Estate Planning Malpractice - Don’t Throw it all Away

KRISTIN YOKOMOTO, JD - WEALTHCOUNSEL MEMBER SINCE 2014

INTRODUCTION

The threat of an estate planning legal malpractice claim can be daunting, and the reality of the claim can be devastating. Every claim not only affects the accused attorney, but ultimately, the entire legal profession. Claims can result in higher malpractice insurance premiums, higher or inconsistent standards through case law, or an increased negative public perception of the profession.

Estate planning and its related fields of estate administration and probate are plagued with potential malpractice claims. But unlike other areas of practice, claims for legal malpractice in estate planning may take many years to mature. Any loss or settlement on a malpractice claim will result in increased premiums and possibly a state bar investigation. That investigation may result in disciplinary action ranging from censure, to license suspension or worse - permanent disbarment.

Even if an attorney ultimately prevails against a claim, the cost, time, burden and potential damage to the attorney’s reputation can take a toll on the attorney’s energy and practice. The best practice is to be aware of the malpractice pitfalls, avoid potentially dangerous situations and protect one’s practice and license.

CAUSES OF ACTION

State and federal statutes, case law and ethical rules provide bases for legal malpractice claims. The main causes of action are negligence, breach of contract, breach of fiduciary duty, or fraud.

1. Negligence claims involve allegations that the attorney did not exercise the degree of care, skill or diligence that an attorney of ordinary skill and knowledge commonly possesses. Negligence claims include giving erroneous legal advice, not giving advice when legally obligated to do so, disobeying lawful client instructions, failing to provide adequate or complete services, or not handling a client matter in a timely manner.
2. Breach of contract claims turn on whether or not the attorney performed services as outlined in the engagement letter or other contract according to its terms. Most claims for breach involve disputes over fees or billing practices because claims alleging a failure to adequately provide the services described in the engagement letter generally fall within a negligence claim.
3. The focus of a claim for breach of fiduciary duty is whether or not the attorney breached an ethical or legal duty such as failing to disclose conflicts of interest, failing to deliver client funds, commingling client funds with personal or practice funds, using client confidences improperly, engaging in self-dealing, or failing to act with abundant good faith, perfect candor, openness, and honesty, and without concealment or deception.
4. The issue in a client's fraud claim against his or her attorney is whether or not the attorney made fraudulent misrepresentations to the client.

ETHICAL VIOLATIONS

Some states' ethical rules expressly provide a disclaimer that such rules are not intended to create civil liability. Notwithstanding such a disclaimer, the ethical rules are used as evidence of the standard of care.[1] The standard of care in many states is determined by the finder of fact, often a jury, based on expert testimony. Thus, ethical violations are generally deemed to be admissible evidence in a malpractice action.

THIRD PARTY CLAIMS

Attorneys typically owe a duty of care only to his or her clients. However, in estate planning and related areas, an attorney's malpractice can also harm the beneficiaries or intended beneficiaries of the client's estate. As such, attorneys need to be aware of the developing case law regarding third party claims.

Early cases held that a third party not in privity of contract with an attorney could not maintain a legal malpractice action against that attorney absent fraud or collusion.[2] This rule was premised upon the concern that without a privity requirement, attorneys could easily lose control over their engagement agreement and be exposed to virtually unlimited potential for liability.

Then in the 1950s and 1960s courts began relaxing the privity requirement bar to malpractice suits by beneficiaries against trusts & estates attorneys.[3] In some jurisdictions, the attorney may be liable to a third party where the third party was an intended beneficiary of the attorneys' services, or where it was reasonably foreseeable that negligent service for a client could result in harm to others.

Since then, state courts have addressed the issue of trusts & estates attorney malpractice inconsistently. For the most part, states can be divided into three broad categories when it comes to third party standing to bring a malpractice action against an attorney:

1. States that allow a broad cause of action that applies a "balancing of factors" test;[4]
2. States that follow the Florida-Iowa rule which only allows for actions related to errors on the face of the estate plan or will;[5] and
3. States that apply the strict privity rules which do not allow third party claims.[6]

Attorneys should be familiar with their state's case law on standing for estate planning malpractice actions, and continue to remain abreast as case law continues to develop.

STATUTE OF LIMITATIONS

State statutes govern when an action against an attorney arising in the performance of professional services for a wrongful act or omission, other than for

actual fraud, shall be commenced.[7] Generally, the applicable limitations period will not begin to run until the injury is either incurred or discovered. Thus, the statute of limitations for estate planning might not begin to run until the client's death, which is an incredible burden for trusts & estates attorneys as a client may live many more years after the client's planning is completed. Attorneys should be familiar with their state's applicable statute of limitations.

DAMAGES

For the most part, the measure of damages in a legal malpractice claim is the loss suffered by the plaintiff.[8] Thus, for example, if the attorney's negligence voided an intended bequest, the damages should be the amount of the lost bequest. Similarly, if the attorney's negligent planning increased the tax burden, the attorney may be liable for the increased tax. In some estate planning malpractice cases, plaintiffs may recover the remedial costs necessitated by the attorney's negligence. As a result, damages can be uncertain and speculative, but ultimately hefty.

ATTORNEY-CLIENT RELATIONSHIP AND DUE DILIGENCE

It is important to note that the attorney-client relationship, which gives rise to negligence or breach of contract claims, can be created upon a written agreement or may be implied if the parties manifested, explicitly or implicitly by their conduct, an intention to create the attorney-client relationship. Such formation of a relationship does not depend upon a written agreement or payment of a fee. Which means that a fiduciary relationship can be established even when an attorney merely enters into a discussion with a potential client.[9]

In some states, a non-client can sue an attorney for negligently failing to advise the non-client that the attorney did not represent the client.[10] Accordingly, it is important to be mindful of what the attorney states during initial consultations and to send letters of non-engagement if there is no engagement. Make it a regular practice to formally document all discussions with clients or non-clients and send correspondence affirming representation or nonrepresentation.

Once an attorney-client relationship is established, a client has a duty to inform his or her lawyer of all relevant facts. Correspondingly, in some states, the attorney may have a duty to investigate those facts in the representation of that client. The failure to do so may subject the lawyer to a malpractice action.[11] Thus, once a relationship has been established, conduct some level of due diligence into the facts and again, document it.

RISKY SITUATIONS TO AVOID

Certain situations are more likely to be litigated, coupled with or followed by a malpractice claim. While these situations can be great opportunities to help solve problems (and be well compensated for doing so), they require great care in managing client expectations. The following list is only the beginning of many issues that require great diligence, clarity in communication, and careful documentation to help prevent or to successfully fend off potential malpractice claims.

- Clients in serial marriages
- Children from prior relationships
- Marital problems
- Substantial disagreements between spouses on the disposition of their estates
- Significant financial imbalance between spouses
- Substantial gifts or bequests to a nonspouse beneficiary
- Any gift in a litigious family or involving a litigious beneficiary
- A child or other beneficiary actively involved in the estate planning process
- Extremely elderly or extremely ill clients
- Unusual gifts or bequests involving a great deal of money or a disproportionate share of the client's estate
- Anytime a beneficiary hires a trial lawyer.[12]

Also, be very cautious of deathbed planning. Be particularly mindful of who calls to initiate the attorney-client relationship, who schedules the meeting, or who besides the individual doing the planning is present and active at the meeting.

Additionally, check the patient's chart for medical notes regarding the potential client's capacity, alertness and medication and obtain a physician affidavit, if necessary. Be especially cautious if a former or current spouse or child will be disinherited, particularly if by an amendment. Sometimes the involvement of a family member or friend is unavoidable if the client lacks some ability; however, be careful because each level of involvement could support an undue duress claim and in turn, a claim of breach of confidentiality or other fiduciary duties owed by the attorney to the client.

While it can often be useful to hold family meetings with the client and other family members, it's essential to preserve confidentiality and state in writing exactly whom the attorney represents and whom the attorney does not represent.

EXAMPLE OF CLAIMS

Malpractice claims can be derived from an endless number of issues. While it may be impossible to create a comprehensive list, some specific issues consistently arise in claims against trusts & estates attorneys:

- Failure to draft what the client wants
- Failure to properly handle potential and actual conflicts among spouses, other family members and business owners
- Having an adverse interest to the client's interest
- Careless or unsupervised drafting
- Failure to notify of changes in the law
- Failure to revise plan documents when law changes
- Failure to consider tax consequences of estate planning (include estate, gift, GSTT, income, or state taxes)
- Failure to meet deadlines
- Lacking the required level of competence
- Involvement in undue duress or lack of capacity claims
- Failure to add provisions regarding after-born or adopted children, ademption, lapse, payment of debts, exoneration, abatement, tax apportionment, or other essential provisions
- Violation of the applicable rule against perpetuities
- Improper document execution
- Failure to properly execute a disclaimer
- The disgruntled or omitted beneficiary

Many of the issues that often trip up attorneys engaged in estate planning can be mitigated by a sophisticated drafting system like Wealth Docx®, but many others can only be prevented by care, diligence, and experience as the attorney matures in practice.

TEN WAYS TO PROTECT YOUR PRACTICE AND LICENSE

KNOW YOUR CLIENT

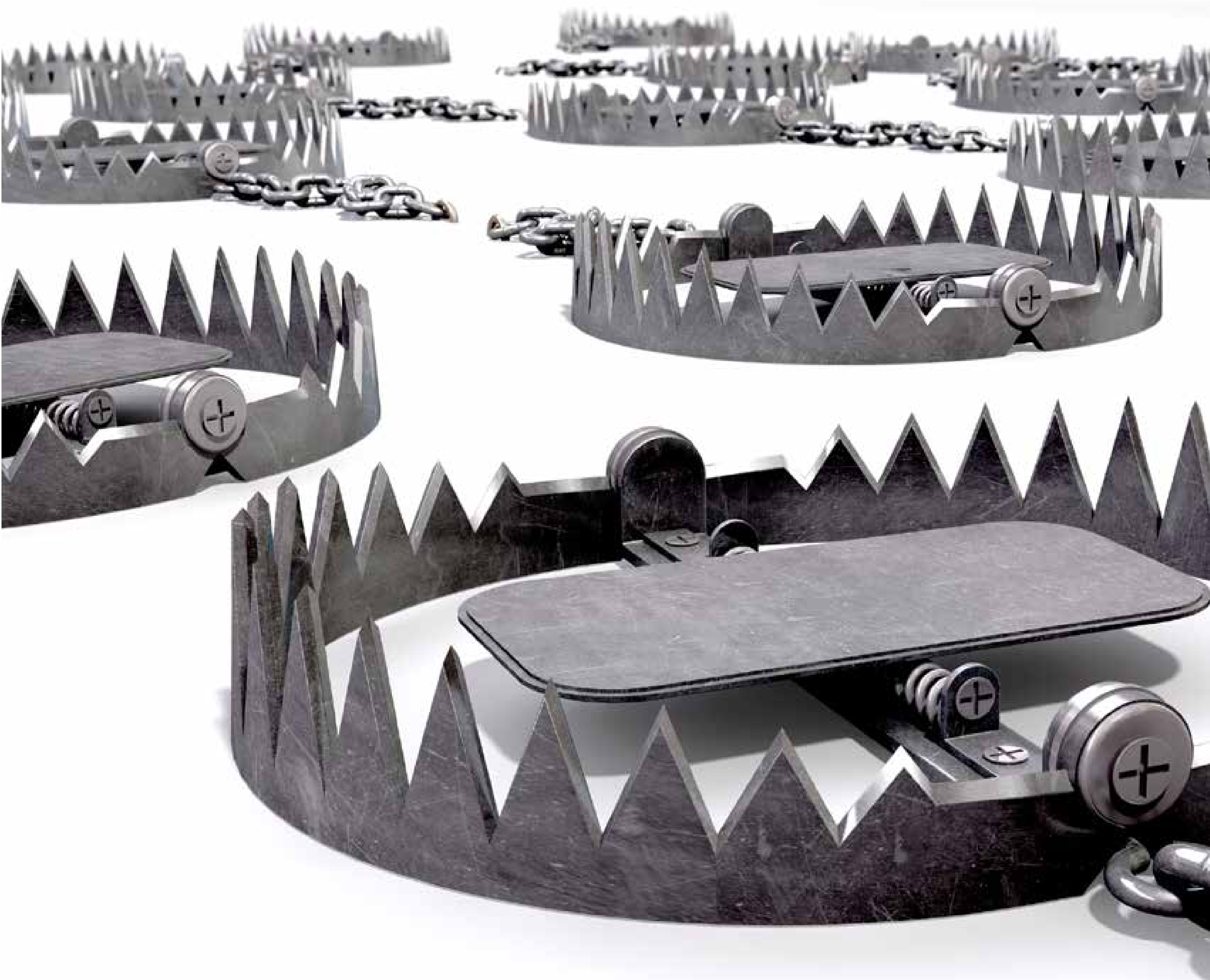
Get to know the new potential client or the former or existing client asking for help on a new project. This cannot be emphasized enough as more often than not, in hindsight, the attorney could have predicted a malpractice action due to the client's personality, unrealistic goals, challenging demands, push back on fees or poor history with other attorneys. New clients come from various sources and each type poses different risks:

1. The unfamiliar potential client who comes from the attorneys' website, blog or advertisement can be very risky because the attorney has no point of reference and has to form his or her own opinion solely based upon the client's story and documentation;
2. The former or current client can create conflicts of interest issues depending on what past services included and what the new requested service includes;
3. The advisor, friend, or client referral can pose risks because attorneys often want to take care of their referral sources; or
4. The friend or family member whose relationship to the attorney causes the attorney to overlook conflicts or to perform additional services such as act as trustee or executor, which may lead to ethical violations and third party claims.

To avoid conflicts, special consideration should be given by an attorney where he or she is representing a husband and wife or family members. Also, when representing a corporation, a limited liability company or partnership, the attorney should explain in writing the identity of the client when it is apparent that the organization's interests are possibly adverse to its directors, officers, employees, shareholders or other members of the organization.

SOLID ENGAGEMENT LETTER

Prepare a solid engagement letter that clearly identifies the client, scope of services, excluded services, conflicts, fees, choice of law and jurisdiction. Carefully consider whether to include required mediation, binding or non-binding arbitration or attorneys' fees clauses, as such clauses can work either for or against the attorney. Keep in mind that in malpractice claims



brought by the client, the engagement letter is often "Exhibit A" with particular focus on the scope of services.

BE MINDFUL

Once an engagement is initiated, always be mindful of every client situation. Actively listen to clients to understand the clients' goals. Carefully establish and maintain reasonable expectations. Consistently report the status of your clients' cases and matters. Clearly discuss fees during the first meeting and document the fees and scope of work (and excluded work) in a formal engagement letter. Keep your client informed (in writing) as important circumstances change. Bill your client promptly and with careful explanation of charges. Demonstrate your commitment to helping your client achieve the goals for which you have been engaged[13] and send a termination of engagement letter upon completion of the matter.

SUPERVISE AND MANAGE

Properly supervise and manage employees or associates and review all conflicts checks, engagement letters, estate plans and other correspondence. Attorneys should explain the estate plan to the client and be available for the legal questions that arise at the estate plan signing meeting.

LEARN AND CONSULT

Maintain and improve your substantive knowledge by attending seminars and reading important publications that impact the trusts & estates industry. If something feels uncomfortable, reach out to an experienced colleague for their independent opinion.

REVIEW THE MALPRACTICE POLICY.

Be familiar with key elements of your malpractice policy: its deductible, individual claim and aggregate claims coverage, covered personnel, covered services and non-covered services (such as investment advice or acting as a trustee for which a separate fiduciary policy should be obtained). If you discontinue your practice or change firms, consider obtaining "tail coverage" since most policies are "claims made." As discussed above, the time for which a malpractice action may be commenced may be many years down the road. Upon learning of a potential claim, consult with your malpractice insurance carries and comply with the notification requirements to preserve coverage. If multiple attorneys are sued on the same claim, and if there is any potential conflict, the policy or state law may provide for cumis counsel whereby an insured can seek independent counsel.[14] Some carriers also issue guidebooks on estate planning or general malpractice information.[15]

CO-COUNSEL ARRANGEMENTS

If you do not have the required knowledge and skill to perform certain services, you may either gain the knowledge to achieve competency, or co-counsel with a more experienced attorney. An attorney who co-counsels on a project should have a written agreement with the performing firm as to whose malpractice policy will cover the subject services for the subject client and if the performing firm's policy will cover the services, then ensure that a rider is issued adding the attorney to the working firm's policy, as well as consider an indemnity agreement for added protection.

One of the many great benefits to being a member of WealthCounsel is that we have thousands of highly experienced trusts & estates and business attorneys in our community. Consider reaching out to another WealthCounsel colleague if you're in over your head with a client matter.

MARKETING MATERIALS

Carefully review your marketing, advertising, and website content. Promotional content may become evidence in a malpractice suit it suggests to the public and client that you are particularly experienced or an expert in the subject area of law. This can be risky as experts are generally held to a higher standard of care.

SOFTWARE.

If you use automated drafting software like Wealth

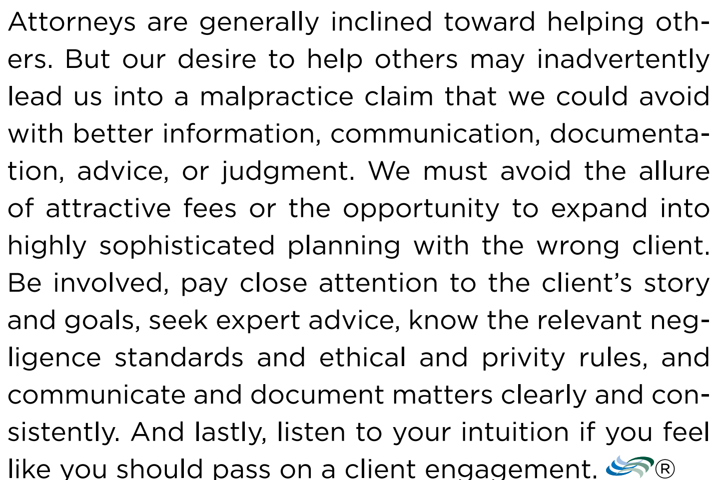
Docx®® to implement estate plans, be sure to fully understand the purpose of each question and the impact of the different answer choices. Always research any topic you're unsure of. Never just guess!

PROCESS AND CHECKLISTS

Create processes or checklists for partners, associates, and staff. Those checklists should cover conflict checks, calendaring systems, how and when to document communications with clients, and proper client file maintenance. When carefully designed and routinely implemented, checklists ensure that every client gets the same experience, and ensure that you and your staff don't deviate from your standard practice.

CONCLUSION

Attorneys are generally inclined toward helping others. But our desire to help others may inadvertently lead us into a malpractice claim that we could avoid with better information, communication, documentation, advice, or judgment. We must avoid the allure of attractive fees or the opportunity to expand into highly sophisticated planning with the wrong client. Be involved, pay close attention to the client's story and goals, seek expert advice, know the relevant negligence standards and ethical and privity rules, and communicate and document matters clearly and consistently. And lastly, listen to your intuition if you feel like you should pass on a client engagement. ®



ENDNOTES

1 For discussion on estate planning ethical considerations, see Kristin Yokomoto, "The Estate Planning Lawyer's Ethical Considerations" https://www.wealthcounsel.com/articles/2016/the-estate-planning-lawyers-ethical-considerations

2 Buckley v. Gray, 42 P. 900 (Cal. 1895).

3 Biakanja v. Irving, 320 P.2d 16 (Cal. 1958); Lucas v. Hamm, 364 P.2d 685 (Cal. 1961), cert. denied, 368 U.S. 987 (1962).

4 The factors considered include: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff had suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the policy of preventing future harm; and (6) whether imposing liability placed an undue burden upon the legal profession. See Lucas v. Hamm, 364P.2d 685 (California 1961), cert. denied 368 U.S. 987 (1962).

5 Under the Florida-Iowa rule line of cases, a beneficiary may maintain a cause of action against the trusts & estates attorney only if the client's intent, as expressed in the will or other document, is frustrated. This limitation is based on courts' traditional reluctance to appeal to parol evidence in will construction proceedings. Applying this principle to the legal malpractice context, courts following the Florida-Iowa rule require the malpractice to be apparent on the face of the will or other document. For the most part, only execution errors are actionable under the Florida-Iowa rule, which means that trusts & estates attorneys are generally immune from liability based on failure to give accurate tax planning advice or errors of law.

6 For discussion of a recent strict privity case in Colorado, see Jennifer L. Villier, JD, "Attorney Liability: Estate Planning and the Strict Privity Rule", https://www.wealthcounsel.com/articles/2016/attorney-liability-estate-planning-and-the-strict-privity-rule

7 For example, in California, the general rule is that such action shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first. (Code Civ. Proc., § 340.6, subd. (a)). Whereas, in Texas, the general rule is that a two-year statute of limitations governs legal malpractice claims. (Tex. Civ. Proc. & Rem. Code Ann. § 16.003).

8 Lavigne v. Chase, Haskell, Hayes & Kalamon, P.S., 50 P.3d 306 (Wash. Ct. App. 2002).

9 Nolan v. Freeman, 665 F.2d 738, 739 n.3 (5th Cir. 1982). The test of whether the attorney-client relationship was formed is the reasonable expectation of the client in light of all the surrounding circumstances.

10 Burnap v. Linnartz, 38 S.W.3d 612, 622 (Tex.App.-San Antonio 2000, no pet.); Kotzur v. Kelly, 791 S.W.2d 254, 258.

11 In re McEnzie, 135 B.R. 869 (Bankr. S.D. Fla. 1991).

12 http://lawterandlawter.com/wp-content/uploads/2011/03/Malpractice-and-Litigation-Involving-Trusts-and-Estates.pdf

13 See "Tips on Client Communications," by Sally Field and Cal Watson of the Great American Insurance Companies, Legal Professional Liability Division as cited in http://www.butler.legal/danger-zone-planning-ahead-to-avoid-legal-malpractice

14 The seminal case in California on when an insurer is required to provide its insured with independent counsel is San Diego Navy Federal Credit Union, et al. v. Cumis Ins. Society, Inc., 162 Cal.App.3d 358 (1984) which was later codified at Cal. Civ. Code § 2860.

15 See http://files.www.lawyersmutualnc.com/risk-management-resources/risk-management-handouts/estate-planning-traps/Estate_Planning.pdf

ABOUT THE AUTHOR

Kristin Yokomoto is the founder of Balanced Legal Planning, APLC which specializes in Estate Planning and Business Planning in Newport Beach, California. Kristin helps her clients by providing plans which balance benefits and risks.