



Recent Legal Malpractice Issues for Estate Planning and Probate Lawyers: Sunrise or Sunset for the Practice?

Bruce A. Campbell¹

This year the Texas Supreme Court once again revisited the issue of who can sue estate planning or probate lawyers for malpractice. The Court's decision in *Belt v. Oppenheimer, Blend, Harrison, & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006) has caused many practitioners concern that they will have open-ended liability for the remainder of their lives, and potentially for their estates. There are fears that the potential exposure recognized by *Belt* will not be insurable. As discussed below, there are at least two ways to view *Belt*, as the sunset that will drive some practitioners from the practice. On the other hand, *Belt* could be just a new way for well-informed practitioners to separate themselves from those who do not regularly practice in the area.

THE BATTLE OVER WHO CAN SUE YOU

Texas, unlike the vast majority of states, protects estate planning and probate lawyers ("Estate lawyers") from claims by disgruntled beneficiaries. *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex.1996). In *Barcelo*, the Supreme Court found that even though a lawyer always owes a duty of care to a client, no such duty was owed to a non-client beneficiary, even if they are damaged by the lawyer's malpractice. The policy reason behind the *Barcelo* decision was that threats of suits by disappointed heirs after a client's death could create conflicts during the estate-planning process and divide

the attorney's loyalty between the client and potential beneficiaries, thus compromising the quality of the lawyer's representation. *Id.* at 578. The Court also noted that claims brought by disgruntled beneficiaries would necessarily require extrinsic evidence to prove how a decedent intended to distribute the estate, creating a "host of difficulties."

Nevertheless, since 1996 when *Barcelo* was decided, there have continued to be efforts to attack Estate lawyers by beneficiaries. One of the most effective ways for beneficiaries to try to gain entrance into the circle of privity with the Estate lawyer has been to point to the actions of the lawyer and assert that the lawyer's conduct evidenced a clear agreement to undertake to represent the beneficiaries. *Vinson Elkins v. Moran*, 946 S.W.2d 381 (Tex. App.-Houston [14th Dist.] 1997; writ dismissed by agr.) (attorney client relationship established with beneficiaries based upon the lawyers advised them on estate administration; on four distinct legal issues; the beneficiaries attended multiple meetings at the law firm and the law firm held itself out as representing several of the beneficiaries and the beneficiaries paid part of the firm's legal fees.). *Moran* is a good example of conduct that will allow beneficiaries to establish that the attorney client relationship was in fact extended beyond the original client, the testator, to include the beneficiaries.

THE EXPANSION OF WHO CAN SUE

This year in *Belt v. Oppenheimer, Blend, Harrison, & Tate, Inc.*, 192 S.W.3d 780 (Tex. 2006) the Texas Supreme Court clarified that the executors of an estate may sue the lawyer who drafted a will and advised the testator on asset management.² In *Belt*, the question presented was whether the *Barcelo* rule bars claims brought on behalf of the decedent client by his estate's personal representatives. In allowing the personal representatives to bring suit, the Court recognized that in Texas an estate's personal representative has the capacity to bring a survival action on behalf of a decedent's estate. The Court found that the estate's personal representatives could bring the malpractice claim if the claim survives the decedent. The Court noted that because there is no statute that determines whether a legal malpractice claim survives death that the Court would look to common law. The Court noted that absent a statute providing the contrary, a cause of action that is penal or personal in nature typically does not survive, although claims that are contractual in nature or affect property rights survive the death of either party. *Id.* at 784. The Court pointed out that it

had never considered whether a legal malpractice claim in the estate-planning context survives a deceased client, but reasoned that such a claim focused on the improper depletion of the estate and involved an injury to the decedent's property. The Court re-emphasized its prior ruling in *Douglas v. Delp*, 987 S.W.2d 879 (Tex. 1999) pointing out that when a client sued for financial loss the client was not permitted to recover damages for mental anguish or other personal injuries.

In *Belt*, the Court ruled that estate-planning malpractice claims seeking recovery for pure economic loss are limited to recovery for property damage. The Court held that legal malpractice claims that allege purely economic loss survive in favor of a deceased client's estate because such claims are necessarily limited to recovery for property damage.

The Supreme Court specifically disapproved of an earlier San Antonio Court of Appeals' decision that held that an estate planning malpractice claim did not accrue during a decedent's lifetime, and therefore, did not survive the decedent because the estate's injuries did not arise until after death. *Estate of Arlitt v. Paterson*, 995 S.W.2d 713, 720 (Tex. App.-San Antonio 1999, pet. denied). The Court explained this part of its decision acknowledging that although the primary damages at issue here—increased tax liability—did not occur until after the decedent's death, the lawyer's alleged negligence occurred while the decedent was alive. The Court relied on its earlier decision in *Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 120 (Tex. 2001) which holds that a legal malpractice claim accrues "when facts have come into existence that authorize a claimant to seek a judicial remedy". The Court pointed out that if the decedent had discovered the injury prior to his death, he could have brought suit against his estate planner to recover the fees paid to them citing *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999).³

After finding that legal malpractice claims survive in favor of the decedent's estate, the Court noted that the estate had a justiciable interest in the controversy sufficient to confer standing. Because a decedent's estate, however, is not a legal entity and may not properly sue or be sued, the Court concluded that only the estate's personal representative has the capacity to bring the claim. The Court stressed that allowing the personal representative to bring the malpractice claim is not inconsistent with the policy reasons supporting the *Barcelo* decision.

The Court noted that its holding arguably presents an opportunity for some disappointed representative/beneficiaries to recast a malpractice claim for their own "lost" inheritance which would otherwise be barred by *Barcelo*, as a claim brought on behalf of the estate. The Court pointed out that this temptation should be tempered by the fact that a personal representative who mismanages the performance of his duties may be removed from the position or be sued. The Court also noted that because the claim allowed under their holding is for injuries suffered by the client estate, any damages recovered would be paid to the estate and only then distributed in accordance with the decedent's existing estate plan. Thus, the benefit of the malpractice claim would only flow to the personal representative if he was also a beneficiary.

In an estate in which there is only one beneficiary who serves as the representative of the estate, it would appear that *Barcelo* has been dramatically narrowed or possibly eviscerated. In any estate that has any amount of complexity it will not be surprising to hear the representative assert that certain assets were mischaracterized or omitted from the estate plan, and therefore, the estate should be able to assert a claim against the lawyer.



IS *BELT* A NEW DAWN?

One of the potential problems that *Belt* could create is that it leaves Estate lawyers in the position of potentially having a very long statute of limitations. Ordinarily, the statute of limitations on a legal malpractice claim is 2 years. Nevertheless, in *Belt*, the Court expressly recognized the discovery rule which allows the claimant additional time within which to bring the claim. That is, the claim does not have to be brought until the claimant discovers or should have discovered, through the exercise of reasonable care and diligence, the facts that establish the elements of the claim. This means that an estate plan that was

drafted 30 years ago might still have viability as a basis to assert a legal malpractice claim against the Estate lawyer or his estate. *Cf. O'Donnell v. Smith*, 2004 WL 2877330 (Tex. App.-San Antonio 2004) (legal services provided in 1968 to 1970 formed the basis of a claim brought almost 30 years later after the testator died).

There may still be other efforts made judicially to limit the claims that might otherwise be brought after *Belt*. In an interesting case addressed by the San Antonio Court of Appeals, the Court found that standing and capacity to bring a malpractice claim does not exist for the niece of the ward of a guardianship. *In Re Archer* -- S.W.3d -- (Tex. App.-San Antonio, 2006). In so holding, the Court noted that it would not simply take the body of law established in the context of estates and apply it to a guardianship.

The Texas Supreme Court in *Belt* was very careful in limiting its decision to the exact work performed by the lawyer involved in the case. It may be that the Court will develop other limitations after *Belt* on the claims that can be brought based upon the subject matter. We will have to wait and see how this issue may develop.

So what can an Estate lawyer do now that *Belt* has been decided? At the heart of any risk management system for an Estate Lawyer is the need for a comprehensive list of all past and present client matters with current addresses for all present and former clients. For some lawyers this will be extraordinarily difficult task, particularly for those lawyers with clients who regularly move from state to state. Nevertheless, with such a database, a lawyer could take steps to minimize the risk of potential malpractice claims.

For instance, one thing that should be considered in managing this risk is whether there is a way to attack the claimant's use of the discovery rule. On this issue, the approach taken will probably need to be tailored to meet each individual lawyer's practice. Nevertheless, generally, it would seem that for representations that are presently ongoing that clear communication to the client in writing confirming the material terms of the representation should be helpful in establishing that the client was aware of the facts that might in the future give rise to a claim.

For clients who do not have an ongoing matter, but whom the lawyer believes is still alive, a different approach could be taken. Specifically, a periodic letter could be sent to the client advising of pertinent

changes in the law. Such a letter, if well drafted, could lay the foundation to assert that the client had a reasonable opportunity to discover facts supporting a claim, and therefore the discovery rule should not apply. For instance, if a law firm were able to demonstrate through correspondence sent to the client over a period of years the facts supporting the claim were highlighted sufficiently to put the client on notice of the claim, under these circumstances the discovery rule could be cut off.

Of course, for any matter in which there is any hint of a defect in the estate plan, the lawyer should immediately disclose the defect to the client and document any declination by the client to remediate the defect.



[A ROSE BY ANY OTHER NAME: FRACTURING A MALPRACTICE CLAIM INTO OTHER CLAIMS](#)

The Texas Courts for quite sometime have prevented claimants from calling their claims something other than a malpractice claim in order to obtain a procedural or substantive advantage in asserting the claim against a law firm. In *Goffney v. Rabson*, 56 S.W.3d 186 (Tex. App. Houston-[14th Dist.] 2001), a client sought to assert a claim against the counsel who had defended her during an estate lawsuit. In the lawsuit, the claimant asserted various causes of action for breach of contract, violation of the DTPA, breach of fiduciary duty and malpractice. Just before trial, the claimant non-suited the malpractice claim and proceeded to trial against the lawyer on her other claims. In reversing a substantial judgment entered against the lawyer, the Court pointed out that the various allegations against the lawyer only constituted a legal malpractice claim. Regardless of how phrased, the gist

of the claim was whether the attorney exercised that degree of care, skill, and diligence as lawyers of ordinary skill and knowledge commonly possess. Because the claimant had dismissed her malpractice claim, she had no viable cause of action upon which to recover, and therefore the judgment was reversed and rendered that the claimant take nothing.

NO GOOD DEED GOES UNPUNISHED

One of the issues that often leads to claims is when a law firm steps away from its traditional role in a representation or represents a party who has more than the usual attorney client relationship with the law firm. For instance, in *Ulrickson v. Hibbs*, 2003 WL 22514689 (Tex. App.-Fort Worth 2003), the Court of Appeals in part reversed a summary judgment granted in favor of a law firm who apparently represented one of its employees in a guardianship. In the underlying matter, the law firm was the second law firm to represent the claimant during the guardianship of the claimant's mother. The court of appeals affirmed the summary judgment granted to the law firm in connection with property that was misdescribed in an accounting because the complainant had sworn that the description was true when it was not while she was represented by prior counsel. Nonetheless, the Court of Appeals remanded for trial malpractice claims against the law firm that: (1) it failed to investigate and research the law regarding the administration of the guardianship and probate estates and failed to communicate with the complainant; (2) failed to properly disclose all of the property in an inventory appraisal and list of claims; (3) failed to timely forward complete legal files to complainant's new counsel; (4) failed to file inventories and make final distributions of the remaining estate; and (5) for billing the complainant for work that remained uncompleted or unfiled. Any time there is some fact of the representation that varies from the traditional attorney client relationship, there is a risk that a claim against the law firm would be asserted.



REFLECTIONS ON THE PAST MAY GUIDE THE FUTURE

Estate planning and probate lawyers will continue to face several new and substantial challenges for their practice. Those lawyers that focus their entire practice on estate planning and probate matters will probably be the best prepared to deal with these new challenges. Those lawyers who maintain records of how to contact their clients and former clients will be in the best position to take steps to minimize the risks to their practices and to their estates. We will have to wait and see whether the courts limit the scope of the *Belt* decision either by party or subject matter that can be brought. At a minimum, lawyers should take steps to communicate clearly in writing what is intended by the instruments they have drawn for their clients. Similarly, maintaining contact with former clients to advise them of changes in the law or in its impact on their potential situation may present an estate planning lawyer with the opportunity to cut off the potential use of the discovery rule. Finally, taking on matters for employees of the law firm or engaging other conduct that is based on something other than a narrow professional relationship should be avoided.

¹ Mr. Campbell is a shareholder with Campbell & LeBoeuf, P.C. and focuses his practice on defending lawyers.

² In *Belt*, it was alleged that the lawyer's conduct led to a \$1.5 million dollar tax liability.

³ In footnote 5 of the *Belt* decision, the Court pointed out that the statute of limitations does not begin to run until the claimant discovers or should have discovered through the exercise of reasonable care and diligence the facts established the elements of the claim, relying on *Apex Towing*.

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4201 Spring Valley Road, Suite 1250, Dallas, TX 75244
972-277-8585 • 972-277-8586 (fax) • www.CampbellLeBoeuf.com