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Liability and Exposure of Lawyers to Claims Asserted by Third Parties

I. NON-CLIENTS WHO BRING CLAIMS AGAINST LAWYERS

General Rule

It is the general rule is that only clients can bring claims of malpractice against attorneys. This is based on the longstanding concept that in order for a duty to exist between such parties, privity between the parties is required. It was generally understood that fundamental to bringing a negligence claim against an attorney there first needed to be an attorney-client relationship giving rise to a duty of care. Courts long understood that imposing a duty of care on an attorney extending to non-clients could expose attorneys to unlimited liability and have a chilling effect on an attorney's ability to zealously represent his/her client.

The notion of privity of the attorney-client relationship no longer sets the bounds for potential malpractice claims. Courts have moved away from strict application of the privity standard and oftentimes decline to follow a per se rule holding that suits against attorneys for malpractice can only be brought by clients. Liability can extend to a non-client when the relationship between the attorney client and non-party is sufficiently close that a duty of care exists.

It has long been held that an attorney can be liable in negligence to a non-client who was an "intended beneficiary" of the attorney's services. This scenario largely occurs in the estate planning process in which beneficiaries of the client's estate are the direct and known intended beneficiaries of the attorney's legal advice in setting up the estate plan. In addition, Court's found that it was fair to provide these non-client intended beneficiaries the right to bring a claim against the attorney with respect to legal advice concerning estate plans since the effect or outcome of the legal advice might not become evident until a time when the actual client is no longer around to question the attorney's advice or conduct.

Attorneys need to be more concerned about claims by non-clients since exceptions to these general rules are growing and plaintiff's attorneys are getting more creative in finding other ways to pursue legal action against attorneys by non-clients. To protect themselves, attorneys need to pay close attention to all individuals who are related to or affected by their rendering of legal services and to the advice they are providing. Oftentimes, it is these tangentially related individuals/parties who may also bring claims against the attorney.

Exceptions to the Rule

Even though the general rule of privity is being eroded on its face, as mentioned above there are exceptions to the rule that have always existed – those known and intended beneficiaries. This known exception is being expanded in some circumstances to include "foreseeable" beneficiaries. Accordingly, attorneys need to look to the people involved in the litigation or transaction at issue to see how far one's liability may extend. This includes any parties which have some foreseeable relationship to the litigation or transaction at issue. The list of foreseeable parties is growing and can include adversaries, those an attorney knows will rely on his/her advice, adversary counsel and current clients who the attorney advises on an unrelated matter.

II. TYPES OF CLAIMS NON-CLIENTS BRING AGAINST LAWYERS OTHER THAN NEGLIGENCE

It is possible that even non-clients can bring claims against attorney for simple negligence/malpractice. However, more often than not, attorneys need to be concerned with claims from non-clients based on more than mere negligence alone.

Attorneys have always faced potential liability for claims such as abuse of process, vexatious litigation and malicious prosecution. The basis of these claims attacks the attorney's motive and/or judgment in proceeding through the legal process and question the attorney's intentions in using that process in zealous representation of his/her client. These claims look to the merits of the legal actions taken and weigh the reasonableness of the attorney's conduct in pursuing those specific legal actions. It is understood that these causes of action exist in part to protect the integrity of the legal system.

Different from claims of abuse of process, vexatious litigation and malicious prosecution are tort-based claims against attorneys such as negligent misrepresentation, fraud, aiding and abetting breach of fiduciary duty, unfair trade practices, negligent and intentional infliction of emotional distress. These types of claims look at the advice/counsel the attorney gives to his client and look at the conduct of the attorney in light of those specific causes of action to see if the attorney's conduct meets the basic elements of those specific causes of action. The question is not related

to the relationship between the attorney and his/her client but rather did the attorney's specific conduct cause harm to the third-party in a tortious manner.

One of the areas that claims by non-clients are expanding is based on a theory of liability known as the aiding and abetting claim. In this scenario, the non-client claims that the attorney's advice or counsel to his/her client was in furtherance of assisting that client to cause harm to the non-client. The non-client claims that the attorney's advice facilitated the client in harming the non-client. Examples of this are when an attorney gives advice that allows a client to intentionally breach a fiduciary duty owed to another party.

III. WHAT ARE THE DEFENSES TO NON-CLIENT SUITS

The first defense to a claim brought by a non-client is to argue that the non-client lacks standing to raise a claim against an attorney based on lack of an attorney-client relationship – lack of privity. The non-client would be required to present some cognizable basis as to why liability should be extended. Likely the non-client would argue they were an intended or foreseeable beneficiary of the attorney's services. Should the non-client be able to pass what is increasingly becoming a nominal threshold argument, the attorney can argue that he/she has immunity against any such claims to the extent those claims question or attack the zealous advocacy he/she was providing to his/her client. An attorney who represents his client with zealous advocacy is not generally liable to non-clients who may be prejudiced by the results of that representation.

When a non-client claims that the attorney is liable under a fraud or negligent misrepresentation theory, one must look at the specific representations the non-client claims were inaccurate. Was the non-client an intended or foreseeable beneficiary of the information provided by the attorney? Was the attorney's statement or representation one of fact or opinion? Was the non-client's reliance on the attorney's statement justifiable? Was the non-client represented by counsel? These are all factors that need to be considered when a non-client argues that an attorney's statement caused them some kind of damage.

IV. WHAT DOES THE ATTORNEY DO TO PROTECT AGAINST THESE CLAIMS

As there is no doubt that claims by non-clients against attorneys are on the rise, attorneys must be diligent in attempting to avoid such claims and in preparing themselves to defend such claims. Foremost, an attorney must understand and specifically identify who he/she is representing in any litigation or transaction. The attorney should not provide advice to non-clients and should take steps to ensure that a non-client does not reasonably believe that he/she is intended to receive or rely on the attorney's advice or counsel. An attorney must not volunteer legal advice to non-clients or even current clients who the attorney represents on unrelated matters. Attorneys

must be proactive in identifying when their advice concerns statements of opinion and be sure that they control how far that information is spread. To protect against aiding and abetting claims, attorneys now appear to have the additional responsibility of evaluating how their client may use the legal advice against other parties. Will they use the legal advice to breach their fiduciary duty or tortuously interfere with others?

As with many defenses to legal malpractice claims directed at the scope of an attorney's duty, the best defense is an affirmative record established through unambiguous communications from the attorney to the client and/or non-client clearly establishing the scope of the relationship or in the case of a non-client, the lack of a relationship.

Attorneys must prepare acknowledgment/engagement letters outlining the matters for which they are providing representation to a client. They must limit their advice and counsel to only those matters they are providing representation. At the conclusion of their representation they must terminate their relationship with their clients for each respective matter.

Attorneys must be concerned with turning down a potential client and confirm so in writing. Such a letter memorializes the fact that the attorney is not providing any legal advice and counters any argument that the non-client reasonably relied on any advice to their detriment. In such cases, the attorney must take care to be sure that there are no imminent deadlines or running of statutes of limitations. If so, the attorney should advise the non-client about the deadlines so as not to create a scenario in which the attorney can be blamed for the non-client failing to meet a deadline or file suit within the applicable statute of limitations.

In cases where a non-client makes explicit or implicit indication that he/she is intending to rely upon an attorney's advice, the attorney should immediately, in writing and in certain terms, indicate that the individual is not his/her client and definitively state that the attorney is not providing them any legal advice or counsel. Of particular concern are cases where transactions occur between a party represented by an attorney and a closely related non-party. Attorneys should be wary when their role is minimized to that of a scrivener. Attorneys are not counsel to a deal or transaction and oftentimes closely related parties may mistake an attorney's role. Ambiguity about the attorney's role in transactional matters can become problematic when one party to the deal suffers damages down the road.

Lastly, in situations regarding attorney preparation of opinion letters, attorneys need to specifically identify the intent of the letter, the recipient of the letter and those parties who the attorney anticipates will rely on the letter. The attorney must also control the manner in which and to whom the letter is disseminated. Again, by identifying these factors in writing at the outset and controlling who receives the letter,

an attorney limits those parties who can claim to have been harmed by relying on the attorney's opinions.

V. RAMIFICATIONS

The obvious ramifications from these types of claims are that attorneys need to be aware that their advice and conduct can be questioned by those outside of the attorney-client relationship. They cannot simply rely on what may seem like common sense. In addition, attorneys can face claims from non-clients alleging intentional conduct and thus must be aware that those claims might not be covered by insurance or may be defended under reservations of rights. Attorneys cannot simply rely on the fact that they provided sound advice to their client; they must take affirmative steps to protect themselves from the expanding scope of individuals who can attack the attorney's conduct.