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THE GAMBLER BREAKS EVEN: LEGAL MALPRACTICE IN COMPLICATED ESTATE PLANNING CASES*

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INTRODUCTION: ON A WARM SUMMER'S EVENING ON A TRAIN BOUND FOR NOWHERE

One of the major developments in the law over the last 40 years has clearly been the increase in the number of lawsuits against attorneys for malpractice in estate planning. Legal scholars have explored the subject,[1] and the American Law Institute has also considered the issue.[2]

 The title and some of the section titles and alternate titles are from or adapted from Don Schlitz, *The Gambler* (Riders Night Music 1978) (recorded by Kenny Rogers).

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1. *See infra* note 3 (listing the author's own contributions); *see, e.g.*, John F. Cooper & Nathaniel B. Kidder, *Privity in Estate Planning Malpractice Actions: The Birth, Death and Resurrection of a Concept*, 17 CUMB. L. REV. 1 (1987); Lynn Curtis, *Changing Standards of Third-Party Liability in Estate Planning*, 66 UMKC L. REV. 863 (1998); Bradley E. S. Fogel, *Attorney v. Client—Privity, Malpractice, and the Lack of Respect for the Primacy of the Attorney-Client Relationship in Estate Planning*, 68 TENN. L. REV. 261 (2001); Gerald P. Johnston, *Avoiding Malpractice Liability in the Estate Planning Context*, 68 INST. ON MAJOR TAX PLAN. 17-1 (1991) [hereinafter Johnston, *Avoiding Malpractice Liability*]; Gerald P. Johnston, *Estate Planners' Accountability in the Representation of*

I have made several modest contributions to the literature on this topic.[3] In my first article, written more than 13 years ago, I discussed the development of attorney malpractice in estate planning, focusing on the decline of privity and the developments in the statute of limitations that favor plaintiffs.[4] I also discussed estate planning malpractice cases, which at the time primarily involved execution and simple drafting errors; courts generally allowed these actions to progress to trial and permitted recovery against attorneys.[5] Relatively few cases involving complicated legal errors had been decided when I wrote that article, and most of those cases involved tax planning.[6] Despite a few cases to the contrary, it was relatively easy to fit these cases into a developing framework that increasingly allowed malpractice actions based on the policy factors associated with the decline of privity.[7] My later article discussing damages in malpractice cases mentioned that attorneys prevailed more frequently in cases involving complicated legal errors.[8] In that article, I also stated that the most-often-litigated issue in the area of estate administration has been whether beneficiaries can sue the executor's attorney for malpractice; I speculated then that this question might be related to the effect of a violation of the ethical rules on malpractice.[9]

Agricultural Clients, 34 U. KAN. L. REV. 611 (1986); Gerald P. Johnston, *Legal Malpractice in Estate Planning—Perilous Times Ahead for the Practitioner*, 67 IOWA L. REV. 629 (1982); W. Probert & R. Hendricks, *Lawyer Malpractice: Duty Relationships Beyond Contract*, 55 NOTRE DAME L. REV. 708 (1980); Gerald P. Johnston, *Legal Malpractice in Estate Planning and General Practice*, 17 MEMPHIS ST. U. L. REV. 521 (1987) [hereinafter Johnston, *Legal Malpractice*]; Manuel R. Ramos, *Legal and Law School Malpractice: Confessions of a Lawyer's Lawyer and Law Professor*, 57 OHIO ST. L.J. 863 (1996). For the leading treatise on all areas of legal malpractice, see RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE (5th ed. 2000).

2. RESTATEMENT OF THE LAW GOVERNING LAWYERS § 51 (2000).

3. *See, e.g.*, Martin D. Begleiter, *Attorney Malpractice in Estate Planning—You've Got to Know When to Hold Up, Know When to Fold Up*, 38 U. KAN. L. REV. 193 (1990) [hereinafter Begleiter, *Attorney Malpractice*]; Martin D. Begleiter, *First Let's Sue All the Lawyers—What Will We Get: Damages for Estate Planning Malpractice*, 51 HASTINGS L.J. 325 (2000) [hereinafter Begleiter, *Damages*]; Martin D. Begleiter, *Article II of the Uniform Probate Code and the Malpractice Revolution*, 59 TENN. L. REV. 101 (1991) [hereinafter Begleiter, *Article II*].

4. *See* Begleiter, *Attorney Malpractice*, *supra* note 3, at 193-218.

5. *See id.* at 218-19.

6. *See id.* at 229-37.

7. *See id.* at 218-28.

8. *See* Begleiter, *Damages*, *supra* note 3, at 328.

9. *See id.* at 329 nn.34 & 36.

The time has come to examine the cases discussing "complicated legal errors"[10] and to determine if a unifying rationale underlies the opinions in these cases. Part I of this Article discusses the duty of the attorney and the standard of competence in estate planning cases to determine whether the complicated cases can be explained as an aspect of the scope of the attorney's duty or of the standard of care owed by the attorney to the client.[11] This Part finds that the concept of duty in attorney malpractice reduces itself to a public policy question and therefore neither explains nor predicts the results of the cases. This Part also finds that the standard of care, which (1) is based on expert testimony and (2) involves a broad range of competence, has little predictive power.[12]

After a brief review of the current status of the privity doctrine, Part II attempts to categorize the complicated legal errors by type and describe the cases within each type.[13] This categorization provides the basis for examining the courts' explanations. This Part discusses most of the significant cases but makes no claim to be exhaustive.

Part III discusses the main theory offered to explain the cases—the "ethical rules" theory,[14] which is based on cases involving will or trust beneficiaries suing the attorney for the estate. This theory provides that certain ethical rules[15] demand that the attorney not be held liable in malpractice to a beneficiary in all but the most obvious cases involving lack of competence.[16] This is because the potential for conflicts of interest will dilute the attorney's duty to the fiduciary, her client.[17] This Part analyzes this argument, both in terms of (1)

10. I intend to include in this category all legal errors except execution errors. Drafting errors that allegedly fail to effectuate the testator's desires, described in my first article as "simple errors," *see* Begleiter, *Attorney Malpractice*, *supra* note 3, at 222-28, are also included because they are the basis for many of the complicated cases that are the focus of this Article. For the most part, however, this Article excludes cases involving beneficiaries suing the attorney for the estate, because different considerations govern those cases. *See infra* note 34.

11. *See infra* Part I.

12. *See id.*

13. *See infra* Part II.

14. *See infra* Part III.

15. Most noteworthy of the rules are those (1) mandating zealous advocacy for the client, *see* MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1 (2003), (2) requiring confidentiality of information relating to the representation, *see* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2003), and (3) prohibiting conflicts of interest, *see* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2003).

16. *See* Begleiter, *Attorney Malpractice*, *supra* note 3, at 218-19 (collecting invalid execution cases).

17. *See infra* Part III.

whether the rationale of the cases involving a malpractice action against an attorney for the executor should be extended to cases against the attorney for the testator, and, more importantly, (2) whether the potential for conflict is of sufficient force to justify such a significant limit on malpractice liability. This Part also discusses cases evaluating and rejecting this argument.

Part IV considers Professor Bradley E. S. Fogel's excellent and thought-provoking analysis in a recent article based on the ethical cases, which argues that the cases allowing malpractice actions misperceive the attorney's role.[18]

After rejecting the ethical theory, Part V offers a different test that has recently begun to emerge in the cases, a test that I term the "evidence" test.[19] While bearing some similarities to Professor Fogel's analysis,[20] the evidence test does not similarly restrict malpractice liability. Moreover, as all courts and commentators agree on the "botched execution" case, the evidence test builds on that case to develop a workable yet flexible rule to decide most of the complicated error cases.[21] Part V also examines the Florida-Iowa rule, which limits recovery in malpractice actions to those cases in which the beneficiary can show violations of the testator's intent as expressed on the face of the will. In an earlier article, I heavily criticized this rule. In Part V, this rule is reevaluated as a possible early indicator of the evidence test, although inarticulately expressed.[22] Although this new test has potential problems in at least one type of case,[23] it appears to be flexible enough to appropriately decide most of the complicated cases. This Article will conclude with some thoughts as to the future use of the evidence test.

Before proceeding to the Article's main subject, I will briefly discuss the significance of malpractice litigation. According to the latest American Bar Association ("ABA") study,[24] although the

18. *See* Fogel, *supra* note 1, at 312; *infra* Part IV.
19. *See infra* Part V.
20. *See* Fogel, *supra* note 1, at 308-13.
21. *See infra* Part V.
22. *See* Begleiter, *Attorney Malpractice*, *supra* note 3, at 198-204.
23. *See infra* Parts II.L & V (discussing the "incapacitated client" case).
24. AMERICAN BAR ASSOCIATION STUDY COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, PROFILE OF LEGAL MALPRACTICE CLAIMS, 1996-1999 (2001) [hereinafter ABA STUDY]. Researchers

number of claims filed in most areas of the law has remained stable since the ABA's prior study,[25] the frequency of probate and trust claims rose 1.08% in the same period.[26] Most parties do not take claims in this area to judgment.[27] In all, plaintiffs abandon 54% of claims without payment,[28] which contributes to a total of 68% of all cases resulting in no payment to the plaintiff.[29] Despite this, the number of estate, trust, and probate claims increased over the previous study, even though the previous study covered a longer time period.[30] The conclusion is inescapable that malpractice remains a significant consideration in estate planning.

I. DUTY AND COMPETENCE

A. The Concept of Duty

An attorney is liable, whether in contract or in negligence, only if he has a duty to the party making the claim.[31] Prior to 1962, attorneys were rarely held liable to beneficiaries or purported beneficiaries under wills because the rule was that an attorney owed a duty only to her client.[32] The legal community referred to this limit of liability as

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compiled data from lawyer-owned insurance companies in the United States and Canada and commercial insurers. *See id.* at 1.

25. *See id.* at 5.

26. *See id.* Between 1996 and 1999, plaintiffs filed 3196 claims in the Estate, Trust and Probate category, which includes estate and gift tax claims. *See id.* at 22. This area ranked fourth highest in the number of claims, following (1) Personal Injury, (2) Real Estate, and (3) Family Law. *See id.*

27. *See* ABA STUDY, *supra* note 24, at 10-11. Only 1% of all claims result in a judgment for the plaintiff that requires payment, but only 14% result in a dismissal of the suit. *See id.*

28. *See id.* at 11. Parties abandon 54% of suits and settle an additional 17% of claims before the commencement of trial. *See id.*

29. *See id.* In claims provided by a smaller sample of insurers, parties abandoned 69% of the claims in the Estate, Trust and Probate category, while 11.2% of the claims resulted in the dismissal of the suit or a judgment for the attorney. *See id.* at 31, app. B.

30. The previous study covered from 1990 to 1995; the current study covers from 1996 to 1999. *See* ABA STUDY, *supra* note 24, at 4. The number of estate, trust, and probate claims in the 1995 study was 1454; this number increased to 3196 in the 1999 study. *See id.* at 5.

31. *See* 1 MALLEN & SMITH, *supra* note 1, § 8.2, at 771.

32. *See* 4 MALLEN & SMITH, *supra* note 1, § 32.4, at 733; *see also* Begleiter, *Attorney Malpractice*, *supra* note 3, at 194-95.

"strict privity."[33] At the time of this publication, only nine states retain the strict privity rule in estate planning cases.[34]

One would expect that examining the scope of an attorney's duty to third parties would provide an objective standard to enable a determination as to whether each type of estate planning error constitutes malpractice. Sadly, that is not the case. The concept of duty itself is a matter of policy.[35] Therefore, any discussion of duty in

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33. *See* 4 MALLEN & SMITH, *supra* note 1, § 32.4, at 733. As I have previously detailed, strict privity is no longer the majority rule. *See* Begleiter, *Attorney Malpractice*, *supra* note 3, at 194-207.

34. *See, e.g.*, Robinson v. Benton, 842 So. 2d 631, 637 (Ala. 2002); Pettus v. McDonald, 36 S.W.3d 745, 751 (Ark. 2001); Nevin v. Union Trust Co., 726 A.2d 694, 701 (Me. 1999); Noble v. Bruce, 709 A.2d 1264, 1278 (Md. 1998); Lilyhorn v. Dier, 335 N.W.2d 554, 555 (Neb. 1983); Viscardi v. Lerner, 510 N.Y.S.2d 183, 185 (N.Y. Sup. Ct. 1986); Maneri v. Amodeo, 238 N.Y.S.2d 302, 304 (N.Y. Sup. Ct. 1963); Simon v. Zipperstein, 512 N.E.2d 636, 638 (Ohio 1987); Barcelo v. Elliott, 923 S.W.2d 575, 577 (Tex. 1996); Copenhaver v. Rogers, 384 S.E.2d 593, 595 (Va. 1989). This list excludes cases in which a beneficiary sued the attorney of the will's executor for malpractice. The courts in these cases tend to hold that the fiduciary's attorney owes no duty to the beneficiary. *See infra* Part III. Courts base these holdings on the rule that the attorney owes undivided loyalty to the fiduciary client, and imposing a duty on the attorney to the beneficiaries would create too great a conflict of interest. *See* 4 MALLEN & SMITH, *supra* note 3, § 32.5, at 757-58. In addition, beneficiaries already have a remedy: suing the personal representative, who can then sue the attorney. *See* Trask v. Butler, 872 P.2d 1080, 1085 (Wash. 1994); *cf. In re* Guardianship of Karan, 38 P.3d 396, 400 (Wash. Ct. App. 2002). However, this remedy is not available in suits against the drafting attorney. Discussion of the problem of whether the fiduciary's attorney should be held liable for malpractice to estate or trust beneficiaries is beyond the scope of this Article, except for the similarities between the rationale of those cases and the ethics arguments made by many of the courts seeking to limit malpractice actions. *See infra* Part III.

Recent decisions have subjected this rule to more detailed analysis, and some inroads to the rule are emerging. In the recent case of *Estate of Leonard v. Swift*, 656 N.W.2d 132 (Iowa 2003), the estate of a ward (whose involuntary conservatorship had been reversed on appeal) sued the conservator's attorney. *See id.* at 135. The attorney advised the establishment and continuation of the conservatorship. The plaintiff alleged that "[t]he conservatorship continued to operate and incur expenditures for services which were not either prudent or necessary," including borrowing, upon the attorney's advice, more than $70,000 on unfavorable terms. *See id.* at 136-37. The conservator's attorney argued that imposing a duty to the ward would place the attorney "in the untenable position of representing differing interests." *Id.* After analyzing Iowa's rule on an attorney's duty to non-clients, the court rejected this argument and concluded that

> the attorney for the conservator owes a duty to the ward *upon proof of and to the extent* (1) the conservator intends as a primary objective of the lawyer's services that those particular services benefit the ward, i.e., the ward is the direct and intended beneficiary of the lawyer's services; (2) recognition of a duty would not significantly impair the lawyer's performance of his obligations to the conservator; and (3) recognition of such a duty is necessary to ensure enforcement of the attorney's obligations to the conservator.

Id. at 146 (emphasis in original). As to the attorney's advice on the loan, the court found that the stated elements satisfied, thus the attorney owed a duty to the ward as to these services. *See id.* As to the advice on the establishment and continuation of the conservatorship, the court found the interests of the conservator opposed the interest of the ward; the attorney thus owed a duty solely to the conservator as to these services. *See id.* at 146-47.

35. The court in *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961), stated:

the cases tends to be very general and devoid of utility in determining whether specific conduct constitutes malpractice. In addition to applying the factors set forth in the seminal case of *Lucas v. Hamm*,[36] courts have stated, for example, (1) that "liability for negligence [should] not extend to an unlimited and unknown number of potential plaintiffs,"[37] (2) that "[t]he concept of duty is premised on what reasonable persons might recognize as fair" and the imposition of a duty "is ultimately a question of fairness,"[38] or (3) that the court must balance "the attorney's duty to represent clients vigorously . . . with the duty to refrain from knowingly making a false statement of material fact or law to a third person."[39] A recent estate planning case stated: "Duty of care is a question of law described as the total of policy considerations which lead to the conclusion that the plaintiff is entitled to protection."[40]

Because of these general descriptions of the concept of duty, any attempt to develop a test based on the scope of an attorney's duty to a third-party beneficiary of a will or trust appears destined to fail.

B. Standard of Care

If duty will not provide a predictor as to whether an estate planning error constitutes malpractice, a second natural inquiry is whether the standard of care an attorney owes to a client would furnish the test. While much literature exists on questions such as whether the ethical

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> [T]he determination of 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 forseeability 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, and the policy of preventing future harm.

Id. at 686-87; *see also* 1 MALLEN & SMITH, *supra* note 1, § 8.2, at 772.

36. 364 P.2d 685 (Cal. 1961); *see supra* note 35 (listing the factors).

37. Pelham v. Griesheimer, 440 N.E.2d 96, 99 (Ill. 1982).

38. Barner v. Sheldon, 678 A.2d 767, 768 (N.J. Super. Ct. Law Div. 1995).

39. Davin, L.L.C. v. Daham, 746 A.2d 1034, 1044 (N.J. Super. Ct. App. Div. 2000). This case is a source for a wealth of such general statements.

40. Leak-Gilbert v. Fahle, 55 P.3d 1054, 1057 (Okla. 2002). No better general statement can be made than that the "courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists." *See* WILLIAM PROSSER & ROBERT KEATON, PROSSER & KEATON ON THE LAW OF TORTS 359 (5th ed. 1984).

standards in the *Model Code of Professional Responsibility* ("*Model Code*") or the *Model Rules of Professional Conduct* ("*Model Rules*") determine the standards for malpractice,[41] specialization,[42] and locality,[43] unfortunately the standard of competence is useless as a predictor because it, like the concept of duty, is defined in extremely general terms.[44] The standard is that the lawyer "should exercise the skill and knowledge ordinarily possessed by attorneys under similar circumstances."[45] Expert witnesses often testify for both parties as to whether the attorney's conduct comports with the standard.[46] In addition to the standard lacking predictive power altogether, estate planning experts often disagree about many things. Moreover, "considerations of locality" are sometimes included in the definition's "similar circumstances," even though the standard of care should not vary depending on locality, and complications may arise from local rules, customs, and practices.[47]

Even when a court defines the standard of competence in more detail, the definition supplied rarely serves as an accurate predictor.[48] For example, a recent case involved the question of whether the attorney had a duty to independently determine the heirs of a testator for whom he drafted a will.[49] The court described the standard of care as requiring an attorney, when hired to prepare a will, to:

> 1) inquire into the client's heirs at law; 2) offer a proper explanation; 3) advise the client as to what is meant by heirs at

41. *See, e.g.*, Hart v. Comerica Bank, 957 F. Supp. 958, 981 (E.D. Mich. 1997); Albright v. Burns, 503 A.2d 386, 390 (N.J. Super. Ct. App. Div. 1986); 3 MALLEN & SMITH, *supra* note 1, § 19.7.

42. *See* 3 MALLEN & SMITH, *supra* note 1, § 19.4.

43. *See id.* § 19.5.

44. *See id.* § 19.2, at 66-67.

45. *See id.* § 19.2, at 67.

46. *See* 5 MALLEN & SMITH, *supra* note 1, §§ 33.15, 33.17, at 106, 128.

47. 3 MALLEN & SMITH, *supra* note 1, § 19.5, at 88. The locality where the defendant practices may range from a small area to the entire state. *See id.* at 91-95; *see also* Buddy O. Herring, *Liability of Board Certified Specialists in a Legal Malpractice Action: Is There a Higher Standard?*, 12 GEO. J. LEGAL ETHICS 67, 75-77 (1998).

48. *See* 3 MALLEN & SMITH, *supra* note 1, § 19.5.

49. Leak-Gilbert v. Fahle, 55 P.3d 1054 (Okla. 2002).

> law; 4) explain the significance of including all heirs at law in a will; and 5) prepare a will according to the client's directions.[50]

Given that statement, can the reader safely predict the answer to the question involved in the case?[51] I suspect that the answer is no. The description of the standard is simply too general, yet this case features one of the more detailed and specific descriptions found in the case law.

Because an examination of the standard of competency reveals no more of a useful predictive test than does an examination of the concept of duty, we must move to an examination of the complicated malpractice cases and the courts' explanations for their holdings to search for a pattern or underlying factor offering an explanation for the results.[52]

II. THE COMPLICATED MALPRACTICE CASES: EVERY HAND'S A WINNER, AND EVERY HAND'S A LOSER

A. Introduction

This Part attempts to develop categories for the complicated malpractice cases. In some instances, assigning a case to a single category is somewhat arbitrary.[53] At any rate, this categorization is mainly for convenience of the discussion and is not based on any overriding difference in treatment. While we will discover that courts in certain types of cases (such as estate planning cases) find for plaintiffs more often than in other types, it is not the category that produces this result.

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50. *Id.* at 1058.

51. The court held that the attorney had no duty to independently confirm the client's heirs. *See id.* at 1062.

52. *See infra* Part II.

53. Because of the difficulty in categorization, this Article provides a miscellaneous category for cases that do not easily fit into any of the other divisions. *See infra* Part II.O.

B. A Brief Note on Privity

A main issue of many early cases was whether a lack of privity barred malpractice actions by beneficiaries under wills against the drafting attorney.[54] Because some early cases are also relevant to the present discussion, a brief restatement of the current status and theories of privity might be useful to put analysis of these cases into context. Nine states retain a rule of strict privity that prohibits a beneficiary or alleged beneficiary from bringing an action of malpractice against the attorney who drafted the will.[55] Several other states follow a rule that allows a beneficiary to bring a malpractice action only where the beneficiary can show that the will on its face does not effectuate the testator's intent.[56] This rule greatly limits malpractice liability.[57] Previously, I have severely criticized this approach as confusing the will with the attorney-client contract and speculated that the true basis of at least some of these decisions was a failure to allege or present evidence of the testator's true intent.[58] I will revisit these cases in Part V and suggest that these courts may have inarticulately attempted to develop a theory that would identify the cases where malpractice recovery should be allowed, but they stated the requirement incorrectly.[59] Properly interpreted, however, these cases could provide support for the rule developed in this Article. Most of the early decisions reject privity and allow suits for

54. *See* Begleiter, *Attorney Malpractice*, *supra* note 3, at 194-207.

55. *See supra* note 34.

56. *See* Begleiter, *Attorney Malpractice*, *supra* note 3, at 198-204. Courts refer to this rule as the "Florida-Iowa rule" because Florida and Iowa adopted the rule early on and have adhered to it. *See, e.g.*, Lorraine v. Grover, Ciment, Weinstein & Stauber, 467 So. 2d 315 (Fla. Dist. Ct. App. 1985); DeMaris v. Asti, 426 So. 2d 1153 (Fla. Dist. Ct. App. 1983); Schreiner v. Scoville, 410 N.W.2d 679 (Iowa 1987); *see also* Fogel, *supra* note 1, at 283. Colorado and Michigan also follow this rule. *See* Glover v. Southard, 894 P.2d 21 (Colo. Ct. App. 1994); Mieras v. De Bona, 550 N.W.2d 202 (Mich. 1996). Maryland followed this rule until 1998, *see* Kirgan v. Parks, 478 A.2d 713 (Md. Ct. Spec. App. 1984), when it changed to a strict privity state. *See supra* note 34.

57. Indeed, unless (1) the will violates a rule of law, (2) the will is invalid for execution errors, or (3) the attorney admits the error, avoiding dismissal of the suit or summary judgment for the attorney is very difficult. *But see* Schreiner v. Scoville, 410 N.W.2d 679 (Iowa 1987) (reversing the dismissal of a beneficiary's claim to an interest in property where the defendant attorney represented the testator in three potentially "interrelated transactions" (a will, a codicil, and a partition)); *infra* notes 518 to 532 and accompanying text.

58. *See* Begleiter, *Attorney Malpractice*, *supra* note 3, at 207-08 n.76.

59. *See infra* Part V.C.

malpractice on a negligence theory, a breach of contract theory, or both.[60]

C. Failure to Effectuate Decedent's Intent

This category, one of the two largest, contains the simplest of the complicated cases, because the facts of these cases are not really complicated. Although the facts vary, the basic unifying factor in these cases is that the plaintiff alleged that the will did not effectuate the testator's intent.

One of the earliest cases in this category was *Ventura County Humane Society for the Prevention of Cruelty to Children & Animals v. Holloway*.[61] The testator bequeathed $10 million to a charity which was described as "SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS (Local or National)."[62] Not surprisingly, "numerous humane societies filed nonexclusive claims to" the bequest; one society filed an exclusive claim, which the parties settled.[63] A class of other claimants sued the drafting lawyer for malpractice, alleging error in the will's ambiguous description of the beneficiary.[64] The court affirmed a dismissal of these claims because the petition failed to allege that the testator intended to benefit the plaintiff organizations.[65]

In *Hiemstra v. Huston*,[66] the testator's son alleged that the will, prepared by the defendant attorney for the seriously ill testator, left almost all of the testator's property to the testator's wife, thus disregarding the testator's wish to give his son half of the trust corpus.[67] The appellate court affirmed a dismissal of the action, noting that the son's petition contained no allegation that

60. *See* Begleiter, *Attorney Malpractice*, *supra* note 3, at 194-207.
61. 115 Cal. Rptr. 464 (Cal. Ct. App. 1974).
62. *See id.* at 466.
63. *See id.*
64. *See id.* at 466-67.
65. *See id.* at 470. Much of the opinion discusses privity, but the lack of any allegation of the true intent of the testator and the lack of a causal connection between the error and the plaintiffs' loss appears to be the true basis of the decision. *See id.* The court also noted that the testator appeared to have "suggested or selected" the language of the will that later proved to be ambiguous. *See id.* at 469.
66. 91 Cal. Rptr. 269 (Cal. Ct. App. 1970).
67. *See id.* at 269.

> the will failed to reflect the testator's true dispositive and testamentary intent or desires *at the time it was approved and executed* by him and that it did not contain exactly what he wanted it to contain and dispose of his estate in the manner in which the testator then intended.[68]

In *Marker v. Greenberg*,[69] the testator directed the attorney to draft deeds conveying the testator's property to himself and the plaintiff as joint tenants.[70] After the decedent's death, the plaintiff alleged that the attorney was negligent in not drafting the deeds to convey the property to the testator and the plaintiff as tenants in common, which would have reduced the estate taxes upon the testator's demise.[71] The Minnesota Supreme Court affirmed summary judgment in favor of the attorney, noting that the property passed to the plaintiff and that the deeds were completely valid; the complaint did not allege that the holdings in joint tenancy were contrary to the decedent's intent or that the decedent was concerned about estate taxes.[72]

In *Hale v. Groce*,[73] the testator directed the defendant attorney to bequeath $300,000 to the plaintiff, and neither the will nor the trust contained the bequest.[74] The complaint alleged that the attorney, by not including a bequest to the plaintiff as the testator had intended, both acted negligently and breached his contract with the testator; the contract would have benefited the plaintiff.[75] The court held that the plaintiff stated a valid cause of action in contract as well as in tort.[76] Although the court was examining only the pleadings in reviewing the trial court's dismissal, it noted that the question of whether the contract was sufficient to create a duty depends on proof, such as correspondence, memoranda, testimony, or affidavits.[77]

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68. *Id.* at 270 (emphasis in original).
69. 313 N.W.2d 4 (Minn. 1981).
70. *See id.* at 4.
71. *See id.* at 4-5.
72. *See id.* at 6.
73. 744 P.2d 1289 (Or. 1987).
74. *See id.* at 1293.
75. *See id.* at 1290.
76. *See id.*
77. *See id.* at 1293.

In *Stowe v. Smith*,[78] the testator instructed the defendant attorney to draft a will leaving half of her estate in trust to be paid to the plaintiff when he attained the age of 50, or, if he died prior to age 50, to his issue.[79] After the attorney assured the testator that the will contained the requested provisions, she signed the will without reading it.[80] After the testator's death, the plaintiff discovered that the will actually directed the trustee to distribute the trust corpus to the plaintiff's issue (rather than to the plaintiff) when the plaintiff reached age 50.[81] The Connecticut Supreme Court reversed a dismissal of the complaint on the ground that the complaint set forth "a cause of action for the plaintiff as the third party beneficiary of a contract."[82]

Similarly, in *Ogle v. Fuiten*,[83] the wills of a husband and wife bequeathed all of their property to the other if the survivor survived the first spouse by 30 days.[84] The wills divided their estates equally among the couple's nieces and nephews if the couple died in a common disaster.[85] The husband died of a stroke, and the wife died 15 days later of cancer.[86] Both estates passed under intestacy because neither will provided for that eventuality.[87] In an action for malpractice by the nieces and nephews, the court held that the complaint stated a valid cause of action.[88]

In *Needham v. Hamilton*,[89] the court held an attorney liable for malpractice for erroneously omitting a residuary clause in the plaintiff's favor that had been included in several previous drafts of the will.[90] On remand, the court rendered summary judgment against the attorney, and the appellate court affirmed, holding that expert

78. 441 A.2d 81 (Conn. 1981).
79. *See id.* at 82.
80. *See id.*
81. *See id.*
82. *See id.* at 83.
83. 445 N.E.2d 1344 (Ill. App. Ct. 1983).
84. *See id.* at 1348.
85. *See id.*
86. *See id.*
87. *See id.*
88. *See id.*
89. 459 A.2d 1060 (D.C. 1983).
90. *See id.* at 1062.

testimony on the standard of care was not necessary because the error was so obvious.[91]

In an early case, *Connecticut Junior Republic v. Doherty*,[92] the court held that an attorney did not commit malpractice when he inadvertently changed the names of the charitable beneficiaries when he drafted a codicil.[93] The case turned on testimony that the testator (1) heard the will read aloud twice, (2) heard the names of the charities twice, (3) made no comment either time that he heard them, and (4) mentioned to a financial advisor within a year of executing the codicil that he had gone back to his original list of charities.[94] The court ruled that the testator had ratified the change in charities, and therefore the plaintiff failed to establish proximate cause.[95]

In contrast to early cases finding against the attorney, courts have often decided later cases in favor of the attorney when the issue is failure to effectuate the decedent's testamentary intentions.

In *Mieras v. DeBona*,[96] for example, the testator executed a will shortly before her death that disinherited one child in favor of her other two children but failed to exercise a power of appointment over a marital trust "established for [the testator's] benefit by her husband," which resulted in the disinherited child receiving one third of the trust corpus at the testator's death.[97] On the day before the decedent underwent surgery, the testator's other two children conveyed to the attorney the testator's instructions to disinherit the third child; the testator executed the will the day after the operation.[98] Emphasizing that the attorney's obligation was to comply with the normal standard of care (rather than any specific promise to benefit the plaintiffs) and that such a limited tort duty removed any conflict of interest between the attorney's duties to the client and to the beneficiary, the Michigan Supreme Court held that no extrinsic evidence was admissible and granted summary judgment in favor of

91. Hamilton v. Needham, 519 A.2d 172, 174-245 (D.C. 1986).
92. 478 N.E.2d 735 (Mass. App. Ct. 1985).
93. *See id.* at 739.
94. *See id.* at 737, 739.
95. *See id.* at 739.
96. 550 N.W.2d 202 (Mich. 1996).
97. *See id.* at 203-04.
98. *See id.* at 205.

the attorney.[99] The court found no inconsistency in disinheriting the child as to the testator's own property and allowing that child to take a portion of the trust.[100] If the testator instructed the attorney to exclude the child "from inheriting any [of her] *property*" and to give all of "[her] *property*" to the other two children, the attorney could not be liable because the law does not consider property over which a person has power of appointment to be that person's property.[101]

In *Miller v. Mooney*,[102] the testator's will left her home to a church, made two small bequests, and left the remainder to her children.[103] Nine years after execution, when the testator was in a nursing home, one of her sons advised her attorney in writing that the testator wanted to (1) sell her home, (2) put the proceeds in a fund for her continued care, and (3) change her will to provide that her estate be left in equal shares to her children and to the church.[104] The attorney said that he would have to discuss this change with the testator; after doing so he wrote to the son saying that the testator did not want to make the change.[105] After the testator's death, the son alleged that the attorney committed malpractice by failing to change the will in accordance with his letter and with the testator's wishes as expressed in a conversation with the attorney on the day that the testator went to the nursing home.[106] Because the son produced no written evidence of the testator's desire to change the will except for his letter, the court affirmed summary judgment for the attorney.[107]

Similarly, in *Rogers v. Regnante*,[108] the court affirmed summary judgment for the attorney on a claim that the attorney negligently drafted a will leaving the children of the testator's first marriage all of his property to the exclusion of his second wife.[109] Although the complaint alleged that the testator intended this outcome, the only

99. *See id.* at 208-09.
100. *See id.*
101. *See id.* at 205-06.
102. 725 N.E.2d 545 (Mass. 2000).
103. *See id.* at 547.
104. *See id.* at 547-48.
105. *See id.* at 548.
106. *See id.* The attorney denied that this conversation took place. *See id.*
107. *See id.* at 551.
108. 736 N.E.2d 391 (Mass. App. Ct. 2000).
109. *See id.* at 395.

written evidence supporting this was a short memorandum referring to personal property.[110] The attorney changed the will several times after the memorandum to conform to a marital deduction estate plan.[111] The court ruled that the note was insufficient proof of the testator's intent in light of the execution of the later documents, which included a will that effectuated his estate plan.[112]

In *Tetrault v. Mahoney, Hawkes & Goldings*,[113] the testator's estate plan involved a deed, a will, and a lifetime trust.[114] The deed transferred the testator's residence to himself and his wife as tenants by the entirety.[115] The will gave the testator's personal property (except cash, stocks, and bonds) and 50% of the residue to his wife, 5% of the residue to each of his two sisters, and the remaining 40% of the residue to his inter vivos trust.[116] Upon the testator's death, the house was the estate's principal asset.[117] The plaintiffs sued the attorney for negligence.[118] The court, in upholding summary judgment for the attorney, stated:

> [O]n the one hand we have a properly executed deed granting a survivorship interest in the marital home to a long-term spouse, coupled with uncontested affidavits that this disposition was in accord with the testator's intent and that the spouse had contributed approximately 37% of the original purchase price. On the other hand we have the mere assertion by the party with the burden of proof that the testator would have made some other disposition of the property (we know not what) if he had been told by his lawyers that the house was his principal asset. In these circumstances the defendants have sufficiently demonstrated by materials unmet by countervailing materials

110. *See id.* at 393.
111. *See id.*
112. *See id.* at 395.
113. 681 N.E.2d 1189 (Mass. 1997).
114. *See id.* at 1193.
115. *See id.*
116. *See id.*
117. *See id.* at 1194.
118. *See Tetrault*, 681 N.E.2d at 1191.

> that the plaintiffs have no reasonable expectation of proving their case.[119]

In a recent case, *Simpson v. Calivas*,[120] the Supreme Court of New Hampshire held that the beneficiaries stated a valid cause of action against an attorney for failure to effectuate testamentary intent.[121] The defendant attorney had drafted a will for the plaintiff's father that gave the plaintiff's stepmother a life estate in "our *homestead* located at Piscataqua Road, Dover, New Hampshire."[122] The will was not clear whether this gift included only the house or all 100 acres that the testator owned on that road.[123] The plaintiff lost an action in the probate court and then sued the attorney, alleging that the testator intended to give the plaintiff the land.[124] The probate court refused to admit into evidence notes that the defendant took during the consultation[125] and evidence on damages that included appraised values in the probate inventory.[126] The court reversed summary judgment in favor of the attorney, holding in addition that the excluded items were admissible.[127]

The "error of law cases,"[128] the "delay cases,"[129] and the "lack of competence cases"[130] are all closely related to the "failure to effectuate testamentary intent cases" discussed in this section.

D. Legal Effect of the Devise

Several malpractice cases have involved a bequest that failed by virtue of legal rules.[131] This section discusses these cases.

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119. *Id.* at 1194 (footnote omitted).
120. 650 A.2d 318, 327 (N.H. 1994).
121. *See id.*
122. *See id.* at 320.
123. *See id.*
124. *See id.* at 320-21.
125. The notes read: "House to wife as a life estate remainder to son . . . . Remaining land . . . to son." *Id.* at 320.
126. *See id.* at 323-27.
127. *See Simpson*, 650 A.2d at 324.
128. *See infra* Part II.D.
129. *See infra* Part II.M.
130. *See infra* Part II.L.

The leading case is *Lorraine v. Grover, Ciment, Weinstein & Stauber*.[132] The testator bequeathed a life estate in his residence to the plaintiff, with the remainder to his sons.[133] The residence was the testator's homestead, which, under Florida law at that time, he could not devise because he had a minor child.[134] The plaintiff sued the law firm for negligence in failing to advise the testator of the prohibition against devising the homestead and in not exploring possible alternatives.[135] The court refused to admit extrinsic evidence and found that the will revealed no intent to give the plaintiff other property if the devise failed.[136] The appellate court affirmed summary judgment for the attorney because the Florida Constitution and a state statute, not the attorney's negligence, caused the bequest's failure.[137]

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131. In a sense, the invalidity of a will as the result of having only one witness or lacking a necessary interested witness could be included here. However, I view these mistakes as simple errors, which this Article does not discuss in detail.

132. 467 So. 2d 315 (Fla. Dist. Ct. App. 1985).

133. *See id.* at 316.

134. *See id.* at 317. The Florida law subsequently changed in this regard. *See* Snyder v. Davis, 699 So. 2d 999, 1005 (Fla. 1997).

135. *See Lorraine*, 467 So. 2d at 317.

136. *See id.* at 318.

137. *See id.* at 319. The dissent was sharp and critical:

> [T]he majority declares the attorney to be immune from liability so long as, robot-like, he puts down on paper what the testator tells him to put down. And, according to the majority, if some law which was known or should have been known to the attorney prevents the testator's correctly recorded wishes from being carried out, it is the law, not the attorney, which has frustrated the testamentary intent.
>
> I think it utterly indefensible to say that an attorney's failure to advise a testator that his desired devise is a nullity is any less negligent than an attorney's faulty draftsmanship or improper execution of a will. . . .
>
> . . .
>
> I am equally, if not more, disturbed by the majority's conclusion that because there is no expression in the will as to what is to happen upon the failure of the "primary" devise "expressed in the will," that therefore [the testator] had no intent to provide for his mother if a life estate in the homestead could not be devised. The majority's insistence that the appellant is an intended beneficiary of the will only if she could receive a life estate in the homestead is unfounded. Plainly, [the testator's] intent to make [the plaintiff] a substantial beneficiary of his estate is discernible from the will, and the reason, of course, that the will contains no secondary or alternative devise to the [plaintiff] is that the testator allegedly was never informed that any was necessary.

See id. at 319, 321.

Similarly, eight years later in *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, the Florida Supreme Court held that an attorney did not commit malpractice in omitting a pretermitted heir provision from a will.[138] The will identified the testator's three children by name and made no mention of after-born children.[139] The plaintiff was born to the testator after the will's execution.[140] The attorney drafted a new will to include the plaintiff, but the testator never executed it.[141] The court did not admit extrinsic evidence and held that the plaintiff lacked privity to sue the drafting attorney for malpractice.[142]

Other cases have yielded different results. In *Wisdom v. Neal*,[143] the court held that an attorney's failure to distribute the testator's property to his heirs per capita, as mandated by the intestacy statute, was a breach of the standard of care and therefore actionable.[144] In *Walker v. Lawson*,[145] the court held that an attorney's failure to advise the testator of the effect of a spouse's election against the will, where the testator omitted the spouse from the will, was "unmistakable malpractice."[146] An early California case, although decided on statute of limitations grounds, appears to state that erroneous advice about a spousal election resulting from a mistake over which property was community property would support a malpractice action.[147]

The most recent case in this area is *Johnson v. Sandler, Balkin, Hellman & Weinstein*.[148] This case involved a will and a revocable

138. 612 So. 2d 1378, 1380 (Fla. 1993).
139. *See id.* at 1379.
140. *See id.*
141. *See id.* The attorney drafted and the testator executed a codicil changing the co-trustee and co-personal representative but did not provide for the after-born child. *See id.* The Probate Court ruled that the codicil removed the after-born child as a pretermitted heir by the doctrine of republication by codicil. *See id.* at 1379 n.1.
142. *See id.* at 1380.
143. 568 F. Supp. 4 (D.N.M. 1982).
144. *See id.* at 8.
145. 514 N.E.2d 629 (Ind. Ct. App. 1987), *rev'd in part*, 526 N.E.2d 968 (Ind. 1988). The state supreme court reversed on appeal because the applicable statute made the accomplishment of the testator's desires impossible. *See Walker*, 526 N.E.2d at 969-70.
146. *Walker*, 514 N.E.2d at 631.
147. Fazio v. Hayhurst, 55 Cal. Rptr. 370 (Cal. Ct. App. 1966).
148. 958 S.W.2d 42 (Mo. Ct. App. 1997).

inter vivos trust.[149] The trust gave one half of the testator's estate to his second wife and one half to the plaintiffs, who were two daughters and one granddaughter by a previous marriage.[150] Through subsequent amendments, the wife's share became a Qualified Terminable Interest Property trust ("QTIP trust"),[151] providing "net income payable to [the testator's wife] for her lifetime and the remainder payable to" the plaintiffs.[152] This formulation increased the plaintiffs' expectancy significantly.[153] No one informed the testator's wife of the changes, and she elected against the will.[154] The plaintiffs sued the attorney who had drafted the amendments, alleging negligence in the attorney's failure to inform the testator of the possibility of a spousal election against the trust and of possible options to avoid the election.[155] The court rejected strict privity for trusts as it had previously in wills, applied a multi-factor balancing test,[156] and allowed the plaintiffs to sue the attorney.[157] The testator's specific instructions to make the granddaughter a beneficiary after her mother's death created in the attorney a duty to the granddaughter; the complete restating of the trust and the substantial revisions drafted by the attorney made him responsible for the trust and imposed on him a duty of advising the testator of possible methods of avoiding the spousal election.[158]

The attorney argued that because he represented both the testator and the wife, he could not obtain from the wife a waiver of the right to elect without creating a conflict of interest on the attorney's part.[159] The court noted that the attorney billed for services and addressed correspondences only to the testator and that the wife admitted that

149. *See id.* at 44.
150. *See id.* at 44-45.
151. *See* I.R.C. § 2056(b)(7) (2003).
152. *See Johnson*, 958 S.W.2d at 44-45.
153. *See id.*
154. *See id.* at 45-46. Interestingly, the attorneys who represented the wife in the election were the defendants—the same attorneys that drafted the trust amendment. *See id.*
155. *See id.* at 46.
156. *See id.* at 48-49. The Missouri Supreme Court previously applied this test in the estate planning setting in *Donahue v. Shughart, Thompson & Kilroy*, 900 S.W.2d 624 (Mo. 1995), which involved gifts causa mortis. *See Johnson*, 958 S.W.2d at 48-49; *see also infra* notes 487 to 496 and accompanying text.
157. *See Johnson*, 958 S.W.2d at 54.
158. *See id.* at 47-50.
159. *See id.* at 47.

she lacked knowledge of the testator's testamentary plan during his lifetime.[160] The court inferred from these facts that she was not a party to the discussions of the trust amendments.[161] More significantly to the court, if the attorney had represented both spouses, he would have been obligated to disclose the potential conflict of interest.[162] This evidence indicated that the attorney represented only the testator and not the wife with regard to the trust amendments.[163] The court reversed summary judgment for the attorney, ruling that genuine issues of material fact existed.[164]

The area of mistakes of law, like many areas involving complicated cases, presents a mixed bag.

E. The Rule Against Perpetuities: Know When to Walk Away, Know When to Run

Something about the Rule Against Perpetuities befuddles law students, law professors, and courts. This is no less true in the malpractice area. Some cases stand for the proposition that no lawyer can possibly master the Rule,[165] others hold that every citizen of a state is presumed to know the Rule,[166] and still others argue that the sufficient possibility of malpractice liability precludes summary judgment.[167] With much trepidation, I proceed.

It is ironic that the case that started the malpractice revolution resulted in an affirmance of the dismissal of an action against the attorney and that the case involved perhaps the most difficult legal issue in any of the cases—the Rule Against Perpetuities. In *Lucas v. Hamm*,[168] the decedent's will created a trust designed to terminate at noon five years after the date of the court order distributing the trust property.[169] The clause clearly violated the Rule Against

160. *See id.*
161. *See id.*
162. *See id.*
163. *See Johnson*, 958 S.W.2d at 51-52.
164. *See id.* at 53-54.
165. *See* Lucas v. Hamm, 364 P.2d 685, 690 (Cal. 1961).
166. *See* Millwright v. Romer, 322 N.W.2d 30, 33 (Iowa 1982).
167. *See* Temple Hoyne Buell Found. v. Holland & Hart, 851 P.2d 192, 198 (Colo. Ct. App. 1992).
168. 364 P.2d 685 (Cal. 1961).
169. *See id.* at 686-87.

Perpetuities.[170] After the parties settled, the beneficiary of the trust sued the drafter for malpractice.[171] The court rejected the strict privity rule, held that the question of duty to a third party was a matter of policy, and promulgated the multi-factor analysis now widely adopted by courts.[172] As to the facts of the case, however, the court held that the attorney would not be liable for malpractice because the Rule Against Perpetuities had "long perplexed the courts and the bar,"[173] was a "technicality-ridden legal nightmare," and was "a dangerous instrumentality in the hands of most members of the bar."[174] Fifteen years later, however, a California Appellate Court stated: "There is reason to doubt that the ultimate conclusion of *Lucas v. Hamm* is valid in today's state of the art. Draftsmanship to avoid the [R]ule [A]gainst [P]erpetuities seems no longer esoteric."[175]

Moving from the "no" and the "definite-maybe" to the opposite extreme is *Millwright v. Romer*.[176] This case involved an age contingency violation of the Rule, another basic error.[177] The court decided the case on the statute of limitations, which began to run on the date that the decedent died, because the Rule Against Perpetuities was incorporated in a statute and "[e]very citizen [was] assumed to know the law and [was] charged with knowledge of the provisions of statutes."[178] That bombshell brought forth a pithy rejoinder from the dissent:

> Question: How do we bar a claim that a lawyer was negligent for misunderstanding the [R]ule [A]gainst [P]erpetuities?

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170. The violation was of the administrative contingency type. *See* W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 644-46 (1938).

171. *See Lucas*, 364 P.2d at 686-87.

172. *See id.* at 687-88; *see also* Begleiter, *Attorney Malpractice*, *supra* note 3, at 195-207.

173. *Lucas*, 364 P.2d at 690 (citing J. GRAY, THE RULE AGAINST PERPETUITIES xi (4th ed. 1942) and W. Barton Leach, *Perpetuities Legislation, Massachusetts Style*, 67 HARV. L. REV. 1349, 1349 (1954)).

174. *Lucas*, 364 P.2d at 687 (quoting Leach, *supra* note 173, at 1349).

175. Wright v. Williams, 121 Cal. Rptr. 194, 199 n.2 (Cal. Ct. App. 1975).

176. 322 N.W.2d 30 (Iowa 1982); *see also* Begleiter, *Attorney Malpractice*, *supra* note 3, at 256-58.

177. *See Millwright*, 322 N.W.2d at 30-33.

178. *Id.* at 33.

Answer: By pretending lay persons understand it.[179]

The issue in *The Temple Hoyne Buell Foundation v. Holland & Hart*[180] was whether an option on mineral interests was subject to the Rule Against Perpetuities.[181] The attorney did not research the question because, as an experienced business lawyer who thought he understood the Rule, he was certain that it did not apply and thus did not advise the clients that application of the Rule might actually be an issue.[182] Based on the testimony of four experts, who agreed that the attorney should have inserted a savings clause that would have protected the option and that the attorney should have recognized the possibility of a dispute and researched the issue, the court reversed a grant of summary judgment in favor of the attorney.[183]

The confusion as to the predictive factor in complicated malpractice cases in estate planning is mirrored in the Rule Against Perpetuities cases.

F. Duty to Review Wills

Few cases involve the question of whether an attorney has a duty to periodically review a will for a client. The two cases discussing this issue agree that no duty to review a will previously executed by a client exists, unless the client specifically requests the attorney to do so.[184]

G. Duty to Investigate Heirs and Assets and to Conduct Research

This Article groups these two areas together on the ground that the duty to investigate heirs and assets and the duty to do legal research should be similar. Surprisingly, this is not the case.

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179. *Id.* at 34.
180. 851 P.2d 192 (Colo. Ct. App. 1992).
181. *See id.* at 194.
182. *See id.* at 198-99.
183. *Id.* at 199.
184. *See* Hargett v. Holland, 447 S.E.2d 784, 786 (N.C. 1994); Davis v. Somers, 915 P.2d 1047, 1049 (Or. Ct. App. 1996) (finding that the statute of repose barred the action).

The sole case involving the duty to investigate heirs is quite recent. In *Leak-Gilbert v. Fahle*,[185] the decedent hired the defendant attorney to update his will.[186] The decedent identified as his heirs the three children of his deceased son.[187] After the decedent died, the identified heirs discovered that the decedent had from another deceased son four additional grandchildren, who were treated as pretermitted heirs.[188] The affected beneficiaries alleged that the attorney should have reviewed the attorney's sister's files (the sister probated the decedent's wife's will), which would have disclosed the existence of the grandchildren.[189] The attorney and her sister shared office space briefly, and her sister's files were in the office building where the attorney practiced, although the sisters never practiced law together.[190] The Supreme Court of Oklahoma held that no duty existed, finding that

> to hold that an attorney has a duty to confirm heir information by conducting an investigation into a client's heirs independent of, or in addition to, the information provided by the client, even when not requested to do so, would expand the obligation of the lawyer beyond reasonable limits. The duty between an attorney and third persons affected by the attorney-client agreement should not be any greater than the duty between the attorney and the client.[191]

Similarly, the only case involving a duty to investigate a client's assets held that no such duty existed. In *Leavenworth v. Mathes*,[192] the liquid assets of the estate were insufficient to satisfy the monetary bequests in the will, which resulted in a diminution of these bequests.[193] The plaintiff alleged that the attorney was negligent in

185. 55 P.3d 1054 (Okla. 2002).
186. *See id.* at 1056.
187. *See id.*
188. *See id.*
189. *See id.*
190. *See id.*
191. *See Leak-Gilbert*, 55 P.3d at 1058.
192. 661 A.2d 632 (Conn. App. Ct. 1995).
193. *See id.* at 633.

not discovering the insufficiency of the assets and in not providing for this possibility in the will.[194] Without much discussion, the court held that no duty existed to investigate a testator's assets.[195]

Somewhat surprisingly, when the question involves estate assets, the courts do impose a duty. In *Schmitz v. Crotty*,[196] the defendant attorney took over an estate from another attorney.[197] The probate inventory contained inadequate legal descriptions of some property and counted other property twice.[198] The defendant relied on the descriptions and values in the probate inventory in preparing the federal estate and state inheritance tax returns and did not discuss the land descriptions and values with either the testator's family or the previous attorney.[199] The court held that the attorney had committed malpractice as a matter of law.[200] An attorney who uses "alternate valuation"[201] has a duty to review the descriptions and determine the values independently as part of the preparation of the tax returns.[202] The court reasoned that a competent attorney would have recognized that the same parcel of land was described three different times and corrected it, thus a failure to do so constituted malpractice.[203]

The duty to research the law as part of the standard of competence is well established. In *Horne v. Peckham*,[204] the plaintiff obtained a patent for processing low-grade wood into a defect-free material.[205] Having become interested in the tax advantages of a Clifford trust after reading about it in the newspaper, and on the recommendation of his accountant, he hired the defendant attorney to prepare such a trust with the patent as the corpus.[206] The attorney told the plaintiff

194. *See id.*
195. *See id.* at 634-35.
196. 528 N.W.2d 112 (Iowa 1995).
197. *See id.* at 113.
198. *See id.* at 113-14.
199. *See id.* at 113.
200. *See id.* at 117.
201. *See* I.R.C. § 2032 (2003).
202. *See Schmitz*, 528 N.W.2d at 116. The Internal Revenue Code permits an executor to use an alternate method of valuing an estate. *See* I.R.C. § 2032 (2003).
203. *See Schmitz*, 528 N.W.2d at 116.
204. 158 Cal. Rptr. 714 (Cal. Ct. App. 1979).
205. *See id.* at 716.
206. *See id.* For a description of Clifford trusts, see Begleiter, *Attorney Malpractice*, *supra* note 3, at 243 n.320.

that he had no tax expertise or knowledge but that he could draft the documents if someone else could tell him what was needed.[207] His research consisted of looking at the annual set of *American Jurisprudence* on federal taxation and reviewing minimal material on the subject provided by the accountant.[208] When the plaintiff asked if he could use a nonexclusive license of the patent rights to fund the trust, the attorney suggested asking a "high-priced tax expert" whom the attorney had already consulted on other matters.[209] The expert gave the wrong answer.[210] The court held that the attorney had a duty to research the question and could be liable for malpractice for failure to do so.[211]

Although not many cases on this subject exist, they are uniform in holding that a failure to research the law violates the standard of care that an attorney owes to his client.[212] However, the discrepancy between the holdings on failure to research the law and failure to research the facts, such as assets and heirs, is puzzling.

H. Duty to Advise

The cases involving the duty to advise a client on various aspects of estate planning are similar to certain other categories discussed in this section. They often resemble the "failure to effectuate testamentary intent cases," [213] because the failure to advise the testator may involve whether the attorney told the testator that the testator's plan would not accomplish what he wanted. They resemble the "error of law cases,"[214] because the failure to inform the client

207. *Horne*, 158 Cal. Rptr. at 716.
208. *See id.*
209. *Id.*
210. *See id.* Unfortunately, the expert had been licensed to practice law for less than a year and had worked as a tax accountant for three years or less. *See id.*
211. *See id.* at 721. The U.S. Supreme Court had decided a case almost exactly on point, which the attorney should have discovered had he done the research. *See Horne*, 158 Cal. Rptr. at 716. At any rate, the law does not condone a failure to research. *See id.* at 718 (discussing Comm'r v. Sunnen, 333 U.S. 591 (1948)).
212. *See, e.g.*, Smith v. Lewis, 530 P.2d 589, 595 (Cal. Ct. App. 1975); *see also* Shopsin v. Siben & Siben, 702 N.Y.S.2d 610, 612 (N.Y. App. Div. 2000) ("An attorney may be liable for . . . his failure to conduct adequate legal research." (quoting McCoy v. Tepper, 690 N.Y.S.2d 678 (N.Y. App. Div. 1999))).
213. *See supra* Part II.C.
214. *See supra* Part II.F.

that a rule of law would prevent the accomplishment of the testator's objective is part of the allegation of malpractice in these cases. As many of the cases involve tax advice, they also resemble the estate planning cases described later in this section.[215] I have attempted to limit the cases discussed in this section to those in which the primary allegation was failure to advise, rather than a failure in drafting, although placing some of these cases in other categories would be easy.

In *Garcia v. Borelli*,[216] the defendant attorney advised the testator that a declaration in the will that certain property was separate rather than community property would be effective to attain that categorization; however, he did not advise the testator of measures to assure that the law would recognize the true character of the property at death.[217] The court held that the plaintiffs stated a valid cause of action for legal malpractice.[218] Further, in *Leyba v. Whitley*,[219] the court held that an attorney handling a wrongful death action owes a duty to his minor client to advise the conservator for the client that (1) the money did not belong to the conservator and (2) the conservator has a fiduciary duty to use it for and distribute it to the client.[220] The attorney also owed the client a duty of reasonable care to protect the client's right to receive the net settlement proceeds.[221]

Perhaps the most extensive discussion of this issue was in *Pizel v. Zuspann*.[222] In *Pizel*, the decedent wanted to transfer land to the plaintiffs.[223] The defendant attorney suggested that he use a revocable trust.[224] The decedent executed the trust and conveyed all of his real estate to it.[225] The decedent and the plaintiffs (the beneficiaries of the trust) acted as trustees.[226] The attorney's partner, who was not

215. *See infra* Part II.K.
216. 180 Cal. Rptr. 768 (Cal. Ct. App. 1982).
217. *See id.* at 770-72.
218. *See id.*
219. 907 P.2d 172, 174 (N.M. 1995).
220. *See id.* at 174.
221. *See id.*
222. 795 P.2d 42 (Kan. 1990), *modified on other grounds*, 803 P.2d 205 (Kan. 1990).
223. *Pizel*, 795 P.2d at 44-45.
224. *See id.* at 44.
225. *See id.*
226. *See id.*

involved in creating the trust, subsequently began representing the decedent.[227] The partner believed that (1) the decedent and the plaintiffs knew that the land was in trust and that they had fiduciary duties to take care of the land and (2) the attorney had explained the trust and the duties of trustees.[228]

When the partner met with the decedent and the plaintiffs to explain trust amendments, the decedent repeatedly told the partner that he desired that the existence of the trust be kept secret because he feared the reaction of others who were not beneficiaries.[229] Accordingly, he instructed the partner to not record the deeds until after his death.[230] The partner recorded the deeds after the decedent died, and a group of the decedent's heirs successfully voided the trust.[231] None of the trustees had done anything while the decedent was alive, and the plaintiffs believed no trust was created until after the decedent died.[232] Reversing a summary judgment in favor of the attorney, the court held that plaintiffs stated a valid cause of action for negligence because the attorney and the partner failed to record the deeds when they created the trust and also failed to advise the plaintiffs of the necessity of taking control of the land as trustees during the decedent's lifetime.[233]

I. Questions Involving Status

Two recent legal malpractice cases involved questions of status. In the first, *In re Guardianship of Karan*,[234] a mother was named guardian of her child, who was the beneficiary of a life insurance policy on the life of the child's father.[235] No bond was required, but the funds were not placed in a "blocked account" as required by Washington statute; the mother depleted the fund.[236] Applying a

227. *See id.* at 45.
228. *See id.* at 44.
229. *See Pizel*, 795 P.2d at 44.
230. *See id.*
231. *See id.*
232. *See id.*
233. *See id.*
234. 38 P.3d 396 (Wash. Ct. App. 2002).
235. *See id.* A blocked account requires court approval for expenditures. *See id.*
236. *See id.*

balancing test, the court held that the guardian's attorney owed a duty of care to the ward.[237] In *Francis v. Piper*,[238] a Minnesota court held that a testator's attorney owes no duty to an heir unless the will named the heir as a beneficiary, even when the testator was under a conservatorship at the time that the will was executed.[239] Finding that the testator knew that the execution of the will would have been detrimental to the plaintiff, the court determined that the testator did not intend to benefit her and thus dismissed the malpractice action.[240]

J. Cases Where the Attorney Had Other Clients in the Testator's Family

Lawyers often represent several members of a family or several generations in a family. This type of representation can cause conflicts or potential conflicts resulting in malpractice actions. Several recent cases have involved such problems.

In *Hotz v. Minyard*,[241] the defendant attorney represented the testator, his son and daughter, and the family businesses.[242] The son was in charge of the testator's Greenville automobile dealership, and the daughter worked for the testator at his Anderson dealership.[243]

The testator executed a will that left the son the Greenville dealership, gave other family members $250,000, and left the residuary estate in trust to his wife for life, with the remainder equally to the son and to a trust for the daughter.[244] Later that day, the testator executed a new will that gave the Greenville dealership real estate to the son outright.[245] The testator told the attorney that the existence of the second will was to remain a secret and specifically directed the attorney to not tell the daughter about it.[246]

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237. *See id.* (citing Trask v. Butler, 872 P.2d 1080 (Wash. 1994)).
238. 597 N.W.2d 922 (Minn. Ct. App. 1999).
239. *See id.* at 925-26
240. *See id.* at 925.
241. 403 S.E.2d 634 (S.C. 1991).
242. *See id.* at 635-36.
243. *See id.* at 635. She was also a minority shareholder in that business. *See id.*
244. *See id.*
245. *See id.*
246. *See Hotz*, 403 S.E.2d at 635-36.

The daughter subsequently requested a copy of her father's will.[247] The attorney showed the daughter the first will and discussed it with her in detail.[248] The attorney made handwritten notes on the will expressing that the testator intended to provide for the daughter as he had for the son if she became capable of handling a dealership.[249] The daughter believed that the notes were part of the will, that she would receive the Anderson dealership, and that she would share the estate equally with the son.[250] The attorney admitted that he did not tell her that the first will was revoked.[251]

The testator subsequently suffered from serious health problems and became mentally incompetent.[252] The daughter took care of the testator while the son managed both dealerships.[253] During this time, the son formed a holding company that took ownership of the Anderson dealership property.[254] The daughter questioned these decisions and tried to return to the Anderson dealership as a successor dealer.[255] The son then fired her.[256] Shortly after the daughter consulted the attorney about her concerns over the son's actions, the testator executed a codicil removing the daughter and her children as beneficiaries.[257] After the family's attempt to settle failed, the daughter sued the attorney for breach of fiduciary duty.[258] The Supreme Court of South Carolina reversed a grant of summary judgment for the attorney, holding that he owed the daughter a duty with regard to her father's will because of their previous attorney-client relationship.[259] The court reasoned that even though the attorney represented the testator regarding his will, he owed the

247. *See id.* at 636.
248. *See id.*
249. *See id.*
250. *See id.*
251. *See id.*
252. *See Hotz*, 403 S.E.2d at 636.
253. *See id.*
254. *See id.*
255. *See id.*
256. *See id.*
257. *See id.*
258. *See Hotz*, 403 S.E.2d at 636.
259. He had prepared her tax returns for 20 years and prepared her will a week before she requested her father's will. *See id.* at 637-38.

daughter, as a client, the duty to deal with her in good faith and not actively misrepresent the first will or its status.[260]

On the other hand, in *Chase v. Bowen*,[261] the Fifth District Court of Appeals of Florida held that an attorney owed no duty to a testator's daughter regarding a will that omitted her as a beneficiary, even though the attorney represented the daughter and drafted her will during the period that he drafted the testator's will.[262] The court disagreed with the daughter's contention that Rule 4-1.7 of the *Florida Rules of Professional Conduct* "require[d] that if a lawyer represents a group of people in one matter or in various matters, he must necessarily get the approval of all in order to represent any one of such group in an unrelated matter."[263] The court held that the lawyer assumed no obligation to oppose any testator from changing a will or in redrafting the will, even if the lawyer prepared wills for other family members.[264]

In *Simon v. Wilson*,[265] the beneficiaries under the testator's wife's will claimed that the testator misappropriated the wife's interest in joint tenancy property during her lifetime and misled her about the effect of her will and that the defendant attorney failed to protect her interests.[266] Two years before the wife's death, the testator hired the attorney to plan their estates.[267] The testator told the attorney that the wife was ill and could not attend their meetings.[268] During a hospitalization shortly after the testator hired the defendant attorney, the testator convinced the wife to give him power of attorney over her property, telling her this was necessary to negotiate Medicare and insurance checks payable to her, to manage their property, and to

260. *See id.* The court held that the attorney had no duty to disclose the existence of the second will, given the testator's express direction that he not do so. *See id.*
261. 771 So. 2d 1181 (Fla. Dist. Ct. App. 2000).
262. *See id.* at 1182.
263. *See id.*
264. *See id.*
265. 684 N.E.2d 791 (Ill. App. Ct. 1997).
266. *See id.*
267. *See id.*
268. *See id.* At that time, and for several years previously, the wife had diminished mental and physical capacity and depended on the testator to attend to her financial matters. She could not leave home without assistance and relied on others to read to her because of her poor eyesight. *See id.*

accomplish the estate plan.[269] The testator then told the attorney that the plaintiffs should benefit under her will.[270] The wife executed the will, and the testator then created a revocable trust and his own will that did not provide for the plaintiffs.[271] The testator placed all the jointly owned securities into his revocable trust.[272] During the entire course of the estate plan, the attorney never interviewed or communicated with the wife.[273]

The court reversed the grant of summary judgment in favor of the attorney, holding that the wife was the attorney's client and that the delivery of the power of attorney was explicit authority for the attorney to act on her behalf.[274] Because it was clear to the lawyer that the disposition of the testator's estate was different from the disposition of the wife's estate, he owed the wife a duty of care that, under these facts, he could have breached.[275]

In *Sindell v. Gibson, Dunn & Crutcher*,[276] the testator retained the defendant attorneys to prepare his estate plan so as to transfer wealth to his daughters and his daughter's children.[277] Knowing that all of the testator's wealth was in his business, the attorneys advised him to make gifts and sales of interests in the business to the children and the grandchildren.[278]

The testator's wife was not the mother of his children, and she had children of her own from a prior marriage.[279] In addition to having substantial assets of her own and her own attorneys, the wife had a community property interest in the testator's business.[280] The court found that at the time that the testator implemented his estate plan,

269. *See id.*
270. *See Simon*, 684 N.E.2d at 796.
271. *See id.*
272. *See id.*
273. *See id.* at 795.
274. *See id.* at 801.
275. *See id.* In view of the conflicting allegations as to the facts, the court did not decide whether the attorney had breached his duty to the wife. *See Simon*, 684 N.E.2d at 801.
276. 63 Cal. Rptr. 2d 594 (Cal. Ct. App. 1997).
277. *See id.* at 596.
278. *See id.*
279. *See id.*
280. *See id.*

his wife would have been willing and able to execute an agreement to the gifts and sales, though none was obtained.[281]

The wife subsequently became incompetent.[282] Her children sued the testator for the amount of his wife's interest in the business.[283] While this action was pending, the testator's children and grandchildren sued the attorneys (1) to indemnify them for the amounts that they stood to lose in the action initiated by the wife's children, (2) for the $50,000 fee paid to the attorneys for the estate plan, and (3) for other expenditures associated with the plan.[284] Although the decision turned on what event constitutes the actual injury in a legal malpractice action,[285] the court held that the failure to obtain the written waiver from the wife clearly constituted negligence.[286]

K. Estate Planning Cases: There'll Be Time Enough for Counting When the Dealing's Done

We now move to the second area where a large number of cases have been decided—estate planning. In this area, unlike some areas previously discussed, courts have held that an attorney is liable for errors involving failure in estate planning in a substantial number of cases. This Article will later attempt to explain why this is so.[287]

One of the leading cases on estate planning is *Bucquet v. Livingston*.[288] The attorney drafted a trust for the purpose of minimizing estate taxes at the death of the plaintiff's parents.[289] The attorney adopted a common plan at the time of drafting—a revocable inter vivos trust with one-half left in a form which qualified for the

281. *See id.*
282. *See Sindell*, 63 Cal. Rptr. 2d at 597.
283. *See id.* Mr. Caballero's wife had a community property interest. *See id.*
284. *See id.* at 596-97.
285. *See id.* at 602. The court's decision turned on the determination of which event constituted the injury, giving rise to a claim of legal malpractice, and it held that the litigation was the event which constituted the damages. *See id.* The court held that the outcome of the litigation would determine the amount of the damages. *See id.*
286. *See Sindell*, 63 Cal. Rptr. 2d at 601-02.
287. *See infra* Part V.
288. 129 Cal. Rptr. 514 (Cal. Ct. App. 1976). *Horne v. Peckham*, 158 Cal. Rptr. 714 (Cal. Ct. App. 1979), is also a leading case in estate planning. *See supra* text accompanying notes 204 to 211.
289. *See Bucquet*, 129 Cal. Rptr. at 514.

federal estate tax marital deduction in the estate of the first spouse to die (to be included in the estate of the second spouse to die), with the other half subject to tax in the estate of the first spouse to die (not to be included in the estate of the second spouse to die).[290] The plaintiff, her husband, and their children were the trust beneficiaries.[291]

Unfortunately, the attorney included a provision allowing the wife (who survived her husband) to revoke the entire trust after her husband's death.[292] This caused the entire trust, rather than one-half of it, to be included in the wife's gross estate and completely destroyed the benefits of the estate plan.[293] The court found the attorney liable for his error, explaining that the marital deduction trust was one of the best known estate planning devices, that Congress had made taxable general powers of appointment ten years before the attorney drafted the trust, and that "[t]he potential consequences of the retention of a general power of appointment was a matter within the reasonable competence of an attorney."[294]

Ironically, one of the few cases in this area holding the attorney not liable for malpractice involved an error extremely similar to that involved in *Bucquet*. In *Noble v. Bruce*,[295] beneficiaries alleged that a lawyer who had prepared their parents' wills leaving all the property

290. *See id.* At the time the attorney drafted and the grantor executed the trust, the federal estate tax marital deduction was limited to one-half of the adjusted gross estate. *See* I.R.C. § 2056(a)(c) (1954). Because of the progressive rates of the estate tax and the limit on the marital deduction, a common estate plan of lawyers at the time was to devise exactly one-half of the adjusted gross estate to the surviving spouse in a form which qualified for the marital deduction. This half received a deduction in the estate of the first spouse to die, and was included in the estate of the second spouse to die. The remainder of the estate was devised in a form that did not qualify for the marital deduction, thus including it in the estate of the first spouse to die, but not in the estate of the surviving spouse. The plan resulted in approximately equal taxable estates for the two spouses, which resulted in less tax being paid on the combined estates than if all the assets were taxed in one estate. The modern equivalent of this plan is the unified credit-marital deduction trust plan. *See* I.R.C. §§ 2001, 2010, 2056 (1986). Congress' subsequent enactment of an unlimited marital deduction improved the plan so that, properly planned, there is no tax on the death of the first spouse. RAY D. MADOFF ET AL., PRACTICAL GUIDE TO ESTATE PLANNING 71-2 (2001).

291. *See Bucquet*, 129 Cal. Rptr. at 514.

292. The court found this to be a general power of appointment, including the property subject to the power of appointment in the wife's estate under Internal Revenue Code section 2041. *See id.* at 516.

293. *See id.* at 517. The wife disclaimed the power of revocation five years after her husband's death, incurring federal and California gift taxes, California inheritance taxes, and attorneys' fees necessary to minimize the damage done by including the power of revocation. *See id.* Her disclaimer preserved the benefits of the plan but at substantial cost. *See id.*

294. *See id.* at 519.

295. 709 A.2d 1264 (Md. 1998).

of each spouse to the other spouse was negligent because he failed to advise the testators of potential tax savings under the estate tax unified credit.[296] Part III will discuss this case in detail, because it is one of the leading cases rejecting malpractice liability based on ethical rules.[297]

In *Jewish Hospital of St. Louis, Missouri v. Boatmen's National Bank of Belleville*,[298] the remainder beneficiary of two testamentary trusts alleged that the defendant attorney committed malpractice by failing to draft the will to take advantage of the marital and charitable estate tax deductions.[299] The attorney's files contained many references to tax advice, and the attorney was present when the testator's accountant assured the testator and his wife that their estate would pay no taxes.[300] The court held that the attorney "undertook an affirmative duty of advising the testator about estate planning and estate taxes," on which the testator had a right to rely.[301] Accordingly, the appellate court reversed a grant of summary judgment for the attorney.[302]

Similarly, in *Creighton University v. Kleinfeld*,[303] the United States District Court for the Eastern District of California denied summary judgment for an attorney based on an allegation that the attorney negligently drafted the tax apportionment clause of the will, creating an ambiguity as to whether taxes were payable from the QTIP trust.[304] The court allowed the introduction of extrinsic evidence of the testator's intent.[305]

Blair v. Ing[306] is a recent significant case that involved an "A-B trust plan."[307] The plaintiffs alleged that an inter vivos trust failed to

296. *See id.* at 1266. The estate tax unified credit (now known as the "applicable credit amount") is codified at Internal Revenue Code section 2010.

297. *See infra* Part III.

298. 633 N.E.2d 1267 (Ill. 1994).

299. *See id.* at 1271-73. The marital and charitable estate tax deductions are codified at Internal Revenue Code sections 2055 and 2056.

300. *See Jewish Hosp.*, 633 N.E.2d at 1273-74.

301. *See id.* at 1276.

302. *See id.* at 1283.

303. 919 F. Supp. 1421 (E.D. Cal. 1995).

304. *See id.* at 1422. QTIP stands for Qualified Terminable Interest Property and is codified at Internal Revenue Code section 2056(b)(7).

305. *See Kleinfeld*, 919 F. Supp. at 1427.

306. 21 P.3d 452 (Haw. 2001).

include a funding formula allocating assets to the bypass (unified credit) trust, thereby preventing it from being funded and including the entire trust in the gross estate of the surviving spouse.[308] The court extensively discussed precedents on privity of contract in legal malpractice actions, including both negligence and third-party beneficiary theories, and the recent assertions that ethical conflicts should severely limit malpractice liability.[309] The court reversed a summary judgment in favor of the attorney.[310]

Several cases in this area have involved the failure to advise a beneficiary to disclaim all or part of a bequest to reduce estate tax liability or to preserve an estate plan.[311] In *Linck v. Barokas & Martin*,[312] the testator's entire estate passed to his wife, and the plaintiffs were "beneficiaries only in the event that" the wife predeceased the testator.[313] The plaintiffs alleged that the drafting attorneys' failure to advise the testator's wife of the tax benefits of a disclaimer resulted in the imposition of gift taxes on gifts from the wife to the plaintiffs.[314] The court reversed a dismissal of the action against the attorney for failure to state a claim and adopted a balancing test similar to the test applied in *Lucas v. Hamm*.[315]

Similarly, in *Kinney v. Shinholser*,[316] which involved the inclusion of a general power of appointment in a residuary trust, the court reversed a grant of summary judgment in favor of the attorney.[317] The court held that the attorney knew (or at least should have known) that the existence of the power of appointment in the will would have

307. An A-B trust plan is a share eligible for the marital deduction and bypass trust consisting of the applicable exclusion amount (unified credit). *See* I.R.C. § 2010 (2003). *See also supra* note 290.

308. *See Blair*, 21 P.3d at 456.

309. *See id.* at 458-64. For further discussion of these theories, see *infra* Part III.

310. *See Blair*, 21 P.3d at 475.

311. Notably, the surviving spouse disclaimed in *Bucquet v. Livingston*, 129 Cal. Rptr. 514, 517 (Cal. Ct. App. 1976), but the court did not base its decision on that fact. *See supra* Part II.K.

312. 667 P.2d 171 (Alaska 1983).

313. *See id.* at 172.

314. *See id.* at 173.

315. *See id.* at 174; Lucas v. Hamm, 364 P.2d 685 (Cal. 1961).

316. 663 So. 2d 643 (Fla. Dist. Ct. App. 1995).

317. *See id.* at 645, 649. This result is a bit surprising in light of the limited privity exception in Florida. *See* Begleiter, *Attorney Malpractice*, *supra* note 3, at 198-204.

serious tax consequences unless disclaimed within nine months of the decedent's death, and he failed to advise the surviving spouse.[318]

In *Williams v. Ely*,[319] which presented a slightly different factual situation, a court again held an attorney liable for legal malpractice.[320] The plaintiffs, who were remainder beneficiaries of a trust, had asked the defendant attorney whether they could disclaim their interests and if they did, whether any federal estate or gift tax would arise from the disclaimer.[321] The attorney advised that a disclaimer would result in no federal estate or gift tax, although the federal gift tax consequences of disclaimers were actually unsettled at the time.[322] The beneficiaries subsequently disclaimed their interests.[323] The Supreme Judicial Court of Massachusetts affirmed that the attorney was liable for legal malpractice.[324] The court based its decision on the certainty with which the lawyer gave his opinion.[325] The lawyer should have advised the client that the issue was not conclusively resolved, thus giving the beneficiaries the chance to assess the risk and to consider alternative options.[326]

Barner v. Sheldon[327] is the only case where a court found that an attorney was not liable for failure to advise a beneficiary of the availability of a disclaimer.[328] The court's decision turned on the fact that a disclaimer would have resulted in the property being received by a person to whom the testator did not want to leave his property.[329] The testator had left his business equally to his three children (the plaintiffs) and divided the residue of his estate equally between the plaintiffs and his wife.[330] The testator did not want to leave anything to his wife but did so only after his attorney advised him of the

318. *See Kinney*, 663 So. 2d at 647.
319. 668 N.E.2d 799 (Mass. 1996).
320. *See id.* at 806.
321. *See id.* at 802.
322. *See id.*
323. *See id.*
324. *See id.* at 808.
325. *Williams*, 668 N.E.2d at 805-06.
326. *See id.* at 806.
327. 678 A.2d 767 (N.J. Super. Ct. App. Div. 1995).
328. *See id.*
329. *See id.* at 771.
330. *See id.* at 768.

possibility of his wife taking an elective share.[331] The plaintiffs sued the attorney for malpractice, arguing that the attorney owed a duty to advise them that they could have reduced or avoided federal estate taxes by disclaiming their interests because the testator's property would have gone to his wife and qualified for the marital deduction.[332] The court logically held that advising the plaintiffs of their right to disclaim would have been contrary to the testator's intent to disinherit his wife and thus imposed no duty to advise.[333]

In the area of estate planning, courts almost uniformly hold attorneys liable for malpractice, both for estate planning errors and for failing to advise beneficiaries of a disclaimer as an estate planning strategy. This Article will later discuss the underlying reason for this uniformity.[334]

L. Lack of Capacity

Courts have recently seen many malpractice actions in the estate planning area based on lack of capacity. The estate planning cases, discussed in the last section, have uniformly held attorneys liable for malpractice.[335] Conversely, the cases involving allegations that a drafting attorney should have investigated or discovered the testator's lack of capacity uniformly shield the attorney from liability.

The earliest case in this area was *Perry v. Adams*.[336] The testator had a schizoid personality and a history of mental and emotional problems.[337] Physicians admitted the testator to a hospital for treatment of terminal cancer, and then moved her to a nursing home.[338] She was disoriented and delusional in the hospital and in the nursing home.[339] The plaintiff possessed an envelope, on the back of which was a handwritten but unwitnessed statement that the testator

331. *See id.*
332. *See id.* They also argued that the wife would have given each of them a $10,000 tax-free gift during her lifetime. *See id.*
333. *See Barner*, 678 A.2d at 768.
334. *See infra* Part V.
335. *See supra* Part II.K.
336. 827 P.2d 930 (Or. Ct. App. 1992).
337. *See id.* at 930.
338. *See id.*
339. *See id.* at 930-31.

had written several years earlier as her will.[340] As the sole beneficiary under this will, the plaintiff hired the defendant attorney to determine if the will was valid.[341] The attorney determined that the will was invalid because it was not witnessed.[342] In an attempt to correct this error, the attorney and two witnesses visited the testator at the nursing home.[343] According to the attorney, the testator "didn't track well with what was going on."[344] The attorney was not convinced that the testator was competent to execute the will and decided to seek the testator's acknowledgement of the will to the witnesses at a later time.[345] He also determined that the statute involved did not specify when the witnesses must sign a will.[346]

The testator died three days later, and the witnesses signed the will several weeks after her death.[347] The court set the will aside, relying on a decision that the court made between the time that the testator died and the completion of her will administration, holding that wills are not valid unless the will's witnesses sign prior to the testator's death.[348] The plaintiff sued, alleging that the attorney had been negligent in not having the witnesses sign the will prior to the testator's death.[349] The court held that evidence of capacity at the time of witnessing was admissible and affirmed a judgment in favor of the attorney, reasoning that courts determine capacity at execution and that execution is not complete until all the statutory requirements are satisfied.[350]

In *Lagotheti v. Gordon*,[351] a disinherited heir sued the attorney who had drafted the will of a testator who lacked capacity, seeking fees that he incurred in challenging the will.[352] The court affirmed a

340. *See id.* at 931.
341. *See id.*
342. *See Perry*, 827 P.2d at 931.
343. *See id.*
344. *Id.*
345. *See id.*
346. *See id.*
347. *See id.*
348. *See Perry*, 827 P.2d at 931.
349. *See id.*
350. *See id.* at 932.
351. 607 N.E.2d 1015 (Mass. 1993).
352. *See id.* at 1016.

dismissal of the case on the ground that the testator's attorney did not owe a duty to the disinherited heir.[353] The court contrasted the duty of an attorney to an intended beneficiary, where no conflict exists because both parties want the testator's will probated, with the imposition of a duty on the attorney to a disinherited heir, where the testator would desire the will to be probated whereas the heir wants the will to fail.[354] The court held that attorneys do not owe a duty to disinherited heirs because the imposition of such a duty would be inconsistent with the duty that attorneys owe their clients.[355] The court noted:

> An attorney owes to a client, or a potential client, for whom the drafting of a will is contemplated, a duty to be reasonably alert to indications that the client is incompetent or is subject to undue influence and, where indicated, to make reasonable inquiry and a reasonable determination in that regard. An attorney should not prepare or process a will unless the attorney reasonably believes the testator is competent and free from undue influence. In making the required determination, the attorney must have undivided loyalty to the client. A fair, objective determination in every case is in the best interest of the client.[356]

In *Gonsalves v. Alameda County Superior Court*,[357] a former beneficiary sued the drafting attorney for failure to investigate the testator's capacity to execute the will that disinherited the plaintiff.[358] The attorney testified that the testator appeared normal at the time, that he drafted her will, and that he had no reason to suspect that the testator lacked capacity.[359] The surgeon who operated on the testator also testified that the testator was fully competent during the period

353. *Id.* at 1017.
354. *See id.* at 1016-17.
355. *See id.* at 1017-18.
356. *Id.* at 1018 (citations omitted). *But see* Morgan v. Roller, 794 P.2d 1313, 1316 (Wash. Ct. App. 1990) (holding that an attorney who drafts a will does not have the duty to disclose to the will beneficiaries his views about his clients' mental capacity).
357. 24 Cal. Rptr. 2d 52 (Cal. Ct. App. 1993).
358. *See id.* at 53.
359. *See id.* at 54.

in which she executed the will.[360] The plaintiff produced a declaration from the testator's personal physician stating that the testator had suffered from hallucinations for many years and was increasingly depressed during the last year of her life.[361] The doctor saw her while she was in the hospital and found her confused and not competent to execute a will.[362] The court affirmed summary judgment for the attorney, observing that the plaintiff, as a beneficiary under a former will, had a remedy at law and could have challenged the probate of the later will.[363] In perhaps the most important examination of the issue, the court stated that imposition of a duty in this case

> would put an attorney in the position of potential liability to either the beneficiary disinherited if he or she draws the will or the potential beneficiary if he or she refuses to draw the will. The potential for such liability would unjustifiably deny many persons the opportunity to make their wills. Many factors which might suggest a lack of testamentary capacity to some attorneys as well as to those unfamiliar with the law in this area do not denote lack of such capacity. As the court said in *Estate of Selb*: "It has been held over and over in this state that old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absent-mindedness and mental confusion do not furnish grounds for holding that a testator lacked testamentary capacity." Even delusions or hallucinations do not show incompetency if not related to the testamentary act. . . . The facts of the instant case illustrate the potential problem for the dying testator and his attorney. The declarations filed in this case suggest that had [the attorney] consulted both [doctors] for an opinion on testamentary capacity, she might have received diametrically opposed opinions. Faced with potential liability to

360. *See id.*
361. *See id.* at 55.
362. *See id.*
363. *See Gonsalves*, 24 Cal. Rptr. 2d at 56.

> [the plaintiff] whom she knew would be disinherited, [the attorney] might have declined to draw the will despite her own view that [the testator] had the requisite competence.
>
> The primary duty of the attorney is to the client and is fulfilled if the attorney, convinced of testamentary capacity by his or her own observations and experience with the client, draws the will as requested. We conclude that an attorney who fails to investigate the testamentary capacity of his or her client is not liable in tort to a former beneficiary disinherited by the will drawn by the attorney.[364]

In the recent case of *Norton v. Norton*,[365] the Delaware Supreme Court pointed out in dicta:

> Although the question of testamentary capacity was not the principal focus of this appeal, we take the occasion to emphasize the importance for a lawyer who drafts a will, particularly for an aged or infirm testator, to be satisfied concerning competence and to make certain that the instrument as drafted represents the intentions of the testator. In a recent case before this court, *In re Estate of Waters*, 647 A.2d 1091 (Del. 1994), we noted the ethical hazards facing a will scrivener who becomes a witness in a will contest case. In *Waters*, as here, the lawyer-scrivener never met the testator prior to the time of execution of the will. We recognize that, in the case of reciprocal wills to be executed by husband and wife, previous direct communication with one spouse may suffice, particularly where the absent party is known to be ill or infirm. But direct communication which precedes drafting of the instrument should be the norm if the lawyer is to discharge his obligation of assessing testamentary competence. Here, the lawyer who drafted [the testator's] will did not meet her until the date of execution and then only for the purpose of

364. *Id.* (citations omitted).
365. 672 A.2d 53 (Del. 1996).

> presenting a completed document for signature. In this case, such an approach undoubtedly contributed to the uncertainty concerning the [testator's] mental capacity and furnished a basis for questioning by those adversely affected by the terms of the will.[366]

The court in *Norton* mentions the interesting case of *Lovett v. Estate of Lovett*,[367] in which the testator's children brought a legal malpractice action against the defendant attorney to recover attorneys' fees, alleging that he negligently failed to explain the ramifications of changing the testator's will.[368] The testator and his second wife executed complex wills and codicils drafted by their former attorney pursuant to their premarital agreement.[369] The testator became disenchanted with the complexity of the documents, decided that he wanted a simple will, and directed his new attorney to simplify these various instruments, which the attorney did.[370] The testator was 73 years old at this time and had some difficulty with his memory.[371] He directed the attorney to draft a power of attorney in favor of his second wife so that she could conduct his business and financial affairs.[372] The testator and his wife also directed the attorney to cancel their prenuptial agreement because they had been happily married for nine years.[373]

The attorney advised the testator that the tax consequences of the new will were less favorable than the tax consequences of the old will.[374] The testator responded that he did not care because he would not be paying the taxes.[375] Although the wife attended the meetings between the testator and the attorney, she did not direct the discussion.[376] However, the wife asserted increasing control over the

366. *Id.* at 55.
367. 593 A.2d 382 (N.J. Super. Ct. Ch. Div. 1991).
368. *See id.* at 385.
369. *See id.* at 384.
370. *See id.*
371. *See id.*
372. *See id.*
373. *See Lovett*, 593 A.2d at 384.
374. *See id.*
375. *See id.*
376. *See id.* at 385.

testator's business until her death.[377] At the time of his wife's death, the testator was suffering from Parkinson's disease and was incapable of managing his affairs.[378] A court declared the testator incompetent shortly after his wife died, and the plaintiffs became his guardians.[379]

The children sued the attorney for failing to advise the testator of the likelihood of a will contest, for failing to investigate which assets the testator owned, for incompletely advising on the tax differences between the old and new wills, for failing to prevent the wife from influencing the testator, and for failing to recommend a psychological examination to determine whether he had the capacity to execute a will.[380] The court held that the memory difficulty, though something for the attorney to consider, was also not sufficient to require the attorney to suggest a psychological examination.[381] As to the defendant's advising the testator of the tax ramifications of the new will, the court held:

> [T]he question is not whether [the testator's] decision was a wise one or even whether [the attorney] should have advised him against it. The more precise question is whether [the attorney] had an obligation to do tax research and then explain the details of the differences so that [the testator's] decision could be better informed. In other words, should [the attorney] have taken these additional steps knowing that his client was generally aware of the "down-side" and nevertheless had a strong feeling in favor of proceeding.[382]

The court concluded that the attorney did not commit legal malpractice because he "made a reasonable choice in deciding not to spend his client's money to research the precise tax difference once it was clear that it would not make a difference."[383] The court noted,

377. *See id.*
378. *See id.*
379. *See Lovett*, 593 A.2d at 384.
380. *See id.* at 385-86.
381. *See id.* ("Circumstances which would justify a suggestion from a lawyer that a client be psychiatrically evaluated as a prerequisite to signing legal documents would be rare.").
382. *Id.* at 387.
383. *Id.*

however, that the result may be reversed under different facts, "such as where the tax differences are particularly dramatic."[384]

Persinger v. Holst[385] is also relevant to this discussion, even though it involved a power of attorney rather than a will.[386] The court stated that, although an attorney has the duty to make a reasonable inquiry into whether his client understands the nature and effect of the legal documents before signing them, an attorney does not owe a duty to ensure that his client has the mental capacity to evaluate the documents.[387] The attorney would have committed malpractice only if he had actual knowledge of the client's incompetence or if there were "overt or unmistakable signs of incompetency, or other extraordinary circumstances that would reasonably lead [the] defendant to conclude that [the client] was incapable of understanding the nature and consequences of her actions."[388]

The courts in this area appear to require external observable signs of lack of competency to even consider imposing a duty to investigate. This result is actually unsurprising. The phrasing of the ethics rules is extremely cautious and permissive and is tilted toward maintaining as much of a relationship as possible.[389] Model Rule 1.14(b) is phrased in the permissive "may."[390] The *Model Rules* do not define mental disability.[391] Indeed, the comment states that the law, to an increasing extent, recognizes different degrees of

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384. *Id.*
385. 639 N.W.2d 594 (Mich. Ct. App. 2001).
386. *See id.* at 596.
387. *See id.* at 600.
388. *Id.*
389. Model Rule 1.14 ("Client Under a Disability") states:

> (a). When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
> (b). A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

MODEL RULES OF PROF'L CONDUCT R. 1.14 (2003).
390. *See id.*
391. *See id.*

competence.[392] Given this caution and reluctance to pronounce a sentence of mental disability, the failure of courts to impose a duty in this situation, absent unmistakable signs of lack of capacity, is quite understandable. The problem, however, is more severe than is evident from the *Model Rules*. Commentators have increasingly observed that attorneys do not have the ability to determine whether a person is competent to make a will.[393] For example, Professor Jan Ellen Rein has stated:

> Deciding what to do when questions of client capacity arise is not for the fainthearted. There are no safe harbors for two primary reasons. First, the notion of capacity is an elusive, amorphous abstraction that, in practice, cannot be divorced from the complexities of the real life situation. Second, none of the rules and authorities give the lawyer adequate guidance for assessing capacity or deciding how to proceed if doubts exist. Some rules are Delphic at best.[394]

Professor Paul Tremblay has observed that the concept of competence, while a matter of psychology or philosophy, has had its boundaries drawn primarily by the courts and remains elusive.[395] Professor Linda Smith has argued that both the *Model Rules* and the *Model Code* offer inadequate guidance for the lawyer who represents a client "whose competence is in doubt."[396] In an earlier article, Professor Rein stated the problem even more starkly.[397] Two of the premises for her conclusion that it is impossible to develop a satisfying and objective definition of incompetency were:

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392. *See id.* cmt 1.

393. *See* Jan Ellen Rein, *Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say*, 9 STAN. L. & POL'Y REV. 241, 242 (1998).

394. *See id.* at 242.

395. *See* Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515, 537 (1987).

396. *See* Linda F. Smith, *Representing the Elderly Client and Addressing the Question of Competence*, 14 J. CONTEMP. L. 61, 73 (1988).

397. *See* Jan Ellen Rein, *Clients With Destructive and Socially Harmful Choices—What's An Attorney to Do?: Within and Beyond the Competency Construct*, 62 FORDHAM L. REV. 1101, 1119 (1994) [hereinafter Rein, *Harmful Choices*].

1. It is nearly impossible to develop a test for competency or capacity that is completely noncircular either in its reasoning or application.

2. Even if a noncircular test could be developed, it could not be routinely applied in a noncircular manner. This is partly because most lawyers, judges, and doctors lack the time, expertise, and resources needed to apply any competency test with the rigor the seriousness of the question warrants.[398]

In the same article, Professor Rein flatly states, "lawyers are not qualified to make competency determinations. In fact, neither are most doctors."[399]

Unlike the other types of cases considered so far, the explanation for the lack of imposition of a duty on the attorney in the "lack of capacity cases" is clear.[400] The definition is so nebulous and elusive

398. *Id.* (citations omitted).

399. Rein, *Harmful Choices*, *supra* note 397, at 1120.

400. *See supra* Part II.L. While this Article was being edited, the California Court of Appeals decided *Moore v. Anderson Zeigler Disharoon Gallagher & Gray*, 109 Cal. App. 4th 1287 (2003). The significance of the case is its outright holding that an attorney preparing a will for a client owes no duty to a beneficiary under the will or under a previous will to ascertain and document the client's capacity to execute a will. *Moore*, 109 Cal. App. 4th at 1307. The case is also important because the drafting attorney had represented the testator for 15 years prior to the execution of the will in question and had prepared an amendment to the trust in September of 1999. Between September of 1999 and June of 2000, the testator became terminally ill. In June of 2000, he was "extremely sick, debilitated and confused." He had been given chemotherapy, was taking powerful medications, and was hospitalized. "He did not recollect nor understand the nature of his property or trust dispositions, nor recall his relations to his family members and children." *Id.* at 1292. Despite his awareness of the testator's condition, the defendant attorney prepared new estate planning documents (trust amendments and a will) fundamentally changing the plan, which was executed by the testator in June of 2000. Relying heavily on *Radovich v. Loche-Paddon*, discussed *infra* Part II.M, and *Logotheti v. Gordon*, discussed *supra* this Part, the court held that the attorney's duty of loyalty to the testator would "be compromised by imposing a duty to beneficiaries in this situation." *Id.* at 1298. The court further recognized the difficulties in determining capacity and that litigation by beneficiaries who questioned the adequacy of the investigation could counterbalance any decrease in litigation from baseless challenges to a testator's competency. The court further noted that disinherited beneficiaries could challenge a will in probate court, while intended beneficiaries of an invalid will had no remedy. But the court's focus is on the potential conflict of interest it fears:

> In contrast, where the testamentary capacity of the testator is the basis for a will challenge, the true intent of the testator *is* the central question. That intent cannot be ascertained from the will or other challenged estate plan document itself. The attorney who is persuaded of the client's testamentary capacity by his or her own observations and experience, and who drafts the will

that a court will not impose a duty on the lawyer absent clear, observed behavior indicating a duty to at least make further inquiry. While one would think that the difference between the lack of capacity cases and the other types of complicated cases would result in the lack of capacity cases offering no assistance in developing a general rule for the cases, we will see that the cases in this section are entirely consistent with the rule emerging for other categories.[401]

M. Delay Cases

The second area that has resulted in a number of potentially revealing cases in recent years is the area of delay. These cases arise when an attorney is at some stage of implementing an estate plan and the client dies prior to completion of the plan. As we will see, none of the cases has yet resulted in attorney liability, but the courts appear to indicate that the right set of facts could produce such a result. At the risk of being accused of saving the best cases for last, however, these cases clearly present the dilemma of courts confronted with complicated legal cases.

First, articles presenting advice to lawyers on how to avoid malpractice and cases in other areas of the law clearly state that attorneys should (1) complete work promptly, (2) not procrastinate in formulating a plan or drafting documents, and (3) implement a

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> accordingly, fulfills that duty of loyalty *to the testator*. In so determining, the attorney should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will.
>
> The extension of the duty to intended beneficiaries recognized in [previous California cases] to this context would place an intolerable burden upon attorneys. Not only would the attorney be subject to potentially conflicting duties to the client and to potential beneficiaries, but counsel also could be subject to conflicting duties to different sets of beneficiaries. The testator's attorney would be placed in the position of potential liability to either the beneficiaries disinherited if the attorney prepares the will or to the potential beneficiaries of the new will if the attorney refuses to prepare it in accordance with the testator's wishes. The instant case, where some children benefited under the previous will and others benefited under the later, challenged will is a perfect illustration of that burden.

Id. at 1299 (emphasis in original). The case contains an extended discussion of all the arguments made in these cases, including the *Model Rules* and the ACTEC Commentaries on the *Model Rules*.

401. *See infra* Part V.

client's estate plan as soon as possible.[402] However, defining "reasonableness" became a problem.

The earliest case was *Krawczyk v. Stingle*.[403] Because he was set to undergo open heart surgery, the decedent met with the defendant attorney to develop a plan and documents to dispose of his estate.[404] He named the beneficiaries and stated he did not want his estate to go through probate.[405] The attorney recommended two lifetime trusts, and they agreed that the attorney would prepare the documents for signature one week later.[406] The attorney stated that she would need additional information to complete the documents and gave the decedent a list of items.[407] Because the decedent did not supply all of the required information until the date that they had originally scheduled to sign the documents, the decedent and the attorney agreed to postpone execution for four days.[408] At this meeting, they also made changes to the documents.[409]

Three days later, one of the decedent's relatives telephoned the attorney and told her the decedent had suffered a massive heart attack, was in intensive care, and could not keep the appointment.[410] The next afternoon, the relative telephoned the attorney again, told her that the decedent was extremely ill, and asked the attorney to bring the trust agreements to the hospital for signature.[411] The attorney spent the next two hours completing the agreements and brought them to the hospital but was unable to see the decedent

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402. *See, e.g.*, Johnston, *Avoiding Malpractice Liability*, *supra* note 1, at 17-42 to -44; Johnston, *Legal Malpractice*, *supra* note 1, at 534-35. For statements of this principle in cases involving other legal areas, see, for example, *Layton v. State Bar of California*, 789 P.2d 1026, 1034 (Cal. 1990) (en banc); *Butler v. State Bar of California*, 721 P.2d 585, 588 (Cal. 1986); and *In re Discipline of O'Brien*, 362 N.W.2d 307, 307 (Minn. 1985). Interestingly, the principle is clearly accepted in the estate administration cases, as to, for example, the failure to timely file tax returns. *See, e.g.*, Sorenson v. Fio Rito, 413 N.E.2d 47, 53 (Ill. Ct. App. 1980); Cameron v. Montgomery, 225 N.W.2d 154, 155 (Iowa 1975); *In re* Remsen, 415 N.Y.S.2d 370, 371 (N.Y. Surr. Ct. 1979).

403. 543 A.2d 733 (Conn. 1988).

404. *See id.* at 734.

405. *See id.*

406. *See id.*

407. *See id.*

408. *See id.* The decedent delivered some of the information three days after the initial meeting but was informed by the attorney's secretary of the outstanding items. *See Krawczyk*, 543 A.2d at 734.

409. *See id.*

410. *See id.*

411. *See id.*

because he was too ill.[412] The decedent died shortly thereafter without executing the trust agreements.[413]

The beneficiaries under the trust agreement sued the attorney for malpractice, alleging delay in the preparation of the documents, failure to inquire on the day that he was informed of the hospitalization whether the decedent could have executed the documents, and failure to bring handwritten documents or a simple will to the hospital on the day that the decedent died.[414]

The Connecticut Supreme Court held that the question was one of public policy and decided it in favor of the attorney.[415] In a statement that would be echoed in later cases, the court noted that other courts had not imposed a duty on attorneys when doing so would interfere with the attorney's ethical obligations to the client:

> A central dimension of the attorney-client relationship is the attorney's duty of "[e]ntire devotion to the interest of the client." This obligation would be undermined were an attorney to be held liable to third parties if, due to the attorney's delay, the [decedent] did not have an opportunity to execute estate planning documents prior to death. Imposition of liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily. Fear of liability to potential third party beneficiaries would contravene the attorney's primary responsibility to ensure that the proposed estate plan effectuates the client's wishes and that the client understands the available options and the legal and practical implications of whatever course of action is ultimately chosen. These potential conflicts of interest are especially significant in the context of the final disposition of a client's estate, where the

412. *See id.*
413. *See id.*
414. *See Krawczyk*, 543 A.2d at 734.
415. *See id.* at 735-36.

> testator's testamentary capacity and the absence of undue influence are often central issues.[416]

Noting the complex plan that the decedent chose, the allegation that the attorney would have had to abandon the plan in favor of a simple will when she learned of the decedent's severe illness, and the fact that the plan might not have been final in light of the changes that the decedent made two days before his heart attack, the court observed that urging the decedent to either sign a simple will or sign whatever instruments the attorney had time to prepare would have been a disservice to her client.[417] Accordingly, the court declined to

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416. *See id.* (quoting G. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 78 (5th ed. 1896) (citations omitted)).

417. *See id. Sisson v. Jankowski*, 809 A.2d 1265 (N.H. 2002), draws heavily on *Krawczyk*. There, the decedent retained the defendant attorney to prepare a will and other estate planning documents. *See Sisson*, 809 A.2d at 1265. The decedent informed the attorney that he suffered from bladder and prostate cancer, did not want to die intestate, and wanted a will leaving his entire estate to one brother (the plaintiff) and nothing to pass to his other estranged brother. *See id.* The attorney prepared the will, and the decedent reviewed it from a nursing home. *See id.* Three days later, the plaintiff informed the attorney that the decedent wanted to finalize his estate plan quickly due to his deteriorating condition. *See id.* When the attorney visited the decedent in the nursing home, the decedent did not execute the will because it lacked a contingent beneficiary, and the decedent wanted one inserted. *See id.* The attorney returned three days later with a revised will, which was not executed because the decedent lacked competence to do so. *See id.* The decedent died 12 days later without executing the will. *See id.* The plaintiff alleged malpractice in that the attorney failed to fulfill her professional and contractual obligations to protect the decedent from dying intestate. *See Sisson*, 809 A.2d at 1265. The federal district court certified to the New Hampshire Supreme Court the question of whether these facts gave rise to a claim. *See id.* The state court responded that the attorney owed no duty to the beneficiary of the unexecuted will and distinguished a prior case, *Simpson v. Calivas*, 650 A.2d 318 (N.H. 1994), *see supra* Part II.C, on the ground that, in *Simpson*, the duty was to draft the will competently, whereas in *Sisson*, the duty was to ensure the prompt execution of the will. *See Sisson*, 809 A.2d at 1268. Emphasizing the importance of the attorney's undivided loyalty to his client, the court concluded that "the potential for conflict between the interests of a prospective beneficiary and a testator militates against recognizing a duty of care." *Id.* at 1269. The federal court dismissed the claim. *See* Sisson v. Jankowski, No. CIV 00-479-M, 2003 WL 172623 (D.N.H. Jan. 29, 2002).

While dismissing *Sisson* as simply another case allowing the attorney time to complete her task is tempting, it presents several troublesome aspects. First, the New Hampshire Supreme Court was unwilling to extend its expansive analysis in *Simpson* to this set of facts. Second, the court emphasized the potential for, rather than the actual existence of, a conflict of interest. The court, quoting a Massachusetts case, went out of its way to say that "[i]t is the potential for conflict that is determinative, not the existence of an actual conflict." *Sisson*, 809 A.2d at 1269 (quoting Miller v. Mooney, 725 N.E.2d 545, 550 (Mass. 2000)). This situation contrasts with the more recent decision of the Iowa Supreme Court in *Estate of Leonard v. Swift*, 656 N.W.2d 132 (Iowa 2003), *see supra* note 34, and is puzzling on these facts. Clearly no conflict existed between the decedent and the beneficiary in *Sisson*. Why not focus on the existence of an actual conflict based on the facts, rather than promulgating a prophylactic rule? One could speculate that the court wanted to distinguish between an unexecuted will and an executed will but was unconvinced that a distinction should exist between the two situations. Moreover, at least one case has held an attorney liable for failure to include a perpetuities savings clause in a will. *See* Temple Hoyne Buell Found. v. Holland & Hart, 851 P.2d 192, 199 (Colo. Ct. App. 1992); discussion *supra* Part II.D. The available alternative of executing the will and then quickly preparing a

impose that duty in this case.[418] Only ten days passed between the first meeting with the attorney and the decedent's death.[419] Although the attorney knew of the proposed surgery, she had no reason to suspect that the decedent would suffer a massive heart attack and that the beneficiaries of the trust were unsettled.[420]

In *Charia v. Hulse*,[421] the decedent hired the defendant attorney to prepare his will naming the plaintiff, his ex-wife, as a beneficiary.[422] During meetings between the plaintiff, her attorney, the decedent, and his attorney, the decedent decided to leave 80% of his estate to the plaintiff and their daughter.[423] The attorney advised the decedent to not sign a will, which was drafted by the plaintiff's attorney, containing these provisions, and to not sign a second will leaving one-third to the plaintiff, one-third to their daughter, and one-third to his son.[424] Two days after the attorney presented the second will, the decedent died intestate.[425] The court held that although the petition alleged no facts substantiating a claim of negligence, it appeared that "any delay on [the attorney's part] was the result of his attempt to properly advise his client."[426] Unfortunately, the short opinion does not explain relevant circumstances of the case such as why the plaintiff's attorney drafted the will for the decedent, whether the decedent was competent, or why the decedent's attorney convinced him to not sign either will.

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codicil to be executed shortly thereafter could have gone a long way toward effectuating the testator's intention. Would it not be reasonable to deny summary judgment because of the availability of this option? Lastly, the court focused solely on the question of whether a duty existed in this case. The case would have been more appropriately analyzed as recognizing a duty and asking whether the attorney had demonstrated competence under the circumstances, that is, treating the case as a standard-of-care rather than a duty question. Treating the case as a standard of care question, the court could have taken account of all the facts and possible alternatives and explored whether an actual conflict of interest existed. Moreover, the court would not have been required to create the artificial distinction between executed and unexecuted wills in this context. *See infra* Part V.

418. *See Krawczyk*, 543 A.2d at 736.
419. *See id.* at 734.
420. *See id.*
421. 619 So. 2d 1099 (La. Ct. App. 1993).
422. *See Charia*, 619 So. 2d at 1100.
423. *See id.* This 80% was later reduced to 75%. *See id.*
424. *See id.*
425. *See id.*
426. *See id.* at 1102.

In *Gregg v. Lindsay*,[427] the testator was admitted to a hospital following a double femoral bypass.[428] While recovering, an old friend, the plaintiff, visited him.[429] The plaintiff testified that he asked the testator about a will and, after some discussion, the decedent directed the plaintiff to contact the defendant attorney to draft a new will naming the plaintiff as executor and giving the plaintiff a substantial bequest.[430] The attorney had drafted the decedent's previously executed will that specified another person as the sole beneficiary and executrix.[431]

The plaintiff informed the attorney that the testator needed a new will that day, as he was in serious condition, and that if the attorney would not draft the new will, the plaintiff would find a lawyer that would.[432] The attorney arrived at the hospital that evening with a draft of the new will.[433] The testator appeared unconcerned about the new will but said that it was acceptable.[434] Because the attorney found the circumstances unusual, he recommended that two people witness the new will's execution.[435] Unable to find witnesses at that moment, the attorney suggested that he return the following morning when witnesses would be available.[436] The testator did not object.[437] The attorney returned the next afternoon, but the testator had been transferred to another hospital where he died later that afternoon.[438] The court held for the attorney, noting that the testator was not anxious to sign the will and did not object to the suggestion that the attorney return the next day.[439] The court distinguished this case from *Guy v. Liederbach*,[440] the seminal Pennsylvania case recognizing a malpractice action in contract by an intended beneficiary, because in

427. 649 A.2d 935 (Pa. Super. Ct. 1994).
428. *See id.* at 936.
429. *See id.*
430. *See id.*
431. *See id.*
432. *See id.*
433. *See Gregg*, 649 A.2d at 936.
434. *See id.*
435. *See id.*
436. *See id.* at 937.
437. *See id.*
438. *See Gregg*, 649 A.2d at 936-37.
439. *See id.* at 940-41.
440. 459 A.2d 744 (Pa. 1983).

Guy an executed will was invalid, whereas in this case the will was unexecuted.[441] The court viewed the will's execution as crucial to establish the testator's intent to benefit the beneficiary.[442] Absent that intent, establishing the oral contract to benefit the beneficiary required the plaintiff to assume "an exacting evidentiary burden which requires clear, direct and precise evidence of each of the elements to a valid contract."[443] "There [existed] no evidence of an agreement that [the attorney], in all events, would have the will executed that first night or that he was in some way required to disregard his client's best interests by making certain of the client's intent and understanding in order to serve [the plaintiff]."[444] The court summarized its view of the case:

> This is nothing more than a case in which the testator died before he had executed a new will. His death did not confer upon a disappointed beneficiary a cause of action against the lawyer who drafted the will and who, with the testator's consent, deferred execution of the will until the following day.[445]

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441. *See Gregg*, 649 A.2d. at 937-38 n.1; *Guy*, 459 A.2d at 746.
442. *See Gregg*, 649 A.2d at 940.
443. *Id.*
444. *See id.* "Where," the court asked, "is the breach of contract?" *Id.*
445. *Id.*; *see also* Miller v. Mooney, 725 N.E.2d 545, 550-51 (Mass. 2000). In dicta, the court in *Miller* stated:

> A client who engages an attorney to prepare a will may seem set on a particular plan for the distribution of her estate, as here. It is not uncommon, however, for a client to have a change of heart after reviewing a draft will. Confronting a last will and testament can produce complex psychological demands on a client that may require considerable periods of reflection. An attorney frequently prepares multiple drafts of a will before the client is reconciled to the result. The most simple distributive provisions may be the most difficult for the client to accept. Considerable patience and compassion can be required of attorneys drafting wills, especially where the client seeks guidance through very private and sensitive matters. If a duty arose as to every prospective beneficiary mentioned by the client, the attorney-client relationship would become unduly burdened. Attorneys could find themselves in a quandary whenever the client had a change of mind, and the results would hasten to absurdity. The nature of the attorney-client relationship that arises from the drafting of a will necessitates against a duty arising in favor of prospective beneficiaries.

Id.

Radovich v. Locke-Paddon[446] is by far the most extensive discussion of the problem, and probably the case on delay in executing a will that comes closest to finding attorney liability. The plaintiff married the testator, who executed a will that contained specific bequests to the plaintiff, the testator's sister, and the sister's husband, with the remainder to the University of California.[447] Shortly thereafter, the testator and her sister formed a partnership to hold farming and real estate investment property.[448] The defendant attorney's law firm formed the partnership.[449] The partnership agreement stated that the partnership was the separate property of the testator and her sister, and they attached a consent form signed by the plaintiff and the sister's husband.[450]

The plaintiff executed a will, also drafted by the defendant, stating that all of his estate was his separate property.[451] Seventeen years after the testator executed her will, the attorney learned that the testator was receiving chemotherapy treatment for breast cancer.[452] He discussed with the testator a new will under which the plaintiff would receive all the income from the residuary testamentary trust.[453] The attorney prepared a rough draft of the will on October 8, 1991 for the testator's review and comments, understanding that he could not proceed further until the testator contacted him.[454] The testator told him that she would confer with her sister before finalizing the new will.[455] The new will was more favorable to the plaintiff than the old will, but the testator died on December 19, 1991 without executing the new will.[456] The plaintiff sued the attorney and his law firm for malpractice, alleging that they had been dilatory in preparing the will

446. 41 Cal. Rptr. 2d 573 (Cal. Ct. App. 1995).
447. *See id.* at 574.
448. *See id.*
449. *See id.*
450. *See id.*
451. *See id.*
452. *See Radovich*, 41 Cal. Rptr. 2d at 575.
453. *See id.* at 574-75.
454. *See id.*
455. *See id.*
456. *See id.*

and negligent in failing to obtain its execution.[457] The court reviewed numerous California cases on malpractice and spent significant time discussing the delay cases previously described in this Part.[458] The court noted that the California cases holding attorneys liable all involved executed wills that were void or partially ineffective, whereas in this case the testator had not executed the will.[459] The plaintiff argued that the previous cases should be distinguished, however, because of the time involved in this case (6 months) as opposed to *Krawczyk* (10 days) and *Gregg* (2 days).[460] The court disagreed, stating that the decedents in those cases contemplated the possibility of death in a very short period of time and probably knew that signing the new will required a decision that they might not be able to change.[461] That was not the case in *Radovich*. The court decided:

> In this case, even more clearly than in *Krawczyk* or in *Gregg*, we see both practical and policy reasons for requiring more evidence of commitment than is furnished by a direction to prepare a will containing specified provisions. From a practical standpoint, common experience teaches that potential testators may change their minds more than once after the first meeting. Although a potential testator may also change his or her mind *after* a will is signed, we perceive significantly stronger support for an inference of commitment in a signature on testamentary documents than in a preliminary direction to prepare such documents for signature. From a policy standpoint, we must be sensitive to the potential for misunderstanding and the difficulties of proof inherent in the fact that disputes such as these will not arise until the decedent—the only person who can say what he or she intended—has died. Thus we must as a

457. *See id.* The alleged value of the decedent's estate was about $10 million. *See Radovich*, 41 Cal. Rptr. 2d at 575.
458. *See id.* at 576-77.
459. *See id.* at 579.
460. *See id.*
461. *See id.*

> policy matter insist on the clearest manifestation of commitment the circumstances will permit.[462]

The court was concerned with the plaintiff's argument that if these facts did not constitute actionable delay, no lawyer would ever be liable for delay in drafting estate planning documents.[463] The court also recognized that countervailing policy considerations are present in these situations.[464]

> We agree with *Krawczyk* that imposition of liability in a case such as this could improperly compromise an attorney's primary duty of undivided loyalty to his or her client, the decedent. In a sense this is factually a stronger case for the point than was *Krawczyk*: Here, notwithstanding his inexplicable delay in preparing the draft will in the first place, [the attorney's firm] did get the draft to the decedent more than two months before she died. Thus here the decedent, unlike the decedent in *Krawczyk*, did have an opportunity to execute the testamentary document before death. Further, the undisputed facts make plain that it was the decedent's intent to give further thought to her testamentary plan and to consult with her sister. Even more clearly here than in *Krawczyk*, "[i]mposition of liability would create an incentive for an attorney to exert pressure on a client to complete and execute estate planning documents summarily," without the additional consideration the decedent in this case said she intended to give them, and "[f]ear of liability to potential third party beneficiaries would contravene the attorney's primary responsibility to ensure that the proposed estate plan effectuates the client's wishes and that the client understands the available options and the legal and practical implications of whatever course of action is ultimately chosen."

462. *Id.* at 582-83.
463. *See Radovich*, 41 Cal. Rptr. 2d at 583.
464. *See id.*

> We acknowledge that in the circumstances it would have been professionally appropriate, at least, for [the attorney] to have inquired of the decedent whether she had any question or wished further assistance in completing the change of testamentary disposition she had discussed with him. But on weighing relevant policy considerations we conclude that [the attorney] and the law firm cannot be held to have owed a duty to [the plaintiff] to have done so.[465]

There matters stood until very recently. No court had held delay actionable in a malpractice action against an attorney by a beneficiary, but some courts were clearly uneasy in finding no liability.

Babcock v. Malone[466] illustrates this unease. The plaintiffs alleged that the testator retained the defendant attorney in March to prepare a new will under which they would be beneficiaries.[467] They were not beneficiaries under the testator's prior will.[468] The plaintiffs alleged that the attorney knew that the testator's health was failing and that the will should be completed promptly.[469] The attorney prepared a draft of the will and sent it to the testator on May 6, but by that time the testator's health had worsened; he died without executing the new will.[470] The court first discussed *Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner*, a leading Florida Supreme Court case denying standing to a child not named in a prior will who challenged the attorney for failing to draft a new will before the decedent's death that included the child.[471] Here, the court barred the plaintiffs' action based on Florida's requirement that the attorney's negligence must frustrate the testator's intent as expressed in the will.[472] However,

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465. *Id.* at 583 (quoting Krawczyk v. Stingle, 543 A.2d 733 (Conn. 1988)).
466. 760 So. 2d 1056 (Fla. Dist. Ct. App. 2000).
467. *See id.*
468. *See id.*
469. *Id.*
470. *See id.* at 1056-57.
471. *See id.* (citing Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So. 2d 1378 (Fla. 1993)).
472. *See Babcock*, 760 So. 2d at 1057; *supra* Part II.B; *see also* Begleiter, *Attorney Malpractice*, *supra* note 3, at 198-204 (describing the Florida-Iowa rule).

because the court in *Espinosa* lacked a draft will from which to "demonstrate the testator's intent," the court here "agree[d] with the plaintiffs that the facts in the present case are stronger than the facts in *Espinosa*."[473]

N. Limiting Representation

Several cases have discussed whether an attorney could defeat a malpractice claim by showing that he limited his representation and that he was not responsible for the alleged negligence. Because these cases do not significantly contribute to our inquiry, this Article will only describe them briefly.

In *Leipham v. Adams*,[474] the beneficiaries of the estates of a husband and wife sued the defendant attorney for failure to suggest to the wife that she disclaim a joint tenancy in a cash management account; the disclaimer would have saved taxes.[475] The attorney responded that the wife hired him only to (1) draft a durable power of attorney for the husband and (2) assist her in applying for insurance benefits following her husband's death.[476] The court affirmed summary judgment for the attorney on the ground that he was not hired to perform general estate planning for the wife, and the limited tasks for which he was hired were not sufficient to impose a general duty on him to oversee or revise the wife's estate plan.[477]

In *Hargett v. Holland*,[478] the court held that the duty of an attorney hired to draft a will ends when he supervises the will's execution.[479] The attorney thus had no continuing duty to the testator to review or correct the will or to prepare another will.[480]

Lastly, in *Fitzgerald v. Linnus*,[481] the plaintiff contended that the attorney failed to advise the decedent's wife to disclaim a portion of

473. *Babcock*, 760 So. 2d at 1056-57.
474. 894 P.2d 576 (Wash. Ct. App. 1995).
475. *Id.* at 578.
476. *See id.* at 580.
477. *See id.*
478. 447 S.E.2d 784 (N.C. 1994).
479. *See id.* at 786.
480. *See id.*
481. 765 A.2d 251 (N.J. Super. Ct. App. Div. 2001).

her husband's life insurance proceeds which would have been advantageous for tax purposes.[482] The attorney responded that the wife was very concerned as to an expedited receipt of the proceeds to pay her living expenses.[483] The attorney claimed that he told the wife that he could not give her tax or financial advice and that she should immediately retain a tax planner or financial adviser.[484] The attorney viewed his role narrowly: to represent the estate and to obtain money for the wife quickly, and the wife agreed with the attorney's statements.[485] The court held that the decedent's wife did not hire the defendant to plan her estate; rather, he was hired only to administer the decedent's estate, and the terms of this engagement defined his duties.[486]

O. Miscellaneous Cases

Three complicated malpractice cases do not fall into any of the above categories, but two are quite significant. The least significant, *Donahue v. Shughart, Thomson & Kilroy*,[487] involved a testator's living trust.[488] At the time he entered the hospital for surgery, the testator sent his long-time attorney sizable checks payable to the plaintiff and drawn on the trust account, and he directed the attorney to prepare a deed transferring to the plaintiff a 50% interest in his home.[489] Four months later, the testator gave the attorney another check drawn on the trust, which the attorney understood the plaintiff would receive upon the testator's death.[490] The plaintiff met with the attorney shortly after the last check was issued to seek legal advice on negotiating the checks and on recording the deed.[491] The attorney told her that there was no hurry to negotiate the checks.[492]

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482. *See id.* at 253.
483. *See id.* at 254.
484. *See id.*
485. *See id.*
486. *See id.* at 258-59.
487. 900 S.W.2d 624 (Mo. 1995).
488. *See id.* at 625.
489. *See id.*
490. *See id.*
491. *See id.*
492. *See id.*

Upon learning in October that the client would die shortly, the attorney sought advice from his partners on how to effectuate the gifts.[493] The next day, the plaintiff visited the attorney, who stated that if the testator followed his instructions, the gifts and the deed would be effective and binding.[494] After the testator's death, the plaintiff settled an action to invalidate the gifts and brought an action for malpractice against the attorney.[495] In an opinion mostly devoted to privity, the court held that if the plaintiff had asked for and received legal advice on the matter, then she could have sued the attorney for malpractice.[496]

The two more significant cases have common elements and were decided within months of each other. The first is *Strangland v. Brock*.[497] The testator's long-time exclusive business and personal attorney prepared the testator's will.[498] At the time that the attorney wrote the will, almost all of the testator's real property consisted of a farm, and the will specifically bequeathed all of the testator's real property to the plaintiffs.[499] The testator left the almost valueless residue to others.[500] About three years later, the testator retained another lawyer in the attorney's law firm (the associate) to sell the farm on a real estate contract.[501] The associate neither reviewed the testator's will nor discussed the sale with the attorney.[502] Shortly after the testator executed the contract, the testator died.[503] A dispute arose as to whether the testator's interest would pass to the plaintiffs or to the residuary beneficiaries.[504] The claimants subsequently settled, with the plaintiffs receiving 60% of the sale proceeds.[505] They then sued the attorney, the associate, and their law firm for malpractice,

493. *See Donahue*, 900 S.W.2d at 625-26.
494. *See id.* at 626.
495. *See id.* at 625-66 & 625 n.1.
496. *See id.* at 629.
497. 747 P.2d 464 (Wash. 1987).
498. *See id.* at 468
499. *See id.* at 465-66.
500. *See id.* at 466.
501. *See id.*
502. *See Strangland*, 747 P.2d at 466. The attorney failed to notice the matter on the firm's "new matter" list. *See id.*
503. *See id.*
504. *See id.*
505. *See id.*

alleging negligence in failing to effectuate the testator's intention to pass to them the major asset of his estate, the farm, and in failing to advise the testator of the real estate contract's effect on his will.[506]

The appellate court affirmed a dismissal of the action.[507] The court held that the attorney had drafted the will exactly as the testator requested, thus leaving all his real property to the plaintiffs.[508] Clearly, the testator did not tell the attorney that he intended to sell the farm at the time that the attorney drafted the will.[509] Absent such notice, no reasonable lawyer could foresee such an event and advise the client of the consequences.[510] The attorney therefore had no duty to so advise or to draft the will more broadly.[511] The plaintiffs also alleged that the attorney should have known about the real estate contract.[512] The court held that the duty to draft a will ends when the attorney executes the will, and the attorney thus has no continuing duty to monitor the assets.[513] The court refused to impute the knowledge of the contents of the will to the associate because doing so would have necessitated a review of all matters previously handled for the client.[514] In light of the burden of imposing such a duty, the court refused to do so in this case.[515]

The case did engender an animated dissent.[516] The dissent attacked the majority's reasoning:

> . . . I would hold that appellants' allegations state a claim for negligence on the part of the respondent law firm, viewed as a separate entity. Appellants' allegations suggest that [the testator's] relationship with [the attorney] and [the associate] could be viewed as part of a broader agreement with their law firm as a whole to provide him with general legal services,

506. *See id.*
507. *See id.* at 470.
508. *See Strangland*, 747 P.2d at 469.
509. *See id.*
510. *See id.*
511. *See id.*
512. *See id.*
513. *See id.*
514. *See Strangland*, 747 P.2d at 469-70.
515. *See id.*
516. *See id.* at 470 (Goodloe, J., dissenting).

including the drafting of his will. If such an agreement were shown to exist, then appellants could probably establish that the law firm had breached its duty of care by failing to provide a will that conformed to [the testator's] intentions. . . .

I do not share the majority's concerns that permitting a cause of action here would lead to unlimited liability for attorneys and their law firms or impose an unreasonable burden on law practice. Nor would allowing a cause of action impose a duty on attorneys to monitor all future transactions or research all past transactions handled for a client by other members of the law firm. The attorney's duty would remain the same: to use "that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction." Whether that standard of care was violated in any instance would remain a question for the trier of fact. Naturally, in some circumstances it would be unreasonable to hold that an attorney has a duty to inquire beyond those matters directly presented by the client. Yet this is not always the case. . . .

Not only are the majority's concerns ill founded, but also its remedy is ill suited to modern times. As solo practice increasingly gives way to large multipurpose law firms, clients are facing less and less control over who their attorneys will be. An individual who seeks services of a law firm today may not have much choice as to which attorneys in the firm will ultimately handle his or her particular affairs; such individual must understandably rely on the firm attorneys collectively to look after his or her interests. In such situations, the client would reasonably expect that the firm attorneys would consider the effect of their individual transactions on the client's general interests. At the very least, the client would expect that the firm attorneys would communicate with one another so that reasonable service is provided.

> In its well intended desire to shield the legal profession from undue expansions in malpractice liability, the majority inappropriately nullifies an entire category of potentially valid claims. I would reverse the trial court and remand for a determination by the trier of fact as to whether each of the respondents individually and/or through their law firm violated the standard of care owed to appellants as intended beneficiaries of [the testator's] will.[517]

The facts in *Schreiner v. Scoville*,[518] which was decided five months earlier, are remarkably similar to the facts in *Brock*.[519] The defendant attorney drafted a will for the testator that bequeathed the plaintiff one-half of the testator's interest in a certain parcel of real property and one-half of the testator's residuary estate.[520] Nearly seven months later, the attorney prepared and witnessed a codicil to the testator's will that reaffirmed the bequest but removed the plaintiff as a residuary beneficiary.[521] Within a month, the attorney brought an action on behalf of the testator to partition the real property.[522] The property was later sold at a partition sale and the testator received cash for her interest.[523] The testator subsequently died.[524] In an action for construction of the will, the court held that the bequest to the plaintiff had adeemed and that he therefore took nothing under the will.[525] The plaintiff sued the attorney for malpractice, alleging the attorney failed to draft a will carrying out the testator's true intent.[526]

This case was the first in Iowa that squarely presented the question of whether beneficiaries could sue a will's drafter for malpractice. The Iowa Supreme Court held that "direct, intended and specifically

517. *Id.* at 471-72 (Goodloe, J., dissenting) (citations omitted).
518. 410 N.W.2d 679 (Iowa 1987).
519. *Compare* Schreiner v. Scoville, 410 N.W.2d 679 (Iowa 1987), *with* Stangland v. Brock, 747 P.2d 464 (Wash. 1987).
520. *Schreiner*, 410 N.W.2d at 680.
521. *See id.*
522. *See id.*
523. *See id.*
524. *See id.*
525. *See id.*
526. *See Schreiner*, 410 N.W.2d at 681.

identifiable beneficiaries of the testator as expressed in the testator's testamentary instruments" possessed a cause of action against the drafting attorney.[527] The court adopted an additional limitation: the action would only be available when "the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is lost, diminished, or unrealized."[528] Despite this limitation, the court reversed a dismissal of the cause of action.[529] While cautioning that separate transactions between a lawyer and client are not related, and that no lawyer should be expected to remember the wills of his client or the effects of changes in the client's affairs on the wills, the court held in this case that the plaintiff could prove the interrelationship of the will, the codicil, and the partition.[530] The court found it significant that the attorney had prepared the will, the codicil, and the partition in a very short time span and that the attorney was the testator's lawyer in all three transactions.[531] One possibly significant aspect of the decision may be whether the attorney was an individual practitioner or a member of a law firm, and no law firm was sued.[532]

After reviewing the significant legal cases on malpractice in estate planning, the next step in the analysis is to examine why courts have increasingly refused to find attorneys liable.

III. THE ETHICAL THEORY OF ATTORNEY PROTECTION: IF YOU'RE GONNA PLAY THE GAME, BOY, YOU'D BETTER LEARN TO PLAY IT RIGHT

A. The Basis of the Theory

The opinions that restrict or prohibit malpractice suits by beneficiaries against attorneys for negligence in the preparation or drafting of estate planning documents primarily argue that allowing

527. *Id.* at 682.
528. *See id.* at 683. This is the Florida-Iowa rule. *See* Begleiter, *Attorney Malpractice*, *supra* note 3, at 198-204; *supra* Part II.B.
529. *See Schreiner*, 410 N.W.2d at 683.
530. *See id.* at 683-84.
531. *See id.* at 684.
532. *Id.* at 680.

unrestricted malpractice suits would impose unlimited liability on attorneys and would create potential conflicts of interest in violation of the attorneys' duties to their clients.[533] To a lesser extent, some of these cases rely on the fact that a suit against the drafting attorney could result in the disclosure of confidential information.[534] Several courts have offered these arguments as justifications for severely limiting or prohibiting malpractice actions against attorneys in estate planning.[535]

Most courts have not found a violation of ethical rules to constitute negligence per se.[536] Occasionally, a court will cite a violation of the rules as some evidence of, or as creating a rebuttable presumption of, malpractice.[537] Rather, courts have used ethical rules to argue that malpractice liability should be severely limited and should not extend to complicated legal cases.[538]

This Article takes a somewhat limited approach in this area to avoid describing numerous cases that do not materially advance the central discussion, which is the reason why the courts decide as they do in estate planning malpractice actions in complicated legal cases. Rather, this Article states the ethical rules on which the arguments are based and quotes extensively from the two leading cases adopting these arguments.[539] Part III.C extensively quotes two leading cases rejecting the ethical arguments and cites agreeing cases in the footnotes.

One non-ethical argument exists in some of these cases: the admission of extrinsic evidence to prove malpractice would be contrary to the Statute of Wills because allowing such evidence

533. *See, e.g., Schreiner*, 410 N.W.2d at 679.

534. *See, e.g.*, Noble v. Bruce, 709 A.2d 1264, 1279 (Md. 1998); Blair v. Ing, 21 P.3d 452, 455 (Haw. 2001). These arguments have had substantial influence over some of the courts that have decided complicated legal malpractice cases in the last 15 years.

535. *See* discussion *infra* Part III.B.

536. 3 MALLEN & SMITH, *supra* note 1, § 19.7, at 99.

537. *See, e.g.*, Hart v. Comerica Bank, 957 F. Supp. 958, 981 (E.D. Mich. 1997); Albright v. Burns, 503 A.2d 386, 390 (N.J. Super. Ct. App. Div. 1986) (stating the ethical rules set the minimum level of competency required of attorneys and failure to meet the standard is considered evidence of malpractice); Ruden v. Jenk, 543 N.W.2d 605, 611 (Iowa 1996). *See generally* 3 MALLEN & SMITH, *supra* note 1, § 19.7.

538. *See, e.g., Noble*, 709 A.2d at 1279.

539. *See infra* Part III.B. The footnotes of Part III.B cite some additional cases stating or accepting these arguments.

would conflict with the terms of a written will and conflict with a testator's solemnized intent. This argument has been discussed extensively and rejected previously.[540]

B. The Duty to the Client and Conflicts of Interest

The two primary ethical considerations that form the basis of these arguments are (1) the attorney's duty of loyalty to the client[541] and (2) the concept of avoiding conflicts of interest.[542] The first part of the duty of loyalty argument is that to create duties to will beneficiaries would extend the attorney's duty to "an unlimited and unknown number of potential plaintiffs" and thereby dilute the attorney's loyalty to and concern for the client.[543] The second part of this

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540. *See, e.g.*, Begleiter, *Attorney Malpractice*, *supra* note 3, at 197-204.

541. *See* MODEL RULES OF PROF'L CONDUCT R. 1.3 (2003). Model Rule 1.3 provides: "A lawyer shall act with reasonable diligence and promptness in representing a client." *Id.* Comment 1 provides, in part:

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

Id. cmt. 1.

542. MODEL RULES OF PROF'L CONDUCT R. 1.7. Model Rule 1.7 (2003) provides:

> (a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:
> (1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and
> (2) each client consents after consultation.
> (b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
> (2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

Id. The confidentiality rule, Model Rule 1.6(a), provides: "(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)." MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2003).

543. *See, e.g.*, Pelham v. Griesheimer, 440 N.E.2d 96, 99 (Ill. 1982). The court in *Gregg v. Lindsay*, 649 A.2d 935 (Pa. Super. Ct. 1994), stated:

argument is that to create a duty to will beneficiaries would create the potential for conflicts of interest.[544] This conflicts-of-interest argument builds on the somewhat different case of a beneficiary of an estate or trust suing the attorney for the fiduciary.[545] In almost all such cases, the courts rule that the attorney represents the personal representative or trustee and that the beneficiary has no action against the attorney.[546] A primary reason for this result is that if a duty to any beneficiary is imposed on the attorney for the fiduciary, that duty will almost certainly conflict with the interests of other beneficiaries in the estate or trust.[547] To create such a situation would force the attorney into a conflict of interest and violate the duty of loyalty, which courts will not do.[548] The court in *Trask v. Butler* set forth one of the most-often-cited examinations of this type of case, stating:

> The multi-factor balancing test also requires that we evaluate public policy before finding a duty to a third party. The policy considerations against finding a duty to a nonclient are the

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> To permit a third person to call a lawyer and dictate the terms of a will to be drafted for a hospitalized client of the lawyer and to find therein a contract intended to benefit the third person caller, even though the will was never executed, would severely undermine the duty of loyalty owed by a lawyer to the client and would encourage fraudulent claims.

Gregg, 649 A.2d at 940; *see also* Persinger v. Holst, 639 N.W.2d 594, 599 (Mich. Ct. App. 2001); Logotheti v. Gordon, 607 N.E.2d 1015, 1018 (Mass. 1993) (stating that when making a determination on a client's competency, the attorney owes the client a duty of undivided loyalty); Robinson v. Benton, 842 So. 2d 631, 637 (Ala. 2002).

544. *See, e.g.*, *Pelham*, 440 N.E.2d at 100. The court in *Logotheti* noted:

> A fair, objective determination in every case is in the best interest of the client. However, the financial interest of one who would only take by intestate succession would not be served in those cases where the attorney decides that the client is competent and free from undue influence, and a will is prepared. If we were to hold that, in the circumstances of this case as alleged in the complaint, the defendant attorney owed a duty of care both to [the testator] and [the heir], we would be imposing conflicting duties on attorneys. This, we shall not do.

Logotheti, 607 N.E.2d at 1018.

545. *See, e.g.*, Trask v. Butler, 872 P.2d 1080, 1085 (Wash. 1994) (en banc).

546. *See, e.g.*, Jewish Hosp. v. Boatmen's Nat'l Bank, 633 N.E.2d 1267, 1277-78 (Ill. App. Ct. 1994); *Trask*, 872 P.2d at 1083; 4 MALLEN & SMITH, *supra* note 1, § 32.4, at 749-54. *Contra* Estate of Shano v. Shano, 869 P.2d 1203, 1208 (Ariz. Ct. App. 1993).

547. *See Trask*, 872 P.2d at 1085.

548. *See* 4 MALLEN & SMITH, *supra* note 1, § 32.5, at 757-58.

> strongest where doing so would detract from the attorney's ethical obligations to the client. This occurs where a duty to a nonclient creates a risk of divided loyalties because of a conflicting interest or a breach of confidence. A conflict of interest arises in estate matters whenever the interest of the personal representative is not harmonious with the interest of an heir. Because estate proceedings may be adversarial, we conclude that policy considerations also disfavor the finding of a duty to estate beneficiaries . . . .
>
> After analyzing our modified multi-factor balancing test, we hold that a duty is not owed from an attorney hired by the personal representative of an estate to the estate or to the estate beneficiaries . . . for three reasons: (1) the estate and its beneficiaries are *incidental*, not intended, beneficiaries of the attorney-personal representative relationship; (2) the estate heirs may bring a direct cause of action against the personal representative for breach of fiduciary duty; and (3) the unresolvable conflict of interest an estate attorney encounters in deciding whether to represent the personal representative, the estate, or the estate heirs unduly burdens the legal profession.[549]

Trask clearly notes a factor present in a suit against the attorney for the personal representative that is not present in a disappointed beneficiary's suit against the drafting attorney.[550] In the proceeding against the personal representative's attorney, a beneficiary may also sue the personal representative for breach of fiduciary duty, and if necessary, the personal representative may sue the drafting attorney.[551] In the action against the drafting attorney, if the beneficiaries cannot recover against the attorney, no one can, because the personal representative's recovery would be limited to the cost of

549. *Trask*, 872 P.2d at 1085 (citations omitted); *see also* Spinner v. Nutt, 631 N.E.2d 542, 547 (Mass. 1994) (holding that the attorney for trustees was not liable to trust beneficiaries).
550. *See Trask*, 872 P.2d at 1085.
551. *See id.* at 1084-85.

drafting the instrument.[552] Despite this significant difference, some courts have relied on the rationale of the estate fiduciary cases to deny liability in the drafting attorney cases on the ground that imposing liability on the drafting attorney would create the possibility of a conflict of interest.[553]

The leading case adopting the ethical arguments to limit the liability of attorneys in complicated drafting cases in estate planning is *Noble v. Bruce*.[554] *Noble* consolidated two cases, the first of which involved the misuse of federal unified credit, while the second involved the failure to correctly draft a tax apportionment clause.[555] Following a discussion of strict privity, the balancing and third-party beneficiary theories, and the admissibility of extrinsic evidence, the court discussed the policy reasons for adopting strict privity:

> There are also compelling policy reasons for the application of the strict privity rule in [both of the consolidated] cases. First, the strict privity rule protects the integrity and solemnity of the will. The beneficiaries are in effect requesting this Court to reform the wills so that the attorney will be responsible for the payment of taxes. If such liability were allowed, the attorney would be paying out-of-pocket for an additional bequest to the beneficiaries not expressed in the will. Although not a persuasive argument, we do note that the attorney's liability is also disproportionate to the cost of the will. The loss to the client is very different from the loss to the beneficiary that may occur as a result of an attorney's negligence in will drafting or estate planning; the client's loss is the cost of redrafting the will,

552. *See id.* (citing Stangland v. Brock, 747 P.2d 464 (Wash. 1987)).

553. *See, e.g.*, Gonsalves v. Alameda County Superior Court, 24 Cal. Rptr. 2d 52, 56 (Cal. Ct. App. 1993) (holding that an extension of liability to those who were disinherited by a will "would put an attorney in the position of potential liability to either the beneficiary disinherited if he or she draws the will or the potential beneficiary if he or she refuses to draw the will," which would be "an intolerable burden to place upon attorneys"); Mieras v. DeBona, 550 N.W.2d 202, 209 (Mich. 1996); Leyba v. Whitley, 907 P.2d 172, 180 (N.M. 1995).

554. 709 A.2d 1264 (Md. 1998).

555. *Id.* at 1266. The Court of Appeals of Maryland used the case as an occasion to completely review the area. *See id.*

whereas the beneficiary's loss [in this action] is the amount of the taxes that could have been avoided.

In addition, the strict privity rule protects the attorney-client relationship. Adopting a new rule that would subject an attorney to liability to disappointed beneficiaries interferes with the attorney's ability to fulfill his or her duty of loyalty to the client and compromises the attorney's ability to represent the client zealously. . . . [A] potential conflict of interest may exist between the client's interests and the interests of the beneficiaries. The beneficiaries allege that [the attorney] was negligent in failing to advise the [clients] of the bypass trust, a mechanism used to allow both spouses to take advantage of the Unified Credit Against Estate Tax. To simplify, upon the death of the first spouse, up to $600,000 of property in the first spouse's estate can be placed in a bypass trust for the benefit of the surviving spouse. The goal of a bypass trust is to ensure that "this amount of property ultimately passes to the next generation . . . without being taxed in the estate of the decedent and . . . without being included in the gross estate of the surviving spouse." William P. Streng, 800 V.C. TAX MANAGEMENT PORTFOLIO ESTATES, GIFTS & TRUSTS, *Estate Planning* (BNA). This goal is achieved by structuring the trust so that the "surviving spouse does not have those property and income rights with respect to the trust property which would cause the trust assets to be included in [the surviving spouse's] gross estate upon [the surviving spouse's] death." *Id.* In sum, the surviving spouse can receive income from the trust property, and upon the surviving spouse's death the trust property passes to the beneficiaries free from federal estate tax.

Minimizing estate and inheritance taxes *for* beneficiaries, however, may not always be the ultimate driving force behind the testator's decisions regarding the provisions contained in his or her will. There may be "compelling nontax reasons not to employ a bypass trust," including flexibility for the survivors.

Stuart Kessler, 844 II.C.3. V.C. TAX MANAGEMENT PORTFOLIO ESTATES, GIFTS & TRUSTS, *Estate Tax Credits & Computations* (BNA). One disadvantage of the bypass trust is the loss of some control over trust assets. . . .

The creation of a bypass trust would have prevented [the wife] from transferring her real property to [the transferees] without destroying the trust or causing [her] severe tax consequences. Thus, a conflict of interest would exist for [the attorney] between the client's desire to retain control over the property during her lifetime and the beneficiary's desire to place the property in a bypass trust in order to maximize the size of the estate. Application of the strict privity rule would ensure that will drafting and estate planning attorneys "may in all cases zealously represent their clients without the threat of suit from third parties compromising that representation." *Barcelo*, 923 S.W.2d at 578-79.

The strict privity rule also protects attorney-client confidentiality. Under Maryland Lawyers' Rule of Professional Conduct 1.6(b)(3), an attorney may disclose confidential information relating to the representation of a client "to the extent the lawyer reasonably believes necessary . . . to respond to allegations in any proceedings concerning the lawyer's representation of the client." An attorney, however, should not be placed in the position where he or she would have to reveal a testator/client's confidences in an attorney malpractice action asserted by a nonclient beneficiary. For example, in the will drafting context, a testator/client may tell a relative that he or she will inherit part of the testator's estate. In reality, the testator/client intends that this relative inherit nothing because the testator/client secretly believes the relative is an evil person. The testator/client confides this secret belief to his or her estate planning attorney and requests the attorney to draft a will that leaves nothing to the relative. Allowing a nonclient beneficiary to maintain a cause of action against an attorney for professional

malpractice may require the attorney to reveal confidences the testator would never want revealed.

Furthermore, the beneficiaries' alleged damages in the instant cases constitute purely economic losses. There is no risk of death or serious personal injury generated by any alleged negligent conduct by [the attorney]. Thus, [the attorney] owed no tort duty to the beneficiaries for mere economic losses absent contractual privity or its equivalent.

The beneficiaries, in the instant cases, posit that an attorney, who commits an error while drafting a will or planning an estate, will not be held accountable if the beneficiaries have no cause of action. That is not necessarily so. Although we need not decide the issue in the instant cases, a testator's estate might stand in the shoes of the testator and meet the strict privity requirement. *See Espinosa*, 612 So. 2d at 1380. Thus, where limitations have not run, we do not foreclose the possibility that a testator during his or her lifetime or the testator's estate may have an attorney malpractice action for negligent acts committed by the attorney while representing the testator. Damages, however, may be limited to the attorney's fee.[556]

The Texas Supreme Court confirmed the Texas rule of strict privity when it decided the other most-frequently-cited case, *Barcelo v. Elliott*.[557] The case involved the failure to validly draft an inter vivos trust.[558] In affirming a grant of summary judgment for the attorney, the court stated:

At common law, an attorney owes a duty of care only to his or her client, not to third parties who may have been damaged by the attorney's negligent representation of the client. Without this "privity barrier," the rationale goes, clients would lose control

556. *Id.* at 1277-78.
557. 923 S.W.2d 575 (Tex. 1996).
558. *See id.* at 576 (not stating reasons for the invalidity).

over the attorney-client relationship, and attorneys would be subject to almost unlimited liability. Texas courts of appeals have uniformly applied the privity barrier in the estate planning context.

Plaintiffs argue, however, that recognizing a limited exception to the privity barrier as to lawyers who negligently draft a will or trust would not thwart the rule's underlying rationales. They contend that the attorney should owe a duty of care to persons who were specific, intended beneficiaries of the estate plan. We disagree.

The majority of other states addressing this issue have relaxed the privity barrier in the estate planning context.

While some of these states have allowed a broad cause of action by those claiming to be intended beneficiaries, others have limited the class of plaintiffs to beneficiaries specifically identified in an invalid will or trust. The Supreme Court of Iowa, for example, held that a cause of action ordinarily will arise only when as a direct result of the lawyer's professional negligence the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized. *Schreimer v. Scoville*, 410 N.W.2d 679, 683 (Iowa, 1987).

We agree with those courts that have rejected a broad cause of action in favor of beneficiaries. These courts have recognized the inevitable problems with disappointed heirs attempting to prove that the defendant-attorney failed to implement the deceased testator's intentions. Certainly allowing extrinsic evidence would create a host of difficulties. In *DeMaris v. Asti*, 42 So. 2d 1153, 1154 (Fla. Dist. Ct. App. 1983), for example, the court concluded that "[t]here is no authority—the reasons being obvious—for the proposition that a disappointed beneficiary may prove, by evidence totally extrinsic to the will, the testator's

testamentary intent was other than as expressed in his solemn and properly executed will." Such a cause of action would subject attorneys to suits by heirs who simply did not receive what they believed to be their due share under the will or trust. This potential tort liability to third parties would create a conflict during the estate planning process, dividing the attorney's loyalty between his or her client and the third-party beneficiaries.

Moreover, we believe that the more limited cause of action recognized by several jurisdictions also undermines the policy rationales supporting the privity rule. These courts have limited the cause of action to beneficiaries specifically identified in an invalid will or trust. Under these circumstances, courts have reasoned, the interests of the client and the beneficiaries are necessarily aligned, negating any conflict, as the attorney owes a duty only to those parties which the testator clearly intended to benefit.

In most cases where a defect renders a will or trust invalid, however, there are concomitant questions as to the true intentions of the testator. Suppose, for example, that a properly drafted will is simply not executed at the time of the testator's death. The document may express the testator's true intentions, lacking signatures solely because of the attorney's negligent delay. On the other hand, the testator may have postponed execution because of second thoughts regarding the distribution scheme. In the latter situation, the attorney's representation of the testator will likely be affected if he or she knows that the existence of an unexecuted will may create malpractice liability if the testator unexpectedly dies.

The present case is indicative of the conflicts that could arise. Plaintiffs contend in part that [the attorney] was negligent in failing to fund the trust during [the testator's] lifetime, and in failing to obtain a signature from the trustee. These alleged deficiencies, however, could have existed pursuant to [the

> testator's] instructions, which may have been based on advice from her attorneys attempting to represent her best interests. An attorney's ability to render such advice would be severely compromised if the advice could be second-guessed by persons named as beneficiaries under the unconsummated trust.
>
> In sum, we 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 actions 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.
>
> We therefore hold that an attorney retained by a testator or settler to draft a will or trust owes no professional duty of care to persons named as beneficiaries under the will or trust.[559]

If these views enjoy wide acceptance, the ethical problems raised by these courts would explain the reluctance of courts to grant beneficiaries relief against drafting attorneys in complicated estate planning malpractice cases. However, these explanations have been met with substantial resistance, to which this Article now turns.

C. Rejection of the Ethical Explanation

The cases rejecting the ethical explanation reject each assumption on which the above cases are based. They disagree that extrinsic evidence is inadmissible to prove the testator's intent in malpractice cases of this type.[560] They deny that imposing a duty on the drafting

559. *Id.* at 576-79 (citations omitted).

560. *See* Begleiter, *Attorney Malpractice*, *supra* note 3, at 201; *see also* Simpson v. Calivas, 650 A.2d 318, 322 (N.H. 1994). The court in *Simpson* stated:

attorney to the beneficiaries dilutes the duty of loyalty to the client or allows an attorney's duty to extend to an unlimited number of persons.[561] They challenge the assumption that the interests of the testator conflict with the interests of the beneficiaries.[562] Indeed, one

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> The defendant in his brief . . . urges that if we are to recognize an exception to the privity rule, we should limit it to those cases where the testator's intent *as expressed in the will*—not as shown by extrinsic evidence—was frustrated by attorney error. . . . Under such a limited exception to the privity rule, a beneficiary whose interest violated the rule against perpetuities would have a cause of action against the drafting attorney, but a beneficiary whose interest was omitted by a drafting error would not. Similarly, application of such a rule to the facts of this case would require dismissal even if the allegations—that the defendant botched [the testator's] instructions to leave all his land to his son—were true. We refuse to adopt a rule that would produce such inconsistent results for equally foreseeable harms, and hold that an intended beneficiary states a cause of action simply by pleading sufficient facts to establish that an attorney has negligently failed to effectuate the testator's intent as expressed to the attorney.

Id. (emphasis in original).

561. *See* Leyba v. Whitley, 907 P.2d 172, 180 (N.M. 1995) ("[W]e first observe that when an attorney's duty to the third-party nonclient arises from the *mutual* intent of the attorney and client to benefit that third party, by definition there can be no conflict of interest inimical to the attorney's professional responsibility." (emphasis in original)); Guy v. Liederbach, 459 A.2d 744, 752 (Pa. 1983):

> Overarching all of appellants' arguments is the basic policy argument that allowing suits such as appellee's would perhaps lower the quality of legal services rendered to clients because of attorneys' increased concerns over liability to third persons and certainly make them much more expensive. We cannot accept the proposition that insuring the quality of legal services requires allowing as limited a number of persons as possible to bring suit for malpractice.

Id. (citation omitted). The court in *Donahue v. Shughart, Thomson & Kilroy*, 900 S.W.2d 624, 628 (Mo. 1995) (en banc), agreed, stating:

> The primary arguments against allowing a non-client to bring a legal malpractice action are the possibility that liability will extend to an unlimited class of individuals and will interfere with the attorney client relationship. These concerns are addressed by the proper application of the modified balancing of factors approach. If the transaction was specifically intended to benefit the plaintiff, liability is not extended to an unlimited class and it does not interfere with the attorney client relationship, particularly where the client is deceased or incompetent.

Donahue, 900 S.W.2d at 628.

562. Jewish Hosp. v. Boatmen's Nat'l Bank, 633 N.E.2d 1267, 1276 (Ill. App. Ct. 1994).

> Our supreme court has strongly emphasized the concept that third-party beneficiary status should be easier to establish when the scope of the attorney's representation involves matters that are nonadversarial such as in the drafting of a will, rather than when the scope of the representation involves matters that are adversarial.

Id.; *see also* Needham v. Hamilton, 459 A.2d 1060, 1062 (D.C. 1983); Ogle v. Fuiten, 445 N.E.2d 1344, 1347-48 (Ill. App. Ct. 1983); Hale v. Groce, 744 P.2d 1289, 1292 (Or. 1987) ("Because negligence

case involving a guardianship rejects the potential conflict rationale in favor of an actual conflict test and raises an interesting and valid challenge to the rationale of the cases in the last subsection.[563] Two justices in *Barcelo v. Elliot*[564] made one of the best arguments against the ethical considerations, observing:

> Additionally, the Court's decision means that, as a practical matter, no one has the right to sue for the lawyer's negligent frustration of the testator's intent. A flaw in a will or other testamentary document is not likely going to be discovered until the client's death. And, generally, the estate suffers no harm from a negligently drafted testamentary document. Allowing beneficiaries to sue would provide accountability and thus an incentive for lawyers to use greater care in estate planning. Instead, the Court decides that an innocent party must bear the burden of the lawyer's error. . . .

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liability of this kind arises only from the professional obligation to the client, it does not threaten to divide a lawyer's loyalty between the client and a potentially injured third party . . . ."); *In re* Guardianship of Karan, 38 P.3d 396, 401 (Wash. Ct. App. 2002) (finding that the interests of a guardian and a ward are the same and imposing a duty to the ward on the attorney for the guardian). The court in *Needham* stated:

> This is not a case in which the ability of a nonclient to impose liability would in any way affect the control over the contractual agreement held by the attorney and his client, as the interests of the testator and the intended beneficiaries with regard to the proper drafting and execution of the will are the same.

Needham, 459 A.2d at 1062

563. *See* Vick v. Bailey, 777 So. 2d 1005 (Fla. Dist. Ct. App. 2000). The daughter initiated guardianship proceedings for her mother (the ward). *See id.* The court appointed someone to serve as plenary guardian for the ward's property and as limited guardian of her person on a preliminary finding of incapacity. *See id.* Although the ward had other counsel, the attorney entered an appearance, as permitted by Florida law, both on behalf of the ward and on behalf of the plaintiff, who was an interested party and a friend of the ward. *See id.* The court ordered mediation, and the plaintiff was not permitted to attend. On the scheduled day of the mediation, the attorney filed a notice of limited appearance on behalf of the ward's son. *See id.* The daughter moved to disqualify the attorney for representing parties (the plaintiff and the ward) with conflicting interests. *See id.* The court held that no actual conflict existed because the parties that the attorney represented wanted to establish the ward's competency. *Id.* at 1006. The potential conflict was not enough to disqualify the attorney, because only an actual conflict between the clients would suffice. *See id.* at 1007. Although this case is not a malpractice case, the difference between an actual and a potential conflict is significant. *See* Estate of Leonard v. Swift, 656 N.W.2d 132, 146 (Iowa 2003).

564. 923 S.W.2d 575 (Tex. 1996).

Nor do the reasons the Court gives for refusing to impose a duty under these circumstances withstand scrutiny. Contrary to the Court's view, recognizing an action by the intended beneficiaries would not extend a lawyer's duty to the general public, but only to a limited, foreseeable class. Because estate planning attorneys generally do not face *any* liability in this context, potential liability to the intended beneficiaries would not place them in a worse position than attorneys in any other setting.

The Court also hypothesizes that liability to estate beneficiaries may conflict with the attorney's duty to the client. Before the beneficiaries could prevail in a suit against the attorney, however, they would necessarily have to show that the attorney breached a duty to the decedent. This is because the lawyer's duty to the client is to see that the client's intentions are realized by the very documents the client has hired the lawyer to draft. No conflicting duty to the beneficiaries is imposed.

Searching for other hypothetical problems that might arise if a cause of action for the beneficiaries is recognized, the Court observes that a will not executed at the testator's death could in fact express the testator's true intentions. Granted, such a scenario may be the result of either the testator's indecision or the attorney's negligence. Similarly, a family member might be intentionally omitted from a will at the testator's direction, or negligently omitted because of the drafting lawyer's mistake. In other words, what appears to be attorney negligence may actually reflect the testator's wishes.

But surely these are matters subject to proof, as in all other cases. Nothing distinguishes this class of cases from many others in this respect. The Court fails to consider that the beneficiaries will in each case bear the burden of establishing that the attorney breached a duty to the testator, which resulted in damages to the

> beneficiaries. Lawyers, wishing to protect themselves from liability, may document the testator's intentions.
>
> In addition, [the attorney] suggests that allowing beneficiaries to sue the testator's attorney would interfere with the attorney-client privilege, by either encouraging attorneys to violate clients' confidences or by hindering attorneys' ability to defend their actions. This concern, too, is unfounded. Under Texas law, the attorney-client privilege does not survive the testator. This is because the lawyer-client privilege applies only to confidential communications, which are "not intended to be disclosed to third persons." And, as Professor Wigmore has explained, "[a]s to the *tenor* and *execution* of the will, it seems hardly open to dispute that they are the very facts which the testator expected and intended to be disclosed after his death."[565]

Blair v. Ing[566] is far more significant. *Blair* was a case of first impression in the Supreme Court of Hawaii, and the court had the benefit of the opinions of several other courts on this issue. *Blair* involved errors in a revocable trust prepared by the defendant attorney as part of an estate plan for a husband and a wife.[567] The problem, similar to the alleged error in *Bucquet v. Livingston*,[568] was the failure to draft a bypass trust so that it was not included in the surviving spouse's estate.[569] The court first engaged in a detailed review of privity and its current status under the balancing and third-party beneficiary contract theories and concluded that a malpractice action could be grounded in either theory.[570] The court adopted the balancing test of *Lucas v. Hamm*[571] as consistent with Hawaii law.[572] The court then proceeded to evaluate the ethical arguments:

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565. *Id.* at 580-81 (Cornyn, J., dissenting) (citations omitted).
566. 21 P.2d 452 (Haw. 2001).
567. *See id.* at 455.
568. 129 Cal. Rptr. 514, 515 (Cal. Ct. App. 1976); *see supra* Part II.K.
569. *See Blair*, 21 P.2d at 456. In this case, the drafting of the funding formula for the marital bypass trust and the way it was construed in preparing the federal estate tax return caused the problem. *See id.*
570. *See id.* at 459-63.
571. 364 P.2d 685 (Cal. 1961).

> [The attorney] . . . contends that the imposition of a legal duty will create unlimited liability to an unlimited class of individuals and will unduly burden the legal profession. In our view, although the imposition of a duty may possibly subject an attorney to greater liability, the potential liability is properly limited by the narrow application of the *Lucas* balancing test under a claim of negligence and third party beneficiary principles under a contract claim. For example, a benefit that is merely incidentally conferred upon the beneficiary will not meet the first factor of the *Lucas* balancing test or the third party beneficiary principle that the contract be entered into with the intent to benefit the non-client. The class of individuals who may bring a malpractice action is limited to a client's intended beneficiaries, provided no other remedy exists to prevent future harm. Although previously noted, we emphasize that our holding today does not create a blanket duty of care to all non-client beneficiaries in every case.
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> [The attorney] further contends that the circuit court did not abuse its discretion in dismissing Appellants' amended complaint because the [clients' t]rust had never been challenged. By allowing the present lawsuit to proceed, [the attorney] contends that a conflict of interest would arise if he were held liable to the Appellants because the Appellants' interests may be adverse to that of his clients', *i.e.*, the [clients'] interests. [The attorney] further contends that allowing a cause of action under these circumstances requires that he disclose client confidences in contravention of Hawai'i Rules of Evidence (HRE) Rule 503(d)(4) and Hawaii Rules of Professional Conduct Rule 1.6(c)(3). In sum, [the attorney] essentially contends that, because there is no express provision in the [clients' t]rust declaring their intent to minimize taxes, the Appellants should not, as a matter of policy, be allowed to introduce extrinsic

572. *See Blair*, 21 P.3d at 465.

evidence to contradict the [clients'] intent as demonstrated on the face of the trust.

Several jurisdictions that permit a legal malpractice action by a non-client subscribe to a rule that precludes the use of extrinsic evidence. Thus, where the testamentary instrument is valid on its face, these jurisdictions deny a non-client's malpractice cause of action. . . .

In *Ogle v. Fuiten*, the Illinois Supreme Court addressed the use of extrinsic evidence in a legal malpractice action brought by a non-client. There, the testators' nephew and niece brought a malpractice suit against an attorney who negligently drafted the testators' wills by failing to include the plaintiffs as beneficiaries. The court rejected the defendant's argument that the plaintiffs should be required to show, from the express terms of the will, that they were intended beneficiaries of the attorney-testator relationship to maintain a cause of action. The court noted that the only remedy for intended beneficiaries who are negligently omitted from a testamentary document due to the fault of the drafting attorney is through malpractice. Thus, the court distinguished a malpractice action by the non-clients from a collateral attack upon the will, noting "that if plaintiffs here are successful in their action, the orderly disposition of the testators' property is not disrupted, and the provisions of the wills, and the probate administration, remain unaffected."

We are persuaded by the reasoning of *Ogle* and, therefore, adopt it in the present case. Here, the Appellants' cause of action would not prevent the enforcement of the trust document itself or vary its terms in contravention of the statute of wills. Thus, by seeking to enforce the terms of the agreement between [the attorney] and the [clients] that were not fulfilled by the trust document in accordance with the [clients'] intent, the Appellants could, if successful, recover from [the attorney], not the trust estate, the benefits they would have received under the Hughes

> Trust but for the allegedly negligent drafting by [the attorney]. To limit a malpractice cause of action by a non-client to the face of the testamentary document that does not reflect the testator's true intent would render the recognition of a cause of action meaningless. In other words, "[t]o have any real meaning, our holding . . . that [the Appellants] could bring this legal malpractice action must sanction as a corollary [their] use of evidence outside the will to support [their] claim. . . . Without the use of such extrinsic evidence, [their] case would be rendered unprovable."
>
> We emphasize, however, that our allowance of the use of extrinsic evidence in this legal malpractice action is wholly separate from cases in which courts interpret testamentary documents. . . .
>
> Moreover, imposition of a duty will not create the potential conflict of interest argued by [the attorney]. As stated by the concurrence in *Mieras*:
>
> > First, because beneficiaries of a will have no rights under the will before the testator's death, a disgruntled beneficiary's cause of action does not ripen until the death of the testator. "[M]erely drafting and executing a will creates no vested right in the legatee until the death of the testator." Second, the only obligation owed by the attorney to named beneficiaries is to exercise the requisite standard of care in fulfilling the intent of the testator as expressed in the will. An attorney would never face conflicting obligations to the testator and the beneficiaries by drafting a document that properly fulfills the testator's intent as expressed in that document. Further, the testator is always free to change the beneficiary of the will, and the displaced beneficiary will have no cause

of action. As noted in the concurring opinion in *Guy*, *supra*:

> The contract upon which the obligation arises required the scrivener to fulfill the intention of the testator expressed to him at the time of the drafting. The fact that the testator could subsequently change the proposed testamentary disposition is of no moment. The scrivener's obligation was to provide that which he undertook to do and the failure to do so constituted the breach which justified the recovery. The duty owed to named beneficiaries is narrowly circumscribed and only requires the attorney to draft a will that properly effectuates the distribution scheme set forth by the testator in the will.

Thus, there is no conflict of interest under circumstances, such as the present case, where a beneficiary seeks to enforce an attorney's duty to fulfill his or her client's intent.

[The attorney] contends that allowing the use of extrinsic evidence in the present case adversely affects the attorney-client privilege by forcing attorneys into a position where they would have to reveal a client's confidences in actions such as the instant case. We acknowledge that an underlying principle in the attorney-client relationship is that the attorney must maintain confidentiality of information relating to the representation, thereby encouraging full and frank communication with the attorney. However, the attorney-client privilege is qualified and does not extend to a communication regarding whether an attorney has breached his or her duty to the client. Balancing the policy of full and frank communication fostered by the attorney-client privilege against the policy of preventing future harm by granting a cause of action in limited circumstances, we believe that, under the circumstances of the present case, the effect upon the privilege is minimal. We therefore believe that, on balance,

> the fact that an intended beneficiary is otherwise left without a remedy far outweighs such a minimal, adverse effect upon the attorney-client privilege.[573]

Even after *Blair*, if an attorney argues that the ethical rules should control the existence of a duty to beneficiaries in a complicated estate planning malpractice action, then the rejection of that argument in *Blair*, especially in light of the extensive discussion in the opinion, at least calls into question whether the ethical argument is an acceptable explanation.

Before exploring alternative explanations, this Article presents and discusses the evaluation of a theory offered in a significant recent article.

IV. THE FOGEL EXPLANATION: FOR A TASTE OF YOUR WHISKEY, I'LL GIVE YOU SOME ADVICE

In 2001, Professor Bradley E. S. Fogel of the St. Louis University School of Law published an article in the *Tennessee Law Review* dealing with some of the material presented in this Article.[574] Professor Fogel attacks the problem by examining the traditional privity rule and its modification by the courts over the last 40 years and focuses on what he sees as the ethical dilemma caused by the imposition of a duty on the testator's attorney to beneficiaries of a will.[575] Professor Fogel believes that when courts recognize a "broad cause of action" in favor of beneficiaries, numerous conflicts of interest for the estate planning attorney are engendered, which may cause the attorney to temper his or her duty to the client because of malpractice concerns.[576] For example, Professor Fogel uses the

573. *Id.* at 465-68 (citations and footnote omitted). Because *Blair* provides the latest and most extensive analysis of the issue, I elected to quote extensively to give the full flavor of the court's rejection of the ethical arguments. "HRE Rule 503(d)(4) provides that '[t]here is no [attorney-client] privilege under this rule . . . [a]s to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer.'" *Id.* at 468 n.11.

574. *See* Fogel, *supra* note 1.

575. *See id.* at 311-26.

576. *See id.* at 318-20.

provisions of the federal estate tax as illustrative of his thesis.[577] He uses a hypothetical example in which an attorney represents both spouses for estate planning.[578] Professor Fogel argues that the spouses frequently wish to leave the entire estate to the surviving spouse outright.[579] However, this plan fails to make optimal use of both spouses' federal estate tax unified credit and could result in a malpractice action.[580] The attorney will often recommend a bypass trust to save the maximum estate tax.[581] Professor Fogel points out that only the beneficiaries of the bypass trust benefit from the plan, and the disadvantages of it are borne primarily by the surviving spouse, who might otherwise have received assets of the first spouse to die outright.[582] Summarizing, Professor Fogel states:

> The use of bypass trusts is another example of the divergence of the heirs and the clients' interests. The use of this technique benefits the heirs at the clients' expense. If a broad cause of action by beneficiaries is recognized, the attorney's loyalties will be split when giving advice regarding this technique.[583]

Professor Fogel also discusses the "protective letter," which many attorneys draft in order to document that their clients chose not to take advantage of options with favorable estate tax consequences, as support for his thesis that recognition of a duty to beneficiaries may damage the attorney-client relationship.[584] Professor Fogel notes that careful estate planners often draft such letters.[585] Professor Fogel notes that the client bears the cost of the letter and that a beneficiary may later argue that the disclosure in the letter was inadequate.[586] Professor Fogel continues:

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577. *See id.* at 315.
578. *See id.* at 314-15.
579. *See id.* at 315.
580. *See* Fogel, *supra* note 1, at 315 & n.349.
581. *See id.* at 316. The attorney might also recommend transfers of assets between the spouses so that the maximum estate tax will be saved regardless of which spouse dies first. *See id.*
582. *See id.*
583. *Id.* at 316-17.
584. *See id.* at 320.
585. *See id.*
586. *See* Fogel, *supra* note 1, at 320.

> Therefore, in order to provide the greatest protection, a careful estate planning attorney should draft the protective letter to prevent beneficiaries from claiming that the attorney's advice was inadequate. The letter should not merely describe the client's choice; it should also clearly explain the negative ramifications of that choice. Indeed, because the purpose of the letter is to protect the attorney from a legal malpractice suit by beneficiaries as opposed to the client, the most effective protective letter should urge the client to adopt the estate plan that is most favorable to the beneficiaries—the potential plaintiffs. Thus, the most effective protective letter might read like a legal brief urging the client to adopt the estate plan most beneficial to the beneficiaries, regardless of the client's best interests.[587]

Professor Fogel believes that because most estate planning malpractice cases are settled—resulting in a reward to the plaintiff—and most malpractice actions are difficult to defend, malpractice liability "instills in [the attorney] a well-founded fear of liability, regardless of negligence."[588] Professor Fogel believes that the specter of malpractice liability influences attorneys to avoid certain types of estate plans in favor of others that are "safer" from a malpractice point of view.[589] This liability thus impairs the duty that attorneys owe to their clients, can prevent some clients from finding affordable representation, and increases attorney fees for estate planning.[590]

Professor Fogel does not advocate a return to strict privity. He recognizes the advantages of allowing a cause of action in many cases.[591] Professor Fogel believes that if beneficiaries did not have a cause of action, attorneys would be immune from liability in many cases, a "manifestly unjust" result.[592] Leaving injured beneficiaries without a remedy would violate the basic tort principle of allocating

587. *Id.* at 320-21.
588. *See id.* at 323.
589. *See id.*
590. *See id.* at 323-24.
591. *See id.* at 325.
592. *See* Fogel, *supra* note 1, at 308.

the loss to the negligent party, the party that could have prevented the loss with the least cost.[593] He does not advocate recognition of the Florida-Iowa rule,[594] but he often approves of the results achieved under it because he recognizes that the rule confuses the will with the attorney-client contract.[595]

Professor Fogel concludes that courts should dismiss beneficiaries' suits for malpractice against estate planning attorneys unless the beneficiary can prove that the attorney was negligent by clear and convincing evidence.[596] Moreover, Professor Fogel believes that early dismissal of most complaints is important, and his standard encourages that end.[597]

Professor Fogel's analysis makes a significant contribution to the discussion of malpractice cases. He provides an astute and extensive statement of the reasons for rejecting strict privity and correctly rejects the Florida-Iowa rule.[598] His recognition that the imposition of malpractice liability has complicated estate planning is certainly correct. Ultimately, however, both his analysis and his remedy neither explain the cases nor satisfy the competing considerations involved.

First, he uses the federal estate tax provisions involving the applicable exclusion amount (unified credit) to illustrate the conflict of interest between testators and beneficiaries.[599] Yet, such "bypass trust" planning has been part of estate planning for many years.[600] Surely, estate planning attorneys are familiar with any conflict of interest tax planning may cause. Moreover, there is no evidence that

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593. *See id.* at 310-11.

594. The Florida-Iowa rule only holds estate planning attorneys liable to beneficiaries if the attorney's negligence thwarted the testator's intent. *See id.*; *supra* note 56.

595. *See* Fogel, *supra* note 1, at 326, 329.

596. *See id.* at 328.

597. *See id.* at 327. Professor Fogel believes that allowing early dismissal of most estate planning cases should minimize the harm that the conflict of interest causes to the attorney-client relationship because parties settle most of these cases. *See id.* Several courts have adopted Professor Fogel's test. *See, e.g.*, Pivnick v. Beck, 741 A.2d 655, 662 (N.J. Super. Ct. App. Div. 1999); Rogers v. Regnante, 736 N.E.2d 391, 395 (Mass. App. Ct. 2000).

598. *See* Begleiter, *Attorney Malpractice*, *supra* note 3, at 198-200.

599. *See* Fogel, *supra* note 1, at 312-16.

600. *See* Begleiter, *Attorney Malpractice*, *supra* note 3, at 241. Indeed, bypass trust planning was involved in *Bucquet v. Livingston*, 129 Cal. Rptr. 514 (Cal. Ct. App. 1976), which was decided more than 25 years ago.

estate planners recommend optimal use of the applicable exclusion amount because of fear of malpractice liability. Indeed, if estate planning is the process of transferring a client's wealth to those persons he wishes at the least possible tax cost, clients benefit from consideration of tax planning schemes because, with proper tax planning, more property ends up with the beneficiaries and less with the government. Although the will beneficiaries reap the benefit of tax planning, the client wants the beneficiaries to gain under the will.

Second, and more fundamentally, it is questionable whether the conflicts to which Professor Fogel refers exist. This is not to criticize Professor Fogel; he was not doing an empirical study and made no claim that he could quantify the extent of the problem. Professor Fogel merely suggested that the problem existed. He observed that:

> Imposing a duty on the attorney to the beneficiaries effectively makes beneficiaries silent parties to every meeting between attorney and client. From the malpractice point of view, the attorney is urged to represent the interests of beneficiaries to the exclusion of the interests of the client. *One hopes that an attorney gives primary importance to the relationship with, and the duty owed to, the client.* However, the legal malpractice structure encourages the opposite stance.[601]

Simply raising the problem and speculating that it may exist does not make it reality. Although protective letters have become more common and more detailed in recent years, that fact does not indicate that the attorney's primary duty to the client is being compromised. The cause and effect relationship is far from established. Remember, plaintiffs in malpractice actions have the burden of proof on the issue of whether the attorney was negligent.

Indeed, existing indications imply that the factors that Professor Fogel cites have neither interfered with nor compromised the attorney's primary duty to his or her client. If the problem were as severe as Professor Fogel believes, courts would universally accept

601. Fogel, *supra* note 1, at 324-25 (emphasis added) (footnote omitted).

Professor Fogel's theory, given judicial sensitivity to ethical violations.[602] However, neither courts nor commentators universally accept the conflict-of-interest explanation of duty.[603] Even if disagreement in the malpractice area existed, the dangers of imposing a duty on the drafting and planning attorney to the beneficiaries, in combination with the ethics rules, would prevent conflicts of interest from compromising attorneys' duties to their clients. However, a recent ABA Ethics Committee Formal Opinion appears to go in the opposite direction.[604] The ABA Ethics Committee considered whether a lawyer should draft a will for a person whom the lawyer has never met, when his client, a potential beneficiary under the will, asks him to do so.[605] If Professor Fogel's thesis is correct, such a beneficiary could influence the attorney to recommend a plan that favors the beneficiary rather than the client and might subject the attorney to malpractice liability. Therefore, one might have expected the ABA Ethics Committee to have prohibited attorneys from drafting such wills. With certain cautions, however, the Opinion states that a lawyer may draft such a will without a conflict of interest.[606] Surely, if the potential for malpractice was as serious as Professor Fogel thought, writing the will would be impermissible.

Lastly, most plaintiffs probably cannot meet the clear and convincing evidence that Professor Fogel requires solely on the face of the complaint. Very often, discovery reveals the facts of the relationship with the testator. How can a plaintiff establish an attorney's negligence by clear and convincing evidence at the threshold of an action, except in the most obvious cases? Moreover,

602. Indeed, the existence of conflicts of interest has led several courts to deny summary judgment for an attorney in malpractice cases. *See, e.g.*, Donahue v. Shughurt, Thompson & Kilroy, 900 S.W.2d 624, 630 (Mo. 1995) (en banc); Simon v. Wilson, 684 N.E.2d 791, 802 (Ill. App. Ct. 1997); Jenkins v. Wheeler, 316 S.E.2d 354, 358-59 (N.C. Ct. App. 1984); Johnson v. Sandler, Balkin, Hellman & Weinstein, P.C., 958 S.W.2d 42, 54 (Mo. Ct. App. 1997).

603. *See supra* Part III.C; *see also* Blair v. Ing, 21 P.3d 452 (Haw. 2001).

604. ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 02-428 (2002), *reported in* U.S.L.W. 2236 (Nov. 9, 2002).

605. *Id.* The lawyer's client, and potential beneficiary, is one of several nephews and nieces of the client, who are the client's nearest relatives. *Id.*

606. *Id.* The Opinion requires that testator's informed consent be obtained if the potential beneficiary agrees to pay the lawyer's fee. *Id.* The Opinion also advises the lawyer to explain to the niece that the uncle is the client and the lawyer would be required to protect the uncle's confidences. *Id.* Additionally, the attorney should make sure the testator is aware that he also represents the niece. *Id.*

Noble v. Bruce, the case Professor Fogel uses to demonstrate the superiority of his new rule, would have almost certainly resulted in a judgment in favor of the attorney under current law.[607] Professor Fogel states that the defendant attorney in *Noble* advised the testators about bypass trusts and the clients rejected them because the clients wanted the testator's surviving spouse to have unrestricted use of the estate's assets after the first spouse died.[608] If the plaintiff had not contradicted this assertion, the court would have entered judgment in favor of the attorney despite the plaintiff's counterarguments.[609] The examination also reveals that the defendant attorney claimed that his clients failed to inform him of $400,000 of their assets, thus lowering their aggregate assets below the federal estate tax threshold.[610] If not contradicted, under current case law, this assertion would have also resulted in a judgment in favor of the attorney.[611]

In short, while Professor Fogel's thesis has appeal, it fails to reflect existing case law, rests on an undemonstrated assumption, presents difficult problems for deserving plaintiffs in malpractice cases, and does not offer a reliable basis to predict the outcome of cases. Nevertheless, Professor Fogel's test would deserve serious consideration if there was nothing else available.

607. *See* Noble v. Bruce, 709 A.2d 1264 (Md. 1998).

608. *See* Fogel, *supra* note 1, at 317-18 (citing Brief for Appellee at 30, Noble v. Bruce, 709 A.2d 1264 (Md. 1998)).

609. The plaintiffs in *Noble* asserted that the attorney gave his client inadequate advice about bypass trusts, and that any properly advised client would have used this device in the client's estate plan. *See Noble*, 709 A.2d at 1267-68; *see also, e.g.*, Barner v. Sheldon, 678 A.2d 767, 768 (1995) (holding that where a disclaimer by the beneficiaries would have resulted in additional property going to the wife, even though the testator wished to leave the wife only the minimum necessary under the statute, the attorney had no duty to advise the beneficiaries of the tax consequences of a disclaimer); Lovett v. Lovett, 593 A.2d 382 (N.J. Super. Ct. Ch. Div. 1991) (holding that where the testator wanted a simple will, and the attorney advised him of the tax ramifications, no duty existed to do tax research or to explain the details of the difference between the testator's former complex will and the simple will).

610. Fogel, *supra* note 1, at 319 (citing Brief for Appellee at 4-6, 12-13, Noble v. Bruce, 709 A.2d 1264 (Md. 1998)).

611. The plaintiffs claimed that the attorney had a duty to confirm the client's assets. *See* Fogel, *supra* note 1, at 319 (citing Reply Brief for Appellants at 19, Noble v. Bruce, 709 A.2d 1264 (Md. 1998)). In *Leavenworth v. Mathes*, 661 A.2d 632 (Conn. App. Ct. 1995), the court held that there was no duty to verify a client's statement of assets. *See id.* at 634.

V. THE TEST FOR COMPLICATED MALPRACTICE CASES: ALLEGATIONS CONTAINING EVIDENCE OF TESTATOR'S INTENT— THE SECRET TO SURVIVAL

A. The Development of the Rule: An Ace That I Can Keep

In recent cases, courts have begun to develop a rule in response to the trend previously traced in this Article that appears to limit the liability of attorneys in complicated malpractice cases. The developing rule is simple. To survive a motion to dismiss, a plaintiff must provide evidence that the testator intended the plaintiff to take under the will or trust at issue.[612] Thus, courts will dismiss a complaint unless the plaintiff offers evidence, preferably in written form, that the attorney failed to achieve the testator's intention to benefit the plaintiff.[613] This rule builds on the early defective-execution malpractice cases.[614] The courts in early cases almost universally rejected privity and held that beneficiaries of an invalid will could bring a malpractice action.[615] Once the courts decided not to retain strict privity, the decisions became easy because the testator's intent to benefit the beneficiary was apparent in the provisions of the invalid will.[616] Because privity was the primary issue and the testator's intent was so obvious, the courts did not focus on the proof requirements.[617] The recent cases have thus had to develop a rule to fill this gap.

The earliest recent case in the development of this rule is *Zikorus v. Wood*.[618] In 1985, the testator executed a will giving the plaintiff a bequest of $100,000.[619] In a 1986 revised will, the bequest was subject to reduction by any taxable gifts that the testator might have made during his lifetime.[620] In a 1989 will, the bequest remained

612. *See* Tetrault v. Mahoney, Hawkes & Goldings, 681 N.E.2d 1189, 1194 (Mass. 1997).
613. *See id.*
614. *See* Begleiter, *Attorney Malpractice*, *supra* note 3, at 196-98, 218-19.
615. *See id.*
616. *See id.* The early cases generally involved wills that were invalid because of some problem satisfying the execution requirements. *See id.* at 218.
617. *See id.*
618. 14 Fid. Rep. 2d 364 (Pa. Common Pleas. 1994).
619. *See id.* at 364.
620. *See id.*

subject to the lifetime taxable gifts but the testator increased the amount of the bequest to $200,000.[621] At his death, the plaintiff's lifetime gifts had completely used his unified credit, which rendered void the bequest to the plaintiff.[622] The evidence at trial demonstrated the testator's increasing intent to avoid taxes, but no documentary evidence was available as to the terms of the contract between the testator and the attorney for preparation of the will.[623] The court affirmed the jury's verdict in favor of the defendant and summarized the evidence as follows:

> [The] plaintiff provided no direct evidence of the terms of a contract between decedent and [the attorney] which directed defendant to draft an unconditional bequest favoring [the plaintiff]. While there was some circumstantial evidence which arguably could suggest such an intent on behalf of decedent, there was also substantial evidence of the testator's intent to maximize tax benefits to his estate which would leave [the plaintiff] in the position of a contingent beneficiary. Of course there was also [the attorney's] direct testimony that the will was drafted to [a]ffect the testator's wishes. Given the conflicting nature of the evidence that [sic] can be no basis for setting aside the jury's verdict as contrary to the weight of the evidence.[624]

The report of this case is not widely available, and because the court did not discuss the issue in terms of formulating a general rule in light of other cases, *Zikorus* did not receive much attention. This case is significant, however, because the 1985 will, where the bequest to the plaintiff was unconditional, allowed the case to go before the jury.[625]

The first widely reported case advancing the requirement of allegations of the testator's intent based on written evidence was

621. *See id.* at 365.
622. *See id.*
623. *See id.*
624. *See Zikorus*, 14 Fid. Rep. 2d at 372.
625. *See id.* at 365.

Tetrault v. Mahoney, Hawkes & Goldings.[626] The plaintiffs, blood relatives of the testator, sued the attorney who drafted the testator's will, deed, and trust at the behest of the testator's stepson without first consulting with the testator.[627] The will transferred the testator's residence, which was the major asset of his estate, to the testator and his wife of 27 years as tenants by the entirety.[628] The plaintiffs alleged that the law firm owed the blood relatives, as intended beneficiaries, a duty of care to ascertain the extent of the testator's assets and to advise the testator that, under the developed plan, his child, grandchild, and sisters would receive nothing.[629] The court held that the plaintiffs had neither submitted documents nor any other evidence showing that the testator's intention was different from the will and estate plan, noting:

> [The law firm] submitted affidavits from both the wife and the stepson in which they averred that the stepson was acting in accordance with the testator's intentions when he had [the law firm] draft the deed and will and that the testator intended his wife to receive the marital residence. In response[,] the plaintiffs have produced nothing to contest these affidavits with respect to the testator's intent. The will, the deed, and the trust document do not support their claims. Indeed, the materials submitted by the plaintiffs support the conclusion that the residence was previously in the testator's name only and another home was in the wife's name only. It is also undisputed that shortly before his death, the testator's wife of twenty-seven years asked the testator to transfer their joint residence to them both, as tenants by the entirety. There is no suggestion, however, in any of the summary judgment submissions that the testator told any of the plaintiffs that his residence would be left to the testator's daughter,

626. 681 N.E.2d 1189, 1197 (Mass. 1997). *See supra* notes 113 to 119 and accompanying text.

627. *See Tetrault*, 681 N.E.2d at 1195.

628. *See id.* at 1193. There were a number of changes in the will over the course of its drafting. The major beneficiaries were the testator's wife and granddaughter, with an income interest in a trust for the testator's daughter and 5% of the residue to each of the testator's two sisters. *See id.*

629. *See id.* at 1193-94. This situation occurred because the real estate and the testator's artwork were not placed in a revocable trust before the testator died, which left the trust largely unfunded. *See id.* at 1193.

> granddaughter, or sisters, nor is there any indication regarding how the plaintiffs would make a showing that the testator intended to make some disposition of his property contrary to that expressed in the instruments. Thus on the one hand we have a properly executed deed granting a survivorship interest in the marital home to a long-term spouse, coupled with uncontested affidavits that this disposition was in accord with the testator's intent and that the spouse had contributed approximately 37% of the original purchase price. *On the other hand we have the mere assertion by the party with the burden of proof that the testator would have made some other disposition of the property (we know not what) if he had been told by his lawyers that the house was his principal asset.* In these circumstances the defendants have sufficiently demonstrated by materials unmet by countervailing materials that the plaintiffs have no reasonable expectation of proving their case.[630]

The court's decision was based on the lack of evidence supporting the plaintiffs' charges, as compared with the affidavits of the wife and stepson that supported the attorney's actions.[631] To survive the summary judgment motion, the court required proof that the testator's intent would have been different had the lawyer told him that the house was his principal asset.[632] Given the lack of such evidence, the court upheld summary judgment in favor of the law firm.[633]

In 1999, a Florida court decided a surprising case that supports this rule. The surprising aspect about *Hare v. Miller, Canfield, Paddock & Stone*[634] was not that a malpractice claim survived an attorney's motion to dismiss, but that the District Court of Appeals in Florida decided the case.[635] This Article subsequently discusses the Florida-Iowa rule, which denies beneficiaries a cause of action unless the

630. *Id.* at 1194 (citation and footnote omitted) (emphasis added). The court noted its disapproval of the lawyers' conduct in drafting a will without meeting with the client, an action which the court characterized as "poor professional practice." *See id.*

631. *See id.*

632. *See id.*

633. *See id.* at 1197.

634. 743 So. 2d 551 (Fla. Dist. Ct. App. 1999).

635. *See id.* at 552.

testator's intent, as expressed in the will, is violated.[636] In *Hare*, the plaintiff was the testator's grandson and the beneficiary of his trust.[637] The trust was originally for the benefit of the testator's wife and daughter and then his two living grandchildren.[638] The plaintiff alleged that, in 1983, the testator hired the defendant attorneys to amend the trust so that, at his death, his daughter's share would continue in trust for her during her lifetime and would then pass to the plaintiff and his sister (or the survivor) after the daughter's death.[639] However, this amendment provided a separate trust for the daughter and separate trusts for the grandchildren, which were payable to them at age 30.[640] The trust also provided each grandchild with the power to assign his or her interest by will if the grandchild died prior to receiving the trust and to the grandchild's estate if no assignment was made.[641] The attorney failed to include the survivorship clause in the amendment.[642] As a result, the plaintiff did not receive his sister's trust when she died even though her daughter predeceased her.[643] After settling with the sister's estate, the plaintiff sued the law firm for malpractice.[644] The court held that the plaintiff had standing because he was a beneficiary under the 1984 amendment:

> [The plaintiff's] second amended complaint contained allegations which relied solely on ambiguities and inconsistencies apparent on the face of the 1984 First Amendment including the lack of a survivorship clause and the termination of the grandchildren's trusts prior to the event which

636. *See infra* Part V.C; *see also* Begleiter, *Attorney Malpractice*, *supra* note 3, at 198-204.
637. *Hare*, 743 So. 2d at 552-53.
638. *See id.* at 552.
639. *See id.*
640. *See id.*
641. *See id.* If no assignment was made, the trust instrument gave the grandchild's estate the power to do so. *See id.*
642. *See Hare*, 743 So. 2d at 552-53.
643. *See id.*
644. *See id.*

> triggered a distribution of the daughter's trust assets into those trusts.[645]

Because the opinion is overly succinct and fails to explain the rationale of the court, one might ask how the *omission* of the survivorship clause could be apparent on the face of the amendment.[646] That the amendment omitted the clause is apparent, but that the testator intended to include the clause is not. The allegation in the complaint is the only source for that assertion. The court found that the original trust indenture did not include such a clause.[647] One can only surmise that the complaint included more than mere allegations of the testator's intent in executing the 1984 amendment.

If *Hare* was not sufficient, the case of *Passell v. Watts*[648] provides additional cause for doubting Florida's continued adherence to its rule. In *Passel*, the grantors created a trust that, upon their deaths, was payable to their son.[649] If the son predeceased the survivor of the grantors, 20% would go to each of the two plaintiffs and to a church and the remaining 40% would go to another party.[650] The survivor of the grantors had the absolute right to dispose of the trust assets.[651] Following the death of one of the grantors, the surviving grantor changed the beneficiaries by eliminating the grant to the church and increasing the 20% shares to 30%.[652] After his death, the church demanded and received its original 20% interest.[653] Citing *Hare*, the court held that an invalid amendment frustrated the surviving grantor's intent to delete the church as a beneficiary and to increase

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645. *See id.* at 553.

646. This is not particularly surprising in view of the prior Florida cases. *See* Begleiter, *Attorney Malpractice*, *supra* note 3, at 198-204.

647. *Hare*, 743 So. 2d at 552.

648. 794 So. 2d 651 (Fla. Dist. Ct. App. 2001). Also significant is that the Second District of the Florida Court of Appeals decided *Passell*, whereas the Fourth District decided *Hare*, thus making two districts favoring the liberalization of the Florida-Iowa rule. *See id.*; Hare v. Miller, Canfield, Paddock & Stone, 743 So. 2d 551 (Fla. Dist. Ct. App. 1999).

649. *See Passel*, 794 So. 2d at 652.

650. *See id.*

651. *See id.*

652. *See id.*

653. *See id.* The manner or proceeding by which this happened was not reflected in the proceedings.

the plaintiffs' share, which provided standing for the plaintiffs to sue the attorney.[654]

In one sense, *Passell* merely recognizes the basic invalid will case in which plaintiffs can sue because the amendment was invalid. In this case, however, there was no proof that the amendment was invalid. The court only said that "[b]y way of some process or proceeding which is not reflected in this record, the Church demanded and received its 20% interest provided in the original trust instrument."[655] If the amendment were actually invalid, then the case would be unremarkable. If the provisions of the trust were as stated in the case, however, one might have difficulty understanding how the amendment could have been invalid.[656] If the amendment was not invalid, the case becomes one of the testator's intent not being carried out, with the evidence only of the amendment. Thus, the case indicates that the court really only required evidence of the testator's intent in the complaint to permit a suit. Perhaps more significantly, the court distinguished the influential Florida case of *Lorraine v. Grover, Ciment, Weinstein & Stauber*[657] on the ground that, in *Lorraine*, the Florida Constitution prohibited the accomplishment of the testator's intent, whereas in *Passel*, the testator's intent could have been, but was not, accomplished.[658] The significance of the court's purported distinction is difficult to determine. In both cases, although the intent of the grantor or testator was clear, it was not fulfilled.[659] The reason that the testators' intent was not accomplished is significant but unclear.[660]

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654. *See Passell*, 794 So. 2d at 653.

655. *Id.* at 652.

656. According to the court, on the death of the first grantor (here the wife), the trust became irrevocable and unamendable, but the survivor had the absolute right to dispose of any or all of the assets "in any manner in which he or she determined to be in his or her best interests." *Id.* Unless the court ruled that this right required a distribution of the assets rather than a trust amendment, it is hard to see how the amendment could have been invalid. Because a termination of the trust and the creation of a new trust could have accomplished the purpose of the amendment, it is also difficult to see how the church received its interest. *See id.* at 653.

657. 467 So. 2d 315 (Fla. Dist. Ct. App. 1985); *see also* Begleiter, *Attorney Malpractice*, *supra* note 3, at 199-200 (discussing *Lorraine*).

658. *See Passell*, 794 So. 2d at 653.

659. *See id.*

660. One could argue that, because the Florida Constitution prohibited the accomplishment of the testator's objective in *Lorraine* and the testator did not indicate his intent to make a substitute gift if the accomplishment of his objective was impossible, the attorney in *Lorraine* was not negligent. *See*

Courts in other recent cases have implied that they accept a rule requiring only that the plaintiff present written evidence of the testator's true intent to survive a summary judgment motion. In *Rogers v. Regnante*,[661] the testator, who had children from his first marriage, remarried.[662] A written premarital agreement provided that the property of each spouse would remain separate and pass to that party's descendants, except for a life estate in the marital home.[663] The testator's later wills progressively changed the life estate in his home to an annuity of $12,000 a year with the power to appoint the remainder in the annuity to the wife (the 1979 will), to a pourover trust with a marital deduction unified credit inter vivos trust (the 1980 will), to the income from the credit shelter trust in addition to as much corpus as the trustee deemed appropriate (the 1984 will).[664] The children of the testator's first marriage sued the attorney who drafted the 1980 and 1984 wills, alleging that the testator intended to leave all of his property to them.[665] The children relied both on the testator's statement that he would leave all of his property to them and on a handwritten note from 1982.[666] While the court took the note seriously, it upheld summary judgment in favor of the attorney based on the fact that the testator had executed a will with different provisions two years later.[667] The court stated:

> As to several of the supposed indicia of [the testator's] intent to leave all to his children—the antenuptial agreement, the separate

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Lorraine, 467 So. 2d at 317. In *Passell*, the grantor's intent could have presumably been accomplished. *See Passell*, 749 So. 2d at 653. This argument is quite weak and is no more persuasive today than when it was written. *See Lorraine*, 467 So. 2d at 319 (Pearson, J., dissenting).

661. 736 N.E.2d 391 (Mass. App. Ct. 2000); *see supra* notes 108 to 112 and accompanying text.

662. *See Rogers*, 736 N.E.2d at 391.

663. *See id.*

664. *See id.* at 392-93.

665. *See id.* at 392.

666. The note to the attorney stated:

> I wish to change a part of my last will, as follows—Under the title of *personal property* I possess at the time of my death, automobile, clothing, etc., now left to my wife, Thelma, I wish changed so that the above *personal property* will go to my four children along with the rest of my estate.

Id. (emphasis in original).

667. *See id.* at 395.

> marital finances, and [the testator's] various statements to his children—there is no evidence that [the attorney] was ever made aware of such things. On the other hand, [the attorney] was aware of [the testator's] 1979 will, his 1980 estate plan, the 1982 note, and the 1984 estate plan. In the main, these documents contradict the plaintiffs' position. . . . The only document possibly supporting the plaintiffs was the 1982 note from [the testator] calling for his personal property to go to his children "along with the rest of [his] estate." The phrase is puzzling; but, even if given maximum value as an expression of [the testator's] intent in 1982 to pass his entire estate to his children, his later execution of the 1984 estate plan must be taken as a conclusive change in that intent. Alternatively, the plaintiffs contend that the 1982 note proves that [the testator] did not understand that the documents he had executed in 1980—and by implication (through their similarity) those in 1984—did not leave everything to his children as he truly intended. Thus, they argue, [the attorney] committed malpractice in 1984 because he must have failed to explain the effect of the plan and ensure it was consistent with [the testator's] true intent. The urged inferences, however, are too tenuous for a rational trier of fact to consider the 1982 note "strong, clear, and convincing" evidence of an intent made known to [the attorney] by [the testator] in 1984 that only his children should benefit from his estate.[668]

In *Babcock v. Malone*,[669] the defendant attorney drafted a will making the testator's nine nieces and nephews beneficiaries.[670] By the time that the attorney prepared the draft, the testator's health had worsened; he died prior to executing the new will.[671] The court noted that this case was stronger than previous cases, but held that Florida precedent required that beneficiaries be mentioned in the previous

668. *Id.* (citation and footnote omitted).
669. 760 So. 2d 1056 (Fla. Dist. Ct. App. 2000).
670. *See id.* at 1056. These nieces and nephews were not beneficiaries under the prior will. *See id.*
671. *See id.*

will.[672] Given Florida's limited exception to privity, one could interpret the statement of the court on the significance of the draft as supporting the new rule.[673]

Although it involved the question of whether an attorney must investigate heirs, *Leak-Gilbert v. Fahle*[674] supports the theory offered in this Article that when a court hears some significant evidence of a testator's intent, it will impose a duty on the attorney.[675] *Fahle* held that the attorney had no duty to confirm information regarding the testator's heirs provided to the attorney by the client.[676] However, the court noted:

> We agree with the beneficiaries that when an attorney is hired to prepare a will, the attorney's obligation is to: 1) inquire into the client's heirs at law; 2) offer a proper explanation; 3) advise the client as to what is meant by heirs at law; 4) explain the significance of including all heirs at law in a will; and 5) prepare a will according to the client's directions.[677]

This statement represents an expanded concept of an attorney's duties as compared to previous cases and indicates the recent willingness of courts to impose affirmative duties on attorneys.[678]

Courts are still reluctant to clearly state a requirement that plaintiffs produce some written evidence supporting their allegations in the malpractice complaint in order to avoid summary judgment.[679] But the cases discussed in this Part certainly indicate a trend toward that position.[680] Additionally, such a requirement strikes a

672. *See id.* at 1057.
673. *See id.* at 1056.
674. 55 P.3d 1054 (Okla. 2002).
675. *See id.* at 1054.
676. *See id.* at 1056.
677. *Id.* at 1058. The problem in *Fahle* arose from the fact that the testator neglected to tell the attorney about his four additional grandchildren who were pretermitted heirs under the Oklahoma statute. *See id.* at 1056.
678. *See supra* Part II.B.
679. *See, e.g.*, Henkel v. Winn, 550 S.E.2d 577, 579-80 (S.C. Ct. App. 2001).
680. *Estate of Leonard v. Swift*, 656 N.W.2d 132 (Iowa 2003), suggests that the reluctance may be ending. In *Leonard*, the court recognized a cause of action by a ward against an attorney for a conservator "*upon proof of and to the extent*" that three requirements were met. *Id.* at 146. This is not to say that all recent cases are consistent with the new rule. *See, e.g., Henkel*, 550 S.E.2d at 579-80

compromise between the unfairness of the strict privity position and the potential conflict-of-interest problems in recognizing a broad cause of action in favor of beneficiaries.[681] Moreover, this rule harmonizes most of the complicated malpractice cases previously discussed in this Article, as the next section demonstrates.

B. The Decided Cases Under the New Rule: Knowing What to Throw Away, Knowing What to Keep

The rule proposed in the previous section is valid only to the extent that it explains and harmonizes the decided cases.[682] Courts appear to have decided these cases haphazardly, with no unifying factor.[683] However, a closer examination reveals that many, if not most, of these cases comport with the rule proposed in this Article.[684]

The earliest legal malpractice cases in estate planning were the "botched execution" cases.[685] These cases involve such errors as the use of interested witnesses, an insufficient number of witnesses, the failure of a witness to execute the will, and similar errors.[686] These cases are easy for courts to decide because both the negligence and the evidence of testator's intent appear on the failed will itself.

The next, and in some ways the most difficult, set of cases is the "failure to effectuate testamentary intent cases."[687] The common thread of these cases is that the plaintiffs alleged that the will or trust drafted by the attorney failed to effectuate the testator's desire to

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(upholding summary judgment for the attorneys on the ground that the plaintiff relied on extrinsic evidence, which the court held that the plaintiff could not use to establish testamentary intent); Rogers v. Regnante, 736 N.E.2d 391, 394 (Mass. App. Ct. 2000) (requiring clear and persuasive evidence to prove malpractice); Beauchamp v. Kemmeter, 625 N.W.2d 297, 299 (Wis. Ct. App. 2000) (requiring that a plaintiff must be named in an executed or an unexecuted will to have standing to bring a malpractice action, thus excluding other written evidence).

681. *See* Fogel, *supra* note 1, at 308-20.

682. The proposed rule is that malpractice actions in estate planning cases should survive a motion to dismiss or a motion for summary judgment only to the extent that the complaint and accompanying documents present allegations and evidence (preferably written) of the testator's intention to benefit the plaintiff. *See supra* Part IV.A.

683. *See supra* Part III.

684. Obviously, those states retaining a strict privity rule do not follow the rule that this Article proposes. For a list of those states, see *supra* note 34.

685. *See* Begleiter, *Attorney Malpractice*, *supra* note 3, at 218-19 (discussing cases).

686. *See id.*

687. *See supra* Part II.C.

benefit plaintiff.[688] The leading case in this category is *Ventura County Humane Society v. Holloway*.[689] What is both significant and often overlooked about this case is that the court dismissed the complaint for the failure of the petitioner to allege that the testator intended to benefit the plaintiff organization.[690] This result clearly supports the thesis presented in this Article. The court required allegations and evidence of the testator's intent to benefit the plaintiff.[691] Lacking even the allegation of such intent, dismissal of the action was the correct result.

Interestingly, courts have dismissed almost every other case of this type for the same reason: the failure of the plaintiff to allege or offer any written indication of testator's intent.[692] Far from being contrary to those cases rejecting privity, these decisions merely represent the failure to allege or sufficiently demonstrate by the papers supporting the complaint any indication that the testator intended to benefit the complainant. As such, these cases are entirely consistent with the rule offered in this Article.

The error of law cases[693] are fairly easy to decide and are generally consistent with this proposed rule. In effect, these cases are exactly the same as the botched execution cases except that to discover the problem, courts must be made aware of the relevant statute, cases, or constitutional provision. Since the error is obvious once the court

688. *See id.*

689. 115 Cal. Rptr. 464 (Cal. Ct. App. 1974).

690. *See Ventura*, 115 Cal. Rptr. at 469-70.

691. *See id.*

692. Hiemstra v. Huston, 91 Cal. Rptr. 269, 272 (Cal. Ct. App. 1970) (finding for the defendant because the plaintiff failed to allege that the testator intended to benefit the plaintiff); Marker v. Greenberg, 313 N.W.2d 4, 5-6 (Minn. 1981) (finding that the failure to allege that the decedent was concerned about estate taxes or the holding of property in joint tenancy was contrary to the testator's intent); Hale v. Groce, 744 P.2d 1289, 1293 (Or. 1987) (noting that whether the contract was sufficient to create a duty might depend on memoranda or affidavits); Miller v. Mooney, 725 N.E.2d 545, 548 (Mass. 2000) (finding that the evidence showed that the testator's wishes were different from those alleged by the plaintiff and that no written evidence existed of the testator's, as opposed to her children's, desire to change the will); Rogers v. Regnante, 736 N.E.2d 391, 395 (Mass. App. Ct. 2000) (finding that the only written evidence supporting the complaint was a short and cryptic handwritten note of the testator, as opposed to several later wills that did not support the plaintiff's position); Tetrault v. Mahoney, Hawkes & Goldings, 681 N.E.2d 1189, 1194 (Mass. 1997) (finding that affidavits supported the attorney's position, while only oral allegations of the plaintiff supported the plaintiff's position); *cf.* Simpson v. Calivas, 650 A.2d 318, 323 (N.H. 1994) (holding for the plaintiff when the plaintiff produced the attorney's notes on estate planning conferences with the decedent that supported his position).

693. *See supra* Part II.D.

determines which law to apply, these actions should survive a motion to dismiss or a motion for summary judgment. The cases in this area, with two exceptions from Florida, support this proposed rule.[694]

Somewhat surprisingly, the Rule Against Perpetuities cases are generally inconsistent with the proposed rule. In theory, these cases are no different from the cases where ignorant or negligent drafting violates a legal rule and causes the failure of a bequest.[695] Indeed, these cases are really no different than the botched execution cases in that the testator's intent is clear on the face of the will. Perhaps this result occurred because the seminal case concerning privity involved a perpetuities violation, and that court did not wish to go too far, too fast.[696] Later developments indicate that *Lucas* was incorrect in this regard and that a Rule Against Perpetuities violation should clearly result in malpractice liability.[697]

The "duty to review wills cases,"[698] the "duty to investigate assets and heirs cases," and the "duty to research the law cases"[699] are consistent with the proposed rule. None of these cases indicate a client's desire of continuous monitoring or investigating beyond the information provided by the client, which the rule proposed in this Article would require for liability.[700]

The "duty to advise cases"[701] are similar to the failure to effectuate testamentary intent cases in that these two categories appear to be alternate contentions of disappointed beneficiaries, with the former a more sophisticated form of the latter. For example, a plaintiff asserts that an attorney failed to draft the testator's will to benefit the plaintiff in accord with what the plaintiff alleges was the testator's

694. *See* Espinosa v. Sparber, Shevin, Shapo, Rosen & Hilbronner, 612 So. 2d 1378 (Fla. 1993); Lorraine v. Grove, Ciment, Weinstein & Stauber, 467 So. 2d 315 (Fla. Dist. Ct. App. 1985). The Florida-Iowa rule affects these cases. *See infra* Part V.C.

695. *See supra* Part II.E (discussing cases).

696. *See* Lucas v. Hamm, 364 P.2d 685, 690-92 (Cal. 1961) (en banc).

697. A later California case, *Wright v. Williams*, 121 Cal. Rptr. 194 (Cal. Ct. App. 1975), severely questioned this aspect of *Lucas*. *See id.* at 199 n.2. A more recent case, *Temple Hoyne Buell Foundation v. Holland & Hart*, 851 P.2d 192 (Colo. Ct. App. 1992), represents the more modern view that the attorney should be held responsible in such cases. *See id.* at 198.

698. *See supra* Part II.F.

699. *See supra* Part II.G.

700. *See supra* Parts II.F & II.G.

701. *See supra* Part II.H.

intent. Met with the argument that no evidence exists of the testator's desire to benefit the plaintiff to the extent alleged, the plaintiff then asserts that, had the attorney advised the testator correctly, the testator would have desired to benefit the plaintiff. This situation most commonly arises in tax planning, where one plaintiff actually argued that a properly advised testator would always use the technique for the benefit of the plaintiff.[702] The non-tax cases in this area generally hold for the plaintiffs, and more than enough evidence of the testator's wishes generally exists. Thus, these cases are consistent with the proposed rule. Those cases holding in favor of attorneys generally do so because the plaintiffs failed to allege that the advice would have affected the testator's intent.

The "status cases" are too few to characterize.[703] One case held (probably correctly) for the plaintiff primarily on the ground that the attorney for the guardian had a duty to the ward based on a congruence of interest.[704] The other quite correctly held for the attorney because of the lack of any evidence that the testator had any interest in benefiting the plaintiff heirs.[705]

The cases where the attorney had other clients in the testator's family who were affected by the will are consistent with the proposed rule in that more than sufficient evidence of testator's intent is usually available.[706] Courts will then either allow or dismiss the action in a manner that is consistent with the available evidence, as they should.

The "estate planning cases" represents the largest category by far, and the cases are uniformly consistent with the rule.[707] This consistency is probably due to the fact that a testator's desire for tax planning is usually evident from the form of the will.[708] In those

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702. *See supra* Part II.K (discussing tax cases).
703. *See supra* Part II.I.
704. *See In re* Guardianship of Karan, 38 P.3d 396, 400 (Wash. Ct. App. 2002).
705. *See* Francis v. Piper, 597 N.W.2d 922, 926 (Minn. Ct. App. 1999).
706. *See supra* Part II.J.
707. *See supra* Part II.K.
708. For example, a marital deduction unified credit will, which a formula clause normally introduces and which would not be used unless the testator was interested in tax planning, is a rather obvious indication of a tax-saving intent on the face of the will.

cases decided for the attorney, written evidence usually exists that the testator's desire was not to save taxes.[709]

The "lack of capacity cases" are perhaps the most difficult for a plaintiff to prove because of the difficulty of producing evidence that would impose a duty on the attorney.[710] The definition of incapacity is so fluid and the ethical rules in the area are so vague[711] that whatever rule courts develop on malpractice will not be helpful until the difficulties in determining lack of capacity are resolved.

The "delay cases" are perhaps the best evidence of the rule.[712] In each of these cases, uncontradicted evidence existed that either the will was a draft that was subject to further review by the client,[713] or that the client did not view the matter with urgency, which justified the attorney's delay.[714] The one case with the facts most likely to survive a motion for summary judgment was dismissed under the Florida-Iowa rule.[715]

The "cases on limiting representation" are consistent with the rule, as the evidence of the limits on representation are often in writing (for example, engagement letters) and are frequently confirmed by the client.[716] The presence of such evidence usually justifies summary judgment in favor of the attorney.

The "miscellaneous cases" are few in number,[717] but one of them, *Stangland v. Brock*,[718] deserves comment. *Stangland* involved an attorney in a firm drafting a will containing a bequest of real estate, the major asset of testator's estate, and another attorney in the firm selling the real estate for the testator three years later.[719] Neither

709. *See, e.g.*, Barner v. Sheldon, 678 A.2d 767 (N.J. Super. Ct. App. Div. 1995).
710. *See supra* Part II.L.
711. *See id.*
712. *See supra* Part II.M.
713. *See* Krawczyk v. Stingle, 543 A.2d 733, 734 (Conn. 1988); Charia v. Hulse, 619 So. 2d 1099, 1102 (La. Ct. App. 1993); Radovich v. Locke-Paddon, 41 Cal. Rptr. 2d 573, 575 (Cal. Ct. App. 1995).
714. *See* Gregg v. Lindsay, 649 A.2d 935, 940 (Pa. Super. Ct. 1994).
715. *See* Babcock v. Malone, 760 So. 2d 1056 (Fla. Dist. Ct. App. 2001); *infra* Part V.C. *Sisson v. Jankowski*, 805 A.2d 1265 (N.H. 2000), does not fit neatly into this analysis perhaps because of its posture as the answer to a certified question.
716. *See supra* Part II.N.
717. *See supra* Part II.O.
718. 747 P.2d 464 (Wash. 1987).
719. *See id.* at 466.

attorney consulted the other.[720] The attorney who sold the real estate did not review the testator's will, and the attorney who drafted the will did not notice the sale of the real estate on the firm's new matter list.[721] The court held that the attorneys and the law firm had no duty to the plaintiff.[722]

Under the rule that this Article proposes, the result in *Stangland* might have been different because, although the proposed rule would hold that the law firm had a duty to plaintiff, the court would still have to decide whether the attorneys were negligent. The evidence of the testator's intent to benefit the plaintiff was absolutely clear on the face of the will.[723] The will was available in the firm's files, and a member of the firm knew about the will.[724] Surely, this is sufficient evidence to survive a motion for summary judgment. The dissent, which argued that the plaintiff should have been allowed to present his case to the jury, would prevail under the rule proposed in this Article.

Most of the cases discussed in section A of this Part are consistent with the new rule.[725] Several of these cases might need rethinking because an unnecessarily high standard of proof was required or because of a reluctance to admit extrinsic evidence.[726]

A review of the cases shows that the rule suggested herein is consistent with and explains most of the results in the malpractice cases involving complicated legal errors in estate planning. In those

720. *See id.*
721. *See id.*
722. *See id.* at 470.
723. *See id.*
724. *See Strangland*, 747 P.2d at 470.
725. *See supra* Part V.A.
726. *See, e.g.*, Henkel v. Winn, 550 S.E.2d 577, 579 (S.C. Ct. App. 2001) (refusing to admit extrinsic evidence); Rogers v. Regnante, 736 N.E.2d 391, 394 (Mass. Ct. App. 2000) (finding clear and convincing evidence); Beauchamp v. Kemmeter, 625 N.W.2d 297, 299 (Wis. Ct. App. 2000) (requiring the plaintiff to be named in an executed or an unexecuted will). The *Kemmeter* requirement is similar to the Florida-Iowa rule. *See infra* Part V.C. The refusal to admit extrinsic evidence reflects a confusion between cases involving the interpretation of wills and malpractice actions involving the contracts between lawyers and clients. *See* Begleiter, *Attorney Malpractice*, *supra* note 3, at 201-04. *Henkel* does not state the evidence that the plaintiff relied on, so we cannot determine how the case would be resolved under the proposed rule. *Rogers* would be decided in the same way under the new rule, as the written evidence for the plaintiff was scant and unclear. *Kemmeter* might well have been decided differently under the new rule, however, as there was at least some written evidence presented of the testator's intent. The court's description of the evidence is too succinct to judge whether, under the proposed rule, the result would have been different.

cases where the results are inconsistent with the proposed rule, this Article's discussion demonstrates that the results under the proposed rule are better reasoned than the decisions.

The cases decided under the Florida-Iowa rule remain. The proposed rule would be even more desirable if it could reconcile these cases with the cases in other jurisdictions. This Article suggests that the Florida-Iowa rule was an early attempt to limit liability in a manner consistent with the policies stated in *Lucas v. Hamm.*[727] Because of the paucity of cases decided at the time that the rule developed, the courts in these two states overreacted to the possibility of increased attorney liability. Furthermore, this Article demonstrates that, with a fairly small change in the formulation of the rule, already foreshadowed in at least one Iowa case and several recent Florida cases, the Florida-Iowa rule could be made consistent with the proposed rule.

C. The Florida-Iowa Rule: Know When to Hold 'Em, Know When to Fold 'Em

Under the Florida-Iowa rule, privity of contract will bar a beneficiary's malpractice action unless the beneficiary can show that the attorney's negligence frustrated the testator's intent as expressed on the face of the will.[728] In Florida, attorney liability is further limited by disallowing the introduction of extrinsic evidence to argue that the will did not correctly or adequately express the testator's intent.[729] This Article previously criticized these limitations as inappropriate because a malpractice action concerns the attorney-client contract rather than the testator's will.[730] The purpose of this section is to ascertain whether that position was overstated because of the problem that those courts sought to prevent; perhaps those very

727. 364 P.2d 685 (1961).

728. *See* Espinosa v. Sparber, Shevin, Shapo, Rosen & Heilbronner, 612 So. 2d 1378, 1380 (Fla. 1993); DeMaris v. Asti, 426 So. 2d 1153, 1154 (Fl. Dist. Ct. App. 1983); Schreiner v. Scoville, 410 N.W.2d 679, 683 (Iowa 1987).

729. *See Espinosa*, 612 So. 2d at 1380; *accord* Mieras v. DeBona, 550 N.W.2d 202, 208 (Mich. 1996); *Kemmeter*, 625 N.W.2d at 302 (holding that the plaintiff does not have standing in a negligence action unless the plaintiff is named on the face of the will; other extrinsic evidence was not admitted).

730. *See* Begleiter, *Attorney Malpractice*, *supra* note 3, at 201-04.

courts that so limited the exception to privity have eroded that position. Lastly, this section explores whether a reformulation of the requirement would be consistent with the position that this Article advocates.

Courts may have formulated the Florida-Iowa rule out of fear of opening the floodgates to malpractice actions and as a reaction to the widespread adoption of the balancing test of *Lucas*.[731] A reformulation that requires a beneficiary to present evidence that a will did not carry out the testator's intent to survive a motion to dismiss, that drops the requirement that the testator's intent be "expressed on the face of the will," and that allows the admission of written evidence would make the Florida-Iowa rule consistent with the rule proposed herein.[732] This Article will show that the courts of Florida and Iowa have moved toward such an approach and that many of the malpractice cases previously decided by these courts would be decided in the same way under the new rule.

McAbee v. Edwards[733] was the first case to consider the privity exception for will drafting in Florida. The court in *McAbee* adopted the *Lucas* factors by upholding the complaint of the beneficiary daughter whose mother requested a will leaving all the property to her daughter.[734] In *McAbee*, the testator married after the execution of her will, and the drafting attorney told her that the marriage did not necessitate any changes to the will.[735] Although the testator's daughter was named the beneficiary, the opinion said nothing about whether a beneficiary's proof of the testator's intent is limited to the face of the will.[736] Florida courts first proposed that evidentiary limitation in *DeMaris v. Asti*.[737] Florida courts first explained the limitation two years later in the leading case of *Lorraine v. Grover*,

731. *See id.* at 196-98.
732. *Id.*
733. 340 So. 2d 1167 (Fla. Dist. Ct. App. 1976).
734. *See id.* at 1168-70. The court primarily relied on *Heyer v. Flaig*, 449 P.2d 161 (Cal. 1969), a post-*Lucas* case with facts more similar to those in *Lucas* than those in *McAbee*. *See id.* at 1168.
735. *See id.*
736. *See id.* at 1170.
737. DeMaris v. Asti, 426 So. 2d 1153, 1154 (Fla. Dist. Ct. App. 1983). Interestingly, the facts are not given in the short opinion.

Ciment, Weinstein & Stauber.[738] *Lorraine* involved a bequest of a life estate in the testator's residence to her mother that was ineffective because the residence was the testator's homestead, which the Florida Constitution and statutes required to pass to testator's children.[739] The court limited the admissible evidence of the testator's intent to the face of the will in order to protect against fraudulent claims.[740] The basis of the Florida rule is to protect attorneys from an onslaught of claims by disappointed beneficiaries and to prevent an undue burden on the legal profession.[741]

Recent developments in Florida appear to reflect judicial dissatisfaction with the limits of the *Espinosa* rule. Florida courts have softened it in some cases. First, and most significantly, two recent cases have held that as long as a plaintiff is also a will beneficiary, a complaint alleging that the plaintiff is entitled to a greater share of the testator's estate will survive a summary judgment motion. In *Hare v. Miller, Canfield, Paddock & Stone*,[742] a named beneficiary of an inter vivos trust sued the drafting attorney for failure to include two provisions in the trust.[743] The case came within Florida's exception to the privity requirement. The court noted:

> [The plaintiff] is a beneficiary under the 1984 First Amendment. [The plaintiff's] second amended complaint alleged the settlor's intent as expressed in the 1984 First Amendment was frustrated by the negligence of the settlor's attorney. [The plaintiff's] second amended complaint contained allegations which relied solely on ambiguities and inconsistencies apparent on the face of the 1984 First Amendment including the lack of a survivorship

738. 467 So. 2d 315 (Fla. Dist. Ct. App. 1985).
739. *See id.* at 316.
740. *See id.*
741. The Supreme Court of Florida, in approving the *Lorraine* rule in 1993, has explained that the admission of extrinsic evidence would greatly expand the risk of incorrect interpretations of testamentary intent and "the tendency to manufacture false evidence that cannot be rebutted due to the unavailability of the testator." *See Espinosa*, 612 So. 2d at 1380. This is really just another way of expressing the court's desire to protect attorneys.
742. 743 So. 2d 551 (Fla. Dist. Ct. App. 2001).
743. The plaintiff alleged that the attorney negligently failed to include a survivorship clause for the testator's grandchildren and a clause providing that the corpus of a trust for his mother be added to his trust when his mother's trust terminated. *See id.* at 552-53.

> clause and the termination of the grandchildren's trusts prior to the event which triggered a distribution of the daughter's trust assets into those trusts. Thus, [the plaintiff's] second amended complaint alleged the settlor's intent as expressed in the 1984 First Amendment was frustrated by the negligence of the settlor's attorney, without relying on a comparison of the 1980 Trust to the 1984 First Amendment as [the plaintiff's] amended complaint had done.[744]

Despite the court's reference to inconsistencies and ambiguities, the 1984 amendment clearly included no survivorship clause and did give a testamentary power of appointment to a grandchild who died prior to the full distribution of his trust.[745] Thus, the trust provisions could have been employed to distribute all the trust property. The court held that the trust beneficiary had standing to sue the drafting attorney for malpractice because he alleged entitlement to an increased share of the estate and could use extrinsic evidence to prove this allegation.[746] Similarly, in *Passell v. Watts*,[747] a Florida court held that trust beneficiaries had standing to sue a testator's attorney because they had sufficient evidence to show that the attorney's negligence had frustrated the grantor's intent.[748] In distinguishing *Lorraine*, the court noted:

> The testator's intent in *Lorraine* was a devise of homestead which could not be accomplished. In this case, [the testator's] intent was the devise of money, if any remained, which could have been accomplished by simply removing the assets from the trust and devising them by a will or using them to fund a new trust.[749]

744. *Id.* at 553.
745. *See id.* at 552.
746. *See id.*
747. 794 So. 2d 651(Fla. Dist. Ct. App. 2001).
748. *See id.* at 653.
749. *Id.*

While the court's reasoning distinguishing *Lorraine* was no doubt necessary given the reasoning of the Florida Supreme Court in *Espinosa*, it is far from convincing. Indeed, *Passell* adopted the position of the dissent in *Lorraine* by implying that an attorney may be liable in malpractice if the attorney could have accomplished what the testator wanted by using a different method than the one that the attorney used.[750] In *Babcock v. Malone*,[751] an attorney prepared a new will for a testator that made his nine nieces and nephews beneficiaries.[752] Although the attorney prepared the will, the testator's health had deteriorated too far for him to execute it.[753] The court noted that the facts were stronger than those in *Espinosa* but felt itself bound by the Florida Supreme Court's rule.[754] The court's language in *Babcock* leaves the impression that the court would have liked to uphold the complaint.

One could wonder whether courts should apply the same standing requirements to beneficiaries that argue that a testator intended the beneficiary to have a greater share of the estate, as courts apply to non-beneficiaries who have a will draft naming the non-beneficiary a beneficiary. It appears that the Florida District Courts of Appeals are becoming increasingly dissatisfied with the limited privity exception and are moving closer to adopting a rule that would allow beneficiaries' actions if the beneficiaries have sufficient extrinsic evidence of the testators intent.

Moreover, the proposed rule would lead to different results in very few cases. Applying the proposed rule to the facts in *McAbee* would lead to the same outcome because the plaintiff was a beneficiary under the will, as were the beneficiaries in *Hare* and *Passell*. In *DeMaris*, the facts are unknown, but assuming it was a disappointed legatee case with the allegations based on statements only, the result would be the same. The proposed rule would lead to a different result than the court reached in *Lorraine* because the will clearly expressed

750. *See id.* at 653; *see also Lorraine*, 467 So. 2d 315, 319-20 (Pearson, J., dissenting) (stating that the difference between these two situations had no legal significance).

751. 760 So. 2d 1056 (Fl. Dist. Ct. App. 2000).

752. *Babcock*, 760 So. 2d at 1056.

753. *See id.*

754. *See id.* at 1057.

the testator's intent to benefit the mother, and the attorney could have satisfied the testator's intent by informing the beneficiary of the problem.[755] Sufficient evidence to determine whether the court in *Espinosa* would have reached a different result does not exist because the court did not discuss the evidence presented with the complaint in any detail.[756] In *Babcock v. Malone*, the result would likely have been different.[757]

The result of many cases in Florida would not be different. More importantly, the rationale that led to the Florida rule would remain. The requirement of written evidence of the testator's intent would limit attorneys' responsibility to beneficiaries. Modifying the Florida-Iowa rule to allow limited extrinsic evidence, and eliminating the requirement of proof of the violation of testator's intent as expressed in the will, would eliminate the need for artificial distinctions and relieve the Florida courts of having to defend the heavily criticized rule.[758]

In *Schreiner v. Scoville*, the Supreme Court of Iowa adopted the Florida-Iowa rule and illustrated that court's willingness to stretch the rule to accomplish the correct result.[759] The case involved a will, a

755. Perhaps the attorney could have satisfied testator's intent by an inter vivos transfer. *See Lorraine*, 467 So. 2d at 317.

756. *Espinosa* involved a pretermitted heir who was not named in a codicil executed after her birth. *See Espinosa*, 586 So. 2d at 1378 n.1. The evidence proffered was that the attorney prepared a new will including the plaintiff as a beneficiary which was not executed due to an unrelated dispute between testator and the attorney. *See id.* If the new will was rejected by the testator, even for an unrelated reason, the result would likely be the same.

757. In *Arnold v. Carmichael*, 524 So. 2d 464 (Fla. Dist. Ct. App. 1988), a District Court of Appeals of Florida case decided prior to *Espinosa*, the court permitted an action by the intended residuary beneficiaries when the attorney mistakenly omitted a residuary clause from the will. *See id.* at 465. If decided under the proposed rule, this case would probably have had the same result. *See id.* The case is generally thought to have been rejected in Florida by *Espinosa*. *See* Kinney v. Shinholser, 663 So. 2d 643, 645 (Fla. Dist. Ct. App. 1995) (involving another estate planning case where the attorney gave the income beneficiary a general power of appointment over a "B" trust, thus losing the benefit of the unified credit, which likely would have resulted in a decision contrary to the *Espinosa* court's dismissal of the action).

758. *See Lorraine*, 467 So. 2d at 319 (Pearson, J., dissenting); *Espinosa*, 586 So. 2d at 1225 (Levy, J., specially concurring).

759. *See* Schreiner v. Scoville, 410 N.W.2d 679 (Iowa 1987); *see, e.g.*, Cameron v. Montgomery, 225 N.W.2d 154 (Iowa 1975) (ruling on an action by executors against the attorney for the estate); Schmitz v. Crotty, 528 N.W.2d 112 (Iowa 1995) (ruling on an action by beneficiaries of the estate against the attorney for the executor, action upheld); Dudden v. Goodman, 543 N.W.2d 624 (Iowa Ct. App. 1995) (ruling on a failure of the attorney to claim marital deduction; action upheld); Ruden v. Jenk, 543 N.W.2d 605 (Iowa 1996) (ruling on an action by the administrators against the attorney for the estate for erroneous advice as to legal validity of an assessment); Holsapple v. McGrath, 521 N.W.2d 711 (Iowa 1994) (application to nontestamentary instruments).

codicil, and the sale of real estate specifically bequeathed in the will, which caused the bequest of the real estate to adeem, all done within an eight month period and prepared by the same attorney.[760] After the court discussed the privity problem, it adopted a rule that "a cause of action will ordinarily arise only when as a direct result of the lawyer's professional negligence the testator's intent as expressed in the testamentary instruments is frustrated in whole or in part and the beneficiary's interest in the estate is either lost, diminished, or unrealized."[761] The court further stated that a lawyer would not normally be liable in a case with similar facts because the sale of the real estate was a separate transaction[762] and that "[n]o lawyer reasonably can be expected to keep track of the provisions in the wills of his or her clients, nor the effect on those instruments caused by changes in the client's affairs."[763] However, the court reversed a dismissal of the action, ruling that the proof could show that the will, codicil, and partition were interrelated because they were all done within a short period of time, dealt with a specific piece of property, and were all done by the same attorney.[764] The court's decision clearly allowed extrinsic evidence, like the partition action and the sale, to influence the result that it reached. A subsequent Iowa case held that an "intended" beneficiary who was not named in the testamentary instrument could not sue the attorney.[765] Given the apparent willingness of the court in *Schreiner* to stretch the doctrine, and its denial of summary judgment to an attorney who drafted a defective deed based on written evidence, it is not a great leap to the rule proposed in this Article.[766] *Schreiner* would have the same result.

760. *See Schreiner*, 410 N.W.2d at 680. The facts are discussed in detail in Part II.O.
761. *Schreiner*, 410 N.W.2d at 683.
762. *See id.*
763. *See id.*
764. *See id.* at 684.
765. *See* Holsapple v. McGrath, 575 N.W.2d 518, 520 (Iowa 1998). However, the court adopted the contrary rule as to a deed, ruling that the attorney's billing statements and memoranda could show negligence and the plaintiff was entitled to his day in court on that evidence. *Id.*
766. *See id.*

CONCLUSION: SOMEWHERE IN THE DARKNESS, THE GAMBLER, HE BROKE EVEN

The last 15 years have witnessed a pause in the malpractice revolution. Concerns over the impact of the increase in both malpractice actions and liability on the legal profession, the potential conflicts of interest and the dilution of the attorney's duty to the client caused by the imposition of a duty on the lawyer to will beneficiaries, and the increasingly difficult legal questions raised by these actions have resulted in courts' dismissing actions against attorneys or upholding summary judgments for different reasons. The courts have developed a variety of rules (or exceptions to rules) in an attempt to strike the correct balance between just decisions for disappointed beneficiaries and protection of attorneys. Professor Bradley Fogel has attempted to analyze some of these decisions and has developed a rule requiring the presentation of clear and convincing evidence to avoid dismissal.[767] Despite the excellent work done by Professor Fogel in discussing the deficiencies of these cases and the ethical dilemma of estate planning attorneys, however, the decided cases do not support the weight that Professor Fogel assigns to the conflicts-of-interest problems. Moreover, giving *potential* conflicts of interest such importance appears to tip the scales too far in favor of attorneys without demonstrable proof that the possibility of malpractice litigation actually influences attorneys to change the plans that they recommend. In contrast, this Article shows evidence that the decided cases have gravitated toward a rule requiring beneficiaries in complicated legal malpractice actions to present or refer to written evidence—letters, unexecuted wills, attorney's notes, bills, etc.—in their complaints to survive a motion to dismiss or a motion for summary judgment. This Article shows that this rule explains most of the categories of decided cases. For those cases for which application of the rule would result in different holdings, such as violations of the Rule Against Perpetuities, this Article has shown

767. *See generally* Fogel, *supra* note 1.

that the result under the rule is more logical and better reflects the balancing of the interests involved than the decided cases. This rule can even explain the Florida-Iowa rule as a well-intentioned reaction to increasing malpractice liability, the effects of which were not understood by the adopting courts. This Article also shows that with a minor modification, and without changing the results of most of the decided cases, the Florida-Iowa rule can be consistent with the proposed rule.

A rule requiring written evidence that the will, plan, advice, or nontestamentary document at issue did not accomplish the testator's intention will clarify the reasoning of the courts in complicated estate planning legal malpractice cases, improve predictability, and better balance the competing considerations.