Loss Prevention for the Trusts & Estates Practice

Present By:

Cari Sheehan
Assistant General Counsel

Taft/

Learning Objectives

1. Identify high-risk T&E scenarios
2. Apply conflict-management strategies
3. Improve engagement and documentation practices
4. Reduce malpractice exposure

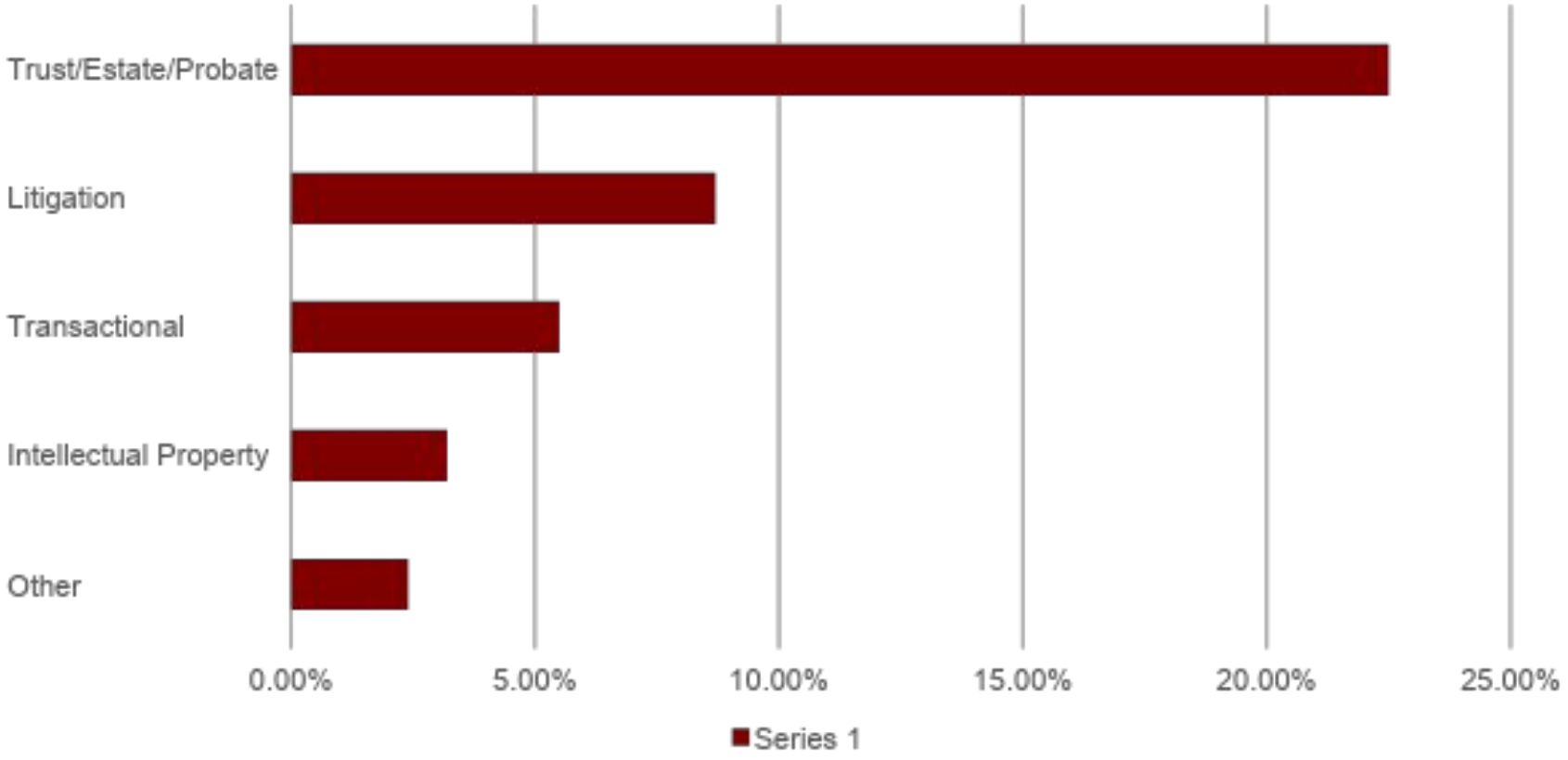
Taft/

Why T&E Claims Matter



Taft/

Claims Frequency By Practice Area



Taft/

Key Sources of Risk

- Conflicts of interest
- Confidentiality breaches
- Drafting errors
- Tax planning mistakes
- Follow-through failures

Taft/

Conflicts of Interest

1. Clarify who the client is
2. Distinguish individual vs fiduciary roles
3. Avoid assumptions in family representations
4. Document engagement scope

Taft/

Representation of Spouses



Joint representation is common



Potentially differing objectives



Risks from undisclosed information



Need for informed consent

Taft/

Ground Rules for Joint Representation



Explain information-sharing expectations



Discuss future conflicts



Clarify withdrawal procedures



Confirm agreements in writing

Taft/

Representation of Entire Families

- Increased risk of conflicting interests
- Family disputes may arise later
- Avoid vague ‘family lawyer’ relationships
- Use clear engagement letters

Taft/

‘I’m Not Your Lawyer’ Letters

- Clarify non-representation
- Reduce beneficiary confusion
- Limit implied attorney-client relationships
- Useful in family business settings

Taft/

"I'm Not Your Lawyer" Letters

2.3.1 General Letter—Nonlitigation Matters

[*Date, Nonclient name and address*]

Re: [*Matter name*]

Dear [*nonclient name*]:

It was a pleasure to meet you. This letter confirms our discussion about the relationship between you, [*client name*], our client, and [*law firm name*] concerning [*matter name*].

As we discussed, our only client in this matter is [*client name*]. We anticipate that our firm will be preparing most of the documents necessary to effectuate this transaction. When we provide you (either directly or, if you decide to retain counsel, indirectly through that counsel) with draft copies of those documents, you may comment on their terms, suggest changes, or take other action to protect your interests. In preparing documents or doing other work on the project, however, we will be representing only [*client name*] and [*its*] [*his*] [*her*] [*their*] interests. We do not represent you. If you wish to have legal representation in this matter, you should retain another lawyer or law firm.

Although your goals appear to be aligned generally, in a venture such as the [*matter name*], [*client name*]'s interests may differ from yours, either now or in the future. In any such circumstances, we represent only [*client name*]'s interests. You have acknowledged that you understand that to be the case.

We have not sent this letter because we anticipate any hostility between you and [*client name*] during this venture. We want to ensure, however, that there is no misunderstanding about the relationships between this firm and other participants in the transaction.

We look forward to working with you on this project.

Very truly yours,

_____

[*Firm lawyer*]

cc: [*Client name*]

Claims by Family Members

Disinherited beneficiaries may sue

Allegations often involve loyalty conflicts

Documentation is critical

Independent counsel may be advisable

Taft/

Standing of Beneficiaries to Sue

- Some jurisdictions require strict privity
- Others allow third-party beneficiary claims
- Trends favor expanded standing
- Fiduciary counsel increasingly targeted

Taft/

Acting as Intermediary

Lawyers often mediate family disagreements

Requires careful neutrality

Obtain informed consent

Consider whether representation is sustainable

Taft/

Advance Conflict Waivers

1. Anticipate future adversity
2. Draft specific waivers
3. Address confidential information concerns
4. Consider screening procedures

Taft/

Confidentiality Basics



T&E matters involve sensitive information



Joint clients may expect secrecy



Confidentiality must be addressed early



Conflicts may force withdrawal

Taft/

Shared Information in Joint Representation

- Default rule favors shared information
- Explain privilege limitations
- Clients must understand implications
- Memorialize agreements

Taft/

The 'Secret Information' Problem

- Extramarital relationships
- Hidden heirs or children
- Unequal treatment of beneficiaries
- Difficult disclosure decisions

Taft/

Concurrent Family Representations

Separate representations may work

Confidentiality obligations remain

Walls and waivers may be needed

Monitor for evolving conflicts

Taft/

Other Estate Planning Risk: Drafting and Execution Risks

- Errors can defeat client intent
- Use updated forms and templates
- Ensure proper execution formalities
- Encourage lawyer-supervised signing

Taft/

Other Estate Planning Risk: Tax Planning Exposure

- Clients expect tax minimization
- Explain planning alternatives
- Document client decisions
- Avoid assumptions about intent

Taft/

Other Estate Planning Risks: Tax Payment Clauses

- Highly litigated area
- Can shift large tax burdens
- Customize clauses to the estate
- Review consistency across documents

Taft/

Other Estate Planning Risks: Estate & Gift Tax Returns

- Filing mistakes create exposure
- QTIP election errors are common
- Generation-skipping transfer tax issues
- Require second-level review

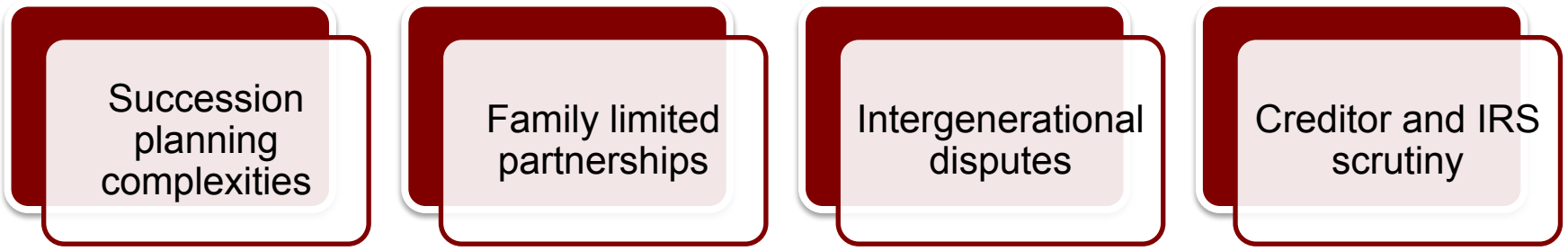
Taft/

Other Estate Planning Risks: Failure to Follow Through

- Funding trusts is critical
- Asset transfer mistakes are common
- Follow-up checklists help
- Clarify third-party responsibilities

Taft/

Family Business Risks



Taft/

IRS Challenges to Family Entities

- Valuation discount disputes
- Sham entity allegations
- Failure to observe formalities
- Fraudulent transfer concerns

Changes in Law and Facts

- Estate plans become outdated
- Clarify ongoing duties
- Encourage periodic reviews
- Use engagement closure letters

Taft/

Representing Fiduciaries

- Determine who the client is
- Executor vs estate confusion
- Trustee and beneficiary tensions
- Privilege considerations

Taft/

Why Client Identity Matters



Determines confidentiality duties



Impacts conflicts analysis



Affects malpractice exposure



Shapes communication obligations

Taft/

Representing Fiduciaries & Beneficiaries

- Simultaneous representation is risky
- Conflicts may become non-consentable
- Independent advice often preferable
- Maintain clear role boundaries

Taft/

Lawyer as Fiduciary

- Heightened scrutiny applies
- Risk of self-dealing allegations
- Compensation concerns
- Increased malpractice exposure

Taft/

Risk Management Best Practices



Use robust engagement letters



Conduct conflict checks carefully



Close files formally



Train lawyers regularly

Taft/

Sample Documentation Tools



Joint representation letters



Fiduciary engagement letters



Advance waiver provisions



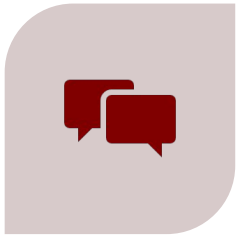
Confidentiality disclosures

Taft/

Key Takeaways



T&E PRACTICE CARRIES UNIQUE RISKS



CLEAR COMMUNICATION REDUCES EXPOSURE



DOCUMENTATION IS ESSENTIAL



PROACTIVE CONFLICT MANAGEMENT MATTERS

Taft/

Conclusion & Q&A

Questions

Taft/