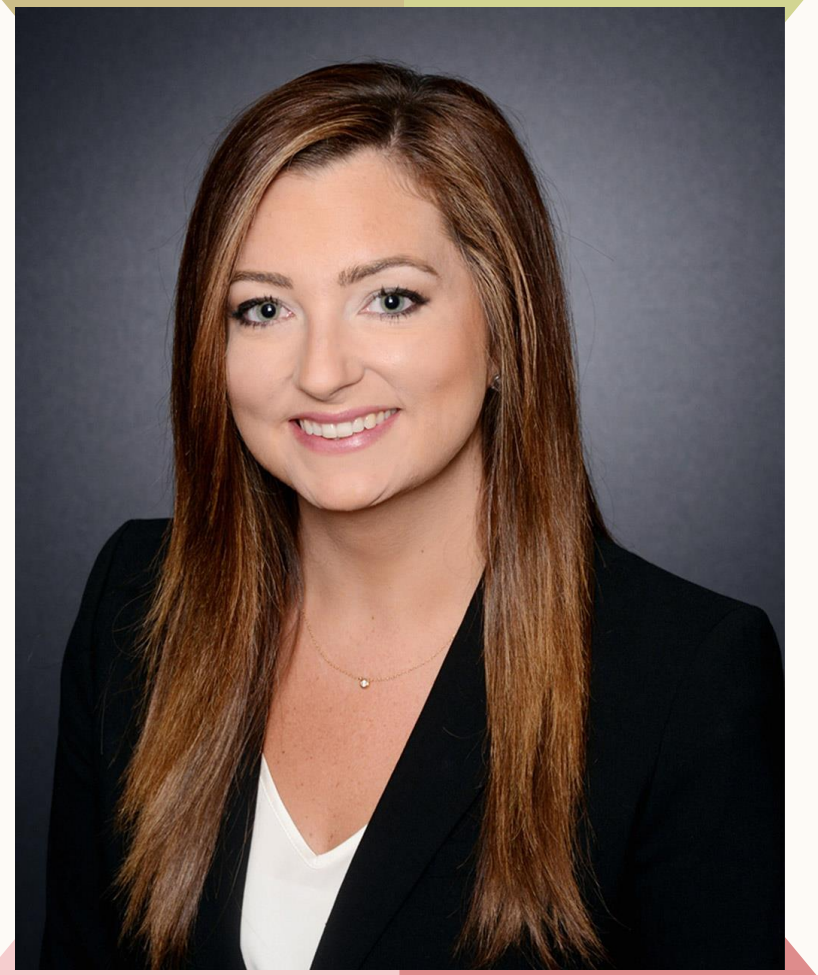
ESTATE PLANNING WAR STORIES FROM THE FRONTLINES

LAURA N. ZOLNEKOFF, ESQ.

ABOUT ME

- Partner at Velasco Law Group.
- Practice is centered on estate planning litigation.
- Velasco Law Group, APC.
- Recent success stories.



THE INVALIDATION BUNDLE

When a party brings a petition to invalidate a trust or will, the following causes of action are also routinely presented to the Court as companion claims:

- Lack of Capacity
- Undue Influence
- Elder Financial Abuse
- Mistake

These claims are typically pleaded jointly when an heir or interested person seeks to upend an estate planning attorney's work. The crux of these allegations typically rests on claims that an elder testator did not understand their estate planning documents and or were unduly influenced into making an estate plan that does not truly reflect their wishes.

WHAT CAN AN ESTATE PLANNING ATTORNEY DO TO AVOID THE BUNDLE?

The Estate Planning Lawyer's Dilemma: We are not geriatric psychiatrists or physicians; however, we are still tasked with assessing the testamentary capacity of our clients in preparing their estate plans.

Capacity is not easy to assess. Capacity can be temporary, situational, reversible, and task specific. Legal mental capacity is different from mental or physical capacity. (Cal. Prob. Code §§ 810(b) and 811(d).)

A client with dementia or Alzheimer's disease may still have sufficient legal mental capacity depending upon the severity of the client's mental state and the nature of the proposed services. In general, lawyers are not trained to ascertain mental capacity and there is no single indicator of diminished legal mental capacity.

SO, HOW DO ATTORNEY'S EVALUATE CAPACITY?

STANDARDS OF CAPACITY ARE DETERMINED BY THE SERVICES BEING REQUESTED.

- For a person to contract, convey property, become married or divorced, or establish or amend a will or trust, California Civil Code §§ 38-40 provides that a person without understanding has no power to make a contract, absent a conservatorship. If there is a question as to understanding, the established will or trust is subject to recession.

- For an individual to execute a simple will or trust, or changes thereto, they must have "testamentary capacity" and be able to (1) understand the nature of the testamentary act, (2) the nature of the individual's property, and (3) his or her persons who would have a claim to their property upon their death. (Cal. Probate Code §6100.5(a)(1)).

- For trusts or amendments which are not simple, but complex, the individual must have contractual capacity. This means, the individual must:

1. Understand and appreciate the rights, duties, and responsibilities created by their decision;
2. The probable consequences of their decision; and
3. The significant risks, benefits of, and reasonable alternatives to the decision. (Cal. Prob. Code §812.)

ENSURING VALIDITY

STEP 1: IS THE DOCUMENT REQUESTED A SIMPLE OR COMPLEX TESTAMENTARY DOCUMENT?

Simple Trust or Will

- This is where the testator's assets are being distributed as they would if their assets were subject to probate. For example, upon their death, their assets are being distributed equally to their then living heirs. There is nothing controversial about their distribution scheme. Additionally, there is nothing complex about the administration of their trust estate or estate following their death.

Complex Trust or Will

- A complex trust or will is one in which an unnatural disposition of the testator's assets is being requested upon their death. For example, one child is not to receive a bequest. Another example can be the establishment of a special needs trust or other specially managed subtrust upon their death. This is complex and will likely require contractual capacity because there are significant responsibilities, obligations, and varying entitlements incurred by the trustee and beneficiary of any such trust. It is crucial that when creating a complex trust or will, the testator understands these rights and responsibilities as well as their ultimate impact on their successor and intended beneficiary.

WHAT'S NEXT?

STEP 2: ONCE IT IS DETERMINED WHETHER A TRUST OR WILL IS COMPLEX OR SIMPLE, WHAT STEPS CAN AN ESTATE PLANNING ATTORNEY TAKE TO DETERMINE CAPACITY?

Depending on the unique circumstances and capacity concerns, the following actions can be taken to create a record of capacity:

- MMSE: Mini Mental State Exam by a geriatric psychologist;
- Certification of capacity by treating physician;
- Video recording the trust and or will execution;
- Requesting that the client complete any forms or intake sheets, personally;
- Taking comprehensive notes during an initial client meeting when discussions are held regarding the drafting and execution of the Trust and at the time of execution;
- Ensuring that family members are not present during the meeting and making notes regarding this.

WHAT IF THE TRUST OR WILL THAT YOU DRAFTED IS CHALLENGED?

Standard of Proof: Preponderance of the evidence. In order to invalidate a trust or will, it must be shown that the evidence presented has a more convincing force and greater probability of trust than opposing evidence. (1 Witkin, California Evidence (3d ed.) §157.)

Deference is given to the testimony of the drafting attorney. This means that your notes are crucial as they likely reflect your impression at the time of drafting the testamentary instrument and any comments made by the testator, which gave rise to the provisions within the document.

ARE YOU LIABLE?

A lawyer who fails to properly assess capacity issues may be liable to third-party beneficiaries.

The most significant dilemma and risk is to the lawyer who now needs to give deliberate attention to capacity issues. The failure of a lawyer to do so has been at the core of third-party beneficiary lawsuits against the drafting lawyer. To date, the courts have been reluctant to determine liability because of the lack of privity of contract, thereby holding that the lawyer does not have a duty to beneficiaries under a will to determine the testamentary capacity of a client seeking to amend an estate plan. (*Moore v. Anderson*, 109 Cal. App. 4th 1287, 1298 (2003).)

However, the principle of privity has been eroding over the years. Because of this, the best way to prevent liability is to think about potential litigation when drafting.

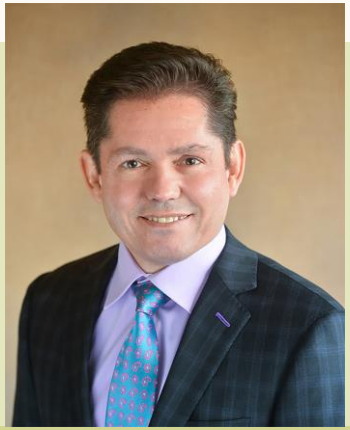
SUMMARY

A drafting attorney will ultimately be the voice of their client if a contest of their trust and or will is presented to the court.

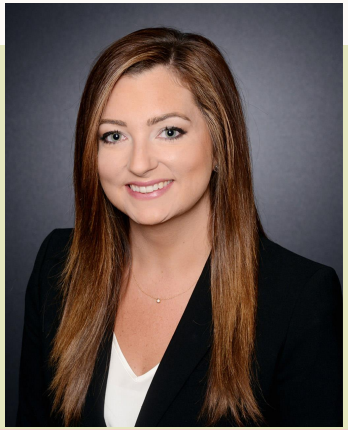
Because of this, it is crucial that when representing a client for estate planning purposes, the attorney evaluates what type of estate plan the client wants and whether special attention needs to be paid to the capacity of the testator.

There are steps that an attorney can take to ensure the validity of their work. However, if suit is initiated, an attorney's work product at the time of drafting and execution is persuasive evidence.

MEET THE TEAM

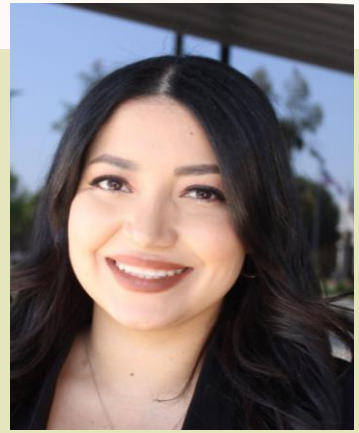


PAUL VELASCO, ESQ.
Principal

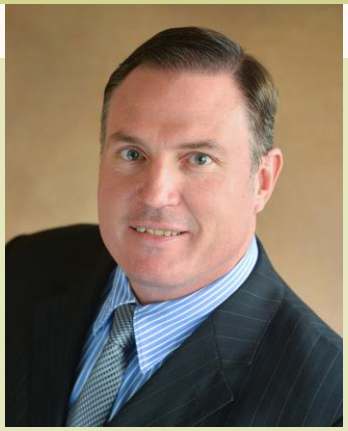


LAURA ZOLNEKOFF, ESQ
Partner

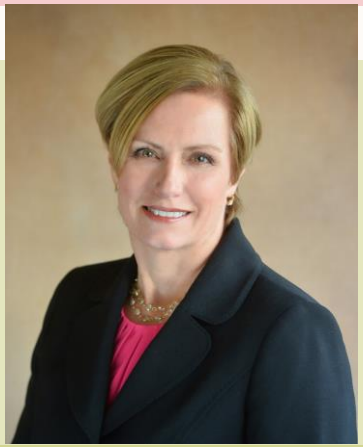
PETER A. SAHIN, ESQ.
Attorney



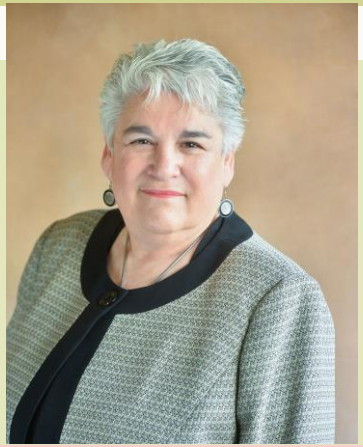
TAMARA DE LA O CASTRO, ESQ.
Attorney



RICHARD J. RADCLIFFE, ESQ.
Of Counsel Attorney



MISTY L. COLWELL, ESQ.
Of Counsel Attorney



SINDEE SMOLOWITZ, ESQ.
Of Counsel Attorney

THOMAS ARMSTRONG, ESQ.
Of Counsel Attorney

AREAS OF FOCUS

- Estate Planning
- Estate Administration
- Probate
- Trust and Estate Litigation
- Trust and Estate Appellate Law

THANK YOU

Laura Zolnekoff
laura@velascolawgroup.com
www.velascolawgroup.com