

PROFESSIONAL LIABILITY

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IN THIS DOUBLE ISSUE

First, John T. Lay and Childs Cantey Thrasher provide an overview of the issues surrounding professional liability in legal malpractice claims arising when one lawyer or law firm associates with or refers a case to another lawyer or law firm. The second article, which reviews potential theories of attorney liability to non-clients in the wills, trusts, and estates contexts, was first presented at the IADC Professional Liability Roundtable on May 17, 2012 in Chicago, Illinois.

Featured Articles

Potential Liability for Attorneys Engaging Co-counsel and Referrals

By John T. Lay and Childs Cantey Thrasher Page 2

Attorney Liability to Non-Clients in the Wills, Estates and Trusts Context

By Joseph S.D. Christof, II and Douglas C. Crone Page 5

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The Professional Liability Committee consists of lawyers who represent professionals in matters arising from their provision of professional services to their clients. Such professionals include, but are not limited to, lawyers, accountants, corporate directors and officers, insurance brokers and agents, real estate brokers and agents and appraisers. The Committee serves to: (1) update its members on the latest developments in the law and in the insurance industry; (2) publish newsletters and Journal articles regarding professional liability matters; and (3) present educational seminars to the IADC membership at large, the Committee membership, and the insurance industry. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



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Attorney Liability to Non-Clients in the Wills, Estates and Trusts Context

ABOUT THE AUTHORS



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An attorney's liability to his or her client is a fairly well-defined area of law and, unfortunately, often a frequent occurrence in today's legal marketplace. A practitioner's liability to third parties other than clients, however, is much more ambiguous and varies depending on the identity of the third party, the applicable jurisdiction, and the specific facts involved. This article provides an overview of an attorney's potential liability to third party non-clients in various jurisdictions, with a particular emphasis on the wills, trusts, and estates context. The wills, trusts, and estates context is perhaps the best defined area of liability for attorneys to non-clients, and some courts borrow from this area to apply or extend liability to non-clients to other areas of legal services.

A. The General Rule – No Liability to Third Parties

Generally and historically, most jurisdictions required the privity of an attorney-client relationship in order for an injured party to maintain a cause of action for negligence against a lawyer regarding the rendition of legal services. *Guy v. Liederbach*, 459 A.2d 744, 748-49 (Pa. 1983). In other words, "an attorney will be held liable for negligence only to his client. In the absence of special circumstances, he will not be held liable to anyone else." *Smith v. Griffiths*, 476 A.2d 22, 26 (Pa. Super. Ct. 1984). *See also Young v. Williams*, 645 S.E.2d 624, 625 (Ga. Ct. App. 2007) ("In general, an attorney-client relationship must be demonstrated before a plaintiff may recover in a legal malpractice case."); *McIntosh County Bank v. Dorsey & Whitney, LLP*, 726

N.W.2d 108, 114 (Minn. Ct. App. 2007) (“Generally, an attorney is liable only to those with whom he has an attorney-client relationship.”); *Fox v. White*, 215 S.W.3d 257, 260 (Mo. Ct. App. 2007) (“The elements necessary to establish a claim of legal malpractice are: (1) an attorney-client relationship”); *Estate of Albanese v. Lolio*, 923 A.2d 325, 331 (N.J. Super. Ct. App. Div. 2007) (same).

The general, and antiquated, rule barring attorney liability to third parties is based upon the absence of privity between the lawyer and the third party. Essentially, because the lawyer has no contract of employment with the third party, no liability can exist. Strict adherence to the privity requirement, however, has been criticized in some jurisdictions because it potentially leaves injured third parties without a source of compensation for their losses. *Smith v. Griffiths*, 476 A.2d 22, 26 (Pa. Super. Ct. 1984).

B. The Balancing Test for Third Party Recovery – The California Approach

Abrogation of a strict privity requirement in legal malpractice cases originated in California state courts. The California Supreme Court determined that the question of whether a lawyer may be held liable to a non-client third party is a matter of public policy and requires the balancing of various factors, including:

- (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 suffered;
- (5) the moral blame attached to the defendant's conduct; and
- (6) the policy of preventing future harm.

Biakanja v. Irving, 320 P.2d 16, 19 (Cal. 1958). A similar approach was advocated by a panel of the Pennsylvania Superior Court in *Guy v. Liederbach*, 421 A.2d 333 (Pa. Super. Ct. 1980). However, on allocatur, the Pennsylvania Supreme Court expressly rejected a balancing test, and continued to adhere to the strict privity rule. *Guy v. Liederbach*, 459 A.2d 744 (Pa. 1983).

A balancing of factors test has been used, in varying degrees, in other jurisdictions as well. *See, e.g., Fickett v. Super. Ct.*, 558 P.2d 988, 990 (Ariz. Ct. App. 1976) (“We are of the opinion that the better view is that the determination of whether, in a specific case, the attorney will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors.”); *Licata v. Spector*, 225 A.2d 28, 31 (Conn. Super. Ct. 1966) (balancing of factors “must be applied in determining whether a beneficiary is entitled to bring an action against an attorney for negligence in drafting a will”); *McAbee v. Edwards*, 340 So. 2d 1167, 1168 (Fla. Dist. Ct. App.

1976) (accepting the *Biakanja* factors); *Stewart v. Sbarro*, 362 A.2d 581, 588 (N.J. Super. Ct. App. Div. 1976) (“We believe, moreover, that where, as here, an attorney undertakes a duty to one other than his client, he may be liable for damage caused by a breach of that duty to a person intended to be benefited by his performance.”); *Schwartz v. Greenfield, Stein & Weisinger*, 396 N.Y.S.2d 582, 584 (N.Y. Sup. Ct. 1977) (applying the *Biakanja* factors); *Jenkins v. Wheeler*, 316 S.E.2d 354, 356-57 (N.C. Ct. App. 1984) (“North Carolina now recognizes a cause of action in tort by non-client third parties for attorney malpractice” based on a balancing of factors.); *Auric v. Continental Cas. Co.*, 331 N.W.2d 325, 329 (Wis. 1983) (“Although the lack of privity does not bar this action, there remains the question of whether liability should be imposed in this specific case. Normally, such a factual determination would be one for the trial court to make.”).

C. Attorneys Remain Liable for Intentional Torts to Third Parties

If an attorney’s conduct is motivated by malice or otherwise commits an intentional tort, the attorney may still be personally liable for losses suffered by a third party. *Smith v. Griffiths*, 476 A.2d 22, 26-27 (Pa. Super. Ct. 1984). *See also Adelman v. Rosenbaum*, 3 A.2d 15, 18 (Pa. Super. Ct. 1938) (“[M]alicious action is not sheltered by any privilege. An attorney is personally liable to a third party when he is guilty of fraud, collusion, or a malicious or tortious act, and he is liable, as anyone else, when he encourages and induces another to commit a trespass.”). Therefore, irrespective of a lack of privity or balancing of factors, an attorney is generally liable for his intentional wrongs.

D. Attorneys are Liable to Third Parties for Negligently Drafting Wills

In Pennsylvania, pursuant to the rule of privity, a claim against an attorney for either legal malpractice or breach of an attorney-client agreement must be asserted by the attorney's actual client and not by third parties outside of such relationship. The only exception to this rule is for a “narrow class of third party beneficiaries,” specifically, for named legatees of a will, whose legacies have failed as a result of attorney malpractice. *Krauss v. Claar*, 879 A.2d 302, 308 (Pa. Super. Ct. 2005). *See also Guy v. Liederbach*, 459 A.2d 744, 752 (Pa. 1983) (permitting recovery of a disappointed legatee on a third party beneficiary theory).

The lone exception in Pennsylvania, which is accepted in other jurisdictions as well, is generally premised on a third party beneficiary theory. Under the Restatement (Second) of Contracts, as adopted in Pennsylvania and other jurisdictions, there is a two part test to determine whether an intended beneficiary may sue on a third party beneficiary theory: (1) the recognition of the beneficiary's right must be “appropriate to effectuate the intention of the parties,” and (2) the performance must “satisfy an obligation of the promisee to pay money to the beneficiary” or “the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.” *Guy*, 459 A.2d at 751-52 (citing and quoting RESTATEMENT (SECOND) OF CONTRACTS § 302). As the Pennsylvania Supreme Court explained:

The underlying contract is that between the testator and the attorney for the drafting of a will. The will, providing for one or more named beneficiaries, clearly manifests the intent of the testator to benefit the

legatee . . . Since only named beneficiaries can bring suit, they meet the first step standing requirement of § 302. Being named beneficiaries of the will, the legatees are intended, rather than incidental, beneficiaries . . . In the case of a testator-attorney contract, the attorney is the promisor, promising to draft a will which carries out the testator's intention to benefit the legatees. The testator is the promisee, who intends that the named beneficiaries have the benefit of the attorney's promised performance. The circumstances which clearly indicate the testator's intent to benefit a named legatee are his arrangements with the attorney and the text of his will.

Guy, 459 A.2d at 751-52. The Pennsylvania exception to the general requirement of privity ensures recovery for “those legatees who would otherwise have no means by which to obtain their expectancies under the testamentary instruments naming them.” *Hess v. Fox Rothschild, LLP*, 925 A.2d 798, 807 (Pa. Super. Ct. 2007). The exception is truly out of necessity to permit the injured party to be made whole.

Other courts have disregarded the third party beneficiary analysis and concluded “that the requirement of privity does not extend to a malpractice suit brought by the intended beneficiary of a will against the attorneys who drafted it.” In fact, the District of Columbia Court of Appeals has stated that it “need not dwell upon a third party beneficiary analysis for, in any event, the gravamen of the cause of action is negligence.” *Needham v. Hamilton*, 459 A.2d 1060, 1061 (D.C. 1983). *See also Ogle v. Fuiten*, 466 N.E.2d 224, 226 (Ill. 1984) (holding that the traditional elements of negligence in tort were sufficiently stated by the allegations of the complaint, in a case involving disappointed potential beneficiaries under a will).

E. Other Examples of Attorneys Liable (or not Liable) to Third Parties

There are numerous other unique and interesting third party liability cases involving attorneys around the United States, which often involve the estates or trusts context.

- Divorce - Although third party liability may be found to exist where the attorney is responsible for damage caused by the attorney's negligence to a person intended to be benefited by the attorney's performance irrespective of any lack of privity, an opposing party in a divorce proceeding is not an intended beneficiary. *Baker v. Coombs*, 219 S.W. 3d 204, 208-09 (Ky. Ct. App. 2007).
- Trusts - An attorney for a trustee will be liable for breach of a fiduciary duty to third-party beneficiaries of the trust if the attorney places his or her self-interest above that of the trustee. *Chinello v. Nixon, Hargrave, Devans & Doyle, LLP*, 788 N.Y.S.2d 750, 751 (N.Y. App. Div. 2005); *Weingarten v. Warren*, 753 F. Supp. 491, 495 (S.D. N.Y. 1990).
- Estates - “Other courts have suggested that a testator’s estate or a personal representative of the estate might stand in the shoes of the testator in an action for legal malpractice in order to meet the strict privity requirement . . . This may well be

a solution to the problem, but it is a question for another day . . . While recognizing that public-policy reasons exist on both sides of the issue, we conclude that the bright-line rule of privity remains beneficial. The rule provides for certainty in estate planning and preserves an attorney's loyalty to the client.” *Shoemaker v. Gindlesberger*, 887 N.E.2d 1167, 1171-72 (Ohio 2008).

- Intentional Tort - “Unlike a claim for negligence, an attorney can be held liable for fraudulent misrepresentation” to a third party. *Buscher v. Boning*, 159 P.3d 814, 832 n.13 (Haw. 2007).
- Heirs - Massachusetts has considered whether an attorney owes a duty to a potential heir during the drafting of a will. The court concluded that “the financial interest of one who would only take by intestate succession would not be served in those cases where the attorney decides that the client is competent and free from undue influence, and a will is prepared. If we were to hold that, in the circumstances of this case as alleged in the complaint, the defendant attorney owed a duty of care both to [testator] and [heir], we would be imposing conflicting duties on attorneys. This we shall not do.” *Logotheti v. Gordon*, 607 N.E.2d 1015, 1018 (Mass. 1993).
- Trusts - Beneficiaries of an *inter vivos* trusts stated a cause of action against the drafting attorney due to adverse tax consequences of the attorney’s drafting. *Bucquet v. Livingston*, 57 Cal.App.3d 914 (Cal. App. 1976).
- Trusts - In a guardianship case, a mother hired a lawyer to help institute a guardianship for her child's estate following the death of the child's father. The father had designated the child as the beneficiary of his life insurance policy. The lawyer petitioned the court for a guardianship, but the resulting guardianship order neither required a bond for the guardian, nor blocked the account from access in lieu of the bond. The mother depleted the funds of the account. The court concluded that the child had standing to bring an action against the attorney for malpractice based on a balancing of factors analysis. *In re Guardianship of Karan*, 38 P.3d 396, 397 (Wash. Ct. App. 2002).
- Wills - An attorney who negligently failed to procure the proper number of witnesses for his client's signing of her will, resulting in the will being denied probate, was held liable to the intended beneficiaries under the will, who had thus been deprived of a portion of their intended legacy. The court stated that the attorney owed a duty to use due care to those foreseeably injured by the negligent performance or nonperformance of the contract, without regard to any question of reliance on the contract. *Licata v. Spector*, 225 A.2d 28 (Conn. Super. Ct. 1966).
- Wills - An attorney employed to draft a will so as to pass his client’s entire estate to her two daughters was held liable to the daughters, under a negligence theory, when the client's husband, whom she had married a few days after executing the will and whom the attorney had known she was about to marry, claimed a portion of the estate as a post-testamentary spouse. *Heyer v Flaig*, 449 P.2d 161 (Cal. 1969).

- Wills - Attorney was liable to residuary beneficiaries, under a legal malpractice theory, when the attorney accidentally left out a residuary clause when drafting a will even though there was no privity of contract between attorney and the residuary legatees. The court reasoned that the attorney assumed a legal relationship not only with client, but also with the client's intended beneficiaries when he undertook to fulfill the testamentary instructions of his client. *Arnold v. Carmichael*, 524 So.2d 464 (Fla. Ct. App. 1988).
- Estates - Decedent's son and the corporation established as part of decedent's estate plan had standing to bring legal malpractice claim against law firm after the IRS disregarded the corporate form of the corporation and recharacterized the son's salary from the corporation as a taxable gift to the son. *Estate of Nevelson v. Carro, Spanbock, Kaster & Cuiffo*, 686 N.Y.S.2d 404 (N.Y. Sup. Ct. App. Div. 1999).
- Trusts - Attorney who drafted a will setting up a testamentary trust owed a duty of care to trust beneficiaries, and was liable to them in negligence for their not having received as much as they should have due to attorney's alleged negligence in advising testator about tax consequences. However, attorney was not liable to beneficiaries for other losses allegedly caused by attorney's later negligence in representing estate. *Jewish Hosp. v Boatmen's Nat'l Bank*, 633 N.E.2d 1267 (Ill. App. Ct. 1994).
- Wills / Trusts - In an action against attorney by an intended beneficiary under a will, where attorney failed to include plaintiff either in the will or related trust instrument, plaintiff stated causes of action both as an intended beneficiary of attorney's professional contract with decedent, and as a tort claimant based on breach of duty to the plaintiff created by that contract as its intended beneficiary. *Hale v. Groce*, 744 P.2d 1289 (Or. 1987).

As the above-cited cases exemplify, many courts have agreed that a lawyer is liable for mistakes made during the drafting of wills and trusts that adversely affect the beneficiaries of such instruments. Courts also have been willing to abandon the traditional requirement of privity between an attorney and client, which historically stood as a prerequisite to recovery in such contexts. With some, perhaps “rogue,” courts extending attorney liability to third parties outside of the well-settled law in the estates and trust context, practitioners must be cognizant of the growing realms of potential liability from clients and non-clients alike.

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