Drafting Attorneys and Litigation Attorneys Need to Collaborate

By Michael Sneeringer[i]

Solo practitioners and smaller law firms practicing trusts and estates law often specialize in either the planning or litigation of estate plans. For some trusts and estates drafting attorneys ("drafting attorney") the situation often is as follows: (i) take a client that poses problems and hope the case does not lead to litigation down the line (wherein the drafting attorney attempts litigation his or her self); or (ii) simply not take on the engagement at all and pass on the case to a trusts and estates litigator ("litigation attorney"), thereby hoping that the litigation attorney one day returns the favor with a referral. Instead, the drafting attorney should collaborate with the litigation attorney. This relationship is of mutual benefit to both attorneys.

This article provides eight scenarios where the drafting attorney can be of help to the litigation attorney and underscores why collaboration is absolutely necessary.

A) Why Collaborate?

Drafting attorneys often do not litigate, but if they did, they would have ideas on how to attack the general validity and effectiveness of existing estate planning documents such as a will or a trust. The drafting attorney, even without courtroom experience, can still be of benefit to the seasoned litigation attorney. Many drafting attorneys are cognizant of the various errors that can befuddle estate plans, which such information can be extremely important to the litigation attorney. The litigation attorney does not have to spend countless hours conducting research, or waiting on a subordinate to do the research, because, presumably, the drafting attorney already knows the answers.

Moreover, the litigator does not have the time or skill set (in some cases) to draft documents for that same litigious client who just walked in the door. Thus, a quid-pro-quo relationship develops, whereby the drafting attorney refers the client to the litigation attorney (for purposes of taking on the litigation matter), in return for the litigation attorney later referring the very same client back to the drafting attorney (to draft estate planning documents following what hopes to be a successful litigation or settlement). If the client is a current client of the drafting attorney, then the client will appreciate the drafting attorney's added value in relying on an expert litigator instead of taking on the litigation his or her self.

A collaborative relationship is best when two people bring two very different sets of skills to the table. This article explores eight collaborative scenarios and, in each scenario, it is contemplated that a new client has approached the drafting attorney for advice (not a current client of the drafting attorney whereby the errors would be the fault of the drafting attorney):

1) Undue influence. This scenario involves a home healthcare aid, relative, or sometimes a complete stranger suddenly becoming a beneficiary under a deceased parent's estate planning documents, or being names the trustee of a deceased parent's trust or the executor of a deceased parent's will (or worse, both!). This situation is a direct result of the United States' aging population. Many baby-boomers and members of America's "Greatest Generation" are susceptible to elder abuse and undue influence. Previously, divorce rates were lower, children lived close to home and people did not live as long. Today, the opposite is true. As people grow older, many do so without proper supervision by others in a family setting. Such an absence of "love" and

“companionship” ultimately leaves the elderly isolated and vulnerable to third parties seeking an inappropriate relationship in order to be compensated.

While each state has different laws governing causes of action against those who take advantage of others for financial gain and such a discussion is outside the scope of this article, the alert drafting attorney should be able to spot facts which may suggest duress, force, coercion or fraudulent contrivance to the extent whereby there is a destruction of the free agency and willpower of the testator/testatrix or grantor/settlor. The drafting attorney should turn over such a case to the litigation attorney in order for the seasoned litigator to review the facts and create a plan of action to invalidate the documents drafted when “mom” was caught in a weak moment and made an in-home caregiver the beneficiary, trustee, executor, etc.[ii]

2) Drafting for changes in the law. This scenario occurs when an estate planning document, such as a revocable trust, contains references to old provisions in the Internal Revenue Code, such as a prior unified credit amount*,* that ultimately leave one or more trusts overfunded for one beneficiary and underfunded for another. Usually the scenario involves a spouse from a second or third marriage receiving more or less money than the children from a first marriage.

Many clients have documents drafted with old governing laws. For example, the unified credit amount is currently $5.34 million, indexed for inflation. As this number increases, bequests in trust may often be under or over funded, causing unnecessary estate, gift or income tax consequences. Such problems are prevalent where a client refuses to update his or her previously drafted documents.

The litigation attorney may be able to show that the errors in the drafting document error the fault of an unsophisticated drafting attorney. A prudent attorney addresses this issue with annual client updates with existing clients. It is the lackadaisical attorney who continues to leave client documents in limbo where this issue becomes a matter that the litigation attorney can pounce on. The litigation attorney is usually better suited to know whether a cause of action may exist for such poor planning and the drafting attorney is then able to collaborate and brainstorm with the litigation attorney as to what may have been a better plan of action with regards to the decedent's trust document.[iii]

3) The conflicting pre-nuptial agreement. This scenario occurs because according to a married couple's pre-nuptial agreement, one spouse was to receive a benefit upon the other's death; however, the original drafting attorney never included the corresponding provision in the estate planning documents of either of the spouses, ultimately precluding one spouse from a very generous benefit that he or she expected.

The institution of marriage has changed dramatically. Today, the divorce rate is rising, while also, a greater percentage of the population is on a second or third marriage. As such, today's married couples are consistently entering into pre-nuptial and post-nuptial arrangements. It is the drafting attorney's responsibility to ask clients if they have entered into such arrangement(s), prepare documents providing for the provisions in such arrangements and where necessary, consult the family law attorney that has prepared such arrangement. If the drafting attorney counsels an aggrieved second marriage client following a death, and notices the lack of coordination between pre/post nuptial arrangements and the estate planning documents, the litigation attorney

should be consulted immediately before assets are distributed. The litigation attorney will know what cause of action to bring, and the drafting attorney will know the holes in the original estate planning documents for the litigation attorney to attack. [iv]

4) The know-it-all. This scenario occurs because one sibling bullies the other siblings following the death of the second parent. Either a sibling threatens to sue the other siblings or starts to take assets without the consent of the other siblings.

The drafting attorney happens to have a client consultation with a distraught family member who feels bullied by other beneficiaries and/or fiduciaries. Often, the drafting attorney will need the help of the litigation attorney to apply pressure and reason to the situation so as to provide a friendly (or sometimes antagonistic) push back to the bullying beneficiaries and/or fiduciaries. This family situation often produces bad feelings and bad results; however, your client is always the number one priority. It may be that the attorney is defending the reasonable party or the bullying party. It is important that the drafting attorney knows when to call on the litigation attorney before things get ugly. The litigation attorney is best suited to help the client enforce his or her rights to the assets, and probably has more experience consoling and reasoning with the aggrieved party in this situation.[v]

5) Substance abuse. Usually, this scenario occurs because the family is concerned that one of the beneficiaries has a substance abuse problem and will not be able to handle the assets; however, a parent, who is the testator/testatrix or grantor/settlor, it may be that the parent or the trustee/executor has the substance abuse problem,

While the drafting attorney can draft around beneficiaries who are known to have substance abuse problems during the lifetime of the grantor/settlor or testator/testatrix, upon the client's death, when the assets are to be distributed pursuant to the terms of the documents, the distributions may be years later and circumstances change, sometimes for the worst. The litigation attorney's role here is to protect the assets from the worrisome beneficiary and protect the beneficiary from his or her self: is it time to Baker Act the beneficiary or stage an intervention? The drafting attorney may have little to no experience in this area and thus the litigator needs to become co-counsel. The biggest worry is that after distributing all of the assets, including the assets to the "problem" beneficiary, the beneficiary may later find sobriety (or other epiphany/"come-to-Jesus" moment) and sue the drafting attorney for letting him or her plunder his or her inheritance. The litigation attorney will have dealt with this situation previously, know how to use the laws in the particular state to protect the beneficiary (from his or her own self-destruction) and understand how to handle the overall family dynamic with regards to the particular situation.[vi]

6) Family/friend fiduciary. In this scenario, a family friend or advisor is put in charge as the trustee and executor. This scenario occurs because either the decedent did not trust the beneficiaries to cooperate and marshal the assets upon his or her death, or the estate plan was created when the beneficiaries were minors so there were no other qualified individuals to serve as fiduciaries. In either case, the problem is that the decedent named an individual who is unqualified, or even "unfit" to act in such a fiduciary role, particularly when there are significant assets in play.

Drafting attorneys often come to the initial client meeting of aggrieved family members and learn that the accountant or family friend is the fiduciary in charge because he or she was the decedent's "confidant." Often this fiduciary does not know the children, but does not want to give up his or her role. Why? Either the fees involved are too good to pass up or the decedent had a verbal agreement with the confidant that he or she would serve as a fiduciary, no matter what. Here, the drafting attorney may need the litigation attorney to call on the fiduciary and the fiduciary's attorney to work out a scenario whereby a more qualified person or institution can be brought in or some other arrangement agreeable to the family can be reached. Additionally, where the unsophisticated person is put in charge and begins on an acceptable course of administration, but later gets behind in filings (for example, the tax returns or the annual accountings to beneficiaries), the litigation attorney would also step in to initiate a change. The decedent may have had the best of intentions; however, once the breadth and depth of the work involved is realized, suddenly, the named fiduciary is not the best choice. The drafting attorney will not have all the resources nor know of all the administrative hurdles to jump through in order to replace the fiduciary; the litigation attorney will understand state law and what course of action to take.[vii]

7) Major drafting errors. This scenario occurs because a decedent had an estate plan either drafted online or by an attorney who does not specialize in estate planning. The drafting attorney can spot the errors, and then bring in the litigation attorney to organize a plan of attack: is court action necessary; will all of the beneficiaries and fiduciaries agree to a certain course of action? This scenario represents the most common way for the drafting attorney to start a beneficial

relationship with the litigation attorney. The drafting attorney can help the litigation attorney and then assist when the aggrieved beneficiaries later need their own estate planning documents drafted or other necessary services.

Another key in this scenario is that if an older client engages the drafting attorney during his or her life with badly drafted documents, a new plan must be created as soon as possible. For example, if the client dies during the new engagement with the old documents in place, his or her beneficiaries may initiate litigation with the new drafting attorney under the pretenses that the new attorney should have recognized the old documents were bad and immediately created a new plan, no matter how new the engagement. Often, the new drafting attorney can prevail, showing that the client was slow to move the engagement forward; however, the drafting attorney will have been dragged through the litigation mud in the meantime… It behooves drafting attorneys to immediately recognize the severity of the situation and move quickly to create new documents. The beneficiaries will recognize the drafting attorney's attention to the matter and may later applaud the drafting attorney's speed and attention. If the drafting attorney is unsuccessful and the client dies before the documents are signed, a good litigation attorney can help protect the drafting attorney. [viii]

8) The Snowbird. The final scenario occurs when clients from a northern state move to a southern state, with advantageous tax laws, for winters or permanently. If the former state law is irrelevant and the decedent has old documents but is properly considered to have lived out the rest of his or her life in the new state, no problems may exist. Issues arise when the decedent had sufficient ties to the prior state to be deemed

a domiciliary or resident of such former state, in which case the litigation attorney may need to be consulted, especially a litigation attorney who practices in the former state.

Some states, including New York, may assert issues such as domicile in that former state for state income and inheritance and/or estate tax issues. Property may need ancillary administration in a host of other states. While ancillary administration issues and laws of states are outside the scope of this article, the prudent drafting attorney must find the right people in order to properly devise property left in the former state. The litigation attorney may have work to do in order to argue that the decedent that did not have significant ties to the former state in order to avoid the tax issues being litigated and collected by the former state. This is a good thing for the drafting attorney because, under this set of facts, the drafting attorney is able to use contacts in other states in order to properly close the estate. This opens up a whole new world of cross state referral sources and communications for the drafting attorney.[ix]

B) Conclusion

The scenarios previously presented are ripe for collaboration between the drafting and litigation attorneys. When the drafting attorney his little to no experience as a litigator, a do-it-yourself approach can prove problematic and only leads to a litigator eventually getting involved, so why not be proactive and collaborate?

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[ii] For additional resources regarding undue influence, see Kirch, Balancing Discretion to Give and Undue Influence Concerns, 38 EST. PLAN J. 28 (Aug. 2011).

[iii] For articles discussing the transformation of laws and how estate planners can plan under uncertainty, see generally Franklin & Law, Portability's Role in the Evolution Away from Traditional By-Pass, 37 EST., GIFT & TR. J. 135 (Mar. 2012); Scroggin, Estate Planning to Cope with the Current Legislative Uncertainty, 34 EST. PLAN J. 10 (May 2007).

[iv] For another resource on the topic of family law pitfalls and estate planning, see Pankauski, When Worlds Collide: The Interplay Between Family Law and Probate Administration, 27 PROB. & PROP. 59 (Jan./Feb. 2013).

[v] For articles addressing the family dynamics associated with estate planning , see Fisher, The Power Tools of Estate Conflict Management- Recharging the Culture of Estate Conflicts, Part 2, 24 PROB. & PROP. 42 (July/Aug. 2010); Fisher, The Power Tools of Estate Conflict Management- Recharging the Culture of Estate Conflicts, Part 1, 24 Prob & Prop 42 (May/June 2010); Folberg, Mediating Family Property and Estate Conflicts-Keeping the Peace and Preserving Family Wealth, 23 PROB. & PROP. 8 (Nov./Dec. 2009).

[vi] For an additional resource on planning for substance abuse issues , see Gassman, Piper & Fala, Prescription to Adapt Estate Plan to an Addicted Beneficiary, 40 EST. PLAN J. 15 (Dec. 2013).

[vii] For more resources on the fiduciary dilemma , see Ebner, Shutting Down a “Fiduciary” Who is Misusing Trust Assets, 27 PROB. & PROP. 35 (Jan./Feb. 2013) and Llewellyn II, Selecting a Successor Trustee- Why the Usual Suspects May Not Be Your Best Choice, 27 PROB. & PROP. 46 (Jan./Feb. 2013).

[viii] For an article addressing the perils of budget conscious estate planning , see Goffe & Haller, From Zoom to Doom? Risks of Do-It-Yourself Estate Planning, 38 EST. PLAN J. 27 (Apr. 2011).

[ix] For a comprehensive article on changes in domicile and its effects on estate planning, see Brogan Jr. & Ross, Changing State of Domicile is Easier Said Than Done, 39 EST. PLAN J. 3 (July 2012).