

PROFESSIONAL LIABILITY

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IN THIS ISSUE

Many jurisdictions are currently reconsidering the long-standing rule requiring privity in legal malpractice actions. Luanne Runge and Mary Giorgi of Gallivan, White and Boyd, P.A., discuss the approaches taken by courts that have relaxed the privity requirement as well as the limits instilled by these jurisdictions to keep some form of protection of attorneys against nonclient malpractice actions.

Privity Requirement in Legal Malpractice Claims in Estate Planning: *Is it still enforced?*

ABOUT THE AUTHORS



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ABOUT THE COMMITTEE

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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The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

An action for legal malpractice generally requires proof of an attorney-client relationship, breach of duty by the attorney, damages to the client, and proximate cause of the client's damages by the breach. *See Rydde v. Morris*, 675 S.E.2d 431, 433 (S.C. 2009). Proof of an attorney-client relationship is often called the "privity requirement" and has "long protected attorneys from malpractice claims by nonclients." *Pelham v. Griesheimer*, 440 N.E.2d 96, 99 (Ill. 1982). "[T]he general rule is that the obligation of the attorney is to his client and not to a third party, absent fraud or collusion." *Id.* (citing *National Savings Bank v. Ward*, 100 U.S. 195, 200 (1880)).

I. Jurisdictions Have Relaxed the Privity Requirement

Despite this long-standing rule, the tides of legal malpractice claims have changed and "[t]he trend in tort law has been to abolish privity of contract as a prerequisite to establishing a duty." *Id.* at 20 (internal citations omitted). In the estate planning context, states that have relaxed the traditional privity requirement in legal malpractice claims generally use one of three approaches to determine whether an intended beneficiary may assert a claim against the drafting attorney. *See* Max N. Pickelsimer, Comment, *Attorney Malpractice in Will Drafting: Will South Carolina Expand Privity to Impose a Duty to Intended Beneficiaries of a Will?*, 58 S.C. L. Rev. 581, 585-98 (2007).

The first approach, the balancing factors test, is exemplified in *Biakanja v. Irving*, 320 P.2d 16 (Cal. 1958). *Biakanja* involved a legal malpractice claim by a nonclient against an attorney who failed to have a will properly attested, which was later denied probate. *Id.* at 17. The question presented to the Supreme

Court of California was whether "defendant [attorney] was under a duty to exercise due care to protect [nonclient] plaintiff from injury and was liable for damages caused [to] plaintiff by his negligence even though they were not in privity of contract." *Id.* at 18. The *Biakanja* court, overruling two prior California court decisions, found that a nonclient could recover despite the absence of privity in certain situations. *Id.* at 19. The court explained the following:

The 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, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.

Id.

Another approach in relaxing the privity requirement, known as the Florida-Iowa Rule, was illustrated in *Arnold v. Carmichael*, 524 So.2d 464 (Fla. Dist. Ct. App. 1988). In *Arnold*, plaintiffs, family members of the deceased, filed a claim against an attorney for professional negligence, asserting that the attorney negligently redrafted the decedent's will. *Id.* at 465-66. The Florida District Court of Appeals found that plaintiffs were

not in privity with defendant but acknowledged that “Florida courts have recognized a limited exception to the privity requirement to allow intended testamentary beneficiaries under certain circumstances to maintain malpractice actions against attorneys.” *Id.* at 466. The court provided that “[u]nder this exception, liability may be found on the part of an attorney if, due to the attorney’s professional negligence, testamentary intent as expressed in a will is frustrated, and the beneficiary’s legacy is lost or diminished as a direct result of that negligence.” *Id.*

The final approach is based on a third-party beneficiary contract theory. In *Pelham v. Griesheimer*, 440 N.E.2d 96, 97 (Ill. 1982), plaintiffs brought a claim for legal malpractice against an attorney, alleging negligence in connection with defendant’s handling of plaintiffs’ mother’s divorce settlement. The trial court dismissed the action because there was no attorney-client relationship between plaintiffs and defendant. *Id.* On appeal, the Supreme Court of Illinois held that “privity is not an indispensable prerequisite to establishing a duty of care between a non-client and an attorney in a suit for legal malpractice” and that “for a nonclient to succeed in a negligence action against an attorney, he must prove that the primary purpose and intent of the attorney-client relationship itself was to benefit or influence the third party.” *Id.* at 99-100. The *Pelham* court found no duty in this action because the “attorney was hired primarily for the purpose of obtaining a divorce, property settlement, and custody of the minor children . . . , not to represent her children’s, [the plaintiff’s], interests.” *Id.* at 101.

Practicing attorneys should be aware of which approach is used in his or her jurisdiction because at least one court has opined that

“[t]he analogy to third-party direct beneficiaries to determine the duty owed to a nonclient by an attorney in a negligence action provides for a broader scope of liability than privity, but a narrower scope of liability than the balancing approach used in California.” *Id.* at 100. Defense of a legal malpractice claim asserted by a nonclient will likely depend upon which approach is used in the applicable jurisdiction.

II. Not All Jurisdictions Have Relaxed the Privity Requirement

Despite the above relaxation of the privity requirement in legal malpractice actions, practitioners should also be aware that some jurisdictions still maintain the strict privity requirement. See Max N. Pickelsimer, Comment, *Attorney Malpractice in Will Drafting: Will South Carolina Expand Privity to Impose a Duty to Intended Beneficiaries of a Will?*, 58 S.C. L. Rev. 581, 595-597 (2007). Some of these jurisdictions include, New York,¹ Texas,² Ohio,³ Nebraska,⁴ and South

¹ See, e.g., *Mali v. De Forest & Duer*, 553 N.Y.S.2d 391, 392 (N.Y. App. Div. 1990) (“It is well established in New York that, absent fraud, collusion, malicious acts or other circumstances, De Forest and Duer, as draftsmen of the will, are not liable to the beneficiaries of such will or other third parties not in privity who might be harmed by their professional negligence.”).

² See, e.g., *Barcelo v. Elliott*, 923 S.W.2d 575, 579 (Tex. 1996) (“[A]n attorney retained by a testator or settlor to draft a will or trust owes no professional duty of care to persons named as beneficiaries under the will or trust.”).

³ See, e.g., *Simon v. Zipperstein*, 512 N.E.2d 636, 638 (Ohio 1987) (“[A]n attorney is immune from liability to third persons arising from 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.”).

⁴ See, e.g., *Lilyhorn v. Dier*, 335 N.W.2d 554, 555 (Neb. 1983) (“[A]s a general rule the duty to exercise reasonable care and skill which a lawyer owes his client ordinarily does not extend to third parties.”).

Carolina.⁵ At least one jurisdiction has provided the following as its rationale for not abandoning the long-standing rule requiring privity in a legal malpractice actions:

[W]e are unable to craft a bright-line rule that allows a lawsuit to proceed where alleged malpractice causes a will or trust to fail in a manner that casts no real doubt on the testator's intentions, while prohibiting action in other situations. We believe the greater good is served by preserving a bright-line privity rule which denies a cause of action to all beneficiaries whom the attorney did not represent. This will ensure that attorneys may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation.

Barcelo v. Elliott, 923 S.W.2d 575, 578-79 (Tex. 1996). While these jurisdictions have not altered the privity requirement, practitioners should be alert to the fact that many of the decisions retaining the traditional rule, have strong dissents, which could become the majority rule at some later time.

III. Even Jurisdictions that Have Relaxed the Privity Requirement Have Imposed Limits

⁵ See, e.g., *Rydde v. Morris*, 675 S.E.2d 431, 435 (S.C. 2009) (“[U]nder the circumstances presented, we see no reason to depart from existing law which imposes a privity requirement as a condition to maintaining a legal malpractice claim in South Carolina.”).

Recently, the South Carolina Supreme Court was asked whether defendant attorney owed a duty in favor of a nonclient prospective beneficiary, which asserted negligent failure to timely draft a will. *Rydde v. Morris*, 675 S.E.2d 431 (S.C. 2009). As noted above, South Carolina still applies that traditional privity requirement in legal malpractice cases. *Id.* at 435. This case is of interest, however, because it makes a distinction between cases alleging negligent drafting and negligent failure to draft a will. *Id.* at 433-34.

Rydde involved a situation where decedent hired defendant attorney to prepare her estate plan. *Id.* at 432. However, before the defendant could prepare all applicable documents and get decedent to execute them, decedent died intestate. *Id.* at 432-33. Plaintiffs, prospective will beneficiaries, filed suit for legal malpractice. *Id.* Defendant moved to dismiss, the trial court granted his motion, and plaintiffs appealed. *Id.*

In deciding whether a duty can be imposed upon an attorney in favor of a prospective beneficiary for the attorney's alleged negligent failure to timely draft a will, the *Rydde* court noted that even courts that have relaxed the privity requirement do not permit this type of action. *Id.* at 433. The court stated:

New Hampshire, Connecticut, and Florida . . . recognize generally that an attorney owes a duty to a non-client intended beneficiary of an executed will where it is shown that the testator's intent has been defeated or diminished by negligence on the part of the attorney, resulting in loss to the beneficiary. Having relaxed the traditional privity

requirement in legal malpractice claims, these states nevertheless draw the line and refuse for compelling policy reasons to permit a malpractice claim by a non-client for negligent failure to draft a will.

Id. The decisions from other jurisdictions relied upon by the *Rydde* court found that a rule imposing liability upon attorneys for negligent failure to draft a will would present a conflict of interest between the attorney’s devotion to the client and his fear of liability to potential third parties. See *Krawczyk v. Stingle*, 543 A.2d 733, 736 (Conn. 1988) (“We conclude that imposition of liability to third parties for negligent delaying the execution of estate planning documents would not comport with a lawyer’s duty of undivided loyalty to the client.”); *Sisson v. Jankowski*, 809 A.2d 1265, 1269 (N.H. 2002) (“[W]e conclude that the potential for conflict between the interests of a prospective beneficiary and a testator militates against recognizing a duty of care.”); *Babcock v. Malone*, 760 So.2d 1056 (Fla. Dist. Ct. App. 2000) (dismissing complaint for failure to state a cause of action where plaintiff alleged negligence against attorney for failure to timely prepare a new will). The *Rydde* court agreed with that above rationale and held that no duty existed. *Id.* at 435.

This decision exemplifies the types of limits jurisdictions have placed on the now relaxed privity requirement. Practitioners should be aware of these limits and try to use similar

policy arguments to impose further limits and increase protection of attorneys against claims by nonclients.

2010 IADC PROFESSIONAL LIABILITY ROUNDTABLE

MAY 13, 2010 – CHICAGO, IL USA

Please mark your calendars to reserve the afternoon of Thursday, May 13 for the 2010 Professional Liability Roundtable! This year’s Roundtable will feature a discussion of potential attorney liability and claims against other professionals under various federal statutes including the Fair Debt Collections Practices Act, the Wiretap Act, the Stored Communications Act, and the Medicare, Medicaid, and SCHIP Extension Act of 2007. The presentations and ensuing dialogue will feature representatives from insurance carriers, outside and in-house legal counsel, and other professional stakeholders. You won’t want to miss this engaging and timely CLE program, so make plans to attend the Professional Liability Roundtable at the University of Chicago Booth School of Business Gleacher Center in Chicago on May 13, 2010. More information and registration materials will be available at:

<http://www.iadclaw.org/news/professional/default.aspx> by the end of February 2010.

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