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Lawyer Malpractice: Duty Relationships Beyond Contract

W. Probert and R. Hendricks***

I. Introduction

Until recently, the lawyer's enterprise had remained virtually an island in negligence law. Traditionally, lawyers were largely immune from non-client claims short of fraud or collusion. Because of the protective barrier of privity of contract, their liability for negligence ran only to clients.[1] Although the courts historically used privity to insulate all manner of activities, the concept has had a special appeal and lasting quality in the area of lawyer malpractice. Understandably, the judiciary has tended to reflect the general professional attitude that a lawyer should be concerned mainly, if not only, with his client's interest.

Even so, it now appears that most states will come to reject privity as an absolute requirement.[2] Although this development may disturb some members of the profession, there is no real cause for alarm. Significant limits on responsibility will remain, the range of liability varying among the states. We will explore the development in some detail, including the background and current context. The trend is part of a larger picture, being affected by tort law generally and having a substantial impact in return. Of especial interest are the interrelationships of the trend with the areas of negligent misrepresentation and of negligent interference with purely economic interests.[3] After exploring these various currents, we will attend closely and analytically to the relevant case law to chart the development of duty beyond contract. Such analysis is particularly desirable in this area because of the subtleties of judicial control and discretion

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1 The leading case is Savings Bank v. Ward, 100 U.S. 195 (1879), in which the lawyer for the borrower owed no duty to the lender regarding certificate of title, *citing* Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842) (the leading case requiring privity of contract to support the duty of due care in contractually involved enterprises). *But cf.* Lawall v. Groman, 180 Pa. 532, 37 A. 98 (1897) (imposing duty on lawyer for borrower for undertaking to provide abstract of title to lender, using both tort and contract theory).

2 A duty of due care to a beneficiary not in privity was imposed on a lawyer in a will-drafting situation, Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied,* 368 U.S. 987 (1962), the contemporary leading case.

3 An early comment of note in this area is Isaacs, *Liability of the Lawyer for Bad Advice,* 24 CAL. L. REV. 39 (1935), declaring the inhibitions of contract theory inadequate to the twentieth century; *But cf.* Keeton, *Professional Malpractice,* 17 WASHBURN L.J. 445 (1978) (favoring the retention of contract limits, except in the *Lucas* kind of situation and for misrepresentation. *Lucas* and its progeny have stimulated considerable response, largely limited in scope). *See, e.g.,* R. MALLÉN & V. LEVIT, LEGAL MALPRACTICE, §§ 54-59 (1977); Freeman, *Opinion Letters and Professionalism,* 1973 DUKE L.J. 371, 379-87; BELDEN, BELDEN & LAPPAS, *Professional Liability of Lawyers in Pennsylvania,* 10 DUQ. L. REV. 317, 333-37 (1972); Averill, *Attorney's Liability for Negligent Malpractice,* 2 LAND & WATER L. REV. 379, 384-400 (1967); Comment, *Legal Liability of the Professional Tax Practitioner,* 20 EMORY L. REV. 403, 411-17 (1977); *see also* Martindale, *Attorney's Liability in Non-Client and Foreign Law Situations,* 14 CLEV.-MAR. L. REV. 44, 46-51 (1965); Wade, *The Attorney's Liability for Negligence,* 12 VAND. L. REV. 755 (1959); Note, 81 L. Q. REV. 465, 478 (1965). Annot., 45 A.L.R.3d 1181 (1972) (often cited in the cases).

involved in decisions on duty, especially in the definition of the scope of duty in various situations.

In our final consideration, we explore and project the present trend, suggesting that ultimately lawyers' responsibility will be keyed to the relationships they enter, whether contractual or not.

II. The Evolution of a New Approach

The decline of privity in this area does not import the ascendancy of foreseeability as a prime criterion of duty.[4] Such accountability would burden lawyers far too heavily, reaching even into the day-to-day business of client counseling and otherwise routine matters. The evolution of negligence theory well demonstrates that neither extreme is necessary. Foreseeability is the major criterion of duty in most areas involving risk of physical harm. However, in general there is no duty to use due care to prevent damage which is purely economic. There are growing exceptions, for example in certain instances of misrepresentation and in some lawyer relationships with non-clients. The exceptions do not threaten to undermine the general principle of non-duty in the economic context nor do they measure duty only in terms of foreseeability.[5] Therefore, privity and contract are no longer necessary in these areas.

Privity was historically significant in providing insulation to all sorts of actors against the economic risks of lawsuits for even physical harms.[6] As judicial perspectives changed, however, manufacturing came to be regarded as the appropriate enterprise to manage the economics of product distribution and, consequently, product safety.[7] The development has been similar with activities previously insulated by notions of privity and contract.[8] The policy now is to allow third party claims to be burdensome, at least to the point of discouraging the production of bodily harm. When it comes to risks of purely economic harm, the considerations are different and more complex.[9] The privity barrier might seem appropriate in contractual relationships where there is no risk of physical harm, such as that of lawyer and client. The privity device allows such actors to manage their risks, leaving the rest to the marketplace.[10] Yet automobile driving is one example of a number of activities which is insulated from liability for purely economic harm without the need of a privity barrier. If

4 The statements of this paragraph are elaborated in various portions of the subsequent text.

5 While lawyer duty to non-clients has independent importance, its greater significance may well turn out to be as a testing ground along with cases involving negligent misrepresentation for expansion of the duty to prevent or compensate for economic harm. *See* notes 13-18 and accompanying text *infra.*

6 F. HARPER & F. JAMES, LAW OF TORTS, §§ 18.3, 18.5, chs. 27-29 (1956 & Supp. 1968); W. PROSSER, *The Borderland of Tort and Contract,* in SELECTED TOPICS ON THE LAW OF TORTS 380 (1954).

7 Prosser, *The Fall of the Citadel: Strict Liability to the Consumer,* 50 MINN. L. REV. 791 (1966); Wade, *Strict Tort Liability of Manufacturers,* 19 Sw.L.J. 5 (1965).

8 *See, e.g.,* HARPER & JAMES, *supra* note 6, at 1042-43, 1506-16, Supp. at 74, 199-202.

9 James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal,* 25 VAND. L. REV. 43 (1972); Note, *Negligent Interference with Contract: Knowledge as a Standard for Recovery,* 63 VA. L. REV. 813 (1977); RESTATEMENT (SECOND) OF TORTS § 766C, Comment c (1979). The distinction is well marked in Seely v. White Motor Co., 63 Cal. 2d 9, 403 P.2d 145, 45 Cal. Rptr. 17 (1965), holding a purchaser's claim for loss of profits stemming from a defective truck to be limited to the remedies provided by the Uniform Commercial Code.

10 *See,* Keeton, *supra* note 3, at 445-47; Annot., 46 A.L.R.3d 979, 982-87 (1972), regarding accountants; Note, *Public Accountants and Attorneys: Negligence and Third Parties,* 47 NOTRE DAME LAW. 588, 602-07 (1972).

a driver negligently causes a destructive fire in a store, he is responsible to the owner but not to the clerk for his loss of wages.[11] It is believed to be a dangerous precedent not only for automobile driving but for practically all activities to open the floodgates to a seemingly endless stream of liability for economic losses suffered by employees, customers, suppliers, and so on. "The law does not spread its protection" to the clerk so that it will not have to spread it unreasonably far.[12]

Thus, there are two potential barriers: privity and no duty to prevent "remote" and purely economic harm. These two barriers can be confusingly perceived.[13] Consider for illustration the leading case on lawyer duty to non-clients, *Lucas v. Hamm.*[14] There, the court noted that, as a general rule, a duty of due care is owed to the person the testator-client intended to name as beneficiary, setting the precedent that a lawyer will be liable if he negligently drafts a void devise.[15] Such a specific duty can hardly be said to be an undue burden on will-drafting lawyers. The beneficiary's only feasible remedy is against the lawyer, and this sort of negligence or incompetence should not go undeterred. There could be apprehension, however, that the precedent could not be suitably confined. The crack in the door could open wide to excessive claims that would unduly burden the legal profession—or threaten all activities with "remote" economic damages.[16] Yet, unless lawyers are a specially privileged class,[17] it seems that the question of burden on the legal profession is part of the larger question of duty. On the other hand, if it can be maintained that there is no undue threat to the legal profession, the precedent marks the beginning of an exception to the general principle regarding economic damages. Therefore, the question is, at least in part, whether there should be such an exception.[18]

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11 Stevenson v. East Ohio Gas Co., 73 N.E.2d 200 (Ohio App. 1946); Adams v. Southern Pac. Transp. Co., 50 Cal. App. 3d 37, 123 Cal. Rptr. 216 (1975), both involving denial of claims for lost wages stemming from explosions.

12 Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303 (1927), is the leading case denying liability for negligently causing economic harm, here the loss of the use of a ship, *criticized in* James, *supra* note 9, at 56.

13 The cases which continue to cite the historical opinion of Savings Bank v. Ward, 100 U.S. 195 (1879), fail to note its dependence on the economic assumptions of Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842). *But see* Roscoe Pound's finding that the life span of a precedent is one generation, in Pound, *Survey of the Conference Problems,* 14 U. Cin. L. Rev. 324, 328-32 (1940); Isaacs, *supra* note 3, in 1935 predicting the decline of a privity requirement in claims against lawyers. Of course *Ward* may be cited for what is left of privity, as in Hughes v. Housley, 599 P.2d 1250 (Utah 1979).

14 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

15 The stage was set for *Lucas* in Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958) (involving a notary and an invalid will). *See also* Weintz v. Kramer, 44 La. Ann. 35 (similar facts) 10 So. 416 (1892), Schirmer v. Nethercutt, 157 Wash. 172, 288 P. 265 (1930); Ward v. Arnold, 52 Wash. 2d 581, 328 P.2d 164 (1958) (lawyer will cases in which the basis of liability is unclear).

16 *See* Restatement (Second) of Torts § 766C, Comment a (1979), regarding the general apprehensions inhibiting a duty of due care to prevent economic harm.

17 *See* discussion of lawyers and accountants in Keeton, *supra* note 3, at 445-47. *But see* Goodman v. Kennedy, 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976) (Mosk, J., dissenting); Comment, *Attorney Malpractice—A "Greenian" Analysis,* 57 Neb. L. Rev. 1003, 1007 (1978), suggesting preservation of privity barrier would not help lawyers' image.

18 The situations in which lawyers have direct dealings with non-clients have built-in limits against runaway liability. Further, not all lawyer-caused harms are purely economic. *See, e.g.,* McEvoy v. Helikson, 277 Or. 781, 562 P.2d 540 (1977) (mental distress); Young v. Hecht, 3 Kan. 2d 510, 597 P.2d 682 (1979) (mental distress and oppression). *See generally* text accompanying note 55 *infra* for a discussion of countersuits by doctors for groundless or vexatious litigation. Even though California has pioneered in this area, there has been confusion in that state. *See, e.g.,* Costello v. Wells Fargo Bank, 258 Cal. App. 2d 90, 65 Cal. Rptr. 612 (1968) (distinguishing *Lucas* as not involving negligent interference with contract); Adams v.

Authoritative commentators have long felt that the law regarding negligent interference with contract or more broadly put, economic loss caused by negligence, has been much too restrictive.[19] They argue that courts have long allowed recovery for economic loss associated with tortious injury to person or property. So it is not the feature of being "economic" but a matter of deciding when it is appropriate to allow recovery for economic damage. Further, if the fear is merely of liability which is potentially unlimited, intolerable, or simply unfair in its extent compared with the culpability of the actor, why not distinguish those situations which are not covered by the spectre of unlimited liability? Courts have distinguished cases in which they can find some sort of property injury.[20] There has been some tendency to distinguish cases in which liability is necessarily limited to one party.[21] The strongest countermovements are found in the trends involving negligent misrepresentation and lawyer duty to non-clients.[22] These two trends may develop into a single flow as part of a general theory of negligence which assimilates concerns about economic harm into more generalized criteria.[23]

Extension of the range of liability for misrepresentation is marked by the leading case of *Glanzer v. Shepard.*[24] Plaintiff was a buyer of beans who relied on the defendant's misstatement of weight. Defendant was a "public weigher" who had been employed by the seller to provide the statement to the buyer. He was held liable in negligence for acting "with the very end and aim of shaping the conduct of another."[25] *Glanzer* posed no threat as precedent because liability was necessarily limited to one party. It was distinguished in the well-known *Ultramares v. Touche, Niven & Co.*[26] There an accounting firm was held to be under no duty of due care in making out a balance sheet which was relied upon by a lender to defendant's client. A contrary holding would, said Cardozo, entail "liability in an indeterminate amount for an indeterminate time to an in-

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Southern Pac. Transp. Co., 50 Cal. App. 3d 37, 123 Cal. Rptr. 216 (1975) (citing *Lucas* as precedent for broadly extending liability for economic damage); Jackson v. Aetna Life & Cas. Co., 93 Cal. App. 3d 838, 155 Cal.Rptr. 905 (1979) (citing *Lucas* as an in-between precedent justifying insurance company liability without privity).

19 *See* James, *supra* note 9, at 46 n.23; Keeton, *supra* note 3, at 445-53. Both authors retrench a bit. *See also* Note, *Negligent Interference with Contract: Knowledge as a Standard for Recovery,* 63 VA. L. REV. 813 (1977); RESTATEMENT (SECOND) OF TORTS § 766C (1979).

20 Newlin v. New England Tel. & Tel. Co., 316 Mass. 234, 54 N.E.2d 929 (1944) (damaged power line and loss of mushroom crop); RESTATEMENT (SECOND) OF TORTS § 766C, Comment b (1979).

21 *See* James, *supra* note 9, at 57; Keeton, *supra* note 3, at 452; *see also* Westerhold v. Carroll, 419 S.W.2d 73 (Mo. 1967) (architect); Craig v. Everett M. Brooks Co., 351 Mass. 497, 222 N.E.2d 752 (1967) (engineer). Both *Westerhold* and *Craig* rely on Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958) and related reasoning.

22 *See* RESTATEMENT (SECOND) OF TORTS § 766C, Comment e (1979), mentioning these two exceptions to the rule against liability for remote economic harm; Note, *Negligent Interference with Contract: Knowledge as a Standard for Recovery,* 63 VA. L. REV. 813, 832 discussing the theory of negligent misrepresentation as a model for broader question of economic harm.

23 For case illustration of merger of theories of lawyer duty to non-clients and negligent misrepresentation, *see* Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976); Goodman v. Kennedy, 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976).

J'aire Corporation v. Gregory, 24 Cal. 3d 799, 598 P.2d 60, 157 Cal. Rptr. 407 (1979) (illustrating how lawyer cases relate to the larger picture of economic harm). *See also In re* Kinsman Transit Co., 388 F.2d 821 (2d Cir. 1968) (relying on proximate cause as a mechanism of controlling liability); Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974) (relying on the "duty" concept and foreseeability).

24 233 N.Y. 236, 135 N.E. 275 (1922).

25 *Id.* at 242, 135 N.E. at 277.

26 Ultramares Corp. v. Touche, Niven & Co., 255 N.Y. 170, 174 N.E. 441 (1931).

determinate class."[27] He noted that professions other than accountants could be affected—lawyers, for instance.

The contemporary trend on misrepresentation goes beyond *Glanzer* and runs counter to *Ultramares,* as reflected in section 552 of the Restatement of Torts, Second. Under this section accountants, lawyers, or others who supply "false information for the guidance of others in their business transactions" owe a duty of care but only to the person or members of the "limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intended to supply it."[28] This standard discards absolute barriers while providing protection against the spectre of potential liability in an endless chain of economic damages. An important aspect of this approach is that it allows the information supplier to determine the range of economic risks he can or cares to manage.[29]

The *Glanzer* case on misrepresentation strongly supports the move in *Lucas,* not a misrepresentation case, to impose a duty on the will-drafting lawyer. The bean weigher provided a service to the buyer under the direction of the seller who paid for his service. In *Lucas,* the lawyer was to perform a service to benefit the client's intended beneficiary under the direction of the client who paid for the service. Thus, under general negligence theory the move from *Glanzer* to *Lucas* is indeed a small one.[30] Put more broadly, the criteria that support duty under the misrepresentation theory as characterized in the Restatement of Torts also support a duty as generalized from the *Lucas* case. *Lucas* involved a lawyer who was employed to provide a benefit for a specific person who was not a client.[31] As is true of suppliers of information, the supplier of

27 *Id.* at 179, 174 N.E. at 444.

28 Mess, *Accountants and the Common Law: Liability to Third Parties,* 52 NOTRE DAME LAW. 838, 851 n.57 (1977) quoting RESTATEMENT (SECOND) OF TORTS § 552 (Tent. Draft No. 12, 1966); *See also* M. EPSTEIN & E. WEISS, A PRACTICAL GUIDE TO ACCOUNTANTS' LEGAL LIABILITY (1977); Annot., 46 A.L.R.3d 979 (1972). For application to lawyers *see* Martindale, *Attorneys' Liability in Non-Client and Foreign Law Situations,* 14 CLEV.-MAR. L. REV. 44 (1965); Averill, *Attorneys' Liability to Third Parties for Negligent Malpractice,* 2 LAND & WATER L. REV. 379 (1967). For a comparison of lawyers and accountants *see* Keeton, *supra* note 3, at 451-53; Note, *Public Accountants and Attorneys: Negligence and the Third Party,* 47 NOTRE DAME LAW. 588 (1972); Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969); Milliner v. Elmer Fox & Co., 529 P.2d 806 (Utah 1974).

29 Keeton, *supra* note 3, at 445-47 asserts that contract limits on liability are necessary to give lawyers economic control, but other mechanisms serve as well, *e.g.,* qualification of statements and caveats in opinion letters. *See* Freeman, *Opinion Letters and Professionalism,* 1973 DUKE L. J. 371, 389-90; Bittner, *Lawyers' Letters to Auditors,* 59 CHI. B. REC. 7 (1977); Shipman, *The Need for SEC Rules Under the Attorneys to Govern Duties and Civil Liabilities of Federal Security Statutes,* 34 OHIO ST. L.J. 231, 241-45 (1973); Babb, Barnes, Gordon, & Kjellenberg, *Legal Opinions to Third Parties in Corporate Transactions,* 32 BUS. LAW. 553 (1977), other articles cited; Comment, *Legal Liability of the Professional Tax Practitioner,* 26 EMORY L. REV. 403, 416 *passim* (1977).

30 *Glanzer* was emphasized as precedent in Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958) (the notary will case which set the stage for *Lucas*).

31 *Lucas* involved the application of general criteria which were first set forth in *Biakanja,* "The determination . . . is a matter of policy and involves the balancing of various factors, among which are . . . ," (1) intent to affect the plaintiff, (2) foreseeability of harm to plaintiff, (3) degree of certainty that plaintiff suffered the injury, (4) closeness of connection between defendant's conduct and the injury suffered, (5) moral blameworthiness of defendant's conduct, (6) policy of preventing future harm. *Id.* at 650, 320 P.2d at 19.

Subsequently the criteria were applied in a situation involving a lawyer's opinion letter to the client's prospective lender. Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976). There was in a sense, as the court noted, intent to benefit the lender, but the more apt characterization is that the lawyer knowingly undertook to affect the lender, in this instance on behalf of his client.

The criteria have been applied, *e.g.,* to accountants. *See* Ryan v. Kanne, 170 N.W.2d 395 (Iowa 1969), Milliner v. Elmer Fox & Co., 529 P.2d 806 (Utah 1974); Aluma Kraft Mfg. Co. v. Elmer Fox & Co., 493 S.W.2d 378 (Mo. App. 1973). *See also* Westerhold v. Carroll, 419 S.W.2d 73 (Mo. 1967) (architect); Howarth v. Pfeifer, 433 P.2d 39 (Alaska 1968) (insurance agent); Tarasoff v. Regents of Univ. of Cal., 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974) (psychiatrist regarding physical harm).

legal services to known third parties knows full well what economic risks are involved and just as surely can decide whether he can or ought to manage the situation in economic terms.

The evolution could rest with *Lucas* and a narrow application of the theory of negligent misrepresentation on behalf of intended recipients. Cautious courts can take those steps without overburdening the enterprise of lawyering or for that matter any other activity.[32] Modest steps can be taken by way of extension of or analogy to misrepresentation theory. Appropriate situations are those in which a lawyer influences non-client behavior by assurances of some limited undertaking.[33] However, enough judicial experience has already been accumulated to justify somewhat less cautious development. The general mechanism of negligence theory seems adequate to the task of preserving control in the courts.[34] The courts can maintain the evolution at a sufficiently slow pace to permit lawyers in turn to adjust their practices and self-protective techniques so as to manage the risks of liability to non-clients.

While the general theory of negligence is keyed to foreseeability, courts have retained control over both the definition of the scope of duty and of the weight of evidence necessary to make out a prima facie case for the jury. There are some frontier areas where negligence theory has been specially shaped. The duties of land occupants do not turn solely on foreseeability,[35] nor do the duties of those who negligently cause mental disturbance to persons not fearful for their own safety.[36] Whether one owes a duty to aid another in peril depends upon special considerations.[37] Key in the analysis of these areas and the frontier area of lawyer duty to non-client are the relationships of the principal characters in the relevant situation. Such keying to relationships allows courts the fullest opportunity to balance important factors that would otherwise be entertained by juries under general negligence theory in the non-frontier areas.[38] Courts have further control in all negligence cases stemming from their

32 Florida is illustrative. *Lucas* was followed in McAbee v. Edwards, 340 So.2d 1167 (Fla. App. 1976). Subsequent cases show an inclination to stop at that move, Adams v. Chenowith, 349 So.2d 230 (Fla. App. 1977); Amey, Inc. v. Henderson, Franklin, Starnes & Holt, 367 So.2d 633 (Fla. App. 1979).

33 See text accompanying notes 68-69 *infra*.

34 California has had the most visible activity, but so far rather tight reins have been maintained. *See, e.g.*, Haldane v. Freedman, 204 Cal. App. 2d 475, 22 Cal. Rptr. 445 (1962) (suggesting that privity remains a requirement unless the *Biakanja* criteria balance favorably to duty) Ventura County Humane Society, Inc. v. Holloway, 40 Cal. App. 3d 897, 115 Cal. Rptr. 464 (1974) (debatable limit of scope of lawyer's duty to the beneficiary of a will). *See* note 48 *infra;* Norton v. Hines, 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975) (rejecting negligence theory against a lawyer who had litigated a claim merely in the hope that a basis for the claim would develop); Goodman v. Kennedy, 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976) (restricting scope of duty regarding negligent misrepresentation). *See* note 66 *infra*. Other courts have gone further. *See, e.g.*, Prescott v. Coppage, 266 Md. 562, 296 A.2d 150 (1972) (imposing a fiduciary duty in favor of non-clients); Stewart v. Sbarro, 142 N.J. Super. 581, 362 A.2d 581 (1976), as do Schwartz v. Greenfield, Stein & Weisinger, 90 Misc. 2d 882, 396 N.Y.S.2d 582 (1977); and somewhat similarly, Simmerson v. Blanks, 149 Ga. App. 478, 254 S.E.2d 716 (1979).

35 Rowlands v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (giving historical background and using *Biakanja* criteria, *supra* note 31, to give foreseeability a higher priority). An added criterion was the prevalence and availability of insurance, a factor not yet discussed in the lawyer cases, *but see* James, *supra* note 9; Keeton, *supra* note 3.

36 Discussed in Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968) (setting forth special criteria).

37 W. PROSSER, LAW OF TORTS, 340-43 (4th Ed. 1971); HARPER & JAMES, *supra* note 6, at 1044-53.

38 On general importance of relationship analysis, *see* Tobriner and Grodin, *The Individual and the Public Service Enterprise in the New Industrial State,* 55 CAL. L. REV. 1247, 1249-50 (1967); Green, *Relational Interests,* 29 ILL. L. REV. 460 (1934); 29 ILL. L. REV. 1041 (1934); 30 ILL. L. REV. 1 (1935); 30 ILL. L. REV. 314 (1935).

power to define the scope of the duty owed. This power is especially significant in the non-client cases.[39]

Of prime concern in determining whether there is a duty to a non-client and what its scope will be are the key relationships: (1) Lawyer to client; (2) Lawyer to non-client (knowingly entered or undertaken by lawyer); and (3) Client to non-client.[40] In place of the absolute weight given to the lawyer-client relationship by privity is the high priority given to that relationship under the developing special negligence theory.[41] Heavy in weight in the judicial balancing process are the loyalty and duty owed to the client, and the lawyer's requisite freedom to pursue the client's interest without overburdening concern for the interests of others.[42] Still, these interests may be outweighed if the lawyer has been overzealous on behalf of his client or if other loyalties are thought to be relevant. The less that duty burdens the lawyer-client relationship, the more fairness in dealing with a non-client weighs, especially if the lawyer had induced his reliance. Economic considerations remain of significant importance[43] but at times they are outweighed by moral considerations.[44] Further, there is a sense, however presently limited, that the business of lawyers is affected with the public interest. At times it may appear relevant that a non-client's claim may serve a regulatory function to deter lawyers from incompetent or highly questionable practices.

III. The Duty and Its Scope[45]

If a lawyer is employed to draft a will to include a particular beneficiary,

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39 Most extensively discussed in Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969). *See also* notes 47-49 and accompanying text *infra.* Even more subtle is judicial weighing of the evidence, *see* notes 110-113 and accompanying text *infra.* On scope of duty generally, see HARPER & JAMES, *supra* note 6, at ch. 28; PROSSER, *supra* note 6, at 326-27.

40 Probably all the cases recognizing duty to a non-client may be characterized as stemming from the lawyer's undertaking of a special relationship. *See* similar point expressed by Prosser regarding claims for loss of prospective advantage. PROSSER, *supra* note 6, at 952. Lack of a requisite relationship was noted in such cases as Savings Bank v. Ward, 100 U.S. 195 (1879) (certificate of title for client); Goodman v. Kennedy, 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976) (wrong advice to client). Undertaking of relationship to both client and non-client was recognized in: Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969) (will case); Prescott v. Coppage, 266 Md. 562, 296 A.2d 150 (1972) (corporation and creditors); Fickett v. Superior Court, 27 Ariz. App. 793, 558 P.2d 988 (1976) (guardian and ward).

41 Many cases deny duty in a particular situation by reference to the lawyer-client relationship. *See, e.g.,* Savings Bank v. Ward, 100 U.S. 195 (1879); Chalpin v. Brennan, 114 Ariz. 124, 559 P.2d 680 (1976); Goodman v. Kennedy, 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976); Amey, Inc. v. Henderson, Franklin, Starnes & Holt, 367 So.2d 633 (Fla. App. 1979); Bryan & Amidei v. Law, 435 S.W.2d 587 (Tex. Civ. App. 1968); Goerke v. Vojvodich, 67 Wis. 2d 102, 226 N.W.2d 211 (1975).

42 The considerations relevant to duty set forth in this paragraph are reflected in the cases and elaborated in the subsequent text. They go beyond the California criteria, *see* note 26 *supra. Lucas* added the criterion of burden of duty on the legal profession. In one form or another, the California criteria have been stated in a number of lawyer cases: Fickett v. Superior Court, 27 Ariz. App. 793, 558 P.2d 988 (1976); Licata v. Spector, 26 Conn. Supp. 378, 225 A.2d 28 (1966); McAbee v. Edwards, 340 So.2d 1167 (Fla. App. 1976); *In re* Killingsworth, 270 So.2d 196 (La. App. 1972); Stewart v. Sbarro, 142 N.J. Super. 581, 362 A.2d 581 (1976); Schwartz v. Greenfield, Stein & Weisinger, 90 Misc. 2d 882, 396 N.Y.S.2d 582 (1977); Metzker v. Slocum, 272 Or. 313, 537 P.2d 74 (1975); and in non-lawyer cases, *see* note 26 *supra. See also* Annot., 46 A.L.R.3d 979, 986-87 (1972), recommending their use in cases involving accountants.

43 Economic considerations peculiar to the legal profession have not been explicitly considered in the cases, *see* note 30 *supra,* but may be implicit in considering burden of duty on the profession. *See, e.g.,* Goodman v. Kennedy, 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976). For discussion regarding accountants, *see* Annot., 46 A.L.R.3d 979, 983-87 (1972). For comparison between accountants and lawyers, *see* Note, *Public Accountants and Attorneys: Negligence and Third Parties,* 47 NOTRE DAME LAW. 588 (1972).

44 The moral factor was omitted from the California criteria in *Lucas,* possibly out of regard to the defendant lawyer, but reinserted in Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

45 The analysis and citation of cases in this section reflect the perspectives developed in the preceding section. Precedents older than 20-30 years are weak, *see* note 30 *supra.* A seeming rejection of duty or a cite to

his duty to the beneficiary under general negligence theory is especially compelling.[46] Even so, the scope of that duty is dependent upon the client's expectations, directions and actions. Thus, the lawyer would owe no duty to the beneficiary to urge a large bequest even if based on recognizable moral considerations, or to minimize tax consequences to preserve the residual estate by refusing a clause which the fully informed testator demands.[47] The ultimate importance of client autonomy may even protect the lawyer against responsibility for a particular litigation-prone ambiguity.[48] The scope of duty is shaped differently by the relationship between client and non-client in fiduciary situations. A trustee or a guardian employs the lawyer and, in that sense, is his client. Yet this client's directions to the lawyer cannot so readily define the lawyer's duty if they run significantly counter to the clear obligations owed by the fiduciary to the beneficiaries. If a trust is involved, for instance, the lawyer's loyalties are split by law, the one of higher priority being that owed to the trust and its beneficiaries.[49] Under a related balancing, lawyer loyalty to the client generally stops short of aiding or abetting criminal activity. Arguably there is a duty owed to a non-client to prevent him from becoming a victim of the client's announced criminal intentions to do him serious bodily or maybe even economic harm, despite the nearly sacrosanct duty of preserving a client's confidences. Clear moral or ethical duties, at least those imposed by the Code of Professional Responsibility, ought not to be considered unduly burdensome on the profession, even if backed by the economic pressure of potential negligence claims.[50]

Savings Bank v. Ward, 100 U.S. 195 (1879) may well be little more than a stand against foreseeability as the prime criterion of duty. *See, e.g.,* Goerke v. Vojvodich, 67 Wis. 2d 102, 226 N.W.2d 211 (1975). The precedential strength of such an opinion is especially slight if it also analyzes its problem in light of otherwise applicable negligence theory, *see, e.g.,* Chicago Title Ins. Co. v. Holt, 36 N.C. App. 284, 244 S.E.2d 177 (1978). If there are other signs in the jurisdiction that duty will likely be recognized, *compare* Victor v. Goldman, 74 Misc. 2d 685, 344 N.Y.S.2d 672 (1973), *aff'd,* 43 A. D. 2d 1021, 351 N.Y.S.2d 956 (1974) (no duty in will case) *with* Schwartz v. Greenfield, Stein & Weisinger, 90 Misc. 2d 882, 396 N.Y.S.2d 582 (1977) (voluntary undertaking) and White v. Guarente, 43 N.Y.2d 356, 372 N.E.2d 315, 401 N.Y.S.2d 474 (1977) (accountants' duty). Cases in which duty is denied involve situations which would be questionable in duty jurisdictions, a point more strongly stated in MALLEN & LEVIT, *supra* note 5, § 58 (1977).

46 *See* notes 14-15 *supra.* Other will cases include Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969), rejecting "surplusage" of earlier third party beneficiary theory; Licata v. Spector, 26 Conn. Supp. 378, 225 A.2d 28 (1966); Woodfork v. Sanders, 248 So.2d 419 (La. App. 1971), contract theory; *In re* Killingsworth, 270 So.2d 196 (La. App. 1972), *modified,* 292 So.2d 536 (La. 1974); Maneri v. Amodeo, 38 Misc. 2d 190, 238 N.Y.S.2d 302 (1963) (no duty); Victor v. Goldman, 74 Misc. 2d 685, 344 N.Y.S.2d 672 (1973), *aff'd,* 43 A.D. 2d 1021, 351 N.Y.S.2d 956 (1974) (no duty). *But see* note 40 *supra* regarding New York's stand on duty generally.

See Bucquet v. Livingston, 57 Cal. App. 3d 914, 129 Cal. Rptr. 514 (1976) (duty imposed in drafting of trust instrument; Donald v. Garry, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971) (lawyer employed by collection agency owes duty to creditor); *cf.* W. L. Douglas Shoe Co. v. Rollwage, 187 Ark. 1084, 63 S.W.2d 841 (1933) (similar situation but creditor called "client").

47 Adopted from Bucquet v. Livingston, 57 Cal. App. 3d 914, 129 Cal. Rptr. 514 (1976). Scope of duty analysis elaborated in Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

48 Ventura County Humane Society, Inc. v. Holloway, 40 Cal. App. 3d 897, 115 Cal. Rptr. 464 (1974), criticized for promoting questionable practices in, Note, *Attorney Malpractice in California: The Liability of a Lawyer Who Drafts an Imprecise Contract or Will,* 24 U.C.L.A. L. REV. 422, 439-42 (1976). *See generally* HECKERLING, TRUSTS AND ESTATES 728-30, (Nov. 1977).

49 Fickett v. Superior Court, 27 Ariz. App. 793, 558 P.2d 988 (1976) (guardian of incompetent's estate converted funds); Prescott v. Coppage, 266 Md. 562, 296 A.2d 150 (1972) (receiver attorney for corporate debtor owes duty to creditors); *In re* Alexander, 360 S.W.2d 92 (Mo. 1962) (a lawyer dereliction of duty to estate); *In re* Fraser, 83 Wash. 2d 884, 523 P.2d 921 (1974) (duty to ward as well as guardian, discipline question). *See also In re* Brooks, 596 P.2d 1220 (Colo. App. 1979) (no duty to beneficiary in discretionary situation); TransAmerican Ins. Co. v. Keown, 451 F. Supp. 397 (D.N.J. 1978) (implying duty to beneficiary of trust).

50 *Compare* Tarasoff v. Regents of Univ. of Cal., 13 Cal. 3d 177, 529 P.2d 553, 118 Cal. Rptr. 129 (1974) (applying *Biakanja* criteria, *see* note 26 *supra*). Moral blameworthiness of the defendant is one factor.

On the other hand, the priority of a lawyer's duty and loyalty to a client in litigation and other adversarial situations practically precludes a finding of duty to the adversary. It has even been held that a lawyer for a defendant in a criminal case owed no duty to a potential witness for his client to warn him about the risks of self-incrimination.[51] Such tactics are questionable. Yet how could a lawyer effectively represent his client if he owed a duty to investigate the potential risks to each of the witnesses who participate in the litigation? Still, the lawyer's freedom is not absolute even in litigation.[52] He may, for instance, be ordered by the court to act in a certain way in favor of an adversary, or he may have acted to cause a court to rely on his assurances in favor of an adversary. Lawyers have under such circumstances been held subject to tort sanction under a duty which the court has imposed on behalf of the adversary.[53] One of the more troublesome questions concerns the lawyer who subjects not only his claimed adversary but a court to the burden of an unmeritorious suit. Litigation is often an indispensable mechanism for clients to realize their legal rights. Considerable benefit has come to society as a whole by allowing lawyers freedom to be venturous in introducing causes that may at one time have seemed unmeritorious or even groundless only later to be recognized as the beginning of a new hope for advancing justice. Consequently, the persistent holding is that mere negligence is not a basis for the adversary's claim.[54] Yet the harm that can come to the reputation of innocent persons, especially professionals such as physicians and lawyers, raises the question whether carefully controlled standards for pursuing litigation might not be better than almost absolute immunity.[55]

The will-drafting sort of situation marks one end of a continuum with its harmony of interests of lawyer, client, and non-client. At the other end, the

See ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101(C)(3); MALLEN & LEVIT, *supra* note 5, at 629-30 (1977); Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation,* 30 S.C. L. REV. 281 (1979). Regarding lawyer's duty to report intention of client to commit crime relevant to securities or income tax, *see* Shipman, *The Need for SEC Rules to Govern Duties and Civil Liabilities of Attorneys Under the Federal Securities Statutes,* 34 OHIO ST. L.J. 231, 276 (1973).

51 De Luca v. Whatley, 42 Cal. App. 3d 574, 117 Cal. Rptr. 63 (1974) (client is the only intended beneficiary).

52 Noble v. Sears, Roebuck & Co., 33 Cal. App. 3d 654, 109 Cal. Rptr. 269 (1973) (a lawyer may be liable to adversary for negligence in employment of private investigator).

53 *See* McEvoy v. Helikson, 277 Or. 781, 562 P.2d 540 (1977) (court imposed duty to retain client's passport); Gottlieb v. Edelstein, 84 Misc. 2d 1053, 375 N.Y.S. 2d 532 (1975) (failure to inform court or adversary of unpreparedness). *See also* Mountain States Implement Co. v. Sharp, 94 Idaho 255, 486 P.2d 80 (1971) (liability for costs to adverse party for taking default judgment); Lyons v. Paul, 321 S.W.2d 944 (Tex. Civ. App. 1958) (fraud on court based on duty to respond to unrepresented adversary's communications). *But cf.* Parnell v. Smart, 66 Cal. App. 3d 833, 136 Cal. Rptr. 246 (1977) (attorneys for automobile insurance carrier did not owe duty of care to adverse third party); Young v. Hecht, 3 Kan. App. 2d 510, 597 P.2d 682 (1979) (an attorney absent special circumstances is not liable for consequences of his professional negligence to anyone other than his client).

54 Often cited is Norton v. Hines, 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975) (using *Biakanja* criteria, *see* note 31 *supra,* to determine that the proper claim is for malicious prosecution).

55 Norton v. Hines, 49 Cal. App. 3d 917, 123 Cal. Rptr. 237 (1975) (strongly suggesting that evidence of negligence might suffice under the rubric of malicious prosecution). *See also* Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation,* 30 S.C. L. REV. 281, 310-14 (1979), suggesting an implied cause of action based on the Code of Professional Responsibility; Birnbaum, *Physicians Counterattack: Liability of Lawyers for Instituting Unjustified Malpractice Actions,* 45 FORDHAM L. REV. 1003 (1977), discussing harm to physicians; Thode, *The Groundless Case—The Lawyer's Tort Duty to His Client and to the Adverse Party,* 11 ST. MARY'S L.J. 59, 72-74 (1979), discussing negligence claim.

Generally, an adversary must claim an intentional tort. *See, e.g.,* Lackey v. Vickery, 57 F. Supp. 791 (W.D. Mo. 1944) (failure to remove lien); Farmer v. Crosby, 43 Minn. 459, 45 N.W. 866 (1890) (execution upon void default judgment).

litigational situation presents a sharp conflict of interests and an inverse likelihood of duty owed from lawyer to opponent. In between lies a range of relationships from nearly adversarial to divergent to collegial. The probability of a duty relationship between a lawyer and a non-client increases as the situations vary from conflict to collegiality.[56] In the sale of realty, for instance, the lawyer's degree of involvement with the non-client will likely vary depending on the relationship between the client and non-client. A sale of realty can be between contentious parties but as well between friends or friendly business associates.[57] Their interests diverge but the non-client is more apt to trust his opinions and offers of limited service. Even in an arm's-length transaction, there may be some degree of trust and reliance. If the lawyer deliberately puts his opinion or his credibility on the line by promise, assurance of benefit, or material representations, it is not unfair to expect him to act responsibly as befits the profession.[58] Further, it seems appropriate to allocate the known or knowable economic risks of his negligence to the lawyering enterprise.

The grounds for duty are clearest when a lawyer makes material representations to a non-client, especially if at the client's request.[59] Illustrative are the opinion letter regarding the client's legal status directed to a prospective lender and the title opinion directed to a prospective buyer.[60] The scope of duty in such situations should be carefully calibrated by courts to correlate with a lawyer's obligation to his client so as not to unduly inhibit or burden the lawyer-client relationship generally. His duty will run only to those he agrees

56 *See, e.g.*, Collins v. Fitzwater, 277 Or. 401, 560 P.2d 1074 (1977) (relationship between the director of a corporation and corporate counsel); Fickett v. Superior Court, 27 Ariz. App. 793, 558 P.2d 988 (1976) (lawyer for guardian and ward). The "closer" the relationships, the more likely a finding of a lawyer-client relationship with more than one party. *See* text accompanying notes 104 and 105 *infra*.

57 The cases in this section generally involve assumptions by courts that land sale transactions are arm's length or even adversarial. *See, e.g.*, Adams v. Chenowith, 349 So.2d 230 (Fla. App. 1977) (closing statement); Amey, Inc. v. Henderson, Franklin, Starnes, & Holt, 367 So.2d 633 (Fla. App. 1979) (buyer and lender's lawyer). *But cf.* Lawall v. Groman, 180 Pa. 532, 37 A. 98 (1897) (finding an "undertaking"); Blevin v. Mayfield, 189 Cal. App. 2d 649, 11 Cal. Rptr. 882 (1961); Busey v. Perkins, 168 Md. 19, 176 A. 474 (1935) (no conflict of interest for disciplinary purposes in representing both buyer and seller where close relationships).

Of all the cases involving claims by a non-client, no doubt the least defensible in supporting a purely adversarial approach in a non-litigation setting is Kendall v. Rogers, 181 Md. 606, 31 A.2d 312 (1943), in which an unrepresented seller who had given limited warranty was persuaded by a lawyer for the buyer that she had to make good on a subsequently discovered defect of title not legally covered by the warranty.

58 The more harmonious the relationships, or the more the lawyer acts to make them appear harmonious, the easier it is to establish justifiable reliance on the lawyer's behavior under theories of misrepresentation or undertaking of duty by assurance or promise. *See* text accompanying notes 68 and 69 *infra*.

59 *See* RESTATEMENT (SECOND) OF TORTS § 552, notes 24-29 and accompanying text *supra*.

60 *See, e.g.*, Roberts v. Ball, Hunt, Hart, Brown and Baerwitz, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976) (letter from borrower's lawyer to lender) (using *Biakanja* criteria). *See also* Ryan v. Kanne, 170 N.W. 2d 395 (Iowa 1969), (applying § 552 to accountants and, in *dictum*, to lawyers); Brody v. Ruby, 267 N.W. 2d 902 (Iowa 1978); Milliner v. Elmer Fox & Co., 529 P.2d 806 (Utah 1974) (approving *Ryan* as to accountants and lawyers).

See also Capitol Bank & Trust Co. v. Core, 343 So.2d 284 (La. App. 1977) (title opinion, contract theory complemented by tort references); Security National Bank v. Lish, 311 A.2d 833 (D.C. App. 1973) (title assurance to client's bank); Reamer v. Kessler, 233 Md. 311, 196 A.2d 896 (1964) (certificate of title, "employment" rationale, with approving reference to tort theory). Similarly, Lawall v. Groman, 180 Pa. 532, 37 A. 98 (1897). *Contra, In Re* Cushman, 95 Misc. 9, 160 N.Y.S. 661 (1916) (a title opinion case which would fit § 552; *see* note 46 *supra* regarding New York precedent).

Other cases with misrepresentation dimensions include Kendall v. Rogers, 181 Md. 606, 31 A.2d 312 (1943) (lawyer misleads unrepresented party in contemporary § 552 situation); Chalpin v. Brennan, 114 Ariz. 124, 559 P.2d 680 (1976) (claimed misrepresentations in contract, eschewing duty in favor of arm's-length freedom); Adams v. Chenowith, 349 So.2d 230 (Fla. App. 1977) (unrepresented vendee cannot rely on closing statement by lawyer vendor); O'Brien v. Larson, 11 Wash. App. 52, 521 P.2d 228 (1974) (vendee cannot rely on lawyer whose role is characterized as merely escrow agent).

or chooses to influence, giving him control to qualify or limit his statements or to decline opinion or comment altogether.[61] The non-client cannot expect him to act differently from the way lawyers ordinarily do unless he offers more. Thus, a lawyer's opinion letter incorporating his client's assertions may be reasonable whereas an accountant's audit similarly based might not be.[62] His obligation to discover liens on realty may vary between a lending situation and a sale if it accords with lawyer practice.[63] He should not, short of fraud, be required to disclose negative facts against his client's interests in an arm's-length transaction so long as his affirmative representations are not misleading.[64]

If the lawyer does not make representations directly to the non-client, a finding of duty would almost always be dubious, except for the writing he knows will be used by the client for a specified purpose and defined audience.[65] Otherwise, the lawyer's counseling function would be severely burdened.[66] It is unreasonable to require a lawyer to protect against client distortions by reducing everything to writing. Further, a non-client's right to rely could not ordinarily be justified. If the lawyer knows his client will repeat his representations to the non-client, or he urges him to do so, a liberalized test of fraud would probably serve best. If his utterances demonstrate recklessness or gross

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61 Savings Bank v. Ward, 100 U.S. 195 (1879) is often cited as the leading case, *see* notes 1, 13 and 45 *supra*. *Ward* would not, however, meet test of § 552 today, because the purpose of opinion was not known to defendant lawyer. *Semble*, Dundee Mortgage and Trust Investment Co. v. Hughes, 20 F. 39 (D. Or. 1884); Currey v. Butcher, 37 Or. 380, 61 P. 631 (1900) (concerning a certificate of title, no duty was shown, but knowledge of defendant lawyer unclear). For cases regarding a lawyer's capacity to limit liability, *see* note 29 *supra*.

62 Milliner v. Elmer Fox & Co., 529 P.2d 806 (Utah 1974).

63 Amey, Inc. v. Henderson, Franklin, Starnes & Holt, 367 So.2d 633 (Fla. App. 1979); Chicago Title Ins. Co. v. Holt, 36 N.C. App. 284, 244 S.E.2d 177 (1978).

64 Goerke v. Vojvodich, 67 Wis. 2d 102, 226 N.W.2d 211 (1975) (position on privity unclear but no duty to disclose in arm's-length transaction); Goodman v. Kennedy, 18 Cal. 3d 335, 134 Cal. Rptr. 375, 556 P.2d 737 (1976). *But cf.* Roberts v. Ball, Hunt, Hart, Brown and Baerwitz, 57 Cal. App. 3d 104, 128 Cal. Rptr. 901 (1976) (half-truths basis of negligence claim).

An analysis of non-lawyer cases strengthens the prediction that the negligent misrepresentation theory will be applied to lawyers; *see* note 31, *supra*. *See also* Craig v. Everett M. Brooks Co., 351 Mass. 497, 222 N.E.2d 752 (1967) (a case concerning an engineer) ; Barry, *Legal Malpractice in Massachusetts*, 63 MASS. L. REV. 15, 24 (1978) (suggesting that the state will apply a similar duty to lawyers).

Sales of securities present special questions in which the issues of state common law and federal statutory interpretation intertwine. *See* Ernst and Ernst v. Hochfelder, 425 U.S. 185 (1976), *discussed in* Shipman, *Professional Responsibility of the Corporate Lawyer*, PROFESSIONAL RESPONSIBILITY: A GUIDE TO ATTORNEYS, 271, 306-09 (1979); Goodman v. Kennedy, *see* note 64 *supra*. *See also* Parker, *Attorney Liability Under the Securities Laws After Ernst & Ernst v. Hochfelder*, 10 LOY. L. REV. 521 (1977); Note, *Attorney Malpractice in California*, 24 U.C.L.A. L. REV. 422 (1976); Smith, *Preventing Errors in Securities Transactions*, 30 S.C. L. REV. 243 (1979).

65 RESTATEMENT (SECOND) OF TORTS § 552(2) (1977).

66 Goodman v. Kennedy, 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976). Because of their lawyer's erroneous advice, corporate officers issued stock to themselves under the mistaken belief that any subsequent sale would be exempt from federal registration requirements. Plaintiff purchasers acquired ultimately worthless stock with no remedy against insolvent officers. A finding of no duty was based on the importance of the lawyer-client relationship and lack of any undertaking by defendant to benefit or influence the plaintiffs. The vigorous dissent based duty on the lawyer as the chief instrumentality of plaintiffs' clearly foreseeable economic loss, the lack of an alternative remedy, and a conception of the attorney as an officer of the law not just the agent of the client. It is difficult to distinguish the purely economic aspect of the case from that of other cases allowing recovery for a discrete, almost packaged, loss. *See, e.g.*, notes 20 and 21 *supra*. It meets the idea of a built-in and recognizable limit in § 552. Yet it is difficult to see how the precedent could be controlled to protect the lawyer's counseling function generally. *See* note 75 and accompanying text *infra*. *See also* Commercial Standard Title Co. v. Superior Court, 92 Cal. 3d 934, 155 Cal. Rptr. 393 (1979) (relying on *Goodman* in claim that defendant negligently advised his client so that he relied on plaintiff's "lot book guarantees").

Compare the situation in which one lawyer gives an opinion at the request of a second lawyer for use by the latter in aid of his client. At least one writer believes this situation establishes a duty relationship between the first lawyer and the client of the second lawyer. Martindale, *Attorney's Liability in Non-Client and Foreign Law Situations*, 14 CLEV.-MAR. L. REV. 44 (1965).

negligence in their lack of concern for truth or validity, then there seems no good reason to protect him from liability.[67]

Lawyers also mislead through direct promises and assurances of some benefit to non-clients. A lawyer might, for instance, persuade a seller of realty to complete the closing of the transaction with his client, the buyer, by offering to perform some service material to the seller, perhaps to record a related security interest. If there is intent to induce reliance, the same reasons that support duty in misrepresentation situations support them here.[68] Additionally, our law is laced with principles holding individuals responsible for creating justifiable expectations in persons who rely to their detriment.[69] Here, there is the added feature that a lawyer may more readily create such expectations which as a professional he should honor, especially but not only if he is serving his client in the process. The limits of legitimate zeal in such service are of course surpassed by fraud. But even negligent overreaching can legitimately be discouraged when it is so easy for a lawyer to avoid intruding or to issue appropriate caveats.

Whether particular assurances give rise to duty should turn on the lawyer-client relationship involved in the situation. Also important is the question, when may a non-client legitimately expect a lawyer to be concerned with his interests. The more that good and responsible practice requires the lawyer to devote his attentions to his client, the less non-clients' expectations should be turned into rights.[70] Suppose, for instance, in a divorce situation the wife is represented by a lawyer and the husband is not. As part of the settlement, the husband delivers a quitclaim deed to certain property to the lawyer, with the wife as grantee. Part of the agreement is that the wife will grant other property

67 Chatham Furnace Co. v. Moffatt, 147 Mass. 403, 18 N.E. 168 (1888) (deceit maintainable in a situation in which defendant states that a matter is of his own knowledge when he does not know); Scandrett v. Greenhouse, 244 Wis. 108, 11 N.W. 2d 510 (1943) (maintainable in a situation in which the behavior was "wrongful" even if not clearly fraudulent) Cardozo stated that recklessness or even gross negligence could be the basis for an inference of fraud. Ultramares Corp. v. Touche, Niven & Co., 255 N.Y. 170, 174 N.E. 441 (1931). *See* Annot., 46 A.L.R.3d 979, 987 (1972), discussing this test with respect to accountants; Metzger and Heintz, *Hochfelder's Progeny: Implications for the Auditor,* 63 MINN. L. REV. 79 (1978), regarding recklessness as a test of scienter in the securities area.

68 Schwartz v. Greenfield, Stein, & Weisinger, 90 Misc. 2d 882, 396 N.Y.S. 2d 582 (1977) (failing to record security agreement in proper place). *Schwartz* relies on Stewart v. Sbarro, 142 N.J. Super. 581, 362 A.2d 581 (1976), in which the court found a duty based on failure to return mortgage instruments as promised at closing, even though the defendant lawyer engaged in highly questionable tactics, both cases finding an undertaking of a *fiduciary* relationship. *See also,* Simmerson v. Blanks, 149 Ga. App. 478, 254 S.E. 2d 716 (1979) (gratuitous promise after closing, but lawyer recorded papers in wrong county, and was held to standard of expertise proffered); Security National Bank v. Lish, 311 A.2d 833 (D.C. App. 1973), (lawyer's gratuitous assurance to lender of client's title in property offered as security). *But cf.* Jacobsen v. Overseas Tankship Corp, 11 F.R.D. 97 (E.D. N.Y. 1950) (no duty to obtain promised release discharging plaintiff as joint tortfeasor of client); McGlone v. Lacey, 288 F.Supp. 662 (D.S.D. 1968) and Delta Equipment and Construction Co. v. Royal Indemnity Co., 186 So.2d 454 (La. App. 1966) (no undertaking to act as lawyer for plaintiff); Young v. Hecht, 3 Kan. 2d 510, 597 P.2d 682 (1979) (no right to rely on assurances of lawyer for wife in separate maintenance action).

69 *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 766C, Comment e (1977), "other cases involving other services than the supplying of information, may not fall within the exact provisions of § 552, but are covered by the general principle underlying it." RESTATEMENT OF AGENCY § 378, relied upon in Simmerson v. Blanks, 149 Ga. App. 478, 254 S.E. 2d 716 (1979); RESTATEMENT (SECOND) OF TORTS § 323 (1977), relied upon in Schwartz v. Greenfield, Stein, and Weisinger, 90 Misc. 2d 882, 396 N.Y. 2d 582 (1977); RESTATEMENT (SECOND) OF TORTS § 324A, relied upon in Stewart v. Sbarro, 142 N.J. Super, 581, 362 A.2d 581 (1976); RESTATEMENT OF CONTRACTS § 90, discussed but not applicable in McGlone v. Lacey, 288 F. Supp. 662 (D.S.D. 1968). *See also,* Seavey, *Reliance Upon Gratuitous Promises or Other Conduct,* 64 HARV. L. REV. 913 (1951).

70 *See, e.g.,* Mason v. Levy & Van Bourg, 77 Cal. App. 3d 60, 143 Cal. Rptr. 389 (1978). In *Mason,* plaintiff lawyer referred the case to defendant lawyer on a contingency basis. The court found that there was no duty to prevent running of statute of limitations. Precedent would promote split loyalties.

to the husband's brother. His best security for her performance would have been to place the deed in escrow, but of course he is not aware of that option, and the lawyer has no obligation to advise him. Nor has he the right to expect the lawyer not to record the deed or deliver it to the wife.[71] If the lawyer received the quitclaim deed upon assuring the husband that the wife would perform, then quite arguably he has crossed the line of duty not to let her have the deed. Yet if he advised the husband to record the deed, saying he would make sure the wife performed, duty is doubtful. Only assurances that he can carry out and that place no questionable burden on his client should give rise to a right to rely.[72] If conceivably the divorce were friendly or if the basic transaction were a friendly exchange of property between a husband and wife instead of divorce, it would be easier to imply an assurance of protection of the husband's interest. Given an explicit assurance, the husband ought to be protected because then there is a definite undertaking which imposes no undue burden on the lawyer. His involvement with the husband is deeper, his commitment firmer. He can avoid the responsibility by refusing the deed or recommending an escrow arrangement.[73]

There will always be cases in which a lawyer will be insulated from liability to non-clients for his negligence. Included will be some cases in which he knows or even intends harm will occur to them. The value of the lawyer-client relationship will outweigh the harm as often as may the interest of the lawyer to be free to make mistakes, even to the point of incompetence, for the sake of lawyer freedom generally.[74] Even if the privity requirement should entirely disappear or the general principle against liability for negligently causing economic harm be significantly eroded, negligence theory will protect against the lifting of the floodgates to unreasonable or uncertain economic risks. Consequently, a lawyer may, with little risk, advise his client of his option to breach a contract, or even counsel the breach as good strategy, if he sticks to advice

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71 *See, e.g.*, Weigel v. Hardesty, 37 Colo. App. 541, 549 P.2d 1335 (1976) (lawyer's duty owed entirely to the wife, lawyer cannot act as escrow agent under these circumstances). *But see* Lyon v. Paul, 321 S.W. 2d 944 (Tex. App. 1958); (lawyer for plaintiff in clearing of title suit did not return to unrepresented plaintiff communications significant to the suit).

72 In Stewart v. Sbarro, 142 N.J. Super. 581, 362 A.2d 581 (1976), the court was careful to place duty on defendant lawyers' failure to inform plaintiff the mortgage had not been executed as promised, rather than on the failure to obtain signatures he could not guarantee. *But cf.* Robertson v. Clocke, 18 A.D. 363, 46 N.Y.S. 87 (1897) (lawyer confronted with contempt charges if he did not deliver to mortgagor a promised extension of the mortgage from his client mortgagee, although the undertaking may not have been gratuitous).

73 See generally the analysis of the next section and particularly notes 111-115 and accompanying text *infra*.

74 A lawyer's negligence to his client does not alone give rise to a duty to a non-client; McDonald v. Stewart, 289 Minn. 35, 182 N.W. 2d 437 (1970); D & C Textile Corp. v. Rudin, 41 Misc. 2d 916, 246 N.Y.S. 2d 813 (1964); Goodman v. Kennedy, 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976); Mason v. Levy & Van Bourg, 77 Cal. App. 2d 60, 143 Cal. Rptr. 389 (1978); Hughes v. Housley, 599 P.2d 1250 (Utah 1979). A non-client who claims that a lawyer has been jointly negligent with him in damaging a third party may not be able to claim indemnity or contribution for the same policy considerations that would prevent his claim of duty. Held v. Arant, 67 Cal. App. 3d 748, 134 Cal. Rptr. 422 (1977); Commercial Standard Title Co. v. Superior Court, 92 Cal. App. 3d 934, 155 Cal. Rptr. 393 (1979) (the client is thus allowed to select his judgment debtor who has no recourse).

Unless there is an undertaking in favor of a non-client, the lawyer's duty in drafting instruments will most likely run only to his client. *See, e.g.*, Drawdy v. Sapp, 365 So.2d 461 (Fla. App. 1978) (deed from client husband to wife); Adams v. Chenowith, 349 So.2d 230 (Fla. App. 1977) (erroneous closing statement); Chalpin v. Brennan, 114 Ariz. 124, 559 P.2d 680 (1976) (purchaser of stock relying on negligently drafted contract).

and counsel and avoids conspiratorial or malicious instigation.[75] However questionable the morality of a particular breach might be, if it is the client's legal option, and even if the lawyer can predict with high certainty the breach, the advising and counseling function will have priority.[76] More questionable would be advising the commission of a tort, at least one involving fault.[77] Stronger for the imposition of duty would be counseling or advising a crime that harms another party. Tort or crime, if bodily harm is involved, deterrence of such lawyer activity seems desirable because a damage claim against the client would rarely be acceptable as adequate although in breach of contract situations it usually would be.[78]

Often a lawyer performs a service or pursues a course of action for a client which he reasonably should foresee or indeed knows will be the subject of reliance by another person. Even if the other party's reliance is arguably reasonable, or even if most lawyers would take account of the other person's interest, duty may still be lacking although the lawyer-client relationship would not be burdened. Representative is the situation in which an employee has been reimbursed by an insurer which carries workmen's compensation insurance on his job. The carrier has notice that the employee's lawyer intends to litigate a claim against a third-party tortfeasor. The carrier is entitled to a portion of the proceeds of either the settlement or the judgment. Conceivably, the carrier would have reason to believe that the lawyer would competently pursue the claim. If the lawyer should negligently let the statute of limitations run, the employee would have a claim against him. Since the carrier's claim is so intimately related to the employee's it is arguable the carrier ought to have a

75 McDonald v. Stewart, 289 Minn. 35, 182 N.W.2d 437 (1970); D & C Textile Corp. v. Rudin, 41 Misc. 2d 916, 246 N.Y.S. 2d 813 (1964); Costello v. Wells Fargo Bank, 258 Cal. App. 2d 90, 65 Cal. Rptr. 612 (1968); Jaffee v. Rubinstein, 24 A.D. 2d 752, 263 N.Y.S. 2d 867 (1965), *appeal dismissed*, 21 N.Y. 2d 721, 234 N.E.2d 706 (1968). For the related notion that one who misadvises his client should not be liable on a theory of negligent misrepresentation to a non-client affected by the advice, *see* note 66 and accompanying text *supra*. *See also* RESTATEMENT (SECOND) OF TORTS § 772, dealing with the privilege of honest advisers, and Comment "c" noting the possible exception for negligent misrepresentation.

76 An attorney apparently can cross the line, however, to liability for intentional interference. *See, e.g.*, Warner v. Roadshow Attractions Co., 56 Cal. 2d 1, 132 P.2d 35 (1943); Kasen v. Morrell, 18 Misc. 2d 151, 183 N.Y.S.2d 928 (1959). Skelly v. Richman, 10 Cal. App.3d 844, 89 Cal. Rptr. 556 (1970). *But cf.*, Bayon v. Pettingill, 77 So.2d 202 (La. App. 1955) (not liable for stopping payment on check); Weigel v. Hardesty, 549 P.2d 1335 (Colo. App. 1976) (facilitating client's breach by recording of quitclaim deed).

77 How far the lawyer must go in involvement with a client's tort in part depends on the court's attitude toward lawyer roles. *See, e.g.*, Grand Isle Campsites, Inc. v. Cheek, 262 La. 5, 262 So.2d 350 (1972) (as merely the "agent" of the client, without personal responsibility) (knowing of client's deceit); Olympia Roofing Co., Inc. v. City of New Orleans, 288 So.2d 670 (La. App. 1974), *aff'd* 292 So.2d 244 (La. 1974) sale *ultra vires;* Bayon v. Pettingill, 77 So.2d 202 (La. App. 1955). *Cf.* Hoppe v. Klapperich, 224 Minn. 224, 28 N.W. 2d 780 (1947) (lawyer is not merely the agent of his client but can be liable if he knows of the malicious motives of his client) Walter v. Doe, 93 Misc. 2d 286, 402 N.Y.S. 2d 723 (1978) (negligent restraining of plaintiff's checking account called an intentional intervention). Whether issuance of execution on property is actionable depends on lawyer's involvement. Ford v. Williams, 13 N.Y. 577 (1856), and appeal of second trial, 24 N.Y. 367 (1862). For mistaken procurement of bench warrant against plaintiff, held not actionable in negligence, *see* Havens v. Hardesty, 600 P.2d 116 (Colo. App. 1979). Merely advising client in such a way that he commits significant but good faith trespass was not actionable. Daly v. Smith, 220 Cal. App. 2d 692, 33 Cal. Rptr. 920 (1963), *but cf.* Warner Roadshow, 56 Cal.2d 1, 132 P.2d 35 (1943) Noble v. Sears, Roebuck and Co., 33 Cal. App. 3d 654, 109 Cal. Rptr. 269 (1973) (possibility of liability in litigation context for invasion of privacy or negligence for employment of private investigators); McEvoy v. Helikson, 277 Or. 781, 562 P.2d 540 (1977) (where privity not a barrier, recognizing liability of lawyer for negligently causing mental disturbance, even without resulting physical damage). The claimant in Young v. Hecht, 3 Kan. App. 2d 510, 597 P.2d 682 (1979) failed in claim of intentional infliction of mental disturbance or oppression.

78 *See* note 50 *supra*. *See also* Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978), proposing new disciplinary rules for the nonadvocates, including prohibition against lawyers' aiding in the commission of a tort.

claim as well. Yet, there are ways for the carrier to protect its interests, and the lawyer was neither employed nor undertook to protect them. Therefore, duty is not imposed.[79] Compare the case of a lawyer who aids his debtor-client in cutting off the known contingent fee interest of the claimant's lawyer by settling directly with the claimant. This is not simply the case of a lawyer advising or helping his client breach his contract because the debtor-client in this sort of case could be liable for extra damages to the lawyer with the contingent fee interest.[80] Liability for negligence to the non-client lawyer is unlikely lacking some sort of assurance running from the debtor's lawyer to the claimant's lawyer.[81] Generally speaking, the lawyer should not be forced to be concerned for the purely economic interests of other parties just because he and his client will affect them, especially, as in this illustration, if the injured party has his remedy in law, if not in fact. It is not in either illustration that lawyers should be encouraged to act incompetently or inconsiderately, but that the tax on such behavior should come from the clients themselves rather than burdening the legal profession with concerns which are better protected by other means.[82]

Yet even non-clients who have no other means of protection may not be able to claim a duty from lawyers who well know of their interests but who claim that they were not clearly employed to benefit them or that the range of potential liability was too uncertain. Children's interests are particularly vulnerable. In a California case, the defendant lawyer represented the wife in a divorce situation.[83] He was sued on behalf of her children on the ground that he negligently failed to prevent a depletion of her estate thus affecting their inheritance potentials, and perhaps their expectations of life-style. The court held that the lawyer owed the children no duty because of the uncertainty of their expectancies.[84] The remedy was a conservatorship. The lawyer might have been hired or voluntarily undertaken to consider the children's interests, but otherwise, the wife, not the children, was his client. An Oregon case takes an equally hard line in a more questionable situation.[85] A minor claimed that a lawyer had negligently failed to perfect her adoption when hired for that pur-

79 Statutory mechanisms were available in Brian v. Christensen, 35 Cal. App. 3d 377, 110 Cal. Rptr. 688 (1973) and Soliz v. Spielman, 44 Cal. App. 3d 70, 118 Cal. Rptr. 127 (1974). Even though there was no recourse whatsoever for bondsman, the same resulted in National Auto and Casualty Ins. Co. v. Atkins, 45 Cal. App. 3d 562, 119 Cal. Rptr. 618 (1975) (perhaps justifiable as risk of insurance enterprise). *See also* Sinram v. Pennsylvania R. Co., 61 F.2d 767 (2d Cir.1932) . *But cf.* Scandrette v. Greenhouse, 244 Wis. 108, 11 N.W. 2d 510 (1943) (willfully cutting off carrier's interest).

80 Bryan & Amidei v. Law, 435 S.W. 2d 587 (Tex. Civ. App. 1968); Annot., 26 A.L.R.3d 679 (1969), defendants mostly insurers.

81 Bryan & Amidei v. Law, 435 S.W. 2d 587 (in dictum, the court said that even lawyers' knowledge of contingency not enough). *But cf.* Skelly v. Richman, 10 Cal. App. 3d 844, 89 Cal. Rptr. 556 (1970) (in dictum, the court said that more knowledge might make out case of "unlawful inducement" of breach of contract). *See also,* Frazier v. Boccardo, 70 Cal. App. 3d 331, 138 Cal. Rptr. 670 (1977); Wolfram, *supra* note 55 at 309-10, who would invoke the Code of Professional Responsibility; Yourt v. McKee, 1 Utah 281 (1876) (duty where lawyer receives money known to "belong" to another); Ashton v. Skeen, 85 Utah 489, 39 P.2d 1073 (1935); Mason v. Levy & Van Bourg, 77 Cal. App. 3d 60, 143 Cal. Rptr. 389 (1978) (cutting off referral fee); Vale v. Heitner, 90 Misc. 2d 921, 396 N.Y.S. 2d 602 (1977) (duty found in dictum).

82 *See also* Lackey v. Vickery, 57 F.Supp. 791 (W.D. Mo. 1944) (no duty to discharge judgment lien); Bloomer Amusement Co. v. Eskenazi, 394 N.E. 2d 16 (Ill. App. 1979) (no duty to record vendor's reserved interest even where reliance likely, but no undertaking); Hughes v. Housley, 599 P.2d 1250 (Utah 1979), (no duty to bail out predecessor lawyer); McCarthy, *Attorney Malpractice in Trademark Cases,* 66 TRADE MARK REPORTER 250 (1976), speculating about duty to persons who rely on an invalid trademark.

83 Haldane v. Freedman, 204 Cal. App. 2d 475, 22 Cal. Rptr. 445 (1962).

84 *Id.* at 478, 22 Cal. Rptr. at 446-47.

85 Metzker v. Slocum, 272 Or. 313, 537 P.2d 74 (1975).

pose by a husband and wife. Later when they separated, the putative father refused to provide support and the court in divorce proceedings declined provision for her support because she had not been legally adopted. The court in this case framed its rationale in terms of unforeseeability and the lack of certainty that she would otherwise have obtained support.[86] The case invites comparison with the will cases in which the duty to non-clients is clearest. Although it may be true that the putative parents hired the lawyer to benefit the child in a general way, there was probably no specific discussion or contemplation of hiring him to vest her with rights of support, inheritance, dependency under social security, and so on. If the case is at all supportable, it derives its merit in recognizing how far liability might ultimately go if the precedent were set in a claim like this. An imaginative court might have restricted the duty to the support right as a matter of providing at least some remedy to deter this kind of incompetence.[87] These are the kinds of situations that raise questions whether courts are realistic in presuming that lawyers always represent this client or that rather than often undertaking to represent several interests in a particular situation. Such is the concern of the next section.

IV. Duty and the Situation

In the future, the cases in the area of lawyer malpractice will probably depict more realistically the varying roles and relationships that lawyers actually undertake. At the same time, misrepresentation theory and variations based on its underlying premises likely will increasingly influence the evolution of relevant tort law. Greater weight may be given to reasonable expectations that lawyers will deal fairly with the people upon whom they exert influence. But no floodgate will open because lawyers will develop contractual and other techniques to limit their undertakings in appropriate ways. In the vein of a somewhat more specific yet modest prognostication—as well as a complement to the earlier analysis—a brief, mainly suggestive exploration follows. The inquiry probes some of the situations in which one lawyer involves himself other than casually with two or more parties.

Lingering preference for privity in some courts reflects more than apprehension of the floodgate peril. Such preference often appears to be a rationalization of several assumptions which ought now to surface. The underlying model is that in most situations a lawyer has only one client, the party who bears the formal signs. Other parties are supposedly on legal notice that the existence of the lawyer-client relationship implies that the client's interests take precedence and that the non-client is at arm's length if not an adversary.[88] In

86 *Id.* at 315, 537 P.2d at 76.

87 *Compare* further the duty owed to the ward of a guardianship. *See* note 49 *supra*.

88 The model or assumptions may be openly articulated. *See, e.g.*, Goerke v. Vojvodich, 67 Wis. 2d 102, 226 N.W. 2d 211 (1975); Adams v. Chenowith, 349 So.2d 230 (Fla. App. 1977); Parnell v. Smart, 66 Cal. App. 3d 833, 136 Cal. Rptr. 246 (1977); Amey, Inc. v. Henderson, 367 So.2d 633 (Fla. App. 1979); Young v. Hecht, 597 P.2d 682 (Kan. App. 1979). It is, however, often apparent in the slant of an opinion. *See* Kendall v. Rogers, 181 Md. 606, 31 A.2d 312 (1943); McDonald v. Stewart, 289 Minn. 35, 182 N.W. 2d 437 (1970); Olympia Roofing Co. v. City of New Orleans, 288 So. 2d 670 (La. App. 1974); Weigel v. Hardesty, 549 P.2d 1335 (Colo. App. 1976); Chicago Title Ins. Co. v. Holt, 36 N.C. App. 284, 244 S.E. 2d 177 (1978); Stratton Group, Ltd. v. Sprayregen, 466 F. Supp. 1180 (S.D.N.Y. 1979). *Compare* Farmer v. Crosby, 43 Minn. 459, 45 N.W. 866 (1890); *with* Hoppe v. Klapperich, 224 Minn. 224, 28 N.W. 2d 780 (1947) (abandonment of assumption that lawyer acts as the instrument of the client). *See* note 77 *supra*.

practice, however, lawyers sometimes create different impressions. Moreover, there are times when a lawyer may quite appropriately represent more than one party by formal declaration,[89] although neither a formal declaration nor a contract is always necessary for the creation of the lawyer-client relationship.[90] Thus arises a future question for tort law: May some or all of the duties owed to a formal client be generated from the apparently non-adversarial way a lawyer is employed or chooses to act toward other parties?[91] There are several approaches available. First, there is the approach previously analyzed that a lawyer must use due care regarding his representations or assurances that are reasonably relied upon by a non-client. Alternatively, a second party might be treated as an "as if" or quasi-client,[92] or be characterized as a client by implication.[93]

Certain situations present prime occasions for representation or service by a lawyer in the interests of two or more parties.[94] Illustrative is the formation of a partnership. It is proper and indeed often desirable in such a situation that there be but one lawyer and that he not try to promote an arm's-length atmosphere as two lawyers well might. The simple model of one lawyer, one client, would cast this lawyer's loyalty as split.[95] If in fact his loyalty were properly understood to be to the group interests, then duty in tort should be calibrated to his role in pursuing that end.

Suppose one prospective partner formally hired the lawyer. The agreement developed much the way it would were both partners formally clients. While not explicitly so, the situation bears analogy to the will cases wherein a

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89 A.B.A. Code of Professional Responsibility, DR 5-105(c).

90 MALLEN & LEVIT, *supra* note 5, § 72 (1977). *See, e.g.*, Quaglino v. Quaglino, 88 Cal. App. 2d 542, 152 Cal. Rptr. 47 (1979) (no particular formality); Fort Myers Seafood Packers, Inc. v. Steptoe, 381 F.2d 261 (D.C. Cir.), *cert. denied*, 390 U.S. 946 (1967). *See also* Ronnigen v. Hertogs, 294 Minn. 7, 199 N.W. 2d 420 (1972); Allman v. Winkelman, 106 F.2d 663 (9th Cir. 1939) (no fee necessary), discussed in comment, 27 ARK. L. REV. 452, 460 (1973). Barnes v. U.S., 381 F.2d 263 (D.C. Cir. 1976). Neither implied contract nor mutual consent necessary in some cases. *See* Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978); King v. King, 52 Ill. App. 3d 749, 367 N.E.2d 1358 (1977); Taylor v. Sheldon, 172 Ohio St. 118, 173 N.E.2d 892 (1961); Connelly v. Wolf, 463 F. Supp. 914 (E.D. Pa. 1978); Note, *Attorney Malpractice: Use of Contract Analysis to Determine the Existence of an Attorney-Client Relationship*, 63 MINN. L. REV. 751 (1979); Smith, *Preventing Errors in Securities Transactions*, 30 S.C. L. REV. 243 (1979), discussing how non-formal lawyer-client relationships arise in security transactions.

The test may be the putative client's impressions because of the lawyer's misleading him. *See* Committee on Professional Ethics and Grievance v. Johnson, 447 F.2d 169 (3d Cir. 1971); Alexander v. Russo, 571 P.2d 350 (Kan. App. 1977) (despite lawyer's intent); *Westinghouse*; E. F. Hutton & Co. v. Brown, 305 F. Supp. 371 (D.C. Tex. 1969); *King* and *Taylor* (even if "client" only engages in preliminary conference with lawyer); Note, 63 MINN. L. REV. 751 (1979). *Cf.* McGlone v. Lacy, 288 F.Supp. 662 (D.S.D. 1968); Delta Equipment & Construction Co. v. Royal Indemnity Co., 186 So.2d 454 (La. App. 1966). *See also* WISE, LEGAL ETHICS at 284 (1970); C. MCCORMICK, EVIDENCE § 88, (2nd Ed. 1972).

91 *See* note 68 *supra* Schwartz v. Greenfield and Stewart v. Sbarro, regarding fiduciary duty to non-client; Isaacs, *Liability of the Lawyer for Bad Advice*, 24 CAL. L. REV. 39 (1935), regarding significance of holding out professional status.

92 Lawall v. Groman, 180 Pa. 532, 37 A. 98 (1897); Shirmer v. Nethercutt, 157 Wash. 172, 288 P. 265 (1930); Reamer v. Kessler, 233 Md. 311, 196 A.2d 896 (1964).

93 There are several kinds of implications: (1) implied-in-fact contract, (2) justifiable reliance implied from relations and other facts, *see* note 90 *supra*, and (3) implied-in-law under tort analysis. Note, *Attorney Malpractice: Use of Contract Analysis to Determine the Existence of an Attorney-Client Relationship*, 63 MINN. L. REV. 751 (1979).

94 *See generally*, HAZARD, ETHICS IN THE PRACTICE OF LAW, at 43-86 (1978).

95 *See, e.g.*, Adams v. Chenowith, 349 So.2d 230 (Fla. App. 1977) (in which the court apparently cannot conceive of even a limited undertaking to the "other party" in a land sale, let alone that a lawyer might represent both parties). A similar attitude pervades analysis in Keeton. *Cf.* HAZARD, *supra* note 94 at 58-68; Paul, *A New Role for Lawyers in Contract Negotiations*, 62 A.B.A.J. 93 (1976), lawyer serving both parties in drafting contract, saving costs.

lawyer owes a duty to a beneficiary. A lawyer can be employed to confer the benefit of his service upon another who is not formally a client.[96] However, the situation may bear closer analogy to the misrepresentation and assurance cases if the lawyer intends or knows that the "non-client" will rely on his expertise. The other prospective partner may well expect the lawyer to show him equal fairness and consideration with the "client." The most appealing rationale might be to call him a client also, by implication or because he was treated "as if" a client.[97] The labelling is conclusory in the same way that an imposition of a duty to a non-client is conclusory.[98] What matters more are the relevant considerations to be balanced. Here, they are much like those we have previously considered regarding duty to a non-client.[99]

Sometimes a lawyer represents a *situation.*[100] The circumstances are similar to the partnership example but the implications may be somewhat less clear. A family in business or in some other kind of activity is illustrative. There might be a dominant family member who is the formal client. The lawyer may undertake to perpetuate the business, perhaps by a reshuffling of investments, compensation, or duties. His involvement with all relevant parties could manifestly be for their common good. They could be led to the reasonable expectation that he is looking out for all their interests and not taking unfair advantage.[101] A lawyer could adopt a similar role in estate planning at the initiation of one spouse and at least seemingly in the interests of both.[102] Other illustrations are a lawyer's mediation of a contract, either in formation or transition, or an attempt to resolve the interests of an insolvent corporation and its creditors. Almost any kind of transaction could be the occasion for this role.[103] Merely because the parties could be at arm's length or their interests later in conflict need not be determinative of the lawyer's role and duty at the time of acting.[104] The way the parties are in fact related may legitimately be ex-

96 *See* notes 30-31 and accompanying text *supra. See also* note 46 *supra.*

97 *See* notes 91-93 and accompanying text *supra.*

98 Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) Tarasoff v. Regents of the Univ. of Calif., 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) ("duty" as a conclusory label); W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 53 (4th Ed. 1971).

99 *See* notes 31, 40-44 and accompanying text *supra,* regarding "*Biakanja* criteria" and other policy considerations. The finer question concerns the scope of duty along a continuum of tripartite relationships in which one party is a client and the other may also be a client or a non-client whose relationship to the other parties is a variable. *See* Basso v. Miller, 40 N.Y.2d 233, 352 N.E.2d 868, 386 N.Y.S.2d 564 (1976) (Breitel, J. concurring), opting against Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968), to retain the categories of invitee, licensee, and trespasser in land occupancy cases because they provide a "sliding scale" and subsume the sort of policy considerations which were detailed in *Rowland,* in turn adapted from the *Biakanja* sort of criteria. In Zalta v. Billips, 81 Cal. App. 3d 183, 144 Cal. Rptr. 888 (1978), the *Biakanja* criteria were applied, to determine not whether a duty was owed to a non-client but the scope of duty owed to a client subsequent to successful litigation.

100 The expression "lawyer for the situation" was apparently originated by Louis D. Brandeis, later Justice of the Supreme Court. *See* Frank, *The Legal Ethics of Louis D. Brandeis,* 17 STAN. L. REV. 683 (1965). *See also* HAZARD, *supra* note 94 at 58; Shipman, *The Need for SEC Rules to Govern the Duties and Civil Liabilities of Attorneys Under the Federal Securities Statutes,* 34 OHIO ST. L.J. 231, 257, 270 (1973).

101 The principles are similar to those underlying duty in misrepresentation and assurance cases, *see* notes 58, 68, and 69 *supra.*

102 "A lawyer who single-mindedly seeks solely to advance his client's interests, taking full advantage of all that the adversary system permits, is not necessarily better than the lawyer who as wise counselor helps potentially conflicting parties resolve their differences in an amiable fashion." Corneel, *Estate Planners: Where Do Your Loyalties Lie?* TRUSTS AND ESTATES, June, 1971, at 383, 423; containing numerous rich illustrations.

103 *See* Paul, *supra* note 95, (limited situational undertaking); *Cf.* O'Brien v. Larson, 11 Wash. App. 52, 521 P.2d 228 (1974) (more restricted role than suggested by Paul).

104 "People have conflicts of interest only if, in addition to having divergent interests, one or both wish to pursue them beyond a certain degree of aggression. . . . It also depends on the legal advice they may get." HAZARD, *supra* note 94 at 55. MALLEN & LEVIT, *supra* note 5, at 149 (1977).

amined, giving special consideration to the manner in which the lawyer relates himself to the parties and their interests.[105]

The comparative role of corporate counsel is instructive. The generally accepted premise is that he represents the corporate entity.[106] However, the fiction should not cloud the facts.[107] His role pragmatically requires that he relate positively to the directors and high-level management. They will and inevitably must rely on his expertise.[108] When he advises them as representatives of the corporation on the proper legal functioning of the corporation, he is advising them for their benefit how they should act in their role. It is for the benefit of the corporation that he act in this fashion. Their interests and those of the corporation are, in this sense, in harmony even if legally distinct. If a conflict should arise between the interests of the corporation and that of an executive, then the lawyer may treat the executive as he ought a second client with a present conflicting interest against the corporate client by divorcing himself from that relationship.[109] Short of such conflict, however, to require key corporate representatives to consult their own lawyers at every turn would hardly be in the best interest of corporations or their lawyers. The basis for duty to a non-client or an "as-if" client could not be much clearer.[110]

In any situation in which only one lawyer is involved with two or more parties, he may knowingly or negligently lead a non-client to believe he is deal-

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105 Of course there are hazards in representing a situation; MALLEN & LEVIT, *supra* note 5, at §§ 95-6, 99; Attorney Grievance Comm'n v. Lockhart, 285 Md. 586, 403 A. 2d 1241 (1979); Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); (an interesting problem discussed in Smith, *Preventing Errors in Securities Transactions,* 30 S.C. L. REV. 243, 266-67 (1979)).

106 "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to its stockholder, director, officer, employee, representative, or other person connected with the entity." A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-18.

107 The C.P.R. has been described as "irrelevant, internally inconsistent, self-serving, ambiguous, and finally, conspiratorial." Note, *Client Fraud and the Lawyer,* 62 MINN. L. REV. 89, 117 (1977) as *quoted in* Wheat, *The Impact of SEC Professional Responsibility Standards,* 34 BUS. LAW 969, 970 (1979).

108 The growing view is that the corporate lawyer owes a complex of duties; *see, e.g.,* Rowan v. LeMars Mutual Ins. Co. of Iowa, 282 N.W. 2d 639 (Ia. 1979); Shipman, *The Need for SEC Rules to Govern the Duties and Civil Liabilities of Attorneys Under the Federal Securities Laws,* 34 OHIO ST. L. J. 231, 257 (1973), referring to duties to directors, management, and shareholders, and to the lawyers representing a situation; Shipman, at 253, 257, based on the holding of Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), *cert. denied,* 401 U.S. 947 (1971) in which he analyzes as treating the corporate entity and its shareholders as joint clients. *See also,* Freeman, *Opinion Letters and Professionalism,* 1973 DUKE L. J. 371; Leibman, *The Change in Client Relationships—The Interface with General Counsel,* 34 BUS. LAW. 957, 958 (1979); HAZARD, *supra* note 94 at 43-7; J. LIEBERMAN, CRISIS AT THE BAR 182-191 (1978); Borowitz, Cohen, Bernant, Klott, *Who Is the Client?* in *Legal Opinions and Accountant Certifications,* 2 PRACTICING LAW INSTITUTE (1975).

109 Appropriate lawyer action in such a situation is described, e.g. in E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 396 (S.D. Tex. 1969); Shipman, *Professional Responsibility of the Corporation Lawyer,* in PROFESSIONAL RESPONSIBILITY: A GUIDE FOR ATTORNEYS 271, 279-83 (1978); Leibman, *supra* note 108.

110 Collins v. Fitzwater, 277 Or. 401, 560 P.2d 1074 (1977) (duty owed to director in corporate matters). *See also,* Ward v. Arnold, 52 Wash.2d 581, 328 P.2d 164 (1958), in which it was equally unclear whether the plaintiff was treated as a client or a non-client, although the choice was not crucial. *See* note 98 *supra. Cf.* Stratton Group, Ltd. v. Sprayregen, 466 F. Supp. 1180 (S.D.N.Y. 1979) (declining client status to individual officers and directors). The reported facts are too sparse to determine if there was arguably a basis for reliance by plaintiffs in the particular circumstances. *See also* Chicago Title Ins. Co. v. Holt, 36 N.C. App. 284, 244 S.E. 2d 177 (1978) (scant evidence of basis of holding out and justifiable reliance).

Shipman, *supra* note 108, believes the "joint client" argument is a means of avoiding the privity question. Another commentator characterizes persons entitled to redress under federal securities laws as "clients." Smith, *Preventing Errors in Securities Transactions,* 30 S.C. L. REV. 243, 254 (1979); *but cf.* Goodman v. Kennedy, 18 Cal. 3d 335, 566 P.2d 737, 134 Cal. Rptr. 375 (1976) (Mosk, J., dissenting) (favoring duty to purchasers of stock under the non-client approach). *See also* Halverson v. Convenient Food Mart, Inc., 458 F.2d 927 (7th Cir. 1972) (all members of an unincorporated association as clients by implication); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978). "The client is no longer simply the person who walks into a law office." *Id.* at 1318. Citing HAZARD note 94 *supra,* and Lieberman note 108 *supra.* Consider also the non-client approach in guardianship, trust, and other such fiduciary situations. *See* note 49 and accompanying text *supra.*

ing fairly and carefully with him and his interests.[111] Two related future issues appear: Will evidence of a lawyer's holding himself out in such a way support an imposition of duty, and how much should it take to make out a prima facie case or even raise a presumption?[112] There are situations in which the potential for one party and his lawyer to take advantage of an unrepresented party runs high. The settlement of a divorce is one. In the corporate setting, taking advantage is much less likely, but the odds favor justifiable reliance. On the other hand, in business situations, the dealings are usually at arm's length. In the divorce setting, the lawyer can protect himself readily enough. He may and probably should advise the parties to have independent counsel where property and children are involved. If he does not, the badge of suspicion might reasonably make out a prima facie case.[113] He should at least be prepared to counter with evidence that he fully informed the non-client of his option or the need to have independent counsel and generally of the risk if he does not. In the corporate setting, a rebuttable presumption of a duty relationship seems eminently justified.[114] In situations that are usually at arm's length, such as land sales, the burden should remain on the claimant, but a lawyer's duty to a non-client ought not to be precluded by an irrebuttable presumption that the transaction was at arm's length or even adversarial.[115] In appropriate situations, easing of the claimant's burden in litigation can have a salutary long-range impact. Lawyers should avoid the temptation of unfair dealing or even the appearance of it. Every lawyer should examine his role in a specific situa-

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111 A lawyer may be negligent to a party who is represented by his own lawyer, as in Stewart v. Sbarro, 142 N.J. Super. 581, 362 A.2d 581 (1976); and in misrepresentation situations, such as an opinion letter or direct dealings, *see* notes 60-65 and accompanying text *supra.*

112 Where duty is to be based on an argument of lawyer-client relationship, *see* E. F. Hutton & Co. v. Brown, 305 F. Supp. 371, 391 (S.D. Texas 1969); Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311 (7th Cir. 1978) ("indicia" of relationship); MALLEN & LEVIT, *supra* note 5, at § 219. If the argument is duty to non-client, the prevailing approach is to treat the question as one of law, perhaps in terms of scope of duty. *See e.g.,* Ventura Humane Society v. Holloway, 40 Cal. App. 3d 897, 115 Cal. Rptr. 464 (1974); Adams v. Chenowith, 349 So.2d 230 (Fla. App. 1977); or more often without elaborate analysis, *supra* note 88.

113 A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(2): Lawyer representing one party generally should not communicate with the other party in a conflict situation. There is a strong but not universal view that a divorce situation is always one of present conflict, Crystal, *Ethical Problems in Marital Practice,* 30 S.C. L. REV. 321 (1979), the current New York view being that a lawyer cannot even with full disclosure represent both parties. *Id.* at 325. The author's view is that such a view is "impractical and inconsistent with traditional notions of professionalism." *Id.* at 354-56. In New York, there ought to be a presumption of duty where one lawyer deals with an unrepresented party. *See* Weigel v. Hardesty 549 P.2d 1335 (Colo. App. 1976), notes 71-73 and accompanying text *supra;* and Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966) (where lawyer entered formally into lawyer-client relationship with the wife, but acted as "scrivener" to the "client" under circumstances where it was likely his client was really the husband); Young v. Hecht, 3 Kan. App. 2d 510, 597 P.2d 682 (1979) (good case for presumption, but perhaps rebutted).

114 The extent of involvement in corporate matters by management and inside directors would presumably give a basis for justifiable reliance. Collins v. Fitzwater, 227 Or. 401, 560 P.2d 1074 (1977). *See also* note 110 *supra;* Chalpin v. Brennan, 114 Ariz. 124, 559 P.2d 680 (1976).

115 *See* Kendall v. Rogers, 181 Md. 606, 31 A.2d 312 (1943) (outstanding example of injustice of what seems a presumption *against* plaintiff); Adams v. Chenowith, 349 So.2d 231 (Fla. App. 1977) (the language of a similar but irrebuttable presumption); Drawdy v. Sapp, 365 So.2d 461 (Fla. App. 1978) (relying on *Adams,* although plaintiff was represented). If a lawyer can ethically represent both parties in non-conflict land sale situations, then proof of such a situation might overcome the arm's-length assumption. *See, e.g.,* Blevin v. Mayfield, 189 Cal. App. 2d 649, 11 Cal. Rptr. 882 (1961); Busey v. Perkings, 168 Md. 19, 176 A. 474 (1935); Kreis v. Black, 75 A.2d 523 (D.C. App. 1950). If the jurisdiction would prohibit joint representation, *see, e.g., In Re* Kemp, 40 N.J. 558, 194 A.2d 236 (1963), then evidence of dealing with the non-client might raise a presumption of a duty relationship, as opposed to the approach of *Adams* which used the ethical prohibition to say a duty relationship could *not* exist.

tion and discuss it with the parties with whom he is involved. Thus also can his burden of enlightened decision be passed to others.

V. Conclusion

The courts are now well along in the first stage of establishing lawyers' responsibility beyond their formal clients. We have charted the judicial mechanism in analytical detail to show the situation-by-situation carving out of the special relationships which impose the encumbrance of the duty of due care. The will-drafting and opinion letter situations along with their close analogues establish the minimum duties for the future. Our exploration of other situations in which lawyers choose to influence situational interests for multiple parties projects duties beyond the minimum.

The judicial mechanism proves to be complex and operates at several levels. The top level establishes complete control for the future in the appellate courts. Foreseeability, the hallmark of negligence theory, is indispensable yet only one of several criteria. While the mechanism allows a balancing of conflicting interests in a discretionary fashion, it is now well established that there is no threat of excessive liability. Even when the situation imposes a duty, the scope of duty is tightly circumscribed through a careful balancing wherein the interest of the lawyer-client relationship weighs heavily.

On a deeper level, a key consideration is the lawyer's conscious undertaking to act at the direction or on behalf of the client to benefit or influence another party. When the lawyer thus acts to create a dependency or a reliance, the second relationship may outweigh the lawyer-client relationship which fostered it. Cumulatively, these added duties create a new enterprise liability of a yet limited kind. Lawyers may choose to bear these risks economically, or avoid them by careful stipulation of the risks which the other parties must bear. In this fashion, the courts merely call for at least a minimal level of professional competence and fair dealing with persons whose interests lawyers impact every bit as much as if they were clients. How far courts will go in setting these new legal standards depends on their willingness to scrutinize their own yet deeply rooted assumptions about the roles lawyers in fact adopt—or should adopt.

While the enterprise of lawyering is in many respects unique, it is part of a larger cumulation of activities. The judicial response to the economic risks of the lawyering enterprise and the allocation of those risks is of a crucible sort. The precedents thus established have provided a base for the careful and restrained definition of the economic risks which other activities may reasonably bear. In this fashion, the courts continue in a manner now well recognized in the process of tort law. The process is not one of paternalism, but judicious intervention to attempt to provide at least a rough form of economic fairness. No enterprise should be a legal island.