

Legal Malpractice

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Can Lawyers Be Sued by Non-Clients?

During the course of the representation of a client, an attorney may commit legal malpractice with respect to the prosecution, defense, or appeal or the preparation of transactional documents. Indeed, the attorney's actions may

constitute legal malpractice by failing to use the skill, prudence, and diligence that attorneys of ordinary skill and capacity would use in performing their legal tasks. However, can an attorney be liable to a non-client for legal malpractice?

Generally, legal malpractice consists of three elements: (1) existence of an attorney-client relationship creating a duty of care, (2) breach of that duty, and (3) proximate causation. *McGrogan v. Till*, 771 A.2d 1187 (N.J. 2001). An attorney generally owes a duty to perform diligently and with a high degree of "fidelity and good faith." *Gilles v. Wiley, Malehorn & Sirota*, 783 A.2d 756 (N.J. App. Div. 2001); see also *Steiner v. Markel*, 968 A.2d 1253 (Pa. 2009). To fulfill his or her duties, an attorney must exercise that degree of reasonable knowledge and skill that lawyers of ordinary ability and skill possess and exercise. *Id.*

Over 100 years ago, the United States Supreme Court held that a third party not in privity of contract with an attorney could not maintain a legal malpractice

action against that attorney absent fraud or collusion. *Nation Savings Bank v. Ward*, 100 U.S. 195 (1879). This rule was premised upon two basic concerns. First, "absent a requirement of privity, parties to a contract for legal services could easily lose control over their agreement." *Schriener v. Scotbille*, 410 N.W. 2d 679 (Iowa 1987). Second, "imposing a duty to the general public upon lawyers would expose lawyers to a virtually unlimited potential for liability." *Id.*

Since the Supreme Court's decision in *Ward*, however, numerous courts have continually chipped away at the "black letter law," carving out a number of exceptions to this rule. As such, the majority rule today is attorneys, in certain circumstances, do owe a duty to non-clients. As a result, it is important to understand the various arguments supporting strict privity in legal-malpractice actions and those supporting a relaxing of strict privity. The primary ethical considerations that underlie the various arguments for and against strict





privity are (1) the duty of loyalty owed to a client, and (2) the concept of avoiding conflicts of interest. Not surprisingly, there are advocates on both sides of this hotly contested issue.

Proponents of strict privity argue that greater attorney liability could adversely affect the overall approach of how a lawyer counsels his or her client. They argue that

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relaxing strict privity would create conflicts of interest among clients and third parties, ultimately exposing attorneys to broad potential liability, and that the strict privity rule is efficient as it limits would-be plaintiffs and removes the fear of potential liability. *Guy v. Liederbach*, 459 A.2d 744 (Pa. 1983). Further, advocates of the strict privity requirement argue because an attorney's primary purpose is to represent his or her client's interests zealously, if courts relax strict privity rules then conflicts between a duty to a client and duties to third parties will result. *Id.* They claim that attorneys cannot maintain the same standard of care to a third party as the attorney maintains to a client, and as a result, expanding liability may cause attorneys to adopt overprotective practices and conservative approaches in dealing with their own clients out of a fear of potential liability to non-clients. *Id.*

Opponents of the strict privity rule argue that the most significant policy reason in favor of abandoning the outmoded strict privity rule is that otherwise, "the injury or property loss would fall to the victim, his or her family members, or the taxpayers." *Swanson v. Ptak*, 682 N.W.2d 225

(Neb. 2004). They argue that an attorney can prevent the loss by exercising adequate diligence or implementing precautionary procedures designed to discover negligence before any resulting harm, and should therefore bear the loss. Opponents of the strict privity rule also advocate that increasing attorney liability will result in more careful legal representation, a higher degree of professional care, and greater diligence. The role of an attorney should be more like that of an advisor and consultant rather than a mere scrivener. *Charleson v. Hardesty*, 839 P.2d 1303 (Nev. 1992). Furthermore, it has been argued that expanding liability for attorneys will bring all professionals under the same standard, eliminating the special privileges that attorneys enjoy above other professionals, such as physicians and accountants.

In light of the above, this article lays out some of the numerous interpretations made by different courts regarding the strict privity rule, including some that follow the rule and some that do not.

Jurisdictions Permitting Non-Client Legal Malpractice Claims

There are many jurisdictions that allow third parties to bring legal malpractice claims where no attorney-client relationship is formed. In these jurisdictions, the attorney may be liable to a third party where the third party was an intended beneficiary of the attorneys' services or where it was reasonably foreseeable that negligent service or advice to or on behalf of the client could cause harm to others. *Waggoner v. Snow, Becker, Kroll, Klaris & Krauss*, 991 F.2d 1501 (9th Cir. 1993). There are six considerations courts analyze to determine whether a duty arises absent privity of contract and not based upon the attorney-client relationship. These considerations are "(1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant's conduct and the injury; (5) the policy of preventing future harm; and (6) whether recognition of liability under the circumstances would impose an undue burden on the profession." *Goldberg v. Frye*, 217 Cal. App. 3d 1258, 1268 (1990); *France v. Podleski*, 303

S.W.3d 615 (Mo. App. 2010); *Grimes v. Saikley*, 904 N.E.2d 183 (Ill. App. 2009); *Chang v. Lederman*, 172 Cal. App.4th 67 (2009); *Donahue v. Shughart, Thomson & Kilroy, P.C.*, 900 S.W.2d 624 (Mo. 1995).

An attorney's knowledge that third parties will be affected by the representation of the client is not in and of itself sufficient to create a duty of care to the third party. *B.L.M. v. Sabo & Deitsch*, 55 Cal. App. 4th 823 (1997). An essential predicate for establishing an attorney's duty of care under an "intended beneficiary" theory is that both the attorney and the client must intend for the third party to be a beneficiary of legal services that the attorney was to render. *Id.* The clear absence of mutual intent on the part of the lawyer and the client is critical to whether the third party can maintain a viable legal malpractice claim. An attorney's undertaking of a duty to the third party must be the result of a conscious decision. *Zenith Ins. Co. v. O'Connor*, 148 Cal. App. 4th 998 (2007); *Donahue*, 900 S.W.2d at 629 (the first factor a non-client must demonstrate includes a showing that it cannot be characterized as an incidental or indirect beneficiary).

Jurisdictions Not Permitting Non-Client Legal Malpractice Claims

There are several jurisdictions that require the existence of an attorney-client relationship in order for an attorney to be liable for legal malpractice. In order to establish liability for professional negligence or legal malpractice, the plaintiff must show the existence of a duty owed to them by the attorney, a breach of that duty, and damages arising from the breach. *Banc One Capital Partners Corporation v. Kneipper*, 67 F.3d 1187 (5th Cir. 1995). *Allen v. Steele*, 252 P.3d 476 (Colo. 2011). Under Texas law, there is no attorney-client relationship absent a showing of privity of contract, and an attorney owes no professional duty to a third party or non-client. *First National Bank of Durant v. Trans Terra Corporation International*, 142 F.3d 802 (1998); *Ryddle v. Morris*, 675 S.E.2d 431 (S.C. 2009) (finding before a claim for malpractice may be asserted, there must exist an attorney-client relationship).

Nonetheless, most of these jurisdictions find a narrow set of circumstances in which an attorney can be liable to a third party.

These circumstances arise when the attorney has committed fraud or a malicious or tortious act, including negligent misrepresentation. *Allen v. Steele*, 252 P.3d 476 (Colo. 2011); *Scholler v. Scholler*, 462 N.E.2d 158 (Oh. 1984) (a cause of action for legal malpractice exists only if the evidence shows either: (1) that the plaintiff is in privity with the client of the defendant attorney, or (2) that the defendant attorney acted maliciously). Absent these limitations, lawyers would be potentially liable to an unforeseeable and unlimited number of third parties. *Id.* Attorneys' liability is also limited due to the adversarial nature of litigation in which "injury to a third person often is the direct, intended objective of the attorney's representation." *Allen*, at 482. *Hess v. Fox Rothchild, LLP*, 925 A.2d 798, 806 (Pa. Super. 2007) ("to maintain a claim of legal malpractice based on negligence, a plaintiff must show an attorney-client or analogous professional relationship with the defendant-attorney.").

Negligent Misrepresentation Claims

Regardless of whether an attorney-client relationship is required for a legal malpractice case, no such requirement exists for a negligent misrepresentation claim. In virtually all jurisdictions, an attorney may be liable to a non-client for negligent misrepresentation.

The elements of a negligent misrepresentation claim are that attorney: (1) in the course of his or her business, profession or employment; (2) makes a misrepresentation of a material fact, without reasonable care; (3) for the guidance of others in their business transactions; (4) with knowledge that his or her representations will be relied upon by the injured party; and (5) the injured party justifiably relied on the misrepresentation to his or her detriment. *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver*, 892 P.2d 230 (Colo. 1995); *Tyler v. Sloane*, 825 S.W.2d 439 (Tex. 1991). Most jurisdictions look to section 552 of the Restatement (Second) of Torts (1977) for guidance, which provides:

- (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business trans-

actions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

- (2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered
 - (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
 - (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Section 552 of the Restatement (Second) of Torts.

The requirement that the misrepresentation was made "for the guidance of others in their business transactions" is an essential element of the tort of negligent misrepresentation. *Allen*, 252 P.3d at 483. This element is separate and in addition to the element that the defendant attorney made the misrepresentation "in the course of his business, profession or employment." *Id.* The "guidance of others in their business transactions" element means that the defendant attorney provided information to guide others, meaning, to guide the recipient of the information, in his or her business transactions. *Id.* The recipient of the information could fall into two classes of people. First, the recipient could be a third party, to whom the attorney provides guidance at the request of his or her client. *Id.* Second, the recipient could be a non-client, to whom the attorney provides information directly. *Id.*

In the case of a prospective client who does not retain the attorney, a critical issue is whether a potential lawsuit against another party can satisfy the element of a "business transaction." The comments to section 552 of the Restatement discuss liability in terms of "commercial transactions" and state that "[b]y limiting the liability for negligence of a supplier of information to be used in commer-

cial transactions... the law promotes the important social policy of encouraging the flow of commercial information upon which the operation of the economy rests." Restatement (Second) of Torts §552 cmt. a.

Common usage supports the Restatement's explanation that a business transaction is a commercial transaction. *Black's Law Dictionary* defines "business" as a

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"commercial enterprise carried on for profit; a particular occupation or employment habitually engaged in for livelihood or gain." *Black's Law Dictionary* 226 (9th Ed. 2009). A "business transaction" is defined as an "action that affects the actor's financial or economic interests, including the making of a contract." *Allen*, at 484.

The tort of negligent misrepresentation is intended to provide a remedy for, and is in fact limited to, "money losses due to misrepresentation in a business transaction." *W. Cities Broad, Inc. v. Schueller*, 849 P.2d 44 (Colo. 1993). In cases in which the plaintiff stated a viable claim of negligent misrepresentation, the aggrieved plaintiff entered into a business or commercial transaction, or was induced to enter into the transaction, based on the defendant attorney's misrepresentations. *Robinson v. Omer*, 952 S.W.2d 423, 427-28 (Tenn. 1997) (holding that negligent misrepresentation did not apply where attorney gave advice for personal, not business, matters); *Banco Popular N. Am.*, 876 A.2d 253 (N.J. 2005) (the attorney liable if the attorney's actions are intended to induce a specific non-client's reasonable reliance on the attorney's representations.).



Obligation Owed to Beneficiaries

Jurisdictions are split as to whether a beneficiary of a will has standing to assert a legal malpractice case against the drafter of the will. The attorney's duty to a testamentary beneficiary requires the attorney to "effectuate the testator's intent as expressed in the testamentary instruments." *Harrigfeld v. Hancock*, 90 P.3d 884 (Idaho 2004).

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The attorney must properly draft and execute the will and other instruments, but only to effectuate the testator's intent as expressed within those documents. *Estate of Becker v. Callahan*, 96 P.3d 623 (Idaho 2004). Lawyers have no duty to testamentary beneficiaries with regard to what share they receive from the testator's estate, if any. However, a lawyer may be held liable to the beneficiary of a will (even when there is a lack of privity between the two) for negligent drafting when it caused the beneficiary to spend considerable money defending the contest of the will. *Rathblott v. Levin*, 697 F. Supp. 817 (D.N.J. 1988).

A few jurisdictions retain the rule, absent fraud, collusion, or malice, that an attorney is not liable to a non-client for harm caused by the attorney's negligence in the drafting of a will or planning an estate. *Miller v. Mooney*, 725 N.E.2d 545 (Mass. 2000) (testatrix's children could not enforce any contract between testatrix and attorney as third-party beneficiary and the attorney owed the children no duty of care); *McDonald v. Pettus*, 988 S.W.2d 9 (Ark. 1999) (children of testator did not satisfy privity requirements of lawyer immunity statute and could not bring a third

party beneficiary legal malpractice claim against will drafting attorney); *Nevin v. Union Trust Co.*, 726 A.2d 694 (Me. 1999) (individual beneficiaries do not have standing to sue estate planning attorney for malpractice when they are not the client who retained the attorney and when the estate is represented by a personal representative who stands in the shoes of the client); *Noble v. Bruce*, 709 A.2d 1264 (Md. 1998) (absence of privity precluded beneficiaries' actions against attorney who drafted will particularly where no evidence contradicts the supposition that the purpose of the contractual relationship was to benefit the testator, not beneficiary); *Barcelo v. Elliott*, 923 S.W.2d 575 (Tex. 1996) (attorney owes no professional duty of care to trust beneficiaries); *Glover v. Southard*, 894 P.2d 21 (Colo. App. 1994) (in action against will drafting attorney for failure to revise will, attorney owed no duty or contractual duty to residual beneficiary); *Copenhaver v. Rogers*, 384 S.E.2d 593 (Va. 1989) (grandchildren, remaindermen under grandparents' testamentary trust, were precluded from bringing a legal malpractice action in tort for negligent performance of legal services, absent privity, or an intended third-party beneficiary claim absent allegations that they were the intended beneficiaries of contract); *Simon v. Zipperstein*, 512 N.E.2d 636 (Ohio 1987) (will beneficiary was not in privity with attorney preparing will and thus did not have standing); *Lilyhorn v. Dier*, 335 N.W.2d 554 (Neb. 1983) (attorney's duty does not extend to heir who was not client); *St. Mary's Church of Schuyler v. Tomek*, 325 N.W.2d 164 (Neb. 1982) (attorney who prepared will had no duty to purported beneficiaries of the will); *Spivey v. Pulley*, 526 N.Y.S.2d 145 (1998) (privity of contract is lacking); *Conti v. Polizzotto*, 663 N.Y.S.2d 293 (1997) (beneficiaries are not in privity with will drafting attorney); *Wright v. Gundersen*, 956 S.W.2d 43 (Tex. App. 1996) (attorney-client relationship did not exist between attorney and testator's daughter, as required to bring negligence claim against attorney, and daughter lacked standing to assert a breach of contract claim against attorney). An attorney is not liable to plaintiffs for not including in the decedent's will certain real-estate assets the plaintiffs thought they would receive. *Holsapple v. McGrath*, 575 N.W.2d 518, 521

(Iowa 1998). Allowing such lawsuits would contradict a lawyer's duty of undivided loyalty to the client. *Krawczyk v. Stingle*, 543 A.2d 733 (Conn. 1988). A potential beneficiary under a will had no vested interest in the estate, and could not sue the attorney who prepared the will for the client-decedent. *Elam v. Hyatt Legal Serv.*, 541 N.E.2d 616 (Ohio 1989), *Noble v. Bruce*, 709 A.2d 1264 (Md. 1998).

However, other jurisdictions allow intended beneficiaries to bring legal malpractice suits against the will drafter when the testamentary intent, as expressed in the will, is frustrated, and the beneficiary's legacy is lost or diminished as a result of negligence. *Espinosa v. Sparber, Sherin, Shapo, Rosen & Heilbronner*, 586 So. 2d 1221 (Fla. App. 1991); *Leak-Gilbert v. Fahle*, 55 P.3d 1054 (Okla. 2002); *Guy v. Liederbach*, 459 A.2d 744 (Pa. 1983) (while privity is required to maintain an action in negligence for professional malpractice, a named legatee of a will may bring suit as an intended third-party beneficiary of the contract between the attorney and the testator for the drafting of a will that specifically names the legatee as a recipient of all or part of estate). Where the remaindermen's interests in the estate were vested, they could bring a legal malpractice suit against the attorney who administered the estate. *Lewis v. Star Bank, N.A., Butler County*, 630 N.E.2d 418 (Ohio App. 1993). *Blair v. Ing*, 21 P.3d 452 (Hawaii 2001) (where relationship between attorney and beneficiaries of trust was such that duty of care would be recognized, the beneficiaries could proceed under either negligence or contract theories); *Powers v. Hayes*, 776 A.2d 374 (Vt. 2001) (fact questions concerning causation precluded summary judgment against testator's daughter who brought legal malpractice action against the attorney who drafted testator's will for failing to advise testator that changes to IRA beneficiary are not controlled by the will); *Mieras v. DeBona*, 550 N.W.2d 202 (Mich. 1996) (beneficiary named in will may bring tort-based action against attorney who drafted will for negligent breach of standard of care owed to beneficiary by nature of beneficiary's third-party status); *Simpson v. Calivas*, 650 A.2d 318 (N.H. 1994) (duty runs from attorney to intended

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beneficiary of will and an identified beneficiary may enforce the terms of the testator's contract with the attorney as third party beneficiary); *Walker v. Lawson*, 526 N.E.2d 968 (Ind. 1988) (an action lies by a beneficiary under a will against the attorney who drafted that will on the basis the beneficiary is a known third party); *Schreiner v. Scoville*, 410 N.W.2d 679 (Iowa 1987) (a lawyer owes a duty of care to the direct, intended, and specifically identifiable beneficiaries of the testator as expressed in the testator's testamentary instruments); *Needham v. Hamilton*, 459 A.2d 1060 (D.C. 1983) (intended beneficiary of a will may have a malpractice cause of action against drafting attorney for negligence); *Auric v. Continental Casualty Co.*, 111 Wis. 2d 507, 331 N.W.2d 325, 328 (1983) (a beneficiary may maintain an action against an attorney who negligently drafted or supervised execution of a will even though the beneficiary is not in privity with that attorney); *Stowe v. Smith*, 441 A.2d 81 (Conn. 1981) (beneficiary of will claim against attorney who drafted will who alleged will contained significant mistakes stated a cause of action as third party beneficiary of contract); *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961), cert. denied, (1962) (intended beneficiaries who lost testamentary rights because of failure

of attorney could assert tort or contract claim against attorney); *Passell v. Watts*, 794 So. 2d 651 (Fl. App. 2001) (intended residual beneficiaries of testamentary documents have standing to bring an action for legal malpractice if they are able to show that the testator's intent as expressed in the will is frustrated by the negligence of the testator's attorney); *Johnson v. Sandler, Balkin, Hellman & Weinstein*, 958 S.W.2d 42 (Mo. App. 1997) (a legal duty is owed by an attorney to a non-client who was the intended beneficiary of a will or trust, but fact issue existed as to whether the attorney was retained to benefit beneficiaries); *Teasdale v. Allen*, 520 A.2d 295 (D.C. App. 1987) (allegedly intended beneficiaries had standing to bring legal malpractice action); *Woodfork v. Sanders*, 248 So. 2d 419 (La. App. 1971) (legatee was not precluded from maintaining an action against attorney on theory of lack of privity); *Licata v. Spector*, 225 A.2d 28 (Conn. 1966) (beneficiaries under a will which was invalid for lack of statutory requisites of attesting witnesses may maintain a negligence action against attorney drafting will); *Persche v. Jones*, 387 N.W.2d 32 (S.D. 1986) (based on rule that beneficiary actions exist under either third party or tort theories against the attorney responsible for drafting a defective testamentary instrument, a non-attorney

banker who assists decedent in drafting will owes duty of care); *Rathblott v. Levin*, 697 F. Supp. 817 (D.N.J. 1988) (will drafting attorney could be liable to beneficiary despite lack of privity); *Wisdom v. Neal*, 568 F. Supp. 4 (D.N.M. 1982) (no attorney-client relationship was necessary to permit heirs to maintain action that attorney owed a duty of care to heirs).

Conclusion

It is becoming apparent the courts will continue to expand attorneys' liabilities to non-clients. With this in mind, attorneys should focus on steps to minimize or avoid such exposures. These preventive measures include using caution when volunteering information to a non-client, and clarifying in writing, whenever possible, limitations or disclaimers on the scope and substance of any communications to a non-client. Also, the avoidance of having statements construed as representations of fact, as opposed to expressions of opinion, by expressly conveying that one's comments are opinions rather than facts, is imperative. Essentially, a lawyer must take all reasonable measures to avoid the risk of causing economic harm to any person that he or she has a reason to know may suffer as a result of the lawyer's actions. 