

**RECENT DEVELOPMENTS IN ETHICS AND MALPRACTICE**

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# **RECENT DEVELOPMENTS IN ETHICS AND MALPRACTICE**

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## **I. Introduction**

Over the past year, courts issued opinions that alluded to little known areas of professional liability in the trust-and-estate context. While the courts might not have fully explored the questions inherent in the circumstances at hand, these cases nonetheless raise issues that should be considered by attorneys who practice in the area of trusts and estates. The most surprising opinion might well be the case allowing an estate planner to be sued for breach of an implied contract to exceed the professional standard of care. For attorneys who conduct estate planning, the thought that they may have implicitly promised a higher standard of performance than the one required by law should be troubling and should warrant further inquiry into whether that cause of action is legally tenable.<sup>1</sup>

## **II. Estate Planner Liability For Breach of Implied Contract**

A recent Oregon decision touches on the issue of an estate planner's liability for breach of implied contract, and the outcome should concern anyone who is interested in maintaining reasonable limits on estate planners' malpractice-related exposure. In this case, the plaintiff used the implied-contract theory to circumvent the professional standard of care, and rather than stop him, the court in question allowed him to proceed. The implications of this – and what attorneys can do to minimize their own risk – are discussed below.

### **A. The Facts of *Caba v. Barker***

In *Caba v. Barker*, 193 Or.App.768, 93 P.3d 74 (2004),<sup>2</sup> the testator suffered a stroke and was hospitalized, at which a relative arranged for an attorney friend to meet the testator at the hospital and prepare a new will for her. This instrument named the relative – who was not a beneficiary of the existing estate plan -- as one of several residual beneficiaries and also designated him as executor. The testator signed this new will and then died two weeks later. After the new will was admitted to probate, several beneficiaries of the initial plan filed a contest, which eventually settled and resulted in a depletion of \$620,000 from the estate.

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<sup>1</sup> Nothing contained in this publication is to be construed as the rendering of legal advice, whether for a specific case or for more general application. This publication is intended for educational and informational purposes only.

<sup>2</sup> A petition for review is pending in the Oregon Supreme Court.

Thereafter, two residual beneficiaries filed a malpractice claim against the drafting attorney and sought damages for the depletion of the estate. They sued for negligence and alleged that by his failure to apprise the client of various matters, including his own lack of independence, the drafting attorney had violated the standard of care. They also alleged that he failed to take the steps necessary to minimize the risk of a will contest. They sued for breach of contract as well, but they did not base their contract theory on the mere allegation that the estate planner had failed to meet the standard of care; instead, they alleged that he had gone even farther and made “an implied promise to make the will invulnerable to a will contest.”

The drafting attorney moved to dismiss, arguing that (1) the plaintiffs did not have standing to sue him, and (2) the plaintiffs’ complaint was legally insufficient because it was predicated on an implied promise. The trial court dismissed the case, and the plaintiffs appealed.

On the first issue, the reviewing court held that the plaintiffs had standing to sue the drafting attorney. The court cited the general rule that plaintiffs of this sort were the classic intended third-party beneficiaries of the drafting attorney’s services and could thus maintain the action. The court held that the implied-promise allegations had no impact on the issue of standing, since the dispositive question was whether the attorney promised his services for the benefit an intended third-party beneficiary, and on that point the law does not require that the promise be express rather than implied. (*Id.*, at 80).

Turning to the second issue, the court looked at whether the allegations sufficiently pleaded claims in tort and contract. The tort claim did not pose a serious issue; noting the allegations that the drafting attorney had failed to meet the professional standard of care, the court held that the complaint stated a cause of action for negligence. (*Id.*, at 81).

The court then examined the implied-contract theory, i.e., the plaintiff’s allegations that the drafting attorney had implicitly promised to make the will invulnerable to contest so as to maximize the interests of the residual beneficiaries. The court read these allegations in light of Oregon authority holding that a plaintiff cannot sue for breach of contract if the agreement merely incorporates a standard of care; instead, the plaintiff must allege that the defendant promised a certain result irrespective of any general standard. And the court held that the allegations satisfied this requirement. Noting that the implied promise to make the will invulnerable to challenge “is not predicated upon the general standard of professional care” (*Id.*, at 82), the court held that the plaintiffs had stated an actionable claim for breach of contract. The court reasoned that the drafting attorney had promised a product with a certain characteristic -- i.e., a will that was invulnerable to contest -- and therefore faced liability regardless of whether he complied with his professional standard of care. The court therefore reversed and remanded for further proceedings.

## **B. The Implications**

An implied-contract theory of the sort advanced in *Caba v. Barker* poses a threat to estate planners because it would allow the plaintiff to circumvent the drafter's standard of care at will.

In the normal malpractice case -- whether it sounds in negligence or contract -- the plaintiff must show that the drafting attorney violated the professional standard of care and that this violation proximately caused damages, both of which require expert testimony to establish. Thus, in *Caba v. Barker*, a standard malpractice theory would not let the plaintiffs sue for failure to make the will "invulnerable to contest." No expert would take the stand and testify that an estate planner must make this guarantee; even the court took it as self-evident that the professional standard of care made no such demands. (*Id.* at 82). Thus, under the normal malpractice analysis, the estate planner should have been safe from that particular claim and in all likelihood should have prevailed as early as the demurrer stage.

But instead, the opposite was true. Rather than throw that claim out, the court let it go forward, which raises the question of whether a plaintiff can circumvent the standard of care whenever he wants by simply alleging that the desired result was the subject of an "implied promise" from the estate planner. The implied promise discussed in *Caba v. Barker* is an example rather than a limit. If plaintiffs in a malpractice action can argue that there was an implied contract to exceed the professional standard of care, they might allege any number of "implied promises" that dramatically expand the basis of an estate planner's potential liability. Whether they can do so -- and what estate planners can do to protect themselves -- are issues that deserve attention.

## **C. Defeating the Implied-Contract Claim In Advance: The Fee Agreement**

Estate planners who want to minimize the threat of implied-contract liability should consider addressing this issue in their fee agreement. If the plaintiff can rely on black-letter contract law, the estate planner should be able to do the same. A fee agreement may well deter an implied-contract argument if it has provisions like the following:

- A clause stating that the attorney has not made any implied agreements or warranties;
- An integration clause that triggers the parol-evidence rule, thereby barring proof of a prior or contemporaneous agreement; and

- A modification clause stating that any subsequent agreement to provide services above the professional standard of care must be in writing and signed by both parties.

The first of these has obvious use. A statement that there was no implied agreement may well head off any contrary argument at a later point in time, and if not, might at least constitute evidence of the parties' beliefs. Moreover, if it is deemed to be a recital, this provision might be dispositive under the doctrine of estoppel by contract, which prevents a party or successor-in-interest from contradicting the facts recited in a written instrument. (See Cal. Evidence Code §622 ["The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration."]).

The second type of provision that attorneys might consider is an integration clause, i.e., a clause stating that the written agreement is the final and complete expression of the parties' understanding. This type of clause should trigger the parol evidence rule, which provides that an integrated written contract cannot be contradicted by extrinsic evidence of a prior or contemporaneous agreement. (*Casa Herrera, Inc. v. Beydoun*, 32 Cal.4<sup>th</sup> 336, 343 (2004) [the parol evidence rule "generally prohibits the introduction of any extrinsic evidence, whether oral or written, to vary, alter or add to the terms of an integrated written instrument"]). If it is triggered, the parol evidence rule should bar a claim that the parties formed an implied contract before or at the time they executed the written agreement. (*Haggard v. Kimberly Quality Care, Inc.*, 39 Cal.App.4<sup>th</sup> 508 (1995) [the parol evidence rule barred the plaintiff's claim for breach of implied-in-fact contract]).

The court can find that a written agreement is integrated even if it does not have an integration clause. Moreover, the parol evidence rule can also be triggered by partial integration, that is, by a finding that the written agreement constitutes the parties' final understanding as to one of the terms contained therein. If part of an agreement is integrated, the parol evidence rule applies to that part. (*Id.*, at 517). Thus, if an otherwise unintegrated fee contract stated that the attorney would be providing services in accordance with the normal standard of care in the industry, a court might deem the agreement to be partially integrated as to that term, which would trigger the parol evidence rule and block the type of implied contract alleged in *Caba v. Barker*.

The third type of provision that attorneys might consider is a modification clause providing that any alteration of the contract must be in a writing signed by both parties. This provision might bar a claim that the parties formed an implied contract after they signed the initial agreement. (*Heart South, PLLC v. Boyd*, 865 So.2d 1095, 1106 (Miss. 2003) [modification clause thwarted an argument that the parties formed an implied agreement after the initial contract was signed]). Specifying that the modification clause applies to any agreement to exceed the standard of care might help ensure that the clause remains effective if the attorney habitually provides services that fall outside the scope of the written contract, which would tend to undermine a more general modification clause. And the requirement of both signatures would help prevent correspondence from being

deemed a modification of the agreement. While not ironclad, this type of clause might allow the estate planner a useful defense against any argument that the parties formed an implied agreement during the course of the attorney-client relationship.

Provisions like these should minimize the estate planner's risk of liability under an implied-contract theory, and the burden of precaution is slight given that this involves nothing more than a review of one's own fee agreement. These provisions need not be intrusive and should represent the truth of the matter; if asked, most attorneys would probably say that they believe themselves obligated to render services in accordance with the professional standard of care and that they are not subject to any other agreements, implied or otherwise, and thus there appears to be no reason why the fee agreement should refrain from making that clear. And in all likelihood, these provisions would apply to any eventual plaintiffs. As a general proposition, intended third-party beneficiaries are bound by the terms of the contract. (*Kessler, Mercier, and Lochner, Inc. v. Pioneer Bank & Trust Co.*, 428 N.E.2d 608, 613 (Ill. 1981) ["third party beneficiaries of a contract have no greater rights than the party they wish to claim under"]).

#### **D. Ethical Concerns Regarding The Fee Agreement**

The possibility of adding this language to the fee contract raises the question of whether doing so is ethically permissible. Many of the attorney's ethical obligations come into being during the initial consultation with a prospective client, and thus the attorney may be working under certain constraints before the fee agreement is even signed.

Ethical principles, however, suggest that the attorney should be able to use provisions like a modification clause and integration clause, as long as the attorney does not attempt to avoid the professional standard of care. Model Rule of Professional Conduct 1.8(h) provides that "A lawyer shall not make an agreement prospectively limiting the lawyer's liability for malpractice unless permitted by law and the client is independently represented in making the agreement." Thus, it would be unethical to argue that an integration clause prohibited the court from implying a term to the effect that the attorney would comply with the applicable standard of care. But this concern would provide no impediment in the circumstances described here, i.e., when the attorney merely wishes to confirm that there are no implied agreements to exceed what the standard of care requires. To this extent, it appears that the use of an integration clause is consistent with the general principle that the client and lawyer "are relatively free to define the scope and objectives of the representation." (ACTEC Commentary on MRPC 1.2).

An exception may occur when the attorney has reason to believe that an implied agreement might actually exist, i.e., that circumstances may have given the client a different impression about the services to be provided and that the client may be reasonable in so thinking. In this situation, it might be improper for the attorney to include contrary language in the fee agreement without explaining the matter to the

client. (See Model Rules of Professional Conduct, Rule 7.1 [a lawyer shall not make a “false or misleading communication” about the lawyers’ services]; Restatement Third, The Law Governing Lawyers, § 14, comment e).<sup>3</sup>

### **E. Viability of the Implied-Contract Theory Against Estate Planners**

Turning from prevention to the implied-contract argument itself, the decision in *Caba v. Barker* is troubling because other authority suggests that the estate planner should not face any liability under this theory, at least not insofar as it pertains to professional services rendered.

The circumstances in *Caba v. Barker* differ from others in which the implied-contract theory might have a certain amount of viability. In jurisdictions that allow a professional to face exposure under this theory, the implied contract seems to be a mere promise to perform in accordance with the professional standard of care, and thus it would overlap with a standard malpractice claim. (See *Bucquet v. Livingston*, 57 Cal.App.3d 914, 921 (1976) [“an attorney, by accepting employment to give legal advice or to render legal services impliedly agrees to use ordinary judgment, care, skill and diligence in the performance of the tasks he undertakes”]). In *Caba v. Barker*, however, the plaintiff used the implied-contract theory to argue that the drafting attorney should be liable even though he did what his duty required. The argument was not that the estate planner had an implied contract with the intended beneficiaries of the plan, since there would be no consideration for an arrangement of that sort. Rather, the plaintiff argued that the estate planner and client had an implied contract in addition to their written fee agreement or, in the alternative, that their written agreement had an implied term requiring performance above and beyond what the professional standard of care required – in this case, a guarantee that the will would be invulnerable to contest. But letting an implied-contract theory supplement the estate planner’s standard of care – or replace it – is of questionable validity when viewed light of black-letter contract law.

As a general rule, if the parties have an express contract, the law will not recognize an implied contract embracing the same subject. (*Trauma Service Group v. U.S.*, 104 F.3d 1321, 1326 (Fed.Cir. 1997) [“an implied-in-fact contract cannot exist if an express contract already covers the same subject matter”]; *Kennedy v. Polar-BEK & Baker Wildwood Partnership*, 682 So.2d 443, 447 (Ala. 1996) [“where an express contract exists between two parties, the law generally will not recognize an implied contract regarding the same subject matter”]). The court may imply a term that is not covered by an express contract, but this is disfavored and can only be done to effectuate the purposes of that express contract. (*Mid-West Energy Consultants, Inc. v. Covenant Home, Inc.*, 815 N.E.2d 911, 916 (Ill. 2004); *Third Story Music Inc, v. Waits*, 41 Cal.App.4<sup>th</sup> 798, 804 (1995)). And since the purpose of a normal fee agreement is to

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<sup>3</sup> This explains that an attorney-client relationship may arise “when the person reasonably relies on the lawyer to provide services, and the lawyer, who reasonably should know of this reliance, does not inform the person that the lawyer will not do so....In many such instances, the lawyer’s conduct constitutes implied assent.”

arrange for services in accordance with the professional standard of care, it should necessarily follow that implied terms are prohibited insofar as they would contradict that purpose and seek to impose more stringent requirements on the attorney.

Stated another way, the attorney-client relationship should not create an implied warranty to exceed the standard of care. Insofar as an implied warranty would overlap with what the attorney's standard of care already requires, the issue is academic and poses little interest to the practitioner. (See *Broyles v. Brown Engineering Co.*, 151 So.2d 767, 771 (Ala. 1973)).<sup>4</sup> But when the plaintiff argues that there was an implied warranty to guarantee a result that the law did not otherwise require, the court should take note of authorities like those cited above, which establish that courts should only imply terms that effectuate the written contract rather than imposing more burdensome requirements.

All of which leads to the conclusion that estate planners should not have to face potential liability when the malpractice plaintiff alleges that there was an implied contract or an implied term in the fee agreement requiring performance above and beyond the professional standard of care. These would seem to be precisely the sort of claims that contract law tries to prevent.

### **III. Estate Planner Liability For Representing An Heir Or Beneficiary In Subsequent Litigation: Malpractice For Conflicts of Interest**

In one recent case, the plaintiff brought a malpractice claim against the drafting attorney for representing an heir in subsequent litigation. The plaintiff argued that this conflicted with the attorney's duty to the decedent and that as a result the attorney was liable for the fees that the plaintiff incurred in connection with those proceedings. This case illustrates the risk that the drafting attorney faces when jumping headlong into litigation at a later date, and it also helps demonstrate several issues that the attorney should consider if faced with a similar claim.

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<sup>4</sup> In dicta, this court mentioned the possibility of an implied warranty in the estate planning context:

“It is possible that an implied warranty of results by an attorney could exist. Without committing ourselves, a court might hold that an attorney who is entrusted with drawing a will and its proper execution impliedly insures its proper execution by sufficient number of witnesses signing their names as such – a very simple mandate of law that requires no room for divisional interpretation. But as a whole, lawyers are dealing with factors that are beyond their control and, under such circumstances, ordinary dealings would reasonably suggest the absence of any implied guaranty of results.”

The court's discussion, however, fails to note that in that hypothetical the attorney would be liable under a normal malpractice theory. (See *Auric v. Continental Casualty Co.*, 331 N.W.2d 325, 329 (Wis. 1983) [attorney faces malpractice liability if he “negligently...supervises the execution of a will”]). Thus, an implied warranty in that situation would be unlikely to add an additional requirement.

### **A. The Facts of *Jung v. Mundy, Holt & Mance, P.C.***

In *Jung v. Mundy, Holt & Mance, P.C.*, 372 F.3d 429 (C.A.D.C. 2004), the decedent consulted a law firm and directed the preparation of a will that left out one of her daughters. That daughter's husband, however, was a law clerk at the firm in question, and he prepared the will. At the meeting to have the final version signed, nothing happened, because he had left that version at home. The mother then died intestate.

Thereafter, the children agreed that they would act as co-administrators and sell the estate's real property to one child at below the market price. But the daughter in question (i.e., the one who was excluded from the final draft of the will) struck out on her own and petitioned to be named the sole personal representative. She obtained appointment and was represented by the same firm responsible for the mother's estate planning. One son took umbrage with the daughter's presumption and backed out of the agreement to sell the home, to which the daughter responded with a sequence of contentious litigation directed against the son, acting at each step of the way through that same law firm. She and her attorneys charged the son with wrongfully repudiating the agreement; he prevailed. They sued him for fraud; he prevailed. Then they challenged his heirship; he prevailed.

Having vindicated himself, the son turned around and sued the law firm for malpractice. He alleged that the law firm negligently failed to help the decedent execute the draft will, which named him as a beneficiary but excluded the litigious daughter. Furthermore, he alleged that the law firm committed malpractice by representing the daughter in her capacity as personal representative in all of the litigation against him. He argued that there was a conflict of interest because the decedent tried to exclude that daughter from the estate, which meant that by taking that daughter's side, the law firm was trying to thwart their original client's intent. For his damages, he sought the attorneys' fees that he had spent defending himself in the litigation.

The law firm filed a motion for summary judgment, arguing that insofar as the son complained about the litigation directed against him, he was barred by the statute of limitations. The district court granted the motion. On appeal, however, the matter was reversed on the ground that the tort was continuing in nature and that the son could therefore recover for damages that occurred within three years of the filing of his complaint.

### **B. The Implications**

The court in *Jung* ruled on the limitations issue but did not address the more interesting question: if the estate planner has a conflict of interest when representing one of the heirs or beneficiaries in subsequent and unsuccessful litigation, is that estate planner liable in malpractice for the opponent's attorneys' fees? There are a number of problems with the assumption that the attorneys had malpractice exposure in this context.

The first concerns the issue of duty. It is well established that the attorney must owe a duty to the plaintiff in order to be liable for malpractice, but it is not entirely clear that this duty extended as far as the plaintiff claimed. This case is unusual because the alleged conflict does not stem from representing two parties who have current and potentially adverse interests in the estate, as may occur when the attorney attempts to represent different beneficiaries simultaneously or when the attorney tries to represent both the fiduciary and interested parties. Rather, the alleged conflict occurred when the attorney represented the decedent and then later represented the daughter who was serving as personal representative.

While in most circumstances they do not create a separate basis for liability, ethical rules are relevant to the standard of care in a malpractice action. (*Skorek v. Przybylo*, 628 N.E.2d 738, 740 (Ill. 1993)). The attorney's duty to a former client is covered by Model Rule of Professional Conduct 1.9, which states that the duty of loyalty prohibits a conflict of interest in the same or a substantially related matter even after the representation of the first client has terminated. (Model Rules of Professional Conduct, Rule 1.9(a)).<sup>5</sup> It is reasonable to conclude that having owed this duty to the client, the drafting attorney then owes it to the personal representative of the client's estate.

In *Jung*, however, the litigious daughter was the personal representative, and thus this conflict did not exist. The son would no doubt argue that the daughter's position and interest in the estate only came about because of the attorneys' malpractice in failing to have the will executed, but the court did appoint the daughter as personal representative, and it was undisputed that the decedent died intestate, which meant that the daughter's entitlement to her share of the estate could not be gainsaid. Thus, one could argue that the daughter's interests were not "materially adverse" to those of the decedent within the meaning of Rule 1.9(a). Since the decedent died intestate, a court might hold that her "interests" are fixed by law regardless of what the son alleged in his malpractice action. That the daughter's litigation may have been a breach of her duty as personal representative does not necessarily mean that the attorneys had a conflict of interest with their former client, particularly since, with the exception of the heirship proceeding, the litigation concerned administrative matters that could ostensibly have arisen even if the decedent had executed the will and died testate.

Furthermore, the outcome might depend on whether the subsequent litigation was "substantially related" to the original estate-planning services. Under Rule 1.9, representing someone with an adverse interest to the former client is not a disqualifying factor in and of itself. To be improper, the subsequent representation must be "in the same or a substantially related matter." This analysis usually turns on the specific facts at hand. In *Jung*, one could argue the issue either way, although it does not seem that the daughter capitalized from confidential information that she should not have had, which is

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<sup>5</sup> "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."

one factor that helps establish a close relationship between the proceedings. (Model Rules of Professional Conduct, Rule 1.9, comment [3]).

In short, determining whether a duty exists can be a complicated endeavor in the trust-and-estate context, even when the alleged conflict stems from the attorney's representation of the decedent.

Turning to a related question, one might ask what would happen if the son argued that the conflict arose when the attorneys opposed his interests rather than the decedent's. In *Jung*, the son argued that the attorney's conflict lay in representing both the decedent and the daughter as personal representative, but he could have argued that as an intended third-party beneficiary of the decedent's contract, the attorneys owed him a duty to refrain from any representation that would conflict with his interests.

That the drafting attorney owes a duty of care to intended third-party beneficiaries, however, does not necessarily mean that he owes them a duty to avoid conflicts of interest, since they are third-party beneficiaries and thus might not constitute "clients" for the purposes of conflict rules. The distinction arises from the fact that in many jurisdictions, non-clients can sue an estate planner for malpractice. In non-privity states, when there is a malpractice suit in the estate-planning context, the plaintiffs are often the intended beneficiaries of the instruments that the attorney was hired to draft; the courts reason that these people were the intended third-party beneficiaries of the agreement with the attorney and thus they should have the standing to bring an action. But while the drafting attorney owes the same duty of care to clients and intended third-party beneficiaries when it comes to preparing instruments, the same might not be true with regard to avoiding conflicts of interest.

Model Rule of Professional Conduct 1.7 states that the attorney has a conflict of interest if the current representation will be materially limited by the attorney's duty to "a third person." The commentary, however, does not discuss intended third-party beneficiaries and instead states that the rule will apply when the lawyer owes "fiduciary duties arising from a lawyer's service as a trustee, executor or corporate director."

For its part, legal terminology traditionally distinguishes between clients and intended third-party beneficiaries.<sup>6</sup> Furthermore, holding that intended third-party beneficiaries are the attorney's clients might play havoc with the attorney's other ethical responsibilities such as the duty to follow client instructions, to obtain the client's consent for settlement, to maintain the client's confidences, etc., etc. Thus, the most likely outcome would appear to be that attorneys do not owe a plaintiff in the son's position an independent duty to avoid conflicts of interest.

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<sup>6</sup> Black's Law Dictionary (6<sup>th</sup> Ed.1990) pp. 254, 1480 (a client is "a person who employs or retains an attorney," while a third-party beneficiary is "one for whose benefit a promise is made in a contract but who is not a party to the contract.").

Leaving aside the issue of duty, a malpractice claim in these circumstances also seems questionable given the requirement for proximate cause. It is obvious that in the context of a malpractice suit, the plaintiff must show that the conflict of interest proximately caused damages. (*Northwestern Life Insurance Co. v. Rogers*, 573 N.E.2d 159, 163 (Oh. 1989) [plaintiff failed to show damages from the attorney's conflict of interest]). And in this case, it seems clear that the damages were proximately caused by the daughter's litigiousness rather than by the advice of her attorneys – if they had declined the representation, the daughter would no doubt have retained other counsel and forced the son to defend himself just the same. If this is the case, the attorneys should face no liability for the son's fees, since he would have incurred them regardless of whether or not the attorneys participated in the litigation.

Thus, when confronted with a situation like that in *Jung*, the attorney should question both the existence of a duty and the existence of proximate cause, particularly when the plaintiff is seeking damages. Trust litigation often illustrates that a conflict of interest does not necessarily support a damage award. Instead, the conflict of interest is often a ground for rescinding a transaction, and it may be a ground for removal or the denial of fees. Many conflicts do not result in monetary harm to the complaining party, and when that is the case, the damage element is missing and a claim for legal malpractice should not lie.

#### **IV. Additional Malpractice Cases In The Estate-and-Trust Context**

When it came to extricating themselves at a relatively early stage of the malpractice suit, estate planners did not fare well in recently reported cases, many of which involved the reversal of judgments entered on dispositive motions.

Estate planners who obtained summary judgment under a statute of limitations were reversed in both *Estate of Watkins v. Hidman, Hileman & LaCosta*, 91 P.3d 1264 (Mon 2004) and in *The Stanley L and Carolyn M. Watkins Trust v. LaCosta*, 92 P.3d 620 (Mon. 2004). In *Estate of Watkins*, the settlor/trustee sued her attorney for establishing very complex irrevocable trusts that she was allegedly told were revocable. After the settlor/trustee was sued for using the assets as her own, she turned around and sued the attorney who had prepared the trusts and advised her. The attorney's firm obtained summary judgment, but the Montana Supreme Court reversed, finding that in light of the trusts' complexity the settlor's failure to discover the negligence tolled the statute of limitations and that her cause of action did not accrue until she was subject to a surcharge and removal suit by the beneficiaries. In *The Stanley L and Carolyn M. Watkins Trust v. LaCosta*, 92 P.3d 620 (Mon. 2004), the Montana Supreme Court reversed summary judgment because there was a triable issue of fact regarding when the malpractice should have been discovered, given the complexity of the estate plan. These cases illustrate the difficulty of obtaining summary judgment on a limitations defense when the plaintiff is suing with regard to technical deficiencies in the instrument.

A similar result occurred in *Rajcan v. Donald Garvey and Associates, Ltd.*, 807 N.E.2d 725 (Ill. 2004), in which the drafting attorneys obtained dismissal under limitations grounds only to be reversed on appeal. The plaintiffs argued that the defendants committed malpractice by failing to advise them of the necessity for a special-needs trust, thereby depriving them of public assistance. The trial court dismissed under a statute of limitations but the appellate court reversed, holding that the plaintiffs sufficiently pleaded fraudulent concealment when they alleged that the attorneys falsely represented that they would provide copies of the trust for review.

In addition, a judgment of dismissal was reversed when a drafting attorney who omitted language tried to avoid liability by arguing that the court could only glean the decedent's intent from the four corners of the instrument. In *Sorkowitz v. Lakritz, Wissbrun & Associates, P.C.*, 261 Mich App 642, 683 NW2d 210 (2004), the plaintiffs alleged that the drafting attorney committed malpractice by failing to include a Crummey clause in the decedent's trust. The drafting attorney argued that the court could only discern the settlors' intent from the document itself and that since no intent to include Crummey language appeared in the trust, the suit had to be dismissed. The trial court granted the motion, but the appellate court reversed, holding that the four-corners rule only applied to interpretation disputes between beneficiaries, not to malpractice actions that involved the alleged diminution of assets left by the decedent.

A drafting attorney also came up short when arguing that her participation in estate planning was subject to special defenses protecting the freedom of speech. In *Moore v. Shaw*, 116 Cal.App.4<sup>th</sup> 182 (2004), the petitioner alleged that the drafting attorney participated in a breach of trust by drafting a trust-termination agreement. In response, the attorney moved to strike under a statute providing that any cause of action arising from an act in furtherance of the right of petition or free speech can be stricken unless the plaintiff shows a probability of succeeding on the claim. The trial court denied the motion, and the appellate court affirmed, holding that the drafting of a trust-termination agreement was not an act in furtherance of either right protected by the statute. Indeed, the court held that the drafting attorney should be sanctioned for making the argument.

And not surprisingly, more states decided to follow the majority rule allowing intended third-party beneficiaries to sue for malpractice. *The Stanley L and Carolyn M. Watkins Trust v. LaCosta*, 92 P.3d 620 (Mon. 2004); *Harrigfeld v. J.D. Hancock and Smith, Hancock & Zollinger*, 90 P.3d 884 (Id. 2004).



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