Irreconcilable Differences: The Duty of Undivided Loyalty Versus the Non-client Duty of Care

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The fiduciary duty of undivided loyalty is the foundation of our advocacy-adversary system of justice. We believe that the best way to effect justice in a cause is to have each party represented by a zealous advocate who places no interest, including the lawyer's own, above those of the client.

Over a century ago, the Supreme Court of the United States held that a third party not in privity of contract with an attorney could not maintain a legal malpractice action against that attorney for negligence, absent fraud or collusion.[1] 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. Second, imposing a duty to the general public upon lawyers would expose lawyers to a virtually unlimited potential for liability."[2]

Fast forward seventy years or so and courts nationwide began to recognize exceptions to this rule such that the majority rule today is that, irrespective of the duty of undivided loyalty, attorneys do owe responsibilities in certain circumstances to non–clients. The conclusions and holdings drawn from these exceptions are as varied as the jurisdictions from which they come. There are, however, similarities and a ubiquitous balancing test that originated in California. This brief article is not in any sense an exhaustive examination of these various rules, but rather a sampling of how some representative jurisdictions have addressed the issue.[3]

California

Until 1958, California followed the traditional view that a non-client could not maintain an action against an attorney for malpractice. Under former California law, a named beneficiary of a will who was damaged as a result of the

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1. National Sav. Bank v. Ward, 100 U.S. 195, 205-206 (1879).

2. Schreiner v. Scoville, 410 N.W.2d 679, 681 (Iowa 1987).

3. For a more detailed review of the issues, *see* 4 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE, Ch. 7 (5th ed. 2000) and; for a comprehensive survey of nationwide authority on attorney liability to third parties, *see generally*: Annotation, *What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other than Immediate Client,* 61 A.L.R.4th 464 (1988); and Annotation, *Attorney's Liability, to One Other than Immediate Client, for Negligence in Connection with Legal Duties,* 61 A.L.R.4th 615 (1988).

negligence of the attorney who drafted the will could not recover, due to the absence of any duty owed by the attorney to the non-client/intended beneficiary.[4] Still, "the general rule [is] that an attorney owes a duty of care, and is thus answerable in malpractice, only to the client with whom the attorney stands in privity of contract."[5]

In 1958, California adopted a multipart test in *Biakanja v. Irving*, holding that a defendant's liability to a third person not in privity in a particular case "is a matter of policy and involves the balancing of various factors, among which are (1) the extent to which the transaction was intended to affect the plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the plaintiff suffered injury, (4) the closeness of the connection between the defendant's conduct and the injury suffered, (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm.[6] The California Supreme Court later added a factor: "whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession."[7] California courts often recite the "moral blame" factor mentioned in *Biakanja* but rarely apply it as a part of their analysis.[8]

Arizona

An Arizona court used the California factors to determine that an attorney was negligent in failing to discover the reasonably foreseeable malfeasance of a guardian of an incompetent's estate.[9] The conservator of the incompetent's estate brought the action against the former guardian and the attorneys for the estate. The conservator alleged that the former guardian misappropriated and converted funds for his own use, thereby liquidating the estate; there was no allegation of fraud or collusion against the attorney. The court upheld a summary judgment denial on the malpractice case holding that it was a fact issue whether the attorneys knew or should have known that the guardian was acting adversely to ward's interests. After using the California balancing test, the court held that "when an attorney undertakes to represent the guardian of an incompetent, he assumes a relationship not only with the guardian but also with the ward… In fact, we conceive that the ward's interests overshadow those of the guardian."[10]

Washington

Washington courts use a modified balancing test to determine whether attorney owes duty to non-client plaintiff who seeks to bring legal malpractice action.

4. Buckley v. Gray, 42 P. 900 (1895).
5. Borissoff v. Taylor & Faust 33 Cal.4th 523, 530, 93 P.3d 337 (2004).
6. Biakanja v. Irving, 49 Cal.2d 647, 650-651, 320 P.2d 16 (1958).
7. Lucas v. Hamm, 364 P.2d 685 (1961).
8. Borissoff v. Taylor & Faust, 15 Cal.Rptr.3d 735 (2004).
9. Fickett v Superior Court of Pima County, 27 Ariz. App. 793, 558 P2d 988 (1976).
10. 27 Ariz. App. at 795.

Washington courts consider the intent to benefit the plaintiff to be a threshold inquiry in the following six element test: (1) the extent to which the transaction was intended to benefit 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) the extent to which the profession would be unduly burdened by a finding of liability. The answer to the threshold question does not completely resolve the issue, but no further inquiry need be made unless such intent exists.[11]

In *Trask v. Butler*, the heir of an estate, the assignee of another beneficiary, and the successor personal representative, filed a malpractice action against the attorney hired by prior personal representative. The court held that the attorney did not owe duty of care to the estate or heirs, in light of fact that they were only incidental rather than intended beneficiaries of attorney-client relationship, in light of the available remedy of direct action against the prior personal representative for breach of fiduciary duty, and in light of the undue burden on the legal profession from irresolvable conflict of interest in deciding whether to represent personal representative, estate, or heirs.[12]

Missouri

Missouri courts have adopted a nearly indistinguishable test: (1) existence of specific intent by client that purpose of attorney's services was to benefit plaintiff, (2) foreseeability of harm to plaintiff as result of attorney's negligence, (3) degree of certainty that plaintiff will suffer injury from attorney misconduct, (4) closeness of connection between attorney's conduct and injury, (5) policy of preventing future harm, and, (6) burden on profession of recognizing liability under the circumstances.[13]

In *Johnson v. Sandler, Balkin, Hellman, & Weinstein, P.C*, the daughters and granddaughters of a decedent brought a malpractice action against attorneys and a law firm that prepared modifications to the decedent's trust. The interest of the daughters and the granddaughters were defeated when the decedent's surviving wife opted to take the spousal share of the decedent's estate. Based primarily on the first factor of the balancing test above, the court held that it was a fact issue whether the attorneys had been retained with the intent to benefit the beneficiaries and therefore if the attorneys owed a duty to the beneficiaries.

Ohio

Ohio courts observe the stricter rule. In *Scholler v. Scholler*, the Ohio Supreme Court held that: "An attorney is immune from liability to third persons arising from

11. Trask v. Butler, 123 Wn.2d 835, 842-42, 872 P.2d 1080 (1994).

12. *Id*.

13. Johnson v. Sandler, Balkin, Hellman, & Weinstein, P.C., 958 S.W.2d 42 (Mo. Ct. App. W.D. 1997), *as modified*, (Dec. 23, 1997) *and reh'g and/or transfer denied*, (Dec. 23, 1997) *and transfer denied*, (Jan. 27, 1998).

his performance as an attorney in good faith on behalf of, and with the knowledge of his client, unless such third person is in privity with the client or the attorney acts maliciously."[14] The Court elaborated in *Simon v. Zipperstein*, stating that "the rationale for this posture is clear: the obligation of an attorney is to direct his attention to the needs of the client, not to the needs of a third party not in privity with the client."[15]

In *Hile v. Firmin, Sprague & Huffman Co., L.P.A.*, the officers and directors of a corporation brought a legal malpractice action against the corporation's attorneys, alleging that the attorneys negligently failed to advise the plaintiffs respecting their potential personal liability for the company to properly file tax returns.[16] The plaintiffs admitted that attorneys were hired only as corporate counsel and the court held that no attorney-client relationship existed between attorneys and directors and that attorneys' sole responsibility was to advise the corporation. In determining whether the attorneys were in privity with the plaintiffs, the court held that, although the corporate directors have a fiduciary relationship with the corporation, their interests are not always identical. As such, the corporate attorney must direct his attention to the interests of the corporation and the personal interests of the corporate directors are outside that sphere.[17]

West Virginia

The West Virginia Supreme Court has observed a duty of a will drafting attorney to third party beneficiaries, but has crafted exacting language to limit that duty. In *Calvert v. Scharf*, the Court was concerned that attorneys could be exposed to "virtually unlimited potential for liability."[18] The Court held that only the "direct, intended, and specifically identifiable beneficiaries of a will" have standing to sue the lawyer who prepared the will, and only where "it can be shown that the testator's intent, as expressed in the will, has been frustrated by negligence on the part of the lawyer so that the beneficiaries' interest(s) under the will is either lost or diminished."[19]

New York

The "well-established" rule in New York with respect to attorney malpractice is that "absent fraud, collusion, malicious acts or other special circumstances, an attorney is not liable to third parties, not in privity, for harm caused by professional negligence."[20] The attorney in *Estate of Spivey v. Pulley* drafted a will and had the plaintiff, the sole beneficiary, sign the will as subscribing witness. This signature required the plaintiff to provide testimony in her capacity as a subscribing witness at probate and thereby voided her bequest pursuant to New York law.

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14. 462 N.E.2d 158, 163 (1984).
15. 512 N.E.2d 636, 638 (1987).
16. 595 N.E.2d 1023 (1991).
17. 71 Ohio App.3d 842.
18. 619 S.E.2d 197, 206 (2005).
19. 619 S.E.2d 197, 207.
20. *Estate of* Spivey v. Pulley, 663 N.Y.S.2d 293 (1988).

Even thought he sole beneficiary of the estate received nothing as a direct result of the attorney's negligence, the court declined to depart from the privity requirement in order to create a specific exception for an attorney's negligence in will drafting, and dismissed the case.