Professional Liability Defense QUARTERLY

When Attorneys Are Sued by Non-Clients: The Immunity and Privilege Rule

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Typically, lawsuits against attorneys are brought by clients alleging legal malpractice. An essential element of a legal malpractice claim is the existence of an attorney-client relationship. The general rule is that a lawyer is liable only to his or her client and not to third persons. *Nat'l Sav. Bank of District of Columbia v. Ward*, 100 U.S. 195, 200 (1879) ("Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third-party"). Generally, when a non-client brings a lawsuit they cannot assert a legal malpractice claim. If a legal malpractice claim is asserted by a non-client, consideration should be given to promptly serving a dispositive motion to dismiss.

On occasion non-clients assert claims that are not for legal malpractice against attorneys relating to conduct of the attorney within the course and scope of rendering legal services to a client. Examples include claims of civil conspiracy or aiding and abetting a client to breach a contract or breach of some other duty owed by the client to the non-client. For instance, if a client refuses to close on a transaction under the terms of a signed agreement, a non-client may assert the attorney advising the client has conspired with the client or aided and abetted the client in the breaching conduct, causing damages to the non-client. But, attorneys owe a duty of loyalty to clients and a duty to give clients independent legal advice. An attorney has to use that "degree of knowledge, skill, and judgment ordinarily possessed by members of the legal profession in carrying out the services for his client." *Temple Hoyne Buell v. Holland & Hart*, 851 P.2d 192, 198 (Colo. Ct. App. 1992). If an attorney owed a duty to third parties, then conflicts of interest would be inevitable and it would impair the attorney's duty to represent her client within the bounds of the law. As the Supreme Court of New York succinctly stated in *D. & C. Textile Corp. v. Rudin*, 246 N.Y.S.2d 813, 817 (N.Y. 1964), "[p]ublic policy requires that attorneys . . . shall be free to advise their clients without fear that the attorneys will be personally liable to third persons if the advice the attorneys have given to their clients later proves erroneous."

The Immunity and Privilege Rule

Under the immunity and privilege rule, an attorney is immune and/or privileged from liability to non-clients for conduct within the scope of their representation of their clients. *See e.g., MedPartners, Inc. v. Calfee, Halter & Griswold, L.L.P.*, 748 N.E.2d 604, 617 (Ohio Ct. App. 2000) (attorney immune from liability to non-clients arising from attorney's work in good faith and on behalf of his client). This rule makes sense because an attorney owes a duty of care to his or her own client, not to third parties who claim to have been damaged by the attorney's negligence. *Ward*, 100 U.S. at 200; *see also Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.*, 892 P.2d 230, 240 (Colo. 1995) ("Because attorneys do not owe a duty of reasonable care to non-clients, attorney malpractice cannot extend to non-clients.").

Courts throughout the country recognize the importance of protecting the attorney-client relationship and duties owed to clients. The United States Court of Appeals for the Eighth Circuit held that "an attorney who acts within the scope of the attorney-client relationship will not be liable to third persons for actions arising out of his professional relationship unless the attorney exceeds the scope of his employment or acts for personal gain." *Maness v. Star-Kist Foods, Inc.*, 7 F.3d 704, 709 (8th Cir. 1993) (involving a claim of tortious interference with contract by plaintiff/appellant employee against employer's

attorney). Similarly, in *McDonald v. Stewart*, 182 N.W.2d 437, 440 (Minn. 1970), the Minnesota Supreme Court affirmed the grant of summary judgment for the defendant-attorney concluding "an attorney acting within the scope of his employment as attorney is immune from liability to third persons for actions arising out of that professional relationship." The Minnesota Supreme Court explained that the immunity afforded to attorneys is only limited if the attorney exceeds the scope of the attorney-client relationship, acts for personal gain, or helps her client perpetrate fraudulent or unlawful activity. *Id*.

The court in *Fraidin v. Weitzman*, 611 A.2d 1046, 1080 (Md. 1992) explained the rule as follows:

> …there can be no conspiracy where an attorney's advice or advocacy is for the benefit of his client and not for the attorney's sole personal benefit. We have held that to impose liability on an attorney for giving advice regarding a matter of no personal interest to him or her, would be a "'fundamentally erratical change in the law' which would radically change the nature of attorney-client relationships . . ." *Johnson v. Baker*, 84 Md.App. 521, 530, 581 A.2d 48 (1990) (citing *Kartiganer Assoc., P.C. v. Town of New Windsor*, 108 A.D.2d 898, 485 N.Y.S.2d 782, 783–84 (1985) ("attorney not liable for inducing client to breach contract with another if attorney acts on client's behalf and within scope of his authority")); See *Los Angeles Airways, Inc. v. Davis*, 687 F.2d 321, 328 (9th Cir.1982) (An advisor's conduct is privileged when motivated by a desire to benefit the principal, even though such conduct also improves the advisor's own position.).

Exceptions to the Immunity and Privilege Rule

There are exceptions to the immunity and privilege rule. One of the most common exceptions is third party beneficiary claims.

An attorney may owe a duty to a third party if the attorney was hired for the purpose of benefitting a third party. *See MacLeish v. Boardman & Clark LLP*, 924 N.W.2d 799 (Wis. 2019) (non-client named as a beneficiary in a will has standing to sue attorney for malpractice if beneficiary can demonstrate attorney's negligence impeded testator's intent); *Calvert v. Scharf*, 619 S.E.2d 197 (W. Va. 2005) (intended beneficiaries of a will who are specifically identifiable can sue lawyer who prepared will when they can show the testator's intent was frustrated by the negligence of the lawyer resulting in the loss of the beneficiaries' interest under the will); *see also* Ronald E. Mallen and Jeffrey M. Smith, *Legal Malpractice* § 7.10, at 379 (3rd ed. 1993) ("the vast majority of modern decisions have favored expanding privity beyond the confines of the attorney-client relationship where the plaintiff was intended to be *the* beneficiary of the lawyer's retention.").

The California Supreme Court held in *Lucas v. Hamm*, 364 P.2d 685, (Cal. 1961), cert. denied 368 U.S. 987, 82 S.Ct. 603, 7 L.Ed.2d 525 (1962), that an intended beneficiary may bring an action for legal malpractice against the decedent's attorney where the attorney's negligent act caused the named beneficiary to lose the intended bequest. The Minnesota Supreme Court has denied a claim based on the third party beneficiary theory by a son against an attorney for his deceased father who prepared a deed transferring ownership into joint tenancy. *Marker v. Greenberg*, 313 N.W.2d 4 (Minn. 1981). S*ee also McIntosh Cty. Bank v. Dorsey & Whitney, LLP*, 745 N.W.2d 538, 546 (Minn. 2008) (recognizing a non-client may hold attorney liable for malpractice only if the non-client was a direct and intended beneficiary of the attorney's services to the client; but holding dismissal of claim against attorney by district court was proper where attorney was not aware of an intent by the client to benefit non-clients of attorney).

An attorney is generally not liable to a third party for malpractice that is alleged to have occurred during adversarial proceedings because adversaries do not usually desire to benefit one another. *Wild v. TransWorld Airlines, Inc.*, 14 S.W.3d 166, 168 (Mo. App. Ct. 2000).

There is also an exception for conduct by the attorney that is malicious, fraudulent, or tortously violates a court order or judgment. *Tensfeldt v. Haberman*, 319 Wis.2d 329, 768 N.W.2d 641 (2009). *See also Sanctions in Minerals Dev. & Supply Co. v. Hunton & Williams LLP.*, 361 Wis.2d 284, 862 N.W.2d 618 (Table) (Wis. Ct. App. 2015) (allegations against attorney not sufficient to fall within the fraud exception to attorney-client immunity; affirming dismissal of complaint that describes all conduct allegedly engaged in by the attorney as falling within the scope of the law firm's "attorney-client agency" with its client and does not allege conduct that is "malicious, fraudulent or tortious" so as to deprive the attorney of immunity.).

The Wisconsin Supreme Court held that lawyers could be liable to non-clients if the attorney intentionally and willfully withheld information for the purpose of misleading or misinforming the non-client. *Goerke v. Vojvodich*, 226 N.W.2d 211, 215 (Wis. 1975). In *Goerke*, a third party complaint was brought seeking indemnification from attorneys who represented the plaintiff in a real estate transaction. The non-clients (the third party plaintiffs) alleged that the lawyers for the plaintiff (the third party defendants) willfully and intentionally withheld information about the plaintiff's mental incompetency. *Id.* The court held that the lawyers could only be liable to the non-clients if their failure to disclose the information amounted to fraud where the defendant attorneys "actually intended to mislead or misinform the other party and, in fact, [did] so to the detriment of that party." *Id.* But under the facts in *Goerke*, there was no allegation in the third party complaint that the defendant attorneys withheld information for the purpose of misleading or misinforming the non-clients.

Sanctions Relating to Ignoring the Immunity and Privilege Rule

One court awarded sanctions where the complaint against the attorneys and their client failed to take into account the law on immunity and privilege of attorneys. *Sanctions in Minerals Dev. & Supply Co. v. Hunton & Williams LLP.*, 361 Wis.2d 284, 862 N.W.2d 618 (Table) 2015 WL 789681, 2015 WI App 28 (Wis. Ct. App. 2015). The court concluded that after the receipt of the safe harbor notice citing to the immunity and privilege rule, the attorneys for the plaintiff "should have come to their senses and said boy, this case is a train wreck and it's time to get out of it" and they needlessly increased the costs of litigation by failing to "have had the good sense to pull the plug on this action" in a timely manner after learning of defects in their case.

A purpose of allowing sanctions for continuing frivolous litigation is to help maintain the integrity of the judicial system and the legal profession. This purpose is served by awarding sanctions against a plaintiff's attorneys when they "fail to pull the plug" on a claim by a non-client against an opposing attorney which is barred by the immunity and privilege rule. Attorneys must be able to perform their duties to clients without being concerned that persons on the other side of any legal matter, transaction or litigation will sue the attorney or attempt to drag the attorney into a lengthy lawsuit when they do not like what the attorney's client did. Prompt dismissal of claims by non-clients against attorneys, and sanctions by courts, preserve both the integrity of the attorney-client relationship and the judicial system.

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Conclusion

The general rule is that a legal malpractice claim against an attorney can only be brought by a client who is in privity of contract with the attorney. The immunity and privilege rule can provide a powerful defense for attorneys who are sued by non-clients for matters arising out of the attorney's professional conduct within the course and scope of an attorney's representation of a client. The immunity and privilege rule does not provide a complete defense to all claims asserted by non-clients against attorneys.

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