

Nice Guys Finish Last in Wills and Estate Planning

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Here are two cautionary tales about how wills and estate-planning attorneys can be caught in circumstances beyond their control and end up with unwarranted legal malpractice claims.

The lose/lose situation. The following facts unfolded within a 48-hour period: Son requested Lawyer's assistance in revising the will of Mother, who was in the hospital at the time suffering from cancer. Neither Son nor Mother had been clients of Lawyer before. When Son initially approached Lawyer, Mother's condition was serious, but she was not in immediate danger of death. Lawyer met with Mother in the hospital and she confirmed that she wanted to revise her will to name her only child, Son, as the sole beneficiary, rather than Niece who was the current beneficiary under the will.

Several years earlier, Mother had written Son out of her will to protect her estate from Son's spouse while Son was going through a divorce. Niece was the sole child of Mother's deceased and only sibling and had a close relationship with Mother.

After meeting with Mother, Lawyer promptly contacted the attorney who had drafted the current will and requested a copy. Previous Attorney provided Lawyer with a copy of the will only after speaking with Mother and obtaining her permission – a process that took several hours.

Upon reviewing the current will, Lawyer discovered that it referred to a pour-over trust. Son was unable to provide Lawyer with a copy of the trust or any details regarding the trust. At that point, Lawyer specifically told Son that Lawyer did not feel comfortable revoking the trust without knowledge of its contents.



Confused elderly parents, estranged (and strange) children – estate-planning practice can pose serious malpractice risks for the best of lawyers. Here's what to watch for.

In the meantime, Mother's condition worsened. Consequently, the parties agreed to revise the will first and have Lawyer evaluate the trust as soon as she received a copy of the trust documents. Lawyer revised the will, brought it to the hospital, and Mother signed it. Hours later, Mother died. At the time of death, Lawyer had still not obtained a copy of the trust from Previous Attorney, who is now counsel for Niece.

After discovering that a majority of Mother's assets were held in trust, Son sued Lawyer for failing to revoke the trust. Son of course had no recollection of the critical conversation between Son and Lawyer regarding Lawyer's reluc-

tance to revoke the trust without further information. This was a classic no-win situation for Lawyer; even if Lawyer had revoked the trust, Niece undoubtedly would have challenged the move, either questioning Mother's competency or alleging undue influence on the part of Son.

Appreciative client or confused victim? Elderly Client was wheeled into Lawyer's office by Client's caretaker, Daughter. Daughter indicated that Client

desired to revise his will so that the bulk of his estate would pass to Daughter upon his death. Lawyer had previously represented Daughter in the sale of her condominium and one other minor legal matter, but had never performed legal services for Client. According to Daughter, Client's other children had virtually abandoned their father and Client wished to pay Daughter back for her kindness.

Outside of the presence of Daughter, Lawyer briefly interviewed Client. Lawyer asked Client if his intent was to leave the majority of his assets to Daughter to the detriment of his other offspring, and Client answered in the affirmative. While Client was physically frail, he appeared mentally alert and well cared for. Lawyer therefore could see no reason why the will should not be revised as requested.

Three weeks later, Daughter again brought Client into Lawyer's office to execute the will. A few months later, Client passed away. After learning of the revised will, Client's other children filed a legal malpractice claim against Lawyer. The suit alleged that Lawyer was or should have been aware that Client was incapable of giving an informed consent or, alternatively, that

Client was subject to undue influence by Daughter.

Familiar scenario. Similar scenarios are played out daily as America's elderly population grows. In the vast majority of cases, the client is lucid and the beneficiaries are decent people without questionable motives. In other situations, however, family animosities, greed, the unpredictable effects of Alzheimer's, or an untimely death can expose a good lawyer to a frivolous malpractice claim. Lawyers must learn how to recognize risky situations and how to minimize the risks.

As a general rule, precautionary measures should depend on the circumstances – the more drastic the client's hoped-for action or the greater the time pressure, the more safeguards the lawyer should put into place. In particular, lawyers may want to consider the following extraordinary measures:

1. Be wary of strangers who request major changes to documents drafted by another attorney. Is there a reasonable explanation for why the client/ caretaker/beneficiary is in your office rather than the original drafter's? The more drastic the revisions, the more your antennae should quiver.

For example, it appears clear in hindsight that Son's decision to engage Lawyer rather than Previous Attorney was a calculated move. And the trusting Lawyer played right into Son's hands.

2. Watch out for situations that could later generate conflict-of-interest allegations. Although Lawyer's previous representation of Daughter in the second scenario did not create a conflict, that charge may be leveled later. You may want to obtain a conflict waiver before proceeding.

It may be that Lawyer let down her guard in the second claim because she was acquainted with Daughter. After all, most of us would never believe that someone we know is capable of such despicable conduct – only strangers prey on the sick and vulnerable.

3. If significant time constraints are involved, limit and clarify the scope of your representation in writing. For example, Lawyer in the lose/lose situation could have confirmed in an engagement letter that she (1) would only be revising the will, (2) would not be revoking the trust until she had reviewed it and discussed its contents with her client, and (3) had told Mother – and Mother understood – that her intent in revising the will could be adversely impacted by the trust. Alternatively, Lawyer could have informed her client in writing that the representation would not begin until she had a copy of both the will and the trust.

4. Attorneys who fear informed consent problems or undue influence claims have several alternatives available. First, you can request a statement from the client's treating physician

(with the client's permission) about the client's competency to make decisions. For a hospitalized client, the physician's statement should not be difficult to obtain. If your client is offended by this precaution, you can explain that without such documentation the client's actions could later be challenged. You can also seek a court determination about the client's mental health, but this approach generally requires more time and expense.

As an alternative safeguard, you can require a second meeting with the client on a date and time selected by you, not the caretaker. This procedure may reveal that the client is lucid one day and confused the next. Another option is to meet with the client at his or her home, preferably with a witness from your office. The client's living conditions may allay your concerns – or heighten them. If either the client or the caretaker rebuffs these suggestions or repeatedly cancels scheduled meetings, you may want to take additional precautionary steps.

Another way to combat undue influence or incompetence charges is to videotape client conferences. In the presence of witnesses, you can ask the client to explain the changes he has requested in his own words.

5. Whenever a client is requesting major revisions to a will or estate plan, you should draft a detailed statement of the changes *and their consequences*. Then read the statement to the client (or, if