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ATTORNEY MALPRACTICE LIABILITY TO NON-CLIENTS IN WASHINGTON: IS THE NEW MODIFIED MULTI-FACTOR BALANCING TEST AN IMPROVEMENT?

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Abstract: Most jurisdictions recognize a cause of action for legal malpractice against a non-client only where the attorney-client relationship is formed to benefit a third-party non-client. This rule generally operates to preclude an attorney's potential liability to a client's adversary. Washington departed from the majority in 1992 in *Bohn v. Cody*, where the Washington Supreme Court found that an attorney did owe a duty to his client's adversary. Two years later, in *Trask v. Butler*, the supreme court modified *Bohn*'s test for determining attorney malpractice liability to third parties to conform Washington's law with the majority of jurisdictions. This Comment suggests that the modified test improves the standard for attorney liability by restricting the cause of action to exclude non-clients in an adversarial position to the attorney's client. However, it criticizes the application of the test for its over-inclusive, arbitrary, and impractical approach to the issue. The Comment argues that the test should analyze the intent of the attorney-client relationship factually, rather than as a matter of law, and should limit its threshold inquiry to whether there was an intent to benefit the non-client.

Over the past several decades, attorney liability for legal malpractice has gradually expanded.[1] In most jurisdictions, the traditional rule requiring strict privity[2] in negligence actions has given way, allowing non-clients to sue attorneys for legal malpractice.[3] Although attorney liability to non-client third parties for the negligent provision of legal services is not based on any single, consistent theory, liability generally has been confined to those whom the attorney and client intended to benefit through their relationship.[4]

In many jurisdictions, the predominant theory for determining whether an attorney owes a duty of care to a non-client is the California multi-

1. *See generally* 1 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 7 (3d ed. 1989); Charles W. Wolfram, *Modern Legal Ethics* § 5.6.4 (1986). This Comment addresses only to whom an attorney is liable for the negligent provision of legal services. It does not address liability that an attorney incurs through other legal theories.

2. Privity is "an identity of interest between persons, so that the interests of the one is measured by the same legal right as that of the other." *Ballentine's Law Dictionary* 996 (3d ed. 1969).

3. *See infra* part I.B–C.

4. Mallen & Smith, *supra* note 1, § 7.11, at 384–86. An attorney's liability for the breach of other duties, rather than the duty of care, is not limited to those whom the attorney and client intended to benefit. For example, when an attorney commits fraud, violates a rule of professional conduct, or breaches a duty to disclose, it is irrelevant whether there was an intent to benefit the person harmed.

factor balancing test.[5] Washington's theory evolved from this test.[6] When applying the California test, courts weigh six factors to determine if the attorney owed the non-client a duty.[7] Courts utilize the first factor, the extent to which the attorney-client relationship was intended to affect the non-client, as an initial inquiry.[8] While all six factors are balanced to determine liability, because the intent-to-affect factor is a threshold inquiry, a case will be dismissed if this first factor is not met.[9] Where the non-client is adverse to the client, however, courts generally will dismiss the case and not impose a duty to the adverse non-client, even if the intent-to-affect standard is met.[10]

In 1992, Washington broke from the majority of states in *Bohn v. Cody*.[11] Applying the California multi-factor balancing test, the court held that a borrower's attorney owes a duty to his client's adversary, the lender.[12] Two years after *Bohn*, Washington adopted a modification of the California test in *Trask v. Butler*.[13] That case narrowed the test's

5. *Id.* § 7.11, at 382–84. *See also infra* part I.B.

6. Trask v. Butler, 123 Wash. 2d 835, 840–41, 872 P.2d 1080, 1083 (1994).

7. *See infra* text accompanying note 41.

8. Meighan v. Shore, 40 Cal. Rptr. 2d 744, 755 (Ct. App. 1995); Stangland v. Brock, 109 Wash. 2d 675, 680, 747 P.2d 464, 467 (1987).

9. *See, e.g., Trask*, 123 Wash. 2d at 845, 872 P.2d at 1085.

10. *See, e.g.*, Harrington v. Pailthorp, 67 Wash. App. 901, 841 P.2d 1258 (1992), *review denied*, 121 Wash. 2d 1018, 854 P.2d 41 (1993); Bowman v. John Doe Two, 104 Wash. 2d 181, 704 P.2d 140 (1985). The principle that an attorney ordinarily owes no duty of reasonable care to a client's adversary is widely accepted. *See, e.g.*, Fox v. Pollack, 226 Cal. Rptr. 532, 533 (Ct. App. 1986) (holding that in real estate transactions attorneys owe no duty to unrepresented adverse parties); Page v. Frazier, 445 N.E.2d 148, 153 (Mass. 1983) (holding bank's attorney not liable to mortgagors for negligent title examination as attorney was hired by bank and potentially conflicting duties precluded liability to non-client); Friedman v. Dozorc, 312 N.W.2d 585, 589 (Mich. 1981) (stating that because attorney owes no actionable duty to adverse parties, attorney owed no duty to physician sued by client). *See also* Mallen & Smith, *supra* note 1, § 7.11, at 386–88; Joan Teshima, Annotation, *Attorney's Liability, to One Other Than Immediate Client, for Negligence in Connection with Legal Duties*, 61 A.L.R. 4th 615 § 9[a] (1988), and cases listed therein. Other courts that have extended liability to a client's adversary have done so in specific circumstances. For example, courts have been more liberal when the attorney issued an opinion letter or similar certification directly to or directed toward a non-client, Westport Bank & Trust Co. v. Corcoran, Mallin & Aresco, 605 A.2d 862 (Conn. 1992) (buyer's attorney issued negligent title opinion directly to lender); when the attorney held himself out as representing the non-client, Nelson v. Nationwide Mortgage Corp., 659 F. Supp. 611 (D.D.C. 1987) (attorney allegedly agreed to provide legal interpretation of agreement after holding himself out as "the" settlement attorney); and when the attorney volunteered his services, Simmerson v. Banks, 254 S.E.2d 716 (Ga. App. Ct. 1979) (buyer's attorney promised seller to file financial statement but failed to properly do so). In *Bohn*, none of these circumstances existed.

11. 119 Wash. 2d 357, 832 P.2d 71 (1992).

12. *Id.* at 367, 832 P.2d at 76–77. *But see supra* note 10.

13. 123 Wash. 2d at 842–43, 872 P.2d at 1084.

threshold inquiry to a determination of whether an intent to benefit existed.[14] In *Trask*, the court held that an attorney did not owe a duty to the beneficiary of an estate where he gave negligent legal advice to his client, the personal representative of the estate.[15] Although the modification was a positive step in limiting malpractice liability to situations where the attorney and client intended to benefit a non-client, many questions regarding the modified test remain unanswered. Without judicial clarification, attorneys will be reluctant to represent clients where potential liability is uncertain.

This Comment argues that although Washington's modified multi-factor balancing test has greatly improved the standard for establishing attorney duties to non-clients, it has been applied in a way that does not deter attorney negligence and which needlessly complicates the initial inquiry. Part I describes the expansion of attorney duties to third parties. Part II discusses the development of attorney liability to non-clients in Washington. Finally, part III analyzes recent improvements in Washington's modified multi-factor balancing test as well as its current inadequacies. Specifically, it explains how the modified test emphasizes the intent-to-benefit inquiry and, in the process, limits liability to adverse non-clients. However, it criticizes the court for not applying a factual analysis when determining the intent of the relationship and for expanding the threshold inquiry.

I. DEVELOPMENT OF ATTORNEY DUTIES TO THIRD PARTIES

While privity was gradually forgotten in other areas of negligence law, not until the past few decades were courts willing to stray from the strict privity requirement in attorney malpractice suits.[16] Traditionally, an attorney-client relationship had to exist for an attorney to owe a duty of care.[17] At present courts apply a number of theories to impose attorney malpractice liability between an attorney and a non-client.[18] These theories include doctrines implicit in the California multi-factor

14. *Id.*

15. *Id.* at 845, 872 P.2d at 1085.

16. *See generally* Mallen & Smith, *supra* note 1, §§ 7.9, 7.11.

17. *Id.* § 7.4, at 364.

18. *See infra* part I.B–C.

balancing test, the tort of negligent misrepresentation, and third-party beneficiary liability.[19]

A. Traditional Strict Privity Bar to Third-Party Malpractice Liability

Once a prerequisite to all negligence actions, the strict privity rule dictates that without privity, there can be no duty owed to a third party.[20] Consequently, if no duty exists, there can be no breach and no cause of action for negligence.[21] It was thought that privity was necessary to avoid limitless liability.[22] However, to avoid harsh and arbitrary results, courts eventually abandoned the requirement of strict privity in negligence cases.[23] Nevertheless, in cases involving malpractice liability to third parties, privity has continued to be a controversial issue.

The U.S. Supreme Court first addressed the issue of attorney liability to third parties in *National Savings Bank v. Ward*.[24] In that case, an attorney overlooked a previously recorded deed in a title search for a client and, after the client defaulted, the client's bank tried to recover against the attorney.[25] The Court held that, absent fraud, collusion, or unusual circumstances, lack of privity between attorneys and third parties barred malpractice suits by non-clients.[26] It reiterated that the obligation of the attorney is to his client and not to a third party.[27]

While the privity requirement was first relaxed outside the legal profession, the same rationale was eventually applied in the area of attorney malpractice.[28] The first case to diminish the privity requirement in a negligence case involving the provision of professional services was *Glanzer v. Shepard*.[29] In *Glanzer*, the court imposed liability for misrepresentation on a public weigher who misstated the weight of beans while knowing and intending that the buyer would rely on the misstated

19. *Id.*

20. 74 Am. Jur. 2d *Torts* § 52 (1974).

21. *Id.* § 51.

22. Winterbottom v. Wright, 152 Eng. Rep. 402, 405 (Ex. 1842).

23. *See, e.g.*, MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916); Thomas v. Winchester, 6 N.Y. 397 (1852).

24. 100 U.S. 195 (1879).

25. *Id.* at 195–96.

26. *Id.* at 199–200.

27. *Id.*

28. *See, e.g.*, Guy v. Liederbach, 459 A.2d 744, 746 (Pa. 1983); Lucas v. Hamm, 364 P.2d 685, 687–88 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962).

29. 135 N.E. 275 (N.Y. 1922).

weight.[30] The court imposed liability because the purchaser's reliance on the defendant's representation was not only foreseeable but was the end and aim of the transaction.[31] The court distinguished *Ward* by noting that the attorney in that case did not intend to serve the lender but only the client-borrower.[32]

For over fifty years, *Glanzer* was as far as courts were willing to stray from privity requirements in the professional services context. In *Ultramares Corp. v. Touche, Niven & Co.*,[33] a lender was barred, due to lack of privity, from suing an accounting firm for injuries resulting from the lender's reliance on the firm's certification of the borrower's financial condition.[34] The *Ultramares* court distinguished *Glanzer* on grounds of foreseeability in that, unlike the bean weigher in *Glanzer*, the accountants did not know the specific person who would rely on their actions.[35] The court reasoned that extending liability to all third parties who might foreseeably rely on an audit would cause accountants to be liable in "an indeterminate amount for an indeterminate time to an indeterminate class."[36] Today, while strict privity no longer bars a non-client from bringing suit against an attorney, it still exists as a defense in a minority of jurisdictions.[37]

B. California Multi-Factor Balancing Test

California was the first state to extend an attorney's duties beyond the traditional confines of privity.[38] In *Biakanja v. Irving*,[39] the California Supreme Court held that a notary public who negligently drafted and organized the execution of a will owed a duty to the sole beneficiary of

30. *Id.* at 275–76.

31. *Id.*

32. *Id.* at 276.

33. 174 N.E. 441 (N.Y. 1931).

34. *Id.* at 442–43, 447.

35. *Id.* at 445–46. While the accountants understood the balance sheets would be shown to others in the course of business, the court found that the plaintiff was not specifically foreseeable to the accountants. *Id.* at 442–43.

36. *Id.* at 444.

37. New York still requires privity for negligence actions against attorneys. C.K. Indus. Corp. v. C.M. Indus. Corp., 623 N.Y.S.2d 410 (App. Div. 1995). *See also* Mallen & Smith, *supra* note 1, § 7.10, at 380–81; Douglas A. Cifu, *Expanding Legal Malpractice to Nonclient Third Parties—At What Cost?*, 23 Colum. J.L. & Soc. Probs. 1, 6 n.31 (1989).

38. For a thorough description of legal developments in California following its break from privity, see Meighan v. Shore, 40 Cal. Rptr. 2d 744 (Ct. App. 1995).

39. 320 P.2d 16 (Cal. 1958).

the will.[40] In reaching this conclusion, it applied a six part multi-factor balancing test which weighed the following factors:

> [1] the extent to which the transaction was intended to affect the plaintiff, [2] the foreseeability of harm to him, [3] the degree of certainty that the plaintiff suffered injury, [4] the closeness of the connection between the defendant's conduct and the injury suffered, [5] the moral blame attached to the defendant's conduct, and [6] the policy of preventing future harm.[41]

Three years later, the same court applied the reasoning of *Biakanja* to attorney malpractice in *Lucas v. Hamm*.[42] In *Lucas*, an attorney who prepared a will which violated the rule against perpetuities and restraints on alienation was found to have a duty to the beneficiaries of the will.[43] In applying the six-part test, the court, without discussion, eliminated the fifth factor, the "moral blame of the conduct," and added another which weighed the extent to which the profession would be unduly burdened by a finding of liability.[44]

The language of the test appears broad in that it extends potential liability to those who an attorney intends to affect.[45] Because an attorney's job is to affect others, whether clients or adverse parties, this test encompasses a large group of potential plaintiffs. Many courts have emphasized the intent of the relationship, thereby transforming it into a threshold inquiry. Unless this inquiry is satisfied, most courts will dismiss the case and not weigh the remaining five factors of the test.[46]

Despite the language of the test, however, courts have been reluctant to expand liability beyond intended beneficiaries.[47] With intent to benefit

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40. *Id.* at 17–19.

41. *Id.* at 19.

42. 364 P.2d 685 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962). This test determines only to whom an attorney owes a duty of care. Other tests must be applied to determine whether other duties are owed.

43. *Id.* at 687–90. The case held that the duty was not breached. *Id.* at 689–91

44. *Id.* at 687–88. *See also* Goldberg v. Frye, 266 Cal. Rptr. 483, 489 (Ct. App. 1990) (quoting Mallen & Smith, *supra* note 1, § 7.11, at 382).

45. *Lucas*, 364 P.2d at 687.

46. *See, e.g.*, Goodman v. Kennedy, 556 P.2d 737 (Cal. 1976); *Lucas*, 354 P.2d at 687–89; Meighan v. Shore, 40 Cal. Rptr. 2d 744, 754 (Ct. App. 1995).

47. Patrick E. Braun, Comment, *The* Pelham *Decision, Attorney Malpractice and Third Party Nonclient Recovery: The Rise and Fall of Privity*, 3 N. Ill. U. L. Rev. 357, 370–72 (1983); Cifu, *supra* note 37, at 9–10. There has been a trend in recent California cases which indicates that, in addition to the intended beneficiary analysis, foreseeability is another test which could lead to liability. However, there has been no such express holding. *See In re* Rexplore Inc. Sec. Litigation, 685 F. Supp. 1132, 1146 (N.D. Cal. 1988) (attorney may be liable to third parties who are intended

effectively established as the threshold factor, the number of potential plaintiffs is greatly limited. This is because an attorney does not intend to benefit all those he or she intends to affect.

For example, in *Goodman v. Kennedy*,[48] the California Supreme Court applied an intent-to-benefit standard when determining that an attorney did not owe a duty to a non-client.[49] In *Goodman*, the attorney incorrectly advised his client, a corporation, that it could issue its stock as dividends to officers and that the officers could sell the stock to third parties without jeopardizing the corporation's exemption from federal securities law registration.[50] The court found that although the attorney did intend to affect the ultimate purchasers of the stock, no duty existed because the purchasers were not the intended beneficiaries of the transaction.[51] It reasoned that an undue burden would be placed on the legal profession if liability were imposed on attorneys for negligent advice that adversely affected all those with whom their clients dealt.[52] According to the court, as attorneys became preoccupied with the possibility of limitless claims, the quality of legal services would diminish.[53] As a result of the disparities between the strict wording of the test and its application, courts applying the California multi-factor balancing test have been inconsistent in their reasoning: While purporting to apply an intent-to-affect test, these courts in fact apply an intent-to-benefit standard.

C. *Alternative Theories for Determining Third-Party Attorney Liability*

Although many jurisdictions have adopted the California test,[54] it has been widely criticized as over-inclusive, ad hoc, and inconsistent.[55] As an

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beneficiaries or who are otherwise "foreseeable" plaintiffs); St. Paul Title Co. v. Meier, 226 Cal. Rptr. 538, 539 (Ct. App. 1986) (attorney may be liable to foreseeable third parties for professional negligence if liability is consistent with public policy considerations).

48. 556 P.2d 737 (Cal. 1976).

49. *Id.* at 743.

50. *Id.* at 740.

51. *Id.* at 743. *Compare with* Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 128 Cal. Rptr. 901 (Ct. App. 1976) (holding that duty of disclosure, not duty of care, exists where attorney's advice is intended to be relied upon by plaintiff).

52. *Goodman*, 556 P.2d at 743.

53. *Id.*

54. Mallen & Smith, *supra* note 1, § 7.11, at 383 n.5 (listing jurisdictions adopting California test).

55. *See, e.g.*, Pelham v. Griesheimer, 440 N.E.2d 96, 99–101 (Ill. 1982); Guy v. Liederbach, 459 A.2d 744, 746–47, 750 (Pa. 1983).

alternative to the California test and the strict privity doctrine, some courts have applied a third-party beneficiary test.[56] Others have followed the tort of negligent misrepresentation as set out in the *Restatement of Torts*.[57]

Under the third-party beneficiary test, the predominant inquiry is whether the principal purpose of the attorney's retention was to provide legal services for the benefit of the non-client third-party.[58] Once a duty is established based on a third-party beneficiary theory, a cause of action may exist in either contract or tort.[59] When applying the third-party beneficiary test, courts have emphasized that no duty can be found in an adversarial setting. This is because, the attorney would owe a duty to the client as well as to those whose interests conflict with the client's interests.[60]

The tort of negligent misrepresentation imposes liability where one, in the course of his or her business, supplies false information to another who justifiably relies on that information and for whose benefit that information was intended to be supplied.[61] Negligent misrepresentation does not require privity.[62] Although the *Restatement* definition requires an intent to benefit in order to find a duty, some courts ignore this requirement.[63] Other courts hold that a duty arises where the purpose of the action was to influence the plaintiff and harm was foreseeable.[64] Although these interpretations impose broad liability, negligent

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56. For a general discussion of the third party beneficiary test and those courts applying such a test, see Mallen & Smith, *supra* note 1, § 7.11, at 384–85.

57. American Bar Association & The Bureau of National Affairs, Inc., 1 *ABA/BNA Lawyers' Manual on Professional Conduct* § 301:608 (1984 & Supp. 1990) [hereinafter 1 *ABA/BNA Lawyers' Manual*] (listing those courts which recognize the tort of negligent misrepresentation). *See Restatement (Second) of Torts* § 552 (1977).

58. Mallen & Smith, *supra* note 1, § 7.11, at 384 n.8.

59. *See, e.g.*, *Pelham*, 440 N.E.2d 96 (applying negligence standard after determining duty was owed to intended beneficiaries); *Guy*, 459 A.2d 744 (applying contract theory to determine whether plaintiff was intended beneficiary of attorney-client relationship).

60. *E.g.*, *Pelham*, 440 N.E.2d at 100; Flaherty v. Weinberg, 492 A.2d 618, 629 (Md. 1985) (requiring plaintiff to plead facts supporting an inference that no conflict actually existed).

61. *Restatement (Second) of Torts* § 552 (1977).

62. *Id.*

63. *E.g.*, Raymark Indus., Inc. v. Stemple, 714 F. Supp 460, 468 (D. Kan. 1988) (finding that negligent misrepresentation is "simply a 'lesser included' form of fraudulent misrepresentation" and thus there is no intent-to-benefit requirement).

64. *E.g.*, Home Budget Loans, Inc. v. Jacoby & Meyers Law Offices, 255 Cal. Rptr. 483, 486 (Ct. App. 1989).

misrepresentation is just beginning to be interpreted, and it is not yet clear what impact this theory will have on attorney liability.[65]

II. DEVELOPMENT OF WASHINGTON'S STANDARD: THE MODIFIED MULTI-FACTOR TEST

Washington originally acknowledged attorney duties to non-clients under both the California test and the third-party beneficiary test.[66] Washington courts vacillated between the intent-to-benefit and intent-to-affect standards. There also was no consensus as to whether a duty could exist between an attorney and a client's adversary.[67] To eliminate confusion, the Washington Supreme Court in *Trask v. Butler*[68] combined the California test and the third-party beneficiary test.[69] It created the "modified" multi-factor balancing test.[70] This test is identical to the California test except that "intent to benefit" was substituted for the original "intent to affect" factor.[71]

Washington first addressed the privity requirement in a cause of action for legal malpractice by a non-client in *Bowman v. John Doe Two*.[72] The court held that an attorney does not owe a duty of care to his client's adversary.[73] Bowman had sued the attorney who represented her son in his petition for alternative residential placement away from his mother.[74] She alleged that the attorney failed to adequately investigate the facts of the case and misrepresented facts to the court.[75] Although the court stated that the allegations may have been true, it applied both the California multi-factor test and the third-party beneficiary theory and concluded that the attorney owed no duty to Bowman.[76] The court noted two

65. 1 *ABA/BNA Lawyers' Manual*, *supra* note 57, § 301:608.

66. Stangland v. Brock, 109 Wash. 2d 675, 680–81, 747 P.2d 464, 467–68 (1987).

67. For example, in *Bohn v. Cody*, the court looked solely to whether there was an intent to affect the non-client. 119 Wash. 2d 357, 365, 832 P.2d 71, 76 (1992). On the other hand, in *Stangland*, despite the intent-to-affect language of the test, the court analyzed whether there was an intent to benefit. 109 Wash. 2d at 681, 747 P.2d at 467–68.

68. 123 Wash. 2d 835, 872 P.2d 1080 (1994).

69. *Id.* at 842–43, 872 P.2d at 1084.

70. *Id.*

71. *Id.*

72. 104 Wash. 2d 181, 187, 704 P.2d 140, 143 (1985).

73. *Id.* at 188, 704 P.2d at 144.

74. *Id.* at 182–84, 704 P.2d at 140–41.

75. *Id.* at 183–85, 704 P.2d at 141–42.

76. *Id.* at 182, 187–88, 704 P.2d at 140, 144. The court listed only the five factors detailed in Lucas v. Hamm, 364 P.2d 685, 687 (Cal. 1961), *cert. denied*, 368 U.S. 987 (1962). 104 Wash. 2d at

reasons for its decision. First, it was concerned that imposing a duty to a client's adversary would interfere with the undivided loyalties an attorney owes to a client.[77] Second, it was concerned that imposing a duty would diminish the attorney's ability to achieve the most advantageous results for the client.[78]

After *Bowman*, however, the court dramatically expanded attorney liability in *Bohn v. Cody*,[79] establishing that an attorney can owe a duty of care to a client's adversary.[80] The court applied the California test and focused on whether there was an intent to affect the non-client.[81] In *Bohn*, the plaintiff lent money to her daughter, who was represented by the defendant.[82] The loan was secured by the daughter's property. During the preparation of the loan, Bohn, who was unrepresented, met with the defendant and asked him whether she would have absolute security in the property as well as a "free and clear" deed.[83] The defendant stated that he represented only his client in the matter, but affirmed that the deed would be free and clear of any liens resulting from the prior owner.[84] However, tax liens incurred by his client encumbered the property and, after the loan transaction was concluded, the IRS sold the house.[85] After Bohn lost her interest in the property, she sued the attorney on the grounds that he breached a duty to her by not advising her that the tax liens existed.[86]

Applying an intent-to-affect standard, the court denied the defendant's summary judgment motion, holding that the defendant may have owed a duty of care to Bohn.[87] The court stated that under the extreme facts of the case, it would not be unduly burdensome on the legal profession to

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182, 187–88, 704 P.2d at 140, 144. However, as in California, subsequent Washington court decisions included the sixth factor. *See* Stangland v. Brock, 109 Wash. 2d 675, 680, 747 P.2d 464, 467 (1987).

77. *Bowman*, 104 Wash. 2d at 189, 704 P.2d at 144.

78. *Id.*

79. 119 Wash. 2d 357, 832 P.2d 71 (1992).

80. *Id.* at 367, 832 P.2d at 76. For a discussion of the adversarial nature of this relationship, see *infra* notes 115–16 and accompanying text.

81. 119 Wash. 2d at 365–67, 832 P.2d at 75–77. Although the court recognized that liability was possible under both the third-party beneficiary and multi-factor tests, it only analyzed the facts under the latter. *Id.*

82. *Id.* at 360, 832 P.2d at 73.

83. *Id.*

84. *Id.*

85. *Id.* at 361–62, 832 P.2d at 74. It is unclear from the opinion whether the attorney actually knew of the tax liens or even whether the court felt he should have known of the tax liens.

86. *Id.*

87. *Id.* at 367, 832 P.2d at 77.

impose a duty on the attorney. According to the court, the defendant should have advised Bohn to seek independent counsel.[88] It further stated that once the defendant started to give an opinion to Bohn, he had a duty to take reasonable steps to "tell the whole story."[89]

Relying on the broad duty imposed in *Bohn*, the plaintiff in *Harrington v. Pailthorp*[90] brought suit for malpractice against the attorney who represented his former wife in custody modification proceedings.[91] However, the court was unwilling to extend attorney duties to litigation adversaries.[92] The plaintiff alleged, among other things, that the attorney had failed to adequately investigate facts and law and had ignored conflicts of interests between his former wife and their children.[93] Finding that the plaintiff and his wife's interests were adversarial, the court found no duty under either the California test or the third-party beneficiary test.[94]

In keeping with the more restrictive holdings of *Bowman* and *Harrington*, Washington deviated from its original tests by creating the modified multi-factor balancing test in *Trask v. Butler*.[95] This new test is identical to the California test except that the key inquiry is whether a plaintiff was an intended beneficiary of the attorney-client relationship.[96] The court cautioned against holding an attorney liable to a non-client

88. *Id.*

89. *Id.* Under the facts in *Bohn*, Cody may have owed a duty to disclose under § 550 of the *Restatement of Torts* or may have fraudulently concealed information under § 551. Under these theories, an independent duty, separate from the duty of care, is imposed on individuals to disclose certain information. A Washington court has never explicitly found an attorney culpable under these two theories. If the court was imposing such a duty rather than a duty of care, applying the multi-factor balancing test was inappropriate because a duty to disclose is owed independently whether or not the defendant is an attorney and whether or not an intent to affect or benefit existed. Washington should clarify that the multi-factor balancing test applies only to finding a duty of care on the part of the attorney and that when finding other duties other theories should be recognized and applied. The court did not discuss its departure from *Bowman* and today *Bohn* must be viewed as a limited holding due to its facts and the court's use of an intent-to-affect standard. *See infra* notes 112–16 and accompanying text.

90. 67 Wash. App. 901, 841 P.2d 1258 (1992), *review denied*, 121 Wash. 2d 1018, 854 P.2d 41 (1993).

91. *Id.* at 904, 841 P.2d at 1259.

92. *Id.* at 907–08, 841 P.2d at 1261.

93. *Id.* at 904, 841 P.2d at 1260.

94. *Id.* at 910, 841 P.2d at 1263.

95. 123 Wash. 2d 835, 872 P.2d 1080 (1994).

96. *Id.* at 842, 872 P.2d at 1084.

where doing so would detract from the attorney's ethical obligations to the client, or where there is a risk of divided loyalties.[97]

In *Trask*, the beneficiary of an estate sued the attorney retained by the personal representative of the estate.[98] Trask, the beneficiary, alleged that Butler, the attorney, negligently advised his client to file a quiet title action against Trask, to sell the estate's property at disadvantageous terms, and to contest a probate proceeding seeking to remove his client as personal representative.[99] Finding that an attorney who represents the personal representative of an estate does not owe a duty to the beneficiaries of that estate, the court upheld summary judgment for the attorney.[100] The court declared as a matter of law that Trask was merely an incidental beneficiary of the relationship between the attorney and the personal representative.[101] Because the intent-to-benefit threshold was not met, the case was dismissed.[102]

By modifying its test, Washington is the first state employing the multi-factor balancing test to explicitly admit that it is applying an intent-to-benefit standard.[103] As discussed below, this new standard properly limits the number of potential non-clients who can sue an attorney for a breach of the duty of care.[104]

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97. *Id.* at 844, 872 P.2d at 1085.

98. *Id.* at 837, 872 P.2d at 1081.

99. *Id.* at 839, 872 P.2d at 1082.

100. This was in contrast to the position the court had taken previously. *See In re* Estate of Larson, 103 Wash. 2d 517, 521, 694 P.2d 1051, 1054 (1985) (holding that because the personal representative employs an attorney to assist in proper administration of the estate, the fiduciary duties of the attorney also run to the heirs); Kelly v. Foster, 62 Wash. App. 150, 152, 813 P.2d 598, 599 (reviewing trial court decisions regarding legal malpractice claim by beneficiary against attorney of executor without reviewing whether duty existed), *review denied*, 118 Wash. 2d 1001, 822 P.2d 287 (1991). *Cf. Washington Rules of Professional Conduct* Rule 1.6 (1994) [hereinafter *RPC*] ("A lawyer *may* reveal to the tribunal . . . any breach of fiduciary responsibility by a client who is a . . . personal representative . . . .") (emphasis added).

101. *Trask*, 123 Wash. 2d at 845, 872 P.2d at 1086. *See infra* part III.B.1 (discussing the need to look to factual specifics of each relationship to determine whether an intent to benefit the beneficiary existed within the attorney-client relationship).

102. *Trask*, 123 Wash. 2d at 845, 872 P.2d at 1086.

103. *Compare supra* note 47 and accompanying text.

104. *See infra* part III.A.

III. WASHINGTON'S MODIFIED TEST ESTABLISHES AN INAPPROPRIATE THRESHOLD INQUIRY

The *Trask v. Butler* modification of the multi-factor balancing test created a dramatic change in Washington attorney malpractice law.[105] As the courts' focus shifted from intent to affect to intent to benefit, attorneys' duties to non-clients narrowed. The modification of the multi-factor balancing test was a positive step because it limited attorney liability to non-adversarial third parties.

However, many problems still exist with the modified test. Until these problems are solved, attorneys will not only continue to face unpredictable and unjustified liability, but attorney malpractice cases will become unnecessarily complex. Because meeting the threshold intent-to-benefit inquiry is crucial to sustaining a cause of action, the remainder of this Comment will focus on analyzing the application of that factor in the modified test.

A. The Modified Test Cures Inadequacies by Establishing Intent To Benefit as the Threshold Inquiry

Washington's original multi-factor balancing test applied an intent-to-affect standard when determining to whom an attorney owed a duty of care.[106] This factor was inappropriate because, as all attorneys intend to affect parties with whom their clients are doing business or engaging in litigation, potential liability was limitless.[107] By abandoning the intent-to-affect standard in favor of intent-to-benefit, the modified multi-factor balancing test first articulated in *Trask* appropriately limits liability to non-adversarial third parties.[108]

An attorney should owe no duty of care to a client's adversary.[109] If a duty were imposed, in addition to conflict of interest concerns, the

105. 123 Wash. 2d 835, 872 P.2d 1080 (1994).

106. *See, e.g.*, Stangland v. Brock, 109 Wash. 2d 675, 680, 747 P.2d 464, 467 (1987).

107. Although five other factors could have limited liability where the threshold was met, at times these factors also were ineffective in limiting liability properly. An example is Bohn v. Cody, 119 Wash. 2d 357, 832 P.2d 71 (1992), where all six factors were balanced, and the court still imposed a duty on an attorney to a client's adversary.

108. *See supra* note 10.

109. *See generally* Bowman v. John Doe Two, 104 Wash. 2d 181, 189, 704 P.2d 140, 144 (1985); Adams v. Chenowith, 349 So. 2d 230, 231 (Fla. Dist. Ct. App. 1977) (noting difficulties in representing both buyer and seller); Friedman v. Dozorc, 312 N.W.2d 585, 591–94 (Mich. 1981) (stating that because attorney owes no actionable duty to adverse parties, attorney owed no duty to physician sued by client).

traditional attorney-client relationship would be permanently altered. At present, an attorney owes a client an obligation of undivided loyalty and independent judgment. The attorney's primary purpose is to earnestly serve the client's interests.[110] A duty of care to adversarial non-clients would limit an attorney's zealous and independent representation. The attorney would become a neutral counselor. The adverse parties would not be obligated to retain their own counsel, but instead could rely on the adversary's counsel. Furthermore, out of fear of potential liability to third parties, an attorney might feel compelled to counsel a client not to proceed with a difficult or unique transaction. This would limit access to courts as fewer attorneys would be willing to accept such cases. Because of such considerations, most courts have recognized that an attorney does not have a duty of care to an adverse third party.[111]

Bohn v. Cody[112] exemplifies the overbreadth of an intent-to-affect standard.[113] Without acknowledging the adversarial relationship, the court actually recognized that a duty may exist between an attorney and a client's adversary.[114] Washington does not specifically define "adversary." However, under conflicts of interest rules, it is clear that Bohn and her daughter had conflicting, and, therefore, adverse interests.[115] Bohn's interest, as the lender, was in securing her money and interest in the property. The daughter's interest, as the borrower, was to finalize the loan with conditions favorable to herself. The attorney's obligation was to arrange the transaction with the best possible terms for

110. An attorney should not materially limit his or her representation of a client by representing adverse interests or incurring duties to another which would adversely affect the relationship with an existing client. *RPC* Rule 1.7. Furthermore, an attorney should act with reasonable diligence in representing a client. *RPC* Rule 1.3. In addition, "[l]oyalty is an essential element in the lawyer's relationship to a client." American Bar Association, *Annotated Model Rules of Professional Conduct* Rule 1.7 cmt. at 105 (2d ed. 1992). Model rule 1.7 is substantially similar to Washington rule 1.7.

111. *See supra* note 10 and accompanying text. *But see infra* note 114 and accompanying text.

112. 119 Wash. 2d 357, 832 P.2d 71 (1992).

113. *See supra* note 89 (discussing when intent to affect may be an appropriate standard).

114. *Id.* The majority position is that relationships between borrowers and lenders are adversarial. *See* 1 *ABA/BNA Lawyers' Manual*, *supra* note 57, § 301:612. The court did state that Bohn's interests were different from the client's and that the attorney must take an adversarial stance toward Bohn to protect his client's interests. However, the court still failed to follow the conventional rule that an attorney does not owe a duty of reasonable care to adverse non-clients. *Bohn*, 119 Wash. 2d at 367, 832 P.2d at 77.

115. *See supra* note 110 and accompanying text; Page v. Frazier, 445 N.E.2d 148, 153 (Mass. 1983) (discussing various conflicts which may arise in representing both borrower and lender); Wolfram, *supra* note 1, at 317 ("[The] lawyer must be in a position that all options that might favor the client can be considered free from the likely impairment of any interests other than those of the client.").

his client.[116] Therefore, any duty on the part of the attorney to ensure the security of Bohn's interest in the property would invariably conflict with his duties to his client. However, the court applying the intent-to-affect standard held that the attorney owed a duty to Bohn. Had the court applied an intent-to-benefit standard this result could have been avoided.

The advantages of the intent-to-benefit standard also exist in litigation. For example, in *Harrington v. Pailthorp*,[117] the relationship between the plaintiff and the attorney's client, the plaintiff's former wife, was clearly adversarial. If the court had applied an intent-to-affect standard, it would have had no choice but to deny summary judgment.[118] Because every attorney involved in litigation intends to affect the adverse party, this standard is automatically satisfied. As discussed above, finding a duty in such a situation would have placed an immense burden on the legal profession. An attorney cannot fully represent a client or offer undivided loyalty when he or she potentially owes a duty of care to an adverse party.[119]

The threshold inquiry in determining attorneys' duties of reasonable care has been limited appropriately to intent to benefit in the modified multi-factor balancing test. The term "adversary" implies a confrontational relationship where neither party intends to benefit the other. By limiting duties to non-adversarial third parties, the narrower intent-to-benefit inquiry avoids the difficulties raised by the former standard.

B. *Application of the Modified Multi-Factor Balancing Test in* Trask *Is Unsatisfactory*

Although the modified multi-factor test was a vast improvement in assessing attorneys' duties of care to non-clients, it was improperly applied in *Trask*. The *Trask* court did not look to the particular facts of that case and therefore overlooked the essence of the relationship. It

116. Some may argue that this was not an arm's length transaction because the plaintiff and the client were related. However, there was no indication in the opinion that the client intended that the attorney's representation benefit her mother or that she asked her attorney to ensure her mother's interest in the property was secure.

117. 67 Wash. App. 901, 841 P.2d 1258 (1992), *review denied*, 121 Wash. 2d 1018, 854 P.2d 41 (1993).

118. While the modified multi-factor balancing test had not been established yet, it appears the court in *Harrington* ignored the actual wording of the test and applied an intent-to-benefit standard.

119. *See supra* notes 108–10 and accompanying text. Fortunately, *Bohn* is the only case in which a court actually took the words "intent to affect" at their literal meaning.

further confused the test by discussing two new factors: the lack of alternative remedies and the burden a finding of liability would impose on the legal profession.[120]

1. *Intent To Benefit Should Be Analyzed Factually, Not as a Matter of Law*

Because the intent behind the attorney-client relationship is so important in determining attorney liability, a court should analyze the factual basis of the relationship. Only then may the parties' true intentions be reliably ascertained. There is no indication that the *Trask* court actually looked to the facts to determine the intent of the attorney-client relationship.[121] The opinion does not address who paid the legal fees, the purpose of the retention, or whether a retainer detailing the duties of the attorney was signed. Instead, it summarily determined as a matter of law that where an attorney advises a personal representative there is no intent to benefit, and therefore no duty to, the beneficiaries.[122]

Factual analysis of the attorney-client relationship is necessary because intent varies with each relationship. If courts determine intent as a matter of law, they will ignore facts that distinguish the intent of different relationships. This will result in dismissals based on legal determinations where, factually, an intent to benefit did exist.

This is exactly what happened in *Trask*. The court ignored issues such as whether the attorney represented his client in her capacity as a fiduciary or as an individual. This fact is significant because, when hired by a fiduciary in a general capacity, an attorney is retained to perform

120. Trask v. Butler, 123 Wash. 2d 835, 845, 872 P.2d 1080, 1085 (1994).

121. *But see* Leipham v. Adams, 77 Wash. App. 827, 894 P.2d 576, *review denied*, 127 Wash. 2d 1022, 904 P.2d 1157 (1995) (intent to benefit determined factually). The *Leipham* court considered many facts in determining the intent of the attorney-client relationship, including the purpose of the retention, the services performed, and the actual words and actions of the attorney and client. *Id.* at 833–34, 894 P.2d at 579–80. *Leipham* and *Trask* are the only Washington cases to apply the modified test.

122. *Trask* follows the majority view that a fiduciary's attorney owes a duty only to the fiduciary and not the beneficiaries. *E.g.*, Goldberg v. Frye, 266 Cal. Rptr. 483 (Ct. App. 1990); Neal v. Baker, 551 N.E.2d 704 (Ill. App. Ct. 1990), *appeal denied*, 555 N.E.2d 378 (Ill. 1990). For an annotated list of cases discussing the duties of fiduciaries' lawyers to beneficiaries see American College of Trust and Estate Counsel Foundation, *ACTEC Commentaries on the Model Rules of Professional Conduct*, 28 Real Prop. Prob. & Tr. J. 865, 892–97 (1994). For a critique of cases finding that no duty exists between fiduciaries' attorneys and beneficiaries see Charles M. Bennett, *When The Fiduciary's Agent Errs—Who Pays The Bill—Fiduciary, Agent, or Beneficiary?*, 28 Real Prop. Prob. & Tr. J. 429, 472–76 (1993).

services that benefit the fiduciary, the estate, and its beneficiaries.[123] The attorney's duties include giving advice regarding the administration, liabilities, and obligations of the estate.[124] By contrast, when hired to represent the client as an individual, the attorney is retained to perform services that benefit the fiduciary individually.[125] These include services such as negotiating the fiduciary's compensation or defending the fiduciary against charges of maladministration.[126]

In *Trask*, the attorney was first retained in a general capacity to perform services for the benefit not only of the estate but of its beneficiaries as well.[127] The court ignored this fact. If it had looked to the facts of the representation, it would have discovered that there was an intent to benefit the beneficiary. Because the threshold inquiry of intent to benefit was met, the case should not have been dismissed.

Although the holding in *Trask* was limited to estate administration, the importance of factual analysis extends beyond such situations. Other examples of fiduciary relationships where a factual analysis is crucial include situations where an attorney represents trustees, partners vis-à-vis other partners, spouses, legal guardians, or corporate directors and officers vis-à-vis their corporation. In such situations, the court must look to the actual nature of the relationship; that is, the court must consider whether the attorney and client's intent was for the attorney to represent the client individually or generally in a fiduciary capacity.[128]

The need to review the facts of a relationship also exists in non-fiduciary situations. For example, where relatives engage in a transaction, such as in *Bohn*, there may or may not be an intent on the part of one relative and that relative's attorney to benefit the other

123. American College of Trust and Estate Counsel Foundation, *supra* note 122, at 889–90.

124. *Id.*

125. *Id.* at 889–91.

126. *Id.* at 889–92.

127. Trask v. Butler, 123 Wash. 2d 835, 837, 872 P.2d 1080, 1082 (1994).

128. *See* Geoffrey C. Hazard, Jr. & William W. Hodes, *The Law of Lawyering: A Handbook on the Model RPC* § 1.3:108, at 78 (Supp. 1992). Examples of situations where a duty may arise include representing a guardian, *In re* Fraser, 83 Wash. 2d 884, 523 P.2d 921 (1974) (after being "fired" by guardian, lawyer correctly refused to withdraw as the ward's attorney until he could ensure the ward's interests were adequately protected); representing a corporation, Fassihi v. Sommers, Schwartz, Silver, Schwartz & Tyler, P.C., 309 N.W.2d 645 (Mich. Ct. App. 1981) (attorney representing close corporation owed fiduciary duties to minority shareholder); representing a trustee, Pierce v. Lyman, 3 Cal. Rptr. 2d 236 (Ct. App. 1991) (attorney liable to trust beneficiaries as aider and abettor of trustee's tortious conduct); and representing a partner, Ronson v. Superior Court, 29 Cal. Rptr. 2d 268 (Ct. App. 1994) (attorney representing general partner may share duty of fair dealing which general partner owes limited partners).

relative. If a court decides the intent of such a relationship as a matter of law, the judgment will not be based on the actual intent of the parties, and the case may be unjustly dismissed because the facts were ignored.[129]

2. *Threshold Standard Should Be Limited to Intent To Benefit*

Most legal malpractice suits brought by non-clients under the multi-factor balancing test are dismissed on summary judgment because the threshold burden of showing an intent to benefit the plaintiff has not been met.[130] Therefore, to clarify the standard that plaintiffs must meet for summary judgment, it is important that courts specify exactly what that standard is and how it can be met. When applying the new modified test, the *Trask* court stated that the threshold inquiry for determining whether an attorney owes a duty to non-clients is whether there was an intent to benefit that party in the attorney-client relationship.[131] But, without explanation, the *Trask* court also analyzed two other factors—the availability of alternative remedies and the burden a finding of liability would have on the legal profession.[132] The court was unclear as to the role these two factors play in the threshold analysis. It failed to explain whether each is a separate threshold that must be met or whether they are balanced with the intent-to-benefit factor. Regardless, these additional factors are inappropriate initial considerations under the multi-factor balancing test.

a. *Availability of Remedies Is Ineffective as an Initial Inquiry*

In addition to applying the intent-to-benefit standard, the *Trask* court considered whether alternative remedies were available to the plaintiff.[133] It found that there were.[134] As a beneficiary of the estate, the plaintiff could have sued the personal representative directly. He also could have requested a judicial proceeding to direct the personal representative to

129. The author is not arguing that the question of intent must go to a jury but merely that it is a factual, not a legal issue. If the facts are unclear at a summary judgment stage, summary judgment should not be granted.

130. *See, e.g.*, *Trask*, 123 Wash. 2d 835, 872 P.2d 1080; Pelham v. Griesheimer, 440 N.E.2d 96 (Ill. 1982); Page v. Frazier, 445 N.E.2d 148 (Mass. 1983).

131. *Trask*, 123 Wash. 2d at 843, 872 P.2d at 1084.

132. *Id.* at 843–45, 872 P.2d at 1084–85.

133. *Id.* at 843–44, 872 P.2d at 1084–85.

134. *Id.*

abstain from breaching her fiduciary duty or to have her removed.[135] The court reasoned that, because alternative remedies existed, there was no need to hold the attorney liable for his negligence.[136] In analyzing the availability of alternative remedies, the court did not clarify whether it was referring to theoretical remedies or practical remedies.[137]

Regardless of which was considered, neither is an appropriate threshold. Consideration of alternative practical remedies as opposed to alternative theoretical remedies is a superfluous and unnecessary inquiry that will only increase the cost and time spent on litigating attorney malpractice suits. On the other hand, considering either alternative practical or theoretical remedies fails to focus on the actions which give rise to the claim. No incentive will be given to attorneys to act in a non-negligent manner.

Threshold inquiries work to weed out unworthy claims. If every case can pass through a threshold, the standard is ineffective. For example, a threshold inquiry into the lack of alternative practical remedies would almost always be satisfied. If such remedies existed, the non-client generally would have pursued them first before suing the attorney directly. Only after such remedies failed, or practically did not exist, such as where the client does not have the money to satisfy a judgment, would the non-client sue the attorney directly. This is because the theories imposing duties on attorneys to non-clients are relatively new and unpredictable.[138] A third-party injured through the attorney-client relationship, for example, would have a much stronger and more predictable cause of action directly against the client based on established legal theories.

In addition, such a threshold inquiry also will unnecessarily increase the time and money spent on such cases. The findings required by this factor, such as whether the client actually is capable of satisfying a judgment, are fact based. Additional discovery, costs, and time would be required to establish this factor. It would be more efficient to reserve such expense until after an intent to benefit is established. If no intent to

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135. *Id.*, 872 P.2d at 1085. Such actions are authorized by Washington statute. Wash. Rev. Code §§ 11.28.250, .68.070, .96.070(2) (1994).

136. *Trask*, 123 Wash. 2d at 844, 872 P.2d at 1085.

137. By use of the term "practical remedies," the author is referring to remedies available both legally and practically. For example, this term would encompass a situation where a cause of action exists and the adverse party has funds to pay the judgment. When referring to "theoretical remedies," the author is referring to remedies available at law irrespective of whether the adverse party is actually able to provide the remedy.

138. *See* H. Robert Fiebach, *Expanding the Plaintiff Pool*, A.B.A. J., Jan. 1995, at 76.

benefit exists, the time and expense of establishing this factor will be saved.

An alternative remedies threshold, whether theoretical or practical, is also inappropriate because the court's focus should be on the attorney's actions that gave rise to the claim. By focusing on whether the injured party has a remedy, the test will not deter attorney negligence and will act as a shield protecting attorneys from liability. Attorneys, like the court in *Trask*, will focus on the status of those affected by their actions. If an attorney knows that alternative remedies are available to non-clients, there is less incentive for that attorney to use a heightened standard of care in issuing advice. This standard would, in effect, shield attorneys who are negligent but know that alternative remedies exist, thereby encouraging attorneys to be less careful in some situations.

One such example is where an attorney's client is wealthy and capable of paying damages. In a situation like that in *Bohn*, if the client had the means to repay the loan to the plaintiff, the attorney would know that he would not be liable for a breach of a duty of care because alternative remedies would be available to the plaintiff. Another example is the attorney who offers the same advice in different legal contexts—one where alternative theoretical remedies are available and the other where they are not. If an attorney negligently interpreted a will drafted for a client, and after the client's death the beneficiaries sued the attorney, the attorney would be liable because the beneficiaries would have no alternative theoretical remedies; they could not sue the client or the estate. If, however, the same negligent interpretation was given to a personal representative who then acted based on that advice and was sued by the beneficiaries, the attorney would not be liable to the beneficiaries. The beneficiaries could sue the personal representative directly and therefore would have an alternative theoretical remedy.

By focusing on the position of the injured party and not on the actions giving rise to the claim, this threshold factor in effect gives attorneys permission to behave negligently by making it more difficult to recover remedies against them in certain situations.

b. Burden on the Legal Profession Is Too Complex To Be a Threshold Consideration

The second extraneous inquiry the *Trask* court considered after determining that the intent-to-benefit factor was not met was the burden

that a finding of liability would place on the legal profession.[139] Although this is supposed to be balanced in the multi-factor test, the *Trask* court singled out this factor and discussed it as part of the threshold determination. However, if courts include undue burden in the threshold determination, they will be forced to consider all the elements of the multi-factor balancing test[140] at the threshold stage.

Numerous courts and legal scholars have examined the increased burden placed on the legal profession by expanded attorney liability. Opinions vary greatly as to how much of a burden is undue.[141] Some members of the legal community fear that expanding attorney liability will undermine the lawyer's duty of loyalty to the client and will threaten attorney-client confidentiality.[142] Others argue that the burden on the legal profession is slight compared to the unredressed injuries suffered by non-clients who, they believe, generally are less blameworthy than the negligent attorney and less capable of spreading the costs of attorney negligence.[143]

A dispute that implicates such a broad range of issues is more appropriately addressed as part of the overall balancing test rather than at a threshold stage. In determining who should shoulder the burden of the loss suffered, the court must not only weigh the specific facts of the case, but also important issues of public policy. To thoroughly analyze whether the burden on the profession is undue, the court will have to address questions including the nature of the action, the degree of harm caused, the foreseeability of such harm, and the policies of preventing

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139. The court stated that unresolvable conflicts of interests would arise on the part of the attorney in deciding whether to represent the personal representative, the estate, or the heirs and that these conflicts would detract from the attorney's ethical obligations to his client. 123 Wash. 2d at 844, 872 P.2d at 1085. However, the majority of an attorney's representation of a personal representative does not involve adversarial actions between a personal representative and a beneficiary. The attorney is hired to facilitate the personal representative's service to the beneficiary. Furthermore, conflicts arising from possible adversarial situations can be avoided by simply explaining to the personal representative the duties that an attorney also owes the estate and beneficiaries. The attorney, at the outset of the representation, can discuss with the personal representative what steps would be necessary in the event a conflict arose. Simply asking attorneys to explain their role to their clients is not a large burden on the legal profession. *See generally* American Bar Association, Section of Real Property, Probate and Trust Law, *Report of the Special Study Committee on Professional Responsibility: Counseling the Fiduciary*, 28 Real Prop. Prob. & Tr. J. 825, 833–37 (1994).

140. *See supra* notes 41–44 and accompanying text.

141. *See, e.g.*, Cifu, *supra* note 37, at 1; Ellen S. Eisenberg, *Attorneys' Negligence and Third Parties*, 57 N.Y.U. L. Rev. 126 (1982).

142. *See* Cifu, *supra* note 37, at 1.

143. *See* Eisenberg, *supra* note 141, at 126–27.

future harm. In other words, the court will have to address the other factors in the balancing test. To keep the threshold inquiry effective in limiting the number of colorable cases and narrow enough so that the whole case is not argued on summary judgment, the threshold inquiry must be limited to determining whether an intent to benefit existed.

IV. CONCLUSION

Washington has made a great contribution to the field of attorney malpractice liability to third parties. Improving on the California test, it clarified that the multi-factor balancing test only applies to those situations where there was not merely an intent to affect, but an intent to benefit the non-client. This test makes it clear that an attorney cannot owe a duty of care to a client's adversary for legal malpractice. Such a duty, if imposed, would completely transform the role attorneys play in protecting and advising their clients. However, there are several other aspects of the new test that must be clarified and improved. Washington courts should look to the facts of the attorney-client relationship in determining the intent of that relationship and not decide intent as a matter of law. Furthermore, the courts must ensure that the threshold test does not force the parties to go through the time and expense of establishing a factor that generally will be satisfied. The initial inquiry must be sufficiently narrow so that the threshold stage acts as an efficient gateway and not as the impetus for consideration of the whole cause of action. Therefore, the courts should limit the initial inquiry to intent to benefit and not include the additional *Trask* factors concerning the availability of alternative remedies or the burden on the legal profession.