



FIRM NAME: _____

DATE: _____

ESTATES, PROBATE AND TRUSTS UNDERWRITING TIPS & QUESTIONS

Claims made against attorneys who practice in the area of Estates, Probate and Trusts have increased. We have prepared some top tips gathered from common claims scenarios to help you in your practice.

1. **PRIVITY:** Many states have eroded privity so that a non-client beneficiary can successfully assert a legal malpractice claim. Document your file to reflect your client's understanding of the estate plan to support their intent and to defend your legal work in the event of a challenge. *****Remember: An IRA/401k account's designated beneficiaries are determinative as to who gets the IRA/401k's assets, regardless of what is in the independent testamentary documents; beneficiaries should follow your estate plan!***
2. **TAX:** Document your file to reflect that your scope of services does not include tax advice or form filing, including gift tax forms. If these tax forms are an integral part of the estate plan, however, following up on this issue may be prudent as the failure to file these forms often leads to malpractice claims.
3. **CONFLICTS:** Conflict allegations may arise if there is an appearance that your loyalty was split. Keep children and/or beneficiaries out of the room and off correspondence. Be specific in your engagement letter as to who you are (and are not) representing.
4. **UNDUE INFLUENCE:** Be cautious if an elderly or ill client requests a change to a long-held estate plan, especially if the new plan negatively effects a child's inheritance or provides for individuals who are outside the family. In such a situation, you should be prepared to defend undue influence or duress allegations.
5. **TRUSTEE:** Carefully consider all risks before agreeing to serve as a Trustee or Executor. Serving in such a capacity includes much critical oversight. It is good practice to seek Court approval of every action you take, even if the heirs or beneficiaries are aligned and appear to be getting along. Avoid hiring your own law firm to serve as counsel for the trust/estate to avoid conflict of interest allegations.
6. **ELDER ABUSE:** In California, recent legal malpractice claims arising out of estate work have included financial elder abuse allegations. Take special care in documenting communications with elderly clients so that there is a clear paper trail as to what was conveyed to the client and what the client instructed. Attorneys should also be particularly cognizant of capacity and duress issues that arise more frequently with the aging population. *****Remember: Document your assessment of your client's capacity in accordance with your state's criteria/guidelines.***

We now request additional information relating to Estates, Probate and Trusts:

1. What is the highest value of any one Estate or Trust that is handled in any capacity by the insured law firm? _____
2. How many Estates are \$5,000,000 or greater for which the firm provides services? _____
3. How many Trusts are \$5,000,000 or greater for which the firm provides services? _____

Signature of Firm Principal

Print Name of Firm Principal

Date