Volume 97
Issue 2 *Dickinson Law Review - Volume 97, 1992-1993*

1-1-1993

Lawyer Liability to Non-Clients

Forest J. Bowman

Lawyer Liability to Non-Clients

Forest J. Bowman*

I. Introduction

Until fairly recently it was a well-established rule of law that to obtain a recovery in negligence for a lawyer's malpractice the plaintiff must first establish that an attorney-client relationship existed between the lawyer and the plaintiff with respect to the subject matter of the services to be performed by the lawyer. Put another way, it was accepted that lawyers should not be liable for professional malpractice to persons other than those with whom the lawyer had entered into a contract for legal services, i.e., the lawyer's own clients.[1]

The idea was that a lawyer could not be negligent for failing to do that which he or she had no duty to undertake and, in the relationship between a lawyer and a client, there being no duty owed to anyone other than the client, only the client could sue for a breach of any duty.[2] The existence of a duty was considered to be basic to any cause of action for negligence, and this duty arose only from the attorney-client relationship.

As far back as 1879, the Supreme Court of the United States held that a third party not in privity with the lawyer should not have the right to sue the lawyer for negligence. Otherwise, the lawyer's obligations would extend to an unforeseeable number of people outside the attorney-client relationship.[3]

Privity of contract was the standard by which a lawyer's liability was determined.[4] The insistence on privity was an outgrowth of

---

* Hale J. Posten Professor of Law, West Virginia University College of Law.

1. *See* McGlone v. Lacey, 288 F. Supp. 662 (D.S.D. 1968); *Cf.* Massey v. Cunningham, 420 So.2d 1036 (La. Ct. App. 1982); Bloomer Amusement Co. v. Eskenazi, 394 N.E.2d 16 (Ill. App. Ct. 1979); *Cf.* Bevelheimer v. Gierach, 339 N.E.2d 299 (Ill. App. Ct. 1975).

2. *See* Banerian v. O'Malley, 116 Cal. Rptr. 919 (Cal. Ct. App. 1974); McGlone v. Lacey, 288 F. Supp. 662 (D.S.D. 1968).

3. Nat'l Savings Bank of D.C. v. Ward, 100 U.S. 195 (1879). Citing the English case of Winterbottom v. Wright, 152 Eng. Rep. 402 (1842), the Supreme Court said: "The only safe rule is to confine the right to recover to those who enter into the contract; if we go one step beyond that, there is no reason why we should not go fifty." 100 U.S. at 203. Moreover, while this case is acknowledged as the most influential decision in establishing the American rule on privity, there were earlier opinions that had also refused recovery because of the absence of privity of contract. *See* Sevier v. Holliday, 2 Ark. 512 (1841); Mardis' Administrators v. Shackleford, 6 Ala. 433 (1844).

4. "Privity of contract" is defined as "[t]hat connection or relationship which exists between two or more contracting parties." BLACK'S LAW DICTIONARY 1199 (6th ed. 1990).

the traditional English rule which said that two parties cannot by contract create rights in a third person.[5] In terms of the attorney-client relationship, only the client could sue the lawyer for breach of the contract because only the client was in privity with the lawyer. No third party could bring a lawsuit for the lawyer's breach of his or her contract with the client. Thus, in *Peterson v. Kennedy* [6] no recovery was permitted by a professional football player who sought recovery against the NFL Players Association lawyer who had filed a grievance on behalf of the player as a member of the Association. The court held that "the attorney who is handling a labor grievance on behalf of a union as part of the collective bargaining process has [not] entered into an attorney client relationship in the ordinary sense with the particular union member who is asserting the underlying grievance."[7] The client in this case was the union, not the player, and only the union would have a cause of action in negligence against the lawyer, because only the union stood in privity with the lawyer.[8]

---

5. A. CORBIN, CORBIN ON CONTRACTS 1 Vol. Ed. § 772.

6. 771 F.2d 1244 (9th Cir. 1985).

7. *Peterson*, 771 F.2d at 1258.

8. Of course, whether the attorney-client relationship exists in the first instance (and, with it, any duty to a client) is itself a question of fact. Chavez v. State, 604 P.2d 1341 (Wyo. 1980); Crest Investment Trust, Inc. v. Comstock, 327 A.2d 891 (Md. Ct. Spec. App. 1974). In addition, the burden of establishing the relationship rests upon the claimant. Shropshire v. Freeman, 510 S.W.2d 405 (Tex. Civ. App. 1974). Moreover, no particular contract or formality is required to give rise to the relationship. George v. Caton, 600 P.2d 822 (N.M. 1979); Bresette v. Knapp, 159 A.2d 329 (Vt. 1960); New York University v. Simon, 498 N.Y.2d 659 (1985); Matter of McGlothlen, 663 P.2d 1330 (Wash. 1983). While the attorney-client relationship is consensual in nature and arises only when both the lawyer and the client have consented to its formation, the facts giving rise to the formation of the relationship can be inferred from the lawyer's conduct. Matter of Olson, 21 B.R. 123 (D.Neb. 1982). A lawyer's fiduciary obligation can arise, for example, from the existence of a continuing and general professional relationship. Bresette v. Knapp, 159 A.2d 329 (Vt. 1960); Flanagan v. Delapp, 533 S.W.2d 592 (Mo. 1976). Moreover, the fiduciary obligation can originate from a lawyer giving, perhaps inadvertently, the impression that he or she was willing to undertake the assistance of the would-be client. So, in Tormo v. Yormark, 308 F. Supp. 1159 (D.N.J. 1975), the lawyer's declaration that he would undertake "to see what could be done with regard to settlement" was held to be sufficient to impose upon the lawyer the duties owed by a lawyer to his clients, even though a formal retainer agreement was never executed and a fee was never paid (and the lawyer insisted that no attorney-client relationship had been entered into).

Obviously, then, where a lawyer declines to enter into an attorney-client relationship, the refusal of the undertaking must be communicated and the failure to notify the prospective client of the intention to enter the relationship may itself be actionable negligence. Folly Farms I, Inc. v. Trustees, Etc., 387 A.2d 248 (Md. 1978); Brandlin v. Belcher, 134 Cal. Rptr. 1 (Cal. Ct. App. 1977).

II. The Lawyer's Duty in Negligence to Non-Clients

A. Background

Refusing to recognize rights of third parties who are not parties to a contract has been criticized as "out of harmony with generally prevailing ideas of justice and convenience and . . . cases in which a remedy was refused have often come to be regarded later as in shocking conflict with existing mores."[9] Thus, where it is clear that a contract exists wherein a defendant made a promise to a plaintiff, and where a third party was to benefit from the promise by the promisor, the right of the third party can properly be described as a "contract right." This contract right is not affected by the fact that the beneficiary is not a promisee or one of the contracting parties.[10]

Accordingly, outside the area of professional liability, the requirement of contractual privity as a prerequisite for liability to third persons has been abandoned. In 1892 the Supreme Court of Louisiana held that a notary public is liable to intended legatees deprived of their legacy by the notary's clear error.[11] In the celebrated case of *MacPherson v. Buick Motor Co.*[12], the New York Court of Appeals held, in 1916, that the Buick Motor Company was liable for damages incurred by a plaintiff who had purchased a defective car from an automobile dealer, despite the absence of privity of contract between the company and the plaintiff.[13] This landmark decision, written by Judge Cardozo, was based on the foreseeability of damage occurring to third parties if an automobile was negligently manufactured.[14]

Six years later, in *Glanzer v. Shepard*,[15] with Judge Cardozo again writing the opinion, the New York Court of Appeals held that public weighers who furnished a certificate to a vendor of beans were liable to the vendee of the beans for an error in measuring the weight.[16] The court emphasized that the vendor's use of the certificate was not merely collateral to the weigher's employment. Rather, the court said, "it was a consequence which, to the weigher's knowledge, was the end and aim of the transaction."[17]

---

9. A. CORBIN, CORBIN ON CONTRACTS 1 Vol. Ed., § 779J.
10. *Id.*
11. Weintz v. Kramer, 10 So. 416 (La. 1892).
12. 111 N.E. 1050 (N.Y. 1916).
13. *Id.*
14. *Id.*
15. 135 N.E. 275 (N.Y. 1922).
16. *Id.*
17. *Id.* at 275.

This same court, however, refused to expand the elimination of privity of contract into the professional field in a 1931 case involving public accountants who had negligently certified the accuracy of a corporation's balance sheet.[18] The plaintiff in this case, in reliance on the balance sheet certified by the defendant, loaned money to what turned out to be an insolvent corporation. However, the court, with Judge Cardozo again writing the opinion, refused recovery for the plaintiff because the plaintiff's reliance on the balance sheet, unlike the reliance on the weigher's certificate, was not known to the defendant accountants.[19]

The majority view today, with respect to the liability of an accountant for negligence to a non-client is that "an accountant is liable for the negligent preparation of a financial report only to those he knows will be receiving and relying on the report."[20]

B. The Modern Trends

1. California.—Modern-day erosion of the doctrine of immunity of lawyers to claims of third parties began in 1958 when the California Supreme Court was faced with a case involving a nonlawyer who had undertaken the legal task of preparing a will.[21] In that case the court held that the notary public who had drawn up an improperly attested will had violated a duty to the intended beneficiary.[22] The court found a duty to the third party, despite the lack of privity of contract between the third party and the notary public, and made special notice of the fact that its action enforced the ends and aims of the original transaction, an echo of the New York Court of Appeals decision in *Glanzer v. Shepard*.[23] The court said that "[t]he determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors."[24] These factors included: (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 injuries suf-

18. Ultramares Corp. v. Touche, 174 N.E. 441 (N.Y. 1931).
19. *Id.*
20. First Nat'l Bank of Bluefield v. Crawford, 386 S.E.2d 310, 312 (W. Va. 1989). This is also the position taken in RESTATEMENT (SECOND) OF TORTS § 552 (1977).
21. Biakanja v. Irving, 320 P.2d 16 (Cal. 1958).
22. *Id.*
23. *Id.*
24. *Id.*

fered; (5) the moral blame attached to the defendant's conduct; and (6) the policy of preventing future harm.[25]

Three years later, in *Lucas v. Hamm*[26], the California Supreme Court, faced with a lawyer who had drawn a fatally-defective will and thereby deprived intended beneficiaries of their testamentary rights, abandoned the requirement of privity of contract in actions for damages against lawyers.[27] The court held that the lack of privity did not preclude the third-party beneficiaries from maintaining an action in tort against the lawyer/defendant.[28]

The *Lucas* court cited the various factors balanced in *Biakanja*, dropped the "moral blame" factor, and substituted an inquiry into "whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession."[29] The court noted that, "[a]lthough in some situations liability could be large and unpredictable in amount, this is also true of an attorney's liability to his client,"[30] and took the view that "the extension of [the lawyer's] liability to beneficiaries injured by a negligently drawn will does not place an undue burden on the profession, particularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss."[31]

2. Other States React.—The California breakthrough for third-party beneficiaries was not immediately embraced by other states. Immunity of lawyers to claims of third parties continued to be the rule, even where the injuries caused to the third party were foreseeable. For example, as recently as 1982 an Illinois appellate court held, in *Favata v. Rosenberg*,[32] that a lawyer owed a professional duty of care only to the client. The *Favata* court held that an intended beneficiary of an amended land trust agreement which was found to be invalid could not maintain a legal malpractice action

25. *Biakanja*, 320 P.2d at 19.
26. 364 P.2d 685 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962).
27. *Id.*
28. *Id.*
29. *Id.* at 688.
30. *Id.*
31. Having taken this strong pro-client stand, the *Lucas* court then held that the lawyer, who had allegedly drafted the will so that trust provisions violated the California law on perpetuities and restraints, was not guilty of negligence. The court noted that "few, if any, areas of the law have been fraught with more confusion or concealed more traps for the unwary draftsman" than this statute (or, presumably, the common law Rule against Perpetuities). While this decision may be of comfort to lawyers and law students who find the subject of perpetuities overwhelming, it is of little solace to clients who expect their lawyers to be knowledgeable in the law.
32. 436 N.E.2d 49 (Ill. App. Ct. 1982).

against the lawyer who drafted the agreement.[33] Urged to adopt the California approach to this issue, under which a lawyer's duty to use ordinary care, judgment, skill and diligence in the performance of professional tasks extends not only to his client, but also to intended testamentary beneficiaries, the court said:

> [W]e are hesitant to extend liability to a non-client because of the personal nature of the attorney-client relationship and the potential for conflicts of interest which might rise if such liability were extended to non-clients.[34]

The *Favata* court's concern with "the potential for conflicts of interest which might rise if such liability were extended to non-clients"[35] apparently reflects the opinion that if anyone should be able to maintain an action against the derelict lawyer it should be the client who hired the lawyer to draft the faulty agreement. If the client were not sufficiently upset with the lawyer's shortcomings to bring the action, the lawyer should not be held liable to third parties.[36] This, of course, is not an option available to testators whose wills do not carry out their wishes due to the negligence of the lawyer/drafter. Thus, it was in the will cases where the old reluctance to hold lawyers liable to the claims of third parties finally broke down. Oddly enough, however, the beginning of the end was in a non-will case.

The same year that *Favata v. Rosenberg* was decided, the Illinois Supreme Court held, in *Pelham v. Griesheime*,[37] that privity of contract was not an indispensable prerequisite to establishing a duty of care between a non-client and a lawyer. A non-client could prevail in a suit for legal malpractice if the non-client could allege and prove facts which would establish that the intent of the client to benefit the nonclient third party was the primary or direct purpose of the establishment of the attorney-client relationship.[38]

In *Pelham* the client's children sued the lawyer who had represented their mother in her divorce action against their father, alleging professional negligence.[39] The father had failed to maintain the children as the prime beneficiaries of his life insurance policies, as the divorce decree had required. The children alleged that the lawyer owed them a duty to exercise a reasonable degree of care and skill

33. *Id.*
34. 436 N.E.2d at 51.
35. *Id.*
36. *Id.*
37. 417 N.E.2d 882 (Ill. App. Ct. 1981); *aff'd*, 440 N.E.2d 96 (Ill. 1982).
38. *Id.*
39. *Id.*

"with reference to seeing that the plaintiffs became prime beneficiaries"[40] of their father's life insurance policies.[41] The *Pelham* court held that the plaintiffs' complaint did not state a cause of action against the lawyer, not because of the lack of an attorney-client relationship, but because the plaintiffs did not allege facts establishing that the intent of the mother to benefit the plaintiffs was the primary or direct purpose of the attorney-client relationship between the mother and the lawyer.[42]

The court said that the lawyer had been retained to represent the wife in litigation with her husband, and owed a duty to the wife alone as his client.[43] The primary or direct purpose of the establishment of the attorney-client relationship here was not to advance the children's interest, even though part of the litigation involved a provision in the divorce decree in which the husband agreed to maintain life insurance that would name his children as beneficiaries.[44] The court noted that "[d]issolution proceedings are, for the most part, adversarial in nature. To conclude that an attorney representing one of the spouses also owes a legal duty to the children of the two litigants would clearly create conflict-of-interest situations."[45]

The key to *Pelham*, then, is that the case involved a lawyer in the litigation role, a role in which the lawyer is duty-bound to optimize the client's advantage regarding the subject of the representation, limited only by those ethics rules designed to prevent fraud on the tribunal. The privity of contract rule makes sense within the context of litigation, given the adversarial nature of our legal system and its requirements of undivided loyalty and zealous representation of the client. In fact, in the litigation context not only may legal representation result in injury to third persons, but injury to a third person is often the direct objective of the lawyer's representation.

C. Third-Party Liability in Specific Contexts

1. Litigation.—Perhaps because of the adversarial nature of litigation and the need for zealous representation of clients, third-party liability in the context of litigation remains virtually unheard of.

40. *Id.*
41. 417 N.E.2d at 882.
42. *Id.*
43. Pelham v. Griesheime, 417 N.E.2d 882 (Ill. App. Ct. 1981); *aff'd*, 440 N.E.2d 96 (Ill. 1982).
44. *Id.*
45. 440 N.E.2d at 101.

Thus, in *MacKerron v. Downing*[46] the court held that, outside of the established torts of malicious prosecution and abuse of process, a lawyer owes no duty to a client's adversary not to pursue groundless litigation.[47] The obligations imposed by the *Code of Professional Responsibility*[48] do not give rise to a cause of action by a non-client for malpractice.[49]

Moreover, the principles that apply to third-party liability within the litigation process appear also to have been given application in settings that, while they do not involve the pendency of a lawsuit, nonetheless contain elements which make it clear that the lawyer's role cannot, by any stretch of the imagination, be viewed as including the undertaking of an obligation to anyone outside the attorney-client relationship. For example, the following situations have been held to include no third-party liability on the part of the lawyer: 1) sending a letter to non-clients demanding that they pay a debt which they supposedly owe to the client;[50] 2) filing a writ of attachment against property of a non-client;[51] 3) structuring a settlement with a tortfeasor in such a way that the economic interests of the client's employer were harmed;[52] and 4) advising a client on the client's contractual rights.[53]

The reasoning here is sound. There can be no question but that a lawyer's effective representation of a client may well result in the infliction of economic harm upon the client's opponent or upon those with whom the client conducts business. The lawyer's ethical obligation to the client is to assist the client, and is not to avoid the infliction of anything other than "needless" economic harm to adversaries or others. Imposing a duty on the lawyer to the client's adversary or others would do irreparable harm to the litigation process and to the lawyer-client relationship as it approaches the litigation role in its nature.

Estate Planning.—Within the area of wills and family estate planning, however, there is less concern with conflicts of interest. The nature of the relationship among the parties is strictly non-ad-

46. 534 A.2d 359 (Me. 1987).
47. *Id.*
48. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A) (1980).
49. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (Preliminary Statement) (1980).
50. Tipton v. Willamette Subscription Television, 735 P.2d 1250 (Or. Ct. App. 1985).
51. C & V Gravel, Inc. v. Maco Construction Corp., 465 So.2d 938 (La. Ct. App. 1985).
52. Thrall Car Mfg. Co. v. Lindquist, 495 N.E.2d 1132 (Ill. App. Ct. 1986).
53. Royal Abstract Corp. v. Golenbock & Barrell, 494 N.Y.S. 2d 613 (N.Y. Sup. Ct. 1985), *aff'd. mem.*, 503 N.Y.S.2d 702 (N.Y. App. Div. 1986).

versarial, and the lawyer is often employed by the client specifically to benefit a third party. The year following the *Pelham* decision, the Illinois Appellate Court for the 4th Appellate District of Illinois was faced with a case where the third-party claimants alleged that they were the intended beneficiaries of wills drafted by a lawyer-defendant. The wills were designed to benefit the claimants but failed to do so because of the negligence of the lawyer-defendant, and the court abandoned the requirement of strict privity of contract.[54] In the absence of the litigation context of *Pelham*, the court permitted the third-party claimants to maintain an action for negligence against the lawyer-defendant, despite the absence of privity between the third-party claimants and the lawyer-defendant.[55]

The California and Illinois courts had thus arrived at the same result, permitting third-party claimants to sue a lawyer in negligence in a non-litigation context despite the lack of privity, by two separate routes. In *Lucas* the California court had "balanced the factors"[56] and viewed the problem through the lens of a duty imposed by public policy.[57] In *Ogle*, on the other hand, the emphasis of the Illinois court was purely on whether the lawyer and client intended the non-client to benefit from the contract between them.[58]

Pennsylvania has taken yet another route to allowing recovery by third-party beneficiaries. In *Guy v. Liederbach*[59] the court rejected as unworkable the tort-based duty established in *Biakanja* and further refined in *Lucas*. The court held that a non-client could only recover for malpractice if he could prove that he was a third-party beneficiary under contract law.[60] The court said that "the class of persons to whom the defendant may be liable is restricted by principles of contract law, not negligence principles relating to foreseeability or scope of the risk."[61] Thus, there are at least three routes to permitting a third-party non-client to sue a lawyer for negligence, despite the lack of privity of contract: (1) The tort-based balancing of factors test of *Lucas v. Hamm* adopted by California; (2) The "intent to benefit the third-party" approach of *Ogle*, adopted by Illinois; and (3) The strict contract principle adopted by Pennsylvania

54. *See* Ogle v. Fuiten, 445 N.E.2d 1344 (Ill. App. Ct. 1983).
55. *Id.*
56. Lucas v. Hamm, 364 P.2d 685 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962).
57. *Id.*
58. Ogle v. Fuiten, 445 N.E.2d 1344 (Ill. App. Ct. 1983).
59. 459 A.2d 744 (Pa. 1983).
60. *Id.*
61. *Id.* at 752.

in *Guy v. Liederbach*. All three theories have had their adherents.[62]

a. Tort-Based "Balancing of Factors" Approach.—The tort-based balancing of factors test of *Lucas v. Hamm* has been adopted by several courts in cases involving wills where the adversarial role of the lawyer is absent.[63] In *Licata v. Spector*,[64] the Connecticut Court of Common Pleas expressed the belief that the principal policy reason for allowing third-party beneficiaries to recover damages arising from a lawyer's negligence is the protection of innocent laymen who, particularly in the area of wills and estates, must rely entirely upon the skill of the lawyer/drafter.

The Supreme Court of Washington said, in a 1987 case,[65] that "[i]n the absence of privity, there must be some other basis for a duty between the attorney and the [non-client] plaintiff."[66] The court said it could find a duty under two theories: (1) the six-factor balancing test of *Lucas v. Hamm*, in which the most prominent factor is that which concerns whether the lawyer's services were intended to affect the plaintiff; and (2) the concept of a third-party beneficiary contract.[67]

In a number of cases, courts have refused to extend the balancing of factors test outside situations, such as will-drafting, in which there is no question as to the client's intention to benefit a non-client third party.[68] In the case of *Burger v. Pond*,[69] for example, the California Supreme Court refused to extend the lawyer's duty of care to a lawyer who, having been retained by the husband to obtain a divorce from his first wife, allegedly was negligent in the handling of the divorce matter with the result that the divorce was set aside, causing great emotional distress to the client's second wife.[70] The court held that, even though the lawyer may have known that the husband/client and the second wife intended to marry and start a family as soon as the divorce from the first wife was final, the lawyer

62. *See supra* notes 54-59.

63. Licata v. Spector, 225 A.2d 28 (Conn. Super. Ct. 1966); Albright v. Burns, 503 A.2d 386 (N.J. Super. Ct. App. Div. 1986); Jenkins v. Wheeler, 316 S.E.2d 354 (N.C. Ct. App. 1984); Auric v. Continental Casualty Co., 331 N.W.2d 325 (Wis. 1983).

64. 225 A.2d 28 (Conn. Super. Ct. 1966).

65. Strangland v. Brock, 747 P.2d 464 (Wash. 1987).

66. *Id.* (citing Bowman v. John Doe, 704 P.2d 140 (Wash. 1985)).

67. *Strangland*, 747 P.2d at 467.

68. Burger v. Pond, 273 Cal. Rptr. 709 (Cal. Ct. App. 1990); Angel, Cohen & Rogovin v. Oberon Investment, 512 So.2d 192 (Fla. 1987); Rendler v. Markos, 453 N.W.2d 202 (Wis. Ct. App. 1990); Fox v. Pollack, 226 Cal. Rptr 532 (Cal. Ct. App. 1986).

69. 273 Cal. Rptr. 709 (Cal. Ct. App. 1990)

70. *Id.*

did not owe a duty of care to the second wife.[71] In this case, "[a]ny benefit to, or affect on, [the second wife] resulted not as an intended objective or purpose of the legal services"[72] the lawyer was retained to perform, but rather from the second wife's relationship with the client.[73]

b. The "Intent to Benefit the Third Party" Approach.—The "intent to benefit the third party" approach of *Ogle* has also found acceptance in various jurisdictions. In the Maryland case of *Goerlich v. Courtney Industries, Inc.*[74], the plaintiff sued a lawyer who had prepared a shareholders' agreement for a corporation that the plaintiff and others were establishing. The plaintiff alleged that the lawyer had committed malpractice in that the document the lawyer had prepared misrepresented that the plaintiff would be a managing employee of the company for the duration of the company's existence.[75] The trial court dismissed the malpractice complaint for failure to state a claim and the Court of Special Appeals of Maryland affirmed, stating "[a]s a general rule, an attorney owes a duty of diligence and care only to his direct client/employer."[76] But the court went on to say:

> Even when there is no contractual privity, however, professional liability in legal malpractice cases has been extended to third persons in certain limited situations. Where the third party can allege and prove that the client intended him to be a third-party beneficiary of the attorney's services and where his interests are identical to those of the client, a suit for legal malpractice may be maintained by that third party.[77]

This third-party beneficiary exception applies to both contract and negligence cases, the court said.[78]

The *Goerlich* court then found that the plaintiff had not alleged that the direct purpose of the shareholders' agreement was to establish an employment relationship between himself and the corporation.[79] Moreover, the court also found that the interests of the plaintiff and the corporation were diametrically opposed in the making of

71. *Id.*
72. *Id.*
73. *Id.* at 715-16.
74. 581 A.2d 825 (Md. Ct. Spec. App. 1990).
75. *Id.*
76. *Id.* at 827 (citation omitted).
77. *Id.*
78. *Id.*
79. Goerlich v. Courtney Industries, Inc., 581 A.2d 825 (Md. Ct. Spec. App. 1990).

the shareholders' agreement and, citing *Flaherty v. Weinberg*, [80] in which the Court of Appeals of Maryland had adopted the third-party beneficiary exception to the otherwise firm privity requirement of a lawyer-client contract in legal malpractice cases, said:

> [T]he third-party beneficiary exception should have limited application in adversarial proceedings because our Code of Professional Responsibility requires that a lawyer represent his client zealously within the bounds of the law (Canon 7) and that the lawyer ordinarily not represent or act for conflicting interests in a transaction . . . ."[81]

The *Goerlich* court also suggested that the Code of Professional Responsibility plays a dominant role in defining the lawyer-client relationship and, derivatively, the status of third-party beneficiaries.[82]

Oregon, too, has adopted the "intent to benefit the third-party" approach of *Ogle*. In the 1987 case of *Hale v. Groce*,[83] the Oregon Supreme Court held that a complaint by an alleged intended beneficiary of a will stated a claim for damages. The claim was against the lawyer who had drafted a will that the lawyer had promised would make the plaintiff the beneficiary of a gift. The lawyer failed to do so, and the plaintiff's claim was allowed under the theory that the plaintiff was an intended beneficiary of the lawyer's contract with the testator.[84]

The following year the Oregon Appellate Court reaffirmed this view in a case that mirrored the 1982 Illinois case of *Pelham v. Griesheimer*.[85] In *Seim v. Soriano*[86], the lawyer had been retained in a proceeding to disolve the marriage of the plaintiff's mother and her then husband.[87] The lawyer/defendant drafted a judgement of dissolution which, among other things, required the husband to maintain his wife's children as beneficiaries under his life insurance policies, which the husband thereafter failed to do.[88] The trial court granted summary judgment for the lawyer/defendant on the ground that he owed no duty to the children and there was no privity of contract between them.[89]

---

80. 492 A.2d 618 (Md. 1985).
81. *Id.* at 626.
82. *Id.*
83. 744 P.2d 1289 (Or. 1987).
84. *Id.*
85. 440 N.E.2d 96 (Ill. 1982).
86. 764 P.2d 591 (Or. Ct. App. 1988).
87. *Id.*
88. *Id.*
89. *Id.*

In 1987 the Iowa Supreme Court adopted the "intent to benefit the third-party" approach, holding that "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."[90]

D. The Strict Contract Approach

The Pennsylvania contract approach to the problem is reflected in *Franko v. Mitchell*,[91] an Arizona case involving a legal malpractice claim growing out of the drafting and execution of a promissory note. In *Franko*, the court defined the scope of the duty a lawyer owes to a third-party beneficiary, holding that "[a]ny duty owed by an attorney to a third party is derivative of the duty owed by the attorney to his client."[92] Thus, a third-party beneficiary seeking redress must allege "that the defendant attorney was negligent toward his client"[93] before the third-party can recover.

III. Acceptance of Abandonment of the Privity Rule

Under one theory or another, however, the following jurisdictions permit actions by non-client beneficiaries: California, Connecticut, D.C., Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Massachusetts, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, South Dakota, Washington, and Wisconsin.[94] The Supreme Court of West Virginia has, by dicta, also announced an intention to permit actions by third-party, non-client beneficiaries.[95]

New York, despite repeated demands to change its law, still recognizes lack of privity as a defense to any kind of malpractice action brought by non-clients.[96] Nebraska, Ohio, and Texas have

---

90. Schreiner v. Scoville, 410 N.W.2d 679 (Iowa 1987).
91. 762 P.2d 1345 (Ariz. Ct. App. 1988).
92. *Id.* at 1354.
93. *Id.*
94. 2 R. MALLEN AND J. SMITH, LEGAL MALPRACTICE, § 26.4 at 595 n. 9 (3d ed. 1989).
95. Brammer v. Taylor, 338 S.E.2d 207, 213 (W.Va. 1985). In a case involving a codicil executed by bank employees, the West Virginia court said:

> If defendants had engaged in the unauthorized practice of law . . . they would be *prima facie* negligent in their supervision of the execution of the codicil . . . and if such negligence proximately contributed to the invalidity of the codicil, defendants would be liable to plaintiff for the value of the legacy lost by invalidation of the codicil, unless plaintiff is barred from recovering from defendants by her own comparative negligence, if any.

Brammer, 338 S.E.2d at 213.
96. *See, e.g*, Spivey v. Pulley, 526 N.Y.S.2d 145 (N.Y. App. Div. 1988); Viscardi v. Lerner, 510 N.Y.S.2d 183 (N.Y. App. Div. 1986).

also refused to abandon the privity requirement in wills cases.[97] Missouri, in a 1989 opinion, declined to take up the issue of whether the jurisdiction should adopt the third-party beneficiary exception to the privity requirement for lawyer liability because the plaintiffs in the case at hand had an adequate alternate remedy.[98] But the overwhelming majority of states which have faced this question in wills cases have opted to abandon the privity requirement.

IV. Other Problems

In addition to differing theories which are utilized to permit recovery by third-party beneficiaries, there is considerable lack of unanimity over how a putative intended beneficiary should go about proving the testator's intent in a will. Some courts have held that the plaintiff must prove from the will provisions themselves that the testator intended that the plaintiff receive all or part of the estate.[99] Other courts have held that the plaintiff may introduce extrinsic evidence, such as a prior will or the lawyer's or client's notes, to prove that the will was not drafted in a way that would carry out the testa-

---

> The firmly established rule in New York State 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.

Viscardi 510 N.Y.S.2d 183 at 185.

97. St. Mary's Church of Schuyler v. Tomek, 325 N.W.2d 164 (Neb. 1982); Simon v. Zipperstein, 512 N.E.2d 636 (Ohio 1987); Berry v. Dodson, Nunley & Taylor P.C., 717 S.W.2d 716 (Tex. 1986), *judgment set aside upon parties' settlement*, 729 S.W.2d 690 (Tex. 1986).

However, the Ohio Supreme Court, in Elam v. Hyatt Legal Services, 541 N.E.2d 616 (Ohio 1989), did make somewhat of a strategic retreat from the *Simon* case, above, in a case that appears distinguishable solely on its facts. In the *Elam* case the lawyer/defendant was hired to help the executor in the administration of his wife's estate. Certain property had been conveyed by the wife to the husband for life with a remainder to others. The lawyer/defendant caused the property in question to be conveyed to the husband in fee simple and, as a result, was sued by four remaindermen. The Supreme Court of Ohio permitted recovery by the remaindermen, stating:

> At first blush, today's holding would seem to contradict this court's holding in *Simon v. Zipperstein*, supra. This court stated in *Zipperstein* that no attorney malpractice action was maintainable because " . . . privity was lacking since appellee, as a potential beneficiary of his father's estate, had no vested interest in the estate . . . ." [citation omitted.] In the case before us, however, there is no doubt that the remainderman's interests were vested. A beneficiary whose interest in an estate is vested is in privity with the fiduciary of the estate, and where such privity exists the attorney for the fiduciary is not immune from liability to the vested beneficiary for damages arising from the attorney's negligent performance.

Id.

98. Williams v. Bryan, 774 S.W.2d 847 (Mo. Ct. App. 1989).

99. Lorraine v. Grover, Ciment, Weinstein & Stauber P.A., 467 So.2d 315 (Fla. 1985); DeMaris v. Asti, 426 So.2d 1153 (Fla. 1983).

tor's intended plan of disposition.[100]

Another point of dispute is whether an intended beneficiary can claim that a lawyer did not carry out the testator's intent where the will has already been declared valid and the intended beneficiary is more in the nature of a disappointed would-be beneficiary. In a 1984 Maryland case,[101] the court held that "one claiming to be an intended beneficiary has no cause of action against the testator's attorney for alleged negligence in drafting the will when . . . the will is valid, the testamentary intent as expressed in the will has been carried out, and there is no concession of error by the attorney."[102] So, too, in Iowa, in a case where the lawyer who had drafted the testator's will (which devised land to a named devisee) and who later helped the testator sell the land to another, the court held that recovery could not be had by the named devisee merely because his devise had been adeemed and he was now disappointed.[103] In Connecticut, however, a malpractice action may be maintained notwithstanding a will's validity.[104]

Finally, taking this analysis one step further, the federal district court in New Jersey has held that a beneficiary may sue the testator's lawyer for costs incurred by the beneficiary in successfully defending the will.[105] The court was unable to see a valid legal difference between a plaintiff who loses the right to one-half of an estate and a plaintiff who loses one-half of an estate in protecting her rights.[106] If, reasoned the court, either situation was caused by a lawyer's negligant drafting, that lawyer should be liable.[107]

V. Conclusion

From a purely academic point of view, the "strict contract" approach of Pennsylvania and Arizona has much to commend it. In terms of contract law it is the "purest" in that it involves the least tinkering with the original contract. There is no need to "balance the equities" by looking at whether innocent lay parties may have been misled by lawyers on whose skill they mistakenly relied to see that their legacies went where they intended them to go. Moreover, the

100. Teasdale v. Allen, 520 A.2d 295 (D.C. 1987); Hamilton v. Needham, 519 A.2d 172 (D.C. 1986); Ogle v. Fuiten, 466 N.E.2d 224 (Ill. 1984).
101. Kirgan v. Parks, 478 A.2d 713 (Md. Ct. Spec. App. 1984).
102. *Id.* at 718-19.
103. Schreiner v. Scoville, 441 A.2d 81 (Conn. 1981).
104. Stowe v. Smith, 441 A.2d 81 (Conn. 1981).
105. Rathblott v. Levin, 697 F. Supp. 817 (D.C.N.J. 1988).
106. *Id.*
107. *Id.*

strict contract approach does not involve concern over the intentions of a now-dead client. All that is required is a showing that the client hired the lawyer to draft an instrument a certain way and that the lawyer negligently failed to draft the instrument as the attorney-client contract provided. Recovery is based strictly on the obligation of the lawyer to the client.

Regardless of the approach taken, however, the distinct trend today is to impose a duty of care on lawyers to directly intended beneficiaries of the client if such a duty does not result in potential conflicts of interest, which is itself saying a mouthful. All three of the approaches adopted today are but variations of the other, with the common principle that a lawyer can, through some extension of his or her duty to the client, be liable to third parties whom the client intended to benefit, either because public policy or the duty to the client demands it.