, who has all the confidence in the world in our ability, will exhibit the Wrath of Khan if we have been less than one hundred percent competent in dealing with foreign law.[41]

There are two responses to this situation. The first is that we research the issue ourselves. This is time consuming and overly expensive. More importantly, we might not be relieved of liability because our research may be "inadequate." The better choice is to consult out of state counsel. "A lawyer should not be held to a stricter rule in foreign matters than the exercise of due care in recommending a foreign attorney. To do so would subject him to hazards which he is not qualified either to anticipate or prevent."[42]

B. Failure to Consider Effect of "Foreign" Law

Community Property. Lawyers in common law states may look merely to "paper" title and ignore the community property character of assets. Even if we question clients regarding domicile, and acquisition of assets, in community property jurisdictions, we may not be going far enough because there is no one unitary community property system.[43]

State Tax Law. Cavalierly transferring real property in diverse jurisdictions to a revocable trust in order to "convert" it to personalty and avoid local inheritance taxes can be dangerous. Similarly, the appointment of a foreign trustee may subject trust income to unforeseen local taxation.[44]

Mischaracterization of Real and Personal Property. Various types of oil and gas interests, leaseholds, mortgages and other property interests may be real estate in one jurisdiction and personalty in another. A "misdiagnosis" could result in additional state inheritance taxes and unforeseen ancillary administrations. Perhaps more devastating would be "shifting" of hoped-for beneficial interests under general legacies and devises.

C. Unauthorized Practice

In *Lindsey v. Ogden,*[45] a Massachusetts domiciliary consulted a New York lawyer who reviewed her estate plan and drafted her will. After noting that he "never held himself out as a Massachusetts lawyer, never drew any documents in Massachusetts and never did anything else that could be considered the practice of law in this State" and that "a Massachusetts domiciliary is free to consult a licensed New York attorney on the merits of her estate planning," the court went on to state that the lawyer's "overseeing the execution of the will in Boston is not unauthorized practice."[46]

Nothing is said in the *Lindsey* opinion as to where the meetings were held. One would wonder whether another court would be so lenient as to the supervision of a will execution not being unauthorized practice. *Query:* Might a lawyer found guilty of unauthorized practice in a foreign jurisdiction face disciplinary action in his home state?

From a malpractice perspective, there are two aspects to the unauthorized practice issue. First, because a typical policy covers

the insured in his capacity as a lawyer, might it be argued that an attorney practicing out of his jurisdiction is not acting as a lawyer? Secondly, might an ethical violation itself be evidence of malpractice?

¶ 1903.9 Failure to "Sign Off"

A. Is there an ongoing duty?

Consider, for example, the "silly putty" syndrome. We sever joint tenancies to create "separate but equal" estates for husband and wife. Three years later, the asset configuration has reassumed its former shape. In *Stangland v. Brock,*[47] the Court held that a lawyer has a duty to draft his client's will competently, and to carry out his client's wishes. "Once that duty is accomplished, the attorney has no continuing obligation to monitor the testator's management of his property to ensure that the scheme originally established in the will is maintained."[48]

There is another, and scarier, issue in *Stangland.* Do lawyers have an ongoing duty to preserve the "integrity" of estate plans formulated by their partners or associates? In that case, one lawyer in a firm of fourteen drafted a will making a devise of all of the client's real property. Subsequently, another lawyer in the same firm represented the client in the sale of his land, and apparently did not discuss the effect of the sale on the will. Although the firm was vindicated in the all but unanimous decision, there is a dissent by one Justice stating that "the client would reasonably expect that the firm attorneys would consider the effect of their individual transactions on the client. At the very least the client would expect that the firm's attorneys would communicate with one another so that reasonable service is provided."[49]

We may create a duty, even though there otherwise would not be one. For example, we should make it very clear to the client that the responsibility for "reviews" is his.

> "It is important that, when they have completed the basic estate planning job, both the client and the lawyer know where the duty lies for future review. The client should not be abandoned without his realizing it."[50]

We should make it plain to the client that we have no affirmative duty to keep him informed of changes in the law which affect

him.[51] Secondly, a defensive measure, in case the reasoning in the Stangland dissent ever becomes the law, might be to maintain a list of "will" clients on the firm's database, and to somehow "flag" those clients as to future transactions.

B. Out of the Thicket

Most estate planning engagements have discreet "endpoints," the most common being the signing of the Wills, Trust Agreements, and related documents. In a "Care and Feeding" letter, we can inform our clients that they have the affirmative duty to review their documents and that, although we will be sending them a "review checklist" in the future, and may send them other materials, we have no ongoing duty to monitor their situations or to advise them of changes in the law. One firm states that it is the clients' affirmative duty to examine all documents within a specified period of time as to their dispositive terms. This approach may be useful.

Where the draftsman of a codicil had inadvertently changed the names of charitable beneficiaries, the testator's conscious ratification of the "mistake" exonerated the lawyer from liability.[52] Before taking too much solace in this decision, it would be worthwhile to note that the court paid special attention to the facts that the testator was "an avid reader and an intelligent and meticulous man . . . ," that he discussed the codicil with the lawyer for forty-five minutes and that he subsequently had stated that he had reverted or returned or gone back to his original list of charities. A further narrowing of this possible defense may be found in *Della Maria v. Powell, Frazer and Murphy,*[53] in which, in the context of a business transaction, the court stated that, under Georgia law,

> "If a client reads and understands documents given him by an attorney, his signature on those documents relieves the attorney of any liability due to injury resulting from those documents."

However, the holding was limited to cases in which the documents' meaning is,

> " . . . plain, obvious, and requires no legal explanation, and the client is well educated . . . and has had the opportunity to read what he has signed."

C. When does the relationship end?

The "continuous representation" rule. Many courts have held that the statute of limitations is tolled as long as the attorney-client relationship continues.[54] However, the "continuous representation" rule may not apply to an ongoing attorney-client relationship, except for the same transaction or "related services."[55]

The judicial willingness to toll the statute of limitations, unless the relationship is severed, militates in favor of our taking a "transactional" rather than a "family lawyer" approach.[56] This sounds well and good in theory, but is inconsistent with economically successful lawyering.

Terminating the Relationship. If we wish to terminate the relationship, we should inform the client in writing, preferably by certified mail. Improper notice may lead to a charge of "abandonment." The notice should be "timely, clear and unmistakable."[57]

ETHICAL CONSIDERATION

Rule 1.16(d) of the Model Rules of Professional Conduct provides that:

> "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned . . . ."

¶ 1903.10 The Incomplete "History"

Obtaining accurate asset data and discussing the client's objectives for his family are only two-thirds of the information gathering process. All documents relating to prior marriages should be reviewed. Although clients often insist that we "take their word" that they have no obligations under divorce decrees. We should not accept their conclusions "on faith." Think about the effect on the marital deduction if a prior marriage has not been terminated.[58] Consider the following scenario:

H and W have three children. They obtain a divorce in the State of Desperation. Their agreement, incorporated into the

decree, provides that H leave "one-half of his net estate" to the children. H and W subsequently modify the agreement (but not the decree), permitting H to "satisfy" his obligation by transferring assets into trusts for the children.

Many years later, after a long marriage to W2, H dies in the State of Grace, leaving all of his assets to his new wife. The children claim their rights under the "unmodified" decree, and ultimately reach a settlement with W2. W2 then sues the will draftsman on the ground that he knew, or should have known, of the effects of the decree under the laws of the State of Desperation, and could have, at the time that he drafted H's will, negotiated a binding settlement of the children's claim with them.

A review of the documents and, perhaps a consultation with counsel in the State of Desperation, might have provided the lawyer with some defensive ammunition.

Another oft-encountered situation is the self-proclaimed domiciliary of a "Tax Haven." Frequently his contacts with his chosen "home" are tenuous at best. If possible, we should try to probe deeply enough to satisfy ourselves that the claim of domicile can be defended.

A. Out of Wedlock Children

The United States Supreme Court has held that state intestacy laws which treat "natural" children differently from their siblings "with benefit of clergy" are unconstitutional.[59] Although one must admit that there does not appear to be any "politically correct" way of asking clients about any "love children," perhaps one can phrase the question in terms of how the client himself or herself might feel about their children having similar descendants. It certainly is within the realm of possibilities that a "pretermitted" child would turn up at the worst possible time.

B. Possibility of (Re)marriage or "Single Adoption"

Many, and perhaps all, states have statutes under which a post-testamentary marriage partially or totally revokes a will, if no provision for the marriage is made. In *Heyer v. Flaig*,[60] the client *specifically informed* her lawyer that she planned to marry, and was married, ten days after she signed her will. She told

the lawyer that she intended to leave her estate to her two daughters. The lawyer was liable because he didn't inform her of the effect of her upcoming nuptials and of ways to implement her wishes.[61]

Is it prudent to mention the effect of marriage on wills to all unmarried clients? Should a "subsequent marriage" provision be routinely inserted in all wills of single people? In the current social climate, might one tactfully broach the subject of a single person adopting a child, or having the child through A.I.D.?

¶ 1903.11 Don't Wear Two Hats (Unless They are *Red Sox* Caps)

Serving as both fiduciary and counsel can easily become a Diet of Worms.[62] There are several reasons why playing two roles may be inadvisable.

We might not be protected by our malpractice policy.[63] A perusal of the specific language of the policy is vital. In *Cohen v. Employer's Reinsurance Corp.*,[64] the insured lawyer was surcharged for imprudently making speculative investments as trustee of a testamentary trust. The Court held that his malpractice policy, which provided coverage for liability "arising out of the performance of professional services for others in the Assured's capacity as a lawyer," did not cover him nor, perhaps more importantly, entitle him to a defense because he was not acting as a lawyer.

Serving in two capacities sometimes leads to conflicts, lack of objectivity and the appearance of overreaching. In *Estate of Weinstock*,[65] the attorneys-draftsmen were denied appointment as executors on the grounds that they had exerted undue influence on the testator in seeking the appointment. An ongoing practice of the draftsman's securing fiduciary appointments could result in serious disciplinary proceedings.[66]

ETHICAL CONSIDERATION

The Model Code of Professional Responsibility states "A Lawyer should not consciously influence a client to name him as executor, trustee or lawyer in an instrument. In those 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."[67]

An Executor is, to a great extent, more a "businessman" than a "technician." We lawyers are not trained or equipped to deal with the investment and "business" aspects of estate settlement. In one Texas case, a verdict against a law firm was reduced from $16.7 million to a mere $4.3 million plus relinquishment of all fees.[68]

Acting as executor and attorney for the estate may increase the number of potential plaintiffs. In the few remaining "privity" states, the attorney for the executor is only responsible to his client. A lawyer serving as executor would probably have a duty (or several conflicting duties) to the beneficiaries.

By accepting a fiduciary appointment, we may be expanding our liability in another respect. Might we possibly be taking on an affirmative duty to review documents and advise clients of changes in the law?

¶ 1903.12 Pay Attention to Formalities of Will Executions

Professor Begleiter notes that "[T]he Courts are likely to find that almost any execution error is a basis for malpractice."[69]

A. Supervise Your Own Ceremonies, if Possible

If the client is unavailable due to illness or impending travel, the wisest course of action would probably be to select competent local counsel, and to send him the original documents with detailed instructions as to how they should be executed, including a copy of your will execution checklist.[70] Even the best "how to" directions, sent directly to the client, can be misinterpreted or not followed.

In *Ward v. Arnold,*[71] a lawyer sent a will to the client's wife with instructions to have it executed in the presence of two disinterested witnesses who "must all be present and sign in each other's, and the testator's, presence." The client executed the will, but not in the presence of the witnesses. Although the case was decided on other grounds, it shows what can go wrong, even if good instructions are given.[72]

B. Avoid Signing the Wrong Will

Have the client's name typed in below the signature line, so that there is no question that the will was signed by the proper

testator, and was signed "at the end." This hopefully avoids having the wills be invalid because two people signed each other's documents.[73]

C. Doubtful Capacity

In *Georges v. Glick,*[74] the issue was the "probate exception" to Federal jurisdiction. There is no report of the eventual outcome of the malpractice case, however the gravamen of the complaint was that the lawyer had executed an amendment to a trust agreement when the client was "mentally incompetent, nearly blind and deaf, and acting under the undue influence of [his second wife]." "Testing for capacity" and maintaining contemporaneous records might have avoided the malpractice claim.[75]

¶ 1903.13 Don't Guarantee Results or Prognosticate

Even the most straightforward transaction can have hidden pitfalls, be subject to non-legislative changes in the law, or be torpedoed by the client's own action.

A. A Promisee Today, a Plaintiff Tomorrow

Normally, our "contract" with our clients is that we will do a "reasonable" job. However, if we state that we will obtain a particular result, failure to do so can be grounds for a malpractice suit on the grounds that we had made a "warranty."

Clients sometimes imagine lawyers as being possessed of a degree of prescience "far beyond that of mortal man." We do not have x-ray vision and cannot leap tall buildings in a single bound. In the world of seemingly bi-monthly "tax reform acts," the law, as we know it, can have an extremely short "half life." We should state that a result "appears" to be obtainable under current law, rather than making statements which approach guarantees. Imagine the reaction of a client who is told that "Crummey" powers *will* "wipe out" tax liability for the next ten years' worth of insurance premiums if, after the transaction is "cast in stone," Congress sharply curtails the *Crummey* principle.

B. No Profit by Being a Prophet

In *Sharpe v. Superior Court,*[76] a disgruntled client brought a malpractice action on the grounds that her lawyer had not

foreseen that, fourteen years after the fact, the law would be retroactively interpreted in the client's favor. Although the court stated that "it is not malpractice for Sharpe to have failed to discover and apply erroneous case law," his vindication cost him dearly, in time, money and stress. In *Procanik by Procanik v. Cillo,*[77] the New Jersey Supreme Court, reversed a Superior Court decision which held that a lawyer has a duty "to disclose to his client, clearly and unmistakably, a complete opinion giving his full informed judgment that the settled law is ripe for reconsideration, particularly when he is . . . a specialist . . . ."[78]

¶ 1903.14 Drafting Errors

Even the most careful lawyer can make a mistake. "Gremlins" creep into documents and hibernate, awaiting re-animation sometimes decades later.

In *Stowe v. Smith,*[79] the lawyer wrote to his client that he had created a trust for her daughter, under which the daughter received the assets outright at age 50. The will omitted a few words and provided that, when the daughter attained the age of 50, the assets would pass to the daughter's issue.

In *Ogle v. Fuiten,*[80] Mrs. Smith survived her husband by fifteen days. Each of their wills provided that the other would inherit if she or he survived by thirty days. There was no gift over, merely a provision that, if the couple died in a "common disaster," the assets would pass to the plaintiffs. Since neither the "thirty day survival" nor the "common disaster" provision applied, the assets passed to non-intended beneficiaries by intestacy.

Both of these unfortunate situations could have been avoided if, at each stage in the process, the draftsman had paid careful attention to what had gone before. For example, the document outline should be compared with the conference notes. The document should then be compared with the drafting outline, as well as with a detailed "plain English summary" letter calling the client's attention to all dispositive provisions and to other important or complex areas with "chapter and verse" citations. The client should be encouraged to take responsibility for the review and correctness of the documents.

¶ 1903.15 Just Say "No" or "A Bird in the Hand Today, An Albatross Tomorrow"

Although it may be flattering to our egos, clients who think we can "walk on water" or who have unrealistic expectations of success should probably be politely turned away. Despite an abundance of care and attention, these people may never be capable of being satisfied with our work. Individuals who appear to read tax literature for relaxation in their spare time can, similarly, be a source of grief. Prospective clients who are extremely passive and tell us to do "whatever we think is best," as well as those who are "price shopping" should most probably be discouraged. If the would-be client reports that he has spoken with several other lawyers, none of whom was as competent as we are, or truly understood his desires, the danger signal should sound.

A. The Dangers of Being the White Knight

Personal injury litigators refer to receiving a summons as being "invited to the party." One of the easiest ways to become an involuntary guest is the situation in which we are called in at the last moment to resolve some problem which has escaped the attention of another practitioner. For example, the nine month period on filing disclaimers may be rapidly drawing to a close and we are asked to "do something," while, unbeknownst to us, the proposed disclaimant has accepted benefits of the assets or has "directed" a disposition.

We have to be exceedingly careful in "helping out" where errors may have occurred. If, and only if, we can, within the proper time frame, *with a 100% chance of success,* cure the problem, then *maybe* we should accept the engagement. If we cannot, *with absolute certainty,* get a "perfect" result, then it simply is not worth it to us to accept the matter because we will be jointly and severally liable with our negligent colleague who called us at the last minute crying that he is drowning.

B. Limited Engagements

We may be retained at times for a "limited purpose." For example, we may be requested to assist in preparing estate and inheritance tax returns by a practitioner who wants to do the

"probate work" himself. We may be called upon to review a set of documents or to possibly attend to the local probate of an estate for which foreign counsel is actually representing the executor.

In each one of these situations we have to, by letter, clearly limit the scope of our engagement. Otherwise we may be pulled into the Serbonian bog of liability with our co-counsel for matters which are beyond our control and in which we have no involvement.

Not only should our, and co-counsel's, roles be clearly delineated in an engagement letter, but conduct which may expand the scope of the engagement should be avoided. For example, in the situation in which our only job is to prepare tax returns, if we file an appearance in the Probate Court at all, it should be "for the purpose of filing the inheritance tax return only."

C. Don't Be a "Ghost Writer"

Drafting documents which will be presented to our colleagues' clients as "their" work product can be disastrous. Firstly, we are obtaining the information "third hand." A "history" developed by a non-specialist may miss extremely important facts. Secondly, we have no idea of how the documents were explained to the client, and what expectations he may have as to tax results.

If some of the other red flags are "invitations to the party," "ghost writing" is an invitation which says "black tie" or perhaps "black armband." There is probably no 100% foolproof safe way to be a ghost writer. It's probably better to decline.

D. "Declination" or "Non-Engagement" Letters

When we, for whatever reason, refuse to accept an engagement, we should consider sending the would-be client a "declination" or "non-engagement" letter. This letter should be sent by certified mail, return receipt requested.[81] In the non-engagement letter, we should unequivocally state that we do not represent the client and state, without giving an opinion on any substantive issues "on the merits," the reason for our declination. We should advise the individual of all critical dates

such as tax return deadlines and statutes of limitation. If it would be advisable that the "non-client" engage counsel, we should explain the consequences of not doing so.[82] We should not, however, suggest names because doing so might expand the scope of our liability if the recommended lawyer "fumbles the ball."

¶ 1903.16 Risks in Delegating Work to Others (Including the Client)

A. Beneficiary Designations

Whose responsibility is it to see that life insurance, employee benefit and other beneficiaries are designated in the "proper" manner? Although we may want to handle this ourselves, clients may be unwilling to bear the added cost. It is easy to have the insurance agent, bank or the client himself take care of the details.

Suppose the client's spouse has not waived her "joint and survivor" rights? What if a trust is improperly described? If nothing is said as to who is responsible, we may be liable as the "captain of the team," a role which we should, to the greatest extent possible, try to avoid. If we do not perform a particular aspect of the job ourselves, we should not be responsible for the fallout of the work not being done properly. We should clearly state, in one or more letters, who will prepare the documents. If we provide detailed instructions, perhaps we will be absolved of liability.[83]

B. Real Estate Conveyances and Other Transfers

Failure to re-arrange the title to assets can torpedo even the soundest documents. Some of the best laid plans have gone awry when it was later discovered that assets supposedly owned by the client were, in fact, jointly held, or were owned by a family corporation.

In *McLane v. Russell*,[84] a lawyer who failed to sever a joint tenancy at the same time as he drafted the will was successfully sued by an intended beneficiary. However, in that case, the client had specifically devised an interest in land to the beneficiary and the lawyer merely drew the will and never

advised her of the necessity to sever a joint tenancy with her sister.

Counsel fared better in *Wilson v. Clancy,*[85] winning on a court ordered summary judgment motion. The client had intended to ultimately leave half of "his" assets to the plaintiff. At the time that the will was drafted, virtually all of the assets were jointly held with the client's wife. The lawyer testified that he had expressly advised his client that the will would not be effective unless the assets were transferred into the client's sole name. The court stated that

> "there could be malpractice only if defendant did not realize, or advise his client of, the need to change the titling [of the joint property]," and that "it is not malpractice for an attorney to draft a will that he or she knows will not be effective until the client takes further steps and, at the same time, to advise the client to take those steps."[86]

The court distinguished *McLane,* stating that, in that case, there had been no evidence that the lawyer had ever told the testator of the need to sever the joint tenancy in order to effectuate her desire.

¶ 1903.17 Is it Dangerous to Retain Wills?

The practice of lawyers' retaining clients' original estate planning documents appears to be quite widespread. Retaining custody of wills can geometrically increase our exposure to liability for two reasons. First, by keeping the document, are we impliedly stating that the estate planning engagement is ongoing? It is far better to treat every engagement as a separate transaction.[87] If the specific engagement has not been terminated, do we have a duty to keep the client informed of changes in the law? Secondly, do we have a duty to keep informed as to whether the client has died? We have to ask ourselves the same question as to being a fiduciary — is it really worth it for any reason for us to retain clients' wills?

¶ 1903.18 Shoemaker, Stick to Your Last

We should not increase our liability by being something other than lawyers. For example, clients often ask us whether a particular investment may have merit. What we may consider a social

conversation may, in the client's mind, be interpreted as professional advice. Not only are most lawyers not trained as investment advisers but our professional liability policy may not provide protection.[88] In a similar vein we should not, unless we have specific skills in the area, take on a duty to analyze products, such as life insurance contracts.[89]

¶ 1903.19 When Tax Considerations are Secondary

Our transfer tax system often requires clients to make dispositions which they otherwise would never consider. For example, many clients would not create lifetime trusts for children, even though the assets could pass free from transfer taxes and, to the extent of the allowable exemption, free from generation skipping tax. Similarly, many people elect not to use a "bypass" trust because they want their spouse to have full control of the assets.

Anytime that a tax "advantage" is not being availed of, the client should acknowledge, in writing, that he has been advised of the tax saving opportunity and that he has chosen not to take advantage of it. It might also be useful to have an appropriate statement in the documents. For example, if a married couple wishes to leave all of their assets "outright" to each other language such as the following might be considered:

> I have been advised that I could have saved substantial estate taxes by leaving a portion of my assets in trust for BRUNHILDE. I feel very strongly that it is more important, for business and family reasons, for BRUNHILDE to have absolute complete control of all of our assets during her lifetime. Having BRUNHILDE have complete control of those assets is more important to me than any tax savings. For that reason, I have left my assets to BRUNHILDE outright, rather than in trust, even though doing so may cost my family substantial additional estate taxes.

¶ 1903.20 Do Clients Really Know What "Irrevocable" Means?

We should be absolutely certain that clients understand what the word "*irrevocable*" means. Consider these words penned almost a quarter of a century ago:

> "The irrevocable transfer . . . is something to be approached with grave concern. Most people can't afford such transfers . . . I don't mean to say that irrevocable transfers may not make sense on occasion, but, for most clients, it is probably better sense to talk them out of it."[90]

Considering the reason for the trust, we should, by using discretionary powers and special powers of appointment, build in "doors and windows" to the greatest extent possible.[91]

The client should *know* that an irrevocable trust cannot be altered, amended or revoked and that "what you see is what you get." He should *know* that, except to the extent that he is a fiduciary, and consistent with his fiduciary obligations, he can no longer control the assets. Further, if the donor is a fiduciary, he should be made aware of the fact that he may have a duty, as a fiduciary, to act inimically to his own interests.

A variation on the theme of irrevocability is the situation in which a married couple makes large gifts and the wife "allows" her unified credit to be used to offset transfers of the husband's assets. The couple subsequently divorces, the wife remarries and then finds out that she no longer has her "exemption."

¶ 1903.21 Don't Expand Your Liability

Malpractice is not necessarily the making of a "mistake." The fact that a less than favorable result was obtained does not, absent negligence or some type of contractual liability, result in malpractice.

> "The issue of whether an attorney erred is distinct and independent from the issue of whether the attorney was negligent. The attorney who has erred might not have been negligent even though the error has caused injury to the client. Conversely, the attorney who is negligent may turn out not have erred . . . . The issue . . . is whether the attorney's conduct comported with the standard of care."[92]

The standard of care is a variation of the familiar tort concept of the reasonably prudent man. The standard may be summarized as "the degree of skill and knowledge possessed and exercised by reasonably careful and prudent lawyers." Although so called "community standards" may be relevant, the "community" is frequently the entire state and, in some cases,

the whole nation.[93] It may be difficult or impossible to *lower* our standard of care. It is extremely easy to *increase* it.

A. Specialization

De facto specialization has been with us for years. Since the watershed case of *Bates v. State Bar of Arizona,*[94] allowing advertising, self designation has been on the upswing. Beginning in the early 1980's, if lawyers held themselves out to be specialists, courts have been holding them to the "reasonable specialist" standard. The words of the New Mexico Court of Appeals are typical: "A lawyer holding himself out to the public as specializing in an area of the law must exercise the same skill as other specialists of ordinary ability specializing in the same field."[95] Please note the words "specialist of ordinary ability." Might a specialist be deemed to have *greater* than ordinary ability?

The mere fact that one has lectured and published in an area of the law, or has served as an expert witness, might transform him from an "ordinary" specialist into a "super specialist." What we write and what we say from podia and on the witness stand can come back to haunt us.

B. Advertising and "Puffery"

The geometric expansion of new lawyers emerging from the cocoon of academia into the harsh economic reality of the real world is mind boggling. It almost seems that one day there will be more lawyers than clients. Many of these beginning barristers feel that they must advertise to obtain business. There has been a "trickle up" effect, with formerly staid firms now engaging in commercial behavior which was formerly viewed as totally outside of the bounds of decorum.

With this increased need for some lawyers to distinguish themselves from the Nietzschean herd comes the tendency to "over sell" themselves by "puffing up" their qualifications and giving the impression that they can obtain a certain level of result. Although no cases appear to address this point directly, the authors of a leading treatise have noted that:

> "[T]he trend towards advertising will accelerate the making of malpractice claims against the attorney based upon 'specialization' or 'expertise' causes of action . . . . Attorneys will

be held to the implied promises they make in advertising. The standard of care and other liability rules for legal malpractice cases will be adjusted to reflect the new freedoms and potential opportunities created by the First Amendment protections of attorney marketing efforts."[96]

¶ 1903.22 Miscellaneous — "Murphy's Law"

Beneficiaries sometimes die out of order. Suppose parents convey their house, outright, to their three sons as a "Medicaid" device. One son dies intestate, without any issue. The couple's daughter-in-law now owns one-third of the house, and has a right to partition. Query whether there would be any liability for not having granted the parents a long term lease, or for not having used a trust?

Consider the possible fallout of a private annuity transaction if the annuitant outlives his actuarial life expectancy or if the obligor will not, or cannot, pay.

"Forgetting about" a prior amendment to a document can lead to embarrassing consequences. In one case, the "wrong" charitable beneficiaries were named because the draftsman (who was almost a mere "scrivener," acting on the directions of a trust officer) gave no consideration to a prior codicil.[97] One "solution" might be to stamp all documents "see codicil/amendment" at the time a change is made.

Not fully explaining the trust relationship can sometimes cause us to ask "how do you spell relief?" For example, many parents would not consent to naming their children as trustees for themselves if they truly understood what the word "discretion" really means.

¶ 1904 Disciplinary Proceedings

¶ 1904.1 Possibly More Damaging than Malpractice

The grievance process is "quasi-public," possibly exposing the lawyer to public ignominy. By contrast, malpractice proceedings are often kept private. Being the object of professional discipline can have a demoralizing effect on one's staff and colleagues. It's probably worse to be accused of unethical conduct than of having "made a mistake." The grievance process is an easier, and cost-free, forum for a disgruntled client, to

whom hurting the lawyer may be more important than collecting damages.

¶ 1904.2 Relationship to Malpractice

Our conduct in a grievance proceeding, by way of admissions, evidence of negligence, etc. can be grounds for a subsequent civil suit.[98] A client may rely on published ethical standards. "A violation of the code of professional responsibility is rebuttable evidence of malpractice."[99]

We should not take a chance on voiding our coverage. As soon as we find out that a grievance has been filed, we should examine our policy as to notice requirements and should notify our carrier in a specific manner provided in the contract. If our policy does not expressly provide for a defense in the grievance proceeding, the company may be persuaded to defend, especially if civil liability may flow from the grievance.

¶ 1905 Partnership by "Appearance"

Lawyers often practice in informal "space sharing" groups in order to reduce overhead and, possibly, to allow for some "cross feeding" among specialists. These non-partnership associations can take myriad forms. Sometimes two or more lawyers are true partners who share space with one or more independent colleagues. Attorneys in a "space sharing" arrangement may become "joint venturers" as to particular matters.

ETHICAL CONSIDERATION

Comment 1 to Rule 1.10 of the Model Rules of Professional Conduct provides that:

> "Whether two or more lawyers constitute a firm . . . . can depend on the specific facts. For example, two practitioners who share office space and occasionally consult or assist each other ordinarily would not be regarded as constituting a firm. However, if they present themselves to the public in a way suggesting that they are a firm, or conduct themselves as a firm, they should be regarded as a firm for purposes of the Rules . . . ."

There are no "bright lines" to demarcate the boundaries. Whether a partnership exists, like beauty and truth, is in the eye

of the beholder. Unfortunately, the beholder is an unsatisfied client who attempts to invite as many as possible to his "party." If the lawyers gave the clients reasonable grounds to believe that they were partners, the courts may hold that a "de facto" partnership had been established, and that each "partner" is liable for the others' misconduct.[100] Although the issue is obviously imprecise, a tour through some of the reported cases provides some guidance.

¶ 1905.1 Partnership Established

Where the names of three lawyers were on the office door, the association was described in a yellow pages advertisement as a "Full Service Law Firm," and the lawyers shared common stationery, the court found that a partnership by estoppel had been created.[101] To add even more fuel to the fire, one of the lawyers had introduced another to a client as his "partner."[102]

In *Royal Bank and Trust Co. v. Weintraub, Gold and Alper,*[103] the partnership had been *dissolved.* However, the firm offices, telephone number and stationery remained the same. The former partners were liable for their erstwhile colleague's wrongful act.

¶ 1905.2 Partnership Not Established

In *American Casualty Co. v. Costello,*[104] lawyers each had and paid their own secretaries and maintained separate files and separate clients' funds accounts. However, they listed themselves as "Noonan, Costello and Bolger" in Martindale-Hubbell, maintained a common checking account and a common telephone number. The court held that, on the particular facts of the case, there was no partnership by estoppel because there was no evidence that the plaintiff had *relied* on the Martindale-Hubbell listing or upon any other "holding out" as a "firm." Note that the plaintiff attempted to invoke the provisions of the Code of Professional Responsibility in its attempt to establish that the lawyers were partners.

¶ 1905.3 Avoid the Perception of Partnership

Lawyers who are not partners should phrase all communications to clients in the first person and assiduously avoid

statements such as "thank you for retaining us." On office signs, on letterhead and in telephone listings, it might be prudent to say "Jones, Smith & Brown, an association of independent lawyers" rather than "attorneys at law" in order to give clients reasonable notice that the lawyers are not partners.

¶ 1906 Conclusion

Lawyers sue lawyers. Lawyers testify against Lawyers. As Pogo says, "We have met the enemy, and it is us." The estate and trust area is a minefield for malpractice exposure. We are called upon daily to explain extremely complex concepts to clients who only want "a simple will."

We must practice defensively. The first line of defense is having an insurance policy which meets our needs. Cost is secondary. Does the policy cover us as fiduciaries? Is a defense provided for disciplinary proceedings?

The second line of defense is recognizing the "soft" areas and avoiding, or dealing with, them. Carefully screening clients today avoids grief tomorrow. We should explain the proposed course of action and document "what we tell them" in writing. We cannot practice too defensively.

Romulan warbirds are approaching the neutral zone! Red alert! Maximum shields!

Live long and prosper.

ANNOTATIONS

References are to the Internal Revenue Code and Regulations unless otherwise indicated.

¶ 1900.1 Scope of Presentation

[1] See, e.g., Johnston "Legal Malpractice in Estate Planning — Perilous Times Ahead for the Practitioner," 67 Iowa L.R. 629 (1982), herein cited as "Johnston"; Begleiter, "Attorney Malpractice in Estate Planning — You've Got to Know When to Hold Up, Know When to Fold Up," 38 Kan. L.R. 193 (1990) herein cited as "Begleiter"; Moore, "Conflicting Interests in Postmortem Planning," U. Miami 9th Inst. on Est. Plan., Ch. 19, esp. ¶ 1921 (1975) and "Conflicting Interests in Estate Planning and Administration After ERTA: Recognition and Resolution," U. Miami 17th Inst. on Est. Plan., Ch. 6 (1983); Price, "Professional Responsibility in Estate Planning: Progress or Paralysis," U. Miami 21st Inst. on Est. Plan., Ch. 18 (1987); Pennell, "Professional Responsibility: Reforms are Needed to Accommodate Personal Family Counselling," U. Miami 25th Inst. on Est. Plan., Ch. 17 (1991); Anno: "When Statute of Limitations Begins to Run Against Attorney for Malpractice," 32 A.L.R. 4th 260 (1982).

¶ 1900.2 Statistics

[2] Source: "Lawyers' Professional Liability Update," ABA Standing Committee on Lawyers' Professional Liability (1985).

¶ 1901.1 An Overview of Policy Provisions

[3] *General Accident Ins. Co. of America v. Hyatt Legal Services,* 516 N.Y.S. 2d 560 (A.D. 4th Dep't. 1987).

[4] 841 F.2d 600 (C.A.5 1988).

[5] *General Accident Ins. Co. v. Namesnik,* 790 F.2d 1397 (C.A.9 1986), corrected, reh. den. 799 F.2d 539.

[6] See Bissell, "Malpractice Insurance Coverage for Members of the Estate Planning Team," U. Miami 11th Inst. on Est. Plan., Ch. 2 (1977), ¶ 204.

[7] 322 N.W.2d 30 (Wisc., 1982).

[8] "Lawyers' Professional Liability Update, n.2, above, at page 3.39 et seq.

¶ 1901.2 When Fire Breaks Out

[9] Cf. *American Fire and Casualty Co. v. Kaplan,* 183 A.2d 914 (D.C. Ct. of App. 1962).

¶ 1901.3 The Duty to Defend — Broader than the Duty to Pay

[10] See, e.g., *Maneikis v. St. Paul Ins. Co. of Ill.,* 655 F.2d 818, 822 et seq. (C.A.7 1981); *Donnelly v. Transportation Ins. Co.,* 589 F.2d 761, 765 et seq. (C.A.4 1978); *Kuzmier v. New Amsterdam Casualty Co.,* 155 N.Y.S.2d 301 (1956).

[11] *Continental Casualty Co. v. Reinhardt,* 247 F. Supp. 173, 174 (D. Ore. 1965), aff'd. 358 F.2d 306 (C.A.9 1966). See *Regas v. Continental Casualty Company,* 487 N.E.2d 105, 108 (Ill. App. 1985).

[12] See *Maneikis v. St. Paul Ins. Co. of Ill.,* n.10, above; *Fireman's Fund Ins. Co. v. Security Ins. Co. of Hartford,* 72 N.J. 63, 367 A.2d 864 (1976), and Anno: "Liability Insurer — Refusal to Defend," 49 A.L.R. 2d 694.

¶ 1902 When Does the Relationship (And Our Exposure to Liability) Begin?

[13] See *Brandlin v. Belcher,* 134 Cal. Rptr. (1977).

[14] *Excalibur Oil, Inc. v. Sullivan,* 616 F.Supp. 458, 467, n.7 (N.D. Ill. 1985).

[15] See ¶ 1903.15D, below.

¶ 1903.1 "Delay"

[16] 90 Ill. App. 3d 308, 413 N.E.2d 47 (1980).

[17] 208 Conn. 239, 543 A.2d 733 (1988).

[18] 208 Conn. at 246 and 247.

[19] Hazzard, *The Law of Lawyering,* § 1.3:104, citing Gates, "The Newest Data on Lawyers' Malpractice Claims," 70 ABA J. 78 (April 1984).

¶ 1903.2 Ignorance of the Law

[20] *Walker v. Lawson,* 514 N.E.2d 629 (1987).

[21] 328 P.2d 164 (Wash. 1958).

[22] 667 P.2d 171 (Alaska 1983).

[23] See Cornfeld, "A Tin Cup for QTIPS, The Tenth Anniversary of the Unlimited Marital Deduction," U. Miami 26th Inst. on Est. Plan. Ch. 14 (1992).

[24] *Estate of Kemnitz,* 623 P.2d 1027 (1981).

[25] *Wisdom v. Neal,* 568 F.Supp. 4 (N.M. 1982).

¶ 1903.3 Referrals

[26] 97 Cal. App.3d 404, 414, 158 Cal. Rptr. 714, 720 (1979).

[27] *Floro v. Lawton,* 10 Cal. Rptr. 98, 106 (1961).

[28] See Eckhardt, "The Estate Planning Lawyer's Problems: Malpractice and Ethics," U. Miami 8th Inst. on Est. Plan., ¶¶ 74.607.1 and 74.607.2.

[29] See, e.g., *Broadway Maintenance Corp. v. Tunstead and Schechter,* 487 N.Y.S.2d 799 (A.D. 1st Dep't., 1985).

[30] See, e.g., *Torino v. Yormark,* 398 F. Supp. 1159 (N.D. N.J. 1975).

[31] *Christensen, O'Connor, Garrison and Havelka v. State Department of Revenue,* 649 P2d 839 (Wash. 1982).

¶ 1903.4 Liability as a "Power Holder"

[32] 1979–2 C.B. 325.

[33] See Crown, "The Emotionally Disabled Trustee," U. Miami 13th Inst. on Est. Plan. ¶ 707.4 (1979).

¶ 1903.5 Improper Designation of Beneficiaries

[34] 40 Cal. App 3d 1043, 91 Cal. Rptr. 269 (1970).
[35] Johnston, op. cit., at p. 664.

¶ 1903.6 Review All Documents

[36] 335 N.W.2d 554 (Neb. 1983).

¶ 1903.7 Failure to Perform Adequate Research

[37] 118 Cal. Rptr. 621, 530 P.2d 589 (1975).
[38] *Davis v. Damrell,* 119 Cal. App. 3d 883, 174 Cal. Rptr. 257 (1981).
[39] Begleiter, op. cit., at p. 247.

¶ 1903.8 Clients and Assets in Other Jurisdictions

[40] Hendrickson, "Ethical Concerns in Multi-jurisdictional Estate Planning," 123 T. & E. 31 (November 1984).
[41] See Wormser, "Interstate Practice of Estate Planning, Ethics and Malpractice," U. Miami, 11th Inst. on Est. Plan., Ch. 8 (1977).
[42] *Wildermann v. Wachtel,* 267 N.Y.S. 840 (Sup. Ct. 1933).
[43] See Moore, "Migration and Property in the 1990's: The Increasing Importance of Community Property — Separate Recognition and Resolution," U. Miami 25th Inst. on Est. Plan., Ch. 11 (1991).
[44] See Guttierez, "Oops! The Impact of State Income Taxes on Multi-jurisdictional Trusts," U. Miami 25th Inst. on Est. Plan., Ch. 12 (1991).
[45] 406 N.E.2d 701 (Mass. App. 1980).
[46] 406 N.E.2d at 709.

¶ 1903.9 Failure to "Sign Off"

[47] 109 Wash.2d 675, 747 P.2d 464 (1987).
[48] 109 Wash.2d at 684, 747 P.2d at 469.
[49] 109 Wash.2d at 690, 747 P.2d at 482.
[50] Eckhardt, op. cit., at ¶ 74.611.
[51] Id. ¶ 74.604.3(b).
[52] *Connecticut Junior Republic v. Doherty,* 478 N.E.2d 735 (Mass. App. 1985, review den. 482 N.E.2d 328).
[53] 612 F.Supp. 1507, 1517 (D. Ga. 1985).
[54] See, e.g., *Greene v. Greene,* 451 N.Y.S.2d 46, 51, 436 N.E.2d 496, 501 (1982).
[55] *Muller v. Sturman,* 437 N.Y.S.2d 205 (1981); *Schoenrock v. Tappe,* 419 N.W.2d 197 (S.D., 1988).
[56] See *Newson v. Boothe,* 524 So.2d 923, 926 (La. App. 1988).
[57] *Schenck v. Davis,* 35 A.2d 681 (N.J. 1943). See Matter of Schwartz, 493 A.2d 1248 (N.J. 1985).

¶ 1903.10 The Incomplete "History"

[58] See Crown, "Divorce, Remarriage, and the Marital Deduction," B.N.A. Ests., Gifts & Trusts J. Sept.-Oct., 1978.

[59] *Trimble v. Gordon,* 430 U.S. 762 (1977).

[60] 70 Cal.2d 223, 449 P.2d 161(1969).

[61] See *McAbee v. Edwards,* 340 So.2d 1167 (Fla. App. 1976).

¶ 1903.11 Don't Wear Two Hats (Unless They are *Red Sox* Caps)

[62] See Heckscher, "The Special Problems Which Arise When an Attorney Serves as Fiduciary," 17 ACTEC Notes 137 (1991).

[63] See ¶ 1901.1 A.1., above.

[64] 503 N.Y.S.2d 33 (App. Div. 1986).

[65] 386 N.Y.S.2d 1 (Ct. App. 1976).

[66] *State v. Gulbankian,* 54 Wisc.2d 599, 196 N.W.2d 730 (1972) and Laurino, "The Duties and Responsibilities of the Attorney/Fiduciary," U. Miami 15th Inst. on Est. Plan., Ch. 16 (1985).

[67] E.C. 5-5.

[68] McCue, "Litigation Notes," Trusts and Estates, September 1988, page 66.

¶ 1903.12 Pay Attention to Formalities of Will Executions

[69] Begleiter, op. cit., at p. 218.

[70] See Crown, "Battle Stations, Evasive, Defensive and Attack Maneuvers for Will Contests," U. Miami 23d Inst. on Est. Plan. ¶ 602.1B (1989).

[71] Op. cit., at n.21.

[72] See Beyer, "The Will Execution Ceremony — History, Significance and Strategies," 29 S.Tex. L.R. 413, 414 (1988).

[73] See, e.g. *Estate of Pavlinko,* 148 A.2d 528 (Pa. 1959), cf. *In re Snide (Snide v. Johnson),* 437 N.Y.S.2d 63 (1981) in which the husband mistakenly signed his wife's will, and the court admitted the will on "equitable" grounds. *Snide* may be the first American decision to "reform" negligently mis-executed "cross wills." However, the "no-reformation" rule remains in effect. See Langbein and Waggoner, "Reformation of Wills on the Grounds of Mistake: Change of Direction in American Law," 130 Pa. L.R. 521, 562 (1982).

[74] 856 F.2d 971 (C.A. 7 1988).

[75] See Crown, "Battle Stations," op. cit. at n.70 at ¶ 601.1.

¶ 1903.13 Don't Guarantee Results or Prognosticate

[76] 192 Cal. Rptr. 16 (App. 1983).

[77] 543 A.2d 985 (N.J. 1988).

[78] *Procanik by Procanik v. Cillo,* 502 A.2d 94, 102 (1985).

¶ 1903.14 Drafting Errors

[79] 184 Conn. 194 (1981).
[80] 466 N.E.2d 224 (Ill. 1984).

¶ 1903.15 Just Say "No" or "A Bird in the Hand Today, An Albatross Tomorrow"

[81] *Togstad v. Vesely, Otto, Miller & Keefe,* 291 N.W.2d 686, (Minn. 1980).
[82] See the lower court opinion in *Procanik by Procanik v. Cillo,* op. cit. at n.78.

¶ 1903.16 Risks in Delegating Work to Others (Including the Client)

[83] See *Wilson v. Clancey,* 747 F. Supp. 1154 (Md. 1990).
[84] 512 N.E.2d 366 (Ill. App. 1987).
[85] *Wilson v. Clancey,* op. cit. at n.83.
[86] 747 F.Supp. at 1157.

¶ 1903.17 Is it Dangerous to Retain Wills?

[87] See ¶ 1903.10 C.

¶ 1903.18 Shoemaker, Stick to Your Last

[88] See, e.g., Policy "A", ¶ 1901.1 B.
[89] See Weinberg, "Wealth Transfer Planning With Life Insurance in the 90's — An Economic Model," U. Miami 25th Inst. on Est. Plan., Ch. 8 and Lyons, "Factors in Selecting a Second-to-Die Life Insurance Policy." 18 E. P. 166 (June/July, 1991).

¶ 1903.20 Do Clients Really Know What "Irrevocable" Means?

[90] Pedrick, "Desultory Comments on Irrevocable Trusts and Federal Estate Taxation," U. Miami 2d Inst. on Est. Plan., ¶ 68.1907 (1968).
[91] See Price, "Powers to the Right People: Flexibility Without Taxability or Drafters Desiderata: Nontaxable Flexibility," U. Miami 25th Inst. on Est. Plan. Ch. 7 (1991).

¶ 1903.21 Don't Expand Your Liability

[92] Mallen and Smith, *Legal Malpractice,* § 15.1 (West, 1989).
[93] Ibid. at § 15.5.
[94] 433 U.S. 350 (1977) reh. den., 434 U.S. 881 (1977).
[95] *Rodriguez v. Horton,* 622 P.2d 261, 264 (1984).
[96] Mallen and Smith, op. cit., at § 4.11 citing Devine, "Letting the Market Control Advertising by Lawyers: a Suggested Remedy for the Misled Client." 31 Buffalo L.R. 35 (1982).

¶ 1903.22 Miscellaneous — "Murphy's Law"

[97] *Connecticut Junior Republic v. Doherty,* op. cit. at n.52. See *Connecticut Junior Republic v. Sharon Hospital,* 188 Conn. 1, 448 A.2d 190 (1982).

¶ 1904.2 Relationship to Malpractice

[98] See, e.g. *Albright v. Burns,* 206 N.J. Super. 625, 503 A.2d 386 (1986); *Oberon Investment v. Angel, Cohen & Rogovin,* 492 So.2d 1113 (Fla. 3d D.C. 1986), quashed on other grounds, 512 So.2d 192 (Fla. 1987).
[99] *Lipton v. Boesky,* 110 Mich. App. 589, 313 N.W.2d 163 (1981).

¶ 1905 Partnership by "Appearance"

[100] Mallen and Smith, op. cit., § 5.3. See also Mallen, "Apparent Partnerships and Real Partnership Liability," 3 Prof. Liab. Rptr. 163 (1979).

¶ 1905.1 Partnership Established

[101] *Bonivire v. Wampler,* 779 F.2d 1011 (C.A.4 1986). See also *Myers v. Aragona,* 318 A.2d 263 (Ct. Spl. App. Md. 1974).
[102] See also *Coleman v. Moody,* 372 S.W.2d 306, 316 (Tenn. App. 1963).
[103] 506 N.Y.S.2d 15 (Ct. App. 1986).

¶ 1905.2 Partnership Not Established

[104] 435 N.W.2d 760 (Mich. App. 1989).

Week of Monday January 13, 2014

Jeffrey Crown

January 2014

S	M	T	W	T	F	S
29	30	31	1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	1

Monday January 13, 2014

Appointments

8:15am - 9:30	Personal	Melinda Off - Medical
9:30am - 10	Personal	Communications
10:00am - 11	Personal	Mrs. Jodice - check on time shares a...
1:30pm - 3	Personal	William O'Brien and Lisa O'Brien 86...

To Do

BF	Personal	Dr./Mrs. Finkelstein - Fidelity ben. fo...

Phone Calls

Tuesday January 14, 2014

Appointments

7:00am - 8	Personal	***No Clients in the Morning, if Possib...
8:30am - 10	Personal	Gym
11:00am - 12	Personal	Jean Meyer sign affidavit
2:00pm - 3:30	Personal	Karen Brett w/Brothers & Sisters (m...

To Do

BF	Personal	Call Helene Rosenblatt re doc's

Phone Calls

Wednesday January 15, 2014

Appointments

9:00am - 9:30	Personal	Daily planning
9:30am - 10	Personal	Communications
10:00am - 10:45	Personal	Marvin Carley to sign docs
10:45am - 11:15	Personal	Communications
1:00pm - 2	Personal	Speech HSC

To Do

Phone Calls

Thursday January 16, 2014

Appointments

9:30am - 10	Personal	Communications
10:00am - 11:15	Personal	Bruce & Audrey Carlson to see JLC
1:30pm - 2:45	Personal	Mrs. Ruscica & Jeanne Weitzel to se...

To Do

BF	Personal	Send Jeannie Filatti e.p. review letter

Phone Calls

Friday January 17, 2014

Appointments

To Do

Phone Calls

Saturday January 18, 2014

Appointments

To Do

Phone Calls

Sunday January 19, 2014

Appointments

To Do

Phone Calls

Certificate of Fiduciary Authority

We, the undersigned, representing that we are all of the trustees of the *Trust* and that we are duly authorized by the terms of the *Trust* to execute and deliver this certificate and make the agreements herein contained, certify and agree as follows.

1. The name of the *Trust* is:

   _____*

2. The date of the *Trust* instrument is:

   _____*

3. We certify that, pursuant to the terms of the *Trust*, orders and other instructions relative to the *Trust* are binding on the *Trust* and the trustees when signed by any _____* of the following named persons: (Note name and address below)

4. We certify that the persons named in this certificate are authorized to sell, convey, pledge, mortgage, lease or transfer title to any interest in securities.

5. The statements contained in this *Certificate of Trust* are true and correct and there are no other provisions in the *Trust Instrument* that limit the powers of the trustee(s) to sell, convey, pledge, mortgage, lease or transfer title to interests in securities.

****Signature of Trustee(s)**:

_____

****Medallion Guarantee here**:

**Please fill in the blank areas noted above.*
**Please note that all trustees must sign and Signature(s) must be Medallion Guaranteed.*

- ***The Medallion stamp may not be dated or notated in any manner.***