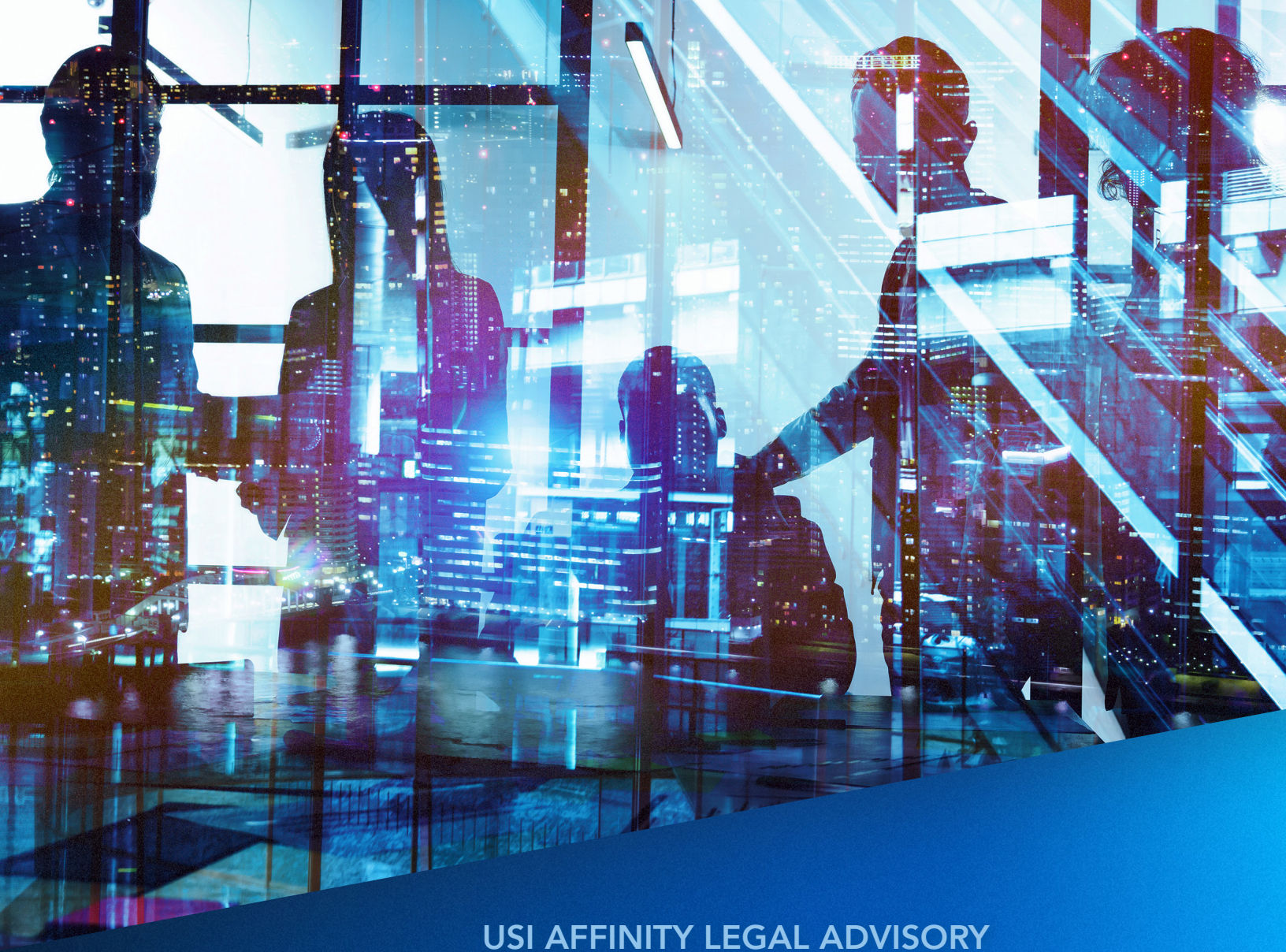

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The Continued Rise in Trusts & Estates Claims Against Attorneys and Considerations for Avoiding Them

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Since the American Bar Association ("ABA") began tracking figures in the early 1980s, professional liability claims against attorneys have been steadily on the rise nationwide. Every four (4) years, the ABA's Standing Committee on Lawyers' Professional Liability publishes a Profile of Legal Malpractice Claims study (the "Study")[1], the most recent of which was released in late September 2020. For this Study, which surveyed claims from 2016–2019, estate, trust, and probate claims were the fourth most frequent claim type, accounting for 11.98% of all reported claims. Although this was 0.07% less than the 2012–2015 Study, it represents a nearly 75% increase from the ABA Study published in 1985.[2] Smaller firms with five (5) or fewer attorneys and solo practitioners in particular were acutely impacted.[3]

If current trends hold, it is likely that this number will continue to rise in the coming years. Even accounting for what we know of the devastating effects of the pandemic, humans are still living longer than ever thanks to continued advances in medicine and science. In 2022, life expectancy at birth was 77.5 years for the total U.S. population, an increase of 1.1 years from 76.4 years in 2021.[4] Compare this to a child born in 1970, with an average life expectancy of 70.8 years.[5] The huge surge in birth rates just after the end of World War II (and more generally between 1946 and 1964), combined with the rising economic prosperity seen in the middle and upper class, has resulted in a larger generation of older Americans, more deaths at advanced ages, and the highest transfer of wealth than at any other time in this country's history. An older population, sometimes known as a "Silver Tsunami," also translates into a greater incidence of dementia and Alzheimer's disease, raising questions of mental capacity, elder abuse and undue influence when estate plans are unexpectedly or abruptly changed. In 2024, an estimated 6.9 million Americans age 65 and older are living with Alzheimer's, or about one in nine people (10.9% of the population).[6]

As the subset of older Americans gets larger and larger, there are naturally more wills, trusts, and estate planning devices being utilized. A family member's passing more often than not leaves heirs and beneficiaries in a highly emotional state, and issues – either real or perceived – in the distribution or administration of an estate often result in the attorney draftsperson/representative being blamed. This is particularly true where there is a large number of heirs and beneficiaries arguing over an estate, where a decedent with a sizable estate dies without a will, or where there is real property involved. There has also been a rise in claims against attorneys involved with an underlying estate litigation, and/or act in a fiduciary capacity over estates and trusts.

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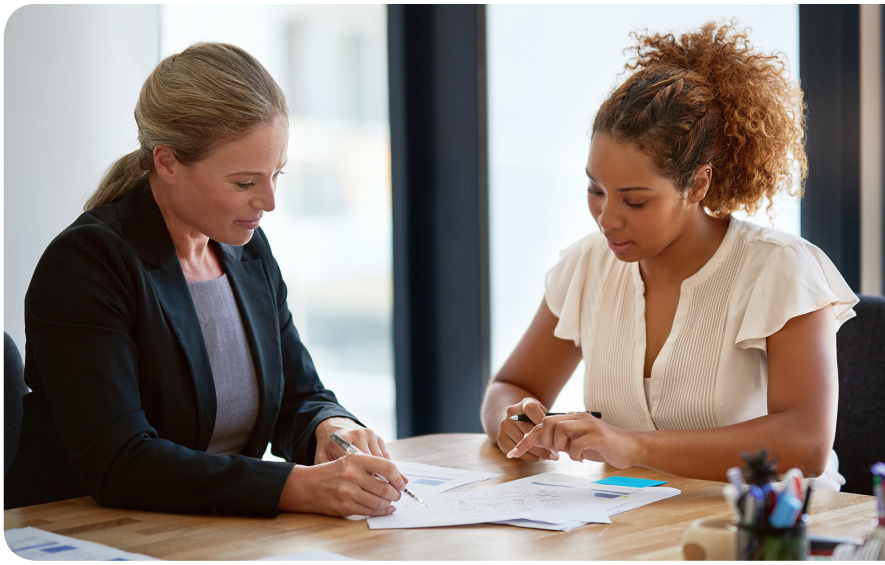
The most common form of malpractice claim against trusts and estates practitioners continues to be when a beneficiary claims that they have received less of decedent's assets than they believe they were entitled to, but for the alleged negligent drafting or advice on the part of the attorney. Less common, but still frequent, are instances of scrivener's errors (drafting omissions such as failing to include a residuary clause or a self-executing affidavit where witnesses predecease the decedent) and failing to appreciate various tax consequences.



Varying levels of general protection are afforded trust and estate attorneys, depending upon the jurisdiction. States such as New Hampshire and Montana afford the least level of protection, and burden the attorney with a duty of care towards non-client beneficiaries, under the theory the retention's primary purpose is to ultimately benefit the natural object of the decedent's bounty. In California, a client's intent to benefit a non-client must be clear, certain, and undisputed in order for the lawyer to owe a duty of care to the non-client; where the facts are ambiguous, no claim for malpractice will lie.[7] In Florida, an attorney is liable to non-client beneficiaries only when the decedent's intent has been frustrated and the negligence is clearly evident within the four corners of the trust document or last will and testament.[8]

States which follow the strict privity rule, such as Ohio, foreclose malpractice lawsuits from non-client beneficiaries even in cases of clear negligence, assuming the lawyer has not acted outside the scope of a clearly defined attorney-client relationship. Of course, the strict privity rule does not protect against an attorney's fraud, collusion or other malicious act. Some states have slightly relaxed the strict privity rule in recent years. For example, in recent years Texas has carved out increasing exceptions to its strict-privity rule.[9] Pennsylvania now permits intended third-party beneficiaries to sue a drafting attorney for malpractice. New York[10], another state which held firm to the strict-privity rule for many years, now permits an estate's executor or administrator to assert a malpractice claim against the estate planning attorney, under the theory that they stand in the shoes of the decedent; however, this rule has not yet changed to include non-client beneficiaries or prospective beneficiaries.

Given the continued rise in these types of claims and the fact that 80 percent of attorneys (irrespective of level of experience) can expect to be sued at least once during their professional lifetime, trusts and estates attorneys should be particularly vigilant in order to protect their clients, as well as themselves. Beyond keeping abreast of the law and avoiding scrivener's errors, the most important protective measure is direct, frequent and documented communications and disclosures, as the greatest number of claims against attorneys are due to poor communication or miscommunication.

Additionally, practitioners should be particularly cognizant of their cybersecurity, as lawyers today – whether they know it or not – are subject to an alarming level of increasingly sophisticated electronic attacks. These range from phishing and spoofed emails to the breach of a firm's systems by a bad actor. These hackers often gain unauthorized access and lie in wait, striking just prior to the transfer of a real estate parcel or building owned by an estate by circulating false wiring instructions

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and absconding with millions in sale proceeds. In general, a trusts and estates practitioner must clearly and specifically define the client and scope of services to be performed in his or her retainer letter. All communications to the client should also be documented in writing to the greatest extent possible. If drafting a testamentary or *inter vivos* document, a careful attorney will insist that their client clearly document their wishes, and triple check the instrument to ensure it matches with the client's wishes. This "best practices" communication rule should ideally be extended even further. For instance, an attorney should encourage their clients to make full disclosures regarding their estate plan to beneficiaries and non-beneficiaries alike. This should be strived for particularly where the client intends to make disproportionate distributions of his or her assets, and will help prevent estate disputes which could ensnare counsel.

Although there is no way to entirely eliminate the exposure from these types of claims, taking considered steps to be more careful and communicative can prevent a trusts and estates practitioner from becoming another malpractice statistic. ■

This article was prepared by Andrew R. Jones, Aaron M. Barham, and Victoria Yachkouri of the New York City-based law firm of Furman Kornfeld & Brennan LLP. Shari is part of a team of over 40 lawyers and paralegals devoted to the defense of attorneys and other professionals in malpractice and disciplinary matters, as well as the defense of construction and personal-injury accidents. For more information about the above topic or the authors, please visit: www.fkblaw.com.

Notes

[1] The Study relies on voluntary reporting by eight (8) commercial legal malpractice insurance carriers and eleven (11) insurance-company members of the National Association of Bar Related Insurance Companies.

[2] According to the Study's history, estate, trust, and probate claims accounted for the following percentages of all professional liability claims: 6.97% from 1981–1984, 7.59% from 1991–1994, 8.67% from 1995–1998, 8.63% from 1999–2002, 9.68% from 2003–2006, 10.67% from 2007–2010, 12.05% percent from 2011–2014, and 11.98% from 2016–2019. The latest Study is expected to be released in Fall 2024, and it remains to be seen how the COVID-19 pandemic will impact these figures.

However, in another more recent study released in May 2024, insurance broker Ames & Gough polled thirteen (13) leading lawyers' professional liability insurance companies and found that "[f]or multiple years, the survey has found the same three practice areas generating the largest number of legal malpractice claims. Among insurers polled this year, 62 percent identified Trust & Estate, while Business Transactions was identified by the same percentage, followed by Corporate & Securities (46%)."

[3] An estimated 94.9% of the legal profession is comprised of firms with fewer than twenty (20) employees.

[4] Kochanek, Murphy, Xu, & Arias, CDC National Center for Health Statistics, Data Brief No. 492, March 2024, *Mortality in the United States, 2022,* available at https://www.cdc.gov/nchs/data/databriefs/db492.pdf

[5] Xu, Murphy, Kochanek & Bastian, CDC National Vital Statistics Reports, Vol. 62, No. 2, February 2016, *Deaths: Final Data for 2013,* available at http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_02.pdf

[6] Alzheimer's Association, *2024 Alzheimer's Disease Facts and Figures,* available at https://www.alz.org/media/documents/alzheimers-facts-and-figures.pdf

[7] See *Gordon v. Ervin Cohen & Jessup LLP,* 88 Cal. App. 5th 543 (2023).

[8] See *Ellerson v. Moriarty,* 331 So.3d 767, 770 (Fla. 2nd DCA 2021), citing *Hare v. Miller, Canfield, Paddock & Stone,* 743 So.2d 551, 553 (Fla. 4th DCA 1999).

[9] See *Barcelo v. Elliott,* 923 S.W.2d 575, 577 (Tex. 1996) (following the strict-privity rule); see also *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.,* 192 S.W.3d 780, 783 (Tex. 2006), where the Texas Supreme Court held that an estate's executors (which may not be formally appointed for many years after a will is drafted) may sue the attorney who drafted a will and advised the testator on asset management.

[10] See *Estate of Schneider v. Finmann,* 15 N.Y.3d 306 (2010); *Phillips v. Murtha,* 215 A.D.3d 408, 410 (1st Dept. 2023) ("The relationship between an estate planning attorney and a prospective beneficiary under a will and/or trust does not in and of itself give rise to a fiduciary duty owed by the attorney to the prospective beneficiary.").