

Journal of Civil Rights and Economic Development

Volume 4
Issue 2 *Volume 4, 1989, Issue 2*

Article 8

March 1989

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Recommended Citation

Katz, Melinda R. (1989) "Privity Requirement for Attorney Liability to Non-clients," *Journal of Civil Rights and Economic Development*: Vol. 4 : Iss. 2 , Article 8.

Available at: <https://scholarship.law.stjohns.edu/jcred/vol4/iss2/8>

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Survey of Professional Responsibility

PRIVITY REQUIREMENT FOR ATTORNEY LIABILITY TO NONCLIENTS

In 1879, the United States Supreme Court promulgated the view that only a client could bring a negligence action against an attorney acting in his professional capacity.¹ The Court, noting that attorneys were not in privity with nonclients, held that no contractual duty to protect nonclient interests existed.² Until recently, the legal profession escaped liability for negligent misrepresentation that adversely affected the interests of third party nonclients.³

¹ See *National Savings Bank v. Ward*, 100 U.S. 195 (1879). An attorney had certified that his client's title on land was good and Savings Bank gave the client a mortgage. *Id.* at 196. The buyer defaulted and the bank found that the mortgagor's title was not good. *Id.* The bank sued the attorney and the Court ruled that, absent fraud or collusion, an attorney owed no duty to a nonclient not in privity. *Id.* at 199-200.

Generally, an attorney is liable to his clients for "want of such skill, care and diligence as men of the legal profession commonly possess and exercise in such matters of professional employment." *Id.* According to the Canons that guide the legal profession, "[a] lawyer should represent a client competently." ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY CANON 6 (1980). Courts have been reluctant to hold an attorney liable to a nonclient for intentional tort, except in instances of fraud. See, e.g., *Meier v. Pearlman*, 401 N.E.2d 31, 40 (Ind. 1980) (no liability to third parties absent fraud), *cert. denied* 449 U.S. 1128 (1981); *Marker v. Greenberg*, 313 N.W.2d 4, 5 (Minn. 1981) (strict privity required for attorney tort liability, except for fraud or improper motive); *Harder v. McGinn*, 89 App. Div. 2d 732, 733, 454 N.Y.S.2d 42, 43 (3d Dep't. 1982) (absent fraud, collusion, malicious or tortious act, attorney not liable to nonclient), *aff'd*, 58 N.Y.2d 663, 444 N.E.2d 1006, 458 N.Y.S.2d 542; *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 329, 401 N.W.2d 816, 826 (1987) (absent affirmative showing of fraud, attorney's are not liable to nonclients). See also Probert & Hendricks, *Lawyer Malpractice: Duty Relationships Beyond Contract*, 55 NOTRE DAME LAW. 708, 708 (1980). "Traditionally, lawyers were largely immune from non-client claims short of fraud or collusion." *Id.*

A person suing in negligence must have been owed a duty arising either from contract or otherwise. See *Savings Bank*, 100 U.S. at 202 (citation omitted). This protects the defendant from being held liable for every event down the chain that might be a result of his negligence. *Id.* With respect to attorneys, "the judiciary has tended to reflect the general professional attitude that a lawyer should be concerned mainly, if not only, with his client's interest." Probert & Hendricks, *supra*, at 708. To establish a prima facie case in negligence, the plaintiff must show: 1) a duty for the defendant to have used reasonable care; 2) a breach of that duty; 3) proximate cause; and 4) damages from that breach. W. Keeton, D. Dobbs, R. Keeton & D. Owen, PROSSER and KEETON on the LAW of TORTS § 30 164-65 (5th ed. 1984). See generally Note, *Attorneys' Negligence and Third Parties*, 57 N.Y.U. L. REV. 126, 132-37 (1982) (discusses "historical force of privity" in determining attorney liability).

² See *Savings Bank*, 100 U.S. at 203. The *Savings Bank* Court reasoned that since only parties in privity could sue on a contract, the same standard should apply to a tort claim arising out of that contractual relationship. *Id.* at 203-06.

³ Probert & Hendricks, *supra* note 1, at 708. In the early 1960's, the bar against recovery by nonclients began to lift. See *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962). The beneficiaries under a will sued the testator's attorney who prepared the will. *Id.* at 584, 364 P.2d at 686, 15 Cal. Rptr. at 822.

Currently, jurisdictions that recognize an action for negligent misrepresentation against attorneys by third parties attempt to harmonize traditional tort and contract doctrines with public policy considerations to allow equitable recovery.⁴ This Survey will examine those jurisdictions and will further examine the issue in New York. Traditionally, New York has required privity between the plaintiff and defendant attorney as a prerequisite for recovery in professional negligence. Recently, however, the federal district court restated New York's privity rule in *Vereins-Und Westbank, AG v. Carter*,⁵ placing this requirement in jeopardy.

I. THE EVOLVING NEW YORK VIEW

In 1922, The New York Court of Appeals first allowed recovery by a third party for economic damages due to professional negligence in *Glanzer v. Shepard*.⁶ The court in *Glanzer* allowed recovery to a purchaser of beans, not in privity with a public weigher, stating that the "end and aim" of the transaction was for the benefit of the buyer.⁷ The same court in *Ultramares Corp. v. Touche*,⁸

Although the *Lucas* court found the attorney not to be liable to the beneficiaries for trust provisions that violated state law, it rejected a per se rule. *Id.* at 591, 364 P.2d at 690-91, 15 Cal. Rptr. at 825-27. The Supreme Court of California articulated a more liberal view of recovery balancing policy considerations. *Id.* at 588, 364 P.2d at 687, 15 Cal. Rptr. at 823. See also *infra* notes 42-44 and accompanying text (list of factors considered by the court). Generally, privity as a prerequisite for recovery in negligence has been weakened in New York. See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) (lack of privity not a bar to action in negligence). See *infra*, notes 7-9 and accompanying text (expansion of negligence recovery without privity).

⁴ See *Lucas*, 56 Cal. 2d at 588, 364 P.2d at 688, 15 Cal. Rptr. at 824 (balancing factors determine existence of duty and liability); *Pelham v. Griesheimer*, 92 Ill. 2d 13, 21, 440 N.E.2d 96, 100 (1982) (tort recovery allowed if nonclient proves traditional negligence elements and that he was intended contract beneficiary); *Simon v. Zipperstein*, 32 Ohio St. 3d 74, 77, 512 N.E.2d 636, 638 (1987) (no liability to third party not in privity unless attorney acts with actual malice).

There are several public policy justifications for allowing third parties to recover from attorneys in negligence. See Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1520-21 (1985). Two major rationales include: 1) attorneys are better able than third parties "to spread the cost of careless lawyering"; and 2) attorneys are given a greater incentive to exercise a higher degree of care. See also Note, *supra* note 1, at 128 (attorneys better able than innocent third parties to absorb loss through insurance).

⁵ 691 F. Supp. 704 (S.D.N.Y. 1988)

⁶ 233 N.Y. 236, 135 N.E. 275 (1922).

⁷ *Id.* at 238-39, 135 N.E. at 277. *Glanzer* involved a public weigher sued by a purchaser who relied on the weigher's negligently prepared certificate. *Id.* at 238, 135 N.E. at 275. In

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distinguished *Glanzer* and held that the creation of accountant liability to third parties for negligence would expose them to liability "in an indeterminate amount for an indeterminate time to an indeterminate class."⁹ The *Ultramares* court stated that a suit for negligent misrepresentation required that the relation between the plaintiff and defendant be "so close as to approach that of privity, if not completely one with it."¹⁰ The *Ultramares* doctrine was later refined and applied in *Credit Alliance Corp. v. Arthur Andersen & Co.*¹¹ to allow certain nonprivity plaintiffs to recover from accountants for negligent acts. The *Ultramares* doctrine remains the standard employed in New York to determine the liability of professionals for negligence to nonprivity claimants.¹²

Notwithstanding the traditional approach to which New York still adheres, the court of appeals has begun to relax its standard. In a recent decision, where the *Ultramares* doctrine was applied to engineers, the court held that privity of contract was not a prerequisite to recover for negligent misrepresentation which produced

Glanzer, "the bond was so close as to approach that of privity, if not completely one with it." *Ultramares Corp. v. Touche*, 255 N.Y. 170, 182-83, 174 N.E. 441, 446 (1931). The service performed by the public weigher was primarily for the information of the third party. *Id.* at 183, 174 N.E. at 446.

⁹ 255 N.Y. 170, 174 N.E. 441 (1931).

¹⁰ *Ultramares*, 255 N.Y. at 179, 174 N.E. at 443. Judge Cardozo pointed out in *Ultramares* that if an accountant was liable to anyone who might rely on his balance sheet then:

[l]awyers who certify their opinion as to the validity of municipal or corporate bonds with knowledge that the opinion will be brought to the notice of the public, will become liable to the investors, if they have overlooked a statute or a decision, to the same extent as if the controversy were one between client and adviser.

Id. at 188, 174 N.E. at 448. See generally Note, *supra* note 1, at 132-37.

¹¹ *Ultramares*, 255 N.Y. at 182-83, 174 N.E. at 446.

¹² 65 N.Y.2d 536, 551, 483 N.E.2d 110, 118, 493 N.Y.S.2d 435, 443 (1985).

¹³ *Id.* In *Credit Alliance*, the New York Court of Appeals refined the *Ultramares* doctrine and held that an accountant will be liable to third parties when the following conditions are met:

- 1) the accountants must have been aware that the financial reports were to be used for a particular purpose or purposes;
- 2) in the furtherance of which a known party or parties was intended to rely; and
- 3) there must have been some conduct on the part of the accountants linking them to that party or parties, which evinces the accountants' understanding of that party or parties' reliance.

Id. at 551, 483 N.E.2d at 118, 493 N.Y.S.2d at 443 (1985). See generally Achampong, *Common Law Liability of Accountants for Negligence to Non-Contractual Parties: Recent Developments*, 91 DICK. L. REV. 677, 678-80 (1987) (discussing accountants' liability in New York); Wade, *An Overview of Professional Negligence*, 17 MEM. ST. U.L. REV. 465, 477-78 n.50 (1987) (same).

only economic damage.¹³ Writing for the court, Judge Kaye in *Ossining Union Free School District v. Anderson LaRocca Anderson* noted that the "cause of action requires that the underlying relationship between the parties be one of contract or the bond between them so close as to be the functional equivalent of contractual privity."¹⁴ The *Ossining* court concluded that the defendants acted with the "objective of . . . shaping [the] plaintiff's conduct, and thus they owed a duty of diligence"¹⁵

The doctrine has yet to be extended by the New York Court of Appeals to allow recovery by third parties against attorneys.¹⁶ There are acute policy considerations which must be addressed before the court decides whether to impose nonclient liability on a profession which is adversarial by nature. Recently, however, in *Vereins-Und Westbank*, a federal court in the Southern District of New York interpreted New York law¹⁷ as providing a cause of action in negligence against attorneys by nonclients.¹⁸

The plaintiffs in *Vereins-Und Westbank*, a note assignee and a payment bond surety, brought an action against an attorney and his firm for negligent misrepresentation.¹⁹ The plaintiffs alleged

¹³ See *Ossining Union Free School District v. Anderson*, 73 N.Y.2d 417, 539 N.E.2d 91, 541 N.Y.S.2d 335 (1989).

¹⁴ *Id.* at 419, 539 N.E.2d at 93, 541 N.Y.S.2d at 335.

¹⁵ *Id.* at 426, 539 N.E.2d at 100, 541 N.Y.S.2d at 339-40.

¹⁶ See *infra* note 29 and accompanying text (New York still requires privity for a non-client to recover against an attorney).

¹⁷ *Vereins-Und Westbank*, 691 F. Supp. at 711 (a federal court deciding state law should rule as the highest court of that state would (citing *Meredith v. Winter Haven*, 320 U.S. 228, 234-35 (1943))).

¹⁸ *Id.* at 709. The court evaluated New York's "*Ultramares* doctrine" as refined in *Credit Alliance*, and determined that if the *Ultramares* doctrine were to be extended to attorneys, on these facts the plaintiffs would be granted relief. *Id.* at 713. The *Ultramares* doctrine was defined by the federal court as "liability for negligent misstatements to one not in contractual privity may attach where the statement is made for the principal purpose of having it relied upon by such person and where its benefit to the party authorizing the statement stems precisely from such reliance by the third party." *Id.* at 709. See also *supra* note 9 and accompanying text (liability of accountants).

The *Vereins-Und Westbank* court extended *Ultramares* liability to attorneys by reviewing New York decisions and determining that there is no authority that the "*Ultramares* doctrine was designed exclusively for the accounting profession." *Id.* at 712.

¹⁹ 691 F. Supp. at 706. The defendant attorney, Barsalou, and his firm represented the four limited partnerships involved in the action. *Id.* The promotor, Jeffrey Carter instructed Barsalou to prepare an opinion letter requested by defendant-bank Interdiscount Ltd. (IDL). *Id.* Vereins extended funds to the four partnerships by purchasing notes executed by the partnerships in favor of IDL. *Id.* Rockwood, a payment bond surety, guaranteed the obligations of the individual limited partners. *Id.*

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that the attorney had written opinion letters that specifically invited third parties to rely upon the information provided.²⁰ The attorney's opinion letters stated that his client's partnership was "duly organized, validly existing and in good standing under the laws of the State of Texas."²¹ In fact, the financial criteria and general partnership status that the claimants understood to be requisite for the formation of the partnership were not satisfied.²² The plaintiffs, alleging their reliance on the attorney's representations, financially supported the partnership and subsequently suffered losses.²³

The *Vereins-Und Westbank* court allowed the plaintiffs to recover, finding that the attorney was aware of the likely reliance by an assignee and surety, thereby satisfying an important element of negligent misrepresentation under New York's *Ultramares* doctrine.²⁴ The court stated that its decision was supported by the New York Court of Appeals rule in *Credit Alliance*,²⁵ which required that the relying party be a "known party."²⁶ Since these claimants were members of an identifiable class of individuals who

²⁰ *Id.* at 706-07. Barsalou's letter, stating that the limited partnership was validly formed and in good standing under Texas law also stated "[t]his opinion may be relied upon by IDL and its assignee under the [Note Purchase] agreement." *Id.* at 706. For a discussion of the nature, purpose, legal ramifications of legal opinion letters, see generally Fuld, *Legal Opinions in Business Transactions—An Attempt to Bring Some Order Out of Some Chaos*, 28 Bus. LAW. 915, 923-32 (1973) (specific language in opinions connote certain legal meanings); Special Comm. on Legal Opinions in Commercial Transactions, *New York County Lawyers' Ass'n, Legal Opinions to Third Parties: An Easier Path*, 34 Bus. LAW. 1891, 1894 (1979) (legal opinions vital to numerous business transactions); Note, *Attorney Liability to Third Parties for Corporate Opinion Letters*, 64 B.U.L. REV. 415, 422-33 (1984) (contract and tort bases for attorney liability to nonclient).

²¹ *Vereins-Und Westbank*, 691 F. Supp. at 706. See Fuld, *supra* note 20, at 923-32 (discussion of the effects of legally operative words).

²² *Id.* at 707. Each limited partner was to have contributed 20% cash as a down payment and 80% to be paid by promissory note executed to the partnership. *Id.* at 706. The contributions were never made. *Id.*

²³ *Id.* at 706. Plaintiffs alleged that "as an exercise of due care Barsalou should have known" that the contributions were never made. *Id.* at 707.

²⁴ *Id.* at 715. The *Vereins-Und Westbank* court defined the *Ultramares* doctrine as attaching liability for negligent misstatements where "the statements [are] made for the principal purpose of having it relied upon by such person, and where its benefit to the party authorizing the statement stems precisely from such reliance by the third party." *Id.* at 709.

²⁵ 65 N.Y.2d 536, 483 N.E.2d 110, 493 N.Y.S.2d 435 (1985). See *supra* note 12 (discussion of *Credit Alliance* holding).

²⁶ *Vereins-Und Westbank*, 691 F. Supp. at 709 (construing *Credit Alliance*, 65 N.Y.2d at 551, 483 N.E.2d at 118, 493 N.Y.S.2d at 443).

were sought out by the attorney, they were within this class.²⁷

The *Vereins-Und Westbank* court reasoned that since the New York Court of Appeals has never held that the *Ultramares* doctrine applies solely to accountants, "lawyers as a class should [not] receive any special treatment"²⁸ Yet, the New York Court of Appeals and lower courts of the state have consistently held, even after the *Vereins-Und Westbank* decision, that absent fraud or malicious conduct, an attorney would not be liable to a nonclient for negligence.²⁹ It is suggested that if the New York Court of Ap-

²⁷ *Id.* at 710. The "wisdom and policy [of *Ultramares* and *Glanzer*] was designed to protect a defendant from being subjected to liability for 'the explosive power resident in words' in lawsuits brought over an 'indeterminate time' by members of 'an indeterminate class.'" *Id.* (quoting *Ultramares*, 255 N.Y. at 179, 181, 174 N.E. at 442, 444-45 (1931))

The propriety of such a requirement is generally accepted. See Averill, *Attorney's Liability to Third Persons for Negligent Malpractice*, 2 LAND & WATER L. REV. 379, 391 (1967). In *Glanzer*, the damages were relatively small and directly controllable by the defendants, while in *Ultramares* the opposite was true due to the unknown status of the potential plaintiffs. *Id.*

²⁸ *Vereins-Und Westbank*, 691 F. Supp. at 712-13.

²⁹ See *Crandall v. Bernard, Overton & Russell*, 133 App. Div. 2d 878, 879-80, 520 N.Y.S.2d 237, 238 (3d Dep't 1987) (unless intentional wrong gives rise to duty of care, attorney not liable to nonclient in negligence), *appeal dismissed, in part, appeal denied in part, motion dismissed*, 70 N.Y.2d 940, 519 N.E.2d 618, 524 N.Y.S.2d 672 (1988); *Grassi v. Tatavito Homes, Inc.*, 90 App. Div. 2d 479, 480, 454 N.Y.S.2d 471, 472 (2d Dep't 1982) (purchasers in real estate transaction have no cause of action against vendor's attorney absent fraud or other intentional wrongdoing), *aff'd*, 58 N.Y.2d 1038, 448 N.E.2d 1356, 462 N.Y.S.2d 445 (1983); *Harder v. McGinn*, 89 App. Div. 2d 732, 733, 454 N.Y.S.2d 42, 43 (3d Dep't) (absent fraud, collusion, malicious or tortious act, attorney is not liable to nonclient), *aff'd*, 58 N.Y.2d 663, 664, 444 N.E.2d 1006, 458 N.Y.S.2d 542 (1982); *Drago v. Buonagurio*, 61 App. Div. 2d 282, 285, 402 N.Y.S.2d 250, 252 (3d Dep't) ("[A]n attorney in this State is not liable to third parties for negligence"), *rev'd on other grounds*, 46 N.Y.2d 778, 386 N.E.2d 821, 413 N.Y.S.2d 910 (1978).

The Appellate Division in New York has not extended the *Ultramares* doctrine to reach attorneys in New York. See *National Westminster Bank USA v. Weksel*, 124 App. Div. 2d 144, 146, 511 N.Y.S.2d 626 (1st Dep't) (where lender was not in contractual privity with borrower's attorney, his negligence suit does not state claim upon which relief could be granted), *appeal denied*, 70 N.Y.2d 604, 513 N.E.2d 1307, 519 N.Y.S.2d 1027 (1987); *Levine v. Graphic Scanning Corp.*, 87 App. Div. 2d 755, 755, 448 N.Y.S.2d 692, 693 (1st Dep't 1982) (New York does not hold attorney liable to non-clients); *Cronin v. Scott*, 78 App. Div. 2d 745, 746, 432 N.Y.S.2d 656, 658 (3d Dep't 1980) (attorney is only liable to nonclient for fraud, collusion, malicious or tortious conduct), *appeal dismissed*, 52 N.Y.2d 999, 419 N.E.2d 1079, 438 N.Y.S.2d 80 (1981). Although many states which require strict privity to hold an attorney liable allow exceptions for beneficiaries under a will, New York does not acknowledge liability in that case. See *Viscardi v. Lerner*, 125 App. Div. 2d 662, 664, 510 N.Y.S.2d 183, 185 (2d Dep't 1986). The *Viscardi* court cites *Credit Alliance* and acknowledges that New York extends liability to nonprivity third parties to certain professionals. *Id.* It notes however, that New York maintains its strict requirement of privity for attorneys to be liable for negligently drafted wills. *Id.* See also *Spivey v. Pulley*, 138 App. Div. 2d 563, 564, 526 N.Y.S.2d 145, 146, (2d Dep't 1988) "[W]hile the Court of Appeals

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peals were again given the opportunity to extend the *Ultramares* doctrine to attorneys, it may be inclined to relax the strict privity requirement which has consistently been a prerequisite to attorney liability in New York.

II. OTHER JURISDICTIONS

A. *Strict Privity Requirements*

A majority of states still require privity for an individual to recover in negligence for legal malpractice.³⁰ Many states however,

in *Credit Alliance Corp. v. Arthur Andersen & Co.* carved out a limited exception to the privity rule with respect to accountants, this court has repeatedly . . . declined to enlarge the application of this exception to professionals other than accountants." *Id.*

On November 14, 1988, after the *Vereins-Und Westbank* case was decided in the federal court, the appellate division for the second department again affirmed its adherence to the privity requirement to hold an attorney liable to a nonclient for negligence. See *Council Commerce Corp. v. Schwartz, Sachs & Kamhi, P.C.*, 144 App. Div.2d 422, 424, 534 N.Y.S.2d 1,2, (2d Dep't 1988) (attorney not liable to nonclient for his reliance on a negligently drafted opinion letter), *appeal denied*, 74 N.Y.2d 606, 543 N.E.2d 85, 544 N.Y.S.2d 820. In *Council Commerce Corp.*, the Second Department states:

[T]he courts of this State have not departed from this requirement in the area of attorneys' negligence where [t]he firmly established rule . . . 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.'

Id. (quoting *Viscardi*, 125 App. Div. 2d at 663-64, 510 N.Y.S.2d at 183).

³⁰ See, e.g., *Chalpin v. Brennan*, 114 Ariz. 124, 126, 559 P.2d 680, 682 (Ct. App. 1976) (attorney not liable for material misrepresentation of fact in merger contract which led to third party's purchase of stock); *Robertson v. White*, 633 F. Supp. 954, 972 (W.D. Ark. 1986) (interpreting Arkansas law, no liability for attorneys in negligence unless privity); *Weigel v. Hardesty*, 37 Colo. App. 541, 543, 549 P.2d 1335, 1337 (1976) (unlike action for fraudulent or malicious conduct, privity required for negligence action); *Angel, Cohen & Rogovin v. Oberon Investment*, 512 So. 2d 192, 194 (Fla. 1987) (where there is no allegation of fraud or conspiracy, plaintiffs may not bring negligence suit against defendant attorney who prepared sale documents); *Meier v. Pearlman*, 401 N.E.2d 31, 40 (Ind. Ct. App. 1980) (no liability for attorney in negligence except for fraud), *cert. denied*, 449 U.S. 1128 (1981); *Sondes v. Sears, Roebuck & Co.*, 501 So. 2d 829, 832 (La. Ct. App. 1986) (liability to nonclients only when attorney acts outside scope of authority); *Marker v. Greenberg*, 313 N.W.2d 4, 5 (Minn. 1981) (attorney liability without privity only if fraud or improper motive shown); *Lilyhorn v. Dier*, 214 Neb. 728, 730, 335 N.W.2d 554, 555 (1983) (attorney's duty of care in drafting will does not extend to nonclient); *Simon v. Zipperstein*, 32 Ohio St. 3d 74, 77, 512 N.E.2d 636, 638 (1987) (absent malice, an attorney is immune from third party liability); *Metzker v. Slocum*, 272 Or. 313, 317, 537 P.2d 74, 76 (1975) (injured third party cannot maintain negligence action without privity); *Guy v. Liederbach*, 501 Pa. 47, 55, 459 A.2d 744, 750 (1983) (privity required for malpractice action based on negligence); *Stinson v. Brand*, 738 S.W.2d 186, 190 (Tenn. 1987) (insufficient showing of fraud for vendors to hold attorney liable in handling of real estate transaction); *Likover v. Sunflower Terrace II, Ltd.*, 696 S.W.2d 468, 474 (Tex. Ct. App. 1985) (sufficient showing of conspiracy to defraud to hold attorney liable to third party).

permit an action in negligence only if the attorney has committed fraud, acted maliciously,³¹ or the plaintiff has suffered a loss because of the attorney's negligence in drafting a will.³² Some states which bar a negligence action permit a contract based recovery and limit recovery to intended beneficiaries of the contract.³³

B. Third Party Beneficiary-Negligence Action

Some jurisdictions allow recovery to nonclients who can prove third party beneficiary status³⁴ under an attorney-client relationship.³⁵ The plaintiff has the burden of proving that the primary

³¹ See *supra* note 30 (cases requiring strict privity). See also *Marker*, 313 N.W.2d at 5 (strict privity required for attorney to be liable in tort, except for fraud or improper motive); *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 318, 401 N.W.2d 816, 821 (1987) (absent fraud, attorney who misrepresented prior contract of sale as cancelled not liable to the new buyers if nonclients).

Attorney fraud has also been recognized as a sole basis for recovery by nonclients. See *Arnold v. Weck*, 388 So. 2d 269, 270 (Fla. Dist. Ct. App. 1980) (attorney's false representation of settlement authority grounds for suit by nonclient); *Malewich v. Zacharias*, 196 N.J. Super. 372, 376-77, 482 A.2d 951, 952-53 (1984) (attorney's fraudulent representations basis for negligence action by third party).

Attorney malice is another basis for liability. See *Trepel v. Pontaic Osteopathic Hospital*, 135 Mich. App. 361, 354 N.W.2d 341 (1984) (privity not required for malicious prosecution action against attorney); *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980) (attorney's filing of malpractice suit against physician to coerce nuisance settlement subjects attorney to suit by third party); *Johnsen v. Petersen*, 43 Wash. App. 801, 719 P.2d 607 (1986) (attorney bringing suit without client's authorization can be liable to adverse party).

³² See *infra* note 50 and accompanying text (discussion of attorney liability for negligently drafted will). But see *Lilyhorn*, 214 Neb. at 729, 335 N.W.2d at 555 (nonprivity defense valid even in action to contest will); *St. Mary's Church of Schuyler v. Tomek*, 212 Neb. 728, 325 N.W.2d 164 (1982) (same).

³³ See *Angel, Cohen & Rogovin*, 512 So.2d at 194 (intended third party beneficiary may sue attorney if his negligence causes legacy to be lost or diminished); *Guy*, 501 Pa. at 47, 459 A.2d at 750-51 (nonclient may recover against attorney if he can establish intended beneficiary status under RESTATEMENT (SECOND) OF CONTRACTS § 302).

³⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 302 (1979). A third party beneficiary is defined in the following way:

- (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
 - (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
 - (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary. *Id.* See *Guy*, 501 Pa. at 47, 450 A.2d at 744 (1983) (third party beneficiary action can be properly restricted by principles of Restatement (Second) of Contracts).

³⁵ See *Bush v. Rewald*, 619 F. Supp. 585, 596 (D.C. Haw. 1985) (attorney's liability to nonclient investors limited to intended beneficiary of advice or third party beneficiary);

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purpose of the attorney-client relationship was to benefit the non-client³⁶ as well as prove all the elements of negligence.³⁷ This approach limits the liability of the attorney, yet allows equitable relief for certain injured nonclients.³⁸

C. Multi-Criteria Balancing Test

To circumvent contractual privity requirements,³⁹ California courts first developed a liberal multi-criteria test that balances policy considerations and bases recovery by third parties on an attorney's breach of a legal duty.⁴⁰ This approach provides for a great

Security Nat'l Bank v. Lish, 311 A.2d 833, 834-35 (D.C. App. 1973) (where information sent directly to third parties, they are considered third party beneficiaries); Pelham v. Griesheimer, 92 Ill. 2d 13, 21, 440 N.E.2d 96, 100 (1982) (nonclient may sue attorney in negligence but must prove primary purpose of attorney-client relationship was to benefit or influence third party); Brody v. Ruby, 267 N.W.2d 902, 906 (Iowa 1978) (third party beneficiary may recover so long as party is "direct and intended beneficiary of the lawyer's services"); Hill v. Willmott, 561 S.W.2d 331, 334 (Ky. Ct. App. 1978) (attorney may be liable for negligence to intended beneficiary of his actions); Capital Bank & Trust Co. v. Core, 343 So.2d 284, 287-88 (La. Ct. App. 1977) (adopts liability to nonclient where contract entered to benefit third party); Flaherty v. Weinberg, 303 Md. 116, 492 A.2d 618, 625 (1985). A nonclient must claim and prove that the attorney client relationship had the "direct purpose" of benefitting the nonclient. *Id.* at 625. The intent must have actually existed, it is not enough to show it was a mere possibility. *Id.* See also Clagett v. Dacy, 47 Md. App. 23, 420 A.2d 1285, 1289 (1980) (court allowed "a modest relaxation of the strict privity requirement in allowing third party beneficiary to recover."); Page v. Frazier, 388 Mass. 55, 65, 445 N.E.2d 148, 154 (1983) (recovery denied since attorney's 'precise purpose' was not to benefit plaintiff). See generally Note, *Attorney's Liability to Third Parties for Malpractice: The Growing Acceptance of Liability in the Absence of Privity*, 21 WASHBURN L.J. 48, 59 (1981) (to impose liability, intent of attorney to benefit third party must be primary or direct purpose of transaction).

³⁶ See *supra* note 35 and accompanying text (cases cited demonstrate nonclient's requirement of showing third party beneficiary status).

³⁷ See *Pelham*, 92 Ill. 2d at 18, 440 N.E.2d at 98. "A complaint for negligence, to be legally sufficient, must set out facts that establish the existence of a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately resulting from the breach." *Id.* (citing *Cunis v. Brennan*, 56 Ill. 2d 372, 374, 308 N.E.2d 617, 618 (1974)). See also *Flaherty*, 303 Md. at 131, 492 A.2d at 625. "If the third party alleges and proves the remaining elements of a negligence cause of action, he can recover against the attorney in negligence." *Id.*

³⁸ See *Bradford Sec. Processing Ser. v. Plaza Bank & Trust*, 653 P.2d 188 (Okla. 1982) (attorney liable to reasonably foreseeable third party for negligently issued opinion), *construed in Note, Negligence: Bradford Securities Processing Service v. Plaza Bank & Trust: Expansion of Attorney's Professional Negligence Liability to Third Parties in Oklahoma*, 36 OKLA. L. REV. 372 (1983); Note, *supra* note 1, at 127-29 (discussing allocation of risk between attorney and third party).

³⁹ See *supra* notes 1-3 and accompanying text (traditionally, lawyers had to be in privity with party to recover in negligence).

⁴⁰ See *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958). The Supreme Court of

deal of judicial discretion and flexibility in granting relief to non-client plaintiffs.⁴¹ California courts weigh: "(1) the extent to which the transaction was intended to affect the plaintiff;⁴² (2) the foreseeability of harm to him; (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 policy consideration of preventing future harm;⁴³ and, (6) the extent to which recognition of liability would impose an undue burden on the legal profession."⁴⁴

California held that a notary public could be held liable to beneficiaries of negligently certified will. *Id.* at 651, 320 P.2d at 18. *Biakanja* established a six part case-by-case balancing test to determine if a duty was owed to third parties in negligence actions. *Id.* at 650, 320 P.2d at 19. *See also infra* footnotes 42-47 and accompanying text (list of multi-criteria test).

California was the first state to extend a cause of action in malpractice against attorneys for certain third party nonclients. *Lucas v. Hamm*, 56 Cal. 2d 583, 589, 364 P.2d 685, 688, 15 Cal. Rptr. 821, 824 (1961), *cert. denied*, 368 US 987 (1962). *See supra* notes 42-44 (sets forth *Lucas* test). The *Lucas* court noted that as between a negligent attorney and an innocent third party, the burden on the attorney was warranted. *Id.* at 589, 364 P.2d at 688. 15 Cal. Rptr. at 824.

Biakanja's rule was modified in subsequent cases as it was applied to lawyers. *See Lucas*, 56 Cal. 2d at 588, 364 P.2d at 688, 15 Cal. Rptr. at 824 (multi-criteria balancing test applied to attorneys in action under a will); *Heyer v. Flaig*, 70 Cal. 2d 223, 227, 449 P.2d 161, 164, 74 Cal. Rptr. 225, 228 (1969) (tort remedy under *Lucas* held preferable to third party beneficiary analysis); *Donald v. Garry*, 19 Cal. App. 3d 769, 771, 97 Cal. Rptr. 191, 192 (1971) (third party creditor receiving percentage of debt has cause of action against attorney of collection agency when he shows lack of diligence in prosecuting claim); *Goodman v. Kennedy*, 18 Cal. 3d 335, 342-43, 556 P.2d 737, 742, 134 Cal. Rptr. 375, 380 (1976) (acknowledged attorney's duty of care to third party beneficiaries or those to whom advice could be foreseeably transmitted); *Cicone v. URS Corp.*, 183 Cal. App. 3d 194, 210, 227 Cal. Rptr. 887, 897 (1986) (attorney liable for misrepresentation of material fact made to third-party's attorney for purpose of influencing client).

⁴¹ *Cicone*, 183 Cal. App. 3d at 210, 227 Cal. Rptr. at 897 (attorney liable for opinion letters to third party without privity using balancing criteria); *Albright v. Burns*, 206 N.J. Super. 625, 632, 503 A.2d 386, 389-90 (1986) (testator's attorney liable to intended beneficiary even though there was no contact between them).

⁴² *See Lucas*, 56 Cal. 2d at 588, 364 P.2d at 687, 15 Cal. Rptr. at 823 (1961), *cert. denied*, 368 U.S. 987 (1962). The first criteria is similar to, yet less stringent for the plaintiff than the third party beneficiary test which requires the plaintiff to prove that the primary purpose of the contract was to benefit the third party. *Pelham v. Griesheimer*, 92 Ill. 2d 13, 440 N.E.2d 96, 100 (1982). Although supposedly less stringent, the *Biakanja* court uses the "end and aim" test of *Glanzer* to analyze this first criteria. *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16, 17 (1954). *See supra* note 6 and accompanying text (outlines *Glanzer* court's approach).

⁴³ *Lucas*, 56 Cal. 2d at 588, 364 P.2d at 687, 15 Cal. Rptr. at 823.

⁴⁴ *Id.* at 589, 364 P.2d at 688, 15 Cal. Rptr. at 823-24. Originally the sixth element as stated in *Biakanja* considered the "moral blame attached to the defendant's conduct . . ." *Biakanja*, 49 Cal. 2d at 650, 320 P.2d at 19. The California Supreme Court later replaced moral blame with the amount of burden of liability would place on the legal profession. *Lucas*, 56 Cal. 2d at 589, 364 P.2d at 688, 15 Cal. Rptr. at 824. The *Lucas* court deter-

Survey of Professional Responsibility

Unlike the third party beneficiary test,⁴⁶ under the multi-criteria balancing test the claimant need not establish restrictive intended beneficiary status.⁴⁶ Recently, however, the California courts in some circumstances have developed a trend toward applying the stricter “end and aim” test of *Glanzer*.⁴⁷ Where the suit between claimant and attorney arises from a prior conflict between the parties as opposed to a nonadversarial proceeding (for instance the execution of a will) a claimant has a greater burden of proving that he was owed a duty of care by the attorney.⁴⁸

The multi-criteria test has been called confusing and vague and has been criticized for allowing a broad category of plaintiffs to recover.⁴⁹ Some states limit this more liberal standard to beneficiaries who were wronged by a testator’s attorney.⁵⁰

mined that the burden was warranted, especially since the plaintiff was an innocent party.
Id.

⁴⁶ See *supra* note 35 (explanation of third party beneficiary test).

⁴⁶ See *Guy v. Liederbach*, 501 Pa. 47, 57, 459 A.2d 744, 746 (1983) (discussion of the faults of California’s broad recovery).

⁴⁷ See *supra* note 7 and accompanying test (outlines *Glanzer* test).

⁴⁸ See *Cicone v. URS Corp*, 183 Cal. App. 3d 194, 209-210, 227 Cal. Rptr. 887, 896-97 (1986) (California court applied *Glanzer* to determine if there was duty owed to nonclient and then considered public policy). The *Cicone* court stated that “where an attorney intends his advice or statement to his client to be relied upon by third persons dealing with his client, the attorney owes the third person a duty of care.” *Id.* [emphasis in original] Once a duty has been established, the California analysis requires a balancing of the multi-criteria test to determine if it is against public policy for a nonclient to recover. *Id.*

⁴⁹ See, e.g., *Pelham v. Griesheimer*, 92 Ill. 2d 13, 22, 440 N.E.2d 96, 100 (1982) (analogy to “third-party direct beneficiaries to determine the duty owed to a nonclient by an attorney in a negligence action provides for . . . a narrower scope of liability than the balancing approach used in California”); *Guy*, 501 Pa. at 57, 459 A.2d at 746 (“Lucas standard is too broad”).

⁵⁰ See, e.g., *Fickett v. Superior Court of Pima County*, 27 Ariz. App. 793, 795, 558 P.2d 988, 990 (1976) (Arizona applies balancing test to determine third party beneficiary’s rights against attorney); *Pelham*, 92 Ill. 2d at 20, 440 N.E.2d at 100 (unless nonadversarial case, as in beneficiaries under will, Illinois employs third party beneficiary rationale); *Marker v. Greenberg*, 313 N.W.2d 4, 5-6 (Minn. 1981) (balancing test applied to determine attorney’s duty to beneficiaries); *Guy*, 501 Pa. 61, 459 A.2d at 746 (Pennsylvania only allows named legatees to recover); *Auric v. Continental Ca. Co.*, 111 Wis. 2d 507, 331 N.W.2d 325, 329 (1983) (Wisconsin court cited *Lucas* to allow recovery to beneficiaries under will). *But see Lilyhorn v. Dier*, 214 Neb. 728, 729, 335 N.W.2d 554, 555 (1983) (privity defense valid even in will contexts); *St. Mary’s Church of Schuyler v. Tomecki*, 212 Neb. 728, 729, 325 N.W.2d 164, 167 (1982) (same); *Viscardi v. Lerner*, 125 App. Div. 2d 662, 664, 510 N.Y.S.2d 183, 185 (2d Dep’t 1986) (same).

CONCLUSION

The issue of professional liability to nonclients will continue to arise in the judicial setting. As additional exceptions are carved, the courts will be forced to address the privity requirements as it relates to attorneys. The majority of states, including New York, still require privity in order to recover in negligence from an attorney while acting in his professional capacity. Those states that do not require strict privity have articulated various tests to determine whether or not an attorney owed a duty of care to a non-client. It is submitted that the strict privity requirement is in jeopardy in New York and courts may expose attorneys to liability for professional negligence to plaintiffs with whom they are not in privity.

Melinda R. Katz

JUDICIAL IMMUNITY IN BAR ADMISSIONS

Each state establishes its own bar admission procedures which require the applicant to meet certain character and fitness criteria.¹ Generally, the qualifications for admission require a prospective attorney to possess a bachelor's degree, a law degree from an approved school,² to pass a written examination,³ and to establish

¹ Law. Man. on Prof. Conduct (ABA/BNA) § 21:101. *See, e.g.*, *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) (state can require bar applicants to possess certain qualifications to be eligible for admission).

² Law. Man. on Prof. Conduct (ABA/BNA) § 21:101. Graduation from an ABA-approved law school is to "provide uniform and measurable standards by which to assess the qualifications of applicants." *LaBossiere v. Florida Bd. of Bar Examiners*, 279 So. 2d 288, 289 (Fla. 1973). There is reliance on the ABA due to the fact that state supreme courts are "unequipped to make such a determination . . . because of financial limitations and the press of judicial business." *Id.*

California has a "Baby Bar" requirement that students attending law schools not approved by California's Committee of Bar Examiners must take and pass an exam at the end of their first year so as to receive credit from the Committee for further study. *See Lupert v. California State Bar*, 761 F.2d 1325, 1328 (9th Cir.) (upheld constitutionality of Baby Bar), *cert. denied*, and *appeal dismissed*, 474 U.S. 916 (1985).

³ Law. Man. on Prof. Conduct (ABA/BNA) § 21:101. *See Richardson v. McFadden*, 540 F.2d 744, 748 (4th Cir. 1976) (purpose of bar examination is to distinguish between those